

EU Competition Law

Current Issues in a Global Context

Brussels - 18 May 2018

Session 1

Mergers

EU and US Developments

What is the position today?

- Effective signals that companies need to take “gun jumping” seriously
 - Altice (EU): € 125m fine
 - Altice (France): € 80m fine
- BUT little meaningful guidance about what the law requires
- Reasonable people can disagree (AG Wahl)

EUMR Art 7.1
Standstill obligation

“A concentration with a
Community dimension
.....shall not be
implemented either
before its notification or
until it has been declared
compatible with the
common market”



Discouraging M&A is not the intent (?)

- *“the literature concludes that the keys to a successful merger include planning and speed”*

PWC M&A Survey Report, 2014

- *“merging firms have a legitimate interest in engaging in certain forms of coordination that would not be expected except in a merger context. The most common forms are due diligence and transition planning ... These forms of premerger coordination will often be reasonable and even necessary to implement the legitimate objectives of the transaction”*

William Blumenthal, FTC public statement, 2005

Altice EU Fine (Press Release)

- “The standstill obligation prevents the potentially irreparable negative impact of transactions on the market, pending the outcome of the Commission's investigation”
- “certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business”
- “in certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.”

Altice Reaction

- “the transaction agreement governing the management of the target during the pre-closing period provided Altice with a consultation right on certain exceptional matters relating to PT Portugal, and was in accordance with well-established M&A market practice”
- “This decision would have serious consequences for European companies; it also sets a precedent, which will have an impact on all future M&A transactions in Europe and consequently on the EU economy.”

Danish Accountants (General Court)

- **Danish KFST:** “The referring court submitted three criteria, used by the Danish competition authority in the decision at issue in the main proceedings, with a view to clarifying what types of measure will be caught by the standstill obligation. Accordingly, the measure in question must (i) be merger-specific; (ii) be irreversible; and (iii) potentially create market effects.”
- **EU:** “it is not a prerequisite of a measure being held to constitute implementation of a concentration under Article 7(1) of that regulation that that measure forms, in whole or in part, in law or in fact, part of the process leading to the actual change of control. The Commission considers that a partial implementation of a merger may, inter alia, arise in respect of measures which (i) consist of preparatory steps in the course of a procedure leading to a change of control; or (ii) allow the party obtaining control to gain influence over the structure or market behaviour of the target undertaking; or (iii) otherwise pre-empt the effects of the merger or significantly affect the prevailing competitive situation.”
- **AG Wahl:** “*Merger-specificity* is a prerequisite for, not a criterion of application of the standstill obligation.” “whether the measure allegedly pre-implementing a concentration is *irreversible* does not strike me as relevant to the standstill obligation.” “Last, as regards the *potential to have market effects*, I consider that criterion, too, to be of no value in determining the scope of the standstill obligation.” Conclusion of AG Wahl: only an acquisition of decisive influence breaches Article 7(1)

Altice French Settlement

- Control over decisions: pre-closing covenants are potentially problematic, even when aimed at protecting value. SFR had sought Altice consent for investment decisions e.g. bid for high speed fibre contract and Canal + contract renewal. Outside scope of the commercial documents Altice intervened to cause SFR to adjust promotional offers and pursued an acquisition of Virgin Mobile in place of SFR.
- Commercial relations between target and acquirer: Altice and SFR changed the nature of their commercial relationship in light of the proposed merger, including an offer by Numericable of a “white label” broadband product to SFR
- Information exchanges: there should be no exchange of commercially sensitive information between companies pre-closing, even between employees with no operational role (so clean teams must include external advisers only).



