



Conference on Innovation, Competition Policy and Online Service Providers

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Innovation and competition policy in the IT sector: the European perspective

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

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Introduction

Ladies and Gentlemen,

I would like to thank the Chinese Ministry of Industry and Information Technology for inviting me here today.

The question of whether competition policy intervention is warranted in high-tech markets is highly relevant. Intervention should of course be rare – the sector is vibrant, innovative and developing. But there may be grounds for intervention in some cases – and when the intervention is done correctly it should be a good thing for society.

High-tech markets are often characterised by a fast pace of development and innovation, but even if innovation is faster in these markets, does this mean that market power, or dominance, is eroded more quickly than in other sectors? Does this mean we should apply competition rules less strictly? Or should we be even more wary of dominance in these sectors?

Markets are most conducive to innovation when they are open and accessible to all. But in digital industries, network effects and lock-in might create entrenched market positions which can be used to exclude new entrants or which can be otherwise exploited. It is therefore important to safeguard a level-playing field and access to markets, platforms and data that can be useful in developing new and innovative digital products and services.

The European Commission's policy is that principles of competition must be maintained in the digital economy with the same rigour – no more and no less - as in the brick and mortar world. We believe that our competition tools work well in these complex cases, and that they provide enough flexibility to adjust to new markets and products.

Our work in the digital sphere is no different from that in the "tangible" economy. Our aim is simple: to prevent anticompetitive foreclosure. Firms in the digital world should compete on the basis of their merits in terms of quality, price and innovation. We will not tolerate efficient market players being left out because of anticompetitive barriers.

So we see no tension between enforcing competition law and promoting innovation, provided that competition law intervention is carried out cautiously and in accordance with established principles.

1. Fostering interoperability as a source of innovation

Interoperability is crucial in the IT sector in an era where an increasing number of devices are expected to communicate and work together. This is why the Commission has taken a strong stand in favour of interoperable solutions. Without predicting which business models and products will prevail in the future, we deem that open and interoperable models favour market entry by a greater number of players and that they

stimulate competition. We also believe *that such systems attract innovation, by bringing its costs down.*

In the Microsoft 2004 case, the CFI found that "Microsoft ... did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate."

Now, eight years later, Microsoft has in the meantime released two new server operating systems and has committed to disclose interoperability information under general Interoperability Principles.

When intervening in high tech markets, it is important of course to strike a careful balance so as not to undermine undertakings' incentives to invest and innovate. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose of its property freely.

The Commission therefore believes that competition intervention requires careful consideration where the application of the prohibition of the abuse of dominant position would lead to the imposition of an obligation to supply on the dominant undertaking.

The existence of such an obligation to supply — even for fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. Also, competitors may be tempted to free ride on investments made by the dominant undertaking. Neither of these consequences would, in the long run, be in the interest of consumers.

Nevertheless, the impact of mandated access on incentives to innovate has to be looked at carefully against the factual background of the individual case. This is why for example we are investigating whether MathWorks, a U.S.-based software company, has distorted competition in the market for the design of commercial control systems by preventing competitors from achieving interoperability with its products. The Commission will investigate whether by allegedly refusing to provide a competitor with end-user licences and interoperability information, the company has breached EU antitrust rules that prohibit the abuse of a dominant position.

2. Increased scrutiny of potential anticompetitive use of intellectual property rights

An area of particular complexity in the high-tech sector relates to standardisation processes. Standards ensure that products in an increasingly inter-connected digital economy can work together properly. They allow companies to produce innovative goods and services for consumers. But many competition issues surround standardisation processes, with possible allegations of exploitative abuses of market power.

When we revised the Guidelines on Horizontal Agreements in 2010 we spent some time looking at best practices for standardisation procedures to give them a safe harbour under the competition rules. One aspect of that is proper rules on disclosure of IP and the giving of FRAND commitments: FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions.

Freely entered into and agreed standards are tremendously beneficial to a range of markets – they create economies of scale and scope and reduce barriers to entry by fostering interoperability. At the same time, ownership of intellectual property rights essential to standards can confer market power. As such, commitments to license these rights in the context of standardisation agreements are extremely important in preventing IPR holders from making the implementation of a standard difficult, for instance by refusing to license or by requesting excessive fees after the industry has been locked in to the standard, or by charging discriminatory royalty fees.

Once a FRAND commitment has been given, it must be adhered to. We are currently looking at several cases where, by threatening to use injunctions, holders of standard-essential patents may be enabled to make demands that their commercial partners would not accept outside of a standard, and as such may be a breach of FRAND.

