



# CPI Antitrust Chronicle

February 2015 (2)

**What Agenda for the Newly  
Appointed EU Competition  
Commissioner?**

Mario Todino

Gianni, Origoni, Grippo, Cappelli &  
Partners

# What Agenda for the Newly Appointed EU Competition Commissioner?

Mario Todino<sup>1</sup>

## I. INTRODUCTION

The purpose of this article is to discuss the objectives that the newly appointed EU Competition Commissioner Margrethe Vestager should prioritize. We first argue that the new Commissioner will have to face some significant challenges, especially: (i) a relatively novel one, that is how to resist interference and navigate through the multilayered Commission devised by the newly appointed President, Mr. Juncker; and (ii) a usual one, namely how to stay consistent with the tradition of a vigorous enforcement action driven by a competent and efficient Directorate General, while avoiding being “captured” by the DG.

We then argue that a couple of relatively simple reforms may significantly improve the Commission’s current enforcement model without causing much disruption, specifically (i) introducing (non-mandatory) deadlines with a view to shortening the average duration of the antitrust investigations and (ii) strengthening the role of the Hearing Officer to oversee not only procedural issues, but also the substance of DG Comp investigations.

## II. VESTAGER AGENDA VERSUS JUNCKER AGENDA?

As is customary with the appointment of a new EU Competition Commissioner, over the last months the Antitrust Community has been vocally discussing what priorities Ms. Vestager should pursue.

The first challenge the new Commissioner will have to overcome is how to navigate through the multilayered Commission devised by the newly appointed President, Mr. Juncker.

Traditionally, Competition has always been one of the most powerful and independent portfolios within the Commission, often run by heavy-weight characters strong enough to resist intrusions from their peers. As the Competition portfolio’s core competence is enforcing competition rules in a quasi judicial manner; the less interference from other stakeholders—possibly more politicized—the better it is.

This time, though, the risk of interference is higher since Mr. Juncker has provided in his mission letter compelling guidelines detailing working methods and sectors to be prioritized in Ms. Vestager’s enforcement actions. And while from a purely political standpoint this initiative may be inspired by a laudable attempt to portray the new Commission as a more transparent and collegial institution than in the past, whether this will be good for Competition is yet to be seen,

---

<sup>1</sup> Partner, Gianni, Origoni, Grippo, Cappelli & Partners, Brussels.

for in his address the President mentions delicate issues which have often been regarded as taboo by antitrust purists.

To begin with, the new working method that Mr. Juncker is planning to implement, where a number of vice-presidents are entrusted with coordinating tasks over peers in charge of heavy portfolios, including competition, will not necessarily work well in competition matters if the effect is to the detriment of timeliness and impartiality. At best we could see a delay in the decision-making process because of the extra layers of stakeholders involved in the process; at worst, an escalation of political interference conveyed through cabinets more prone to receive inputs inspired by national interests.

Mr. Juncker's reference to industrial policy is equally worrying, for it seems to advocate a more prominent role for a factor that typically has no place in competition enforcement. Further, it may significantly pollute mainstream enforcement whose sole aim should be the protection of a competitive marketplace to the ultimate benefit of consumers and society as a whole.

The areas most exposed to interference are merger control and state aid, where selfish national interests, disguised under more palatable labels (e.g. the competitiveness of European industry), may resurface to advocate a special treatment for indefensible cases (rescue aids to inefficient firms or anticompetitive concentrations) capable of causing significant harm to European consumers and tax payers in the long run. Needless to say, Ms. Vestager should resist this contamination, for history has taught us that relaxing the application of competition rules in times of crisis ends up exacerbating the hardship.<sup>2</sup>

So it is key that both the multilateral working method and the industrial policy considerations do not affect enforcement activity, but stay confined to regulatory and legislative initiatives, which in the competition field should be relatively limited after the recent finalization of a number of important projects (the private enforcement directive, the streamlining of the merger control process, modernization in state aid). In this respect, an area of state aid policy that would deserve some fine-tuning is regional aid to large investment projects ("LIPs"), whose recent reform in 2013 may have excessively toughened the Commission's policy by giving the instrument little appeal to large firms—the only ones which may have the financial means and the ambition to launch significant industrial investments in the European Union.<sup>3</sup>

