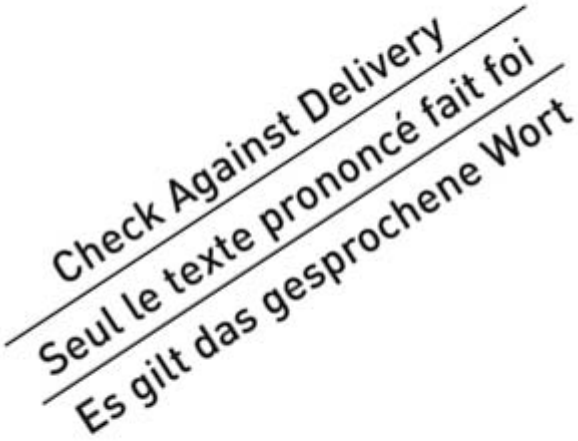
EUROPEAN COMMISSION

Joaquín Almunia
Vice President of the European Commission responsible for Competition Policy

Competition enforcement in the knowledge economy



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Ladies and Gentlemen,

This is the second time that I attend this conference and I want to thank Barry Hawk for his kind invitation.

I must tell you that the passage of time has not diminished the pleasure to share with this expert audience the views and latest news from the EU competition authority.

But this year it's a bit different, because I am using my trip across the Atlantic to give not one presentation but two.

Yesterday I spoke at another antitrust conference organised by Georgetown Law in Washington DC and quite a few of us – including Jon Leibowitz and Joseph Wayland – are meeting here for a second day in a row.

This means that I cannot repeat today any of the accounts I have given to them 24 hours ago. That would quickly send people to sleep – or to their tablets and smartphones

I need to say something new to keep them alert and entertained. So, here is what I'm going to do.

Yesterday I spoke about the part of our enforcement work that is somewhat specific to the EU; in particular, that which helps complete our Single Market.

Today, I will focus instead on the challenges that are common to competition authorities around the world.

More specifically, I will look at the new challenges brought by the information revolution: from the circulation and use of information in financial markets, through some competition issues related to the protection of intellectual property, to other topics typical of the digital economy.

Tomorrow, Alexander Italianer, the Director General of the Commission's competition department, will develop some of these topics, focussing on the link between competition and innovation.

Financial markets

I will start with the financial services.

Over the past 30 years or so, banks and other financial institutions have grown spectacularly in size and complexity and information technology has changed the industry beyond recognition.

For regulators and antitrust enforcers this means that to keep financial markets open and fair we must refine our tools and update our expertise.

It's an uphill struggle. We all know that for too long the financial-services sector has not had the same constraints and standards that were imposed on other industries to protect us from the harm it could do – nowhere near the standards for environmental protection, for instance.

We know that well, but today I will not talk about regulation and oversight – or the lack thereof.

Instead, I will talk about how the EU competition authority is trying to keep a level playing field in the industry and prepare the ground for the sounder, safer and more transparent financial sector of the future.

Our action covers a broad area.

In February, following an extensive investigation, we blocked the proposed merger between Deutsche Börse and NYSE Euronext, which would have created a quasi-monopoly in European financial derivatives traded globally on exchanges.

We are also investigating possible infringements in the market for Credit Default Swaps. Here we want to see whether a number of leading investment banks have adopted strategies to preserve their stronghold in this profitable market.

Finally, we have been investigating two leading market-information providers on concerns that the prices or restrictions they imposed on the use of proprietary data were excessive.

A case against Standard & Poor's was closed with commitments at the end of last year, whereas we are still working with Thomson Reuters.

The company offered a first set of commitments in 2011 but the market test was not successful.

We then received an improved proposal last June, and we are currently assessing the replies we have collected through a second market test.

Benchmark rates manipulation

And then, we are also active in investigating the manipulation of benchmark rates such as Libor, Euribor, and Tibor. These cases concern financial information of the highest order.

In the past few months the press has extensively reported the story and the actions taken against Barclays.

Our investigations focus on the markets for derivatives that are priced by reference to benchmark rates for various currencies. We are investigating whether cartel arrangements took place between a number of international banks.

I want to make clear that we cover the competition aspect of the story, whereas other authorities deal with fraud and other forms of criminal conduct and financial regulators are examining the matter from yet another perspective.

The European cartel proceedings – unlike in other jurisdictions such as the US – are multiparty proceedings. This means that we can solve the matter in one go, rather than one company at a time.

The banking sector needs a change of culture, and competition control – together with the enforcement of financial-service rules and new legislation – can help it happen.

It is simply unacceptable that leading figures in the business behave as if it were above the law and immune from social responsibility. We need to foster a new ethics in the business using the most appropriate means.

Banks need to return to their primary function, which is to provide credit to the real economy at competitive terms. They also need to be more open, transparent and accountable. And they must stop posing recurrent threats to stability.

These are the long-term objectives we have been pursuing since the end of 2008 when the European Commission was entrusted with the task of controlling the rescue and restructuring of banks in distress by EU governments.

We have been using a special State aid regime to make sure that the bailouts would occur under the same conditions throughout the Single Market.

