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# CYBER COMPETITION: NEW CHALLENGES FOR ANTITRUST ENFORCERS?

**21 September 2017** - BRUSSELS

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General Court of the EU
Italian Competition Authority
Swedish Competition Authority
World Customs Organisation

# PROGRAM

17:00 REGISTRATION

17:15 WELCOME

**Claus KASTBERG NIELSEN** | Managing Director, Copenhagen Economics, Brussels

17:20 OPENING KEYNOTE SPEECH

**Ulf ÖBERG** | Judge, General Court of the European Union, Luxembourg

17:40 MARKET FAILURES IN THE NEW DATA ECONOMY: HOW TO FIX THE FLAW?

**Thomas RØNDE** | Professor, Copenhagen Business School

**Griet JANS** | Economist Advisor, Belgian Competition Authority, Brussels

**Alexandre DE STREEL** | Professor of EU law, University of Namur and CERRE, Brussels

**Mark POWELL** | Partner, White & Case, Brussels

*Moderator:* **Adina CLAICI** | *Director, Copenhagen Economics, Brussels* | *Visiting Professor, College of Europe, Bruges*

18:45 ENTREPRENEURSHIP: SHOULD ANTITRUST POLICY PROTECT NEW ENTRANTS?

**Svend ALBAEK** | Deputy Chief Economist, European Commission, Brussels

**Arvid FREDENBERG** | Chief Economist, Swedish Competition Authority, Stockholm

**Georgios PETROPOULOS** | Research Fellow, Bruegel, Brussels

**Geert GOETEYN** | Partner, Shearman & Sterling, Brussels

*Moderator:* **Liza LOVDAHL GORMSEN** | *Director of the Competition Law Forum, British Institute of International and Comparative Law, London*

19:45 CLOSING KEYNOTE SPEECH

**David BAILEY** | Barrister, Brick Court Chambers, London | Visiting Professor, King's College London

20:00 RECEPTION

# KEYNOTE SPEECH

# JUDGE ULF ÖBERG

This summary and the views expressed cannot be deemed to reflect the position of the speakers' institutions.

Judge Öberg discussed some challenges that the cyber economy poses to more traditional assumptions of competition analysis. The traditional antitrust approach in particular in brick and mortar economies is more or less static. Here economic analysis mainly focuses on price and quantity. Cyber competition challenges that toolbox due to the particular features of these markets, which include platform competition, multi-sidedness, relevance of innovation and data, or free services. What do we do when the competitive constraint may be written into the algorithm? How do we do when innovation is harder to predict and measure than price effects? These, and other difficulties, could explain why the Commission had, until recently, focused mainly on price effects, and ignored competitive constraints that could harm consumers in different ways. In the context of merger control this could mean a review of the notification thresholds involving innovative targets that have little or zero turnover. The idea behind is to prevent incumbent firms from buying-out competitive constraints or disruptive technologies. Of course, the main question remains unanswered. How do we relate the intensity of competition to the rate of innovation?

Cyber competition challenges the decisional practice and the case law that bases its analysis on price competition. How should we assess the payment of services with personal data? Companies offer services for free because they can collect data in exchange. Under what circumstance, if any, could the provision of free services be qualified predatory pricing? It also challenges the traditional tools to define the market. Can a zero-price market be a market at all? How can you define it? Should privacy and data protection be a value that concerns competition law? In Ulf's view, although the Court stated in an *obiter dictum* in *Asnef-Equifax* that any possible issues relating to the sensitivity of personal data are not as such a matter of competition law, this may not be the final word on this issue.