Non-horizontal mergers

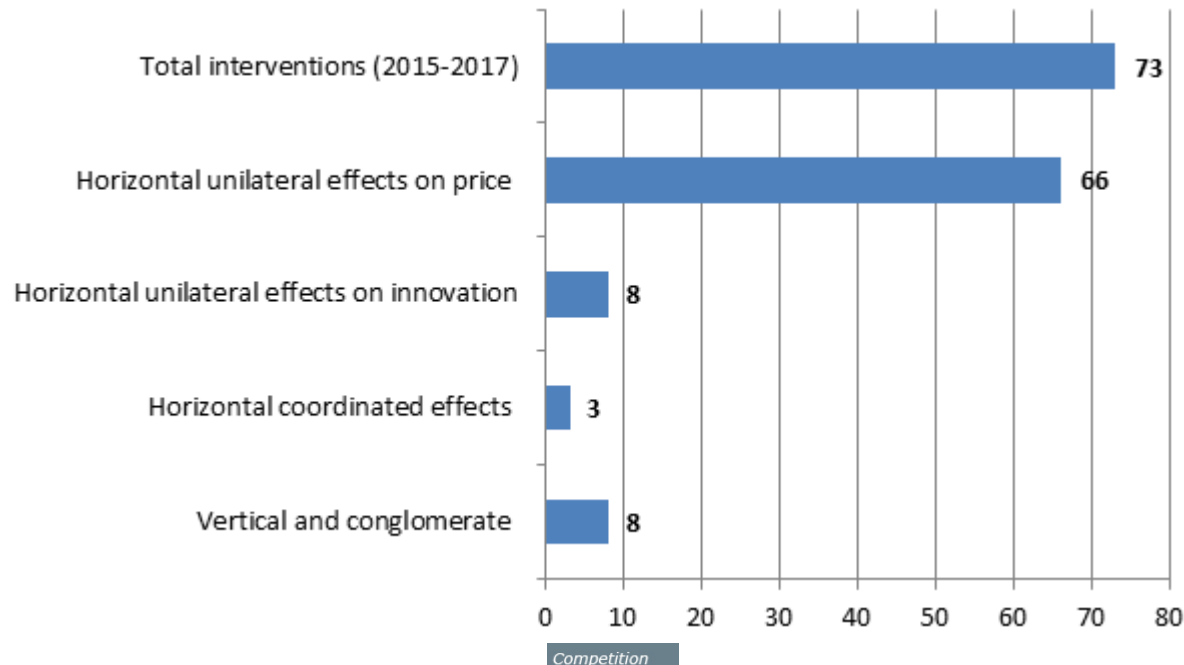
Michele PIERGIOVANNI

Head of Unit – Information, communication and media
DG Competition European Commission

Brussels, 18 May 2018

Enforcement trends (2015-2017)

- Focus on likely increases in prices due to horizontal non-coordinated effects
- But also effects on innovation, coordinated effects and non-horizontal mergers



Recent non-horizontal mergers (1)

- M.8788 -- Apple/Shazam – currently in phase II
 - Shazam as an important entry point
 - Access to Shazam data
- M.8394 -- Essilor/Luxottica (phase II clearance, no remedies)
 - Tying and/or bundling of lenses and eyewear
- M.8306 -- Qualcomm/NXP (phase II clearance, remedies)
 - Tying and/or bundling of baseband chipsets with NFC/SE products
 - Access to key technology
 - Interoperability

Recent non-horizontal mergers (2)

- M.8314 -- Broadcom/Brocade (phase I clearance, remedies)
 - Access to confidential information
 - Interoperability
- M.8124 -- Microsoft/LinkedIn (phase I clearance, remedies)
 - Tying (pre-installation)
 - Interoperability

US Developments: Trump and AT&T/Time Warner



Trump Antitrust Enforcement: 5 Key Takeaways From First 18 Months

1. Not As “Merger Friendly” As Expected

- First litigated challenge to vertical merger in nearly half a century
- Contested Merger Challenges: 9
- Abandoned Mergers: 5
- Merger Trials: 2

2. Significant DOJ Policy Shifts

- Increased skepticism toward behavioral remedies (including in vertical merger context)
- Companies may begin receiving fine/sentence reductions for having compliance programs in place when criminal antitrust offenses occurred
- Emphasis on protecting IP creators over IP implementers
- Less cooperation with state attorney general’s offices



Trump Antitrust Enforcement: 5 Key Takeaways From First 18 Months

3. FTC Commissioners Were Only Recently Appointed – Will They Follow DOJ’s Lead?

- Until earlier this month, FTC was operating with only 2 out of 5 commissioners for over a year
- FTC is now up to full strength but one Trump nominated commissioner cannot take post until current Republican commissioner agrees to step down
 - Former Acting FTC Chairwoman has refused to step down as a commissioner until President Trump fulfills promise to nominate her to federal judicial post
- Newly confirmed Chairman has expressed interest in:
 - greater enforcement in healthcare and pharmaceutical industries to ensure that anticompetitive conduct or mergers do not lead to high prices
 - protecting consumer privacy and enhancing data security

