

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT BY MARGRETHE VESTAGER
EUROPEAN COMMISSIONER FOR COMPETITION

SEPTEMBER 6, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, members of the subcommittee, thank you for accepting this written statement for submission with regard to the subcommittee’s investigation into competition in the digital economy and the role of digital platforms.

I have been the European Union’s Commissioner for Competition since 2014. During this period, we all have become increasingly aware of the various consequences of the accelerated digital revolution happening around us. Digital services increasingly connect people and businesses and can open the path for new products, new business models and new opportunities for consumers. We recognise these benefits, but cannot turn a blind eye to the fact that they also raise new risks and new forms of market power. Competition enforcers and other regulators, not just in Europe but around the world and including the United States, are investing significant resources to come to grips with the unique features of this digital economy and its main players, and the threats to effective competition and to innovation thereby created. As European Commissioner for Competition, I have launched a reflection process involving an open public consultation, a one-day conference in Brussels in January 2019, and the commissioning of a report written by three appointed Special Advisers from academia and published on 4 April 2019, titled “Competition policy for the digital era.”

The Special Advisers’ report is only one example of a widespread climate of reflection on competition in the digital economy around the world, as evidenced by many reports and hearings. The FTC has held hearings in recent months, but we have also taken note of, among others, the Common Understanding of G7 Competition Authorities on Competition and the Digital Economy, the Furman Report in the United Kingdom, the report on digital platforms by the Australian Competition and Consumer Commission, a report on data by the Japanese Federal Trade Commission and a number of initiatives among individual Member States of the EU. It is encouraging that so many competition authorities are reflecting on how to meet the challenges arising from digitization and there seems to be a trend towards convergence, at least when it comes to identifying the biggest challenges (such as the market power and the ‘gate-keeper’ function of certain platforms, the role of data and the need to carefully scrutinise acquisitions of innovative start-ups by digital incumbents).

Ever since the 2004 decision finding that Microsoft abused its dominant position in the market for PC operating systems by denying rivals the ability to interoperate with Windows and by tying Windows Media Player with its operating system, the European Commission has been at the forefront of enforcement in digital and tech markets. We have sought to protect incentives for firms to innovate to the benefit of consumers by developing and marketing new or improved products or services that increase the quality and choice available to them, as well as to prevent dominant companies from foreclosing actual or potential competitors by anti-competitive means. We have applied our rules to all companies doing business in the EU in a non-discriminatory fashion and irrespective of their national origin.

Some observers have called on us and on others to refrain from intervening in digital markets, arguing that “competition is always just a click away.” However, our careful analysis of the new developments and assessment of the evidence in particular cases pointed clearly to situations in which a stifling of the competition process, and thereby consumer harm, had appeared and needed to be addressed. We have pursued these cases on the basis of a rigorous, evidence-based approach and strived to take account of all relevant specificities of digital markets, including their fast-moving nature; network effects, that is the fact that, in particular in digital markets, the value of a product or a service increases according to the number of people using it; the “winner-takes-all” tendency to tip in favour of dominant players; the implications of ‘zero-price’ services (such as when the use of a search engine or social network is offered to consumers free of charge while the provider makes a profit by selling ad space on the service); and the importance of data.

Some of our cases involved the analysis of issues that come squarely within the announced scope of the subcommittee’s investigation. These cases, and others, have established precedents that we hope can provide clarity and guidance into further enforcement in this sector, where appropriate and applicable.

Antitrust enforcement

In 2017 and 2018, we adopted two major prohibition decisions addressed to Google in relation to conduct that we characterised as abuses of Google’s dominant position in search in contravention of Article 102 of the EU Treaty (the equivalent of Section 2 of the Sherman Act). In *Google Shopping*, we found that Google had abused its dominant position as a search engine by treating its own comparison shopping service more favourably in its general search results than rival comparison shopping services in terms of placement and presentation. By doing so, Google leveraged its dominant position in general search to stifle competition on the merits in comparison shopping markets. The decision ordered Google to comply with the simple principle of giving equal treatment to rival services as it gives its own services in the positioning and display of search results for comparison shopping.

Then last year in *Android*, we found that Google had abused its dominant position by the use of certain contractual obligations and financial incentives aimed at protecting and strengthening Google’s dominance in general internet search. The aim of this decision was to create the conditions for competing search and browser providers to compete head to head with Google for pre-installation on Android devices, and for the development and marketing of competing operating systems based on the Android open source code. Google has proposed to put in place a choice screen that will let consumers choose which search and browser provider they want on their Android phone. In the past, choice screens have been an effective way for a dominant company to restore competition. In this case, it would have the potential to give users a real choice of how they search on Android devices and to allow Google’s rivals the chance to be chosen upfront by users.

In both of these cases, we are now accordingly looking carefully at remedies proposed by Google to resolve the competition concerns. Implementation and monitoring of effective remedies is essential to correct the harm caused by the infringements.

