



FORDHAM Conference

September 12, 2019

Keynote

Isabelle de Silva

President of the Autorité de la concurrence

**THE FUTURE OF COMPETITION LAW:
TIME TO CHANGE OR TIME TO ADAPT?**

It is fair to say that we have seen in the past few months an unprecedented level of debate about antitrust. This was specific in many ways.

First, we saw mainstream media take a closer look at antitrust enforcement, and put the debate about Big Tech – in all its dimensions – center stage.

Second, we saw antitrust become a hot topic in the political arena: the way big tech should be dealt with in the US seems to be an important issue in the presidential debate in the US ; the Siemens Alstom decision in the EU (in which the European Commission blocked the merger between the two companies) led to several declarations of very high level government members in France and Germany, and fueled a Franco – German manifesto to change the antitrust policy, which was later amended and which Poland joined a few months ago ; the way antitrust should tackle the digital economy and “European sovereignty” has been at the center of the constitution of the new European Commission, and, last but not least, the fact that President Ursula von der Leyen entrusted Margrethe Vestager with an important portfolio and agenda.

Thirdly, we have seen an incredible flurry of very interesting and in depth reports (to name only a few, the Cremer report of the digital advisers to the European Commission, the Furman report, the Stigler report, the ACCC report) - not counting academic papers – which address the question of whether antitrust should or should not be changed, and which new objectives and methods it should use.

This prompts me to ask: do we need to change competition law and the way we apply it? This is a question that arises on an almost daily basis, and that has often been debated in national Parliaments and with business associations lately. These are stimulating times, but in this vortex of debates we must find our own way and go forward. So what I will share with you today are my views on the current debate.

The priorities I set for the agency cover the whole economy. We however have a strong focus on the digital economy, which brings us to “invest” in knowledge and information gathering in order to better understand new issues such as data collection and access to data. We rely in our work on existing tools – which allow us to achieve quite a lot – and we also explore ways to improve them when it might prove to be necessary.

In a time of uncertainty and, sometimes, of international dissensions about antitrust policy, it is crucial that we have a very clear view of our objectives – and of what cannot be asked of us.

The debate about antitrust and big tech is an example where we hear very extreme views. For some, antitrust failed to do its job properly, in view of the fact that “some companies are gigantic, lead the economy and occupy strongholds that seem unassailable”. For others, there is nothing new under the sun, we should keep applying competition law as before, and cases will come. And some others criticize the recent spur of big digital cases, in European countries, and many others, as a form of hipsterism, pendering to populism or bending the law in unforeseen directions.

It is a clear fact that some companies, the GAFAMs to name them, are strong, powerful, very profitable and present internationally, which is not *per se* a competitive concern. We can neither deny that we have seen a lot of innovation in terms of services for the consumer, in the way we travel, interact with each other or work.

A big part of the debate about big tech is also about issues that need to be dealt separately from antitrust, and that warrant a strong regulation or intervention from governments and agencies: data protection, the protection against hate speech, political campaign manipulation, intervention from foreign governments, fraud. There is a big agenda there, but it is not a case for antitrust.

But what might be a real concern is the fact that competition enforcement has been felt to be too slow. This is clearly a number one priority for the European Commission, ourselves and most of my colleagues at the international level. To achieve a better pace in our investigations, we must adapt our internal methods and, when needed, adapt the law.

In addition, what is worrisome is the fact that it might seem impossible to build an alternative to those platforms, and to have a possibility of competition or new entry. These are legitimate concerns we need to deal with, especially in relation to the acquisition strategy of those companies, if it appears that this is a key feature of the way they achieve their market position, or dominance.

These issues are clearly on our radar. They lead me to discuss four major points of attention: (i) Is the standard of consumer welfare appropriate? (ii) Should existing theories of harm in abuse cases evolve and should we set our priorities differently in terms of antitrust enforcement? (iii) Is merger control well fitted? (iv) Should we cooperate more or differently?

1. Is the standard of consumer welfare appropriate?

Should we shift the focus of antitrust law from the maximization of consumer welfare to include other goals, such as income inequality, unemployment, wage growth, pluralism and democracy? Should we care about the necessity to create national or European champions?