---

<sup>2</sup> See in this respect the telling examples of the United States during the Great Depression, and Japan during the recession in the '90s. In the case of the United States, competition rules were basically suspended when the National Industrial Recovery Act ("NRA") was adopted on June 1933. Several commentators found that the NRA was an important factor in slowing the recovery. See C. Shapiro, *Competition Policy in Distressed Industries*, Remarks as Prepared for Delivery to ABA Antitrust Symposium: Competition as Public Policy (May 13, 2009). Likewise, weak competition policy during the so-called "lost decade," in the form of government intervention to restrict competition in structurally depressed industries, contributed to Japan's sluggish economic growth in recent years. See, *inter alia*, Hayashi & Prescott, *The 1990s in Japan: A lost decade*, REV. ECON. DYNAMICS (2002).

<sup>3</sup> In 2006 the rules applicable to LIPs were revised in the context of the second reform of regional aid (see Guidelines on Regional Aid for 2007-2013, "RAG 2006"). The RAG 2006 set forth a more flexible and economic-oriented approach towards reportable investment projects (*i.e.*, those projects whose aid intensity exceeded the thresholds set forth by the Block Exemption Regulation, for which a notification was due), by removing the *per se* prohibition laid down in the previous rules with respect to those projects meeting one of the two following thresholds: (a) the market share of the aid beneficiary was above 25 percent before or after the investment; and/or (b)

For the rest, the sectors that according to Mr. Juncker deserve attention are quite uncontroversial.

Digital economy is undoubtedly an important area where antitrust enforcement action should stay intense. It is a key industry that needs special scrutiny as it is inherently conducive to market concentration in light of its specific market features (i.e. network effects, entry barriers, standardization, SEPs, two sided markets). But this has been the case over the last years, with high profile investigations such as *Microsoft I<sup>4</sup> and II<sup>5</sup>*, *Rambus<sup>6</sup>*, *Intel<sup>7</sup>*, *E-Books<sup>8</sup>*, *Samsung/Apple<sup>9</sup>*, *Motorola/Apple<sup>10</sup>*, and now *Google<sup>11</sup>*. In this area the Commissioner should do business as usual and take the right decisions while resisting external interference, something which is far from being obvious, e.g. in a case like *Google* where the oscillations of the past combined with the layers of grievances voiced by all sorts of stakeholders—some of which are blatantly biased—have rendered the matter extremely difficult to disentangle.

Incoming mergers in the telecom sector are another hot potato. Here again, signs are mixed and somewhat contradictory. So far there has been a cacophony of messages, with many critical statements being voiced by European enforcers and regulators vis-à-vis this process of

---

the production capacity created by the project accounted for more than 5 percent in a market in structural decline. In the event a LIP project exceeded one of these two conditions, the RAG 2006 required the Commission to conduct an in-depth assessment of the aid measure through the opening of an in-depth investigation aimed at ascertaining that (i) the aid was necessary to provide an incentive effect, and (ii) the benefits expected outweighed any distortion of competition. Detailed guidance on the criteria to apply for the purpose of this assessment was then adopted in a communication which set forth the methodology of the in-depth assessment, based on the so-called balancing test (“Communication 2009”).

These rules have changed again with the last review process: from the entry into force of the RAG 2013, the market share/capacity thresholds that triggered the in-depth assessment under the RAG 2006 have been removed; as a result, any individual aid notifiable to the Commission is subject by default to an in-depth investigation. Extending the in-depth investigation to all reportable LIPs, with a view to assessing the incentive effect of the aid and the prevalence of positive implications, entails in practice a significant toughening of the treatment of such projects. Indeed, the Commission’s recent practice in point shows that very few reportable LIPs—if any—are likely to stand scrutiny: the counterfactual analysis and the balancing tests are prohibitive hurdles to pass and, if anything, there is still some opacity and too much discretion in the Commission’s hands which create excessive uncertainty. If, on top of that, one adds the excessive—and quite unpredictable—length of the review process within which this assessment is conducted, the end result is that most firms will be discouraged from receiving significant aid in connection with LIPs and will fall back on small projects receiving aid amount below the notification threshold. This may ultimately prove to be detrimental, given the positive impact of LIPs on local economies in terms of new jobs and spill-over effects and the risk of delocalisation in extra-EU areas offering more competitive conditions.

