



EUROPEAN COMMISSION

Johannes Laitenberger

Director-General for Competition, European Commission

Level and open markets are good for business

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

AMCHAM-EU 34th Annual Competition Policy Conference
Brussels, 27 October 2017

1 Introduction

Ladies and Gentlemen:

I thank AmCham EU for inviting me to make a few remarks in today's debate on how the wind of change that is reshaping technology, business and our everyday lives affects competition policy and enforcement.

When preparing for today's debate, I couldn't help to note that your organisation has been holding its competition conference for the past 34 years.

We have seen plenty of change in three-and-a-half decades. Thirty-four years ago ARPAnet completed the adoption of the TCP/IP protocol suite. It was January 1st, 1983 to be precise, and many regard that date as the birth of the Internet. At the time, I had just started university and I remember how excited I was when I could trade in my mechanical typewriter for an electric typewriter. Little did I know what was to come. The fact that Europe's antitrust enforcers and the main organisation speaking for U.S. business in Europe have held a fruitful dialogue throughout all these years of far-reaching and often disruptive change means one very important thing to me. It means that the EU's single market – with effective and fair competition at its core – has been a crucial factor to trans-Atlantic business and for trans-Atlantic prosperity and consumer welfare. Competition control has fostered openness, a level playing field and more integration. So, I commend AmCham EU for recognising this fact early on and for its determination to keep the conversation going through the years.

2 The remit of EU competition law

EU competition rules are 60 years old this year. Over time, we have built a solid implementation record thanks to the action of the European Commission, national authorities, the EU Court of Justice and the courts in EU countries – without forgetting the rigorous and engaged debate between politicians, enforcers, academics and practitioners.

Through the decades, European and non-European companies with operations in the single market have always been able to rely on a stable and predictable set of rules and on their impartial and even-handed implementation.

Sometimes our implementation system strikes North American observers as odd.

Canada's Competition Act of 1889 and the Sherman Antitrust Act of 1890 in the U.S. rely on enforcement agencies bringing cases to the courts of justice. In contrast, the Treaties of Rome established the substantive standards for competition rules in the nascent united Europe but not the process or sanctions.

So, a choice had to be made and an administrative system was chosen, modelled after Europe's continental tradition of enforcing economic-law provisions. However, this has been done without any concession on the standards of rule of law and judicial redress. To those who, coming from a North American perspective, think that in our system the Commission is prosecutor, jury, judge and executioner all rolled into one, I would like to remind that the Commission does not instruct its cases in an adversarial manner. We examine inculpatory evidence in the same way as exculpatory evidence. And the EU Courts have unlimited jurisdiction on our cases; regularly review the Commission's decisions and – from time to time – also clarify the Commission's understanding of the rules.

The Treaties' competition articles and the administrative system give Europe's enforcers a somewhat different remit from our U.S. counterparts. Our tasks include helping to integrate the single market and taking care of consumer welfare in a dynamic not just static way. Among other things, this means that when we look into business practices

that may raise concerns, we consider not only short-term and direct effects on prices but also long-term effects, their impact on innovation and other factors.

But where this may sometimes lead to differences between the EU and the U.S., they pale in comparison to the similarities. I like to describe competition policy and enforcement on the two sides of the Atlantic as two branches that have grown from the same trunk. Every time I have so far met my colleagues from the U.S. and Canada, my belief has been reinforced that we act on the same principles; pursue the same goals; and speak essentially the same language. Long may it continue.

3 Panel topics

Competition policy and enforcement are widely recognised as a European success story, even by detractors and those critics that would like to see a very different European Union.

One reason that can explain our track record is that the rules have proven to be nimble and resilient. Over time, they have adapted to change in the markets, in society and in the EU itself – most notably during the enlargement process that culminated in 2004 and through the financial and economic crisis that challenged us from 2007-2008 onwards. I have no doubt that the rules will continue to be adaptable to the changes we are observing in technology, economy and society today.

In the next few minutes I will try to make this point sharing a few comments with you on the topics of the three panels: innovation in merger review, exchanges of information, and the much debated issue of algorithms and big data.

3.1 Innovation in EU Merger review

Let's start with innovation and mergers.

