

# Staying abreast of digital markets in the European Union: Taking a closer look at e-commerce

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## Introduction

Ladies and Gentlemen:

It is the first time I take part in Fordham's conference on international antitrust law and policy since I was asked to lead the department of the European Commission in charge of competition policy and enforcement – in fact, it's the first time ever. I wish to thank James Keyte for his kind invitation to address the expert audience that gathers in New York every fall for one of the prime events in the competition community. The topic I chose for my presentation this morning is – I believe – complementary to what we've just heard from FTC Chairwoman Edith Ramirez. She told us about the Big Data issue. I would like to talk a little bit more in depth on e-commerce in the European Union and what we do at DG Competition in Brussels to stay ahead of change in digital markets.

The fact that we have picked similar topics does not point at collusion but at coordinated effects, because the digital revolution is everywhere. I would like to show – as Edith has just done for Big Data – that we have the tools and the methods to keep pace with it. The digital revolution is not new. Time magazine devoted its famous January cover to the Machine of the Year in 1983. Over 30 years later, our machines and apps are still a powerful factor of change. They are still transforming consumer behaviour and the way companies do business. Among other things, information technology has re-invented the interface between consumers and firms. There is almost no limit to the stuff you can buy online. I am mentioning this because e-commerce will be the core of my presentation. We have been studying the sector in Europe since May last year and I would like to share with you the main findings we published last week and some reflections. But before I do, I wish to thank the nearly 1,800 respondents, including retailers, manufactures and other market players from all the 28 countries of the European Union who have taken time off their businesses to respond to our questionnaire.

## Doing business in the digital age

What does it mean exactly when we say that the digital economy has changed the way entrepreneurs do business? For one thing, advancements in information technologies have accompanied the progressive integration and inter-dependence of world markets. Instant and cheap information flows, together with falling transport prices, have built value chains that span the globe.

The shape of regional and national economies has also changed. Whole world regions have taken giant strides towards development, freeing millions from poverty. In developed countries, we have seen a shift towards services and tech-intensive goods. For instance, since 1980 the share of manufacturing in total jobs has fallen by half in the US and the UK and by one third in Germany, and this mainly because of technological progress.

Finally, we have seen corporations with turnovers in the billions and only handfuls of employees. And some companies have covered the ground from promising start-ups to global brands in the blink of an eye. Uber's original app was first downloaded in 2010. Today the company operates in 72 countries and carries a valuation of US\$70 billion.

These features of the digital economy don't concern competition policy directly. However, they shape the markets that we monitor for breaches of competition rules and we must be keenly aware of them. Other features of digital markets, instead, engage competition enforcers directly. For instance, in high-tech industries IPRs and network effects matter more than in traditional industries. And this creates conditions for more concentrated markets. Here in the United States, the top four firms in 'IT, telecoms and media' account for close to half the total revenue in the sector. In contrast, the average across all sectors is just over 30%.

## **Balancing risks and opportunities**

These risks are real and competition enforcers need to take them into account. But there is no denying that the digital era has made a positive difference in our lives. Let me give you a personal account. Forty-three years ago, when the first Fordham Conference on International Antitrust Law and Policy was held, I moved from my native Germany to Portugal. From one day to the next, I was disconnected from my sources of information. To get the latest results of my favorite football club I had to rely on shortwave radio. A few years later, what I needed was German newspapers to follow political developments. But it took two or three days for German dailies to reach Lisbon. Today we tell our children to stop fiddling with their smartphones around the dinner table, but – let me tell you – I could have used social media, instant messaging and video calls at the time.

Things have changed completely since then. The flow of information has become much more intense. I don't need to tell you of the countless social and economic opportunities brought by the digital economy – from sharing rides and accommodation with strangers to 3D printing. The risks, too, go well beyond the smartphones that make conversations with our kids impossible around the dinner table. I've already mentioned network effects and the temptation of digital companies to lock their users in and make it difficult for them to switch to a rival service.

Then there are the privacy concerns linked to the huge amounts of data that large digital companies can collect on their users. Often, the consequences for consumers may be positive or negative depending on how companies use the data they collect – not on the data itself. For instance, an analysis of consumers' past purchases or browsing history may allow companies to offer products and services tailored to their preferences. However, the

same data may be used to set different prices for one and the same service, which would prevent consumers from getting the best deals. Moreover, even in Europe's Single Market, the content you have bought in one country may not be available when you cross a border, which may have implications for competition policy and enforcement.

