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FOR ANTITRUST LAWYERS

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PROGRAM

9:00 WELCOME & BREAKFAST

9:15 OPENING DISCUSSION

Jonathan SCOTT | Non-Executive Director and Chair, UK Competition and Markets Authority, London

Richard WHISH | Emeritus Professor, King's College London

09:45 ## #1: MARKET DEFINITION IN INNOVATION MARKETS: TIME TO RETHINK?

Gönenç GÜRKAYNAK | Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Birthe PANHANS | Head of Unit in Mergers: Transport, Post, and other services, DG COMP, Brussels

Soledad PEREIRAS | Vice President, Compass Lexecon, Madrid

Paul REEVE | Principal, RBB Economics

Mike WALKER | Chief Economic Adviser, UK Competition and Markets Authority, London

Moderator: **Richard WHISH** | Emeritus Professor, King's College London

11:15 COFFEE BREAK

11:30 ## #2: MODELS OF COMPETITION AND MARKET POWER

Antonio BUTTÀ | Chief Economist, Italian Competition Authority

Miguel DE LA MANO | Executive Vice President, Compass Lexecon, Brussels

Oliver LATHAM | Vice President, CRA, London

Pierre RÉGIBEAU | Chief Economist, DG COMP, Brussels

Moderator: **Andriani KALINTIRI** | Lecturer in Competition Law, King's College London

13:00 LUNCH

14:30 ## #3: ESSENTIAL FACILITIES: BACK THROUGH THE WINDOW?

Luisa AFFUSO | Chief Economist, OFCOM, London

Justin COOMBS | Executive Vice President, Compass Lexecon, London

Doug MELAMED | Professor of the Practice of Law, Stanford Law School

Moderator: **Ingrid VANDENBORRE** | Partner, Skadden, Brussels

16:00 COFFEE BREAK

16:30 ## #4: DMA ENACTMENT: TOWARDS BIG TECH REGULATION, AT LAST?

Christophe CARUGATI | Affiliate Fellow, Bruegel, Brussels

Pat TREACY | Senior Counsel, Bristows, London

Moderator: **Renato NAZZINI** | Professor, King's College London

18:15 RECEPTION

OPENING DISCUSSION

JONATHAN SCOTT

RICHARD WHISH

Emeritus Professor
King's College London
London

Richard Whish moderated the discussion. The first topic for discussion is the current state of the debate on the economics of innovation. The second part of the discussion concerns the current thinking of the CMA concerning the market definition and market power. The third point concerns the merger control, especially killer acquisitions, otherwise known as nascent competition, to avoid the pejorative character. Finally, cooperation at the national and international levels can also be discussed.

JONATHAN SCOTT

Non-Executive Director and Chair
UK Competition and Markets Authority
London

Jonathan Scott highlighted two important points about competition law; the first is that competition drives innovation and the second is the challenge for competition authorities of how to respond to the speed of change in markets. According to him, the question is the following: Is the competition we are looking for competition between the big five platforms, or is it innovation in the way these platforms make services available to us? Recent works on digital advertising have established that some of the larger platforms are stifling competition. Generally, in all markets, if large players control gateways and access, this can lead to them shaping the evolution of these markets, which Jonathan believes can have an inhibiting effect on innovation. In addition, the effects of incumbency have an impact on how new entrants to the market may behave. It should be noted that platforms have different models, so how competition takes place may vary from one platform to another. In this context, in the context of the proposal for the Digital Markets Unit (DMU), it mustn't be a "one size fits all" regulator. It should focus on the behaviour of individual platforms because, as mentioned, they all have different business models. It is therefore important that the regulation emphasises this point.

Concerning market definition and market power, the revised Merger Assessment Guidelines published last year indicate that in most cases the most relevant evidence relates to the constraints faced by the merging firms rather than a more formal market definition. While the CMA needs to identify the markets where any SLC exists, this may not be the focus of the CMA's cases.

On merger control, Jonathan noted that studies show there has been under-enforcement in digital markets and suggest that past transactions such as Facebook/Instagram and Google/DoubleClick were instrumental in allowing SMS firms to entrench their powerful positions. It is difficult, however, to assess in retrospect whether the decisions in those reviews were correct considering the operation of the markets and the available evidence at the time those transactions took place.

Government has proposed certain amendments to the merger regime. The new jurisdictional test will ensure that the CMA has jurisdiction to review killer acquisitions and potentially problematic vertical or conglomerate mergers. In addition, the new test will simplify jurisdictional assessments: under the current test the CMA sometimes spends a lot of time assessing jurisdiction when what matters is the substance.

* Marie de Monjour drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

Another challenge that will be addressed by the proposed digital amendments is that very small digital businesses that are acquired may have potentially valuable intellectual property that could pose a future competitive threat to large incumbent businesses. These small transactions often go unnoticed because acquisitions of relatively small, often private, companies by very large companies are often not made public. Once such transactions do come to the CMA's attention, a real challenge for the regulator is that these companies are probably often very dependent on a small amount of technology and again a small core of people who have developed it, and these assets are likely to have been integrated into the acquirer's business shortly after completing the transaction.

