

# Competition assessments and abuse of dominance

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*Remarks on the two themes of the EUI Competition Workshop, Florence 22 June 2018*

Ladies and Gentlemen,

I would like to thank Prof Mel Marquis, Sir Philip Lowe and Prof Giorgio Monti for inviting me to join the Competition Workshop at the European University Institute's Department of Law. Several colleagues have told me about the quality of presentations and debates in past editions. I am really happy and honoured to be part of it today.

This year's edition takes place in the year in which the European Commission's Directorate-General for Competition, formerly DG IV, turns 60. Its continued relevance and performance over the decades has benefitted significantly from the exchanges with the judiciary and academia.

The implementation of the materially unchanged Treaty competition rules is also a story of continued reflection within the Directorate General on how to keep up to date the way we do our work.

Over the years, many eminent personalities have contributed to this. Sir Philip Lowe, during his mandate as Director-General from 2002 to 2010 – as well as in his previous roles in the Directorate-General – was among the most eminent of them. It is therefore my pleasure to extend a particular thank you to him today.

I will use my opening remarks to share with you some reflections coming out of our practice on the two themes you have chosen for this year's debates – i.e., competition assessments and abuse of dominance.

## Competition assessments

Starting with competition assessments, I believe that in the European Union we have brought the mutual interplay between legislation and regulation on the one hand and competition policy and enforcement on the other to a whole new level.

EU competition law and its enforcement system has been closely associated to broader policy and institutional work since the start of our process of integration.

In my opinion, this is consistent with three distinctive features of the European Commission's (and, within it, of DG Competition's) mandate as derived from the Treaty rules: the remit to help build an internal market, the responsibility to check government and business interventions in the economy against compatibility with undistorted competition, and the European Commission's status as a supra-national authority to enforce competition rules on the basis of the law underpinned by rigorous economic analysis.

On account of these features, a space has opened over time where regulation and competition policy and enforcement frequently interact with each other and converge towards common goals.

The next question, of course, is how the interaction can be used to the best effect.

In plain language: when does it make sense, in the field subject to competition policy and enforcement, to regulate rather than rely on applying the competition rules as such?

In broad terms, I think that regulation is preferable on issues that are clearly identifiable ex ante and recurring; i.e., when regulation provides a superior framework to businesses and consumers, namely in terms of predictability, certainty and clarity.

Take the Interchange Fee Regulation that entered into force in 2016. The regulation followed several competition cases in which we had found that specific arrangements between credit card companies, banks and retailers raised competition concerns.

Once the recurrence and systematicity of issues was established, a single piece of legislation fixed at the roots a problem that touched a very great number of transactions every day, whereas competition enforcement could only address their effects individually and ex post.

At the same time, it is important that regulatory solutions do not weaken the competitive impulse in the markets, in particular when considering policy responses to novel issues.

Good communication channels between regulators and enforcers is the best way to prevent this.

The good news is that these channels are working quite well at the European Commission.

For instance, the Geoblocking Regulation that will enter into force in December has profited from the findings of the e-commerce sector inquiry conducted by DG Competition from 2015 to 2017.

But even when there is no such direct impact of competition cases on legislation, competition advocacy plays an important part. Our experience helps us to identify areas where competition problems may arise in the future. And it is also our role to ensure that future legislation does not impact negatively on competition.

In our daily practice, DG Competition works very closely with other Commission departments. We have informal contacts in the early phases of law-making, followed by formal inter-service steering groups and inter-service consultations. Through all these stages, our experience as enforcers is shared with the colleagues involved in the legislative process. This is underpinned by the Commission's Better Regulation methodology and procedure, that incorporates systematic competitiveness checking both in the inception and evaluation of legislation in a holistic and systematic fashion.

## **Enforcers and regulators**

Having established the need for an open dialogue between competition enforcers and regulators, let us see how many shapes it can take.

From my point of view, the dialogue can be classified into three main categories. I would call them 'ensuring effectivity', 'filling the gap', and 'addressing new frontiers'.

## Ensuring effectivity

Competition decisions ensure effectivity when they make sure that the objectives of a piece of legislation are actually attained on the ground.

This often occurs when we look into the business practices of companies that operate in liberalised industries, such as the telecommunications sector.

Europe's telecoms markets, traditionally national public monopolies, were opened up by several legislative packages starting in 1988 and culminating in full liberalisation in 2002.

