

Restoring confidence in a world in flux: The contribution of competition policy and enforcement

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Which competition policy for a world in flux?” – Brussels, 26.1.2017*

Introduction

Ladies and Gentlemen:

It is fitting that my first public appearance in 2017 to continue the conversation between the Commission’s DG Competition and the community of European competition experts is at the GCLC annual conference.

Over the past 12 years your conference has helped set the tone of the debate in competition circles here in Brussels and beyond.

A frank, constructive and expert debate is more needed than ever – precisely because at this point in time we have a very strong sense that we do indeed live in a world in flux, as the title of the conference suggests.

So, I am grateful to Massimo Merola for his kind invitation.

What a world in flux means

What does it mean when we say that our world is in flux? Let me look at the question from two sides.

On the one hand, there’s political, economic and societal change on many levels: from geopolitical rearrangements of regional and global scale to technological advances; from new business models to new ways to work and communicate. On the other hand there’s how people react to change – individually and collectively.

To many, change is opportunity. It means more freedom and new prospects for work, business and our everyday lives. But to others, change is cause for anxiety. It questions certainties and habits, references and traditions.

This anxiety can turn into outright ‘angst’ when and where combined with a widespread and growing mistrust in the institutions that have steered our polities, and in the experts and professionals who provide these institutions with hard facts, analyses, and reference frameworks for decision-making – including the legal and economic professions.

The OECD, in a study they have recently announced, found that trust in government is deteriorating in many member countries. The headline figure is worrying: just 40% of citizens trust their governments.

But this sentiment is not limited to governments *strictu sensu*. It extends to institutions in general as well as to communities of expertise. And there is growing distrust not only in public policies but also in the benefits of open and competitive markets.

How to respond to this state of affairs?

When it comes to our competition community of practice and expertise, we should acknowledge we all have common responsibilities. We should recognise that success in our specific roles depends on a functioning system. Thus, we should all try to nurture the people's confidence in the system as a whole.

So, we must abide – and live – by our rules and best practices even more consciously than in the past. In the present environment, even a slight slip – witting or unwitting – risks poisoning the wells. And poisoned wells are a long-term problem, not a short-term one.

This includes striking the right balance between due process and the swift resolution of cases.

Competition policy and enforcement in the EU works when everyone involved in the system keep their eyes on relevance, quality and speed.

We will continue to meet the highest factual, economic and legal standards, so that decisions can be taken quickly enough to have a useful impact. Because justice delayed is justice denied.

It is also true that the sentiments of anxiety and 'angst' – genuine and concerning as they are – don't always reflect the facts accurately.

Just as bad money drives out good, it seems to me that bad news drives out good news in the public arena these days.

And although there is much to worry about, the picture can only be complete if we take the good news into account as well. When we do – despite all the heart-breaking and worrying crises that we face – our world is still getting healthier, wealthier and less violent than in the past.

Closer to home, here in the EU many recognise that the Single Market and competition policy and enforcement are part of the good news.

And to dispel any doubt that I'm standing before you to blow my own horn, let me add that this is thanks not only to the work done at the European Commission, but also in the national competition authorities across the EU, in the courtrooms, and – yes – in the boardrooms and consumer associations. And – last but not least – in academia.

This is not about looking at the world through rose-tinted glasses – not at all. As the Financial Times put it earlier this month, "noticing the good news as well as the bad is [...] essential for making reasoned policies".

In the case of competition authorities, it is essential for enforcing a policy that lies at the heart of the European project: implementing competition rules fully, effectively and swiftly.

It would be illogical for us to resist change; and probably futile as well, since change is the only constant in life – as the phrase goes. We are in the business of competition, after all. Competition is a *driver* of change.

Rather than resisting change, it is our job to monitor, anticipate and understand change in the markets and in our societies.

This way, we can make sure that change benefits the many and not just a few. Change that leaves people behind is change for the worse. Change for the good must be inclusive.

Because, as Commissioner Vestager is wont to say, what we do is all about the people.

So, enforcers have to enhance consumer welfare and protect market players that play by the book. And they must enforce the rules even-handedly and on the basis of fairness – as Commissioner Vestager never tires to remind us.

Now, from time to time I hear people in the competition community say that 'fairness' is not a competition rule. That it's neither a legal nor an economic concept. I think that this objection misses the point.

It is – and must be – a rationale that guides enforcers as they carry out their tasks. If our work wasn't buttressed by values, it would be mechanical and unthinking. And nobody would benefit from that.

There is of course no trade-off between reference to 'fairness' and rigorous fact-checking, economic analysis and legal scrutiny.