The reason why the Digital Markets Unit is being sent to Manchester is that it is a city with a very strong technology sector. So, in their view it is an attractive location as the Information Commissioner's Office (ICO) is already based near Manchester and Ofcom is also going to take up premises there. These regulators are trying to balance some of the competing objectives they may have and reconcile them. This is a major shift in the innovation and technology space which he hopes will be seen positively by the technology community. So, as part of this goal of cooperation, the Digital Regulation Cooperation Forum (DRCF) is an important step for the leaders of the CMA, Ofcom, the Financial Conduct Authority (FCA), the ICO, and other bodies. In particular, it allows much stronger multi-disciplinary teams to be built and resources to be shared. In addition, for the first time, the CMA has recruited people from the technology community rather than from competition law. ■

PANEL 1

MARKET DEFINITION IN INNOVATION MARKETS: TIME TO RETHINK?

RICHARD WHISH

Emeritus Professor
King's College London
London

Richard Whish moderated the discussion.

BIRTHE PANHANS

Head of Unit in Mergers: Transport, Post, and other services
DG COMP
Brussels

Birthe Panhans highlighted several topical issues and challenges, not least because innovation involves many different aspects. For example, industries are driven by a lot of investment in research and development, markets are developing rapidly, etc. At present, the Market Definition Notice is undergoing a review process. This is being done in two phases. In the first phase, the Commission has carried out a retrospective assessment of the performance of the text, and the shortcomings that we can identify. In a second step, the Commission revises the substance of the communication and tries to draft a new text. Through this work, it seeks to achieve three different objectives. The first is to be able to cope with all the market realities in today's world. The second is to ensure a consistent application of market definition principles through mergers and antitrust. The last is for the Commission to ensure that its work is transparent and accessible and helps businesses to anticipate the Commission's actions. As a result of these initial reflections, a staff working document has been published that highlights areas for improvement and those that work. This document shows that certain fundamental principles of market definition have not changed. Indeed, the objective of market definition is still to systematically identify all the competitive constraints that companies face. In addition, it also allows market shares to be calculated and the competitive strength of different companies to be compared within this framework. These principles will surely be better reflected in the future Notice. The more substantive findings of the staff working document, therefore, allow the identification of those parts of the Communication that worked well. For some issues, there is a need to reflect the evolution of the market definition. One of these would be the role of market definition in highly differentiated markets. The next issue concerns valuations of non-price innovation, and in particular whether innovation should be valued within an existing product market or whether there should be a new market definition. The small but significant non-transitory price increase (SSNIP) test is always an interesting topic. In her view, the Communication is currently quick to accept the concept as such, while recognising its limitations and the need to adapt it to the specific circumstances of the markets. Finally, another very topical issue is the rapid evolution of markets and digital issues.

At present, the Commission plans to publish the document during the summer.

MIKE WALKER

Chief Economic Adviser
UK Competition and Markets Authority
London

Mike Walker underlined that the purpose of the market definition has, in his view, not changed since 1996. It is a question of market power. It should be noted, however, that while this definition is useful when we have homogeneous product markets, it is much less useful when we have differentiated product markets and of course innovation involves differentiation. It is therefore necessary before talking about innovation to focus on market power and to understand when the market definition can tell us something useful about market power. He pointed out, however, that whilst market definition is only a tool, it is not always a useful tool. Sometimes it is just not a useful step because it gets in the way of assessing competition.

The economics of innovation can make the market definition more difficult, but not less useful. Market definition is about identifying competitive constraints, and these competitive constraints may well be innovation constraints, not just price constraints. Thus, the constraints a firm face may well come from other firms that innovate rather than from other firms that set low

prices. The SSNIP test is not anchored on price. Indeed, it is still a useful conceptual tool for thinking about competitive constraints, but it is not necessarily about price.

In conclusion, it is important to always think about the market definition and whether it is useful, but he does not consider that it is time to rethink the market definition. The outcome of a case should never be about market definition.

Ecosystems are an example of the importance of focusing on market power. If we think about competition between ecosystems, there are at least two very different issues. First, there is the issue of platforms creating ecosystems to protect their main monopoly. Then there is competition between ecosystems, so there are many duopolies and triopolies in several areas. So, to say that there is a definition of the relevant market that helps us to focus on these two issues seems wrong in his view. One should focus on market power first and then ask what the answers, consequences, and solutions are.

PAUL REEVE

Principal
RBB Economics
London

Paul Reeve highlighted the differences between the international regimes and the need for consistency between them. This can be illustrated by the Sabre/Farelogix decision and the way it was concluded in the UK and US. Firstly, the judge in the UK considered that even if the companies do not provide the same service because one is a two-sided product and the other a one-sided product, it is still possible for one to exercise a strong constraint on the other. It is, therefore, possible to consider that these two companies are in the same market. For the same facts, the judge in the US considered that these two companies could not be in the same market. Thus, according to the US judge, the DoJ's attempt to block this merger fails at the market definition hurdle. In the world of innovation, every product we talk about where innovation is important is probably international to some extent, so there is a need to be consistent about what the solution is in these areas. In his view, there is a certain risk that competition authorities around the world are almost in a race on this issue. They are competing with each other to be thought leaders and are taking different routes. Recently we saw a number of international mergers that are each being blocked by just one competition authority, perhaps partly because approaches to market definition are not aligned. He hopes that following this transition phase the authorities will eventually arrive at the same destination.

