EUROPEAN COMMISSION

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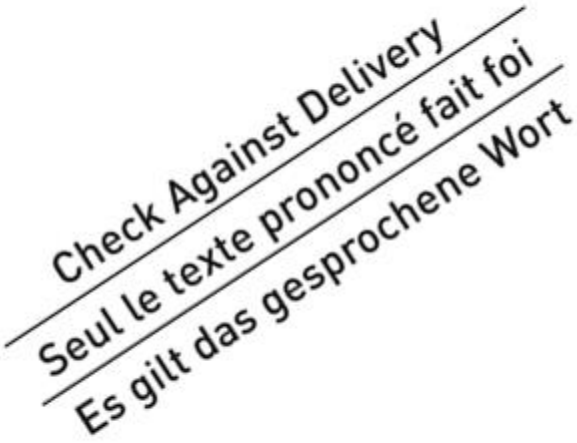
Remarks at panel discussion "The invisible hand losing grip – Do we need to rethink abuse control?"



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Many thanks, Kristina. Thank you very much, Andreas and the Bundeskartellamt for inviting me. It is an honour and a pleasure to share this panel with you, Ariel, Frank, and Jorge.

It is a truism that digitisation has brought us new business models, new actors, and new benefits. And it has become a truism that – contrary to initial expectations – digitisation and the internet are not a competition problem-free zone.

We observe strong scale, network and scope effects – factors that can make it easier for businesses to entrench their market position and leverage their dominance from one market to another.
"First mover" advantages and "winner takes all" dynamics may cause a tipping effect, making it hard to displace a firm once it has acquired dominance. The tipping effect can give some firms a strong incentive to engage in anti-competitive behaviour. Since the potential payoff is large, the frequency of such anti-competitive behaviour – and the financial commitment to such behaviour – may increase.
Due to their "data advantage", certain platforms may be in a position to start new data-driven services, sometimes in competition with digital services already sold through that platform. In economic language, a platform may try to replace its complementors. This may be all the easier when the platform owner has the power to simply shut out a competing service from the platform or when the platform can bundle its new service with its other services.

In other words, a platform's data advantage, its gatekeeper role and its potential for bundling can all work in a complementary way.
Identifying the typical and likely risks to rivalrous markets linked to today's and tomorrow's business models and business behaviour is at the core of our policy reflections and enforcement efforts. This is a fundamental issue. To put the question here in Berlin in German: "Es geht darum, ob wir Marktwirtschaft bleiben oder Machtwirtschaft werden" – "do we remain a market economy or will we become subject to the economics of power?"

This fundamental issue – and all the more detailed issues that derive from it and are linked to it – are being discussed worldwide. In this regard, we follow the hearings organised by the U.S. FTC with as much interest as the reflections of the Australian ACCC and the UK CMA, including the UK report that has just been published.
The European Commission can build on the work and learnings from 20 years of enforcement of the EU competition rules in this sector. The Commission has applied these rules, for example, in cases on

- Applying favourable treatment to one's own downstream business while demoting others [Google Shopping decision, 2017];
- Pre-installation [Microsoft browser decision, 2009, Microsoft/LinkedIn merger decision, 2016, and Google Android decision, 2018];
- Interoperability [Microsoft, 2004, and the Microsoft/LinkedIn merger decision, 2016];
- Concerns about collusion on business models [E-books, 2012 and 2013];
- Standard-essential patents [Motorola, 2014, and Samsung, 2014];
- Most-favoured-nation clauses, not only with regard to price MFNs, but also with regard to business model MFNs [Amazon E-books, 2017];
- Restrictions on using brand names and trademarks for the purposes of online search advertising [Guess, 2018]; and
- Exclusivity rebates [Qualcomm, 2018, Intel 2009].

These cases establish precedents and provide insights that can provide clarity and guidance. They are of course in continuous need of being checked against further change. So that there can be refinement and, where necessary, sharpening.

The Commission's enforcement record shows that the EU competition rules capture new types of behaviour and new types of harm on a regular basis. Indeed many of the abuse cases in recent years do not neatly fit into narrowly defined traditional categories of abuse cases. But they are consistent with long-standing more general concepts, for example leveraging. Think of self-preferencing or most-favoured-nation clauses or standard-essential patents. Or think of the many cases that focus on competition on non-price factors – preserving competition on quality, choice, and innovation.