4. Significant Decline In Criminal Enforcement Statistics

- \$3.6 billion in fines (last year of Obama Administration) vs. \$67 million in fines (most recent year in Trump Administration)
- 66 individuals and 20 corporations charged (last year of Obama Administration) vs. 27 individuals and 8 corporations charged (most recent year of Trump Administration)



Trump Antitrust Enforcement: 5 Key Takeaways From First 18 Months

5. Dealing With Presidential Statements And Tweets About Mergers Is The New Normal
 - “Why doesn’t the Fake News Media state that the Trump Administration’s Anti-Trust Division has been, and is, opposed to the AT&T purchase of Time Warner in a currently ongoing Trial. Such a disgrace in reporting!” – *President Trump, May 11, 2018*
 - “The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast. The ‘Fakers’ at CNN, NBC, ABC & CBS have done so much dishonest reporting that they should only be allowed to get awards for fiction!” – *President Trump, April 3, 2018*
 - “I know that the president spoke with Rupert Murdoch earlier today, congratulated him on the [Disney/Fox] deal. [President Trump thinks] that, to use one of the president’s favorite words, this could be a great thing for jobs, and certainly looks forward to and hoping to see a lot more of those created.” – *White House Press Secretary Sarah Sanders, December 14, 2017*
 - “Masa (SoftBank) of Japan has agreed to invest \$50 billion in the U.S. toward businesses and 50,000 new jobs” – *President Elect Trump, December 6, 2016*



DOJ vs. AT&T/Time Warner: Pre-Trial Context

- Most Experts Expected A Negotiated Settlement Rather Than Contested Litigation
 - U.S. antitrust enforcers had not challenged a vertical merger in court in nearly half a century
 - Vertical mergers had come to be viewed as generally pro-competitive and fixable through behavioral remedies
 - Public reports indicated that the companies offered behavioral remedies similar to those the DOJ accepted in the Comcast/NBCUniversal merger (notably arbitration of content prices)
 - Public reports indicated that the DOJ and companies may have been close to reaching a settlement prior to the arrival of the current head of the DOJ's Antitrust Division (Assistant Attorney General Makan Delrahim)
- There Has Been Public Speculation That Politics Played A Role In The DOJ's Decision To Sue
 - "AT&T, the original and abusive 'Ma Bell' telephone monopoly, is now trying to buy Time Warner and thus the wildly anti-Trump CNN. Donald Trump would never approve such a deal because it concentrates too much power in the hands of the too and [sic] powerful few." – *Trump Campaign Statement, October 22, 2016 (two weeks prior to U.S. presidential election)*
 - "This is certainly an interesting deal. . . . [T]his is more of what we would call a vertical merger, a content with distribution [merger] rather than two competitors merging. . . . [J]ust the sheer size of it and the fact that it's media I think will get a lot of attention, however I don't see this as a major antitrust problem." – *AAG Delrahim, October 24, 2016 (prior to serving in Trump Administration)*
 - "Personally, I've always felt that [the AT&T/Time Warner deal is] not good for the country. I think your pricing is going to go up. I don't think it's a good deal for the country." – *President Trump, November 21, 2017 (day after DOJ challenged AT&T/Time Warner merger)*
 - "The president denied the [AT&T/Time Warner] merger. They didn't get the result they wanted." – *President Trump's Legal Counsel Rudy Giuliani, May 11, 2018 (one week after close of DOJ challenge to AT&T/Time Warner merger)*
 - Not a single state attorney general's office joined the DOJ's lawsuit

DOJ vs. AT&T/Time Warner Trial: 5 Key Takeaways

1. Challenges To Vertical Mergers Are A Completely Different Animal

- DOJ could not rely on market shares to establish presumption that deal is unlawful
- DOJ had limited legal precedent it could cite to support its case

2. The DOJ's Case Appears To Have Been Hurt By Key Evidentiary Rulings

- In a bench trial, judges typically admit into the record most evidence proffered by the parties
- In this case, the judge limited the DOJ from using documents created by DirecTV prior to its being acquired by AT&T

