

# Keynote speech:

## Preserving competition across the spectrum

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### Introduction

Thank you for the invitation. I am delighted to open this conference in these certainly very interesting times for these sectors. As you may expect, I will focus my remarks on merger enforcement.

Technology and telecoms are certainly a focus of our enforcement, and we also had an important media case just last year (*Vivendi/Lagardere* in book and magazine publishing in France). But of course, TMT is not the only area we care about – we pay attention across industries, and we know there are others that matter just as much to our economy as tech. But certainly, this is an area where we have continued to be particularly vigilant.

So, what are the trends?

### Telecommunications

First in telecommunications. For a word which is a hybrid of the Greek ‘distant’ and the Latin ‘sharing’ it seems appropriate to first dispel a myth that has sometimes gone around: that the Commission’s competition policy is against cross-border telecoms consolidation and prevents pan-European players from emerging. This is simply not true. Cross-border consolidation in itself has never been a problem from a competition standpoint and the Commission has never intervened in a single transaction between telecom operators that have not

been active in the same market already. Acquisitions by a well-known French player in Ireland and Poland; a Slovak/Czech player's acquisition in Bulgaria and Hungary; or a Norwegian player's acquisition in Finland – these cases have all been unconditionally cleared.<sup>1</sup>

For competition policy is not the stumbling block that prevents cross-border consolidation – it is national regulatory barriers and the lack of a complete single telecoms market blocking any benefits from cross-border transactions.

Comparisons are often made between the EU and US, and the reduced number of operators across the Atlantic, but the comparison makes little sense. Yes, in the US you have a handful of players – but they are active across one single market, with one spectrum authority. Instead in the EU you have around 45 mobile network operators (some of which belonging to the same group) active in 27 different nationally regulated markets – with limited incentives to compete beyond their borders.

Therefore, the unblocking of the single market should be the focus of concerns; not unduly using competition policy as a scapegoat.

We know on the other hand that unfettered in-country consolidation within Member States is not the answer to make up for the limited geographic scope of national markets. It will neither lead to better prices for customers nor to

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<sup>1</sup> Iliad's acquisition of Eircom in Ireland (2018) and of Play Communications S.A. in Poland (2020); PPF's (telecom operator in Czechia and Slovakia) acquisition of Telenor's telecoms business in Bulgaria and Hungary (2018); Telenor's acquisition of Finnish operator DNA (2019).

greater investment by firms. On the contrary evidence shows that it is the presence of competition that encourages investment, rather than hinders it.

That is why the Commission continues to be committed to ensuring competitive telecoms markets across the EEA in the interest of all players, and in the interest of fair prices, quality and choice for consumers, in line with the broad consumer welfare standard we have always taken in the EU.

Of course, not every national telecom deal brings competition problems, on the contrary – there are no magic numbers – and we remain dedicated to examining the facts and evidence of each specific case; taking a reasoned decision one way or another, under a transparent process, as required by our framework. And we have built up considerable experience in assessing these transactions and their market impact, having investigated 36 telecoms mergers since 2015.

When we do see significant competition issues raised by a transaction (in telecoms or any other sector) we have a duty to be vocal on these. After all, telecommunications need to work for businesses and people, for our economy to prosper. If they are too expensive for them to use, choices and quality are reduced, and the efficiencies generated do not outweigh the harm created, we must raise concerns.

Many of the cases where we have found concerns in telecoms are so-called ‘gap cases’, transactions in oligopolistic markets where we still found significant competition concerns despite there being no creation or strengthening of a dominant position of any one firm. The Commission has the ability to tackle such mergers since the adoption of the EU Merger Regulation in 2004, but there has

been a continuous debate for the past 20 years on how the Commission can prove a SIEC falling short of dominance.

Fortunately, we got welcome clarity on that front from the Court of Justice in last year's *CK Telecoms* judgment. Times have certainly changed in some ways since the prohibition decision underlying that judgment – *Hutchison Three / O2 UK* – was taken. The UK is no longer a Member State for example. However, in other ways things have not changed so much with Vodafone and Three having just recently announced a proposed merger here in the UK.

The judgment confirms that the standard of proof the Commission has to meet is that of a balance of probabilities (be it in a gap case or for any other merger); endorses the Commission's approach under its Horizontal Merger Guidelines as to when parties are 'close competitors' or where there is an 'important competitive force': concepts that are crucial building blocks for the Commission's ability to investigate and enforce when necessary when faced with such mergers.

Importantly, the Court also confirms that putting forward, and demonstrating efficiencies, is firmly in the parties' court.