The second point on coherence concerns mergers and markets. On the one hand, the definition of a market must be understood on a case-by-case basis, there is no single definition of a market that applies to a particular product. On the other hand, Paul considers that there is a small difference in the way things are

looked at at the moment in the sphere of mergers and in the sphere of the behaviour of the supposedly dominant companies.

In conclusion, if the purpose of market definition in this context is to ensure that we identify all the potential competitive constraints in the market and that we cast a sufficiently wide net, this seems to mean that even when we are looking at the market definition in the context of dominance it is necessary to cast a very wide net and to think not only about the individual constraints of individual competitors but also about all potential competitors and the cumulative constraint that they may represent.

SOLEDAD PEREIRAS

Vice President
Compass Lexecon
Madrid

Soledad Pereiras focused on market definition in digital markets. According to her, the market definition can still be a valid exercise. Indeed, it is difficult to think of a case where market shares are not calculated and to calculate market shares, a market must be defined. However, we should begin to recognise the limitations of market definition in the context of innovation and the context of digital markets.

In digital markets, we typically observe a company that is acting as a platform and sells different products to different groups of customers. In this context, the first question is the number of markets that will need to be defined. In general, the authorities have defined different markets on either side of the platform. However, considering separate markets does not provide a full view of how the markets work. Indeed, when an assessment of competition is made it is necessary to consider that the two sides of the market are closely linked. Platforms in this type of markets face different competition in each side of the market and, in fact, they may face competition from companies that are only in one side of the market. However, there is a strong interdependence between the demand in both sides of the market because the platform needs both sides on board and, therefore, competes for customers in both sides. Companies make pricing decisions considering both sides of the market, not just one side, so the competitive constrains that a platform faces in its pricing strategies can only be assessed considering both sides of the market.

The second challenge to market definition is how these markets will be defined. The most rigorous conceptual tool that we have is the SSNIP test, where we identify the smallest set of substitute products on which a monopolist would find it profitable to increase prices by a small but significant amount. But in this market, it may be perfectly normal for a platform to subsidize one side of the market when the presence of consumers in this side is important in the other. The application of the SSNIP test must therefore be reformulated and used as a conceptual guide for example, adapting it to assess to what extent a hypothetical monopolist can profitable impose a “small but significant non-transitory decrease in quality”. The application of this test is even more complicated in multi-sided markets as platforms always re-optimise the price structure across the platform.

The third challenge concerns how market shares will be calculated. Again, it is necessary to consider whether these market shares will be calculated on one side of the market or the whole platform. One should also carefully select what unit will be used to calculate these shares. Revenue from sales may no longer be relevant for the assessment of market power (ultimate purpose of market definition) and there may be additional complications because the monetization model may be different across platforms. Some alternatives measures may be number of users, number of views, number of downloads, number of subscribers or the time a person has spent on the platform.

What do we do in practice to define markets? The starting point for market definition is generally based on qualitative evidence and in many cases this will lead to an uncontroversial market definition. Quantitative evidence can also provide useful insights for market definition. An analysis that she will expect to gain more relevance in this respect will be natural experiments where one analyses the reaction to unexpected events (supply shortages, advertising campaigns, market entry…) although this has not yet been used in the context of market definition in digital markets. Consumer surveys will also be increasingly used to infer consumer preferences.

GÖNENÇ GÜRKAYNAK

Partner
ELIG Gürkaynak Attorneys-at-Law
Istanbul

Gönenç Gürkaynak pointed out that it was important to consider the interactions throughout the whole ecosystem and address the macro issue in the context of market definition, as an antitrust intervention would impact not only a particular level but rather the whole ecosystem. Therefore, defining market definition as a tool for understanding competitive constraints is correct but incomplete.

The main question that emerges with debates as to whether market definition is still relevant and necessary in a digital context is that whether we are moving too far away from legal certainty. In his view, since market delineation has proven to be critical in delivering legal certainty to undertakings so far, it should not be abandoned so easily and if it is, it must be replaced by tests, thresholds and principles that govern market participants' understanding of their market position.

The market definition can help to monitor large technology companies, and this is the purpose of the SSNIP test. Although Gönenç would not use it in a digital market, he considers it useful as an intuition, knowing that it should not only be based on price but should also be cross-tested with a small but significant and non-transitory decrease in quality or in costs. Thus, in his view, even if the market definition might not take the lead in the analysis, it should not be eliminated without being replaced by another alternative.

He, therefore, considers that market definition allows us to give a context, to observe the effects in a relevant market, and in a rarer way market definition also allows us to have an idea of the consequences of an isolated enforcement measure. If we can encapsulate the whole ecosystem, if we can understand what the ecosystem is and define the market properly, then we have an idea of what this type of enforcement will entail shortly. So, it is not easy for competition agencies, lawyers, and economists to feel satisfied with the idea that their enforcement measures will certainly lead to the results they want. Thus, market definition from this perspective is particularly important.