<sup>4</sup> COMP/37.792, *Microsoft*, decision of 24 March 2004.

<sup>5</sup> COMP/39.530, *Microsoft*, decision of 16 December 2009.

<sup>6</sup> COMP/38.636, *Rambus*, decision of 9 December 2009.

<sup>7</sup> COMP/37.990, *Intel*, decision of 13 May 2009.

<sup>8</sup> COMP/39.847, *Ebooks*, decision of 12 December 2012.

<sup>9</sup> AT.39939, *Samsung*, decision of 29 April 2014.

<sup>10</sup> AT.39985, *Motorola*, decision of 29 April 2014.

<sup>11</sup> Comp/39.740, Comp/39.768, Comp/39/775, *Google*, decision of 30 November 2010 (opening of investigation)

consolidation, in spite of which the Commission has approved three mergers, although conditional upon remedies (divestiture of spectrum, etc.)<sup>12</sup>. The issue will be to strike the right balance between consumers' interests, which may be harmed by horizontal mergers whose purpose is to reduce existing competitive constraints, and the survival of an industry that is suffering heavy losses due to the progressive shrinking of margins as a result of vigorous competition and regulatory margin squeeze; and making sure the Commission's decisions are not devoid of effectiveness by subsequent interventions of national regulators..

Energy is another area of interest that President Junker wants Ms. Vestager to focus on. Here, we see only one pending investigation which is politically charged and should be handled with care, namely *Gazprom*, and a few less relevant cases that are the sequel of previous high profile investigations.

Financial services have—rightly so—attracted a lot of attention already in terms of antitrust enforcement and will continue to do so in the future, but no particular change is required. Particularly in the state aid area, the Commission's handling of the credit crunch and later the sovereign debt crisis has been quite a success and no particular adjustment is required.<sup>13</sup>

Fighting with state aid rules what is perceived as tax circumvention effected by large multinationals is a recent development under the tenure of Commissioner Almunia and has already become one of the priorities of the new Commissioner. In a string of pending cases against Luxembourg, Ireland, and Netherlands, the Commission is investigating whether tax rulings issued by these countries to a number of multinational companies - rulings which validated intra-group transfer pricing arrangements - contain an element of illegal aid.<sup>14</sup>

These investigations are both legally and politically sensitive and may have far-reaching implications. From a legal stand-point, they are difficult cases to argue, for the key test applied by the Commission to establish the existence of a fiscal aid has always been to demonstrate that the company benefitting from the preferential fiscal treatment was receiving a fiscal advantage relative to the ordinary fiscal treatment (the benchmark) that would be otherwise applicable to companies in the same situation in the same country. In the present cases, instead, the

---

<sup>12</sup> See Cases M. 6992, *H3G/Telefonica Ireland*, M.7018, *Telefonica Deutschland/KPN E-Plus*, M.6497, *H3G Austria/Orange Austria*.

<sup>13</sup> In the most acute phase of the crisis, DG Comp managed to set up a fast track for immediately approving rescue recapitalizations and only in a second step discuss the magnitude of the restructuring measures to put in place. This model was successful in ensuring a quick stabilization of financial markets while preventing systemic contagion of the EU banking system. Later, with the first signs of the crisis easing, the rules were toughened, up to a point that now any capital injection by the State in favor of a Bank requires the implementation of a restructuring plan and an exit strategy. With progressive normalization, the gradual toughening of the policy and the bail-in principle recently introduced in the last banking communication are sensible initiatives: from now on, in cases of capital shortfalls, bank shareholders and junior creditors will be required first—not the tax payers—to support losses before the bank can benefit from state funding.

<sup>14</sup> See decisions of 11 June 2014, SA.3873 – *Ireland - Alleged aid to Apple*; SA.38375 – *Luxembourg – Alleged aid to FFT*; SA.38374 - *Netherlands – Alleged aid to Starbucks*. In essence, the theory of harm is that by accepting intra-group transfer pricing mechanisms that – according to the Commission –are not based on market terms, the tax authorities of these countries have granted a number of multinational companies a preferential fiscal treatment.

Commission is looking for a benchmark elsewhere, namely the best practices of the OECD.<sup>15</sup> From a political stand-point, on the other hand, these investigations are unavoidable given the level of interest created by angry public opinion.

