Antitrust in the Financial Sector - 5th Annual Conference
#2 Current International Issues in the Financial Sector
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*Interview with Maria Velentza (DG COMP), by Linda Cenedella (Partner, Morgan Lewis)**

Maria Velentza** (Director Financial Services, DG Competition, European Commission) has been interviewed by **Linda Cenedella** (Partner, Morgan Lewis) in anticipation of the 5th edition of the **Antitrust in the Financial Sector Conference** to be held online with a series of **3 webinars on April 6th, 13th and 20th.

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Linda Cenedella: **The U.S. Supreme Court in its *American Express* decision concluded that you can't just look at the effects on one side of the market without considering the effects on the other side. This does not appear to be the approach in Europe. Platform markets are prevalent in the payment space, so how can global platforms operating in the U.S. and Europe reconcile these different approaches?**

Maria Velentza: Indeed, the approach under EU competition law is significantly different from the U.S. First, under EU competition law, the defendant has the burden of proving efficiencies, and these efficiencies must fully outweigh the harm caused by restrictive agreement.

When assessing efficiencies under Article 101.3 of the Treaty on the Functioning of the European Union (TFEU), an agreement must satisfy four cumulative conditions: (i) it must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; (ii) consumers must receive a fair share of the resulting benefits; (iii) the restrictions must be indispensable to the attainment of these objectives, and (iv) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

Under EU antitrust law, the "fair share" condition cannot be met unless the benefit to the class of consumers affected by the restriction (the merchants) offsets the harm occasioned by the restriction to that same class of consumers. Hence, there is limited scope for "cross-market" efficiencies. This position has been clearly confirmed by the EU Courts[1] and is also reflected in the Commission's Guidelines on the application of Article 101.3 TFEU[2].

However, payment service providers (be it large or small, global or domestic) active in the EU should also comply with additional legislation, such as the Interchange Fee Regulation ("IFR"). Under the IFR, anti-steering provisions (the subject matter in the US Supreme Court Amex judgment), are prohibited for both debit and credit cards. This is yet another distinction with the US perspective, where anti-steering provisions are only prohibited regarding debit cards.

With this in mind, it is important to remember that the EU, constituting a single market of 27 Member States is quite unique. I refer to this because one of the objectives of this legislation is to eliminate any obstacles to the proper functioning and completion of an integrated market for electronic card-based payments, with limited distinction between national and cross-border payments. But this should not be looked at in isolation. The IFR was inspired by competition policy, in particular regarding reducing transaction costs for consumers. Hence, the rationale for the prohibition of anti-steering provisions is that consumers using low(er) cost means of payment should not "subsidise" the ones using more expensive means of payment.

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[1] Judgment of the Court of Justice of 11 September 2014, *MasterCard and Others* v. *Commission*, C-382/12, ECLI:EU:C:2014:2201, paragraphs 242-243.

[2] Guidelines on the application of Article 81(3) (now 101(3)) of the Treaty, OJ C 101, 27.4.2004, p. 97, paragraph, 43.

In short, the existing legal framework in the EU is inspired by a wide set of policy objectives and offers payment service providers with legal certainty when offering their services in our internal market, with access to over 500 million consumers. I believe global platforms/payment service providers should balance their interests on each side of the Atlantic and enjoy the full benefits that a geographically diverse but integrated market offers.

You've been very active in the payments space, including specifically data access issues. Is equal access to data a realistic goal? If so, how can competition policy be reconciled with data security requirements, which may inherently limit access to protect safety and security?

The competitiveness of financial/payment services firms will increasingly depend on real time access to relevant big data sets and the ability to use them to develop innovative market intelligence products. However, not all limitations of data access constitute restrictions of competition. Many variables may influence this assessment.

There is a general debate whether public intervention is needed to ensure sufficient and timely access to data. Competition law can play an important role in this by ensuring in a proportionate manner that a level playing field is maintained (for example, when data access is warranted, that access is granted on fair, reasonable and non-discriminatory terms and in a manner that does not enable or facilitate collusion). The Commission's Guidelines on horizontal cooperation agreements[3] include relevant principles for self-assessment in this regard.