Judge Öberg's "educated guess" is that we are in a sort of a tipping point as to the very purpose of competition law and policy in cyber-markets. What are the consequences for both Courts? First, not only cyber-competition is fast moving but also highly technical. These two features challenge both Courts and agencies to act quickly. Second, and relatedly, the increase in settlements, together with an increased relevancy of NCAs, has led to a relative decline in competition law cases reviewed by the EU Courts. The Court of Justice will probably be seized of an increasing number of preliminary references to shape the direction in which competition enforcement will go. Thirdly, and perhaps more importantly, is the actual scope of judicial review that the EU Courts can carry out. There is a welcome departure from "economic complexity" arguments limiting judicial review, as seen i.a in *Impala, UPS* or *Intel* cases. Ulf recalled in particular the finding in *Impala*, namley that the inherent complexity of a theory of competitive harm does not, of itself, have an impact on the standard of proof which is required before the EU Courts. In this respect, some participants argued that the Court would need to grant longer hearings as a result of full judicial review. The administration of economic proof, the hearing of witnesses and the appointment of economists as experts to procedures before the EU Courts may need to be rekindled. Lastly, the length of procedures question the value of precedent in fast moving markets by the time the EU Courts render their judgement. ■


CE
CYBER COMPETITION:
NEW CHALLENGES
FOR ANTITRUST
ENFORCERS?

# PANEL 1

# MARKET FAILURES IN THE NEW DATA ECONOMY: HOW TO FIX THE FLAW?

**ADINA CLAICI** ❶

moderated the panel.

**THOMAS RØNDE** ❷

What is a market failure? Economists have thought about this issue for a long time. Thomas gave the economist's perspective of what constitute the basic sources of economic failure. One of the fundamental theorems of economics is that if markets are very competitive and there is symmetrical information, the market outcome is efficient in the sense that the situation of one person cannot be improved without hurting another person.

Competition in digital markets shows many sources of market failure. For instance, with very high fixed costs, there is only room for a limited number of firms in the market. In short, there is less fierce competition. Similarly, switching costs and network effects give large incumbents a competitive advantage vis-*à*-vis smaller entrants and result in market power. Network effects also result in coordination problems in the choice of technology. In this regard, the guarantee that the market picks the "right one" is no longer there, and it might simply be the reflection of first-mover advantages in technology. Furthermore, even if a better technology were to come up later, this would require coordination from consumers to achieve successful entry.

We should aim for competition *for* the market. New entrants must have the possibility to enter the market and challenge the incumbent. The need for competition policies in this regard is high, with particular attention to compatibility requirements, standards, property rights, and data access.

**ALEXANDRE DE STREEL** ❸

Antitrust is mainly there to solve the market failure of market power. To assess market power in the digital economy, how should we characterise data? Is it like oil? An input? A currency? Data is non-rivalrous, thus it cannot be like oil. Data is more a general purpose input. Data is an "infrastructural resource" for data driven innovation (OECD, 2015). If we agree that data is an infrastructure, the next question is how to assess market power. We should leave the traditional idea of output markets, which focuses on prices, but rather focusing on the input, i.e. what is needed for innovation. In this respect, the Commission's analysis in *Dow/DuPont* is very interesting. It goes upstream in the value chain thereby focusing on the capabilities for innovation instead of what is being produced as an output. Focusing on output too much might give raise to a fallacy, perhaps as in the *Facebook/WhatsApp* decision, where the Commission focused on the output market (social networks, communication market…) and not so much on data for being an input.

If data is not sufficiently available, the obvious remedy is to share it. The non-rivalrous nature of data decreases the cost of data sharing to certain extent. Is not like tangible infrastructure, where sharing does not lead to loosing it. Although there is little debate on exploitative abuses, there still is some pressure on NCAs to do something about it. In Alexandre's view, this is very dangerous because is more about regulation than competition policy.

In the digital economy market failures manifest themselves in a different way. If we talk about consumer protection, the traditional asymmetrical information of the consumer vis-*à*-vis the producer has been reduced through reputational systems. However, in there is another type of asymmetry of information regarding the use of personal data that has not been yet solved, and that would require to that end more transparency.

Thus, most of the renovation and adaptation needs need to be done in the field of regulation and not in competition policy. In this regard, regulation needs to be principle-based since very detailed regulation gets easily out-dated by the high pace of technological advancements. The problem that principle-based regulation decreases legal certainty can be solved with soft law instruments, guidance papers and case law.

**GRIET JANS** ❹

Besides the potential harms big data might bring along in competition, it is important to stress that Competition authorities also benefit from the Big-Data evolution. In particular it has switched the way in which competition authorities analyse markets.