It is therefore necessary to ensure that the emergence of new concepts remains under the control of legal certainty. ■

PANEL 2

MODELS OF COMPETITION AND MARKET POWER

ANDRIANI KALINTIRI

Lecturer in Competition Law
King's College London

Andriani Kalintiri moderated the discussion. The discussion will be focused on innovation from the perspective of models for competition and market power.

ANTONIO BUTTÀ

Chief Economist
Italian Competition Authority
Rome

Antonio Buttà pointed out that, even though innovation issues are often discussed in the context of digital markets, they actually arise in a variety of markets and competition law investigations. For instance, the Italian Competition Authority has recently faced the need to address dynamic market environments both in merger analysis and in the assessment of co-investment projects in ultra-broadband networks. In these circumstances, competition authorities need to have a forward-looking view of what the market will be like and of what the incentives to invest are. And the incentives to innovate can very well vary across different markets according to the nature of dynamic competition. Economists are therefore required to contribute with a good understanding of what the innovation process looks like in order to make sure that we can apply sound economic analysis to such cases.

Competition authorities also confront themselves with the innovation that is taking place in the digital field. Indeed, the digitalisation of the economy is raising various issues. On the one hand, there is the question of intervening to make sure that society can benefit from the innovation brought about by digital platforms; indeed, in some cases, the Italian Competition Authority has intervened to remove the obstacles that could hinder entry by new digital platforms. On the other hand, there is the need to intervene against digital platforms

that limit competition. In particular, innovation issues have been at the heart of the recent Google/EnelX antitrust case of the Italian Competition Authority. This case looks at the development of a "new" ecosystem, and concerns Google's refusal to allow Enel to provide access to the Android Auto ecosystem so that Enel can offer an innovative application to search for and reserve electric charging stations, a functionality not offered by Google's apps. Google justified its refusal because this is a publishing policy and they do not have the resources to do so. However, while Google was denying access to Enel, it was integrating data about electric charging stations into Google Maps and it was envisaged to possibly offer booking functionalities via Google Maps in the future. This behavior was found to amount to an abuse of dominant position and Google was fined. This case provides an example of how ecosystems are central also in orchestrating innovation: the design of the ecosystem crucially affects "static" competition within that ecosystem, but also the ability and the incentives of all parties to innovate.

Because of the relevance of the decision, he also briefly mentioned the recent Amazon "Fulfillment by Amazon" (FBA) case by the ICA, which is a classic case of self-preferencing, in that Amazon favoured its own logistics service over competing services, rather than a better service over another service. It did so by granting substantial benefits to third-party sellers who used its own logistics services. Here, the Italian Competition Authority considered that this constituted an abuse of dominance, leading to the imposition of a very substantial fine on Amazon and several very detailed behavioural remedies to overcome this discrimination.

OLIVER LATHAM

Vice President
CRA
London

Oliver Latham pointed out a difference between the qualification of the Google Shopping case and the Amazon case mentioned by Antonio Buttà. First of all, the Google case had a narrative of maintaining a monopoly. Whereas in the Amazon case, he never really understood what the incentive story is and why it is more compelling than a more benign explanation of what was going on. One reason for this is the length of the decision. For example, a reader could walk away not knowing that deliveries made by Fulfillment by Amazon are both faster and more likely to arrive on time than deliveries made by a third-party logistics operator. Thus, he says it is important to build cases around incentives and to ensure that we are rigorous about why conduct is better explained by anti-competitive incentives than by more benign ones.

There are thus several challenges to measuring market power in innovative industries. In particular, two issues can be discussed, the power of gatekeepers and the question of measuring market power in dynamic contexts. First, concerning gatekeeper power, many of these theories of harm are based on the idea that a platform reduces third-party access to consumers, whether through self-referencing, reduced interoperability, or otherwise, in a way that harms overall innovation. The logic that you can have market power on one side of a platform but not on the other has been quite powerful for many antitrust cases, but we have to be a bit careful when applying it for three reasons. The first is that we have to think carefully about whether the economic conditions for a competitive bottleneck are present in a particular case. The second is that he believes that we should be calmer about competitive bottlenecks. The third is that when we think about these power effects in the platform market, we should not lose sight of the effects in the bilateral market. Potentially, some of these may be more subtle than those around market abandonment.

The measurement of market power in more dynamic contexts is relevant in mergers where one wants to think about the position of the ball in three years, not the current position. As an economist, it is important first of all to put less emphasis on current performance and market share and to think more about how to measure the assets that different companies have to compete and how to take into account the incentives for those companies to develop those assets in the future.

According to him, one of the areas where we need to improve our ability to anticipate and determine developments is in the area of data and network effects.

PIERRE RÉGIBEAU

Chief Economist
DG COMP
Brussels

Pierre Régibeau highlighted two reasons for the current concerns about market power. First, there has been an increase in concentration and margins that would reflect an increase in market power. The second reason is that market power may be working a little differently in some digital industries. However, this work raises empirical irregularities, not least because we are not yet entirely sure that these irregularities are correct, and we have very little idea what is driving all the irregularities that exist. So, there are still many uncertainties here, and for this reason, it would be premature to think about changing the paradigm. Moreover, even if the irregularities were established, a paradigm shift would not be necessary. All the necessary competition models exist so that economists can understand what is going on if we have access to the right data.

