



EUROPEAN COMMISSION

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EU competition law: relevance anchored in empiricism

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

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1 Introduction

Thank you for this introduction, Cristina. And congratulations for once again bringing together a comprehensive set of urgent questions and a diverse set of experts who are well-placed to tackle them.

I said on purpose that this programme brings issues and people together. In the current intense debate around public policy in general and competition policy in particular, we have a duty to try to identify common ground so as to find solutions based on common principles and analysis.

This conference is a privileged venue for this purpose.

Last year, I tried to build common ground by arguing that accuracy and administrability go hand in hand. I also argued that the Commission, other competition authorities, the courts, businesses, and experts have a shared responsibility to make the system work. This year, I want to share with you some views on making the competition law debate less polarised, less abstract, and – especially – more driven by empirical insights. So as to ensure its continued relevance in an economy and a society marked more than ever by disruptive developments.

In a context of unprecedented public attention and multiple demands and pressures, EU competition policy, law and enforcement are challenged by both those who believe there should be less competition enforcement and those who believe that competition enforcement does not go far enough.

So what is the problem? Too much competition enforcement? Too little?

My answer is that we need competition policy, law and enforcement more than ever; we need to ensure that they constantly evolve to address new issues; and that they retain a strong role to play alongside regulation.

But in order to maintain their legitimacy and effectiveness and relevance, we need to make progress towards solving disagreements. And the only way to solve disagreements is to start by looking at the facts. As in science, empiricism is the key to progress, if you will.

2 Consumer welfare

The first challenge when looking at facts is to scope the width and breadth of the analysis. In identifying the relevant scope, we are guided by an accepted objective: Ensuring consumer welfare.

In fact, we all talk about “consumer welfare” all the time. But do we all mean the same thing?

EU competition law is meant to care for the “other side” of the market where the undertaking at issue is active. When an undertaking misbehaves when selling its products, the “other side” of the market means consumers. When undertakings collude on their purchase prices, they hurt the “other side”, meaning their suppliers. It is useful to keep this monopsony situation in mind, as in the Commission’s *Battery Recycling* cartel case of 2017. But in the vast majority of cases, the “other side” of the market means “consumers”. With this caveat, we can use “consumer welfare” as shorthand.

In this context, some tend to reduce the measurement of consumer welfare to short-run effects on price and output. Others stress that other, more dynamic measures deserve attention as well – quality, choice, and innovation. Some argue that the consumer welfare standard requires showing anti-competitive effects in all circumstances. Others note that protecting the competitive process is a good proxy for ensuring consumer welfare, even when anti-competitive effects are not immediately apparent. Some argue that a less efficient competitor does not contribute to consumer welfare. Others note that a less efficient competitor – or a “not yet as efficient” competitor – may still bring competition in the market; even more so if it is able to remain in the market, grow, and become more efficient.

In sum, the term “consumer welfare” is not as consensual as it seems. It is sometimes used to maintain a dogma of price and output effects. Or a dogma of the “as efficient competitor test”, to be applied to all types of abusive conduct. I think that the legal remit defined in Articles 101 and 102 TFEU requires us to do better.

We must take an empirically driven view of consumer welfare and recognise that some consumer harm is not readily visible in price and output effects. We can recognise that a competitor which is not yet as efficient as the dominant firm may – under certain circumstances – nonetheless bring competition to the market. The empirical view means that we should pay attention to the exceptions to the “as efficient competitor test”, without jumping to conclusions either way.

This is, in the end, simply doing what the EU courts are asking the Commission to do – to take account of all relevant aspects of a given case.

3 Taking account of macroeconomic trends

The question of the relevant scope of our analysis extends to the role of macroeconomic trends in competition policy. In a press article a few weeks ago, it was argued that competition enforcers display a lack of curiosity about what goes on outside of our field. I think this does not do justice to the current debate in our field. Competition enforcers and many experts are trying to draw insights from macro trends – as we can see from this conference, both this year and last year. However, it is true that there is not yet a consensus on this. In particular when macroeconomic trends challenge received wisdom. Or vested interests. But in any event, we are not done yet. We are still checking whether there is indeed too much concentration, high corporate profits, low business dynamism, and high inequality in EU markets. Yet, even if we are not done yet, we must already think of the next stage: What would we do with those results? A dogmatic view is that macro trends are irrelevant to competition law. Another dogmatic view would say that, on the contrary, competition law as a whole has failed. The empirical view is that we need to check, indicator by indicator, whether they can tell us something useful about how to fine-tune our enforcement.