Quite to the contrary, 'fairness' starts with all of this. It is about ensuring, first and foremost, the preconditions without which there would be no broader choice; no level playing field; no market outcomes based on merit; no link between taking risks and assuming liabilities.

We would be foolish to ignore a lasting legacy of the financial and economic crisis: our fellow citizens' perception of a lack of equity. A lingering suspicion "that the game is somehow rigged". We can only look at change confidently if the people's trust in equity is restored.

Digital revolution

I have just said that understanding the main factors of change and their implications for our action is the first order of business. Let me look first at the digital revolution that is transforming manufacturing, business, finance and much else.

It'll be a quick glance. For a deeper look, you'll have to wait for my colleague Cecilio Madero who will close today's discussion by looking at how DG Competition's enforcement practice has protected and will continue to protect innovation in digital markets.

Like all revolutions, the digital revolution is disruptive – just ask any player in the media and retailing industries. For example, technology has promoted the emergence of industries with very low labour needs.

In 1990, the top three carmakers in Detroit between them had nominal revenues of \$250 billion, a market capitalisation of \$36 billion and 1.2m employees.

In 2014, the top three companies in Silicon Valley had revenues of \$247 billion and a market capitalisation of over \$1 trillion but just 137,000 employees.

But this is not the whole story. The digital revolution is opening new paths for companies to vie for our business.

We at DG Competition follow these developments keenly, especially in high-tech industries.

We monitor markets closely for any anti-competitive implication of network effects, battles over standards, and buy-offs of innovative and disruptive firms.

The good news here is that if sometimes digital technologies are part of the problem, they are often part of the solution.

Digital technology holds out the promise to lower transaction costs; disseminate innovation on a wide scale and at a fast pace; and boost productivity overall.

Digital technology fosters the emergence of new and better goods and services – and of the jobs associated with them.

Much is at stake for Europe's competitiveness. The Commission estimates that a genuine Digital Single Market could contribute €415 billion per year to Europe's economy and create hundreds of thousands of new jobs.

Digital technology is also part of the solution when it comes to competition control. We at DG Competition have been using quite sophisticated digital tools in our investigations.

Finding evidence of illegal anti-competitive practices during inspections has become one of the big challenges of our investigations, especially in antitrust and cartels. The most useful information is no longer available on paper but, increasingly, on computers and mobile devices.

To rise to the challenge, DG Comp has been using cutting edge forensic IT tools to gather, preserve and validate the evidence. And we continue to keep an eye on developments in digital technologies to stay abreast of the challenge.

Globalization

A second big factor of change is globalisation. The experts and organisations that follow these things talk of global value chains that bind to each other markets scattered around the world.

For example, these are times when floods in Thailand can disrupt supply chains in the hard drive and car industries in Japan and the US.

And it's not only about high-tech products. A few years ago a shortage of screws from an Italian supplier created huge problems for a car manufacturer in France.

In this landscape, we see a growing number of cases in our practice with a worldwide scope. And the only logical response is increasing co-operation with sister agencies around the world.

Let me give you one figure: between 2010 and 2015 we cooperated with an international competition authority in over half of all decisions taken. And more and more cases involve both established authorities and other jurisdictions, including in emerging economies.

For instance, in our antitrust Visa Card commitment decision we cooperated with agencies from Australia, Brazil, India, Singapore, South Korea, China and the USA.

In our Power cables cartel case discussions involved agencies from Australia, Japan, New Zealand, South Korea and the USA.

Companies need a transparent, stable and dependable competition environment wherever they operate in the world. This is why we promote convergence, effective enforcement and a global level playing field in bilateral agreements and within the International Competition Network.

The message in January 2017 is this. If we think we can go it alone, we will all lose. If we cooperate, we will all benefit.

The European Competition Network is the best example. To all intents and purposes, it is an enforcement team. Together, Europe's agencies are a solid, nimble and knowledge-based system, which – as we will see later – can become even more effective.

DG Competition in a world in flux

Ladies and Gentlemen:

I said earlier that the action of Europe's competition authorities can be regarded as part of the good news that are often overshadowed by less positive news. To make the point, let me give you a few figures that illustrate DG Competition's action in 2016.

Achievements in 2016

DG Competition has been very busy last year. We received over 360 merger notifications – the second highest in a single year. After the figures contracted at the height of the financial and economic crisis, they have steadily increased again since 2013. These trends reflect the global waves of consolidation observed in several industries.

While around 250 of the notifications received were in simplified procedure, now a significant number of cases involve competition agencies in other jurisdictions and have grown in complexity, especially when it comes to identifying the remedies needed to preserve competitive market structures. At present, DG Comp is working on as many as four very complex Phase II cases.

