EU Competition policy: Plus ça change…

Fordham

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Ladies and gentlemen,

Let me start by thanking the organisers of this event for what promises to be a very exciting and packed schedule. As you know I stand here today in replacement for the EU Commissioner for Competition as Ms Vestager took a leave of absence, and the caretaking Commissioner, Mr Reynders, could not rearrange his schedule at such short notice. Your loss is my gain, as I can sort of play Commissioner for a day today.

On behalf of those of us who travelled to get here today, I am especially grateful that you are providing us with **two things** I know will fight jet lag and help us stay alert: the first of course is coffee.

But the second is much more important, and that is the thrill of reconnecting with long-standing relationships, building on them, and exchanging views and knowledge. This is the DNA of Fordham and the Legacy of Barry Hawk. And this is the reason why, for the European Commission, Fordham is one of the most important events

in the calendar. Here we get to hear outside views and gain new perspectives. Here we get to learn and to listen.

But I will also take the opportunity to give you the report from Brussels.

Certainly, it has been another eventful year since the last time we met – with enforcement activity up for all three instruments, as well as significant advancements on our policy work. And when I look ahead, I don't see any risk of us getting bored in the coming year, either.

Digital regulation

For one thing, we have been working hard towards translating an entirely new digital architecture into change on the ground. The designation of the first six gatekeepers under the DMA two weeks ago completes the design phase of the regulation. We've now entered the enforcement phase, where compliance is our ultimate goal. I'm happy to get into more details on how we see this playing out – I'm sure you will have questions.

But before we get there, I want to place the DMA in a wider context. The digital transition has profound effects on the whole economy – and our society as a whole. It affects far more than just the smooth operation of competitive markets. It impacts labour markets, economic structures, social norms – even our financial system is undergoing major changes – and it profoundly transforms the way our democracies function.

In such an environment, if we as competition policy enforcers want to ensure that our long-standing principles of healthy, competitive markets are upheld, we cannot just 'stay in our lane' with blinders on. At the same time, we could not and should not assign too many goals to competition policy if we want to remain both legitimate and effective. Frankly, allocative efficiencies of well-functioning markets and consumer welfare are already broad enough concepts as policy goals. And of course we could not and should not duplicate the work of sector regulators. This is the fine line we have to walk: do not stay in our narrow lane, and yet do not step out of our core mandate. This is an issue that goes way beyond digital – just think of environmental issues for example.

How should we walk this fine line. Well, first by working together with our colleagues across disciplines and departments to make sure the myriad of digital regulations being passed – whether on privacy, online safety, or artificial intelligence – are in line with the principles of free and fair competition for the future.

Second, by cooperating with sector supervisors in individual cases, as for example the EU Court of Justice has recently held in a case involving Meta. The Court expressly stated that competition authorities have a duty of sincere cooperation with data protection authorities when taking into account data protection rules in establishing an abuse of a dominant position. Similarly, in the context

of the DMA we plan to work together closely with data protection authorities to ensure the complementarity between the two sets of rules.

These kinds of complementarities in policy design and enforcement are not just ‘nice to haves’. They are essential if we want to preserve fair and contestable markets in the coming decades. And in new areas like Artificial Intelligence or the regulation of FinTech and cryptocurrency, we will need to keep a watchful eye on how regulation does or does not support our competition policy aims. Of course, finding complementarities means we will have to step outside our comfort zone, more and more, without ever losing sight of our core business. Yet, to put things into perspective, this complementarity and necessary cooperation between ex-post competition enforcement and ex-ante regulatory framework is not exactly new. It is actually a traditional feature of markets characterised by network effects and sharply increasing returns on scale. This is the same combination that allowed the successful liberalisation of traditional utilities in energy, transport, and telecoms in the 1990s.

Antitrust

When we talk about ‘complementarities’, we talk about the relationship between conventional antitrust enforcement and how we enforce the DMA. There seems to be an assumption that with the

DMA, the Commission is signalling a withdrawal from the decade of digital antitrust enforcement that we have been engaged in up to now.