These have all been important elements to bear in mind in our two recent telecoms interventions, in *Orange/MasMovil* in Spain and *Orange/Voo/Brutele* in Belgium. In each case, significant remedies were required to ensure competition would continue to be preserved post-merger in the interest of consumers and the market as a whole.

In *Orange/MasMovil*, a Joint Venture between a full mobile network operator in Spain (Orange) and a hybrid mobile network operator (MasMovil,) we found after our Phase II investigation that: (i) the transaction would have created the largest operator by customer numbers in Spain with a significant increase in market share across all relevant retail markets; (ii) that Orange and MasMovil were close and important competitors; (iii) that the transaction was likely to lead to price increases well above 10%, and (iv) that any efficiencies that the transaction could have created, such as cost savings or incremental 5G or fibre roll-out, would not have offset the transaction's significant anticompetitive effects.

To remedy the concerns, Orange and MasMovil committed to divest spectrum across three frequency bands to a fast-growing Romanian operator, already present in the Spanish market as an MVNO – Digi, enabling Digi to build its own mobile network in addition to its own fixed network and essentially allowing Digi to replicate MasMovil's role in the Spanish market characterised by a high penetration of fixed-mobile bundled offers.

Digi will also have the option of a national roaming agreement, to use the JV's network as a complement, as it rolls out its own growing network with the new spectrum. Digi's already established presence as a MVNO as well as its experience as a mobile network operator in other Member States means it is ideally placed to effectively take on MasMovil's role and we were able to accept the remedies proposed.

Post-transaction the competitive situation will be maintained, while the deal's efficiencies can still be realised. The Parties claimed that the transaction would

create the necessary scale to invest in 5G and fibre roll-out: by approving the creation of the JV between Orange and MasMovil, we therefore ensured such potential critical investments, while protecting competition in the form of Digi replicating the role MasMovil played.

In *Orange/Voo/Brutele*, in order to proceed with its JV, Orange committed to giving access to a reputable player, Telenet, for at least 10 years to its existing and future network infrastructure. The result is that the number of telecoms operators remain the same post-transaction, with Telenet effectively replacing the current access seeker, Orange, as the new access seeker. The remedy has been an important element in the increasing nationwide presence of Telenet and Orange's fixed networks across the country vis-a-vis Belgacom, the national operator.

## Technology

Now, the implications of the *CK Telecoms* judgment are very important for our ability to effectively preserve competition in the mobile telecoms sector, but also go far beyond that sector. Indeed, the Court recognises that the standard of proof is the same for all mergers and irrespective of the theory of harm, enabling further our ability to be bold in our enforcement when necessary; and let's face it – sometimes we have to be.

That goes in particular for the tech sector where we are often faced with novel market realities. When that's the case, those transactions need to be rigorously assessed. We have endeavoured to do just that in our recent tech investigations such as those into *Broadcom/VMware*, *Microsoft/Activision Blizzard*, *Viasat/Inmarsat*, *Booking/eTraveli*, *Adobe/Figma* or *Amazon/iRobot*.

Some of these cases involved more 'classical' foreclosure issues. Such as *Broadcom/VMware*, where we approved the transaction subject to an interoperability remedy, to ensure Broadcom's hardware rivals would not be foreclosed from access to VMware's important infrastructure technology.

In *Amazon/iRobot* we had concerns surrounding access degradation, to the detriment of rivals and consumers post-transaction. We found that Amazon's online stores are an important sales channel for robot vacuum cleaners. Amazon could have reduced the visibility and increased the advertising costs for iRobot's rivals' on Amazon's stores in certain Member States. This would have made it more difficult for iRobot's rivals to reach consumers, while favouring the sales of iRobot itself. Ultimately, we had concerns it would have led to higher prices, less choice and innovation for consumers. Amazon abandoned the transaction after we raised our objections.

In line with the case law, our guidelines, and our past decisions, we took into account the potential impact of the antitrust rules as well as the applicable regulatory framework when assessing Amazon's incentives to engage in the conducts found. This included looking at the relevant rules and obligations that Amazon is subject to as of 7 March this year under the DMA. We preliminarily concluded that, for various reasons, the numerous potential foreclosure strategies brought about by this transaction were likely to arise, even with the new regulatory environment – which is also, to be noted, still at an early phase of implementation.

But let's be clear: the DMA and the EU Merger Regulation are complementary tools. That's what the legislators intended when they introduced the DMA. And the Merger Regulation remains the best way to tackle structural changes in the market and prevent incentives that are likely to reduce competition from being created in the first place. I am confident therefore that the full powers of both the DMA and the EU Merger Regulation are here to stay when it comes to gatekeeper mergers.

