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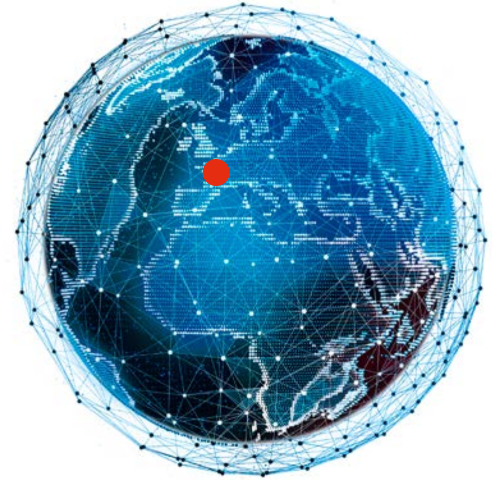

NEW FRONTIERS OF ANTITRUST

DEMAIN LA CONCURRENCE

13th ANNUAL INTERNATIONAL CONFERENCE OF CONCURRENCES REVIEW

IN-PERSON ONLY | TUESDAY 21 JUNE 2022, PARIS

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COURTS & AGENCIES

- Autorité de la concurrence
- Belgian Competition Authority
- Bundeskartellamt
- DG COMP
- General Court of the EU
- Hellenic Competition Commission
- Italian Competition Authority (AGCM)
- Netherlands Competition Authority
- OECD
- Portuguese Competition Authority
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- Essilor Luxottica
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- GlaxoSmithKline
- Groupe Casino
- La Banque Postale
- Microsoft
- Orange
- PaRR
- Renault
- Safran
- SFR
- Soitec
- Suez
- Thomson Reuters
- Total Energies

PROGRAM

8:00 WELCOME & BREAKFAST

8:45 INTRODUCTORY REMARKS

Frédéric JENNY | Chairman, OECD Competition Committee | President, Concurrences Review International Committee | Professor, Co-Director - CEDE, ESSEC, Paris

9:00 OPENING KEYNOTE SPEECH

Olivier GUERSENT | Director-General, DG COMP, Brussels

9:30 #1 LABOUR AND COMPETITION: NON-POACHING AGREEMENTS, STATUS OF PLATFORM WORKERS: WHAT ARE THE RISKS?

Elvira ALIENDE RODRIGUEZ | Partner, Shearman & Sterling, Brussels

Jee-Yeon LEHMANN | Managing Principal, Analysis Group, Boston

Stanislas MARTIN | Rapporteur-General, Autorité de la concurrence, Paris

Martijn SNOEP | President, Netherlands Authority for Consumers and Markets The Hague

Moderator: **Frédéric JENNY** | Chairman, OECD Competition Committee, Paris | Professor, Co-Director - CEDE, ESSEC, Paris

11:00 COFFEE BREAK

11:30 #2 COMPETITION LAW AND SCIENTIFIC EXPERTISE: WHERE ARE THE EXPERTS?

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

Yann GUTHMANN | Head of Digital Economy Unit, Autorité de la concurrence Paris

Pierre RÉGIBEAU | Chief Competition Economist, DG COMP, Brussels

David SEVY | Executive Vice President, Compass Lexecon, Paris

Moderator: **Mélanie THILL-TAYARA** | Partner, Dechert, Paris

13:00 LUNCH

14:30 #3 EXCLUSIONARY ABUSE: WHAT ARE THE NCAS AND COURTS' RECENT TRENDS?

Irene DE ANGELIS | Director, Antitrust Affairs, Intesa Sanpaolo, Milano

Frédéric DE BURE | Partner, Cleary Gottlieb Steen & Hamilton, Paris

Benoit DURAND | Partner, RBB Economics, Brussels

Andreas MUNDT | President, Bundeskartellamt, Bonn

Moderator: **Ian FORRESTER** | Former Judge, General Court of the EU Luxembourg

16:00 COFFEE BREAK

16:30 #4 PROOF AND EVIDENCE: DOES THE DIVERSITY OF REGIMES CREATE INEQUALITY?

Raphaël DE CONINCK | Vice President, CRA, Brussels

Luc GYSELEN | Partner, Arnold & Porter, Brussels

Paul NIHOUL | Judge, General Court of the EU, Luxembourg | Professor of Law UC Louvain, Brussels

Ioannis LIANOS | President, Hellenic Competition Commission | Professor of Global Competition Law and Public Policy, Faculty of Laws, University College London (on leave)

Moderator: **Anne-Sophie CHONÉ-GRIMALDI** | Professor, University Paris Nanterre

18:00 CLOSING KEYNOTE SPEECH

Benoît CŒURÉ | President, Autorité de la concurrence, Paris

18:30 CONCURRENCES PHD AWARDS 2022

Jacques STEENBERGEN | President, Belgian Competition Authority Brussels

Thibaud VERGÉ | Professor of Economics, ENSAE Paris

19:00 RECEPTION

OPENING KEYNOTE SPEECH

OLIVIER GUERSENT

Director-General
DG COMP
Brussels

Olivier Guersent will address four topics: the Digital Markets Act (DMA), the review of the market definition Notice, antitrust on labour markets, and the issue of environmental benefits of agreements.

First of all, it should be stressed that the DMA cannot be dissociated from the Digital Services Act (DSA). The DMA is inspired by competition enforcement mostly in the area of Article 102 and is therefore asymmetrical, whereas the DSA is symmetrical and is about everything you don't want to see on the web and in the internet world, not just for big business but for everyone. The adoption of the DMA does not mean that competition law has not done a good job in recent years, Olivier Guersent even considers that with the European Competition Network, Europe has been at the forefront of competition law enforcement in the technology sector. However, he points out that competition law has always come too late. For example, in the first Microsoft browser case, it took only six months for the introduction of Internet Explorer in Windows to kill the incumbent Netscape, whereas it took the Commission five years to reach a final decision. The large fine imposed on Microsoft in this context did not, however, revive Netscape and therefore did not revive competition. This same pattern was subsequently observed in numerous cases involving dominant platforms and it was thus found that when such behaviour is implemented by incumbents with a gatekeeper function, it is always detrimental and competition enforcement cannot prevent irremediable damage from being done. The conclusion was therefore as follows: Let's ban it altogether. In its simplest form, this is what the DMA is about. For this text to work, it must of course be clear who these gatekeepers are and what is and is not expected of them. In addition, for the DMA to be effective, it must also be possible to change the list of dos and don'ts relatively quickly. Finally, it must be complementary to, and not a substitute for, competition law. It is actually not expected that the DMA should lead to a lesser application of Article 102 in the field of technology.

