
6 December 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

COMPETITION AND DEMOCRACY

Contribution from BEUC

-- Session I --

7-8 December 2017

This contribution is submitted by BEUC under Session I of the Global Forum on Competition to be held on 7-8 December 2017.

JT03424335

Why Competition Law Must Protect Democracy - A European Perspective¹

1. Open Markets Fuel Democracy

1. The relationship between competition law and democracy has often been relegated to a theoretical discussion without being necessarily considered in the enforcement activities by antitrust agencies. This is because the debate around pursuing higher societal values by means of antitrust enforcement has been disregarded by the current theory that informs the economic and legal analysis of the cases under investigation.
2. Antitrust and democracy have much more in common than what is often perceived. In a well-functioning market economy, any company should have the same possibilities to offer their products and services to consumers. And every consumer should be able to choose from all available products and services according to their own expectations and needs.
3. The freedom to choose enhances the realisation of our democratic values. Consumer choice steers the economy in the same way as citizens' votes influence political processes². This is because people express their freedom through the ability to make decisions. And this is a common feature for all markets and human behaviors.
4. Thus, companies engaging in anti-competitive behaviours foreclosing the market from competitors undermine consumers' freedom to make decisions in the same way voter restrictions prevent citizens from participating in the political life of their community. The reason is simple: we all share the basic need to make our own decisions as free men and women.

2. Market Concentration Threatens Democracy

5. Market concentration leads to a restriction of consumer choice and the freedom to choose. Even if under certain circumstances monopolies - in the broad sense – can be justified (due to natural barriers) or are needed to pursue a higher goal (e.g. administration of justice) they should be avoided as much as possible and authorities must do their utmost to prevent the concentration of market power in the hand of a few.
6. In some sectors, the impact of market concentration on democracy is more evident than in others. Take for example the concentration that took place in the last decades in the media sector and which led to the establishment of a number of media conglomerates³. When a handful of companies have the power to control the public

¹ Agustín Reyna.

² Böhm F. (1971), "Freiheit und Ordnung in der Marktwirtschaft", ORDO, Bd. 22.

³ Hoynes W. (2002), "Why media mergers matter", Open Democracy, https://www.opendemocracy.net/media-globalmediaownership/article_47.jsp [accessed on 5 December 2017]

opinion it becomes more difficult for people to make informed choices and vote with their feet.

7. The reason for the rapid concentration of the media sector was well-explained by US Senator Wellstone when debating the proposed acquisition of CBS by Viacom: “*One problem with this merger is that it would increase the pressure on other firms to do the same, accelerating the momentum towards further concentration in the industry*”⁴. And this is exactly the trend that we have seen in both sides of the Atlantic. If 21st Century Fox completes the takeover of Sky, Rupert Murdoch would bring together two of the most powerful broadcasters in the world⁵. Similarly, AT&T is on its way to acquire Time Warner which would lead to a vertical integration of content production and distribution⁶.

8. But the threat to democracy from market concentration does not concern only the content industry. It is a common pattern for many markets. Since Facebook bought Instagram and WhatsApp there has been very little competition from new entrants in the respective markets. Google has not stayed behind by strategically acquiring companies that allow them to strengthen its market power in search and advertising⁷. This resulted on consumers being forced to engage with these few companies if they want to have a digital life. In the last years, it has become almost impossible for consumers that get online to avoid dealing in one way or the other with Google, Facebook, Amazon or their various subsidiaries and controlled companies or products. This means that even if consumers perceive that there is a wide range of companies out there on the net, in reality the choice is very limited.

9. Thus, restricting consumer choice by reducing the number of competitors (e.g. by means of mergers and acquisitions or abuse of dominant positions) or unduly influencing people’s decision-making processes (e.g. by creating a false perception of choice and competition) undermine our basic freedoms. It is therefore the responsibility of antitrust bodies to act against these threats.