The consumer welfare standard, which lies at the heart of the antitrust analysis, is thus under review or even under threat.

What are we talking about exactly? Our goal is to put consumers first and to defend the interest of the consumer. In economic terms, we define consumer welfare as the difference between the value placed on a good by a consumer and the price he/she must pay to buy it. This sum added to profits generated by companies determine the total surplus accumulated on the market in question.

Why do we use the consumer welfare standard? Enforcers rely on this test for several reasons. It has proved to be a reliable tool for authorities and one that has created legal certainty for companies for several decades. The notion of consumer is flexible enough to include not only ultimate consumers but intermediate consumers as well (i.e. companies) and public institutions. It is therefore suitable for many types of situation. On a side note, this point is often misunderstood and misrepresented because the most “popular” cases in the media are often about end consumers being ripped off by a cartel. But, as enforcers, we care as much about protecting businesses against inappropriate conduct from their clients, suppliers or competitors. This led us to recently adopt a motto for the agency: “La concurrence au service de tous”, which means “Competition for the benefit of all”. We should, perhaps, find a new name for the concept of “consumer welfare” so as to reflect its true and broad meaning. So I throw this to the academics in the room to come up with a new name!

If consumer welfare mainly addresses price variation, it can also take into account variations in quantity or in quality or diversity of products and services. In other words, the consumer welfare standard allows an analysis of price effects and non-price effects as well, whenever relevant.

This has proved useful in the European practice and in our national practice. One area where it is sometimes felt that competition agencies are not active enough is labor markets. There are not many of such cases in Europe at the moment, but we have been following closely the priority given to no poach agreements by the US DOJ, and we already have one cartel decision

sanctioning a so called “gentlemen’s agreement” between cartelists not to hire a person from the other companies (Decision 17-D-20 of 18 October 2017 regarding practices in the floor coverings sector).

Both the European Commission and the Autorité have included a reference to quality, variety and innovation in their merger guidelines, and non-price effects of merger transactions were expressly accounted for in a number of merger control decisions.

One example is a hospital merger (Decision 17-DCC-95 of 23 June 2017 Elsan/MédiPôle Partenaires http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=663&id_article=2999&lang=en), which was referred to us by the European Commission. The transaction involved the acquisition of the third largest healthcare provider in France (MédiPôle) by the second largest one (Elsan). In the context of a hospital merger, where prices are regulated, we looked at its potential “non-price effects”, such as degraded quality of medical care. In the end, we did accept commitments by the acquiring party in order to address concerns of reduced choice and quality in healthcare offerings available.

There have been many cases where the effects of a merger on pluralism of the press and media were also considered, with a view to preserving the diversity of editorial content (Decision 19-DCC-141 of 24 July 2019 regarding the acquisition of sole control of Mondadori France by Reworld Media http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3481&lang=en).

All in all, the consumer welfare standard is well-grounded, well-tested, and multi-dimensional. It is a good existing toolbox. Should we then try to change it by broadening its content? I would argue that we should not go down that road, for a number of reasons.

First, the consumer welfare standard serves its purpose: protecting consumers and delivering results for them. Second, broadening it would introduce subjectivity into our enforcement, which could in turn expose enforcers to more pressure by interest groups, and weaken the existing standard that offers legal safeguards for parties. Third, applying the consumer welfare standard - as it is - makes it possible to have competitive markets and therefore supports broader goals of social justice and democracy: there is no need to formally incorporate them as they are a natural consequence of the work made by enforcers and regulators upstream.

Public interest should, in my opinion, constitute a different step (and in many jurisdictions, falls in the hand of other authorities than the competition agency): industrial policy and promoting national or European champions are clearly not on the list of the things we consider; but we firmly believe that amongst the benefits of solid competition lay greater innovation for the consumer, as well as dynamic industries and services.

2. Should existing theories of harm in abuse cases evolve and should we set different priorities for antitrust enforcement?

We hear strong views about the fact that “Big is bad” and suggestions that large market players, akin to near monopolies, should be dismantled in the same way a corporation like Standard Oil was split in the early days of US antitrust.