3. The Court Did Not Appear To Find The DOJ's Third-Party Evidence As Persuasive As Anticipated

- At first glance, the DOJ appeared to have developed strong third party evidence from competitors – both in terms of testimony and documents – during its investigation
- However, this third-party evidence did not appear to hold up well in court:
 - the third-party witnesses were unable to cite any reliable data or empirical analyses to support their contentions that the deal would cause them to pay higher prices and/or lose subscribers
 - the court appeared to question the reliability of subscriber surveys conducted by certain third-parties



DOJ vs. AT&T/Time Warner Trial: 5 Key Takeaways

4. The DOJ Placed Significant Weight On The Merging Parties' Documents And Public Statements

- The DOJ tried to use the merging companies' documents and public statements to show that:
 - Time Warner content is “must have”
 - rival pay TV distributors would lose significant subscribers and revenue without Time Warner’s “must have” content
 - Time Warner has significant leverage when negotiating with distributors
 - AT&T views online pay TV distributors and smaller channel packages as a threat to its “cash cow”



DOJ vs. AT&T/Time Warner Trial: 5 Key Takeaways

5. Battle Of The Titans: Former Chief DOJ Antitrust Economists Took Each Other Head On

- DOJ Expert: Carl Shapiro (President's Council of Economic Advisers 2011-12; DOJ Head Antitrust Economist 1995-96, 2009-11)
 - Credited a significant portion of the companies' merger efficiencies
 - Conclusion: subscribers would pay less than 0.5% more per month (\$436 million total per year)
 - Court's questions suggested it was skeptical of theoretical model – described complexity of the analysis as being “like a Rube Goldberg contraption”
- AT&T/TW Expert: Dennis Carlton (DOJ Head Antitrust Economist 2006-08; U.S. Antitrust Modernization Commission 2004-07)
 - Primarily focused on poking holes in Shapiro's analysis and conclusions
 - Conclusion: Shapiro and Nash bargaining model was not reflective of actual market conditions and trends
 - Conclusion: Even taking Shapiro's model at face value, using correct inputs eliminates alleged competitive harm (e.g., accounting for long term contracts)
 - Conclusion: merger efficiencies would erase any possible price increase and could actually result in lower prices; merging parties' proposed behavioral remedies eliminate any risk of competitive harm



Session 2

Unilateral Conduct Law and Economics post-*Intel*

Exclusionary pricing: Where next for the “as efficient competitor” test?

Bojana Ignjatovic

Brussels, 18 May 2018

- Presumption of foreclosure with respect to “fidelity rebates” but DomCo can rebut with **“supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects”**
- Before considering an objective justification, the Commission needs to conduct **“an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking”**
- Time to dust off the Art 102 guidelines?

- **Two separable purposes of the AEC framework**
 - Focus on **costs** and **contestable share**: could competitors compete with DomCo, given their costs and contestable share?
 - **AE** of the AEC: how efficient should those competitors be?
- An assessment of whether competitors can reasonably compete at the **contestable share** is the critical question in the context of loyalty rebates
- If not a cost based assessment, then what? A form-based approach generally fails to protect consumer interests as it can discourage pro-competitive practices
- Particularly important in the context where **foreclosure effect** does not need to be proven

- Much of the debate focuses on (is distracted by?) the question of whether it is necessary for the competitors to be **as efficient** as DomCo
- This is essentially a policy choice: economics does not provide an answer to the “correct” measure of costs
- **Pros of AEC:**
 - Competition on the merits
 - Easy for DomCo to self assess
 - Lower prices!
- **Reasonably efficient competitors?**
 - To take account of scale/entry costs
 - Some competition is (dynamically) better than none?
- Clarity needed as to what threshold **will be used**

- **What measure of cost?**
- **Time period for analysis?**
 - The relevant time horizon over which the test is carried can affect both the measure of costs and the captive base
- **How to deal with uncertainty of future demand? Ex ante versus ex post test?**
- **How to deal with multiple potential rivals?**
- **Role of product differentiation?**
- **Beyond the AEC: foreclosing (as efficient) competitors requires more analysis than simply a price-cost test**
 - Alternative routes to market to become a viable competitor?
 - What share of the market is covered by the scheme?
 - How great are scale economies denied to rivals?