As far as the sources of innovation related to market power are concerned, they are not very different from the traditional effect on prices in a merger. The mechanisms involved are pretty much the same, so at the product market level, there is not much change. At the technology market level, the source of market power is of course patents and other property rights. At the level of innovation markets, it is important to understand that another source of market power and innovation is the control of the input, the ability to carry out the innovation. The second type of vertical aspect is found in the Nvidia/Arm case in particular, and is consistent with the idea that it is not just a question of no longer serving others, but that it is a question of self-preferencing in the sense that Arm may have had an incentive to develop a

scarce resource to innovate in the type of market where Nvidia was present and, as a result, would have had fewer resources to innovate in markets where Nvidia is not present.

MIGUEL DE LA MANO

Executive Vice President
Compass Lexecon

Miguel de la Mano focused his presentation on mergers and in particular on the new theories of harm. The big digital platforms are very active in mergers and acquisitions. They have acquired companies that have been in existence for four years or less. In this context, many people consider that the current merger enforcement framework is no longer adequate as it would lead to highly concentrated digital markets where companies are often competing for the market itself. The objective today is to be able to protect potential competitors to ensure the contestability of the market. According to him, two options are possible. The first would be to do nothing and for markets to eventually self-correct.

The second would be to re-examine and re-evaluate the existing enforcement tools, but also to re-evaluate the business models and economic reasoning on which the Merger Guidelines are based. Moreover, in recent years new or updated theories of harm have emerged (killer acquisitions, reverse killer acquisitions, and anti-competitive foreclosure through data aggregation). They also require a new set of merger control guidelines that cover these concerns but also explain the mechanism by which harm materialises and the facts and circumstances in which these theories apply.

Finally, the third option would be to shift the burden of proof to the merging parties, to introduce a presumption of illegality when it comes to digital mergers. This would imply a radical change in the way merger law enforcement is carried out today. In practice, it could lead to blocking acquisitions by large digital platforms unless the parties can prove large efficiencies. However, the immediate problem with this option is that the framework for assessing efficiencies makes it virtually impossible for merging parties to meet this burden. Thus, the first challenge is the counterfactual bias against efficiencies. It is often argued that digital platforms could develop any given innovation in-house rather than acquire a company that already produces the innovation. This means not only that any pro-competitive effects are not merger specific, but also, implicitly, that digital mergers can only be motivated by the desire to reduce competition. However, this is not correct because there is a limit to what large digital platforms can do. They have access to significant funds, of course, but they do not have unlimited or free access to other essential resources. Moreover, digital platforms also have to deal with a certain degree of uncertainty.

Two other benefits can also be highlighted. Firstly, the pooling of platforms allows ecosystems to be extended in a way that would not otherwise be possible except through a merger. In addition, the incentives to develop ecosystems also differ because of the risk of retention effects.

In conclusion, we are now in a situation where mergers are just another tool that digital platforms use to improve their value proposition. These benefits have been too little considered until now. Thus, the process should involve weighing up the static and dynamic effects on a case-by-case basis. ■

PANEL 3

ESSENTIAL FACILITIES: BACK THROUGH THE WINDOW?

INGRID VANDENBORRE

Partner
Skadden
Brussels

Ingrid Vandenborre moderated the discussion. At the EU level, the ruling of the General Court in *Google Shopping* has certainly led to a re-evaluation of what essential facilities standards look like in a technology market and when dealing with self-preferencing [?] claims. This judgment might be viewed as expanding on existing case law on refusal to deal and margin squeeze abuses. In *Google Shopping* judgment, the Court found that Google's general results page has characteristics akin to those of an essential facility in as much as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market. However, the Court ruled that not every issue relating to access to such a facility has to be assessed in light of the conditions applicable to essential facilities and refusal to supply set out in the *Oscar Bronner* ruling, in particular the requirement of indispensability need not be applied. The Court found that there was no real potential substitute available, as required in the jurisprudence, that would allow someone to be a viable competitor in the marketplace without or with limited inclusion in Google's search term results. In addition, the Court looked at the nature of Google's service and stated that the very essence of Google's search business is that it is an open infrastructure available to others. In this respect, the circumstances differed from simply a unilateral refusal to deal or supply. The Court explained that Google is not concerned only with a unilateral refusal to supply, but rather with a discriminatory conduct in demoting rival search results. Thus, the Court found that self-preferencing cannot be measured in the same way as an access obligation would be in the *Oscar Bronner* context.

To recall, in *Oscar Bronner* (1998), the Court considered that a refusal to supply or to grant access constitutes an abuse when three conditions are met, i.e. (i) when a refusal to grant access is likely to eliminate all competition on the market, (ii) it cannot be objectively justified and (iii) the product or service must be indispensable so that there can be no alternatives available on the market for the contractual partners. The Court clarified that these conditions apply in principle to 'essential facilities', meaning infrastructures that are indispensable to carrying on a business on a market where there is no actual or potential substitute In the *Slovak Telekom* judgment, these conditions were somewhat extended. Where a dominant undertaking refuses to grant access to infrastructure that it has developed for its own business, the decision to grant or refuse access can only be reassessed if the dominant undertaking has real market power and does not need to eliminate all competition.