### III. VESTAGER AGENDA AND DG COMPETITION

The second big challenge for the new Commissioner is how to stay consistent with the tradition of a vigorous enforcement action driven by a competent and efficient Directorate General, while avoiding being “captured” by the DG.

So far it must be said that new competition Commissioner’s actions have been spotless. Her public statements and propositions have sounded sensible and accurate. A lot of emphasis has been put on independence of judgments and tough enforcement. It is therefore all the more legitimate to expect from this Commissioner a more ambitious agenda than diligent homework closely supervised—if not dictated—by a very strong and influential DG.

And what could be the *quid pluris* that could elevate Ms. Vestager to the rank of the best competition commissioners? To be fair, competition policy in the European Union has reached a very advanced stage already and no revolution is needed, just some well-chosen incremental improvements to the current enforcement set up.

### IV. WHAT SHOULD MS. VESTAGER’S ENFORCEMENT PRIORITIES BE?

Provided that Ms. Vestager will stick to her pledge and deliver a sound independent antitrust enforcement—as has been the case for many years under previous competition commissioners—the first question is whether it is sensible to discuss a shift in emphasis or a rethinking of the priorities in enforcement actions. We are not supportive of fundamental changes. After all, Ms. Vestager is inheriting a best-in-class administration run by highly qualified officials. Therefore, not much should be changed in this respect, all the more given that some incremental improvements have already been undertaken.

#### A. Competition Enforcement

Following past legislative and policy reforms, which have impacted both substantive and procedural issues, the EU merger control (“EUMR”) system has reached a level of maturity and sophistication which makes it one of the best-in-class review systems in the world. The improvements still to be implemented to the EUMR are therefore marginal.

A consultation process is under way to establish whether an *ex-ante* review system should be extended to acquisitions of minority shareholdings, along the lines of some jurisdictions of the

---

<sup>15</sup> An additional element of complexity may come from two recent rulings of the European General Court (cases T-219/10, *Autogrill España v. European Commission* and T-399/11, *Banco Santander SA and Santusa Holding SL v. European Commission*), where the Court has annulled two Commission decisions finding that Spanish tax breaks for shareholdings in foreign companies violated state aid rules. In overturning the Commission decisions, the General Court found the Commission had failed to show that the tax regime was selective because it is available to any company. The ruling—which is being appealed by the Commission—could have implications for the above mentioned investigations into suspected unfair tax breaks for Apple in Ireland, Starbucks in the Netherlands, and Amazon.com and Fiat Finance and Trade in Luxembourg, precisely because in such cases a similar issue of selectivity is at stake.

European Union (e.g. Germany and the United Kingdom). The best approach would be to set up a very simple *ex ante* system based on a non-opposition procedure, where the filing parties would be required to provide very limited information requirements upfront (significantly lighter than what is required in a short form CO), leaving the Commission to react and request additional information only with respect to those transactions creating a "competitively significant link" between competitors and with sizeable level of influence or special rights.

In antitrust, the priority should remain the fight against cross-border cartels. Unilateral behavior should be prosecuted only in the presence of blatant exclusionary practices causing tangible foreclosure effects, bearing in mind that the dividing line between pro- and anti-competitive is not an easy one to draw. In this respect, economic analysis aimed at establishing potential for foreclosure, coupled with an effect-based assessment aimed at establishing the existence of substantial harm—if any—caused by the practice under scrutiny, should remain the pillars of the Commission's enforcement practice under Article 102 EU.

Admittedly, this is the course of action DG Comp has been implementing over the last two or three years, despite the contradictory and anachronistic messages being voiced from time to time by some European judges that it would be still sufficient to prove an abusive behavior using a purely form-based analysis.<sup>16</sup>

The ever increasing number of commitment decisions recorded over the last years is an only partially positive development, which requires some fine-tuning. While being an effective tool to secure timely interventions for intricate cases, commitment decisions are bad when they become the tool to extort remedies out of poor investigations, or when they lead the agencies to take a "regulatory" stance and seek remedies that go beyond the scope of the alleged competition problems in an attempt to re-shape the market-place.