I've said it before and I will say it again here - this will not be the case. My colleagues and I do and will continue to, enforce Articles 101 and 102 with the same rigor and vigour as before, including in digital markets. Indeed, if you look at our recent activity, you can see quite clearly that it is very much 'business as usual'. The investigation we launched over the summer into Microsoft and its 'Teams' product for instance echoes previous Article 102 bundling cases.

The investigation into Google's use of its dominant position as an intermediary to possibly favour its own ad exchange service is another recent example of this ongoing work. And you may expect more digital antitrust enforcement activity in the coming months.

This dual enforcement strategy is the result of differences in timing – Article 102 enforcement is more ex post, while the DMA is more ex ante. But it is my expectation that even a high degree of DMA compliance will leave scope for more Article 102 cases to be taken in the future. After all, not all abuses of market dominance, and not all market players, can be covered under the DMA.

At the same time, the digital regulation design is built on the experience we have gained from a decade of antitrust enforcement. So naturally there will be synergies. That's a good thing and was the point in drafting the DMA. It will allow us to free up more resources

to pursue cases in other sectors of the economy – because let us not forget, we all talk a lot about digital, but that is not all that matters!

In fact in the more "traditional" sectors, I expect that things will be getting busier than before. The pandemic rattled supply chains across Europe, and while things have largely returned to normal, the shake-up has opened windows of opportunity for some very 'tried and tested' kinds of anticompetitive conduct, like market segmentation and supply restriction agreements. So the new world of digital abuse is very much keeping us busy, but the old world of traditional and sometimes unsophisticated behaviour is still very much alive. We are conducting investigations for example into good old restrictions of cross-border sales in the Single market. And of course we're also looking at some practices that used to be less on our radar, like non-poach agreements.

Mergers

Let me now turn to merger control. These are transformative times, raising major challenges for merger control ranging from the digital revolution to increasing market consolidation across the board. Increasing concentration in traditional or industrial sectors remains a major focus point for us. In fact the majority of our interventions continue to be based on horizontal concerns in established industries. I know this is also an area of focus here in the US. After all, tackling horizontal concentration is an antitrust enforcer's 'bread and butter'.

And again I think it is important not to forget that in the midst of all the excitement raised by tech deals – we cannot and will not let our attention slip from what happens in traditional sectors.

At the same time, we do of course need to have our finger on the pulse when it comes to fast-paced sectors like digital or med tech, and the outlook for merger control for such areas remains dynamic, challenging and novel. As enforcers, we need to be just as dynamic. This can mean revisiting our tools to ensure they keep up with market developments, as we are currently doing with the Market Definition Notice or the US agencies with their new Merger Guidelines. It can also be helped by relatively straightforward reforms like simplifying our procedures for the handling of non-problematic cases – that's something we have recently done and it's not trivial. It will deliver real capacity improvements in the coming months, further enabling us to focus our attention, time and resources where they matter most.

The need to remain on top of things in merger control in the digital space and more broadly in highly innovative markets can also involve fundamental evolutions for some of our most foundational practices. There are three broad areas I want to discuss in that respect.

The first relates to jurisdiction. It's no news to anyone here that there have been increasing concerns related to loss of innovation competition and killer acquisitions or varieties thereof. All enforcers are grappling with that phenomenon. In the EU, it seemed that certain

deals we should be looking at were slipping through the net by not meeting traditional turnover based notification thresholds. It is simply a fact that the nature of digital and highly innovative markets creates more risks that transactions escape proper scrutiny. Yet these transactions may impact competition and in particular innovation competition, which is increasingly important as a parameter of competition in these very markets. These transactions have the potential to impact deeply and negatively the way markets function. This may be due to the revenue models, the strength of network effects or the aggressive acquisition policies of large digital players. Our response to this potential enforcement gap, as has been discussed at this forum before, came in 2020 when Margrethe Vestager announced a change of our recommendation to Member States, regarding the use of Article 22 of the EU Merger Regulation. Just a few months later in March 2021, we followed-up through a Commission notice giving further guidance on this recalibrated approach to referrals under Article 22. In a way, we came back to the roots of article 22 in the 1989 Merger Reg, so as to be able to invite EU national competition authorities to refer a merger to us we think we should review, even if it does not meet the EU or even any national notification thresholds.