We must remain vigilant and address these risks seriously. But risk is inherent to change and we need to keep a cool head. On balance, the digital age has multiplied the opportunities for consumer welfare and this is precisely the reason why the work of public authorities has become more important. We need to make sure the opportunities are for all, not for a privileged or more educated few.

Competition enforcement in digital markets raises a wide range of issues. Think of the waves of mergers and acquisitions in recent years among manufacturers, carriers, service providers and content producers. Think of unilateral-conduct issues from predatory pricing to tying and bundling. We need to prioritise these issues and weave them into a narrative that can illustrate our action – and the precise limits of our action – to citizens and consumers out there. What we are doing in the European Union and the European Commission is looking at these issues in the context of a comprehensive policy strategy that goes beyond competition – the Digital Single Market strategy. Within this broad strategy, competition policy and enforcement set a number of priorities for itself.

But the overall goal of our action is, I believe, shared by competition agencies the world over. We need to make sure digital companies don't take advantage of their dominance and power. They must be held to the same standards as any other market player. Many are uncomfortable with the power of digital giants – and of corporate behemoths in any industry, for that matter. As Commissioner Vestager put it the other day in Washington, D.C. referring to big corporations in all kinds of businesses: "Some fear that they are now so big that no government can control them". Well, as far as competition policy and enforcement in the European Union is concerned, that's simply not the case. She added: "the idea that global companies are beyond the reach of competition rules is clearly untrue".

## **E-commerce sector inquiry**

This is the broad context for the in-depth study of the e-commerce sector we launched last year. Under Article 17 of Regulation 1/2003 the Commission can launch inquiries into individual economic sectors – or into certain agreements across sectors – when "the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market". The article also provides that the Commission asks companies and business associations to provide information on agreements, decisions and concerted practices. In order to launch a sector inquiry – which is a competition-enforcement instrument – we need to have some indication that something may not be completely right in the markets. On the basis of the information thus collected, we can then look at what kind of enforcement action may be necessary.

What sparked our interest in e-commerce markets? European consumers have embraced e-commerce with glee. Last year, for instance, over half of them bought goods and services

over the internet. However only 15 percent shopped online from a seller based in another country of the European Union. Clearly, there is something to be looked into. What we want to make sure is that this gap is not due to anticompetitive barriers erected by companies.

Let me stress two important points before I proceed. First, building the Single Market has always been a key goal of EU competition policy – since 1958, in fact. Regulatory barriers that have been removed to integrate Europe’s markets should not be replaced by barriers erected by companies. Second, let me reiterate that we are talking about a competition-law instrument and a competition-law inquiry. What we want to look at is the behavior of firms in the e-commerce sector in the Single Market. Specifically, we are looking into contractual restrictions to cross-border online sales. We did not collect information on the conduct of online platforms in general. This means that the inquiry is distinct from other initiatives on online platforms taken under the Commission’s Digital Single Market strategy.

### **Preliminary findings: Tangible goods**

On September 15, we published, as the Regulation provides, the Preliminary report to discuss the inquiry’s first findings with all interested parties. I would like to share with you the main preliminary findings of our study. These can be divided in two broad categories; one for tangible goods – such as shoes and clothes – and another for digital content – such as live streams of music, films, sports events, etc. Let us see what we found in the markets for goods first.

When you shop for goods, the main advantage of e-commerce is transparency. Thanks to the internet, in principle, European consumers can compare the prices of the goods they want to buy from countless outlets across the continent. The other side of the coin is the risks this poses to manufacturers: as price competition increases, competition on quality may suffer and free-riding may increase. Therefore, many manufacturers seek to control distribution to contain price competition and protect the quality of their products and the image of their brands. Manufacturers are also fighting free-riding. It is a fact that often consumers go to a brick-and-mortar shop to fit a pair of sneakers before buying them online from home.

