CPI TALKS…

…With Thomas Kramler

In this month's edition of CPI Talks… we have the pleasure of speaking with Thomas Kramler. Mr. Kramler is Head of the Digital Single Market Task Force in the European Commission's Directorate General for Competition.

Thank you, Mr. Kramler, for sharing your time for this interview with CPI.

1. Is the current antitrust framework well suited to deal with harm to innovation, especially in the context of the digital economy? Or put another way, how well do existing competition rules work in digital markets? Is there a need to adapt the rules?

The debate over whether competition law is capable of dealing with new market developments in innovative markets is as old as competition law enforcement. In 1958, when the competition provisions of the Treaty of Rome entered into force, the skateboard, and more importantly, microchips, which are today used in virtually every piece of electronic equipment, had just been invented. Evidently, the drafters of the Treaty of Rome could not have foreseen the technical developments that followed, such as the smartphone. However they wisely formulated Articles 85 and 86 of the Treaty (now 101 and 102 TFEU) in a manner that allows them to take into account technical developments and even turn them into a yardstick for the assessment of restrictions to competition under EU competition law.[1]

Every market is specific. The basic tools of European competition law (Articles 101 and 102 TFEU) have been crafted in a "technology neutral" way and can be applied to "new" or "old" markets alike. The European Court of Justice confirmed in *Telia Sonera*[2] that the application of EU competition rules cannot depend on whether the market concerned has already reached a certain level of maturity and that particularly in rapidly growing markets, quick intervention may be warranted to prevent harm to competition.

The history of EU competition law enforcement since 1958 shows that the basic EU competition rules are flexible enough to address technological developments. This is well illustrated by the examples of the *IBM* abuse of dominance case on mainframe interface information in the 1980s, which was settled in 1984, and the *Microsoft* interoperability abuse of dominance case, which was decided two decades later in 2004. Both cases addressed technological challenges of their time (mainframe and work group server interoperability) within the legal framework set out by the Treaty of Rome in 1958.

In the *Microsoft* case, the question of whether its refusal to supply interoperability information limited technical development, i.e., innovation by competitors in work group servers, was actually at the heart of the case and addressed extensively in the Commission's 2004 decision and the 2007 Court judgment. The case, which led to the emergence of an innovative open source competitor to Microsoft in the work group server operating system market, shows that EU competition law can effectively be applied to cases which concern innovation in technology markets.

1 See the references to the "promotion of technical progress" in Article 101(3) TFEU and to "limiting the technical development to the prejudice of consumers" in Article 102 (b) TFEU.

2 See C-52/09, *TeliaSonera Sverige*, para. 108.

EU competition rules as well as their application by the EU courts have therefore proved flexible enough to address technological developments. This does not, however, mean that antitrust enforcers should be complacent about new market developments. On the contrary: in order to remain relevant, the established enforcement principles need to be applied in the context of market realities and, where necessary, adapted in the light of these realities. Market features of digital markets, such as the growing importance of data and network effects and the provision of "free" services to consumers in two sided digital platform markets, can and must be factored into the assessment of conduct under EU competition law. The Commission's *Google Shopping* and *Google Android* decisions of 2017 and 2018 demonstrate this.

2. Do you think that the transatlantic antitrust differences, if any, will grow even more in light of the digital economy?

One should not overstate transatlantic differences when it comes to competition law enforcement. The overall goal, which is to protect competition in the interest of consumers, is shared across the Atlantic and there is a lot of very close cooperation between U.S. and EU enforcers and convergence in their approaches and outcomes for the vast majority of cases.

However, when it comes to monopolization/abuse of dominance cases, one has to acknowledge that the law on both sides of the Atlantic is somewhat different. Enforcement priorities might also differ, including in digital markets, and first and foremost, market conditions may be different. This can lead to different assessments of the need to intervene in certain markets.