There are two particular features in the *Google Shopping* judgment. First, i the Court considered Google as a "super-dominant" player. Second, there was a change in Google's practice after the launch of its service, which is another very distinct feature that suggests that the Court viewed this as a e particular case of potential unfairness, and perhaps a different set of issues to be assessed, than if you have an unchanged infrastructure and service from the start. This brings us back to the economic reason for the limited essential facilities doctrine, which is to avoid negatively impacting incentives to invest in important facilities for consumers.

DOUG MELAMED

Professor of the Practice of Law
Stanford Law School

Doug Melamed pointed out that in the US there is not much left of the notion of essential facilities. However, in his view, there has long been a coherent set of principles that are sensible but difficult to apply governing unilateral refusals to deal. In this context, two points should be highlighted. First, US antitrust law is an enforcement regime that seeks to prohibit bad conduct that harms competition. Then the second point is that US law begins with the notion that a company or other entity is generally free to choose with whom it wishes to do business, but this right has never been considered unconditional. The law will find a duty to deal if three conditions are met.

The first condition, the so-called "market power condition", is that access to the facility, inputs, or resources of the firm must be necessary to ameliorate or avoid a monopoly or market power problem. The second is the "conduct condition", i.e. it must be shown that the denial of access or refusal to do business with

the complaining firm was unprofitable for the defendant – entailed a profit sacrifice – except for the reward of increased or preserved market power. Proof of the second condition requires that we have some idea of the terms of trade on which we would reasonably expect that company to trade. That takes us to the last condition, the "pragmatic condition". This means that the court must be able to identify the appropriate terms of trade on which the defendant has refused to trade and provide a remedy that will only require reasonable access to appropriate terms.

In the US, concerning the market power requirement, self-preferencing does not violate antitrust laws unless it can be said to cause or be likely to cause a market power problem. For example, if Amazon manufactures widgets and prefers its widgets to third-party widgets, the self-preferencing could be an antitrust problem if the self-preferencing causes or is likely to cause Amazon to obtain monopoly power in widgets. The terms of trade can in principle be inferred from the terms offered to comparable, preferred users of the Amazon platform,

This leaves open the difficult case, which has not yet been resolved, i.e., the case where there is no joint venture, no existing regulatory oversight, and no prior dealings between the parties or with another, similarly situated party. Even if giving the plaintiff access to or dealing with the facilities seems reasonably necessary to prevent or reduce monopoly power, US antitrust law will require such access or dealing only if the plaintiff can persuade the court that access or dealing would have been feasible and profitable for the defendant and that the defendant nonetheless refused such dealing. It is not clear whether the plaintiff could prove that absent regulatory terms of trade or commercial benchmarks.

He argues that there is a case to be made for digital being an area where regulation would be appropriate. Case-by-case adjudication is very difficult and has led in practice to a default rule that there are no essential facilities or duties to deal under the antitrust case, at least in almost all cases. One could imagine regulation resolving the terms of trade problem. However, the proposed legislation in the US is not necessarily adapted to these situations. The bipartisan American Innovation and Choice Online Act is not intended to simply operationalise the welfare and economic prosperity goals that antitrust laws are supposed to achieve. It is about reducing the size of large companies, favouring small companies, and promoting fairness and equality. These are not economic objectives, and they are not antitrust objectives.

JUSTIN COOMBS

Executive Vice President
Compass Lexecon
London

Justin Coombs pointed out that in the context of potential exclusionary behaviour by companies three questions are raised: whether the company has the ability to exclude competitors,

whether it has the incentive to do so, and the effect that such behaviour would have on the market and consumers.

First, under the ability question, an undertaking would have the ability to foreclose a downstream undertaking from the market by refusing to supply if three conditions are established. The first condition is that the upstream firm supplies the downstream firms with an essential input (downstream firms cannot supply their own customers without access to this input). Second, there must be no viable alternative supplier of the input. Third, someone can't enter the market within a reasonable time and supply this input, so no one will suddenly enter the market and customers will not be able to start supplying themselves or sponsor new entry.

The next issue is incentives. In general, this kind of case involves a situation in which the upstream company not only supplies the downstream market but is itself present in the downstream market. Therefore, this company has a kind of conflict of interest in the sense that its customers are also its competitors. For this reason, it might have an incentive to try to foreclose these downstream firms to monopolise the downstream market and earn monopoly profits. In this context, the Chicago critique says that in practice there is only one monopoly profit to be made in this industry, so the upstream firm can already make that monopoly profit by charging a monopoly price for the essential input. However, while there are some very limited circumstances where it is true that there is only one monopoly profit, in most industries this is not the case. There may also be strategic reasons why a company might want to do this.