A feature of the telecoms regulatory framework is the ex-ante access regulation, which basically identifies competitive bottlenecks – typically in fixed-network markets – and imposes remedies to address them following competition-law principles.

This framework was clearly successful.

Over the past 15 years, telecoms markets have become increasingly competitive and services and products increasingly accessible across Europe.

However, some incumbents found it hard to play by the new rules – and this is where competition enforcement gets into the picture.

Let me give you a quick example.

Back in 2011, the Polish telecom regulator acted several times to have Poland's incumbent operator – called Telekomunikacja Polska, today Orange Polska – comply with its regulatory obligations to grant access to its fixed broadband network.

In proceedings under Art. 102 TFEU, the Commission held that the company had abused its dominant position by deliberately placing obstacles in the way of alternative operators to limit competition on broadband markets.

This led to an agreement between Orange Polska and the telecom regulator in which it undertook to comply with its regulatory obligations and invest in the modernisation of its broadband network.

This is to show that antitrust enforcement can make sure that the intended effects of regulation, in this case Polish telecoms regulation implementing the EU telecoms framework, have actual impact on the ground.

The recent agreement of EU co-legislators regarding the Electronic Communications Code confirms the key role of competition-law principles in designing sector-specific regulation.

The regulatory approach is based on the concept of 'significant market power', which is important to ensure effective competition.

The Code recognises that competition is a prime driver of investments and that access regulation is a necessary precondition in markets which otherwise wouldn't be competitive.

At the same time, the new rules put emphasis on investment incentives, thereby reinforcing infrastructure-based competition.

In this vein, the new Code substantially reduces ex-ante regulation where rival operators co-invest in very high-capacity networks, based on FRAND terms.

It also makes it easier for smaller players to be part of investment projects thanks to the pooling of costs.

To help national regulators apply the Code's competition-based principles in a changing competitive landscape, during the negotiation process of the Code the Commission updated the Guidelines on Significant Market Power.

The updated guidelines – among other things – equip regulators to apply the rules in increasingly oligopolistic markets where bundled offers of mobile, fixed and TV services are increasingly frequent and where consumers can use the same services through different platforms, such as cable and copper or fibre networks.

## **Filling the gap**

I called the second type of interaction between competition control and regulation 'filling the gap'. The story I will use to illustrate it starts in September 2008 with the fall of Lehman Brothers.

At the time, State aid control was the only tool available at EU level to address unilateral responses by individual EU countries to the systemic repercussions on the Single Market and ended up as the immediate tool to coordinate the crisis response across Europe.

Crisis rules were quickly developed in six communications between 2008 and 2013.

On that basis, the Commission took over 500 decisions and more than 30% of the EU banking sector was restructured under those rules.

The experience gathered during those years, in particular the idea of a fairer re-distribution of the cost of bank failures, underpinned the development of the Bank Rescue and Restructuring Directive, the resolution pillar of the Banking Union.

The directive is fully in place since 2016.

Still, State aid control continues to complement it and, therefore, to play an important role to ensure a level playing field across the entire single market.

State aid rules apply irrespective of whether the aid is granted in the context of resolution under the directive, outside resolution, or even to financial institutions in Member States that are not part of the Banking Union and to which the directive does not apply in the first place.

In all cases, the Commission will apply State aid rules to protect the level playing field.

## **Addressing new frontiers**

The story of State aid control venturing in uncharted territory during the financial crisis leads me to the third category – the one I called 'addressing new frontiers'.

This phrase points to the action the Commission must take in rapidly changing industries, which often present fresh challenges and create new public-policy objectives.

Rapid change is a feature of energy markets, which are being transformed by the sharp increase in renewable energy.

This is a positive development, of course, but solar and wind are intermittent sources of power, which create security of supply issues in many EU countries.

To cater for sudden variations in consumption or renewable production, Member States have introduced so-called 'capacity mechanisms' to maintain the availability of flexible power plants.

The sector inquiry the Commission conducted in 2015 and 2016 into capacity mechanisms – the first ever in State aid – identified many and potentially very distortive support measures. Several cases have already been investigated and EU countries have re-designed their capacity mechanisms in their wake.

In addition, in 2016 two basic principles were introduced in our State aid rules to promote the market integration of renewables:

- First, renewables producers have to go through competitive tenders, driving down costs and avoiding overcompensation; and
- Second, renewables producers who receive State aid have to participate in the market just like any other producer, helping to balance supply and demand.

The experience so far has been very positive. In Germany, for instance, the cost of support to solar energy has dropped by 50% in about two years.