For it to be implemented effectively, there must be joint enforcement within the Commission, DG COMP, and DG CONNECT. A joint application with the ECN will also need to be developed. In addition, there is a need to hire data specialists. The aim is to pool all the information collected to effectively enforce the DMA, Article 102, the Data Act, and the DSA.

Concerning the revision of the Market Definition Notice, it is clear that society has evolved and that 23 years ago the issue of digital markets for example did not exist. Indeed, there is no reference to zero price markets and very little on multi-sided markets. However, this revision should not deviate from the principles governing the original text. Indeed, the definition of the market remains largely consumer centric. The relevant market is in the end of the day the market for realistic customer alternatives for substitutable goods and services.

The third issue concerns the way competition policy deals with labour markets. There are several ways to approach this issue.

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.

The first is the one on which the Commission is most advanced at the moment: How do you deal with collective agreements concerning the working conditions of the self-employed? This is of course about the platform economy, but not only. The Commission's objective is to avoid that the self-employed, who are in a weak position vis-à-vis their employers, cannot negotiate together their working conditions and, if necessary, their wages, being opposed by competition policy and being treated as cartels. This is essentially what the Commission is trying to do with its guidelines on collective agreements for the self-employed. Its other objective is also to deal with the application of competition policy and competition law to labour market agreements, in particular wage-fixing agreements and no-poach agreements.

Finally, the last topic is how to deal with the environmental benefits of Article 101(1) agreements. In the final version of the Horizontal Guidelines, a specific chapter is dedicated to this type of agreement. What the Commission would like to point out is that to the extent that the restriction of competition will be necessary to achieve a measurable environmental benefit, the Commission will not exclude that they may benefit from an exemption under Article 101(3). The revolution that has taken place with Regulation 1/2003 is that the Commission has aligned the standard of paragraph 3 with the standard of efficiencies in merger control, massively reducing the scope of paragraph 3. So, one has to ask whether there is room for a slightly different interpretation of Article 101(3), not least because we are not talking about irreversible changes in market structure. According to Olivier Guersent, this is a matter of policy, not of law, so there is a lot of room for enforcement officials and judges to decide. The risk here is greenwashing. We had several discussions on the concept of full offsetting. In his view, we should stick to the concept of full compensation, but we should be aware that full compensation is not an exact science. ■

PANEL 1

LABOR AND COMPETITION: NON-POACHING AGREEMENTS, STATUS OF PLATFORM WORKERS: WHAT ARE THE RISKS?

Frédéric Jenny
Chairman
OECD Competition Committee
Paris
Professor, Co-Director
CEDE, ESSEC
Paris

What is at stake in this panel is the concern that competition authorities may have about certain labour market practices of commercial enterprises. These practices revolve around two things: wage compression and limiting the ability of labour to be mobile between firms through various contractual provisions preventing them from dealing with competing firms. Labour markets may not have been flexible enough, which could lead to problems of competition in these markets. It seems paradoxical that competition authorities are addressing this problem. Indeed, the traditional view is that competition authorities try to maximise consumer welfare. Thus, it is somewhat counter-intuitive that competition authorities would go after firms that try to limit or suppress wages. However, a distinction must be made between different situations. Once you are in the context of the monopsonistic power of certain firms over labour it is quite easy to reconcile going after them with the traditional approach of antitrust or competition because they reduce wages by reducing output, which leads to a reduction in consumer welfare. It is more difficult to reconcile the consumer welfare objective of competition law with practices where there is some attempt to reduce wages or reduce worker mobility without necessarily reducing output because it is not so clear that there is consumer harm. Moreover, the legitimacy of competition authorities to intervene in labour markets may be questioned. This raises questions about the scope of activity of competition authorities.

Martijn Snoep
President
Netherlands Authority for Consumers and Markets
The Hague

From the point of view of competition authorities, labour markets are like any other market, and employment contracts are concluded by buyers and sellers. In labour markets, the buyers are usually companies. Most people are employed by companies or 'undertakings' in the sense of European competition law. Therefore, these buyers of labour can restrict competition on the upstream market for labour or on the downstream market on which they sell their products and services, through agreements, collusion or mergers. However, sellers tend not to be undertakings in labour markets. Their practices are therefore not covered by competition laws. However, it should be noted that there is an increasing number of self-employed workers who are now active in labour markets. Moreover, these self-employed workers can, depending on circumstances also be companies, who can therefore agree, collude and otherwise create market power to restrict competition.

The Commission's experience in the field of labour markets is relatively limited. This can be explained by the fact that most labour markets are national or even regional or local in scope. The same applies to the involvement of the European courts in competition law cases on labour markets, which is also limited. The few known decisions have been given as preliminary rulings following cases brought before national courts. This context explains why national competition authorities seems to have the lead when looking into labour markets and employment relations in competition matters. The actions of national competition authorities are therefore important to focus on in the development of European competition law in

this area. From this perspective, there are four areas on which Martijn considers that national competition authorities are or should be concentrating. The first is employers' wage cartels, i.e. employers may have an incentive to agree on wages and other working conditions to the detriment of workers. The second area concerns non-hire and non-poach agreements or collusion between employers. The third area is mergers leading to monopsony positions in markets where the merged entity can suppress wages or lower working conditions. Finally, the last area concerns collusion between genuine self-employed workers.

The Netherlands Authority for Consumers and Markets (ACM) considers that the purpose of competition law is to protect the competitive process and the structure of the market. A disruption of this process leads to, amongst others, a decrease in consumer welfare, which is why it is important to protect it. Moreover, this competitive process promotes the creation of the internal market in Europe, which has also been recognised as an objective of competition law. If we do not protect this process, it may lead to unfair results. This is why also from a fairness perspective it is important to hold to the line that buyer cartels are *per se* prohibitions.

The Dutch Competition Authority revised its Horizontal Cooperation Guidelines and added a paragraph on labour relations to explain to companies what they can and cannot do. The authority has also adopted guidelines for the self-employed. These have helped to identify those who are considered to be falsely self-employed for competition law purposes. They also provide a safe harbour for certain types of agreements among truly self-employed. An agreement among self-employed to achieve at least an income compared with a minimum income or living wage, should fall outside the scope of competition law. That law is not designed to protect such substandard (below a living wage) type of competition.

Jee-Yeon Lehmann

Managing Principal
Analysis Group
Boston

From the 1980s onwards, income disparities in the US increased dramatically. There are multiple explanations for this increase, including skill-based technological change, globalisation, declining value of minimum wage, and declining rates of unionisation. Recently, policymakers and regulators have pointed to increasing industry concentration and buyer power. It is in this context that US law enforcement agencies and policymakers have taken a closer look at the state of labour competition.