3. The Values that Inform EU Competition Law Enforcement

10. The main legal basis of EU antitrust law is found in Articles 101 (anti-competitive agreements) and 102 (abuse of dominant position) of the Treaty of the Functioning of the European Union (TFEU). These provisions set the conditions to establish whether a

⁴ Wellstone P. (2000), “Growing Media Consolidation Must Be Examined to Preserve Our Democracy”, Federal Communications Law Journal, Volume 52, Issue 3, Article 7, page 553

⁵ The Guardian (2017), “All you need to know about Fox's Sky deal”, available at <https://www.theguardian.com/media/2017/jun/29/all-you-need-to-know-21st-century-fox-sky-takeover-deal> [accessed on 5 December 2017]

⁶ The Washington Post (2017), “AT&T wants to close its deal with Time Warner. But first, it has to go through this guy”, available at https://www.washingtonpost.com/news/the-switch/wp/2017/11/02/att-wants-to-close-its-deal-with-time-warner-but-first-it-has-to-go-through-this-guy/?utm_term=.4bec50ca586d [accessed on 5 December 2017]

⁷ Wired (2017), “If you can't build it, buy it: Google's biggest acquisitions mapped”, available at <http://www.wired.co.uk/article/google-acquisitions-data-visualisation-infoporn-waze-youtube-android> [accessed on 5 December 2017]

certain behavior distorts or is likely to distort competition in the Single Market and therefore should be prohibited.

11. These two articles are often read as standalone provisions and therefore competition bodies and courts limit their enforcement activities to the purely legal and economic assessment of the practice under scrutiny. This situation has recently led to many debates about the role of antitrust enforcement to protect other values or highest public interests. From a European welfare perspective, the starting point of these other values are the European Treaties.

12. Article 2 of the Treaty on the European Union (TEU) sets the founding values of the EU and consequently those that have to be guaranteed when making and enforcing both EU and national laws:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

13. This Article is not only a political and symbolic statement but has concrete legal effects for the EU and its Member States⁸. In the context of EU Competition law enforcement we can explain this from two perspectives:

14. First, in relation to the objectives of the European Union. According to Article 3 TEU *“the Union's aim is to promote peace, its values and the well-being of its peoples”*. This means that the EU institutions when fulfilling their tasks as defined by the TFEU must observe the protection and realisation of the European values. This has two dimensions: on one side, a negative dimension by prohibiting any EU action contravening the European values and, on the other side, a positive dimension by promoting through the EU's activities those values and the well-being of all Europeans.

15. Secondly, in relation to the means to be used to achieve the objectives of the European Union. The TEU mandates the establishment of an internal market which shall be founded on a *“highly competitive social market economy”*⁹. Such task is an exclusive competence of the European Union by *“the establishing of the competition rules necessary for the functioning of the internal market”*¹⁰. For the EU legislator and the European Commission (as antitrust enforcer) as well as for the national competition agencies this means that the adoption of EU law and its enforcement must be oriented to the achievement of the objectives established in Article 3 TEU.

16. Therefore, even if there is no explicit mentioning of the EU values in Articles 101 and 102 TFEU, they must be taken into account when interpreting and enforcing such provisions.

17. A closer look at the case law of the Court of Justice of the European Union points at this direction. In *T-Mobile Netherlands*, the Court echoing the opinion of Advocate General Kokott stressed that competition law aims at protecting the structure of the

⁸ Piris J-C (2010), *The Lisbon Treaty, A Legal and Political Analysis*, CUP, Cambridge, page 71

⁹ Article 3(3) TEU

¹⁰ Article 3(1)(b) TFEU

market and thus competition as an *institution*¹¹. This entails the protection of competitive markets as a public interest objective¹², which is superior to the interest of individual undertakings. This explains why the Court considered in *Post Danmark* that Article 102 TFEU (ex-82 EC) covers not only practices that directly cause harm to consumers but also practices that cause consumer harm through their impact on competition¹³.

18. Freedom, democracy and the respect for the rule of law and human rights are values that can be guaranteed when everybody has the same chances to participate in an open and competitive market. This happens, for example, when companies are not discriminated by those enjoying a dominant position and consumers have the possibility to choose between products and services of different qualities and prices and from different providers.

19. Therefore, a company in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market¹⁴. This well-known principle of the enforcement of Article 102 TFEU expresses the idea that companies that are able - because of their market power - to undermine competition as the institution expressing the values that shape our common market must do their utmost not to do so. Contrary to what has been argued against the European antitrust enforcement tradition¹⁵, this is not about the protection of competitors but the protection of the institution of competition and therefore the European values of freedom, democracy and respect for the rule of law and fundamental rights.

20. A more recent case of the European Commission against Google stresses these ideas¹⁶. Google has harmed consumers by systematically favouring its own services and not showing to them the unbiased results that correspond to their search parameters.

