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Being open about standards

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

Credible competition policy requires competition law enforcement. Cartel cases, merger cases, abuse of dominance cases.

But competition *policy* is not only about cases.

It is about putting in place the conditions for companies to deliver better goods and services to consumers. So it must be informed by more than the individual cases.

If markets are not delivering as they should, then I want to understand the problems, and find solutions. That may mean enforcement, advocacy, or specific Commission or national government policy initiatives.

In technology markets, I think it means all three.

We all know that the Commission has found competition problems in at least some technology markets. The Commission has never before had to issue two periodic penalty payments in a competition case... And there are other cases of alleged unlawful conduct pending.

As an enforcer, I act only where there is a proven breach of the competition rules. But as a policy maker I take the knowledge I gain as an enforcer, and apply that more generally. If the proposals I come up with are grounded in the reality of markets, they will help to make markets work better, whether or not there is a breach of the competition rules in the particular case.

What does that mean in the technology sector? Standards are clearly more important than ever. They often facilitate economies of scale but their real impact on technology markets is with interoperability.

The development of electronic communications networks has seen a rise in the importance of interoperability between equipment used, between services provided, and between data exchanged. Interoperability encourages competition on the merits between technologies from different companies, and helps prevent lock-in.

Standards are the foundation of interoperability.

Standards may, of course, be proprietary or non-proprietary. Much excellent technical development has been driven by non-proprietary standards – the internet is awash with acronyms for non-proprietary standards: HTTP, HTML and XML.

Many standards bodies express a preference for non-proprietary standards. Non-proprietary standards avoid the need for licence agreements and royalties. They avoid the need to ask permission if you want to use or develop the technology – follow-on innovation may be easier. They avoid subjecting the future development of the standard and the technology to the commercial interests of the technology's originator.

Of course, proprietary technology development is vital to reward R&D investment and innovation that would otherwise not be made. The patent system is a tremendously effective mechanism to create incentives to innovate, and reward successful innovation.

Proprietary technology is at the heart of Europe's success in second and third generation mobile technologies, for example. Intellectual property protection for technology will always be necessary to give just rewards for investment in R&D. There will always be an important place for proprietary technology and formal proprietary standards.

Standards may also emerge, de facto, from markets: a particular operating system for example, or a particular document format.

Standards emerging from the market can be a good thing if they emerge as a response to consumers' expressed preferences. But they may also be problematic, having none of the safeguards of disclosure that standards bodies typically require.

The patent system, too, has some inherent safeguards:

- Disclosure: helps avoid unintentional infringements, and makes it easier to innovate around the patent.
- In some exceptional circumstances, patent systems even provide for compulsory licensing.
- And of course, patents are limited in time.

However, it is now common to hear criticism of how the patent system is used:

- There are so many patents, whose scope is sometimes less than crystal clear, that it can be harder to know what patents read on a particular technology.
- There are also concerns that patents are now often used strategically and no longer primarily to protect innovation.

In addition, the growing importance of software means that copyright and, in particular, trade secret protection is often just as important as patents, if not more so, in technology markets. But:

- Laws on copyright and trade secrets rightly do not require disclosure of software source code before protection is granted.
- Trade secrets are not limited in time – and in effect, as far as technology is concerned, neither is copyright.
- And of course copyrights and trade secrets may not be technologically innovative.

Where interoperability information is protected as a trade secret, there may be a lot of truth in the saying that the information is valuable because it is secret, rather than being secret because it is valuable.

This raises the possibility of perpetual exclusion, based on technology which is not even innovative.

Clearly we can do better.

Having worked in business for much of my life, in government for part of it, and now serving as the Commissioner for Competition, these considerations draw me to a simple conclusion.

We need an approach to standards that is based:

- on evidence;
- on economics; and
- on experience.

It is simplistic to assume that because some intellectual property protection is good, that such protection should therefore be absolute in all circumstances.

It is simplistic to assume that because standardisation sometimes brings benefits, more standardisation will bring more benefits.

It is simplistic to assume that if the best approach is sometimes to base a standard on proprietary technology, then that is always the best approach.

And it is simplistic to assume that we can fix on a standard today, without paying attention to the risk of being locked-in tomorrow.

So what does this mean in practice?

First, we should only standardise when there are demonstrable benefits, and we should not rush to standardise on a particular technology too early.

Second, I fail to see the interest of customers in including proprietary technology in standards when there are no clear and demonstrable benefits over non-proprietary alternatives.

Third, standardisation agreements should be based on the merits of the technologies involved. Allowing companies to sit around a table and agree technical developments for their industry is not something that the competition rules would usually allow. So when it is allowed we have to look carefully at how it is done.

If voting in the standard-setting context is influenced less by the technical merits of the technology but rather by side agreements, inducements, package deals, reciprocal agreements, or commercial pressure ... then these risk falling foul of the competition rules.