Let’s ask ourselves the question of whether “Big is bad”?

Is big really new? There have been large, international market players before. Think Coca Cola or IBM. Academic research shows that what is new is the speed at which new tech giants have reached this level of growth and turnover.

Maybe the reason why there is this emerging fear is that today’s digital giants are not only “big” but have a grip on every aspect of our lives. We constantly rely on their services: at work, in our social, family or love life, when we travel, study, get informed, or chill out. Concerns about their size may have more to do with their pervasive nature, and our own dependency on devices, because they are so addictive: nomophobia, fear of missing out, ever longer hours spent every day being connected, watching videos or social networks “feeds”. Those may be worrying social trends, but they certainly raise issues that are much more profound than the issue of competition and concentration.

There is also the fear that some phenomena would now be beyond the reach of governments: Google or other big tech companies are perceived as more powerful than states, which raises the fear that any single government or agency will never be able to “deal” with issues such as dominance or data protection. Some of the problems (cybercrime, hate speech, data protection violation) are indeed very tricky to solve: the current “Tech anxiety” is thus understandable.

So what is our part and what do we need to do?

Competition law specifically looks into the behavior of dominant players. They do not come under antitrust scrutiny because they are “big” in terms of turnover or profits, but in terms of market power. Dominance is fine but then special responsibilities weigh on those that have acquired dominance in order to ensure they do not abuse it in such a way as to deprive others, oftentimes smaller players, of the possibility of entering the market. I will also note that very big profits or turnover are certainly relevant factors to consider, as they may be an element of dominance.

In addition, we have observed that abuse cases arising out of the digital sector can be addressed through current antitrust powers.

In Europe, the Commission laid down the foundations for its enforcement in two important abuse cases: Google Shopping in June 2017 and Google Search in July 2018.

In the first one, the Commission fined Google 2.42 billion Euros for abusing its market dominance as a search engine by giving an illegal advantage to another Google product, its own comparison shopping service. In the second one, the Commission fined Google 4.34 billion Euros for imposing illegal restrictions on Android device manufacturers and mobile network operators to strengthen the dominance of its search engine. The theory of harm in each case was quite classical, but the “subject” of the cases was fairly new, and complex to analyze.

In France, we similarly strive to ensure an effective enforcement when it comes to abuse cases. We intend to fully use all the possibilities of French and European law. The scope is wide enough, so we shouldn’t be afraid of using all the possibilities that competition law offers.

An interesting example, in terms of theories of harm, is a recent case regarding the treatment of waste with infectious risk in the healthcare sector (Decision 18-D-17 of 20 September 2018 http://www.autoritedelaconurrence.fr/doc/18d17_en_final.pdf). This case is very far from being a “Big Tech” case, but it illustrates the fact that we always need to have a global approach to competition law, without narrowing it down to specific companies or sectors. This case gave us the opportunity to give fresh relevance to our approach to abuses of exploitation, based on the very compelling facts of the case.

In this case, a dominant company (providing waste management services to hospitals in Corsica) had increased abruptly, significantly, durably and in an unjustified manner the prices it charged to public hospitals. We considered that the company breached our antitrust law because it used its position in the market to implement abusive price increases.

Apart from this specific case, we believe that the same theory of harm could well be replicated to address strategies of domination by online platforms, when they give way to abuse through pricing, or terms and conditions, if the facts of the case warrant it.

Another important point is the need to use not only the full substance of the law, but also all relevant enforcement tools. In that respect, interim measures are an extremely useful tool that should be used as much as possible, when the conditions are met. The fact that the European Commission is considering the use of this tool is clearly a very positive sign in terms of achieving more effective enforcement. The Autorité is thus ready to order provisional behavior changes, before the end of an investigation, via interim measures. We did it earlier this year when we asked Google to clarify its ads rules and implement them in a non-discriminatory manner. A company offering an information directory, Amadeus, had complained that Google had suspended several of its AdWords accounts (later renamed Google Ads) and refused most of the ads it wanted to promote its services (Decision 19-MC-01 of 3 January 2019 regarding a request for interim measures from Amadeus http://www.autoritedelaconurrence.fr/doc/19mc01_en_final.pdf).