From her perspective, there are three key developments over the past decade that have shaped the landscape of labour market antitrust litigation in the US. The first development is the US Justice Department's 2010 investigation into six high-tech companies, including Intel and Apple, regarding alleged agreements not to poach software engineers from one another. The second development that Lehmann highlighted was the October 2016 publication of the joint DOJ/FTC guide for human resources professionals. This guide emphasised the agencies' view that the antitrust law applies with equal force to the labour market as it does in the product market. The guidance was also the first time that the agencies officially announced that naked wage-fixing or no-poach agreements could lead to criminal prosecution of companies. Finally, the third key development is the new Biden administration's emphasis on labour market competition as a key element of its antitrust enforcement agenda. This focus led to first two criminal trials involving

wage-fixing or no-poach agreements in early 2022 (*United States v. Jindal and United States v. DaVita and Kent Thiry*). In April 2022, two juries in federal courts voted unanimously to acquit all defendants of the antitrust charges. Despite these defeats, the DOJ appears undeterred in its effort to criminally prosecute conduct that it perceives as restricting competition in the labour market.

In the US, agencies have drawn analogies between the product and labour markets and have relied heavily on standard tools and arguments in these labour market antitrust cases. In *Jindal* and *DaVita*, the DOJ's case relied primarily on drawing analogies to conduct in the product market that have been historically established to be *per se* violations: wage-fixing is akin to price-fixing and non-solicitation agreements are akin to bid-rigging or market allocation agreements. Although the court's denial of motion to dismiss in both of these cases appear to bear out the DOJ's view, at least in part, the court in *DaVita* deviated from traditional *per se* burden of proof and recognized the novelty of labour market criminal cases. In *DaVita*, although the court acknowledged that non-solicitation agreements could be market allocation agreements, the court opined that not all non-solicitation agreements, and even no-hire agreements, are anti-competitive. Accordingly, the court ruled that the Justice Department needed to not only show that an agreement existed (as in a typical *per se* case), but that they needed to prove beyond a reasonable doubt that the defendants entered into the agreement with the intent and purpose of allocating the market. Moreover, the court's instructions to the jury before their deliberation rejected the Justice Department's argument that it need not prove anticompetitive effect. Instead, the judge explained that proof of market allocation required a demonstration of "cessation of meaningful competition" in the allocated market.

Elvira Aliende Rodríguez
Partner
Shearman & Sterling
Brussels

From a practitioner's point of view, when a theoretical problem arises like the question whether competition rules should apply to problems of no-poaching or wage fixing, the starting point for examining it would be to consider: What would be the effect on the prices that consumers will pay? On this assumption, the monopsony seems slightly different from the monopoly in the sense that one could think of rent extraction upstream that could potentially lead to lower prices downstream linked to a reduction of the costs. If these were to be passed on to consumers, monopsony could lead to a market with lower prices for consumers. According to Elvira Aliende Rodríguez, the starting point is whether monopsony has any positive impact on consumer welfare. This would not be the case if one thinks that price cuts are not passed on to consumers when certain conditions occur in the market. Furthermore, it would not work either if there were some degree of market power downstream, so that the monopsony would not pass on price reductions but would retain them and benefit by increasing its margins. Another aspect that has been less considered is that such a situation would also theoretically lead to a decrease in production so that the monopsony might be expected to have fewer employees.

The Spanish Competition Authority is one of the first to have indirectly examined wage-fixing and no-poaching issues. Indeed, in 2010 and 2011, in two cases that had all the elements of a normal cartel (Transitarios and Peluquería Profesional), the Authority also challenged the no-poaching agreements. In

Portugal, Poland, Lithuania, and other countries, similar cases have been investigated relating to the sports world. Different sport clubs tried to take advantage of agreements between them not to pay the athletes based on the Covid-19 crisis. The local competition authorities considered that the clubs could not agree on these issues, because they had a distorting effect on competition. This gives an insight into cases that were not purely focused on wage fixing. These cases had a more traditional approach to what a cartel was and, within that approach, found that there were problems with non-poaching or wage fixing. The only case that differs is the Portuguese case which deals with these issues on a standalone basis.

Stanislas Martin

Rapporteur-General
Autorité de la concurrence
Paris

As with its position on sustainable development, Stanislas Martin argues that regarding labour law and non-poaching agreements, the French Authority will stick to the consumer welfare standard and intervene when sustainability is a parameter of competition. A parallel can therefore be drawn between the two areas. For example, in the context of sustainable development, he underlines that the Authority intervenes in cases where sustainability issues are a criterion of choice for consumers, where consumers pay attention to sustainability and look at it to choose the product, and therefore it is a parameter of competition.

The French Authority had a case in 2017 in the floor tiles sector where companies agreed not to compete on everything. A classic non-poaching agreement was therefore put in place between these companies. Although this limb of the agreement is not the most conspicuous in the decision, there was nevertheless this feature in this 2017 case. This agreement had a direct impact on competition between the three companies concerned. This impact is justified by the fact that this agreement kept wages low and prevented talent from moving to where and how it would best serve the economy. Thus, it prevents an optimal allocation of resources, it distorts the market and the optimal allocation of resources.

Stanislas points out that direct consumer harm does not have to be demonstrated to meet the consumer welfare standard. In its merger control decision in the Aurubis/Metallo case, the Commission found that regarding buyer power and direct consumer harm, the test set out in the Merger Regulation is whether the merger may significantly impede competition. Thus, without demonstrating direct harm to consumers, it can be shown that it impedes the competitive process and falls under traditional competition law, at least for a merger. For the French Authority, it is a competition parameter if it is a strategic input. It means that if the resource is unlimited and everybody has easy access to the resource there is no issue at all. According to the 2016 DOJ/FTC guidance, from an antitrust perspective, firms that compete to hire or retain employees are competitors in the labour market, whether the firms produce the same products or compete to provide the same services. In the US they consider this to be a competition issue within the traditional norm of competition. ■

PANEL 2

COMPETITION LAW AND SCIENTIFIC EXPERTISE: WHERE ARE THE EXPERTS?

Mélanie Thill-Tayara
Partner
Dechert
Paris

This panel will address various issues that are central to the European debate today. First of all, the problematic relating to the place and role of experts in the treatment of competition cases will be addressed. There are also issues related to the definition of relevant markets, which often requires complex economic analyses and gives rise to expert debates. Authorities and experts face several difficulties and challenges in this context. It is indeed important to be able to identify good practices that may exist in other areas and that could inspire authorities and even courts to improve the consideration of scientific expertise in competition proceedings. There is a certain tension between the right of competition authorities to deal with any practice that may constitute an infringement of the competition rules and the practical reality of cases, which often involves very complex analyses.