More generally, I would say that the EU approach towards the actions of companies with considerable market power has, over time, been more skeptical than the U.S. approach. This is also reflected in EU case law, which refers to the "special responsibility" of a dominant undertaking not to allow its behavior to impair genuine, undistorted competition.[3]

3. Does the consumer welfare standard need to be changed to incorporate public policy considerations in light of the digital economy?

I would say that a consumer welfare standard interpreted in a way that takes into account not only price effects but also effects on competition in relation to other parameters, such as product quality and innovation, can fully cater for the challenges of the digital economy in terms of competition law enforcement.

Not to focus solely on price effects will be particularly important in two-sided digital platform markets where sometimes only one side pays and the other side is provided with a "free" service.

In such markets one should not readily assume that the side which receives the "free" service cannot be harmed through anticompetitive behavior in the absence of higher prices. Harm can also result from fewer available choices, a deterioration of product quality or an impact on distribution or product innovation.

In this respect, the EU courts have held that in two-sided markets, where the customers in those markets are not substantially the same, the restrictive effects of a measure in one market cannot be compensated by advantages for the other side, if the measure does not have any appreciable objective advantages for the first side.[4] In other words both sides need to benefit from the efficiencies of the measure in order to make it compatible with EU competition law.

A consumer welfare standard which takes into account factors such as impact on choice and innovation appears to be well suited for digital markets where many services are offered free of charge to consumers. On the other hand, EU competition rules appear less well suited to pursue policy objectives that go beyond ensuring undistorted competition to the benefit of consumers.

3 See C-413/14 P, *Intel*, para. 135.

4 See C-382/12 P, *MasterCard*, para. 242.

4. The OECD is studying whether the competition toolkit should be adapted to the digital economy. What are your views on this topic?

The work being done by the OECD on the toolkit is very much in line with the reflections and studies carried out on digital markets by many competition authorities around the world. Recently Commissioner Vestager decided to set up a panel of advisers from outside the Commission. Their objective is to seek input on what the key upcoming digital developments are that will affect markets and consumers, and on their implications for EU competition policy.

The panel is made up of Professors Heike Schweitzer, Jacques Crémer, and Assistant Professor Yves-Alexandre de Montjoye. They are working on a report on the future challenges of digitization for EU competition policy, to be delivered by March 31, 2019.

The Commission will also organize a conference on January 17, 2019 to discuss the topic with a broad variety of contributors. Additionally, the Commission is seeking contributions in particular from those stakeholders that are involved in or affected by the digitization of the economy.[5] The conference and the report from the Special Advisers are designed to provide input to the Commission's ongoing reflection process and to identify the key upcoming digital challenges and their implications for EU competition policy.

5. How do you view the pressure on competition rules to increasingly absorb public policy objectives like privacy or data protection?

Competition rules and data or consumer protection rules are complements and not substitutes. The objective of increasing consumer welfare overlaps, but different tools are deployed. It would be a disservice to competition law enforcement if one were to expect that its tools can solve privacy or consumer protection issues meant to be tackled through the enforcement of laws specifically designed for that purpose.

Instead of overburdening competition law enforcement with pursuing policy objectives it was not meant to cope with in the first place, it would be wiser to rely on the cooperation of competition law enforcers with data and consumer protection authorities in order to ensure the complementarity of enforcement activities in digital markets.

6. Which of the many debates around relatively novel issues (like algorithmic collusion, privacy as a parameter of competition, etc.) would you consider as most relevant?

One should be careful with predictions, especially about the future. However, one trend that is likely to impact competition law enforcement is the use of Artificial Intelligence ("AI") by companies in order to adapt pricing or products. As AI needs (big) data to properly work, it is possible that disputes will arise between companies about access to valuable data, or companies may merge in order to get access to such data. In these cases, the assessment under competition rules would likely need to examine the competitive value of data, which is not without challenges for competition law enforcers.

5 More information is available at http://ec.europa.eu/competition/scp19/.

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