## **B. Substantive Convergence Across the European Union**

The issues of decentralized enforcement of EU competition rules and the related need for coordination and convergence appear to be high in the Commission agenda, although the Commission's view appears a little one-sided. In the context of the recently adopted communication on the enforcement of Regulation 1/2003, and the related staff working papers<sup>17</sup>, DG Comp appears mostly concerned by the need to achieve procedural convergence, including:

- guaranteeing the independence of national competition authorities ("NCAs") in the exercise of their tasks and making sure they have sufficient resources;
- ensuring that NCAs have a complete set of effective investigative and decision-making tools;
- ensuring effective tools for imposing deterrent and proportionate fines;
- having well-designed leniency programs in place in all Member States; and
- avoiding disincentives for corporate leniency applicants.

---

<sup>16</sup> See the recent Judgment rendered by the EU General Court in *Intel* (T-286/09, now under appeal before the Court of Justice, Case C-413/14 P)

<sup>17</sup> See Commission communication and staff working documents of 9 July 2014, *Ten years of antitrust enforcement under Regulation 1/2003*.

However, an issue which is very delicate and little discussed in the Commission's working paper is the problem of substantive convergence, i.e. convergence of assessment criteria when applying EC competition rules to similar conducts across the European Union. Questions that need resolving include:

- What kind of evidence does a leniency applicant have to bring to a competition authority to meet the added value test and be granted leniency?
- Under what conditions should an exchange of information be deemed to constitute a hard-core violation of competition rules?
- When should a target rebate be deemed abusive under Article 102?
- What type of evidence should be required to establish the initial date of an antitrust infringement in the context of a single and continuous multi-party concerted practice?

In all these cases, and many other examples, the impression is that even the most sophisticated NCAs across the European Union do not always apply the same standards and substantive law,—let alone the less equipped NCAs, whose enforcement practices in terms of substantive standards are very diverse.

Due to the proliferation of similar cases before NCAs with common origins, the problem of substantive convergence is increasing, which is why the need for a consistent treatment of similar cases becomes all the more compelling. The only way to achieve this goal is that DG Comp truly exerts some form of supervision over the decisions taken by the NCAs of the EU Member States.

The point here is more about an effective and systematic supervision of specific decisions designed to secure some level of harmonization than about general guidance—which, to be fair, is already abundantly provided by the Commission. Another tool could be capacity building (training programs) and more intense cross-exchange of competition officials across EU countries with the aim of creating a truly common culture of competition enforcement.

## V. SOME POSSIBLE IMPROVEMENTS TO THE CURRENT PROCEDURAL RULES

Equally pertinent to the discussion on what are the right antitrust cases to prosecute and what illegality thresholds should be applied is the question of whether the Commission's interventions in the market place are timely enough.

### A. Shortening the Duration of Antitrust Investigations

In times of crisis, where anticompetitive practices may add an unbearable additional cost to consumers' stretched budgets, it is arguably much more important that competition agencies timely intervene to remove those practices tangibly harming consumer welfare. In this respect, the Commission's antitrust proceedings have repeatedly been criticized for their excessive length, both under Article 101 and Article 102.<sup>18</sup> And while there are some excusable reasons justifying the average duration of the Commission's investigations—primarily the complexity of cross-border investigations and the multi-linguistic regime—the excessive length of these

---

<sup>18</sup> Statistics show that over the last ten years, the average duration of a Commission's investigation for both cartel and abuse of dominance cases is four to six years. The recent introduction of the settlement procedure has partially shortened the duration of the latest cartel investigations.

investigations is also due to the fact that the Commission is not subject to any deadline within which the investigation must be completed.

The absence of deadlines at the procedural level, coupled with the possibility of conducting an investigation before opening a formal proceeding, are key to the Commission's tendency to overly expand the typical time-span of its antitrust investigations. This, in turn, may end up frustrating the chief aim of antitrust enforcement, i.e. to intervene in a sufficiently timely way to effectively remove market distortions to the benefit of society as a whole.

