Merger control in the third ICN decade:

new approaches and standards

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Good afternoon to everyone attending this Annual ICN Conference.

I will start by saying that merger control is very much a key part of agencies' enforcement toolbox. And this is because it allows enforcers to keep markets contestable and innovative.

In general, from a European perspective, I believe our current merger review system has shown itself to be adequate to incorporate changes in economic and social dynamics.

I am also mindful of the significant discussions that the competition community embraced over the past few years. These discussions raised aspects that push us forward. For example, we have been extensively discussing the full potential of the toolbox in merger review. This, in my view, has been useful.

Agencies' decisions, over time, reflect the market and its competitive dynamics more accurately.

This is obviously a continuous process: markets evolve, business strategies adapt, consumer preferences change, innovation disrupts the status quo.

And enforcers, as usual, **must keep pace**.

But let us look at what is at stake here. A core issue today is how we should address potential competition.

Potential competition at the core of the challenges

Firms, and the economies in which they operate are undergoing a digital and green transition, which was accelerated by the pandemic. These are strong market dynamics to be considered today in merger control. But in their essence, the **theories of harm** to be analyzed in a merger assessment are no different from before. And they can be such as: increases in prices, decreases in quality, foreclosure effects, raising barriers to entry.

But they do take on a **different** flavor: because the strategies are different, and mostly because potential competition is difficult to grasp or quantify. For example, competition in digital markets revolves around network effects, access to user bases, data collection, the very own capacity to analyze such data.

These characteristics fundamentally change how players think and act when compared to non-digital environments. Sizeable digital players are organized in digital ecosystems of goods and services, which create **synergies** among them. They compete for the whole market rather than for a market share, in a winner-takes-all race.

This means digital players are **wary** of potential competition. They become very diligent merger-wise. They move early on to buy a potential competitor, or eradicate them when buying is not an option, possibly through foreclosure.

In the green economy, potential competition has also taken a central role, one where innovation is a key dimension of competition.

But potential competition issues go beyond digital markets and the green economy. These are mere illustrations.

Three main challenges regarding merger control

How are enforcers tackling issues such as potential competition and market dynamics in general? I would pinpoint three main aspects: killer acquisitions and notification thresholds, standard of proof and decision under uncertainty, and remedy design.

1) Killer acquisitions and notification thresholds

On killer acquisitions, there is a risk of potentially harmful mergers going under the radar of competition agencies. For example, digital start-ups which are still developing products in adjacent markets. Or bioengineering products still in a development phase.

Competition enforcers have devised solutions to address this so-called enforcement gap. For example, some countries, like Germany and Austria, have introduced a threshold based on the transaction's value. The European Commission has resorted to the referral mechanism.

So this seems to be going in the right direction in order to close the perceived enforcement gap.

2) Standard of proof and decision under uncertainty

Once we are able to capture the relevant deals under the notification net, then it is time to develop the merger's assessment.

And this brings me to the second challenge. Despite all the discussions one can have, all the internal documents and information than can be collected, and all the fine-tuning on theories of harm, enforcers are always going to make merger decisions under **some** degree of uncertainty.

The characteristics of some markets and the prospective nature of merger assessments make this **inevitable**. Anticipating how markets are going to evolve and defining the proper counterfactuals for the merger assessment can be challenging.

But enforcers need to ensure that incentives to innovate are maintained and that contestability is fostered. This is an important **compass for all**.

3) Remedies in dynamic markets

Lastly, the third challenge relates to remedy design and remedy implementation in dynamic markets where there is a risk that incumbents can find alternative ways to tilt the odds in their favor.

Again here, enforcers face significant uncertainty and information asymmetry while needing to ensure that they only accept remedies that will have a meaningful impact in maintaining contestability.

At the same time, enforcers want to preserve, side-by-side with competition and contestability, the efficiencies generated by the deal. And we all know this is a highly-skilled task.

Discussions took us this far.

And to get here, dialogue among competition authorities has been extremely useful.

Digital economy, data and privacy in merger control

The topics I have mentioned earlier – killer acquisitions, decision within uncertainty and remedy design – are particularly acute in the digital economy.

Digital markets have specific characteristics to be taken into account in merger decisions.

1) Network effects

Take network effects.

Network effects are arguably the most striking feature of digital markets. They often exist across products, which are then integrated in digital ecosystems.

The relationship between these products creates incentives for incumbents to **neutralize** competition coming from adjacent markets to their core business.

Competition authorities have therefore to be watchful of incumbents seeking to buy-off players in these adjacent markets, as that may be a way to foreclose entry into the market or ecosystem.

Whether the incumbent integrates or kills the product of the acquired firm, such a merger risks eliminating a source of potential competition.

2) Data

Another fundamental feature of digital markets is their **reliance on data**.

Indeed, data is at the core of most business models in digital markets and one of the most important drivers of network effects.

Digital platforms rely on the collection and treatment of large amounts of data, which feed the statistical models and algorithms underpinning the services provided.

And users are digital platforms' so-called "data farms".

Active users and the time they spend on the platform are akin to a productive asset for digital platforms. And so, competition is centered around **user bases**.

This means that digital platforms have incentives to:

- attract and keep users in the ecosystem;
- prevent any user leakages onto competing ecosystems;
- and bar competitors' access to users.

This also means that enforcers need to bear these strategies in mind, especially when assessing mergers that involve **shifting control** over large user bases.

Now let us look at how data enters merger assessments.

First, enforcers look at how the resulting datasets or data collection capabilities may bring **efficiencies**. It is possible that more complete datasets may generate better products to consumers. However, the combination of data and data collection capabilities may also become a source of harm for consumers.

How? Data may be instrumental in foreclosure strategies, for example, in raising barriers to entry. This has to do with incumbents' incentives to close off entry points to the market. "If I get the data first, or the means to collect the data first, that data cannot be used to compete against me."

Moreover, not all data combination is born equal.

If data is combined to steer consumers to more expensive products and extract more consumer surplus for example, the potential benefits of the merger may not accrue to consumers.

3) Privacy

Then data may also raise significant **privacy** concerns. Consumers do care about privacy and many digital products **differentiate** on privacy. Therefore, data may also be factored into merger assessments as a dimension of **quality**.

Regarding this, it is important to assess when privacy is a differentiating factor and whether there is a risk of privacy reduction following the merger.

4) Other concerns

Then there are other concerns specific to digital markets, which are more methodological in nature. I am talking about market definition or assessing market power in zero-price environments.

Another concern is that mergers in digital markets may involve the analysis of large volumes and documents, or even algorithms and their respective codes. This may require specific expertise by competition authorities and may highlight information asymmetry issues.

Market contestability remains enforcers' compass

To conclude, I would say that enforcers have always faced evolving markets, some markets more than others of course, and with those evolving markets, evolving concerns as well.

Enforcers' compass, however, does not need to change:

and that is, market contestability must be ensured by maintaining the threat of potential competition. This is most likely the best way to achieve good outcomes for consumers in digital markets.