To be sure, competition law is only one among several policy instruments that influence macro indicators. But competition law is not neutral when it comes to addressing what are perceived as problematic trends. Sometimes the use of

several instruments is needed to achieve a particular public policy goal, while checking carefully whether some instruments are more effective than others, given the circumstances.

4 Digital

The field where the debate over the relevant parameters of analysis is probably most heated is the digital field.

On one side, I hear many stakeholders arguing that the digital sector is very competitive and does not need more competition enforcement. They typically point to the wealth of digital services that we all enjoy every day. On the other side, I hear complaints that the digital sector is too concentrated, restricts consumer choice, stifles innovation, and increases inequality. Not to mention the risks of other types of harm, such as lack of privacy and IT security, device addiction, or election manipulation.

A dogmatic view is to believe that everything is for the best in the digital sector. The empirical view is that we need to ask whether the classic competition law tools work as well in today's digital sector – especially considering the size and reach of the digital giants. So it may be useful to look around, ask questions, perhaps open cases – and close cases – to check whether some restrictions of competition are preventing the emergence of even better digital services.

Put differently, a dogmatic view is to accept the digital sector as it is. The empirical view is to recognise that many consumers do not feel best served by today's digital sector; to let consumers imagine a more competitive digital sector; and to ask whether competition law should remove obstacles to achieve it. In fact, that is a clear message coming out of the public consultation that the Commission ran over the summer to identify facts and arguments about competition in the digital sector. That public consultation prepares the ground for the conference that Commissioner Vestager will be hosting in Brussels on 17 January.

Now, in the digital sector, a common argument is that competition enforcement would reduce incumbents' incentives to invest and innovate because it would reduce their ability to appropriate the returns from their investments. To be sure, competition law is sensitive to this argument: we need to preserve firms' ex ante incentives to invest in pro-competitive ventures. Still, this idea cannot excuse all sorts of anti-competitive behaviour.

If we are so concerned about rewarding innovation, should we not be concerned about innovation by smaller players as well? In sum, it is a dogmatic view to care only about incumbents' innovation incentives. The empirical view is that innovation incentives work both ways: We need to recognise that potential entrants can face innovation incentives or disincentives as well.

When it comes to applying the empirical approach in the digital field, take the *Android* decision of last July, for example. Let me address two key points. One can take an abstract view, or one can take an empirical view on both points.

- First, does consumer inertia give an advantage to pre-installed apps? The abstract answer is that "competition is only a click away". But that answer is not based on how things work in real life. In real life – or "IRL", as they say

on the internet – empirical evidence shows that Google’s pre-installed search and browser apps did have a significant advantage.

- Second, does the iPhone constrain Google’s behaviour vis-à-vis smartphone manufacturers? Again, if you want to take the abstract view, you would argue that there is no competition problem because iPhones exercise competitive pressure on Android phones. But, empirically, evidence points the other way: since Apple’s mobile operating system is not licensed to smartphones manufacturers, smartphones manufacturers are dependent on Google. And if Google forces manufacturers into a model that consumers don’t like, would enough consumers switch to iPhones? That is an empirical question, and the empirical answer – put forward in the decision – is “no”.

Or take the ongoing debate about the role of data in competition policy. Some of the literature in that field argues that there is no problem: Data is abundant; data becomes quickly outdated; and data is only one among several factors in creating a successful product. Such views can quickly become dogmatic, discouraging the very opening of cases concerning data. I prefer the empirical approach: If we have discernible concerns, let’s check. Indeed our role is to look for and verify “concerns”: To ask questions, to open cases, but also to close cases. For example, the Commission cleared the *Apple/Shazam* merger last September because, after asking questions, it appeared that Shazam’s data, combined with Apple’s data, did not significantly impede effective competition in the music streaming market. But this also shows that we will continue to be vigilant about the role of data in our merger assessment.

5 Presumptions

Once you have determined the relevant parameters of analysis, you must start to sort the facts thus obtained. This brings me back to the role of presumptions that I already mentioned last year.