In the retail banking market, one of the data-related issues concerns the perceived asymmetry in supervisory and data portability regulations applicable to BigTechs as compared to banks. More specifically, it is held that BigTechs' entry into retail finance may be facilitated by the asymmetric data access conditions that are regulated in the market. Whereas in the EU, banks are obliged to provide access in particular under the Payment Services Directive 2[4] ("open banking") – this access condition may not apply to FinTechs and BigTechs, in principle. This may create an alleged asymmetry.

However, a perceived "symmetric" data access may, in turn, risk creating a new imbalance, as the mandated data access under the Payment Services Directive 2 is more limited and targeted. Access to consumer data is only permitted for a specific purpose which has to be explicitly requested by the customer, and this specific purpose must be related to the provision of account information or payment initiation services.

At the end of the day, many questions still need to be addressed on a case-by-case basis: e.g. what type of data is needed, can the data be obtained from other sources, is the request proportionate, is a regulatory approach preferred to competition enforcement, or a mix of both? The debate around consumer data protection and competition is still ongoing and closely follows the developments brought about by digitization (not limited to the financial

[3] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72.

[4] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, OJ L 337, 23.12.2015, p. 35–127.

sector) and the increasing role played by data. A recent example of the ongoing debate is Facebook's dominance decision by the German Bundeskartellamt on sharing data with its WhatsApp service which a few weeks ago, was referred to the EU's highest court, the Court of Justice of the European Union.

One thing seems clear, however, competition policy and consumer data protection do not contradict each other. They rather complement each other by ensuring that consumers get access to the benefits of the data-based digitized sectors, without having to give up their fundamental data rights.

Finally, as you know we have a new administration in the U.S. and there has been much chatter of more aggressive competition enforcement. Any thoughts on whether more aggressive enforcement in the U.S. will have a bearing on cooperation with the EU?

From her first mandate, back in 2014, until today, Executive Vice-President of the European Commission Margrethe Vestager has repeatedly made clear that one of her primary focuses lies on a combination of effective and proactive competition enforcement in the digital ecosystem. As such, one of the six priorities of the von der Leyen Commission is building a Europe fit for the digital age. Bringing consumers and businesses together in a safe, transparent and competitive digital market will only create benefits for both sides in today's increasingly digitized economy.

In the past years, the Commission has been very active in competition law enforcement in digital markets. However, these markets are challenging and complex for a number of reasons. Potential issues include the finding of a dominant position in tipping markets, the quantification of and legal standard for foreclosure effects and the design of effective remedies. To tackle competition problems in digital markets effectively, enforcement actions may in some have to go beyond established enforcement practice and test the limits of current jurisprudence.

But again, our intervention in digital markets is not limited to competition enforcement. As regards regulation, we have acknowledged the importance and necessity of adjusting our existing framework in order to keep up with the increasing complexity of the digital ecosystem. COVID-19 has also contributed in the need to fast-track the aforementioned process, as more users, data and transactions find their way to the digital world. Along these lines, the Commission recently presented two legislative proposals. On the one hand, there is the proposal for a horizontal Digital Services Act (DSA), which aims to bring more safety for users and establish a powerful transparency and clear accountability framework for online platforms. On the other hand, we have the proposal for a Digital Markets Act (DMA), which establishes a set of narrowly defined objective criteria for qualifying a large online platform as a so-called "gatekeeper", establishing obligations, "do's" and "don'ts" they must comply within their daily operations.

We should not forget that digital markets are generally international and no one actor can succeed in their regulation in isolation. Of course, every jurisdiction has its own market context, as well as its own legal and policy framework and traditions, so it is unrealistic to expect a one-size-fits-all solution that will address all the issues that digital world presents.

Having said that, we see great value in maintaining an open dialogue with the US and learning from our respective knowledge and experiences. This explains why we follow with great interest developments in ongoing Big Tech investigations and proceedings in the US. After all, and as our Executive Vice-President rightly pointed out, Europe has a long history of close and effective cooperation with the US. If we can formulate appropriate policy responses on the basis of shared experiences, knowledge and, if possible, common visions, this could be very beneficial, both for citizens and businesses on both sides of the Atlantic.

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