According to our findings, 64 percent of responding manufacturers opened their own e-stores in the past ten years to respond to the growth of e-commerce. Another strategy they used – reported by over half of responding manufacturers – are selective distribution systems, to the point of not allowing pure online stores to sell their products. For instance, selective distribution is widespread in the clothing, cosmetics and consumer electronics sectors. Thirdly, manufacturers impose restrictions of various kinds on their online retailers, such as minimum prices, online sales restrictions, and so on. 18 percent of retailers reported some sort of restriction to sell on online marketplaces in their distribution agreements. Manufacturers also request that retailers do not sell their goods abroad; 12 percent of retailers reported this limitation. However, many more retailers – one in three – decided independently not to sell abroad. This latter trend limits trade in the Single Market. However, if non-dominant companies – such as retailers – unilaterally decide to geo-block,

that is not a matter for EU competition enforcement, of course. But once this is the result of agreements between undertakings, we need to take a closer look.

To sum up on tangible goods, the main issues the Preliminary report identified which may warrant further attention are restrictions of cross-border sales, restrictions of internet sales (including marketplace bans), and restrictions on the use of price comparison tools. We also have indications of pricing restrictions. These restrictions can range from absolute to relative and from systematic to occasional. So a detailed examination is required before we can conclude whether the European Commission or the national competition authorities in European Union countries should take enforcement action in individual cases.

### **Preliminary findings: Intangible content**

Let us turn to online sales of digital content. Here competition hinges mainly on the availability of copyright licences for content. In essence, right holders specify in their distribution agreements how, for how long and where a provider can sell the content they own.

Our inquiry found that contractual restrictions on licensed rights are quite common in the European Union – in fact, they are the norm. As much as 70 percent of providers report they do not sell digital content abroad and 60 percent geo-block because the right holders included a clause to that effect in their agreements. These figures point at a potential competition concern, more so if they encompass *both* active and passive sales. The licensing practices we have found may make it difficult for new players to enter the market and for new business models and services to emerge. The ban to sell digital content from one European Union country to another raises another concern. Erecting private barriers to trade within the EU Single Market is not in the general interest. Beyond these restrictions to cross border sales, other concerns include contractual restrictions in relation to transmission technologies, timing of releases and other such features that are distinctive of digital-content markets. Here again, a closer look and detailed examination are required before Europe's competition authorities decide whether to take action.

As provided by Article 17 of Reg. 1/2003, we invite all stakeholders to have a good look at the Preliminary report, so that we can have an exchange of views based on actual facts and real figures. The public consultation remains open until November 18, 2016. We aim at publishing the final report in the first quarter of 2017.

We have collected plenty of good information from the people who make e-commerce happen. Now we can understand how the sector works a lot better. We will use the information if we find competition concerns in individual contracts and business arrangements that need to be addressed. But producers, retailers and content providers need not wait that long. The report is already providing guidance as to what they can do to stay on the right side of EU competition law. It appears that some have already reviewed their practices after they received the questionnaire that we prepared to conduct the inquiry. That is excellent news, because prevention is always better than cure.

## A few thoughts

Now I would like to share with you a few reflections prompted by the findings of our inquiry and by the experience I gathered over the past year of enforcing EU competition law in the digital industries.

The first comment, again, is related to the special responsibility of the EU competition authority to build the Single Market. We have found that many players in e-commerce adopt practices that effectively erect private barriers within the Single Market. Removing barriers of this sort is – and remains – part of our duties since the dawn of the European Union in the late 1950s. Contributing to build the Single Market gives EU competition enforcement a clearly structural side. It is also thanks to an open and level Single Market that we have enjoyed decades of peace and shared prosperity in Europe.

It may be useful to recall these facts a few months after a majority of British voters said they would leave the European Union. As you know, the process starts in earnest only when the United Kingdom notifies its intention to leave the Union under Article 50 of our Treaty. The impact this will have on competition policy and enforcement will depend on the negotiations that will follow. However, until those negotiations are over, the United Kingdom is fully part of the Single Market and of Europe's competition policy and enforcement system. I hope that any future arrangement will – to the extent of the possible – preserve the competitiveness of markets and promote economic growth and innovation both in the United Kingdom and in the European Union.