There is, therefore, a strong case for advocating more timely interventions from the Commission, which could be achieved by slightly revising the current Commission's procedural rules with respect to antitrust proceedings. An elementary improvement could be to adopt the procedural safeguards that are already in place in some EU countries, which include:<sup>19</sup>

- systematically opening the antitrust investigations by way of a reasoned decision which is immediately made public;
- stating the facts under scrutiny;
- identifying the parties to the investigation;
- outlining the potential theories of harm;
- setting out the team responsible for dealing with the case; and
- what is most important, establishing a (non-mandatory) time period within which the investigation has to be concluded.<sup>20</sup>

These improvements alone, by creating a higher level of transparency and accountability, would push DG Comp to become more attentive to deadlines and achieve a substantial reduction of the average duration of its antitrust investigations<sup>21</sup>.

### ***B. Strengthening the Role of the Hearing Officer***

A second substantial improvement to the current procedural setting would come from the introduction of an additional safeguard, i.e. strengthening of the role of the Hearing Officer ("HO") with a view to rebalancing the concentration of the investigative and decision powers within the hand of the Commission (actually the Commissioner, due to the little influence the College has in the Competition Commissioner's decisions).

Currently, the HO role is limited to the supervision of due process and rights of defense in the context of DG Comp investigations. With only a little modification by the Commission of the HO remit, the HO could be given a wider scrutiny power in order to oversee not only procedural issues, but also the substance of DG Comp investigations.<sup>22</sup> In particular, the HO could act in a way similar to the internal scrutiny panels (fresh pair of eyes) which are

---

<sup>19</sup> This is the case under the Italian antitrust system and to some extent the Spanish system.

<sup>20</sup> There would still be the possibility to extend the deadline based on another duly motivated, public decision.

<sup>21</sup> In favour of this reform, see Working group on "*Antitrust law in times of economic crisis*", Global Competition Law Center, 2012 Annual conference.

<sup>22</sup> In fact, the HO has been sometimes been granted such powers to look into the substance of the case, although very exceptionally.

occasionally set up within DG Comp (more in the past than in recent days) to give a second opinion on some high profile investigations.

The HO would be involved only in the most important cases (e.g. the second-phase merger investigations, the abuse of dominance and the cartel investigations, the most important state aid investigations). From the moment a formal investigation is opened, the HO should have access and knowledge of the documents in the file, look into the substance of the case as well as into the due process and defense issues, and chair the oral hearing, thereby playing a more active role than the HO does at the moment.

Finally, the HO would refer to the College of Commissioners by issuing a non binding, public opinion—like an Advocate General before the European Court of Justice—addressing both substantive and procedural issues and where the HO would recommend a certain outcome. The college of the Commission would then take a decision upon the matter having duly considered—but without being bound by—the HO's opinion.

To make this change effective, a couple of practical expedients would be appropriate: first, independent and knowledgeable candidates should be retained for the job—as opposed to the current tradition to designate Commission officials; and second, the HO should have a sufficient staff to cope with these wider supervisory tasks.

This would be a sensible and relatively simple reform to put in place—i.e. with no need to embark in any perilous and heavy legislative amendments requiring inter-institutional discussions with Council and Parliament. And it would provide a significant improvement to the DG Comp's current proceedings without causing much disruption to the administrative enforcement system.

The advantages of having a stronger HO in the investigation would be manifold:

- It would strengthen DG Comp due process by turning the oral hearing into a more credible moment of discussion and cross-examination—as opposed to the current solemn farce where the outcome has already been decided.
- It would provide the College of Commissioners with impartial and unbiased advice from a truly fresh pair of eyes.
- The qualities of the decisions would improve.
- The impression that sometimes arguments voiced in the final phase of the investigations go totally unheard would disappear.
- Finally—in cases of dissent between the HO and the final decision of the Commission—the opinion issued by the HO could prove to be a solid base for a judicial application before the EU Courts.

At the same time we do not see serious counter indications: the presence of the HO should neither cause any clumsiness in the handling of the file—no more than is currently the case—nor delay the decision making process, as the schedule should fit in the current timetable, with no need for any significant extension. Above all, this reform would preserve the current EU

administrative competition enforcement model, which, despite all its flaws, has proven to be effective and consistent with the traditions of Continental Europe.<sup>23</sup>

---

<sup>23</sup> Moreover, it is now undisputed, following the *Menarini* judgment rendered by the Court of Strasbourg (*Affaire Menarini Diagnostic S.r.l. c. Italie*, no 43509/08), that this system is compliant with the fundamental rights of due process and rights of defense.