In the most recent *Google AdSense* decision (2019), which deals with the provision of search ads on third-party websites, the Commission looked at hundreds of contracts and the impact that their terms had on the market. Through an exclusivity provision, the most commercially important customers were contractually prevented from sourcing any search ads from Google’s rivals on their websites. Over time, Google replaced this with another clause that did not completely stop customers from

sourcing ads from Google's rivals, but required them to take a minimum number of search ads from Google and put them on the most visible - and therefore most profitable - part of the page. Finally, customers also had to get written approval from Google before changing the way they displayed the search ads of Google's rivals - right down to the size, colour and even font of those ads.

The evidence showed that customers did have an interest in sourcing from rivals, but that Google's practices either prevented or strongly deterred them from doing so. We saw that search advertising is a market with strong network effects. This means that to compete effectively, one needs to build scale. The conduct thus prevented Google's rivals from competing on the merits in what was a strategic entry point.

A common element among many of these digital cases is the existence of smaller, specialized companies or start-ups in an adjacent market that the dominant company is trying to monopolize. Our enforcement actions have not been aimed at protecting specific competitors, but at the process of competition that can enable such companies to innovate and grow in ways that benefit consumers through new or improved services or increased consumer choice. For example, in 2017 we accepted commitments from Amazon not to introduce or enforce what are sometimes called "most-favoured-nation" clauses in the e-books market. These clauses required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or inform Amazon about more favourable or alternative terms given to Amazon's competitors. The clauses covered not only price but also other aspects that a competitor could use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion. The Commission's investigation concluded that such clauses could make it more difficult for other e-book platforms to compete with Amazon on price as well as these other parameters. Amazon proposed a set of commitments to remove these concerns, and the Commission made these commitments binding by decision just under two years from the opening of the formal investigation.

It is also well known that the Commission is now conducting an investigation into Amazon in relation to its Marketplace. Amazon is an example of a dual-role platform, which, on the same website, offers both marketplace services to third party sellers and sells products as an online retailer, in direct competition with those third party sellers. The Commission is examining whether Amazon might thereby gain access to competitively sensitive information about competitors' products that it could use to boost its own activities at the expense of third party sellers. This investigation is still ongoing and it is too early to conclude that it will end with a finding of an infringement, but it shows that issues surrounding access to and the use of data are likely to occupy us in the years to come.

The Commission also conducted a sector inquiry into e-commerce, in which we found that manufacturers widely use price monitoring software programs to monitor prices of their online retailers, and that these can be used to more easily limit the ability of online retailers to set their own resale prices, thereby restricting competition between them. Moreover, online retailers also often use pricing algorithms to automatically adjust the retail price to those of its competitors. Price restrictions imposed by the manufacturer on only a few (low pricing) online retailers could therefore have a broader impact on the overall online prices for the respective products. These and other suspicions were investigated and sanctioned in a series of prohibition decisions adopted during the last year against several EU and Asian companies, including Asus, Philips and Pioneer.

Merger control

Similar to the Hart-Scott-Rodino Act, the EU Merger Regulation empowers the Commission to examine mergers and acquisitions among firms meeting certain turnover-based jurisdictional

thresholds. The Commission can prohibit an acquisition if it finds that it will result in a "significant impediment of effective competition", or approve it with conditions if the firms are able to propose remedies that remove the identified competition concerns. In a nutshell, the goal of merger control in the EU, as well as in the US and elsewhere in the world, is to ensure that markets remain open and competitive. Digital and data issues have and will continue to occupy competition enforcers in the field of merger control, just as they have in the sphere of antitrust.

Since 2007, when we opened an in-depth investigation into Google's acquisition of DoubleClick, the Commission has notably dealt with a number of cases in which an important part of our analysis was whether the merged entity would be able to accumulate large amounts of data inaccessible to competitors, and thereby gain an insurmountable competitive advantage in a market where that data is an input. In this line of cases including, among others, *Google/DoubleClick*, *Microsoft / Yahoo! Search Business*, *Facebook/WhatsApp*, *Microsoft/LinkedIn*, *Verizon/Yahoo!*, *Bite/Tele2/Telia Lietuva/JV* and *Apple/Shazam*, we investigated these concerns in detail, taking into account the specific features of the markets at stake.

Through our investigations, we have learned that data is not a uniform and homogenous product and that our assessment of data-related issues has to take into account its multifaceted characteristics. For this purpose, the Commission has begun to develop methods to compare datasets using four relevant metrics: the variety of data composing the dataset; the speed at which the data are collected; the size of the data set; and the economic relevance of the data.

The Commission has applied this methodology, for example, in *Apple/Shazam*, where it analysed the potential impact on the market music streaming services in Europe resulting from the music data concentration brought about by the transaction. The Commission ultimately did not find competition concerns in this regard, insofar as Shazam's data was not deemed unique and Apple's competitors would still have the opportunity to access and use similar database after the transaction.