Now you might be puzzled. After defending empiricism over dogmatism, here I am defending the use of presumptions? Yes, I do so, because presumptions are a tried and tested way to draw lessons from accumulated experience. As such, the use of presumptions is an indispensable element of the empirical approach. I am of course aware of the view that competition law presumptions are “shortcuts”, and that when a competition authority uses presumptions, the risk of error increases.

But reality is more complex and nuanced.

For instance, firms rely on many presumptions of legality in EU competition law, from safe harbours to block exemptions to rules of per se legality. For example, there is – in principle – a safe harbour below a 25% combined market share in merger control, and below a 40% market share in the Article 102 TFEU Guidance Paper. It is also consensual that we should learn lessons from the past about behaviour which seemed anti-competitive but is actually harmless. So in reality, the criticism that presumptions equal “shortcuts” is often only applied to situations where authorities learn the lessons of the past and conclude that a particular type of behaviour is presumed harmful.

Yet if we know from experience, or from a preliminary investigation, that one fact can be expected to indicate the existence of another fact, it seems reasonable to presume it. Until it is rebutted, of course.

For example, the Commission can presume that pricing below average variable cost is predatory, because, as an Advocate-General put it, "it is not usually rational to sell below average variable cost".

Again, I am aware of the argument that presumptions increase the risk of false convictions, and I do not take it lightly.

Yet I am not convinced, for two reasons.

- First, the argument against presumptions is that it is always preferable to gather large amounts of information – or rather, as large amounts of information as imaginable – and to do so afresh every time. That sounds good in theory. But in practice, authorities need to achieve optimal decision-making under conditions of time pressure and resource constraints. This is why the legal standard we are held to is not 100% certainty. It is enough to show "likely" harm. And we have resource constraints because information gathering is costly and our resources are finite. If you are looking for a needle in a haystack, it is not very useful to increase the size of the haystack. Meanwhile, justice delayed is justice denied. There are benefits from using tried and tested, rebuttable presumptions.
- Second, the argument against presumptions relies on the view that false convictions are more harmful than false acquittals. Typically, the argument is that over-enforcement is very bad, because it will "chill" pro-competitive behaviour; while under-enforcement is not that bad, because markets will self-correct. Reality shows that this is somewhat naïve, because some firms do enjoy entrenched positions. Instead of waiting for markets to self-correct in the long term, with consumers suffering in the meantime, competition authorities are there to stop the harm as soon as possible. It is little comfort for consumers to be told that the harm will perhaps stop on its own at some point in the future. False acquittals can carry large costs.

My modest claim today is that we should perhaps rebalance the debate about presumptions. It turns out that the principled case against presumptions is quite weak. By contrast, we should be more mindful of the benefits of presumptions. Here I want to emphasise that EU competition law presumptions are rebuttable. Competition law presumptions merely shift the burden of proof to the company under investigation, to ensure that the relevant evidence emerges. In that sense, presumptions are merely a procedural device to "smoke out" the defendant's evidence, as Professor Salop [put it](#).

Of course, that works in favour of defendants that have good evidence to support their position. Presumptions tend to work against defendants that are unable to explain or justify presumed bad behaviour. In that sense, presumptions are a good way to ensure the accuracy of antitrust decisions. So in a case with presumption, the firm needs to take an active role in producing the best possible evidence supporting its position. In a case without presumption, the firm can merely reply to the Commission's requests for

information. While a case with presumption produces a swift exchange of relevant evidence, a case without presumption can become a drawn-out battle about what constitutes satisfactory replies to requests for information.

In sum, presumptions can help to solve the information asymmetry problem.

In this framework, EU competition law includes presumptions of various levels of strength.

Pricing below average variable cost, for example, is presumed illegal, and there are very few possible justifications for it. The parental liability presumption is rarely rebutted. That is not the sign of a problem – on the contrary, it is a sign that the presumption is strong and working as expected.

But there are also lighter presumptions.

For example, when the Commission alleges that parallel behaviour in the market allows it to presume the existence of an anti-competitive agreement, the firms under investigation can rebut the presumption simply by pointing to some “plausible” alternative explanation for the parallel behaviour. Not an alternative explanation established as a fact. Only a “plausible” explanation.