To deal with these problems, the competition authorities have devised several responses. In particular, they have created investigation units, each of which is responsible for a certain sector. They have also added more specialised skills, such as the expertise of economists, or experts with the necessary skills to analyse algorithms or other AI programs that may have an impact on the analysis of anti-competitive behaviour. Finally, authorities may also draw on the expertise of other authorities.

Gönenç Gürkaynak
Partner
ELIG Gürkaynak Attorneys-at-Law
Istanbul

No competition authority or group of individuals could have sufficient knowledge to regulate all markets. They would need to have external help or build an internal capacity with the skills to regulate these practices. However, this raises questions about legal realism in the sense that the decision-making bodies will ultimately have to take responsibility for their decisions. Thus, while the role of experts is useful, their arguments can also be complex to understand, and it would be quite dangerous for antitrust agencies to distance themselves from the very decisions they make. The question then arises as to what exactly should be required of experts and how transparent it is necessary to be to defence counsel about the ability to process data. To ensure reliable practice, competition authorities should be very transparent and explicitly state that they have relied on expert evidence and point where they have relied for a given argument and how they have verified that evidence. This will allow the reliability of the sources used to be tested and further prevent cases of *"your word against my word"*.

Gönenç stresses that it is very important to use economic experts for analyses of the structuring of remedies, for analyses of the effectiveness of remedies, for analyses of the effects on the ecosystem in digital markets, for counterfactual analyses, for analyses of the feasibility of what is given as a homework expert approach, but also in the question of market definition as well.

To raise the standard of expert evidence, competition authorities and judges need to know what they are talking about so that it is acceptable for them to consider that the expert is evading the issue, using overly complex terms that judges or authorities may not be expected to understand. If judges and competition authorities were to demand more sophisticated and consumable feedback, this would also change the behaviour of experts.

Yann Guthmann
Head of Digital Economy Unit
Autorité de la concurrence
Paris

The need to strengthen the Authority's expertise in digital matters arose from the Estates General on Digital Issues. However, the Authority did not wait for the creation of this service to have expertise in digital matters (e.g. Google Amadeus decision, Google neighbouring rights, etc.). The search for expertise is an important notion which means that expertise is a dynamic notion, as it is an expertise which is constantly evolving. Thus, the creation of the digital unit within the Authority includes data scientists, which makes it possible to add significant value to the expertise. The unit has four missions: to develop new digital tools and to collaborate with the academic world and with counterparts in other French authorities and administrations as well as with all other foreign data units. The most important aspect of its tasks is to assist the rapporteurs when they have concrete cases where digital technology is involved. For example, the request for precautionary measures concerning ATT. Another case where the contribution of data scientists is important is when there is a large volume of data to process, such as in the Google News Corp. decision. The data scientists help the rapporteurs to assess the relevance of the commitments in order to evaluate a performance measure.

The data unit assists reporters to ensure that they understand the industry, avoid being swamped with information by opposing parties and to help them ask the right questions. For example, this issue arises in the context of app store issues, particularly the iOS system. It is not possible to download an application without going through the Apple app shop. This is the only place where such a restriction exists. Apple resists this sideloading requirement, citing security concerns. However, according to Yann the

question is not there, we should ask ourselves if we can allow sideloading while ensuring a level of security. So you need the right background to be able to ask the right questions.

Pierre Régibeau
Chief Competition Economist
DG COMP
Brussels

There are very different types of expertise. Economic expertise and management expertise are closely linked to the legal analysis of cases. There are also more specialised analyses such as statistics or data analysis, which are used for certain specific cases. One of the essential aspects of economic expertise is that it must be linked with legal analysis. This is why it is necessary to have the expertise of the Competition Authority itself and not an external expertise. The role of economists is to determine the facts, who is competing with whom, what is known about the behaviour of the companies. They must also assess the damage that could be caused by a given conduct. Finally, economists must be concerned with remedies to help the market return to a more competitive structure. To do this, economists must rely on technical analyses, but these are only supporting points. The role of economists is really to bring rigour, internal consistency and consistency with the facts.

Some improvements to the use of scientific expertise can be made to the current process. If it is a recurrent expertise, then it is necessary to ensure that this expertise is held internally. In the case of data analysis, it would be a mistake to have the expertise within a pre-existing group such as the economists' group. Each scientific expertise should have its own group. However, it is important that the groups can talk to each other, so that each expert understands how the information relates. At the level of the courts, solutions must therefore be found to train judges in these matters so that they can understand at least some of the vocabulary and how it is possible to assess the credibility of scientists.

In a procedure, the Commission's economic service first gathers the facts. If it is a specialised industry then it needs to be accompanied by experts from that industry. They will then look at the data to create their own facts but also to do econometric studies of behaviour. If you are in a field where there is a lot of data, you need to be helped by data specialists. After that, there is the statistical analysis, which is very often done within the framework of the economics department, so there is no need for external help. At the fundamental level of market definition, this is one of the levels where the most advanced technical knowledge is needed. In the context of this definition, the first question to ask is, if there are two products, are they functional substitutes? If they are medicines, for example, this qualification becomes a little more difficult because you need

to know for whom these medicines can be substitutes. So you need an expert in this kind of product who is also able to communicate with the economic department.

David Sevy
Executive Vice President
Compass Lexecon
Paris

On the question of sectoral expertise, the economists, who work in the field of competition, have worked with a very general toolbox without being locked into a particular specificity. They have relied in particular on a body of theoretical and academic knowledge, but also on the work of sectoral regulators. However, economists continue to keep economic principles as a sieve for analysis without being a prisoner of sectoral specificities.

Today, digital is very important, but the body of knowledge in this area is more limited. There is less academic and empirical work because it is a recent subject. In order to enrich the dialogue in this field, it is therefore necessary to create a common base. This is the reason for the creation of economic units within the authorities. In practice, these units provide a good understanding of what is going on in complex industries. Moreover, in the process of embedding this economic analysis in legal procedures, these specialised units allow for the building up of knowledge and conjectures about what to think about this or that type of behaviour. These initial conjectures will then be enriched during the course of the investigation with the data that will be brought in. Dynamic knowledge management is an important issue. It is a question of knowing to what extent the initial conjectures will be revised over time to incorporate the learning that comes from the cases.

The example of commercial litigation provides an interesting illustration of how to question expertise and use it for decision-making purposes. The first thing is good practice. The second thing is that rather than just exchanging reports, there is a process of convergence or filtering that will take place. This will make it possible to identify important points of dissension on which the analysis that follows will be able to focus, particularly the analysis made by the judges. This exercise in highlighting inconsistencies helps to advance understanding of the degree of plausibility of the competing theories and allows the most plausible theory to be chosen.