Hence, we investigated in the *Google/Motorola* merger whether, post-merger, the threat of injunctions could be used by Google to extract patent cross-licences from competitors on terms they would otherwise not have agreed to. We came to the conclusion that the market situation was not significantly changed by the transaction so the merger was cleared. However, this clearance does not bless all actions by Motorola in the past or all future action by Google with regard to the use of these standard-essential patents.

This was not an isolated case. The Competition DG is currently investigating the alleged strategic use of standard-essential patents in the mobile telephony sector. For instance, we recently opened proceedings against Samsung and *Motorola Mobility* (now fully owned by Google).

Allow me to also mention another issue involving innovation and competition policy.

3. Promoting the Digital Agenda through the development of Next Generation Networks

Fast internet is a pre-requisite in today's world. Through successive regulation and a series of antitrust cases, we have built over time a strong legal environment that promotes both solid investment and competition.

The deployment of Next Generation Networks (NGNs) across the EU and broadband connectivity are of strategic importance for European growth and innovation in all sectors of the economy as well as for social and territorial cohesion. The Europe 2020 Strategy underlines that importance and the Digital Agenda for Europe sets ambitious targets for

broadband connection. It aims to bring basic broadband to all Europeans by 2013 and requires that, by 2020, (i) all Europeans gain access to internet speeds above 30 Mbps and (ii) 50% or more of European households subscribe to internet connections above 100 Mbps. Estimates are that achieving the first target would require up to €60 billion and the second up to €270 billion of investment.

Investments in broadband networks are primarily driven by the market. However, there is room for State aid when areas are not adequately served by private operators. So State aid control needs to reconcile two conflicting aims: to prevent "crowding out" of private investment and to be sufficiently flexible to allow public investments in regions which otherwise would fall behind.

Moreover, State aid rules ensure that publicly funded networks are pro-competitive. The Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access encourages investments in Next Generation Networks and provides for a consistent regulatory approach based on competition law principles. The Recommendations provide that national regulatory authorities should mandate access to fibre networks, both as regards active elements and the underlying civil engineering infrastructures of the dominant operators. The Recommendation also provides for a favourable regime in case of co-investment in multiple fibre lines.

Fostering investments into Next Generation Networks in any case does not justify lowering the standards of competition law enforcement or of regulation. We always say categorically that the transition to Next Generation Networks should not lead to regulatory holidays or to competition holidays.

4. Cooperation with China in antitrust enforcement in high-tech sector

I would like to turn now to a more specific issue of our important co-operation with China and its competition authorities. In a world where many issues are not confined to one country or region, a common approach to competition enforcement is vital for business, and it is incumbent upon us, as competition authorities, to work together as closely as possible.

The European Commission recently cooperated with Mofcom in the HDD cases and our cooperation was very good. Our collaboration was helpful in improving our respective assessments of the cases and to avoid conflicting outcomes. Although there were some differences in the detail, the cooperation underlined that we have the same general goal: that is, to safeguard competition for the welfare of consumers.

Both the Commission and Mofcom approved the *Western Digital/Hitachi* transaction with commitments. Our respective case teams had several phone conferences to discuss the relevant market players and the market dynamics, which helped to improve the general

understanding of the cases. Both the Commission and Mofcom accepted the same divestiture remedy and subsequently approved Toshiba's acquisition of the divested HDD assets, albeit with different implementation conditions.

Our cooperation was also a very good opportunity for the Commission to learn more about the Chinese antitrust procedures. It is of course most useful for competition enforcers to cooperate and keep each other informed on their respective procedures, on the remedies envisaged, and on the timing they are likely to follow. This is why we think it is important to continue close contacts on the cases which affect both our jurisdictions. A welcome next step would certainly be to extend our co-operation even further, for instance from the phase of the competitive assessment to the phase of remedy negotiation and implementation. Effective remedies and the approval of a suitable buyer, where warranted, are of utmost importance to keep the market competitive.

Besides our case-related co-operation, exchanges on competition policy are of paramount importance. Let me mention in this respect the recent workshop between MOFCOM and DG Competition in March this year, which dealt with mergers in the ICT industries. Such regular initiatives help not only to increase our understanding of each other's competition policies but also to foster a trusting environment for future co-operation to our mutual benefit.

Close

Ladies and gentlemen,

Getting the balance right between allowing the market to develop and innovate, and ensuring that positions of market power are not abused can be difficult. It requires careful and cautious analysis of the facts and the market developments. The European Commission has intervened in several cases in recent years, and the intervention has been positive for innovation.

Nevertheless our interventions remain extremely rare when compared to the vast number of high tech, innovative markets that exist. Intervention is, and should always be, exceptional. I can assure you of the strong commitment of the European Commission in that regard.