Navigating the tightrope between exclusionary and excessive pricing





Intel and Beyond

Giulio Federico

The new case law

Sean-Paul Brankin, 18 May 2018

Google Shopping

- *Google Search Shopping, 27 June 2017 (AT.3974)*
- Abuse comprises
 - More favourable display of Google shopping results
 - Demotion of competitor shopping results


Google Shopping

“The conduct is abusive because it constitutes a practice falling **outside the scope of competition on the merits** as it:

- (i) diverts traffic in the sense that it decreases traffic ... to competing comparison shopping services and increases traffic ... to Google’s own comparison shopping service and
- (ii) is capable of having, or likely to have, anti-competitive effects”

(Google Shopping, para 341)






Google Shopping

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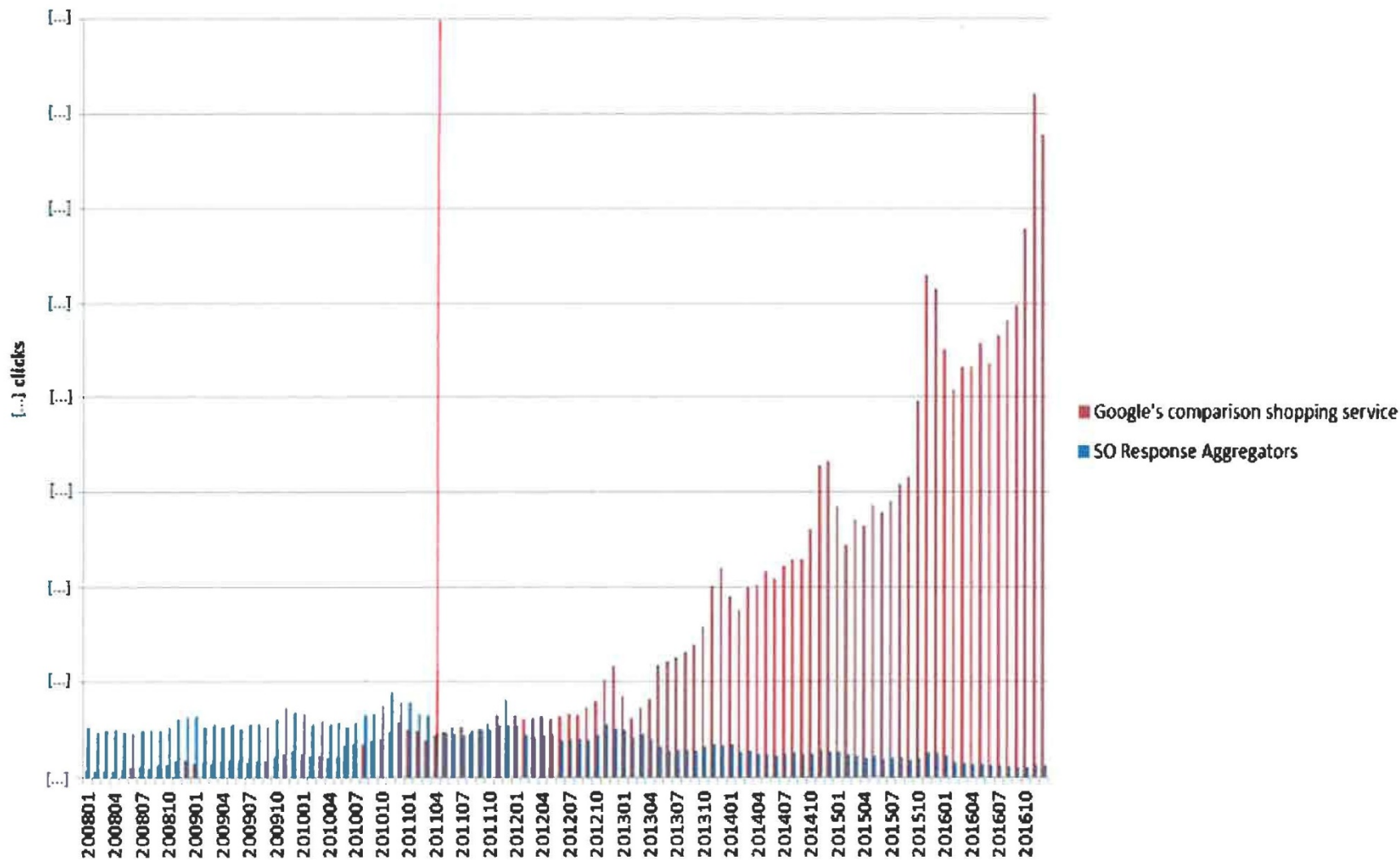
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Traffic in the United Kingdom from Google's general search results pages to SO Response Aggregators and to Google's own comparison shopping service during the period January 2008-December 2016