The recent agreement of the two co-legislators on new legislation in the field is therefore reflecting the division of labour between competition enforcement and sector regulation.

Whilst regulation can – and often must – arbitrate between the relative weight of different public-policy objectives, it can be complementary to the competition enforcement objective (when this applies) so as to be mutually reinforcing.

## **Abuse of dominance**

Let me now turn to the second workshop theme – abuse of dominance. I will arrange my remarks under two headings: exploitative and exclusionary practices.

### **Exploitative practices**

To frame the first kind of abuse, let me start by saying that a lot of our work protects consumers indirectly, by keeping markets competitive. The best defence consumers can have against an exploitative company remains their ability to turn to its competitors.

But we are bound to come across cases where there is not enough competition in the market to provide a real choice. We can see situations in which dominant businesses exploit their customers by charging excessive prices or imposing unfair terms.

Competition enforcers have a responsibility – explicit under Art. 102 TFEU – to protect these consumers and we do so to the best of our abilities. But I can think of at least two reasons why we have to be circumspect in the way we deal with those situations.

First, because the fact that a company makes high profits may be the result of superior innovation and risk taking, which we actually want to encourage.

Second, because in most markets high profits encourage new competitors to enter and existing ones to expand. Once again, we want to preserve and foster markets' own mechanism to restore competition.

Historically, the Commission has pursued few cases on excessive pricing by dominant undertakings and also the Court of Justice of the European Union (ECJ) has rarely addressed them.

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The traditional reference is the United Brands ruling of 1978. In it, the ECJ proposed a method to determine whether a certain price is excessive based on a two-pronged test.

First, the test proposes to establish whether the difference between the costs of the product and the price is excessive. In the affirmative, it proposes to assess whether the price is unfair in itself or when compared with competitive benchmarks.

More recently, in the AKKA/LAA preliminary ruling of 2017, the Court clarified that it is possible to establish abusive excessive prices *only* on the basis of a comparison between the dominant undertaking's prices and other relevant price benchmarks, without necessarily having to assess the difference between its prices and costs.

Let me also mention a related ruling issued earlier this month by the CAT, the British Competition Appeal Tribunal, which found that the UK Competition and Markets Authority had misapplied the test for unfair pricing in its 2016 decision against the companies Pfizer and Flynn.

In this judgment, the CAT seems to distance itself from the United Brands test for unfair pricing, which describes as '*a deceptively simple approach*'.

The CAT appears to require a very thorough benchmarking at both stages of the test – that is, excessiveness and unfairness – and an extremely detailed explanation on why some benchmarks, which may appear to be potential candidates, are not used. This appears to go further than previous case law.

I agree that there are many reasons to be careful about when to intervene. This is why excessive pricing cases are rare compared to intervention against exclusionary conduct, both at EU and Member State level.

That said, there can of course be scenarios in which intervention against such practices is necessary to ensure a well-functioning market that delivers to consumers.

Looking at the very restrictive criteria applied by the CAT and the high barriers to finding an infringement they entail, further discussion will be needed as to whether competition authorities would actually be able to continue ensuring the effective enforcement of competition law in this area if they were to base themselves on a test that appears to go beyond the requirements of current ECJ case-law. I do not endeavour to draw any conclusions on this today. But I note that – apart from looking at the specificities of individual cases, each case being unique – we need to have adequate

regard to the systemic balance of interests if the legal mandate is to remain effective; under-enforcement is as damaging as over-enforcement.

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Although, as I said, abuse of dominance cases involving excessive pricing are rare, recently the issue featured in the Commission decision involving Gazprom and in the opening of formal proceedings against the pharmaceutical company Aspen. Let me describe the former in some detail.

The Commission started the Gazprom investigation on the suspicion that the company was using territorial restrictions to prevent the free flow of gas between eight EU countries in Central and Eastern Europe.

Moreover, this restriction may have enabled Gazprom to charge unfair prices in five of these eight markets, namely the three Baltic Member States plus Bulgaria and Poland.

Gas is a commodity used mainly for domestic heating and industrial uses. Therefore, unfairly high prices may have a huge impact on those countries' firms and households.

Information on Gazprom's contract prices indicated that its Eastern European customers paid much higher, oil-indexed gas prices than German customers. And this, even though the gas travelled through Eastern Europe to reach Germany.

In order to assess whether the company was charging excessive prices, the Commission applied the traditional United Brands test. The choice of benchmarks for the second stage of the test was quite straightforward. The Commission used the prices Gazprom charged to Western European customers.