Turning to the potential theories of harm related to big data from an economic perspective, in merger control, one might for example investigate whether or to what extent the merger leads to being in possession of a "super" big data set, by adding up or combining the existing data sets of the merging companies, which might in a worst scenario lead to the situation where the market will tip. Here it is important to evaluate whether this data set of the merged entity is unique, and to identify to what extent access to this data is essential for competitors to be able to compete on an even playing field, and how easy or difficult and costly it is to duplicate these data.

Still in merger control, another potential harm is related to network effects, arising when a product becomes more valuable as more people use the product. Increased network effects in itself are not an infringement, but they may raise competition concerns if they allow the merged entity to foreclose competitors and make it more difficult for competing providers to expand their customer base.

Another concern relates to the anticompetitive exchange of information between competitors through Big Data. Greater volumes of data and more transparency in a market mean more opportunities for tacit or explicit collusion. Related to this, one might need to consider the possibility that computer programming could be used to take part in anticompetitive conduct, for example, using a common algorithm to fix prices. So as an Authority, we have to be aware of the potential competitive dangers related to machine learning and data analytics.

Overall, these theories are not that different from those in the traditional sectors. The big difference is the translation to the digital markets and getting a good understanding of the company's business model and competitive environment, which e.g. in the case of multi-sided platforms and network industries might be very different from traditional sectors. We sometimes may have to develop new ways of delineating markets, assessing market power, understanding pricing models and so on.


## MARK POWELL ❺

Are competition rules better placed than regulation rules to deal with market failures? Judge Oberg has already given the answer. It lies at the "glacial" pace at which competition rules are enforced. Intel's rebates began in 2005, the European Commission made a decision in 2010, the GC delivered its judgment in 2015, the Court of Justice in 2017, and we can expect another 3-4 years until the GC hears the case again. That is a total of 16 years. At this pace, if today there were to be an evil algorithm discovered we would not get a decision until 2033.

Second, if you apply competition rules to this grey area one must be aware in the unintended consequences in trying to fill in the "gaps". Competition rules are quasi-criminal and give raise to very significant penalties.

Mark suggests importing the market regulation inquiries from the UK to beef up the market inquiries of the European Commission. They allow the authority to take a close look at the market and then make recommendations.

## DISCUSSION AND Q&A

Alexandre thought that big-data helping enforcement is very important. The next frontier is enforcement by technology. What kind of regulation? Transparency on the data is what is needed, not how the algorithm manipulates it.

Thomas sought to set common ground and argued that we do not want dominance that is the result of being better yesterday and not the result of being better today. Transposing the underlying idea of number portability from a telecom company to another, data on social media should also be portable as the user is the owner of its own data and he who makes it useful. In merger policy, this area is particularly difficult. How do you give the next entrant the possibility to enter the market when the most profitable way of exiting the market is being acquired?

Mark agreed with Alexander's idea of going up the value chain, but considered that in practice that is a very difficult exercise filled with much uncertainty. In merger control, for example, it is very difficult to figure out what the acquiring and the target companies have (and other what competitors have).

The concern is how to apply competition rules when it is one algorithm colluding with another algorithm. Mark dispelled the concerns regarding algorithms is that almost certainly there will always be some peripheral evidence of human colluding behaviour (as in the Football posters case in the UK).

Alexandre reacted to several questions from the audience relating to data as infrastructure and the potential incentives and privacy problems arising from a remedy based on access. In Alexandre's view, the main difference with the Bronner line of case law and the essential facilities doctrine is that it deals with rivalrous goods. Quite to the contrary, data is non-rivalrous, and this has important consequences. Namely, the cost of sharing data is less important. And also, that we should "revisit the concept of essential facilities", which were developed for infrastructures that were not so essential in the economy and were rivalrous goods. Lastly, privacy issues must be solved when the remedy imposed is to share access to the data. The supervision of this remedy cannot fall upon a competition authority as they are clearly badly placed to do so. This would require some sort of regulatory system. Mark considered that since the entry into force of the Data Base directive, the higher standard set in the case law on access to IP rights is applicable to data since the directive puts data under a level of protection similar to an IP right. ■

# PANEL 2

# ENTREPRENEURSHIP: SHOULD ANTITRUST POLICY PROTECT NEW ENTRANTS?

### LIZA LOVDAHL GORMSEN ❶

moderated the panel.

