



**EUROPEAN COMMISSION**

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## **Competition enforcement in digital markets: using our tools well and a look at the future**

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

14th Annual Conference of the GCLC "Remedies in EU Competition Law:  
Substance, Process & Policy"

**Brussels, 31 January 2019**

Rector Magnificus,  
Dear Massimo,  
Dear Makis,  
Dear Damien,  
Ladies and Gentlemen:

Thank you for the introduction. Congratulations for bringing together a comprehensive set of topics related to competition remedies and a diverse set of experts who are well-placed to tackle them.

My colleagues and I will listen very attentively to your discussion. It is very welcome, particularly in this moment, that you undertake an effort for a systematic and consistent analysis of such a subject across competition disciplines. *Sine ira et studio*, and without a running commentary on ongoing cases.

I would like to set the scene for your debate by laying out how the remedies discussion fits into the challenges faced by competition enforcers and into DG Competition's future work streams.

## **1 Too much or too little competition enforcement in digital markets?**

In a context of unprecedented public attention and conflicting demands and pressures, EU competition policy, law and enforcement are challenged from two sides. On the one side are those who believe there should be less competition enforcement. On the other side stand those who believe that competition enforcement does not go far enough. In my second mother tongue, in Portuguese, there is a saying '*Mais vale prevenir que remediar*', it is better to prevent than to remedy. Now, this is reflected in different ways in legal cultures and in legal disciplines. There is a strong element, in particular in European legal culture, of a precautionary principle. But in an area like competition law that has to do with the dynamic development of the economy, of business, of technology, there is a risk if we take precaution too far.

This is also reflected in the development of competition policy and competition law over the last decades. In a sense, that tension between "prevention" and "remedy" is embodied by the discussion on "by object" and "by effect". "By object" has a prevention dimension. "By effect" needs to take into account the remedial dimension in a much more pronounced way. And the more economic approach, which is also vaguely commemorating anniversaries around this point in time, is the realization that prevention and remediation need to go hand in hand if we want the economy, business, and technology to really develop its full potential for society, for citizens, for consumers. But it means also that we need to take both sides of this challenge very seriously. We can only take risks if there is a possibility to remedy. So, the topic of this conference today ties in perfectly with all the debate that we have about the impact of fast moving globalisation and fast moving digitisation on competition policy and enforcement.

Do we need more enforcement to contain risks or do we need less enforcement to realise potentials?

Do we need more regulation to contain risks or do we need less regulation to realise potentials?

This is a debate that is hot everywhere, not just in competition policy.

But competition policy is one of the fields where the debate is coming to a head. It is a truism that globalisation and digitisation touch all sectors of the economy. From e-commerce to hotels to taxis. From financial services to the automotive sector to health care. From plant seeds to air transport to energy grids. And it is also a truism to repeat the old saying that we ain't seen nothing yet.

On the one hand, we have the stakeholders that argue that the digital sector is already very competitive, that it does not need more competition enforcement. They point to the wealth of digital services that we all enjoy every day. And, they say very forcefully, there is a risk that competition enforcement might chill incentives to invest and to innovate. On the other side, there are many complaints that the digital sector has been actually too concentrated for a long time; that it restricts consumer choices; that there is a tendency to stifle true innovation; and that there is even a tendency to increase inequality. Not to mention the risks of other types of harm, that go beyond mere competition policy and enforcement considerations. Like problems of privacy, cybersecurity, device addiction, news manipulation, and falsification of the democratic process.

Which side is correct? Or maybe better put: where to set the cursor? Under the leadership of Commissioner Margrethe Vestager, we have initiated different work streams in DG Competition on digitisation and its implications for competition law. Our aim is to gain the necessary insights in further digital developments and map their implications for competition policy.

As you know, Commissioner Vestager appointed three special advisers, Heike Schweitzer, Jacques Cr  mer and Yves-Alexandre de Montjoye on competition and digitisation last April. They will produce a report by this spring.

In parallel, your conference today was preceded by another conference here in Brussels a couple of weeks ago; on 17 January 2019 to be precise, titled 'Shaping competition policy in the era of digitisation'. I am sure that many of you have attended the conference or at least followed it via streaming. In fact, I have seen many of you there. It was a very rich exchange and we can safely say that the consensus among the experts was that competition policy has a shaping and active role to play in the digital economy.

Furthermore, Commissioner Vestager had launched a call for contributions last summer, addressed to those stakeholders that are already involved in or affected by the digitisation of the economy. The aim was to gather their input on the topics covered by the conference. The objective on that occasion was not to get academic papers or impact assessments, but the respondents' key facts and arguments in a clear, concise and substantiated way, for the further discussion. We received over 100 responses. The submissions clearly showed that many respondents do not feel best served by today's digital sector and would like to see a more competitive digital landscape. The majority of the submissions laid out arguments for a pro-active competition enforcement and competition-driven regulation.