The Commission's preliminary conclusions were that prices in Central and Eastern Europe were indeed significantly and persistently above the competitive price benchmarks.

In the decision, the commitment regarding the alleged excessive pricing abuse was very innovative. In essence, it uses a market-based remedy.

This type of remedy was possible because of the way gas supply contracts are formulated. Many are signed for periods of up to 20 or 30 years and therefore usually include price-review clauses that enable customers to request changes to their gas price. Of course, the re-negotiated price very much depends on the wording of the clauses.

The decision binds Gazprom to introduce a number of important changes to the wording of its price-revision clauses.

According to the new price-review clause, in the future customers can request adjustments as soon as their price diverges from competitive Western European benchmarks, in particular the price at liquid hubs in Germany and the Netherlands.

This innovative commitment empowers Gazprom's customers to renegotiate prices in line with competitive benchmarks, with the possibility to refer the matter to an arbitrator in case of disagreement.

This leaves the determination of the price to market forces while making sure that gas prices will remain competitive in the five countries in question. This solution eliminates the risk that oil-indexation may trigger excessive prices in the future.

As to the Aspen Pharma case, I will be a lot more succinct because the investigation is ongoing. The Commission opened the in-depth investigation to look into information that the company has imposed very significant and unjustified price increases of up to several hundred percent on certain medicines.

And this is what I can share with you at this stage to respect due process.

The rest will come when the case reaches a conclusion.

## Exclusionary practices

Moving on to the issue of exclusionary conduct by dominant companies, the most recent case is the Qualcomm decision taken by the Commission at the start of this year.

The decision has been much commented in the specialised media – and I am sure by many of you – because it was the first exclusivity-rebates case after the Intel judgment of 2017.

That ruling confirmed that EU competition law continues to recognise that exclusivity rebates given by a dominant company are presumed illegal.

However, it emphasised that a dominant firm can try to rebut this presumption of unlawfulness by putting forward evidence seeking to show that its rebate scheme is not capable of producing anti-competitive effects.

If the dominant company puts forward sufficiently case-specific arguments to that effect, the Commission needs to address those arguments and show that the conduct is capable of foreclosing competition.

Here, the ruling gives guidance on how the Commission has to show capability to foreclose competition and which tools it can rely on.

One is the so-called ‘as efficient competitor test’. But that is just one of the tools in the toolbox. The Commission can rely on both quantitative and qualitative evidence to prove its case.

So, let's look at the facts of the decision. The Commission fined the company €997 million for abusing its market dominance in LTE baseband chipsets – the components that keep our mobile devices connected to cellular networks.

It found that Qualcomm had been paying Apple on condition that it would not buy the components from rivals, thereby preventing them from competing in the market.

In this case, the Commission did not find it necessary to run an ‘as efficient competitor test’ in light of the significant body of qualitative evidence gathered, in particular internal documents from Apple which showed the actual effects of Qualcomm's exclusivity payments. This approach is in line with the Intel judgment.



Also in line with the judgment, the Commission carefully analysed Qualcomm's price-cost test, which attempted to show that an as-efficient competitor would not have been foreclosed. Our analysis showed that Qualcomm's approach was flawed and failed to show that its payments were not capable of foreclosing competition.

This decision illustrates clearly that there are ways to reconcile accuracy and administrability even when we are faced with complex cases requiring us to gather and properly assess significant amounts of information.

It also shows that one can pursue cases by following an effects-based approach while still concluding an investigation within a reasonable time frame.

The use of rebuttable presumptions as a way to allocate the burden of providing evidence at different stages of the analysis plays a role in that context.

The Commission's cases are built on solid evidence precisely by applying the tools that are most relevant and sufficient to prove each individual case. That way we can ensure both speed and thoroughness in our antitrust enforcement and avoid over-enforcement as well as under-enforcement.

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Before I conclude, let me repeat a remark I made at the start. The competition control system we have developed in the EU is quite remarkable in many respects. One of these is the degree and extent of interaction between enforcers and policy-makers.

We should treasure this tradition and make it grow stronger. And I know that, speaking at one of the academic centres of excellence in EU law, I am preaching to the converted.

EU competition-law enforcement has served us well over the past 60 years. We need it more than ever in these challenging times – and for many years to come – if we are serious about meeting the demands that come from our fellow European citizens for a single market that works for everyone and gives everyone a fair deal.

Thank you.