### SVEND ALBAEK ❷

Svend talked about facilitating entry through competition enforcement. He discussed the recent Amazon case, where Amazon had introduced several parity clauses in its contracts with eBook publishers. Some agreements had plain-vanilla price parity clauses. Some other contained discount pool provisions, where if a price was lower on another retailer Amazon would get some money from the publisher that it could subsequently use to discount itself. In the end, the Commission concluded that these discount pools had similar effects as price parity clauses. There were also several non-price parity clauses. One type was the so-called business model parity clauses, by which an eBook publisher had to offer Amazon the same business model that it had agreed with other retailer. There were also selection parity clauses where Amazon had to give equal treatment regarding the catalogue, formats, and release dates of titles. Sometimes there were also cooperation obligations meaning that publishers had to make books compatible with Amazon's Kindle format. As a consumer, you could basically not find any book anywhere that was not also on Amazon or any book at a lower price on another platform or reseller. So why should the customer bother search anywhere else than Amazon?

This scheme would seem to make it very difficult for new competitors to enter. In the end, Amazon gave commitments, which meant it eliminated all these clauses from the contracts. This case went very fast. The Commission opened proceedings in June 2015 and in May 2017 the Commission issued its commitments decision, leading the market to be open. Of course, it remains to be seen whether any firm will be able to challenge Amazon.

### ARVID FREDENBERG ❸

Internet giants have caused some problems for competitors. Schipsted Media Group owns two Swedish portals for selling used cars, Blocket (a major second hand market) and Byt Bil. There are a couple competing portals for the add placement of car dealers adds. Car dealers complained because Blocket forced them to place their adds on both Blocket and Byt Bil, when they were only interested in doing it on Blocket. This tying could have caused problems for competing portals. During the investigation Blocket came to the Swedish Competition Authority and suggested to change their business model and make the Byt Bil add placement optional, which led the agency to close the case. On pizza delivery, Online Pizza started in 2008 and is now owned by Delivery Hero. The Competition Authority received a complaint from a competing pizza delivery portal in a small town complaining that overnight they lost all of their affiliated restaurants. The restaurants left because Online Pizza seemingly required some sort of exclusivity from them to appear in its platform. If multi-homing on competing platforms was hindered there could be competition problems. Eventually, Online Pizza clarified the clause in the contract that had led to a misleading interpretation of exclusivity and the case could be closed.

### GEORGIOS PETROPOULOS ❹

Georgios considered that vertical restraints have been largely discussed but not from the e-commerce perspective. This is particularly interesting because e-commerce incentivises new firms to enter and be active in the online market. On the one hand, the cost of setting up an online shop can be viewed as an attractive investment in comparison to a brick and mortar shop. On the other hand, the geographical constraints are not so visible. A firm can open an online shop and have consumers coming from different regions and countries. Clearly, dynamic entry is something already observed in e-commerce markets.

However, we also observe new vertical restraints. The traditional theory following the Chicago School points out that efficiency and coordination gains come from these vertical restraints. A more modern neoclassical approach points out the concerns of foreclosure, collusion, etc. Firms constrain access to marketplaces, price comparison tools, manufacturers impose constraints on retailers, etc. These constraints could discourage entry for a small company that have a trampoline access to the market through these resources. This produces economic costs. A study written by Copenhagen Economics concludes that access restrictions to online marketplaces put at risk €26 billions for SMEs.

The solution is close coordination between competition policies with digital policies towards the implementation of quality standards for online marketplaces and price comparison tools that will minimize the justified reasons for associated vertical restraints without hurting the manufacturers of the branded goods.