The second comment I have on the picture of e-commerce that emerges from our study is a bit like the perplexity you feel when you look at a paradox. We are talking about a technology that has been designed to disseminate information and tear down barriers. When applied to trade, information technology has a huge potential to integrate markets, level them and empower consumers. At the same time, the technology has the potential to raise artificial barriers, and that is especially disturbing. We will see if the law has been broken in individual cases. But it seems certain that the practice breaks the core promises of the technology; the very reason why we have all embraced it. It is also at odds with its potential to foster growth and employment; make markets work better; and enhance consumer welfare.

The next comments zooms out of e-commerce to look at the broader picture. Today's internet giants are successful in the European Union thanks to their innovation and entrepreneurial prowess, but also thanks to the fact that Europe's Single Market – home to over half a billion potential consumers – is open and level.

Companies from all over the world are welcome to do business in Europe as long as they play by the book. The success of big digital companies in the European Union is the best proof I know that keeping competitive conditions keen in Europe works. Just as we have made sure that nothing blocked their path to success we must make sure that nothing stops their rivals, either. We will continue to make sure that today's disruptors will not be prevented from becoming tomorrow's giants.

And then, a question that is often asked. Why are there so few European household names in the digital industries? Many factors contribute to explain this fact. One that I can clearly see is that the Single Market for brick-and-mortar goods is fairly advanced and works reasonably well. In contrast, the Single Market for digital goods and services lags behind.

This is one of the assumptions of the Digital Single Market strategy; one of the top priorities of the present Commission, involving several of its departments, including DG Competition. Creating the best conditions across the European Union to boost the digital economy is simply essential for sustained growth in Europe. Digital is the crucial economic infrastructure of the 21<sup>st</sup> century just as cars and planes were in the 20<sup>th</sup> century and railroads in the 19<sup>th</sup>.

So competition policy in the European Union at this point in time has not only an enforcement role to play, it has also a role to contribute to competition-friendly regulation, and that is also reflected in a number of legislative proposals that the Commission has put forward, the latest just two weeks ago in the context of President Juncker's State of the Union speech in 2016, namely an overhaul of our telecoms rules and an overhaul of our copyright rules.

My final reflection will question a common assumption which I myself have expressed. I said that the digital age has brought radical change to business and in our lives. But there are other, more fundamental aspects that not even the digital revolution could reach.

As we conduct our studies and investigations in digital markets, we observe the same basic temptations in the digital world as in the analog world – colluding at the expense of others, seeking illegal advantage, and incumbents trying to limit the market entry of rivals. Very often in these markets technology is simply a new tool used to carry out anticompetitive conducts that have always been considered illegal.

Under this respect, digital breaches of competition law look decidedly like traditional ones. EU competition rules are flexible enough to detect and sanction both, as long as we keep updating our knowledge of these fast-moving markets as we are doing – among many other things – with the e-commerce sector inquiry.

## 1 Close

Ladies and gentlemen,

this just to give you quick survey of what we do; of a specific initiative that we have launched; and of the context in which we operate. Before I close, I would take this opportunity to make a plea for international cooperation among competition agencies.

The internet has made the world a much smaller place. Digital-industry players know this better than most and the most successful ones have global operations. Making sure that global digital giants abide by competition rules can only be a common endeavour. Competition authorities from every world region should work together to achieve this goal.

DG Competition – which has been present in all the 43 editions of this conference since the time it was called DG IV – has always advocated international cooperation. Indeed, we are close to the 25<sup>th</sup> anniversary of the EU-US Competition Cooperation Agreement, signed on September 23, 1991. It is the oldest such agreement we have. In the meantime, many more have been signed with other agencies; today, we have agreements or MoUs with ten authorities outside the European Union. The latest memorandum of understanding, with our South African colleagues, was signed earlier this year. We have a very sustained cooperation in this context also with our colleagues in Asia; for instance cooperation agreements with Korea and Japan. As recently as last year, we signed a best practices and merger review document with China's MOFCOM, which also attests to the intensity of our international cooperation.

We are strong supporters of the International Competition Network. I was at the annual conference of the ICN in Singapore last April. I returned from that trip with the proof that Asian competition authorities are an active part of the global competition enforcement community. I would like to end my presentation today on this note. We share the same values, we pursue the same goals when it comes to competition policy and enforcement. The European Commission is eager to work together with sister competition authorities around the world and take its tradition of openness and cooperation into the future so that markets work better and consumer welfare is enhanced.

Thank you.