In addition, if we are to include proprietary technology in a standard, then ex ante disclosure may help those involved make a properly informed decision. Competition law should not stand in the way.

This will almost always entail ex ante disclosure of the existence of essential patents. And it may increasingly entail ex ante disclosure of maximum royalty rates. Both can increase the effectiveness of the standard setting process, lead to more competitive solutions and reduce the risk of later antitrust problems. Standards bodies could very often require disclosure without fear of competition law intervention.

Standards bodies do important work in difficult circumstances. But like all of us their rules need to keep pace with the changing commercial environment. If they need help in tightening up their rules to avoid being manipulated by narrow commercial interests, or to design the right ex ante rules, then they have my support. My door is always open.

Fourth, if we extend intellectual property protection for technology, then we should only do so when it is justified under intellectual property principles, i.e. on the basis of evidence that such extension will lead to more innovations and will therefore promote consumer welfare.

Finally, if standards develop through customer preferences, most of the time, we should do nothing.

That stance may surprise you. But it is often wise to resist the impulse to regulate. If the proprietary technology initially appears to harm consumers more than it helps them, often the market will find a way out of the problem.

Of course, although I am a great believer in the market finding the right result, I am not naïve. Sometimes intervention will be necessary.

When a market develops in such a way that a particular proprietary technology becomes a de facto standard, then the owner of that technology may have such power over the market that it can lock-in its customers and exclude its competitors.

Where a technology owner exploits that power, then a competition authority or a regulator may need to intervene. It is far from an ideal situation, but that it is less than ideal does not absolve a competition authority of its obligations to protect the competitive process and consumers.

In essence the competition authority has to recreate the conditions of competition that would have emerged from a properly carried out standardisation process.

There seem to me to be two possibilities and, depending on the case, either or both may be necessary.

First, the de facto standard could be subject to the same requirements as more formal standards:

- ensuring the disclosure of necessary information allowing interoperability with the standard;
- ensuring that other market participants get some assurance that the information is complete and accurate, and providing them with some means of redress if it is not;
- ensuring that the rates charged for such information are fair, and are based on the inherent value of the interoperability information (rather than the information's value as a gatekeeper).

In addition, where equivalent open standards exist, we could also consider requiring the dominant company to support those too.

Better, much better, than trying to sort out these problems, is preventing them from arising. And we all have a responsibility to ensure that this type of perpetual lock-in does not happen, and, where it does happen, we have a responsibility to minimise the damage.

Here I am not speaking of my role as the Competition Commissioner, but as a purchaser of technology.

What can purchasers do? Quite a lot.

Look at Apple. Over the last couple of years there have been some calls to regulate Apple – in particular to ensure some interoperability between competing music stores and its iPod music players, and between competing music players and music from the iTunes store.

The issue arose because first, the music labels insisted that Apple used digital rights management technology, and then second, Apple's iPod was a tremendous success. But now the major labels have licensed other music stores to provide music in MP3 format, a format that can play on the iPod and on other players. So pressure from consumers, and possibly concern from the major labels about over-reliance on Apple, looks to have led to a timely market-based solution.

This is important. If consumers can avoid lock-in to a single vendor, by exercising influence through purchasing behaviour, they may be wise to do so.

As purchasers, we need to be smart when we buy technology. We need to be aware of the long term costs of lock-in: you are often locked-in to subsequent generations of that technology. There can also be spill-over effects where you get locked in to other products and services provided by that vendor.

That is just bad purchasing.

And that is why the Commission has committed that:

- for all future IT developments and procurement procedures, the Commission shall promote the use of products that support open, well-documented standards. Interoperability is a critical issue for the Commission, and usage of well-established open standards is a key factor to achieve and endorse it.

This policy, adopted last year, needs to be implemented with vigour.

There is much to learn from other public bodies such as Munich - and I am delighted to have the Mayor of Munich here this morning to tell us about his experience. But Munich is not alone: there is also the German Foreign Ministry, and the French Gendarmerie. The Dutch Government and Parliament are also moving towards open standards.

The Commission must do its part. It must not rely on one vendor, it must not accept closed standards, and it must refuse to become locked into a particular technology – jeopardizing maintenance of full control over the information in its possession.

This view is born from a hard headed understanding of how markets work – it is not a call for revolution, but for an intelligent and achievable evolution.

But there is more to this than ensuring our commercial decisions are taken in full knowledge of their long term effects. There is a democratic issue as well.

When open alternatives are available, no citizen or company should be forced or encouraged to use a particular company's technology to access government information.

No citizen or company should be forced or encouraged to choose a closed technology over an open one, through a government having made that choice first.

These democratic principles are important. And an argument is particularly compelling when it is supported both by democratic principles and by sound economics.

I know a smart business decision when I see one - choosing open standards is a very smart business decision indeed.