Other transactions we recently reviewed involved so called ecosystems. Now, 'Ecosystems theories of harm' is a catchy phrase but it is important to unpack what it means, and in reality, it is a continuation of what we have been doing in the past, so no real change in direction for merger control per se.

Ecosystems are a business organization reality in today's economy, notably in some digital markets. To do its job properly competition policy has to be in tune with the market reality and take into account new developments – that's why we take into account the ecosystem dynamic of firms, where applicable, in our merger reviews.

The concept of an ecosystem has been explicitly confirmed by the General Court. As the Court underlined in the *Google Android* judgment in digital ecosystems, markets may be "distinct but interconnected" requiring "multi-level or multi-directional examination". These complementarities are important when assessing the overall strategy of a company.

In a merger context, the fact that markets are complementary and "interconnected", part of an "eco-system", is as relevant as in antitrust and

explains why we have always put an emphasis on the need to look closely at non-horizontal relationships. It is not new for us but what is new is that it is now widely acknowledged. And we have reflected this in our new Market Definition Notice.

So, I would not say there are necessarily distinct ‘ecosystem theories of harm’. The ecosystem is most often the market context that we take into account in our assessment of the respective theories of harm.

And while these theories are sometimes described as novel, they have actually been present in our decisions for a while. *Meta/Kustomer*, *Amazon/MGM*, or *Microsoft/Activision Blizzard* are all examples of merger cases where we considered, amongst other issues, the potential impact (on rivals as well as on the merged entity) of adding the service that was acquired in one of the parties’ ecosystems.

*Booking/eTraveli* last year was our first prohibition based on concerns relating to an ecosystem. We found that that transaction would have strengthened Booking’s dominant position, hindering further the ability of competitors to enter or expand in the hotel OTA market and entrenching Booking’s travel ecosystem.

Yet, in *Google/Photomath*, (also last year) we concluded in relation to Google’s ecosystem that the deal would not result in generating significant additional traffic for Google and hence the transaction would not significantly impact the prevailing network effects. This is in stark contrast to the flywheel dynamics in Booking’s acquisition of eTraveli.

So, all these cases actually show that the outcomes can be very different because not every acquisition taking place in an 'ecosystem' necessarily has the same impact: some may raise issues; others not, and when there are concerns, some can be solved and others not.

These cases also show that the framework we have under the Merger Regulation is flexible enough to adequately assess mergers involving ecosystems, even when these generate a mix of horizontal, vertical and conglomerate effects.

Some non-horizontal mergers may entail effects that are not necessarily based on a foreclosure 'conduct'; they can be more 'horizontal' in nature and we will need to continue to be vigilant on capturing these effects. For example, a merger of firms that are not currently horizontally related may cause concerns about potential competition, innovation competition, aggregation of (data) assets or traffic leading potentially to a strengthening of the position, and/or increasing barriers to entry.

A pertinent example is that of *Adobe/Figma*, where we had concerns about current horizontal competition between the parties in interactive product design tools - where the deal would have resulted in Adobe discontinuing its own existing efforts. But we also had potential competition concerns: with Figma being a competitive threat to Adobe as the most successful disruptor in creative design for a long time, and as potential entrant in the raster and vector editing markets where Adobe is the clear market leader with its Photoshop and Illustrator products. Adobe and Figma ultimately abandoned the transaction following our objections and those of other authorities.

## Artificial Intelligence

Another area where we see disruption, and the next frontier for TMT, is of course Artificial Intelligence. Competition policy has to play its role in making sure this next generation technology remains competitive and accessible to all who can make good use of it – and not just in the hands of a few tech titans. As is well known we are currently looking at Microsoft’s partnership with OpenAI to determine whether there has been a concentration within the meaning of our rules. And we will continue to scrutinise such partnerships under the relevant instrument, be it merger control or antitrust. We will also keep a close eye on how new market realities brought about by AI may bring about anti-competitive effects in our substantive assessment of transactions.

## Conclusions

For as we have done in the past, and will continue to do so in the future, we will evolve our assessments in accordance with market developments: using the flexibility we have under the EU Merger Regulation framework to do so.

Sometimes this means being bold; and when needed, we rise, and will continue to rise, to that challenge – even when there is no ‘precedent’ but we see there is harm to competition that needs to be prevented.

But in doing so we will always respect the fundamentals: the rule of law, the need for engagement and transparency in our decision-making process, and the need for a reasoned decision that fully weighs the facts and evidence case-by-case.

These are the elements that will stand us in good stead to preserve competition in these times of technological advancement, to the benefit of all players, and across the spectrum.

Thank you.