The conditions we have imposed on the bailouts have helped maintain stability in financial markets and are paving the way for a more stable and safer financial sector for the post-crisis environment.

The EU is active on the regulation front too. We are debating new European laws on market abuse – including criminal sanctions – to protect investors and ensure market integrity.

In July, the European Commission amended its proposals so that they would cover the sort of manipulation that is emerging from the Libor scandal, making it a criminal offence.

Finally, earlier this month, the Commission launched a consultation on how benchmarks such as Libor and Euribor are compiled, produced and used.

We all agree that we must go after those who fall on the wrong side of the law and punish them, but that's not enough.

The system that is currently used to set these benchmarks does not offer enough guarantees – not for the most important number in the world.

We should do a whole lot better than that. We need a better system that guarantees that the benchmarks are accurate measures; are free from conflicts of interest; and are used appropriately.

These steps taken by the Commission reflect the main lesson that we can learn from this never-ending crisis. Financial services need stricter and better regulation and oversight, which doesn't necessarily mean burdensome rules.

Intellectual property

Ladies and Gentlemen:

My second theme today relates to the arrangements or practices used to protect intellectual property and their implications for competition control, a topic that Alexander Italianer will develop further in his presentation tomorrow.

Ideas have never been more valuable as in this knowledge era of ours. A good patent system that rewards invention and stimulates innovation is central to the smooth functioning of our economy and vital for growth and job creation.

At the same time, as with every system that grants exclusive rights, it should not be abused, or distorted through anticompetitive agreements. And this is where issues related to patents become of interest to competition enforcers.

To show you why we give particular attention to the potential misuse of patents, I will draw on our current experience in two areas: the pharmaceutical sector and the market for smartphones, where the patent wars do not seem to abate.

Enforcing competition law in the pharmaceutical industry inevitably raises the issue of intellectual-property rights.

Back in 2009, a sector inquiry conducted by the European Commission found a link between the use of patents and competition problems.

One common problem arises in the settlements of patent disputes, where a generic company agrees to drop its case against an originator company in return for money – lots of money – or some other advantage.

The EU Courts – which review the decisions taken by the EU competition authority and hear cases referred to by national courts in the Union – have provided some guidance in the relationship between patent law and competition control.

For instance, they have ruled that submitting misleading information to an administrative authority – such as a patent office – to obtain exclusive rights may constitute a competition-law infringement.

They have also established that a refusal to licence IPR-protected information about pharmaceutical products can, in some cases, constitute an abuse.

Our enforcement action now explores the dubious practice that we call "pay-for-delay agreements".

These are agreements in which the manufacturer of a branded drug pays another company to keep the generic – and much cheaper – drugs it produces out of the market.

Both companies have something to gain in such deals, but you will agree with me that they are not necessarily in the interest of the people and of health care.

Pay-for-delay transactions have been a recurrent theme in our control of the pharmaceutical industry over the past few years and it seems to me that they are an issue in the US too.

I have seen the news of the decision taken by federal appeals court in Philadelphia last July.

I understand the decision means that from now on pay-for-delay deals will not always be legitimate. I also understand that the ruling is a victory for the FTC – I congratulate Jon for this success, and I am very interested to hear his comments.

As to the latest from Brussels, we have recently issued formal objections in two cases which also involve patent settlements.

The main companies involved – Servier and Lundbeck – are both originator companies which concluded agreements with a number of generic competitors.

We suspect that those agreements involved substantial transfers – including direct payments – to prevent the market entry of competing generic versions.

Other investigations are ongoing in this sector.

In particular we have opened formal investigations against Cephalon and Teva in another case of patent settlement which was concluded in the US but was worldwide in scope and could therefore prevent the entry of generics in Europe.

We have also a case open against Johnson & Johnson and Novartis in the Fentanyl case with regard to contractual practices that could have had the same object.

I will now turn to smartphones and their never-ending patent wars.

The latest skirmishes include the $1 billion fine that Samsung was asked to pay because it infringed some of Apple's design patents and the ruling of the Korean court which – a little earlier – had found that Apple had infringed some of Samsung's standard-essential patents.

Let me clarify one important point. These are primarily patent cases, not competition cases, but we must remain vigilant because this state of belligerence may encourage a company to use its patents as weapons to harm legitimate competitors.

This is why the cases we opened earlier this year against Samsung and Motorola Mobility – now a subsidiary of Google – continue to be a top priority for us.

Standard-essential patents lie at the core of these cases.

I don’t need to tell you how important these patents become for an entire sector when they are part of a standard and their holders commit to license them on fair, reasonable and non-discriminatory terms.

The worst-case scenario is when a company willing to take a licence for standard-essential patents on FRAND terms is hit by an injunction.

Legal battles like these may put the standardisation process at risk and hold up innovation in the entire industry.

Fortunately, there is a growing consensus on both sides of the Atlantic on the damage that the misuse of standard-essential patents can do to competition.

The fact that we have received many complaints related to standards-essential patents also shows that there is a great need for guidance. I want to tell you that I am willing to provide clarity to the market through our enforcement.

Having said that, I am also convinced that the industry needs to do its homework too. I expect the leading companies in the sector not to misuse their intellectual property rights.