With the ECN + Directive, pending its transposition into French law, we will have a new tool, the “ex officio interim measure”: we won’t need to wait for a complaint, as we will be able to order a company to stop a conduct if it harms competition. We are already able to issue ex

officio interim measures in the field of buying alliances since a new law gave us this power last year (Law no. 2018-938 of 30 October 2018 for balanced commercial relations in the agricultural and food sector).

In the course of our investigations, we must also be aware of new dimensions of competition. The use of data is a case in point. Data is paramount in many sectors and in online advertising especially. All the value is based on user data. Google and Facebook grab between 80 and 90% of market share in some sectors. Their power requires that they pay particular attention to the way they treat business partners and the ecosystem around them. The Autorité has ongoing investigations into online advertising.

We will also be very attentive to the way platforms can consolidate their market power and build their strategy across different, adjacent markets.

For this, we need more sector inquiries and studies on digital topics. This is why we will continue to have an intensive program of sector inquiries and studies, as well as guidelines. We have, for example, the joint study on algorithms with the Bundeskartellamt to be published next month, a study in preparation on behavioral remedies, another ongoing study on retail and online models, and finally we will soon start a new study on payment systems and big tech, with a focus on cryptocurrencies and the use of blockchain technologies. Another subject of interest for us are the new digital assistants. We participated in a very interesting study carried out by several French sector regulators, the broadcast and copyright protection regulators, along with the telecommunications regulator and the data protection agency (Digital assistants and connected speakers, May 2019 https://www.csa.fr/content/download/254216/733314/version/20/file/2019_05_24_Assistants). One question we underline is whether they will become a major entry point for online purchases, and whether there are associated risks for competition.

I am delighted to hear that the new European Commission also intends to use sector inquiries more intensively, adding to the good work done in the past on online commerce for example.

Finally, I think that we must look into the appropriate tools. Beyond the fine itself, we might make a broader use of injunctions, so as to change the way a company does business if it is demonstrated that it creates a harm to competition (i.e. in Germany, this is what the Bundeskartellamt tried to do with its Facebook case). There is also a debate about how to “repair the market” (i.e. the Google shopping case) as a result of the harm caused by an abuse. All those questions need to be carefully considered. Imposing fines is not the sole goal of enforcement. What matters also is the message directed to companies that certain behaviors are prohibited, and that they shall refrain from engaging in such conducts.

In conclusion, the law is mostly correct, but doing cases is the difficult part.

3. Is merger control well fitted and is there a deficit we need to address?

Mergers are indeed an important part of the picture. There is much discussion on how to deal with the acquisition of fledgling firms by big companies, or so-called “killer acquisitions”. The concern is that large digital businesses may be blocking innovation by buying tech start-ups. One concrete example is the Facebook’s 1 billion dollar purchase of Instagram and WhatsApp.

The big question is how to respond. Should we update our merger control toolkit?

Some experts in Europe have underlined that traditional tools of analysis (such as market shares) may not be appropriate to address this type of transactions and suggested shifting the burden of proof onto larger companies to prove the efficiencies of their deals (i.e. the burden of competitive proof). One reason for that proposed shift in the burden of proof is the lack of data available to competition authorities on such deals, which creates a difficulty to enforce competition policy effectively.

A clear problem has been that these transactions often times involve low turnovers and may therefore fly under the radar of merger control.

This calls into question the effectiveness of purely turnover-based notification thresholds with regard to certain sectors (tech, health and media industry for example). Can we accept that these thresholds fail to capture certain transactions involving targets with limited actual turnover that may raise serious competition concerns? In my view, the issue is not only about big tech but also about other areas of the economy where there is a high level of concentration and insufficient competition, which means some specific mergers might have a damaging impact.

To clarify a point, I think the issue is certainly not limited to “killer acquisitions”, a catch word that is often used but that doesn’t accurately describe the problem. There might be a case in which a company buys a competitor, nascent or not, to “shut down” a future competitor. The studies done in the pharmaceutical industry are certainly very interesting, particularly on the focus on new products in the pipeline, and the subsequent effect of some acquisitions.