Our approach has been criticised and challenged in court, and after an encouraging judgment in first instance, we're now patiently awaiting the Court's final say. But one thing I think the facts now clearly confirm – as we've said since the beginning, this recalibrated

approach was not intended to capture a multitude of transactions. It hasn't, and it won't – it's an important tool for us to fix possible holes in our net, not an entirely new net. So far we have taken three cases under the recalibrated approach to art. 22 referrals - at first Illumina/GRAIL, and more recently Qualcomm/Autotalks and Nasdaq Power/EEX. I'm confident they will not be the last of these cases, especially in light of the new transaction reporting requirements imposed on designated Gatekeepers under Article 14 of the DMA. I do not expect however a flood of new cases below thresholds either.

The second evolution we're in that reflects how markets have changed is to do with how we assess our Merger cases, and the theories of harm we build. Here again the particular nature of digital markets comes into play. For instance, first order price effects are less consequential when the actual revenue comes from an advertising stream three markets away. One big challenge here is understanding how a certain product sits within the digital ecosystem of the acquiring entity – this can lead to horizontal, vertical effects or conglomerate effects. Added to this, ecosystems can impact innovation (positively and negatively), and our case assessments must fully reflect and take into account the likely effects on innovation. Fortunately, so far our EU merger control framework has shown itself to be flexible enough to allow us to capture these new market realities, and there are several cases where we have been looking into ecosystem effects.

The third and final evolution relates to remedy design. Let me state clearly that we retain a strong preference for stand-alone divestitures, where they can address the competition concerns fully. This has always been true and will remain so in most cases. Further, within structural remedies, we are increasingly rigorous and less minded to accept remedies made of bits and pieces of existing businesses, rather than the divestiture of a fully functional pre-existing entity. Finally, and to close on this subject, we have also been strengthening our policy in the area of airline remedies, as illustrated by a number of cases in the last three years.

But the design of remedies is not something the Commission is engaged in by itself – we are not even in the lead. The way our procedure works is that the parties are in the driving seat, and it is our duty to give due consideration to any reasonable proposals they put on the table – this includes actively seeking the views of market participants and taking those on board.

And in that process we recognise, particularly in some non-horizontal cases, that sometimes a non-divestiture solution can meet our standards if it is effective, easy to implement and monitor, and in line with market realities. For example, non-divestiture remedies may address specific interoperability and market access concerns.

That said, when a remedy proposal does not meet our standards we will not hesitate to reject it, and if necessary end up prohibiting the

transaction if that is the only way to prevent a significant impediment to effective competition. That goes for any sector and any market.

Cooperation

The final point I would like to address today applies not only to Mergers, but across the instruments of competition law enforcement. It is to do with cooperation. There can be no doubt that in today's global economy, the competition policy community needs cooperation. To ensure effective and well-targeted enforcement solutions. But more than that perhaps: the business community needs it in order to ensure a smooth and transparent path to better compliance, and workable outcomes that make sense on the ground.

Of course, we have different legal systems, different enforcement traditions and also different priorities, so 100% alignment is neither realistic nor even desirable – especially not when it comes to the design of instruments themselves. But I believe there is scope for adequate convergence when it comes to outcomes.

And there is always scope for us to improve our dialogue – to listen and to learn from each other, including in settings like this one.

Conclusion

It feels like I barely scratched the surface on a lot of these issues – and I know there are many more topics I did not address at all. So let me

end here, to give us more time for that discussion, and to continue listening and learning from each other. Thank you.