In *Apple/Shazam*, the Commission also analysed whether, through the acquisition of Shazam, Apple could gain access to competitively sensitive information about competitors' customers and use that data to target customers of competing music streaming services in order to make them switch to Apple Music. The concern was dismissed due to the negligible impact that such conduct would have had in the market, which was growing very rapidly.

Further, the Commission has also integrated, where appropriate, data protection as a quality parameter for the assessment of merger cases. In *Microsoft/LinkedIn*, the Commission investigated the extent to which consumers see data protection as a significant relevant factor, whether data protection constitutes a driver of competition between the merging parties and other companies and whether the merger could lead to a deterioration of data protection practices by the merging companies.

The Commission found that data protection was an important (non-price) parameter of competition between professional social networks in Europe, which could have been negatively affected by the transaction. In particular, the Commission found that, by pre-installing LinkedIn on its operating systems for PCs or integrating LinkedIn's functionality in its productivity software, post-transaction Microsoft could have marginalized existing professional social networks, which offer a greater degree of data protection to users than LinkedIn (or could have made the entry of any such competitor more difficult). As result, the transaction would have also restricted consumer choice in that regard. The transaction was cleared subject to commitments aimed at addressing such marginalization risks and preserve consumer choice, in particular in relation to different levels of data protection. These

commitments, in sum, ensured that those customers who value more privacy would not be harmed by the merger.

In parallel to its enforcement practice, the Commission launched a reflection process about whether its rules and processes allow it to sufficiently capture all potentially harmful effects coming from mergers in the digital sector. This notably concerns cases of acquisitions of small, innovative companies, often with limited turnover as yet, notably by large digital players, which may escape the turnover-based jurisdictional thresholds of the EU Merger Regulation. We are closely monitoring this issue.

Conclusions

I have already mentioned above the report written by the Special Advisers in the context of the broader reflection process, setting forth their views on where we should go from here. In concluding, I would like to share with you one of their clearest and, in my view, most important conclusions: that competition policy will continue to play a crucial role in promoting pro-consumer innovation in the digital age. At the same time, however, we must recognize the complementarity that exists between competition law and other legal regimes, such as consumer protection and privacy; and also between case-specific enforcement and possible ex-ante regulatory initiatives, which may be, appropriate to address clearly identified and systemic problems we might find.

The European Commission has also carried out specific research on how practices used by online platforms influence consumers¹, coordinated enforcement action of consumer protection authorities regarding social media (Facebook, Twitter, Google+) and platforms (Airbnb) and has taken important relevant regulatory initiatives such as the General Data Protection Regulation (GDPR²), a Regulation on platform-to-business trading practices (the P2B Regulation³) and new transparency requirements for online platforms vis-à-vis consumers (New Deal for Consumers). I will not further elaborate on these in this statement, except to say that these instruments already set high standards of protection for the respective consumer and business-sides of online platforms' multi-sided markets, while providing those 10 500 online platforms operating in the EU with a harmonised legal framework that is conducive to innovation.

The Special Advisers' report, like many of the other reports recently published in this field, highlight the unique features of the digital economy and propose some possible adaptations our existing regulatory and enforcement frameworks may need to make in order to meet these challenges. As just one example, the special advisers have pointed out that a platform can seriously affect competition, just by acting as the referee – by laying down the rules that govern the market. The way a search algorithm is designed can affect which businesses are noticed, and which are not. An online marketplace can decide which sellers to allow on the platform, and the terms of their contracts with buyers. When the platform chooses to act as both a player and a referee, it can grant itself an unfair advantage. And so their report suggests that those platforms could have a responsibility under competition law to make sure the rules that they set are transparent and do not harm competition.

Regardless of whatever mix of policies and measures we eventually choose to protect competition in digital markets, it is now clear that we must move forward on the basis that, due to the characteristics

¹ Behavioural study on advertising and marketing practices in social media, European Commission, 2018 and Behavioural study on the transparency in online platforms, European Commission, 2018

² Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119/1 (2016).

³ Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57 (2019).

of these markets, including notably their network effects that favour incumbents, the risk of under-enforcement is just as harmful to innovation and competition as is that of over-enforcement. Authorities must act based on solid evidence and sound legal and economic principles, but they must be able to take action before anti-competitive practices achieve their goal and harm becomes irreparable.

Thank you for the opportunity to share these thoughts with the subcommittee. Digital markets are international, so we will be all the more effective in our efforts where we can find common ground and common approaches across jurisdictions. Indeed, the Commission and the US competition enforcement agencies already have a long history of fruitful, open exchange and cooperation on the most important matters affecting both our jurisdictions. My current mandate as Commissioner for Competition is drawing to a close, but the Commission will continue to stand ready to exchange views and experience with this subcommittee, as well as with any other body interested in engaging with the issues I have discussed in this statement, as needed and as appropriate.