But some of the mergers we discuss don’t fit at all into this framework. Facebook certainly didn’t “kill” WhatsApp or Instagram, quite the contrary: those two acquisitions served to greatly enhance the company’s reach in given markets, through the use of consumer data and the development of online advertising revenues, among other things. One of the issues at stake, in that kind of case, is whether this type of acquisition, by already very powerful companies, might entrench their position in a way that would significantly lessen the possibilities of entry by other competitors.

With this in mind, I believe that merger watchdogs need to be able to have a look at those specific mergers, even though they would be below the turnover notification threshold. We must be able to check, even if there is no competition concerns in the end.

In order to develop concrete proposals, we have been working on these issues in France since more than two years now. We have hosted an ICN Workshop in Paris to discuss nexus and thresholds in December 2016. We have also proposed options for a substantive reform of our merger regime and held two rounds of extensive public consultation in October 2017 and June 2018.

During that time, we considered different existing and emerging solutions.

One option was to have new notification thresholds, like they were introduced a few months ago in Germany and in Austria. We found that this solution wouldn't be ideal because it would create a lot of uncertainty and debate about what is exactly the value of a given transaction, and might "catch" mergers that have no particular competition significance. We therefore proposed not to follow that road, and rather to create a new regime designed to enable us to look at a proposed or recent merger, when it might have a significant competition impact. We got our inspiration from ex post review merger regimes, and discussed the matter extensively with our colleagues at the US FTC, the US DOJ and the Swedish competition authority that apply similar regimes in which mergers and acquisitions can be revisited during a certain time period after their clearance.

In addition, we recently considered introducing in France a provision inspired from the Norwegian system, which imposes disclosure requirements on certain identified market players about mergers and acquisitions in individual markets where the degree of competition is of particular significance, even if they fall below the regular notification thresholds. In this framework, which we find very interesting, relevant market players and economic markets are listed by the authority, which also sets the time period during which the disclosure requirements are valid. In the end, the authority can intervene against mergers and acquisitions if they worsen the competitive situation. It can also impose fines on market players if they breach the disclosure requirements.

This idea of specific obligations for certain specific major companies has been taken up by the Furman report, while at the same time many proposals, in France and Europe, advocate for new forms of regulation that would apply to strategic market players or "systemic players" (and only to them).

It will be a topic to pursue and discuss with the future European Commission to determine whether we need another layer of ex ante regulation, after the "platform to business" regulation that has recently been adopted by the EU (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services). And if we were to create a new "ex post" merger regime to catch transactions with a significant competition impact, then

it would be even better to do it at a European level, so as to achieve convergence of the legal framework governing mergers.

Another overarching evolution for merger control is to find ways to make it more dynamic, more thorough and forward looking, especially when we look at major mergers. We will continue to need to do a very in-depth review, including a look at internal documents, as we did for example in the Se Loger.com – Logic-Immo.com merger between two online platforms, in the sector of real estate listings (Decision 18-DCC-18 of 1 February 2018 on the acquisition of Concept Multimédia by the Axel Springer group http://www.autoritedelaconcurrence.fr/doc/decision_seloger_en_def.pdf).

In my opinion, we also need to be very strict about procedural rules, for example when it comes to the standstill obligation (we have shown that we took this issue very seriously indeed with our 80 million euro fine for gun jumping against Altice, Decision 16-D-24 of 8 November 2016 http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2900&lang=en), but also the veracity of the information provided to us. When the information is incorrect, this may lead to a fine, such as the one imposed by the European Commission on Facebook for providing misleading information about its acquisition of WhatsApp (110 million euro fine). I certainly think that in some cases, this might be a reason for undoing an approved merger, when the approval was given based on incorrect facts and assumptions.

Finally, I have the conviction that we need to think “outside the box”. Although market definition is a very precise exercise with a serious and well-established methodology, retrospective exercises show that the markets that were considered relevant may prove to have been too narrow, or that markets deemed to be separate have in fact converged pretty fast in meaningful ways: think social networks, messaging apps, or the relation between an online search engine and a “vertical” app. The fact that some major players develop business strategies based on apparently separate markets (think of the Amazon strategy incorporating the online video service into its Amazon Prime service for parcel delivery) is yet another example why we should look at the “big picture”.