The trend in antitrust and cartels is less linear. Take fines, for instance. Because of the nature of our action in this instrument, total fines can be lower one year and higher the next. Last year, we imposed fines for a total of €3.7 billion. In 2015, total fines amounted to €365 million and in 2014 to €2.2 billion. On aggregate, these figures certainly show we are keeping up the guard.

Last but not least, in State aid we received 235 notifications, which is about 11% of the total number of cases when considering the cases dealt with by government authorities across the EU.

This is the intended effect of the State Aid Modernisation strategy as Member States make extensive use of the new the new General Block Exemption Regulation – or GBER – which exempts additional categories of unproblematic measures from prior Commission scrutiny.

In 2016, GBER cases accounted for 89% of all registered cases. This represents an increase of about 19 percentage points and 48 percentage points compared to 2014 and 2013, respectively.

This allows the Commission to focus its efforts where scrutiny is really needed – big on big things and small on small things.

Corporate-tax State aid cases

Our corporate-tax cases are a good example.

This Commission has already adopted four decisions: Luxemburg/Fiat, Netherlands/Starbucks, the Belgian excess profit scheme, and Ireland/Apple. We also have three on-going investigations and we are assessing over a thousand tax rulings in the 23 countries of the EU that make active use of them.

Beyond the numbers, these cases show what it means for a competition authority to keep abreast of developments in the age of the giant multinationals with operations that span the globe.

Companies large and small have to pay their fair share of taxes. EU countries may not allow selected companies to pay less taxes than others. That would give them an illegal competitive advantage.

Of course, we do not assume authority over national or international taxation rules. Nor do we want to achieve fiscal harmonisation through the back door. All we do is keep the Single Market level so that companies can compete on their merits to the benefit of consumers.

Cooperation procedure

A competition authority that is not afraid of change hones its instruments at all times.

Back in September, in the ARA antitrust decision, the company saw its fine reduced by about one third because it acknowledged its participation in an infringement and proposed a structural remedy.

The last time we reduced a company's fine for its cooperation outside of cartels was more than ten years ago. Commissioner Vestager decided to revive the provision to speed up procedures and fix the harm to competition once and for all. "Because", she said, "the faster we can wrap up a case and restore competition to the market, the less consumers will suffer".

Several people in this room may remember these words; they were part of the speech the Commissioner gave at the previous GCLC conference.

We are ready to apply this approach in more cases. We can reduce fines to companies that cooperate in timely and comprehensive fashion – including by acknowledging their infringements, providing evidence and, as the case may be, suggesting remedies. This can be done within the framework of the Commission's 2006 Fining Guidelines.

In tomorrow's opening session, my colleague Kris Dekeyser will have more on this.

E-commerce inquiry

A forward-looking competition authority is also ready to invest serious resources and look at systemic competition problems in individual sectors. The sectors we have looked into were capacity mechanisms in energy and cross-border e-commerce. Let me make a few remarks on the latter.

More and more consumers buy online in Europe and many businesses strive to participate in the growth and innovation opportunities that e-commerce offers.

However, online distribution puts pressure on manufacturers' existing business models and distribution structures. So, some of them react to the pressure by means that may be anti-competitive – such as with requirements to geo-block.

The preliminary report of our study was in public consultation until last November. The good news is that – before we take further action, if any – many companies have already reviewed their policies to stay on the safe side of the law.

When looking at vertical restraints we need to strike the right balance.

While blanket internet sales bans are undoubtedly a hardcore restriction, in line with the Pierre Fabre judgment, this does not apply to all restraints on online sales. In our submission to the Coty case, for instance, we confirmed our position that mere marketplace bans are not hardcore restrictions.

More generally, businesses' concerns such as free-riding may justify restrictions. But they must not go beyond what is necessary.

DG Competition and other Commission policies

The strategic approach inherent in sector inquiries is also apparent in the many ties that link our action to the broader priorities of the Juncker Commission. Political priorities, after all, reflect economic and social issues and urgencies.

As Commissioner Vestager said several times, we apply competition rules without political interference but in light of political priorities.

I've already mentioned our fiscal-aid cases, which add to the Commission's commitment towards tax fairness, and our sector inquiries, which are part of the Digital Single Market and Energy Union agendas.

But there's plenty more examples. For instance, our cases on standard essential patents give guidance to industry and facilitate an open and efficient standardisation environment. Cases as the BEH Electricity case help build an efficient Energy Union. Our on-going investigations and past decision in rail transport help translate the push towards liberalisation into reality. And our Euribor, Libor and CDS cases ensure that our financial system remains trustworthy and open.

I could go on.

