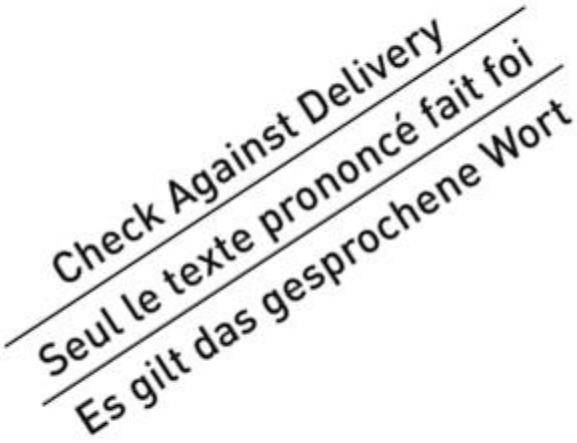
EUROPEAN COMMISSION

Johannes Laitenberger
Director-General for Competition, European Commission

Panel on "Fairness in Unilateral Practice Cases"



GCLC Conference
Brussels, 26 January 2018

Competition

Introductory comments

- Good morning and welcome to this second day of the GCLC conference. This panel is about "Fairness in Unilateral Practice Cases", and we have three presentations, one by Lorenzo Coppi on excessive pricing, one by Kristina Nordlander on discrimination, and one by David Bailey on "meeting competition" defences.

- Let me say a word about the link between fairness and unilateral practices. If you look at Commissioner Vestager's speeches – yesterday's, for example – she uses the notion of "fairness" as a way to describe the rationale that underpins EU competition enforcement. It is a way to express the overall goals and benefits of EU competition policy in a more tangible manner. It is not meant as a self-sufficient, generic legal test to be applied in cases. And certainly, the very concept of "fairness" excludes that it substitutes rigorous, fact-based analysis.

- In a way, practicing competition law is a little bit like practicing medicine. The goal of the doctor is to ensure patients' overall health. But the tests needed to come to a diagnosis and a therapy must be more specific and detailed than just asking whether a person feels in good health, or exhorting the patient to return to good health. Yet – medicine is, or should be, all about health.

- If we then look at how the general concept of fairness underpins the more specific tests, there are of course the two main dimensions of "fairness" mentioned in Advocate General Kokott's speech yesterday afternoon. On one hand, there is the procedural notion of fairness including the impartiality of our decision-making and the rights of defence of the parties to our proceedings. On the other hand, there is the material notion of "fairness" enshrined in the Treaty rules on competition. For example, the notion of "unfair" prices appears in the text of Article 102.

- We are going to hear from our three speakers about what this means in practice for excessive pricing, discrimination, and a "meeting competition" defence. As you know, these are highly topical issues. With regard to excessive pricing, which will be covered by our first speaker, you may have in mind recent or ongoing excessive pricing cases at EU and national level, or the divergence between EU competition law and U.S. antitrust law in this regard – a divergence which may be explained by the fact that the notion of "unfair" prices is in the text of Article 102 of the Treaty. We all know that excessive pricing cases – exploitative cases – have been rare, for two main reasons. First, through enforcement in exclusionary abuse cases, we can prevent monopoly power from arising in the first place, which in turn reduces the likelihood

of the exploitative abuses happening. Second, competition authorities are not price regulators and certainly do not intend to become price regulators. We are therefore picking our cases cautiously to make sure that incentives to invest are not put at risk. We also take into account the rather complex and resource intensive exercise that is running an excessive pricing case. This, however, does not mean that we would shy away from our legal mandate. As far as the Commission is concerned, it stands ready to intervene where such practices risk exploiting consumers directly. And this is why we are currently looking into allegations of excessive pricing in two pending investigations (Gazprom and Aspen).

With regard to discrimination, which is the topic of our second speaker, the European Court of Justice will soon deliver its judgment on the MEO case, after Advocate-General Wahl delivered his opinion in December. This judgment will further clarify when price discrimination would be harmful to competition and thus abusive. We also expect the Court to confirm the need for a rigorous and facts-based analysis of such practices. Which is what we are doing in each and every one of our cases irrespective of the underlying theory of harm. The "Google Shopping" decision is one recent example of our commitment to this approach.

Concerning a "meeting competition" defence, which will be covered by our third speaker, we know from the United Brands jurisprudence that a dominant firm can take reasonable steps to protect its commercial interests, subject to its special responsibility not to abuse its dominant position. Defining those "reasonable steps" means defining the scope of "competition on the merits" which, I am sure we can all agree, should not result in harm to competition and ultimately consumers. In this regard, we also know that "not all competition by means of price may be regarded as legitimate", as the Court told us in Post Danmark I.

I am now looking forward to stimulating presentations and a lively discussion.