Qualcomm

- *Qualcomm (exclusivity payments)*, 24 Jan 2018 (AT.40220)
- Qualcomm made significant payments to Apple conditional on exclusivity
- Assessment of consumer and competitor harm based on:
 - extent of Qualcomm’s dominance
 - the significant amounts paid
 - importance of Apple as a customer
 - failure of Qualcomm to demonstrate any efficiencies
 - rejection of Qualcomm’s AEC test

Intel

- Loyalty provisions are presumed abusive
- Evidence that behaviour “not capable of restricting competition” returns the burden to the EC
- EC must then consider
 - extent of dominance
 - share of market covered
 - conditions, amount and duration of rebate
 - existence of a strategy to exclude
- Potential efficiencies have to be counterbalanced “in addition”
- In *Intel*, an AEC test “played an important role” so had to be examined on appeal

MEO

- *MEO*, 19 April 2018 (*Case C-525/16*)
- There is no de minimis threshold for abuse (para 29)
- But, where tariff differentiation does not have a significant effect on costs or profitability it may not be capable of having any effect on competition (para 34)
- A finding that behaviour is capable of distorting competition does not require proof of actual deterioration but must be based on an assessment of all the relevant circumstances (para 37)

Session 3

Antitrust in Grey Areas Price Signaling, after-markets and digital collusion

Hogan
Lovells

Price signalling

Matthew Levitt

Brussels 18 May 2018



Overview

- What is price signalling?
- In what circumstances, if any, is price signalling an Article 101 infringement?
- What, if anything, can this tell us about the application of Article 101 to AI and algorithmic collusion?

What is price signalling?

- Horizontal Guidelines

"Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination" (paragraph 63)

- OECD roundtable *"Unilateral Disclosure of Information with Anticompetitive Effects"* (2012)

"Overall, there was broad agreement that genuinely public disclosure of information should generally be viewed as legal. It was therefore suggested that the creation of a safe harbour for certain public announcements of future price intentions would be viable, provided they have commitment value. ...

"While private communications can always be construed as invitations to collude, public announcements can also be construed as invitations to collude depending on how the communication is formulated.

This would generally be the case of announcements which: (i) contain not only information which must, as a matter of commercial policy, be conveyed to customers but also information which is not intended for that audience, for example including references to specific competitors; (ii) disclose more information than is strictly necessary for the purpose of the announcement; (iii) make the behaviour announced contingent on what other market players or the industry at large will do; and (iv) include threats (e.g. a price war) in case other market players do not accept the invitation to collude" (Secretariat Executive Summary, page 13)

The EU case law

- Dyestuffs (1972)
 - public announcements of individualised data regarding intended future prices were considered as a concerted practice
 - preceded by period of explicit collusion
- Wood pulp (1993)
 - "it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct" (paragraph 71)
 - Announced price regarded as a ceiling price (paragraph 77)
 - Not public announcements, though high degree of transparency (paragraph 87)
- Container shipping (2016)

Container shipping

- Alleged facts
 - 15 carriers announced future GRIs (General Rate Increases) – i.e. the quantum of future price increases
 - Press releases on websites and in specialised press
 - 3-5 weeks before implementation date
- *"[T]he Commission raised provisional concerns that GRI announcements may be of limited value for customers and may be of value for coordinating pricing behaviour among the Parties. In the Preliminary Assessment the Commission raised the concern that the practice subject to the proceedings may have had the objective of communicating pricing intentions to competitors rather than informing customers about price developments"* (Commission decision AT 39850 of 31.8.2016, paragraph 52)
- Article 9 commitments
 - No future communication of GRIs
 - Maximum price announcements possible
 - Announced at least one month in advance

National case-law

- Russia container shipping case
- Irish motor insurance
- Spanish hotels – infringement finding annulled
- UK cement – commitments closing market investigation
- German cement – investigation closed
- Italian motor insurance investigation closed
- Dutch mobile phones - commitments
- US invitation to collude cases

What does this teach us about the application of Art. 101 to AI?