At present, the question of efficiency gains is one of the blind spots in economic analysis. On the subject of information, the efficiency gains are not necessarily in very complex sectors, but the real difficulty is to provide proof. There is a real problem of access to relevant expertise which is not scientific expertise in the general sense of the term, but expertise in terms of practice. ■

PANEL 3

EXCLUSIONARY ABUSE: WHAT ARE THE NCAS' AND COURTS' RECENT TRENDS?

Ian Forrester
Former Judge
General Court of the EU
Luxembourg

Ian Forrester moderated the discussion.

Andreas Mundt
President
Bundeskartellamt
Bonn

In recent years we could see a renaissance of abuse control procedures, most of them relating to the digital economy. Before this phase, not many proceedings had been conducted against abuse of dominance, whether exclusionary or exploitative. It is with the development of the digital economy that all kinds of abusive practices appear to be applied by large IT software and hardware companies. So these types of abuse control proceedings, which were somewhat exceptional in the past, have become a key instrument to control Big Tech and the digital economy. However, Andreas stresses that it is important to consider the complexity and difficulty of these types of abuse cases. The Bundeskartellamt has successfully dealt with several abuse of dominance cases in this sector. One of these is the Facebook case, in which the German authority prohibited the company from combining user data from different sources. This practice by Facebook involved two theories of harm. The first was the exploitation of users who give their data to Facebook. The second was that the collection of so much high-quality data led to exclusionary abuse with regard to its competitors, as Facebook was continually able to improve its service while its competitors could not do so as they did not have access to the same quantity and quality of data. Especially the Facebook cases demonstrates that procedures can be rather lengthy, since this one is still pending in court.

Nevertheless, the various cases conducted by competition authorities in the past years have improved the contestability of markets in the digital economy. For example, the German Amazon case in 2019 brought far-reaching improvements for sellers on Amazon's online marketplaces because until then Amazon had practically been exempted from any liability towards sellers. However, these results are not yet sufficient. This is why the DMA and Section 19a were created.

Another issue that comes up regularly is the level of proof required in court. For example, the courts in the Qualcomm and Intel cases have expressed doubts as to whether the Commission produced all the economic evidence it should have produced. These concerns led the courts to declare that there were no proven foreclosure effects caused by Qualcomm or Intel.

According to Andreas, the standard of proof required to establish the existence of an abuse of dominance is relatively high after the decisions of the European courts. In particular, the «as efficient competitor» test can be quite complex.

Benoit Durand
Partner
RBB Economics
Brussels

Self-preferencing is a new type of abuse that is increasingly being investigated, especially against Big Tech. It is quite a broad concept and to better understand it, it is possible to look at the Commission's Google Shopping decision of 2017. Initially, Google favoured its price comparison services which were, therefore, more visible than those of its competitors. In addition, the Commission also pointed out that competing price comparison services were subject to Google's algorithm. The Commission's concern was that Google Shopping was not subject to the same algorithm as Google's competitors, which made it more visible to consumers. Since this decision, there have been numerous investigations against self-preferencing. For example, last year the French Competition Authority also found Google abused its dominant position in the market for ad servers for publishers of websites and mobile apps.

One question is how to determine that these practices fall under the category of self-referencing abuse. Benoit points out that there is very little guidance on this type of abuse. For example, in the Commission's 2009 guidance on exclusionary abuses, there is no reference to self-preferencing. In the DMA there is an article prohibiting access controllers from engaging in self-preferencing practices in the context of ranking services, which is therefore quite limited. Thus, it is a very broad concept in which different types of practices could be included.

In determining that self-preferencing is abuse, the Commission's 2009 guidance indicates that the consumer welfare test is essentially there to help us determine which practice is abuse and which is not. In other words, there is nothing wrong with foreclosing competitors, but you can't do it if it would harm consumers. To operationalise the consumer welfare test, the «equally efficient competitor» test has been introduced and works quite well when it comes to at least price abuses. At first sight, the competition problem with self-preferencing is that essentially the platform or vertically integrated company will favour its affiliates. So, by engaging in self-preferencing, you reduce competition between the affiliate platform and third-party sellers, which leads to higher prices for consumers. Such a practice could therefore lead to less innovation.

However, self-preferencing can also be seen as beneficial for consumers. For example, in the 2016 UK High Court case following the Streetmap complaint against Google, the judge found that ultimately it made more sense for Google to continue to develop, expand and improve the quality of its search engine and provide consumers with a relevant search result including a map than not to do so. The court decided that this decision was objectively justified even though other map providers do not have a space on the first page of search results.

Frédéric de Bure
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There are two contradictory trends. On the one hand, many judgments have been adopted by European courts on the notion of exclusionary abuse, which provides a very good degree of legal certainty. However, on the other hand, regulators have shown great legal innovation in enforcement which has called into question the definition of exclusionary abuse and the importance of the exclusionary concept for competition rules. This reflects a kind of conflict between these two trends.

First of all, in the context of the first trend, the concept of exclusionary abuse is now very well defined in Community law. According to Frédéric, there are three main stages in the evolution of the concept of exclusionary abuse. First, some major cases have determined that the application of Article 102 should focus on the idea of exclusion rather than on the exploitation of customers. The second step was the modernisation of antitrust, which was essentially a move away from per se infringements and the introduction of a basic economic consensus to define the notion of exclusionary effects. Finally, the third stage of this evolution is what we are currently witnessing, namely the consolidation of the different concepts in the recent European court rulings in the Intel, Enel, and Qualcomm cases. These rulings show that a dominant firm can compete on the merits, and can exclude less efficient competitors, but cannot use its dominant position to exclude equally efficient competitors.

In the second trend, which concerns enforcement, regulators have been very innovative in recent times. This has made it very difficult for a dominant company to know whether or not it is complying with the antitrust rules and to ensure compliance. In the category of exclusionary abuses, many recent cases have deviated from the legal framework of the above-mentioned rulings and the Commission's guidance document. For example, in the Google Shopping decision, the legal test is not the one specified in the guidelines for refusal to supply. Furthermore, the Google Shopping case ignores the as efficient competitor principle because it would not apply to non-price abuses, however this actually contradicts the Enel judgment which states the exact contrary. In France, we have also seen a great degree of legal innovation. For example, in the TDF/Itas case, the investigating departments of the French Competition Authority tried to revive the Continental Can doctrine, according to which acquisition by a dominant company can be abusive. This was an attempt to address the issue of deadly acquisitions. However, this is uncharted territory and does not appear anywhere in the case law or guidelines.

There is another line of jurisprudence that concerns the revival of exploitative abuses. The difficulty with this type of abuse is that there is no guidance and the legal test for this category of abuse is extremely uncertain.