In all of these work streams, we've been working together with other Commission departments. We've also done a bit of advocacy – and our efforts seem to bear fruit.

Other areas of EU law increasingly support competitive outcomes or include ideas inspired by competition law. For example:

- The Third Energy Package adapts rules from competition law, for example when it comes to unbundling;
- The so-called "PSD 2" directive requires banks to provide account information to alternative service providers; and
- The recently agreed General Data Protection Regulation includes a right to data portability, with the aim of improving competition among online service providers. The Regulation also introduces fine levels inspired by competition law.

- The legislative proposals on geo-blocking and content portability complement EU competition rules insofar as they address cross-border sales restrictions which are unilaterally implemented by non-dominant companies and therefore fall outside the scope of EU competition law.

Policies

These are the overall priorities and policies of the European Commission. But within this DG Competition advances its own policies. I will mention three areas: merger control, the European Competition Network, and the Damages Directive.

Merger review

In merger control the question is whether the rules should change to capture deals in which the target has little or no sales.

One notable example was Facebook's \$19 billion acquisition of WhatsApp, which did not meet the Merger Regulation's turnover thresholds as WhatsApp at the time had a massive user base but little sales.

This phenomenon is not limited to the digital economy. Other industries, such as the pharmaceutical sector, have seen 'pipeline' deals.

Our public consultation on this and other aspects of merger control closed in mid-January. Now we are processing the replies and will soon share results.

The outcome will inform the type of follow-up. At this point in time, it is too early to say if there will be any proposal for legislative changes.

But one thing I can say. If you want more on merger control, don't miss the panel my colleague Guillaume Lorient will chair later this morning with a focus on the challenges of establishing competition harm in dynamic markets.

ECN+

As to national authorities and our policy initiative devoted to them – called ECN+ – I've already said that National Competition Agencies play a key role in enforcing competition rules across the EU. But they could do even more.

For example, some NCAs cannot gather evidence from laptops and mobile phones – and I don't need to repeat how this can thwart investigations.

Others don't have enough resources. Recently an authority could carry out inspections at only one suspected cartel member, giving the others the time to destroy evidence and get off scot-free.

We ran a public consultation on these issues and 80% of respondents said action should be taken to make NCAs more effective.

Commissioner Vestager launched an impact assessment. On the basis of the outcome, she will decide whether an EU legislative proposal is required. In the affirmative, it could be tabled in the first half of 2017.

The ECN is designed as a flexible system. We can find better solutions for everyone if we allow for an open dialogue.

A good example is the recent agreement between Amazon/Audible and Apple to end all exclusivity obligations in the supply and distribution of audiobooks. The Commission and the German Bundeskartellamt closely cooperated on this matter.

But, of course, we also need some sort of structure when views don't converge spontaneously through open dialogue.

This is why we have our new early-warning system, where potentially controversial cases are signalled at the earliest possible stage. In exceptional cases, the Commission can also decide to take a case away from a national authority.

We are also learning from experience. In the Booking cases, for example, a dedicated Monitoring Working Group is now finalising its analysis of the effects of the different remedies adopted. The aim is to enable the ECN to take a coordinated decision about further action in this sector.

Damages Directive

Finally, let me mention the Damages Directive, whose deadline for transposition into national laws expired a month ago.

The process is over in seven countries: Denmark, Finland, Hungary, Luxembourg, Slovakia, Sweden and Lithuania. Many others are on the home stretch. Most likely, a majority of Member States will cross the finish line in the coming weeks and months.

I would take this opportunity to encourage the remaining EU countries to redouble their efforts so that everyone in Europe can enjoy the same level of protection. I see this as a golden opportunity to create a legal level playing field across the EU.

Close

Ladies and Gentlemen:

I have deliberately painted a broad-brush picture so that more specific issues can be put in context. And looking at the programme, it seems that hardly any issue has remained uncovered!

In closing, I would like to go back to the anxiety and mistrust that seem to mark our time. What can we do to respond?

I think all of us – academics, civil servants, the legal and economic professions, opinion formers and political leaders – have a joint responsibility. We can debate, argue and

challenge each other. But our efforts should be informed by a sense of joint responsibility towards our polities.

A Single Market that works smoothly is a public commons. Competition control is essential to it. In our different roles assigned by law, society and custom we can make the system work.

Tapping the internal market's full economic potential; protecting the legitimate interests of consumers; creating better doing-business conditions for our entrepreneurs.

Crucially, we must explain what we do, why we do it, and how we do it. We must do so in plain language, so that specialists and laymen can understand and relate to it.

In my mind, there is no better way to give positive and tangible answers to the concerns of our fellow Europeans in this world in flux.

Thank you.