- Content and timing
 - How and when is the information more relevant to customers than to competitors?
- Commitment value
 - What is the role of commitment and is it reconcilable with a competitive bargaining process?
- Application to price comparison tools and market intelligence agencies
- Distancing and presumption of acceptance
 - Cf ETURAS
 - Cf OECD
 - Intelligent adaptation and price monitoring



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Digital Dilemmas: What to believe about marketplace bans

Kevin Coates
18 May 2018

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Christoph Leibenath

Session 4

National Enforcement

Procedural harmonization: ECN+,
Brexit, etc.

Cooperation and ECN+

Prof. em. Dr. Jacques Steenbergen
President

King's College conference
Brussels, 18 May 2018

Independence, tools and resources

- Independence: now legal requirement
 - Impartiality, no conflicts of interests,
 - No instructions, no unjustified dismissals,
 - Right to set priorities.
- Procedures and due process: reference to Charter on fundamental rights.
- Resources: what is required for effective enforcement.
- Tools:
 - dawn raids also in residences, RFIs, cease & desist orders, provisional measures, commitments.

Sanctions, leniency and cooperation

- Fines to be calculated with a cap of no less than 10% of the world wide turnover of the group of companies.
- Penalty payments.
- Detailed provisions on leniency to companies and natural persons (where relevant).
- Assistance to other NCAs:
 - dawn raids, notification of SOs at the request of the requiring authority, enforcement of sanctions.
- Convergence of statutes of limitation.
- Confidentiality, use of information received in cooperation: protection of documents related to on-going cases and leniency documents.

Cooperation between NCAs in the ECN

- Some figures for the BCA:

	2017	2016	2015	2014
Dawn raids for NCAs	2	2	/	2
Questions from NCAs	27	31	31	46
Discussions in plenaries, advisory committees and workgroups	48	46	47	51

Plus bilateral contacts, informal calls, etc.: no figures available.

- Key factors of success:
 - Team spirit goes beyond a mere will to cooperate,
 - E.g. ICT forensic efforts for convergence,
 - Case related cooperation will mostly be within clusters of neighbours.

What brings ECN+

- In respect of multi-jurisdictional cases:
 - Detailed provisions on leniency to companies and natural persons (where relevant): more legal certainty and fewer incentives for forum shopping,
 - Convergence of statutes of limitation: less risk of underenforcement,
 - Calculation of fines: less risk of underenforcement but increased risk of over enforcement.
- On mutual cooperation in each other's cases:
 - Further convergence on the rules of confidentiality and the use of information received in cooperation,
 - More symmetry of tools, e.g. in respect of dawn raids, notification of SOs,
 - Convergence on parent liability
 - Mutual assistance on enforcement of sanctions.

More information:

The ECN Brief (Newsletter):

<https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial>

The ECN website:

http://ec.europa.eu/competition/ecn/index_en.html



The Challenge of Diverging National Competition Enforcement

an in-house perspective

The future of collaboration

Simon Constantine

Director, Policy and International

Competition and Markets Authority

18 May 2018

King's College Conference, Brussels

The future starts here: *CMA international engagement today*



- Existing mechanisms: EU and beyond
 - UK \leftrightarrow EU: Regulation 1/2003
 - UK \leftrightarrow ROW: informal arrangements
- Case cooperation and investigative assistance, e.g.
 - Notification and coordination of investigative measures
 - Obtaining evidence to assist overseas enforcers
 - Enforcement of investigative measures and remedies.
- Information sharing
 - Confidential and non-confidential
 - Disclosure under UK law – Part 9 EA02
- Policy development: a ‘multi-polar’ approach

COMPETITION

CONSUMER PROTECTION

**European
Competition
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**OECD
Competition and
Consumer Protection
Committees**

**EU Consumer
Protection
Cooperation**

**International
Competition
Network**

**Bilateral
Engagement**

ICPEN



The future is yet to come: *Brexit and beyond*

- ‘Known unknowns’: final form / timing subject to agreement
- The mutual benefits of continued effective cooperation
 - Substance over form...?
 - “Must haves” and “Nice to haves”?
- Deepening global links: “Second generation” cooperation

The future is not (just) about Brexit: *Cooperation in a digital age*

- Industry 4.0: speed, scale and scope of change
- International challenges, international solutions?
- Interconnected policymaking and regulation



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