21. As a gatekeeper, Google is not only limiting which companies can reach customers through its search services but also the ability of consumers to find what they are looking for. Due to Google's manipulation of search results, consumers are meant to believe that the results they see on the screen correspond to their search parameters when in reality they see only what is best for Google¹⁷. Thus, we can argue that this behaviour is not only incompatible with Article 102 TFEU and the special responsibility Google has

¹¹ Judgement of 04 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-08/08, EU:C:2009:343, paragraph 38 and Opinion of Advocate General Kokott delivered on 19 February 2009, EU:C:2009:110, paragraph 58

¹² Judgement of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83, paragraph 22 and Judgement of 22 October 2002, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, C-94/00, EU:C:2002:603, paragraph 42

¹³ Judgement of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, C-209/10, EU:C:2012:172, paragraph 20

¹⁴ Judgement of 09 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, C-322/81, EU:C:1983:313, paragraph 57

¹⁵ Lee-Makiyama H. (2016), "Protecting competition, or competitors? - Europe's pursuit of Silicon Valley", available at <http://www.opennetwork.net/protecting-competition/> [accessed on 5 December 2017]

¹⁶ European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service" (Press release, 27 June 2017) IP/17/1784, available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm [accessed on 5 December 2017]

¹⁷ Reyna A. and Martin D. (2017), "Online Gatekeeping and the Google Shopping Antitrust Decision: The Beginning of the End or the End of the Beginning?", *European Competition and Regulatory Law Review*, 3/2017, Symposium on Google Search (Shopping) Decision, available at <https://ssrn.com/abstract=3056713> [accessed on 5 December 2017]

as a dominant player but also runs against the values protected under Article 2 TEU by limiting consumers' freedom to choose products based on unbiased information.

4. Challenges for Antitrust Agencies

22. The main challenge for antitrust authorities is to abandon the idea that market efficiency is the ultimate goal of competition law enforcement. On the contrary, market efficiencies should be seen as a means to achieve open markets that serve the establishment of a democratic economic order¹⁸. This does not mean taking on new competences or re-shaping their powers but to re-think the theoretical background that has been used in their enforcement activities. This means integrating in their theories of harm or welfare standards those values that can be undermined by certain behaviors of firms.

23. Take for example the case of 'fake news' or the disinformation of the electorate by facilitating the mass dissemination of factually inaccurate information. Is this an antitrust issue? Probably not if we look at it only from the viewpoint of market efficiency. But, what if this facilitation of mass disinformation is related to how markets are structured? What if journalistic sources are foreclosed by a dominant platform in a way which is incompatible with Article 102 TFEU?

24. Sally Hubbard rightly noted that *"although fake news' outrageous nature plays a major role in their virality, ignoring the role of Facebook's design features that deter users from clicking to legitimate news publishers' sites is missing an important contributor to the problem. And it overlooks how the fake news problem is in large part a competition problem."*¹⁹

25. So why antitrust authorities have not picked up this case? It is a matter of political will or the difficulties around framing this case as an antitrust issue? I would be inclined for the later reason and here is where the authorities need to carefully evaluate their function as guardians of the values that shape our society and can be undermined by anti-competitive practices.

5. The Antitrust's Soul

26. Ariel Ezrachi and Maurice Stucke in a recent editorial enquired about the ultimate function of antitrust: *"Is antitrust solely about promoting some form of economic efficiency or the welfare of the powerless?"*²⁰. The answer to this question, according to them, would depend on the type of society we want to live in and the values we want to promote.

¹⁸ Deutscher E. and Makris S. (2016), "Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus", *CompLRev* 11(2), p. 189

¹⁹ Hubbard S. (2017), "Why Fake News is an Antitrust Problem", available at <https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#1cd1f94a30f1> [accessed on 5 December 2017]

²⁰ Ezrachi A. and Stucke M. (2017), "The fight over the antitrust's soul", *Journal of European Competition & Practice*, available at <https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpx070/4600093> [accessed on 5 December 2017]

27. And indeed, as seen above, the Europe Commission as the EU's antitrust enforcer and the Member States' national competition authorities are expected to defend the values that legitimate the existence of the EU. Values that must craft the policies and activities aimed at the establishment of a single market based on a social market economy.

28. We must abandon the idea that the sole role of antitrust is to secure economic growth and market efficiencies. Antitrust plays a more vital function which is to ensure that firms in their aim to maximise profits and gain market power do not undermine the basic values of a democratic society. Open and competitive markets is what allows both companies and consumers to participate in the economy and, ultimately, in a democratic life.

29. It is time to rescue the essence of antitrust and put it into practice. This will not be an easy task after decades of unyielding antitrust enforcement but it is a battle that is worth fighting. This is because the fight over the antitrust's soul is, after all, a fight for our democratic values.