Based on the input, I believe that we can say that we need competition policy, law and enforcement as much in the digital sphere as we needed it, and still need it, in the analogue world. This being said, we need to refine the use of our tools to address new developments in these fast moving markets; as well as the right balance with regulation.

## 2 Refining competition enforcement to tackle digital markets

Therefore, the question should not be whether there is a need for competition enforcement, but how to make competition rules work well in today's digital environment – especially considering the size and reach and speed of the digital giants. We have seen a limited number of big tech firms that have acquired or are acquiring difficult to assail dominance in digital markets, making them virtually "gatekeepers" in these markets. We have also seen that some of these firms have now been in a dominant position for over a decade without new companies actually displacing them. This position is also conferring them leverage to extend their dominance into adjacent, not yet conquered markets. It is a phenomenon that has spurred a vivid debate about the question of whether such dominance has been, or is being, acquired and consolidated through "competition on the merits". However, even if an initial dominance is acquired in their original market on the merit – which I think seems to be the case in most cases – this may not mean that dominance can and should be used to push out rivals or to impose unfair terms on their users or to acquire similar positions in other markets.

So far, the fundamental EU competition rules have, on the whole, proven apt to deal with new market developments and novel conduct. This was, for example, shown by the Commission's Google Android case. The case demonstrates the importance of competition in the market in order to allow consumers to benefit from the highest possible quality and follow-on innovation (e.g. the "Android-fork" related concern). The case also shows that it is not a foregone conclusion that the leader in one market (i.e. desktop search) will necessarily benefit from a similar position in a related market (i.e. mobile search) when competing on the merits. In addition, the case makes clear that even if smaller competitors in digital markets do not typically benefit from the same economies of scale as the dominant undertaking, they can be an important source of competition. Where this is the case, such competitive constraints should therefore be taken into account when considering whether a conduct is likely to result in anti-competitive foreclosure.

## 3 How to best use our tools?

There is no room for complacency though. There is good reason to assume that the moving pictures will continue to become ever faster, ever more colourful and multi-dimensional, as has been the case until today. It is maybe an exaggeration to say that in terms of competition law and enforcement we are at a passing moment from black and white to multi-colour. That is a state that we long have moved forward from. But if we look at how the moving image is developing, we can clearly see that it is not only virtual reality that is colouring a new way of seeing things. Discussions on 17 January indicated – as I stated in my concluding remarks there – that the application of some of the existing theories, legal tests, analytical methods, potential remedies and investigative procedures need to be reconsidered to ensure that we adequately address new phenomena. Tomorrow's cases and legal outcomes will not necessarily be the same as yesterday's cases and legal outcomes. We may also need to scope new categories of behaviour, broader categories of behaviour and the importance in all of this is to clearly define theories of harm, as just been underscored by Makis' introductory remarks. So to sum up, we need to stay on our toes for competition policy to remain effective and relevant in the years to come, in view of the pronounced network, scale and learning effects. In my opinion, we should take into account a dynamic view of competition, use novel antitrust cases to gain experience with new markets or business models; and revisit or adapt theories of harm to facts and developments, making sure that we act swiftly. And finally – and this is why your conference is so topical – where we cannot prevent harm, we must develop the remedies that effectively remove harm. In this

sense, a clear, good understanding of how effective remedies work in a digital economy is an essential element in allowing us to fully explore the potential of innovation in this field.

What do I mean by the dynamic view of competition? We do not only need to look at the snapshot of the market as it is today. We need to look at the film of how it may evolve, of how it will evolve. We need to acknowledge that smaller firms may have the potential to grow and therefore threaten dominant companies. Hence, there may be circumstances where one must consider intervening in order to protect "not as yet efficient" competitors in order to prevent damage to competition and ultimately consumers, like the Court of Justice recognised in the Post Danmark II judgment. My second point was tackling novel cases to gain experience in new markets. This cannot mean that we rush to new cases without a solid factual grounding. But, when there is enough evidence, we must be ready to revisit assumptions and theories in light of new facts. Indeed, the complexity and novelty of digitised markets and practices means that we need to place even more importance on understanding markets. However, once we do have a view and we can show that a behaviour is harming consumers, we should, must have the necessary courage and act. Even if it implies challenging received wisdom. To use philosophical categories: we should not link competition law to a scholastic approach but subject it to Popper's thorough exercise of verification, falsification and then maybe confirmation.

How to square this quest for accuracy with speed? Ideally, we need to bring cases at the right moment to ensure that a dominant company does not get the possibility to reach a "tipping point" and consolidate its position to an extent that becomes difficult to reverse. And this is what we do and what we have done. For example, we have completed our Amazon most favoured nations clauses case and TenneT, our latest electricity case within around three years and our latest parallel trade case, Guess, around two years. So there is not a conclusion that there cannot be speed in antitrust. But of course the challenge remains to accelerate the main proceedings in all competition cases, while fully safeguarding the parties' rights of defence. This is a challenge that we share with the judicial review by the Courts.