### GEERT GOETEYN ❺

It is a valid question to ask whether, under the current merger control regime, there is a risk of not being able of reviewing cases where the lack of turnover of small innovative companies allows their uncontrolled acquisition by big incumbent firms.

But for a number of reasons, the idea of imposing a value threshold designed to catch those acquisitions, does not seem to be a good way of solving the risk. Would it help small innovative companies to have a regime where their acquisition can be reviewed by competition authorities? Many of these small companies enter with the business model of being bought a several years down the line. In this respect, the value-based threshold creates as well a lot of uncertainty that may make mergers less attractive. The first evident reason is the calculation of value, which is not straightforward. Secondly, in combination with the value-based test you need a local nexus test. How do you do establish jurisdiction in a digital market where it is not easy to find the link local link (number of downloads, number of users, etc.)? And thirdly, a value-based test would have a number of unintended consequences. One might be indeed that it does not help start-ups, or a flood of non-problematic notifications. In this regard, some of the cases reviewed, like the *Facebook/WhatsApp*, the referral system allows for many of these deals to be captured. The referral system does not only allow parties to ask but also the authorities can refer to the Commission.


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## DISCUSSION AND Q&A

Liza asked Svend about the "not yet as efficient competitor test." What does the Commission do to help new entrants? Svend answered that maybe we should help them by leaving them alone. The Commission is trying to avid creating red tape for new entrants. De minimis rules, state aid de minimis rules, etc. rules based on market shares, as long as new entrants stay away from hardcore restrictions, they can do a lot. In the Guidance Paper, paragraph 24 the Commission states that it "recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency." Svend would be reluctant to apply this threshold to predatory pricing or margin squeeze behaviour, but not to rebates.

Participants in the audience raised questions regarding the practicability of a "reasonable efficient competitor test." There was consensus as to the difficulty of carrying out such analysis, even in regulated industries where the regulators have lots of data. In the context of protecting less efficient competitors, Geert considered that the Intel judgment makes several healthy statements. Dominance in itself is not an issue. A dominant company that competes less efficient competitors away of the market is a natural thing. By reference to *Post Danmark I* it establishes that it is right to carry out pricing test in a rebate analysis. By referring to *Hoffmann LaRoche*, that there are certain rebates that presumably have an exclusionary effect, the categorization remains. However, the presumption is rebuttable, and parties can show why the conduct is not capable of having an exclusionary effect. Has the court gone as far as saying that we need to the actual effects? In Geert's opinion that is not the case. However, if the parties go to the Commission with an effects analysis the Commission and the Courts cannot avoid looking into the evidence presented by the parties.

Georgios highlighted that in the online world there are new competitive restraints that did not come up in the offline economy. For example, restrictions to sell in online marketplaces and to use price comparison tools. In his opinion, there is a need to update the guidance on vertical restraints. In online sales, how to discriminate between active and passive sales? How do we treat restrictions on platforms? Are restrictions to appear in a price comparison tool to be regarded as by object restrictions? ■


## CLOSING KEYNOTE

# DAVID BAILEY

Professor David Bailey began by referring to *The Economist* describing digital data as the world's most *valuable* resource. Data is valuable for us as individuals and consumers; it is valuable for businesses in terms of developing ever-more personalised advertising; and it may also contribute to the development of artificial intelligence. Of course, some data is more valuable than others.

Not only is data valuable, it is also increasingly voluminous. It has been predicted that the *volume* of data created will reach 180 Zettabytes in 2025! Hence, the term 'big data'.

In the data-driven digital world we live and work in, things also move with unprecedented speed and *velocity*. The *Microsoft* case of 2004 endorsed the idea that no streaming media player would be able to enter and compete with Windows Media Player if consumers had to 'download' rival media players, whereas WMP came bundled with Windows. The idea of downloading being too slow and too cumbersome no longer rings true in an age of smartphones, tablets and apps.

David discussed two cases involving cyber competition, but that were based on a conventional economic theory of "leveraging" or extending market power from a dominated market to a closely related or neighbouring market.