The final question concerns the effects of the obligation to supply. In this context, there are two effects that we have to balance. First, we have the short-term effect, which is why we might impose an obligation to supply, i.e. it will increase competition in the downstream market in the short term. There is also a potential long-term adverse effect of such a supply obligation, which is that it could affect incentives to invest and innovate. These two effects must therefore be balanced. This means that we need to think very carefully about the circumstances in which it would be beneficial for consumers and society to impose a supply obligation. This will be the situation where the effect of increasing competition is greater than the effect on investment incentives. There are situations in which we can expect this to be the case. Three questions are relevant.

The first question is whether there will be a significant increase in competition as a result of the obligation to supply. The second question is the nature of the products that are going to be supplied by downstream competitors: are they true copies or differentiated products? If they are differentiated products the benefits to consumers from an obligation to supply will be higher. It may also mean that there is less of a negative impact on investment incentives because if they provide a differentiated product they are less likely to cannibalise the dominant firm's customers and therefore have less of an impact on the investment incentives of the dominant firm and other firms. Lastly, it may be that a supply obligation leads not only to differentiated products but also to completely new products. In this case, the supply obligation is even more likely to have benefits and even less likely to harm investment incentives.

Recent legislative proposals introduce a system of ex-ante regulation imposing obligations on companies that have operated in the private sector and where the entire investment has been privately financed. The question now is what effect this will have on investment incentives. On the one hand, you could say that it may remove the incentives for these companies to invest and create new products because these regulations are imposed on them. On the other hand, ex-ante regulation could reduce uncertainty relative to ex-post competition law enforcement, which might enhance investment incentives. So, these new regulatory frameworks need to be developed in such a way as to provide the benefit of greater certainty for business rather than a situation where the business has less certainty.

LUISA AFFUSO

Chief Economist
Ofcom
London

Luisa Affuso stated that concerning regulated utilities, the basis for regulation began with the provision of access to what were effectively essential facilities. So, facilities such as the electricity network or the water network are very difficult to replicate by anyone who wants to compete with the incumbent. In these situations there is a natural monopoly, i.e. the market can only be profitable with one operator. The Communications Regulation Directive established conditions for the effective regulation of infrastructure assets in communications. When markets started to change and technological change led to different forms of business models and different technologies, there was the possibility of introducing competition into parts of this network; but this could only happen if it was still regulated where the bottlenecks remained. Today, the terms of regulation are determined by transparency, in some cases by price control obligations and access obligations. The regulator conducts a periodic review when the market is assessed to determine whether there is still significant market power (SMP). SMP is therefore the key criterion for regulation.

In the UK we are currently considering what the new digital regulation should be. Ofcom has been working closely with the CMA to try to think about what the test should be. The test that has been proposed to the government is based on holding a Strategic Market Status (SMS) position, which is quite similar to SMP. However, it goes a bit further and says "significant and entrenched position of strength in the market". The test will be this: How can we identify entrenched positions of market power where there is no alternative to intervention? When we look at new markets, such as online platforms, there are many changes in new services that do not always fit well with traditional market functions and, as a result, our case law. The assessment of these markets is very complex, for example, it is difficult to define a relevant market since the goods and services offered by the platforms can be monetised across several markets. Moreover, unlike traditional markets where consumer preferences and behaviour are taken as given, through choice architecture (e.g. dark patterns; nudges) platforms are able to manipulate consumer behaviour. This can make them a 'de facto' essential facility, even when alternatives potentially exist, to enable them to become gatekeepers and bottlenecks. Within this new context there is a risk that all cases against platforms (like Google Shopping) will be 'special cases' as they defy the moulds of our established frameworks. ■

PANEL 4

TOWARDS THE ENACTMENT OF THE DMA, AT LAST?

RENATO NAZZINI

Professor
King's College London

Renato Nazzini moderated the discussion. Fairness is one of the objectives of the DMA and according to him underlines that it is an essential legal concept. It has to be defined according to the context. For example, in the context of Article 102, it is known that "unfair price" must mean something that has no economic relationship with cost or a price against which a competitor cannot fight because we are talking about competition.

The conversation then turns to the most important changes that have taken place throughout the legislative process. He pointed out that the compromise text now provides that the definition of gatekeeper based on the quantitative threshold is a presumption. When the presumption is based on things that have nothing to do with market power concerning those particular services it indicates the spirit behind the objective which is to make things inflexible and to make it almost impossible for gatekeepers to rebut those presumptions or to prove in any way that certain types of conduct are not efficient or beneficial.

Another issue that can be raised is the sharing of information with competition authorities, perhaps with other regulators, data protection regulators, and so on, from them to the Commission and from the Commission to them. So, it is possible to highlight questions about how these exchanges work. Moreover, it is possible to take the example of an old decision, Spanish Banks, which concerns the exchange of information between the Spanish competition authority and the Commission. It was recognised that once information is obtained for a specific purpose, it cannot be used as evidence for another purpose, but it can be shared and used as intelligence to launch a new investigation. In his view, this should also work with the DMA.