So now, I have set the full scene before finally coming to the subject matter of the conference. Let me now zoom in on remedies. You have chosen to make this topic very broad, as I already said, and my colleague, Carles Esteva Mosso, will talk about merger remedies tomorrow. So let me just make a few remarks on antitrust remedies. The Commission has the power to impose any remedy, whether behavioural or structural, which is necessary to bring an infringement effectively to an end, as long as we respect the principle of proportionality. That is what recital 12 and Article 7 of Reg. 1/2003 tell us. And that is really the fundamental provision that enables competition as a discovery process. Because it means that there is a possibility, as the Rector said, to correct and to roll back if that becomes necessary.

An effective remedy must eliminate the consequence of the infringement. This applies to both "cease and desist" orders and to specific remedies. An effective remedy should create new realistic commercial opportunities. It shall restore the competitive process. But it is of course for the (existing and new) market participants to take these opportunities up. The Commission cannot – not even through its remedy policy – guarantee a specific market outcome (in terms for instance, the number of competitors on a given market or their respective or aggregate market share). Nor is it the task of the remedies policy to provide compensation for the damages suffered by individual competitors (for that, we have the private damages actions whose legal framework has been significantly reinforced in recent years).

And, of course, the remedy must be "proportionate to the infringement committed and necessary to bring the infringement effectively to an end" as article 7 of Reg. 1/2003 says. This means that, on the one hand, the remedy must go as far as necessary to bring the infringement to an end. And, on the other hand, it must be limited to what is necessary, not more than that, to achieve its objective, so when there are several appropriate measures, we should impose the least onerous one. And this can require taking into account possible efficiencies and balancing the interests of the infringing companies, competitors, customers, and consumers.

Each of the above elements must be assessed based on the specific circumstances of each case.

There is a close correlation between the theory of harm and the remedy to be imposed. It is clear that this has an impact on the timeliness of the investigation. There is no trade-off between timeliness and effectiveness, but certainly a need to strike a very careful balance. And this is of course particularly relevant in the markets that might be prone to tipping.

Here the cooperation procedure in antitrust procedures might be particularly useful. In exchange for the firm's acknowledgement of their liability for the infringement (and potentially in exchange of additional evidence and helping to find an effective and proportionate of remedy), the firm may receive a substantial reduction in fines. Such a solution, and in particular, if the cooperation involves the effective remedy, will provide guidance to the market while, while at the same time, balancing novel approaches and the level of sanctions.

## **4 Future policy work**

I have outlined the steps we will be focussing on in the coming years in order to tackle digital markets.

As I concluded at the Conference of 17 January, either we shape digitisation or it will shape us. There are many public policy issues related to "digital" – from artificial intelligence to fake news to "e-health". However, this does not mean that every conduct that raises concerns is a competition problem. In fact, many issues go far beyond the realm of competition law (for instance unfair commercial practices). To the extent that they are clearly defined and recurring, regulation should tackle such issues.

Nevertheless, we need to ensure that competition objectives are embedded in Commission initiatives related to new technologies. For example, we will be closely involved with our colleagues who work on the new policies on connected and automated mobility. We need to make sure that markets keep their potential to serve as the place for discovery of better and more innovative products and services for consumers. And that means that it is both from theories of harm and from remedy design that we can draw conclusions for what is a good and an effective regulation over time.

So, over the next few years, there is a lot of work to do. Part of this is that in the field of antitrust, four block exemption regulations will expire. This will require significant investment in evaluation and revision of these regulations and the respective guidelines; and it is work that is already starting now.

## 5 Final thoughts

So, a lot of work to do, a lot of tasks for DG Comp. But a collective endeavour, I should think, for the competition community. Far from being trapped in an outdated, backward looking set of rules and discussions. I think the competition community of enforcers and counsels, experts and academics, policy makers and business people has shown, time and again, that one can question assumptions. That one can provide input and direction needed to keep up with the times. And, whilst we cannot, of course, say that history will automatically repeat itself, I think we have every reason to have confidence in the intellectual capacity of the competition community. Not in a narrow tunnel vision. But, because it is embedded in an economic, business and societal reality. So I am confident that we will also be able to tackle this task yet again. The current debates all over the world, here in Brussels, in the US, in Australia, in Brazil, they are testimony to this. So, let me end with the words with which I started. Your conference is a very precious contribution to taking the debate forward. It is a systematic and consistent look at an issue that we need to fully grasp and understand if we really want to make sense of competition policy, law and enforcement in years and decades to come.

I wish you a fruitful conference. I am truly grateful that you gave me the privilege to be with you today and to set out how the challenge of this conference fits in to that broader picture.

Thank you for your attention.