4. Final question: should we cooperate more, or should we do it differently?

The answer is a resounding yes. We need more cooperation, and we need to make it more intensive with a focus on substantive convergence and cross-border cases.

International cooperation is of the essence as we continue deepening our cooperation and opening new frameworks for dialogue. Our meetings in the ECN, ICN, OECD and UNCTAD are extremely meaningful, and a crucial way to know what other enforcers are doing, to share our views and be inspired by new ideas.

We also had a unique opportunity to actively cooperate during the French presidency of the G7. I want to say how happy I am that our G7 initiative came to fruition, thanks to the

wonderful support and excellent input by all the agencies involved. We launched over the last few months a dialogue that resulted in a Common Understanding of the G7 competition authorities (9 agencies, including the European Commission), which I presented last July at the G7 Summit in Chantilly, in the presence of finance and economy ministers and central bank governors. “The digital economy” was one of the priorities identified by the French government for its presidency of G7 with focuses on competition, cybersecurity, employment and tax. Competition had not, until this time, been on the G7 agenda. This created momentum for the Autorité to lead discussions with fellow competition agencies of the G7.

After very intensive and fruitful discussions (including an important meeting in Cartagena Colombia during the ICN conference in May 2019), we reached an agreement and adopted a Common Understanding on “Competition and the Digital Economy” in Paris this past June in the presence of the heads of competition authorities of G7 countries (G7/ Common Understanding “Competition and the Digital Economy” http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3476&lang=en).

For the very first time, a common position was expressed by seven jurisdictions and the European Commission on the role of competition law in the digital economy, around four main messages: (i) The digital economy offers many benefits and brings innovation, yet digital markets must remain competitive, (ii) Existing antitrust rules are relevant and flexible enough to meet the challenges of the digital economy, yet improvements are possible, (iii) Advocacy and competition impact assessment of policies are important when it comes to the adoption of regulations as they can harm competition and (iv) There is a need for international cooperation to foster convergent enforcement given the cross-border nature of practices.

2019 was certainly a good year for international cooperation with another achievement: a new and innovative “Framework on Competition Agency Procedures” (called “CAP”) was reached within the ICN following the US DOJ initiative. These two examples are concrete answers to the demand for more convergence on substance and fairness in procedures.

We must also invent new forms of cooperation on our home ground. I firmly believe that we must find new ways to cooperate much more intensively with sector regulators or agencies dealing with data protection, digital issues or consumer protection.

This may enable us to give advice on ex ante regulations so that they do not harm competition, but also to reach common views by incorporating, for example, data protection concerns or the consumer protection dimension in our thinking, and vice versa.

Antitrust rules coexist with sector-specific regulations aimed at protecting consumers (data protection regulation, content regulation, etc.). In order to limit potentially negative side effects of such regulations on competition, but also to give us a clearer view of the issues at stake, a dialogue between regulators is a must-do. This is the reason why we created in France - voluntarily and without a specific legal framework - a “G9” of sector regulators in which we

discuss, very regularly, certain transversal issues such as data, digital, and also human resources or IT. It has proven extremely effective and useful. One of the outputs was the study I mentioned earlier about digital assistants and connected speakers. We are currently continuing our discussions with a common reflection on data.

We live in very exciting, but challenging times. It is our duty and responsibility, within the competition law community, to think collectively and act as globally as possible.

A lot is expected from us. We cannot and shouldn't embrace everything that is expected from us, but we certainly have a lot that we must and can do.

There is a real and legitimate expectation from consumers, companies and governments that antitrust regulators are up to the task.

It is very encouraging to see that we are on the same page with the community of international enforcers, and especially to see that there is no "transatlantic divide" because the two American agencies are tackling these issues with as much enthusiasm and energy as we do, the announcements of the last few months have made that clear.

So to conclude, if 2019 was "the year of the Reports", let's hope that 2020 will be the "year of Action"!