As I stated in this very place a year ago, the Intel presumption can be seen as one of those “lighter” presumptions. Former judge da Cruz Vilaça – the judge-rapporteur in the Intel case – has written that the *Intel* judgment may embody something “coming close to a presumption”. Or perhaps a quasi-presumption. Indeed, as the Intel judgment says, exclusivity rebates are not like other rebates: They are viewed with suspicion and they require the dominant firm to “submit supporting evidence” about the lack of foreclosure early on, “during the administrative procedure”. So the *Intel* judgment sets exclusivity rebates apart from many other types of abuses. And as former judge da Cruz Vilaça says, the Commission does not have to make “the same investigative efforts in all cases”. Indeed, as the Court of Justice has held in the area of Article 101 TFEU, there is a “sliding scale” approach to proving infringements: the more obvious the infringement, the sooner the Commission can end its inquiry.

The *Qualcomm* decision of last January was the first decision on exclusivity rebates after the Intel judgment. It imposed a fine of 997 million euros for an infringement lasting five and a half years. The infringement consisted in Qualcomm’s payments to Apple in exchange for exclusive supply of certain types of chipsets. Apple would have to return those payments to Qualcomm should it decide to buy from other suppliers. I would mention a couple of points in particular with regard to the *Qualcomm* decision.

- First, the *Qualcomm* decision is an example of a thorough yet swift decision, with the investigation lasting about two and a half years.
- Second, the Commission rebutted Qualcomm’s “as efficient competitor test”, but in view of the nature of the practice and the evidence in the file, the Commission did not perform its own quantitative “as efficient competitor test”. The Commission’s position is that since Apple viewed Intel as a credible supplier for part of its requirements, in Apple’s view, Intel was at least as attractive as Qualcomm with regard to those requirements. In addition, the decision established that, had Intel sold at least some chipset volumes to Apple, this would have made it easier for Intel to sell to other customers as

well, in light of the importance of Apple as a trendsetter in the smartphone and tablet market.

While *Intel* and *Qualcomm* are key developments in the discussion of competition investigations, perhaps there is an even bigger theme in the background. It is the appropriateness of the effects-based approach as practiced over the last 20 years or so. My aim here is not to revisit or assess the more economic approach in a historical perspective – far from it. I simply think that the more economic approach has worked well in many ways, by giving the Commission a better understanding of many types of behaviour.

And just as we appreciate the benefits of the more economic approach in the past 20 years, we should also use the more economic approach with regard to the challenges of today's markets. Indeed, in keeping with the more economic approach, it is good practice to test one's assumptions. It would not do justice to the more economic approach to continue to make assumptions about optimal enforcement, such as the assumption that the quantitative approach is necessarily better than the qualitative approach. Indeed, the more economic approach should incorporate insights from "decision theory" – the economics of making optimal decisions in conditions where information is costly and resources are limited. In sum, the debate is not whether we need more economics or less economics. It is about using economics to ensure that the system as a whole is optimal.

6 The Commission and the courts

My last point today concerns the interaction between the Commission and the EU courts.

EU competition law very largely rests on case-law based directly on Articles 101 and 102 TFEU. This can lead to the temptation to extrapolate from each judgment in a way that supports some dogma. Such an approach is not in line with the spirit of caution and constant refinement of precedent that runs through EU case-law. As President Lenaerts has [written](#), the Court itself takes a "small steps", "stone-by-stone" approach, being careful not to prejudge future issues. In this sense, as he explains, a particular judgment should be read as part of a line of case-law, together with earlier and later judgments.

With this in mind, the Commission and the national competition authorities, the latter through the national courts, engage in a permanent dialogue with the EU courts, identifying what must be clarified, and adding small brush strokes to paint the bigger picture. Just like digital firms engage in R&D and innovation, it is up to the Commission to face new market developments and to develop R&D and innovation to craft solutions, and explain those solutions to the Court, which will then confirm them or not.

It is through this process of dialogue that EU competition policy can address new challenges.

Ladies and gentlemen, I have tried to address several themes today – from consumer welfare, to the digital sector, to presumptions. I believe we all have an interest in competition policy, law and enforcement because it is a fast-

moving area with a constant stream of new behaviour, new ideas, and new theories.

My proposal is that, in order to maintain the vitality and fitness – indeed the relevance – of our field, we need to push ourselves to practice empiricism, out of which – if we use the right tools – adequate and timely enforcement will arise. This is what we owe to those we serve under the rule of law in our democracies: the people.

I wish you a fruitful conference. Many thanks for inviting me once again. Thank you for your attention.