The Commission's analysis of the impact of mergers on innovation is not new. According to our legal framework, we have to consider all aspects of a loss of competition, including harm to consumers resulting from hampering innovation. The rationale for this is simply put: weaker competitive pressure in the market can harm innovation just as it can affect prices and output.

And so, we have regularly looked at how a given deal would likely affect innovation in recent and not-so-recent cases. One can mention in this respect – and this is, of course, a selection – Intel/Altera and GE/Alstom of 2015; a joint venture between Telefonica UK, Vodafone UK and Everything Everywhere, the Deutsche Börse/Euronext prohibition, and the ARM/Gemalto joint venture all in 2012; the Intel/McAfee transaction of 2011; and, of course, a number of pharmaceutical mergers.

U.S. agencies also assess mergers' impact on innovation. The horizontal merger guidelines of the Federal Trade Commission and the Department of Justice include specific sections on unilateral effects on innovation. Both agencies deal with the possible curtailment of ongoing product development as well as reduced incentives to initiate the development of new products as a result of a merger.

The Department of Justice also raised competition concerns about mergers' effects on future innovation in a number of recent cases, such as Anthem/Cigna this year; Halliburton/Baker Hughes in 2016; and Applied Materials/Tokyo Electron in 2015. The Federal Trade Commission did the same in Steris/Synergy of 2015 and Verisk/EagleView of 2014.

The fact that we apply similar frameworks does not necessarily mean that our assessment will always result in the same outcomes. This can be explained by different economic circumstances, facts and realities on either side of the Atlantic.

Take the assessment of the recent Dow/Dupont case by the Department of Justice and the European Commission. Both authorities undertook an in-depth investigation of the deal and both investigations resulted in conditional clearances. Both assessed not only

the likely impact on existing product markets, but also the merger's effect on the development of new crop-protection chemicals. In addition, we were in close contact throughout the entire process and the cooperation was very good indeed.

Eventually, in addition to competition concerns relating to existing product markets, the Commission found that the deal as initially proposed would cause innovation problems in the EU. In order to remedy the Commission's concerns, the parties committed to divest a significant part of DuPont's existing pesticide business, including its research and development organisation.

On the other side of the Atlantic, the Department of Justice also found competition concerns relating to existing product markets. To remedy them, the settlement proposed by the Department of Justice included the divestiture of several products that were also part of the divestiture package accepted by the Commission.

However, as regards innovation concerns, the Department of Justice found that the market conditions in the United States did not provide a basis for a similar conclusion to the Commission's finding at that time. This has to be seen against the background that crop protection markets are very much national in scope and innovation in crop protection is characterised by strong regional factors.

In particular, European markets have seen significantly larger cuts in investments in pesticide innovation and innovation output than North American markets in recent years. Moreover, Europe depends more on the largest players. Smaller Japanese innovators play a comparatively bigger role in the U.S. market. But they hardly reach Europe's pesticide markets.

If you ask me, different outcomes based on different economic realities like these are not a concern related to doctrine. Quite to the contrary, this shows that competition enforcement is based on facts and evidence.

We have already seen different outcomes in the past, for instance in the assessment of the acquisition of Staples/Office Depot – a proposed merger concerning the markets for office supplies. The Commission cleared the deal with conditions in 2016. The Federal Trade Commission decided to go to court to block the deal.

Different, fact-based outcomes in individual cases do not call into question a common understanding of core principles to be applied in the assessment of mergers. This does not mean that there may never be a time when disagreements on the applicable framework can be at stake. But before we attribute differences to those, let's look at the facts and then we can have an informed discussion.

3.2 Cooperation and information exchanges

Moving on to cooperation and information exchanges among competitors – the topic of the second panel – I would just like to put on the table a question that we hear quite often. How fit are our existing tools to the new realities that we find in the markets? As a matter of fact, some critics go even beyond that and hold our tools responsible of inhibiting the emergence of new business models.

I always pay attention to critical views, because they keep us on our toes and can be useful to refine our thinking and improve our practice. But I believe that criticism on this individual point is misguided.