PAT TREACY

Senior Counsel
Bristows
London

Pat Treacy underlines that the need for regulation is justified by the importance of digital platforms in the modern economy. The objectives of this legislation are listed in the recitals. The recitals draw attention to the network effects found in these markets, the barriers to entry, the inherent position of platforms, and the difficulty that normal competitive forces have had in breaking down these positions. There is an internal market objective in establishing rules to ensure contestability and fairness in the market. The objective is to ensure a single market and sufficiently harmonised rules in the digital sector for all Member States. It should also be noted that the proper functioning of this law will depend on how it is implemented. However, it should be noted that despite the usefulness of this legislation, there is a feeling that something not explicit is going on in the recitals or the legislative text itself.

One of the things that have changed in the compromise text is the emphasis on the procedure and how people will be designated and can escape designation and how the Commission can essentially assume that people who have strategic market power are gatekeepers and cannot escape. One of the things that Pat is most concerned about in trying to make things ex-ante essentially illegal and making it very difficult for people to escape this obligation is that there are a lot of assumptions underpinning the DMA about the impact of certain types of behaviour and the likely ultimate consequences of certain types of behaviour.

The DMA seeks to ensure some cooperation between the Commission and national competition authorities. Part of the obligation is the pre-notification of acquisitions to the Commission, which will then liaise with the national authorities. If the latter subsequently deem it necessary and appropriate, then they will refer the case to the Commission.

It is important to underline that, although on the one hand, the DMA resembles competition law in particular as regards the nature of the obligations, on the other hand, its enforcement mechanisms are inspired by Regulation 1/2003. In addition, there are also aspects of the GDPR or consumer protection. Thus, ensuring coherent cooperation will be a major challenge. Moreover, the obligations imposed in articles 5 and 6 are at the outer limits of where competition law has gone in very specific circumstances. This is a regulatory instrument.

In terms of fines under the DMA, what is interesting is that we all know that the intention was to increase the maximum possible fine that you have under the current competition rules, which is 10% of global turnover, to a much higher figure. This seems to be in the final text. Parliament had suggested a floor, and according to Parliament, this was not included in the final text. Originally the ceiling was 4%.

CHRISTOPHE CARUGATI

Professor
King's College London

Christophe Carugati considered that the most important obligation in the compromise text concerns the interoperability of messaging services. Another important provision in the compromise text states that when reviewing the DMA, it must also be ensured that social networks are interoperable. As regards data sharing, the Commission has incorporated all the behavioural aspects of what a gatekeeper can do to induce you to accept its terms and conditions. Then the structure of the obligations and prohibitions is pretty much the same, you still have the obligations in Article 5 that will apply to everybody without the possibility of having a regulatory dialogue or talking to the Commission to make sure that the implementation will work properly. However, in Articles 6 and 6a, there are also obligations of use, but they will not significantly change the business models of custodians. The most important changes concern the implementation of the text.

On the designation of gatekeepers, the compromise text explicitly states that during their designation they will not be able to make any reference to market definition or market power. However, what is interesting is that the Commission will be able to carry out a market study to add new gatekeepers, new services, new core platform services, or new obligations. On the question of the rule of reason or objective justification, the compromise text does not say that gatekeepers cannot objectively justify. It simply says that they can only be exempted on grounds of public morality, public health, or public safety. But that does not mean that in the future the courts will not be able to apply a rule of reason here.

As regards the implementation of the text, it is well established that the Commission will have exclusive competence. Within the Commission, it seems that DG COMP will be in charge of the implementation of the text and DG CONNECT will be in charge of the follow-up of the DMA to see if the rule fits into the Commission's digital agenda. The 80 employees foreseen in the basic text are not sufficient and are no longer mentioned in the compromise text. This is therefore still an ongoing discussion. Moreover, they will necessarily have to recruit more IT experts, but they will need fewer lawyers, especially as the obligations are self-executing and gatekeepers will not have to justify their obligations for the time being. In this context, national courts will also be able to implement the DMA and we will have kind of DMA-like mini-regulations in each Member State. Consumer protection associations will be able to bring class actions against gatekeepers before the courts.

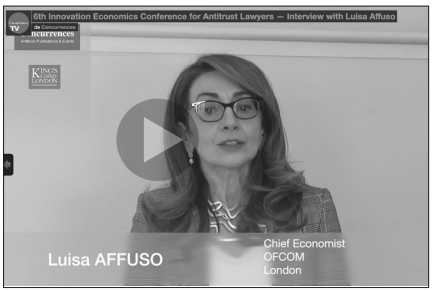
As regards the exchange of information, the Commission has made it clear that competition authorities, including data protection authorities within a network, will have to ensure consistency and that they can share information for effective enforcement. So, information sharing is important but most essential is enforcement sharing. It means that we will have to enforce together based on the information we share, but only one regulator will be competent to start a case.

The problem with the DMA is that we will have a law that is mandating obligations that are superior to other regulations.

According to Christophe, it does not matter to gatekeepers if they have to pay a fine amounting to 10 or 20% of their turnover. What will be more problematic for them is having to comply with the obligations imposed by the DMA because that is where their money comes from. So, it's these accusations of non-compliance that they're going to fight. ■

VIDEOS

During the conference, some of the speakers summarised their speeches in short videos. These can be watched at concurrences.com (Conferences, Innovation Economics Conference for Antitrust Lawyers, 21 April 2022).



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