It is high time they look for negotiated solutions – I am tempted to call them ‘peace talks’ – that would put an end to the patent wars.

Keeping digital markets level and open

Ladies and Gentlemen:

The third and final part of my presentation will be devoted to issues that are closer to the digital economy.

The principles of competition-law enforcement do not change when we leave the realm of brick-and-mortar but we have to adjust our methods to the specific features of these new sectors.

Above all, the digital world changes at breakneck speed and competition authorities must learn to be nimble and move at a much faster pace.

The first two examples of these challenges I will give you come from industries that have been taken by storm by the digital revolution: recorded music and publishing.

As you know, we are reviewing the plan of Universal – the world's leading record company – to buy the recorded music business of EMI. It is our duty to ensure that it respects EU rules on mergers.

Record companies have always developed in pace with the technology and the latest developments – such as digital recordings, audio files, and online platforms – are completely changing their business.

This is why our review of the transaction looks with great attention at the digital world. In particular, we want to make sure that the deal would not have negative effects for digital customers and for the development of new digital services.

Universal has submitted – in July and August - a set of remedies to address our concerns and at present we are finalising our assessment, also on the basis of the useful feedback of other participants in the industry.

The formal deadline for our decision would be the 27th of September, but we always try to beat the deadline by a few days if we can. So, I may announce our final decision very soon.

I am aware of the parallel investigation conducted by the FTC and I am looking forward to reading your conclusions.

A different part of the EMI group was involved in another merger review; the acquisition of its publishing business by Sony, which we cleared with remedies in April.

In the publishing industry, the impact of information technology is even greater.

Although the book is one of the human inventions which can hardly be improved upon, the written word can now circulate by many other means. One of these is the e-book, which is the focus of another important investigation.

The core of the case is the suspected collusion between a number of major publishers with the help of Apple to raise the retail price of e-books and prevent competition at retail level.

We are concerned that the agency agreements, which have replaced the wholesale model, were the result of such coordination.

This is the typical case involving various jurisdictions; as a matter of fact, three of the five publishers involved in our investigation settled here in the US with the DOJ and then, at the end of August, with the States.

In a nascent and fast-moving market, such as that for e-books, it is vital that we nip in the bud any competition restrictions. It is also vital that we find swift and effective solutions to ensure that the business environment remains open and dynamic.

With that purpose in mind, we have had extensive discussions with Apple and with four of the five publishers. Yesterday we published for public comments the commitments that they have agreed to propose.

We will review the comments we receive from interested parties and decide whether or not there is ground for further action.

As regards these investigations, I would like to note once more that they follow different systems and procedures on the two sides of the Atlantic, but there is a clear convergence in our respective approaches and objectives.

The last two stories I have for you today relate to the core of the digital economy with household names such as Google and Microsoft.

As to Google, it is well known that we have competition concerns that the company is using its dominance in online search to foreclose rival specialised search engines and search advertisers.

After several exchanges with me, Google has agreed to propose solutions in the four specific areas of concern that we have identified.

I have now instructed my staff to engage into technical discussions with Google in order to assess in-depth the solutions presented to us.

If effective solutions were found quickly and tested successfully, competition could be restored at an early stage by means of a commitment decision.

However, we are not there yet, and it must be clear that – in the absence of satisfactory proposals in the short term – I will be obliged to continue with our formal proceedings.

Let me add that this process is without prejudice to the separate investigation of other issues involving Google that have been raised with the Commission.

I will close with Microsoft.

Back in 2009, the company ended an antitrust investigation of the European Commission when it pledged to offer a 'choice screen' that would allow us to easily pick our preferred web browsers.

This remedy was very effective while it was implemented and the case is widely regarded as one of the most relevant antitrust cases of the last decade at EU level.

It has recently emerged that the company has not kept its commitments. Microsoft itself has confirmed that it failed to roll out the choice screen with the version of Windows released in February 2011.

This means that for around one and a half years millions of users in the EU have not seen the choice screen.

Generally speaking, I consider that the commitments offered by the companies themselves are a good way to solve competition problems, as an alternative to lengthy proceedings.

But the policy can work only if they translate their words into action. This is why I take compliance very seriously and I will make sure that we take the necessary decisions as a matter of priority.

Ladies and Gentlemen:

These reports on our current work in the financial sector and in the digital industries have one thing in common: they all involve global markets that move really fast.

I believe it is the responsibility of competition enforcers to recognise this fact and, whenever possible, to look for swift and effective solutions that can preserve a healthy competitive environment and restore it when we see that it is in danger.

The same applies to the other domains I have talked about today: patents and the dissemination and use of financial-market information.

These too are cases with global implications and are evidence of the growing need for coordination among competition authorities in different jurisdictions.

We need to bring our approaches closer together and define common objectives, building upon the already good relations that we have established over the years in our bilateral contacts and within multilateral bodies such as the International Competition Network.

As we do so, we must stay true to our principles and preserve our ability to stop and correct any attempt to rig the markets and harm consumers and the economy.

And to do so, we must always stay ahead of the curve so we are ready to respond to the challenges posed by the constant evolution of business.

Thank you.