The case experience points to a need to focus on "evidence-based antitrust". This does not mean entering into an infinity loop of more or less abstract discussions. Nor does it mean restricting oneself to short-term, easily quantifiable parameters. It involves determining which evidence is relevant, who has the burden of providing such evidence, and which standard – at each stage of the case – the evidence has to meet. In this way, the optimal search for evidence in particular cases can be reconciled with optimal decision-making for the competition enforcement system as a whole. As Sir Peter Roth put it in a remarkable and thoughtful article very recently, "Competition law must not become so demanding, or so uncertain, as to prevent its practical application."
The Commission constantly strives to better reconcile administrability and accuracy of our enforcement. That means using an empirically-driven

approach to show harm – formulating competition concerns as testable hypotheses, instead of assuming from the outset that some behaviour is or is not a problem. But to be able to test a hypothesis, one has to be willing to imagine and investigate the hypothesis in the first place.
And in the course of an investigation comes a point where one must say "We have established that these indicators or proxies are sufficient to prove an infringement". Or not.

Competition law manages risk in a dynamic and disruptive sphere. A sphere that we want to be dynamic and disruptive. Because we have learned from experience that competition is overall the best way to satisfy consumer needs. This means that competition law cannot operate under the strict precautionary principle approach. That would stifle competition and innovation. But it also means, conversely, that we cannot operate under an "absolute certainty of harm" approach: that would risk eliminating competition.

So the issue is where to place the cursor: how much information is enough? And here, the digitisation experience must make us mindful of both the costs of over-enforcement and the costs of under-enforcement. Case experience shows us that the costs of "false positives" is not necessarily higher than the cost of "false negatives".
Taking into account the case experience, the Commission does not only continue its case work and investigations – it has also, during the last year, engaged in a comprehensive external dialogue and reflection on the future challenges of digitisation. The public consultation and the conference that we organised in Brussels on 17 January 2019 have illustrated the width and breadth of the issues we face. We look forward to the upcoming report of the special advisers appointed by Commissioner Margrethe Vestager and their views and recommendations.
The special advisers are looking at the three key characteristics of the digital economy and its relevance for competition policy. First, increasing returns to scale, network effects and lock-in effects, which explain the rise of digital platforms. Second, economies of scope, which explain the emergence and growth of digital ecosystems. And third, the role of data. All of this of course also forms part of a quest towards coherence of competition law overall.

It would be tempting to try to pre-empt on some of these issues.
But whilst we may touch on some of these aspects during the discussion, I will not be the spoiler for the moment.

Let me just say this.

One element that has clearly come out of the external reflection process so far is that complementarity between competition enforcement and regulation is crucial.
The role of regulation is particularly important when there is a recurring issue, which is clearly definable, and which is typically harmful, so that a recurring case-by-case assessment is ultimately inefficient.
In fact, due to the initial – though in the meantime disproved – assumption that digitisation and the internet could or even should not be subject to "traditional" regulation, competition law as an essentially case-by-case flexible instrument has sometimes been cast in the role of a universal "righter of wrongs", the policeman of all corporate behaviour. That overstates its specific usefulness and capacity.

Competition enforcement can often act as a trailblazer, paving the way for regulation. Of course, the regulation of credit card fees, telecom liberalisation, the abolition of roaming fees or the regulation of airline computer reservation systems all stem from competition cases originally. And competition enforcement can inform regulation so as to make it more effective.

But competition rules cannot address all problems raised by digital markets alone. Concurrent regulation, such as consumer protection or data protection, has an indispensable role.
I would like to conclude with a few big-picture points.
Like you, I hear lots of discussions whether EU competition rules are "fit for purpose" and need to be "fixed".
My day-to-day experience is quite different. Once we have established a consistent theory of harm and the evidence underpinning it, the substantive rules do offer a solution.

We have an overall framework that does allow us to capture the picture. But we need to properly detail and colour it. Each paint brush contributes to strengthening the overall impression.
To put it differently, the role of the law is not to "move fast and break things", but to "focus sharply and improve things". And if we do that, the invisible hand will not lose grip – to paraphrase Robert Reich – it will not be strong-armed, but it will hold firmly when it is needed.
Thank you.