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Over the past decade, the financial sector has been at the center of innovation led mainly by FinTech and Big Tech, but also innovation by the current incumbents in the payments markets. It is not surprising, she says, that some recent cases of alleged exclusionary abuse have been linked to Big Tech or incumbent payment systems.

On the one hand, Intesa Sanpaolo is helping the big tech companies that have created and rapidly increased their market power in the digital or mobile wallet market. These are services that banks would otherwise prohibit their customers from using digital wallets, which would cause them to lose customers. Thus, large technologies have become essential business partners for banks. In this context, the case over Apple Pay services is about Apple not allowing other providers access to Near Field Communication (NFC) on iOS, so on Apple devices, you can only use Apple Wallet and other providers cannot download their wallets to iOS-based devices. The Commission's preliminary view on Apple's dominance in this market is that acting in these markets in a way that prevents other providers from accessing the NFC entry restricts competition by reserving this access to Apple Pay Wallet alone.

On the other hand, the Italian Competition Authority has recently opened an investigation against Mastercard. This procedure is linked to alleged exclusionary conduct to the detriment of the national payment system, namely the Consorzio BANCOMAT. Mastercard issued a mandate, which is a kind of communication, but which is mandatory for the licensee, in which it demanded that acquirers adopt only the double tap process when paying by card. As a result, BANCOMAT would have suffered a restriction of competition as a result of this mandate, as the double tap payment method appears to be very inefficient in terms of user experience, according to surveys conducted. The reaction would have been a forced reaction by acquirers who had no choice but to opt for a two-touch payment. Furthermore, as some digital wallet providers only require the one-touch experience because they feel it is a very efficient experience for customers, the Mastercard mandate would have prevented the national scheme from reaching an agreement with digital wallet providers.

Thus, from the company's perspective, the technological revolution that has occurred over the past ten years has fostered the emergence of new players but has also strengthened the position of the incumbent players in some markets. ■

PANEL 4

PROOF AND EVIDENCE: DOES THE DIVERSITY OF REGIMES CREATE INEQUALITY?

Anne-Sophie Choné-Grimaldi
Professor
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With regard to evidence, two issues need to be discussed. The first concerns the object of the proof, i.e. what must be proved for a transaction to be prohibited and the behaviour sanctioned. The second issue concerns the intensity of the proof, i.e. the question of the standard of proof. There are currently significant differences between US law, EU law and national law in relation to these two issues.

In reality, these two issues function in a 'communicating vase': if one is more demanding on the object of the proof, then one can be less demanding on the intensity of the proof and vice versa.

In the context of the first issue, which concerns the object of proof, on the one hand, the economic approach shows that the effects criterion remains decisive. On the other hand, there is the opposite tendency, which can be seen in particular in the DMA, which establishes an *ex ante* approach and lists prohibited behaviour without any research into effects having to be carried out.

The intensity of the evidence, and therefore the standard of proof, is defined as the degree of conviction that the judge must feel in order to be able to establish a fact on which to base a claim. However, it can be seen that the use of a standard of proof may not be essential. For example, it is not used in French law. In French civil law, the principle is that of certainty. The French judge cannot base his decision on so-called doubtful grounds. In criminal law, the principle is that of intimate conviction. In both cases the system is completely binary. That said, one must not be mistaken: it is not because certainty is required that it is more difficult to prove the facts. Thus, in French law, other procedures are used to lower the level of the evidential requirement. These other procedures can be divided into three categories. Firstly, the object of the proof is played on, it is enough to require the plaintiff to prove something that is easier to prove for the evidential requirement to be lowered. The second procedure concerns the burden of proof. In order to determine who bears the burden of proof, the ability to prove, i.e. the capacity of a person to prove, is taken into account. It is sufficient to place the burden of proof on a person who is more capable of providing it in order to facilitate this. Finally, the methods of proof are used, for example by using the technique of bundling evidence. These procedures make it possible to lower the level of intensity of the evidence. Their use explains why in French law, for the time being, there has been no need to resort to the standard of proof.

Raphaël De Coninck
Vice President
CRA
Brussels

Economists approach the question of the standard of proof through decision theory. In general, economists try to find rules that maximise an objective function and this maximisation takes place under a number of constraints. This can be, for example, the administrability of the rules. The idea is to determine the norm that leads to the best outcome from an *ex ante* point of view. In order to do this, we need to think about how to design rules that minimise errors. However, sometimes authorities and judges do not make the right decision. In order to avoid these errors, one tries to find the standard that would most limit the cost of these errors. The cost depends on the probability of these errors and also on the impact of these errors on the parties as well as on other businesses. On the one hand there are behaviours that will be harmful to competition such as horizontal price fixing. It can therefore be argued that a per se illegality rule is perfectly logical. On the other hand, some behaviour is very unlikely to be anti-competitive. These are behaviours that can be used by many

firms that are not necessarily dominant. For many behaviours we are in the middle of this spectrum, and it is in this context that economists want to look at the effects.

With regard to decision-making under uncertainty. This is a very interesting question, particularly in the light of the CK Hutchison case which is currently before the Court of Justice. From an economic point of view, on the issue of uncertainty it is not correct to focus only on probabilities. You really have to think about the magnitude of the effects. In a second step, one should look at an arbitrary probability threshold and discard and give zero weight to events that are below a certain threshold. Finally, the last point about probability is that there is not just one event. The final point about probability is that there is not just one event. There is a range of likely outcomes, and several of them may have less than a 50% chance of occurring. This does not mean that they should not be taken into account. It means that they should be given due weight in the assessment.

Luc Gyselen

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The subject of this panel raises three questions: who has the burden of proof; what is the standard of proof (degree of probability); and what is the standard of legality (elements of an offence to be proven)? The latter question will not be addressed.

As regards the burden of proof, a comparison can be made between the EU and the US.

The «rule of reason» in the US implies that companies are free to prove the efficiencies of their anti-competitive agreement, conduct or merger and that the competition authority must then demonstrate that there are less restrictive alternatives to achieve these efficiencies.

In the EU, there is the same balancing of anti-competitive and pro-competitive elements, but the burden of proof is, in principle, entirely on the companies (although the Court has clarified that the Commission must assist in the fact-finding exercise). This means that the undertakings must prove not only that there are efficiencies but also that there are no less restrictive alternatives (and, in addition, that there is sufficient residual competition left in the market). In addition, the Commission has stated that «ultimately, priority is given to protecting rivalry and the competitive process in the long run over potentially pro-competitive efficiencies». In Europe, the balancing of anti- and pro-competitive elements is therefore likely to be biased.

A comparison between the US and the EU can also be made with regard to the standard of proof.

In the US, this is explained as follows: «if you were to put evidence favourable to the plaintiff and evidence favourable to the defendant on opposite sides of the scales, plaintiff would have to make the scale tip somewhat on his side». Thus, the term «somewhat» (more likely than not) does not set the bar very high.