The first was the *Microsoft/LinkedIn* merger case in 2016. *Microsoft* paid an eye-catching amount to acquire LinkedIn, some €26 billion. That money was not paid for capital, brands or intellectual property; rather, it was paid to acquire user data and its revenue-earning potential. Another remarkable feature of the case is that, even in 2016, *Microsoft* still has 80%-90% of PC client operating systems in Europe (i.e. Windows), and 90% of productivity software solutions (i.e. Office). So it still has a very strong position. David focused on one of the theories of harm investigated by the European Commission, namely conglomerate effects. Conglomeracy has been controversial over the years, but this case shows that conglomerate effects are "alive and kicking". The Commission found that *Microsoft/LinkedIn* would have the technical ability and commercial incentive to pre-install LinkedIn with its ubiquitous Windows operating system. The Commission also found that this behaviour would be likely to significantly impede effective competition due to network works, or more accurately "network effects on steroids". Put shortly, the more professionals that use LinkedIn, the more valuable it becomes to other members of LinkedIn and the more attractive it becomes to non-members of LinkedIn. The Commission's concern was that a tipping point might be reached, where other competing professional social networking platforms would be unable to compete with the merged firm. In the end, the merger was cleared because *Microsoft* gave commitments not to do the very things that the Commission was worried about.

The second case David examined was the high-profile *Google Shopping* case, in which the Commission imposed a €2.42 billion fine on Google Inc for giving its comparison shopping service an illegal advantage on its search engine results pages. One of the interesting questions that arises from the decision is what theory of harm underpins the Commission's decision? As a separate, but related, matter what is the limiting principle? David came up with four. The first is that such behaviour might be said not to be competition on the merits. That expression is easy to say, but can sometimes be difficult to pinpoint in real-life. A second explanation is to characterise Google's conduct as being discriminatory, a theory and practice that applies as much in the offline as in the online worlds. The trouble with that explanation is that it might imply that there is a duty on dominant firms not to discriminate at all, which could inhibit welfare-enhancing behaviour. A third theory is that the *Google Shopping* case is all about access to Google's flagship product: www.google.com. If that is right, then the Commission would have to show that Google's search engine is "indispensable" for comparison shopping services. The Court of Justice defined "indispensability" narrowly in *Bronner*, specifying that one would only exist where access to the facility is essential to an ability to compete on the secondary market and it is uneconomic to duplicate that facility. A fourth way of possibly explaining the *Google Shopping* case is to go back to the principle emanating from the Court of Justice's judgment in *Télémarketing*. That principle is that it is an abuse for a dominant firm to seek to reserve a secondary market to itself, and it might be suggested that Google had reserved the comparison shopping services market for itself.

In conclusion, David suggested that there is a case for timely and judicious intervention under the competition rules in the digital world. He also commended the e-commerce sector inquiry as a valuable way to discover what firms are doing online, how they distribute their products, and so on. It can sometimes be useful to listen and learn first, before deciding whether to intervene.

In the final analysis, it is going to be fascinating to see whether the digital world will be characterised by Schumpeterian "perennial gales of creative destruction" or will be dominated by a few, digital monopolies. ■

# TESTIMONIALS

« The conference provided a comprehensive look on a complex topic, including both legal and economic perspectives as well their connection.
The panel supplied great expertise allowing all participants to engage in interesting discussions. »

**MAXIMILIAN LANGER,** Copenhagen Economics

« The event was both well organised and with interesting panels. »

**ALON NEUMANN,** Flint Global

« Well-balanced panel providing high quality insight into what is currently one of the most relevant issues for all antitrust lawyers. »

**PAWEL ZUKOWSKI,** Berwin Leighton Paisner

« It was a great event with high quality discussions. The speakers of the panels made concrete recommendations about how we can make digital markets more competitive and how we can facilitate market entry. A lot of food for thought. »

**GEORGIOS PETROPOULOS,** Bruegel

« A very interesting conference to participate in. Lively and informed discussions of a hot issue in competition policy. »

**THOMAS RØNDE,** Copenhagen Business School

# VIDEOS

**During the conference, some of the speakers summarized their speeches in short videos. These can be watched at concurrences.com (Conferences > 21 September 2017).**


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