As technologies and business models change, our enforcement action should rely on underpinnings that remain quite constant. In our practice, we can still find collusion, competitors kept at bay, and threats to innovation even in the most innovative markets. Above all, I would like to dispel the notion that the enforcement of competition rules may encroach on innovation. Innovation sits at the core of the competitive process, which – in turn – contributes to consumer welfare. As a consequence, we will never stand in the way of fruitful cooperation between competitors when this ultimately leads to better products for consumers. At the same time, these forms of virtuous cooperation must not go beyond their purpose. They must not hurt competition.

I think that our guidelines on horizontal cooperation provide guidance to business people and their counsels as to what may be exchanged between competitors and what should not. That is still valid. I have not yet seen a compelling example of a pro-competitive, efficiency-enhancing cooperation that fell foul of the guidelines.

3.3 Algorithms and big data

Finally, let me turn to algorithms and big data – which have become maybe the hottest topics of conversation in competition circles and beyond.

As I recently remarked, some of today's cases are different from the cases we would meet in the past because market realities are different. Technological advancements in the use of large amounts of data are affecting business methods and marketing channels; they are even affecting the operations and management of companies – and competition authorities, for that matter.

Once again, I do not believe that these changes will send competition enforcers back to the drawing board – not for the moment, at least. So far, the rules that we already have and the principles on which they are based have proved to work in the new environment, too. One example is Microsoft's acquisition of LinkedIn that the Commission cleared with conditions last year. We also see data becoming increasingly relevant in cases that hinge on collusion and abuse of dominance.

As machines learn to behave more and more autonomously, we will likely have to monitor potential antitrust issues related to algorithms. The basic principle here is actually quite simple. Companies cannot hide behind an algorithm. Practices that are illegal offline will likely be as illegal when implemented through an algorithm. Algorithm should be designed to comply with competition rules in the first place. Respect for the rules must be part of the algorithm that a company configures and for whose behaviour the company will be ultimately liable.

4 Converging interests across the Atlantic

These are my very brief comments on the topics that have been debated today – I'm sure in much greater detail. Now I would like to say a few words on the need to maintain the *acquis* of good relations between EU and U.S. competition agencies and even strengthen it for the future – a need that is growing in importance at this point in time. In light of our *acquis*, there is no good case to construct a fundamental divide between the two sides of the Atlantic. In addition to our bilateral cooperation on individual cases, the EU and U.S. enforcers have been natural partners in shaping the agenda on the international scene – be it in the International Competition Network or in the OECD. The European Commission on one side and the Federal Trade Commission and the Department of Justice on the other have been fostering global convergence on competition law and enforcement for a long time. They have supported and led initiatives ranging from the convergence of leniency programmes in cartel enforcement to the recommended practices for merger notifications that were revised more recently. We have been doing this for years because decision-makers knew that, in an increasingly global business environment, the strength of the international links that we have with our sister agencies around the world is a decisive factor of our effectiveness. Stronger convergence leads to a more predictable and stable global framework of rules – and this is what most businesses and consumers from Europe, the U.S. and elsewhere in the world demand of us.

5 Close

For this very reason I would like to close with a call to continue this unity of purpose and action – and I can hardly think of a better venue than the AmCham-EU to do it.

We have in reality a lot to lose and nothing to gain if we treat international cooperation as a zero-sum game. Today's multinational corporations – wherever their headquarters happen to be – know well that their success depends in no small part on a consistent, predictable and stable enforcement of competition rules in every world region where they operate. And today's consumers know that in our inter-connected world, inter-connected rules protect them better than a patchwork of enforcement – or even enforcement at cross purposes.

We in the EU believe that we should respond to this legitimate call. The EU is leaving a long, complex crisis behind. More Europeans than ever are looking at themselves as EU citizens. They are looking at our common institutions with renewed confidence and optimism. So, there is a window of opportunity that we cannot miss.

This is not about denying differences. This is about fostering convergence. And let us not say that a game with rules is a game for losers. In a game without rules, in the end we would all lose – I would like to stress this with great force. For 34 years, this conference has helped to make the EU-U.S. relationship a win-win partnership. I think a good case can be made to advocate for the robust implementation of consistent rules across jurisdictions.

This is the time to join forces with international partners and in international organisations. It is together that we can multiply our advocacy. The choice is not between the unruly marketplace and relaxed bubbles where enforcement prevails. The choice is between a game with rules and a game without rules. This is the spirit that we should carry into the next years and decades.

Thank you.