In Europe, presumptions are made in the field of Art. 101 when «experience» shows that certain agreements «in principle always present a sufficient degree of harmfulness to competition». Companies can rebut the presumption by reference to the legal and economic context in which their agreement arises, but they rarely succeed (sometimes wrongly, it seems).

In the context of Art. 102, the notion of restriction by object does not exist, but the Commission has de facto imported it in its 2009 Notice by referring to cases where the conduct of the dominant undertaking makes no commercial sense except to create foreclosure effects.

In merger control cases one cannot work with presumptions as the analysis is necessarily prospective. In the CK Telecoms case, the Court of First Instance seems to have introduced a stricter standard of proof than the balance of probabilities. However, it seems to us that the facts of the case in this gap case (elimination of a competitor who had not been a maverick prior to the merger) explain this.

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The standard of proof begins as a point at which the evidence will be deemed sufficient to convince the authority or the judge. Evidence law theorists usually establish a distinction between the assessment of the probative value or force of the parts (probative force) and the weight of the whole of evidence. (weight) Usually, both evaluations are not regulated by rules: there are no formal rules of weight and the probative force of one or more pieces of either sort of evidence depends upon complex considerations, which are quite difficult to formalize. In terms of standards of proof, there are two traditions. The first is the common law which recognises that there are different degrees of proof within each standard and that the standard depends essentially on the subject matter or «a degree of probability which is proportionate to the occasion». The concept of the standard of proof is not familiar to most continental legal systems. Indeed, the standard is deeply subjective because it is linked to the conviction of the judge or decision-maker, and there is no real distinction between criminal and civil cases as in common law systems. In a way, we can contrast the more probabilistic or logical probability approach of the common law system with the more subjectivist approach of the civil law systems.

If we look at European competition law, it is generally accepted that the European courts and the Commission have dealt with the principle of free or unfettered evaluation of evidence. First, the requirement of a sufficient degree of proof may vary according to the context and stage of the proceedings. In the context of a restriction of competition subject to higher sanctions, higher evidential requirements are expected. The level of proof may also vary according to the stage of the administrative procedure. The type of requirement is different when you open an investigation, when you send a statement of objections, or in terms of the level of evidence when you issue an infringement decision. The second thing is that evidence is assessed holistically. According to him, one should move towards an assessment of relative plausibility which will refer to the relative strength of the explanation as determined by the inferential interest of the decision maker. It is a matter of proving the required legal standard and thus of performing a relative plausibility analysis between the different facts. The relative plausibility theory should be distinguished from general probability theories of evidence evaluation. Plausibility does not reduce to probability. The assessment of the evidence or more generally fact-finding should not focus on abstract probabilities but on the relative plausibility of competing hypothesis presented by the parties. According to this theory, legal proof is a form of inference to the best explanation that examines the comparative plausibility of the parties' stories ending in the question whether one is justified in believing (or treating) any of them as the true (or most plausible) account The process will involve two steps: first, it is important to generate potential explanations of the evidence; second, it is important to select the best explanation from the list of potential ones (which will be the actual explanation). Choosing among competing explanations depends on the relative plausibility of each narrative/story, as measured by reference to a number of criteria: the degree of coverage (that is the greater the portion of the evidence a story is able to account for the higher its plausibility), the completeness/consilience of the story (it explains more facts and has less gaps), the coherence of the narrative (that is the added quality of the individual elements integrating well together to yield a smooth and convincing narrative of events and finally its probative force (that is the positive support it receives from the evidence).

With regard to presumptions, practical decision-making in competition law cannot do without the use of analytical shortcuts, but also presumptions and assumptions. Presumptions can be distinguished from other analytical shortcuts, such as proxies and premises, in that presumptions have a specific procedural consequence as they automatically shift the burden of proof onto the party against whom they operate. Although presumptions establish a link between a fact A and a fact B, hence operating as an evidential (factual) shortcut, one may also envision the

distinct possibility that they establish a link between a fact A and a normative statement B (instead of a fact B), henceforth establishing a mandatorily drawn normative rather than factual inference. In this case, although the foundation of fact A may be challenged, the mandatorily drawn normative inference B may only be challenged to the extent the normative framework explicitly acknowledges some defense possibilities. This brings us to the distinction between simple presumptions about facts, or simple presumptions about normative inferences, which are rebuttable, from per se rules, which establish an *"irrebuttable substantive presumption". The latter* establish proof to the requisite legal standard that if a prohibited practice such as horizontal price fixing occurred, this suffices to establish liability (normative inference), and precludes *any* justifications concerning the effects of the practice based on the absence of market power or the fact that they are pro-competitive, these defences becoming irrelevant. The rebuttal in this case is only possible by challenging its foundation, the occurrence of the fact A, but not the "mandatorily drawn inference" B, that is the finding that such conduct is capable of having anticompetitive effects. Hence, from this perspective, "naked restrictions" in Article 102 TFEU are closer to "by object restrictions" under Article 101(1) TFEU than the EU Courts have been ready to accept.

Finally, Big Data will change the way we think about presumptions. Until now, we have thought about economic evidence. At a more fundamental level, to the extent that scientists may rely on just correlations to predict how economic actors or individuals will act, the concept of causality could lose relevance. Today, Big Data models are essentially mapping models that present data and help visualise relationships simply by looking at the data. This raises interesting questions about causal claims with Big Data, which seem to rely on "variational induction" and eventually "the identification of phenomenological laws which may hold only locally in specific contexts", and how different this is with regard to causal claims that are built on the hypothetico-deductive model of economics, that is very much dependent on theoretical hypothesis, on the basis of deduction from certain generalised features of our experience and practices (premises) to infer that the world must be like to make the existence of these experiences and practices possible (conclusion), which will then be verified or disproved by empirical evidence. In any case, the purpose of the inquiry should be to form a reasoned belief on the functioning of the real economy, that is the structures, powers, mechanisms and tendencies that form the background conditions for such phenomena to be produced.

Paul Nihoul
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General Court of the EU
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In competition law, when the question of whether two companies have come together is asked on the facts, a standard of proof of personal conviction can be used. In contrast, for the assessment of mergers one has to look at the calculation of probability. For example, for telecom operators, the difficulty is that they are not each asked to establish their own network, but to share networks. In this type of circumstance, the court stressed that there should be a serious probability. However, in the first ground of appeal, the Commission argued that, in laying down this rule, the court erred in law by saying that it was necessary to go as far as a serious probability. The Commission indicates, through the Merger Regulation, that there is no presumption in favour of one or the other, there is no presumption that economic freedom must prevail.

Who decides what? This is called the balancing system. There is no one deciding for the other, we check each other, it is not always efficient for economists, but it is at least efficient for freedom. The General Court was created to examine complex facts to improve the judicial protection of individual interests. Thus, the mission was to improve the control exercised in the field of competition. In a 1993 decision, Judge René Joliet stated that plausibility is the fact that if the Commission presents one plausible explanation, but the companies present another that is plausible, the mere existence of a plausible alternative explanation implies that there should be no presumption of a cartel. Since then, all the cases show that from now on the control must be deep, in a general way, in all cases of competition. ■

CLOSING KEYNOTE SPEECH

BENOÎT CŒURÉ

Autorité de la concurrence
President
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Purchasing power is one of the concerns of the French Competition Authority. The debate on the macroeconomic impact of competition policy focuses on the relationship between market power and inflation. It should be noted, however, that the primary cause of inflation is not a lack of competition, but the deficit in productive supply inherited from the Covid-19 pandemic. In addition, the war in Ukraine has led to an increase in the cost of inputs - in particular, energy and food commodities. In this context, in the short term, the contribution of competition policy is limited, unless anti-competitive behaviour amplifies the price increase. In the long run, however, competition policy becomes useful as it can lower the price level.

The causality between concentration and price levels is not contested by the doctrine, but it does not explain the acceleration of prices. Thus, in order to fight inflation, innovation and free market entry should be encouraged, while taking into account the specificity of current economic mechanisms.

The tools of competition authorities can help avoid too much concentration as well as tackle abuses of dominance and to fight rents, and return purchasing power to consumers. For example, cartels lead to overpricing, which has a direct negative impact on purchasing power. In this context, the Authority can sanction the companies concerned. In addition, the fight against abuses of dominant positions also makes it possible to sanction behaviour that harms the State's accounts.

The Authority also has consultative powers which enable it to make recommendations to the public authorities to increase consumers' purchasing power. This prerogative is illustrated by the example of mobility. The Authority has been able to persuade the public authorities to carry out a reform that enables consumers to benefit from a practical and economical mode of transport, namely the coach. Concerning driving licences, the Authority has issued recommendations aimed at making the organisation of tests more fluid, in particular by simplifying the administrative procedures concerning test sites. The main problem today is the waiting time for the practical test, which has serious economic consequences because it requires additional driving lessons and delays access to the labour market for some candidates. In this respect, the Authority recommended the introduction of an individual online registration system (Law of 7 December 2020 on the acceleration and simplification of public action). Concerning «visible» car spare parts, which are protected under design and copyright law, and which therefore only the manufacturer can distribute to repairers, the Authority recommended, in a 2012 opinion, that this manufacturer monopoly be gradually lifted, to bring down the prices of these parts. Finally, following the privatisation of the motorway concession companies, the Authority made a series of recommendations aimed at improving the competitive operation and regulation of the sector.

It is the Authority's responsibility to monitor changes in the French economy as closely as possible. This is true of the «new frontier» constituted by the data economy. The Authority was quick to include in its analysis the competitive pressure exerted by online distribution on in-store sales. Digital technology is spreading to all activities. The role of data is emerging as the most substantial factor of change, including in sectors not initially associated with digital, such as healthcare or the automotive industry. A first joint study between the Authority and its German counterpart, published in 2016, analysed the challenges arising from the collection of data, and a second study, in 2019, drew up an overview of algorithms and the competitive issues raised by their use.

Data is the fuel for the emergence of large platforms. From an economic point of view, most of them can be analysed as two-sided or multi-sided markets. Their development relies on direct and indirect network effects. Moreover, platforms tend to practice vertical but also conglomerate integration, where data plays a crucial role. The acquisition of a mass of data can make this integrated offer even more difficult to compete with and create a lock-in effect.

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.

It has become necessary to develop, in parallel with competition rules, other instruments such as the Digital Markets Act («DMA»), adopted under the French Presidency, and aimed at complementing the repressive intervention of European competition authorities. The DMA will help promote compliance with competition law, and conversely, antitrust decisions will support the evolution of develop the DMA.

Sustainable development also requires the intervention of competition authorities. The Authority's ambition is to act within the framework of the objectives set by climate law at the national level and by the Green Deal at the European level. The Authority ensures that companies do not distort competition on these aspects, but also adopts a positive strategy to integrate the objective of sustainable development into the competitive analysis. In particular, it has contributed to the reflection undertaken by the European Commission, which took the initiative of examining how environmental objectives can be accounted for, particularly concerning the assessment of positive externalities, in the light of the conditions for exemption under Article 101(3) TFEU. However, the Authority needs to develop its decision-making practice to better understand the determinants of the competitive analysis on these subjects.

The Authority's intervention requires the use of all the procedural tools at its disposal, including the few new prerogatives given to it by the ECN+ Directive. Two recent decisions illustrate the use of various instruments in the fight against abusive practices by platforms. The first concerns Google's recognition of the related rights of publishers and news agencies. After a decision on interim measures in 2020, which imposed injunctions on Google, and a decision in 2021 imposing fines for disregarding several of these injunctions, in June 2022 the Authority accepted and made binding the commitments proposed by Google. In particular, Google committed to negotiating in good faith, communicating the information necessary for a transparent assessment of the remuneration, ensuring the neutrality of the negotiations, and giving them a broader scope. These commitments will be closely monitored by an independent trustee approved by the Authority. The second decision concerns the relationship between Meta and intermediaries in the online advertising market. In June 2022, the Authority accepted and made binding commitments from Meta to put an end to practices that could affect the conditions of competition in the market for non-search-related online advertising. Meta's behaviour was likely to distort competition between online service providers seeking to place ads on Meta's inventory. It was also likely to have foreclosure effects by weakening the competitive constraint of intermediaries, such as the petitioner, Criteo. The commitments are aimed at users of Meta's services established in France, but also at companies that would fall within the scope. These decisions illustrate the importance of the Authority's choice of the most appropriate procedural instruments depending on the behaviour it intends to sanction or correct.

Finally, the Authority is concerned about the proper articulation between competition law and other public policy objectives. Cooperation with sectoral regulators is essential to understand the interplay of players and the functioning of markets, particularly concerning data protection. For example, in March 2021, the Authority issued a decision seeking to strike a balance between the protection of personal data and the competitive functioning of the online advertising market. The Authority, relying on the opinion of the data protection agency, Cnil,, considered that there was no need to issue interim measures, as Apple's behaviour did not constitute an abuse of a dominant position. However, it continued to examine the case on its merits to verify that Apple had not implemented a self-preferencing practice. For the first time, the Authority found that «protecting the privacy of users» could constitute a «legitimate objective». The investigation is currently ongoing, in cooperation with the Cnil. ■