Women & Antitrust

Voices from the Field

Vol. II Curation & Foreword by Kristina Nordlander

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Grania Holzwarth is head of EU competition policy at Deutsche Telekom, responsible for EU competition affairs in Brussels, with a focus on ongoing competition cases in the field of telecoms mergers and antitrust cases in the ICT sector, as well as the development of competition policy in the context of digitalisation. She is chair of ETNO's (European Telecommunications Network Operators' Association) Competition Policy Taskforce and vice-chair of the ICLA (International Commercial Law Alliance) European chapter.

Ingrid Vandenborre is the partner in charge of the Brussels office of Skadden, Arps, Slate, Meagher & Flom, and focuses on EU and international merger control and competition law. She was recently named "Competition Lawyer of the Year" at the Benchmark Litigation Europe Awards, based on her representation of Aspen, and she represented Kuoni and Thomas Cook in an investigation by the European Commission into geo-blocking clauses that was suspended without penalty for both companies. Her recent merger control experience includes the representation of PayPal, Visa and Stryker in relation to the acquisitions of Honey, Plaid and Wright respectively, and ABB in its transaction with Hitachi.

Grania, thank you very much for accepting this interview. You are responsible for European competition affairs at Deutsche Telekom, a company you joined in 2001. This is a very long time in such a fast-developing sector. What key trends have you observed over this timeline?

Probably we are observing one of the most significant developments right now: the digital transformation. Also referred to as the 4th industrial revolution, it will lead to fundamental changes in how businesses, markets, communities and even our whole lives will be structured and function. Digital technologies, in particular AI (artificial intelligence), immense computing power and storage capacity, will bring unprecedented opportunities – for which, by the way, the telecom industry's next generation infrastructure will be one of the key drivers.

The telecoms sector has seen many exciting developments on the technical as well as on the corporate side over recent years. One of the first projects I was working on when I started at Deutsche Telekom group was the IPO of T-Mobile International, its holding company for all mobile subsidiaries. Although this did not materialise in the end, at the time it resonated the industry trend of clearly separating mobile and fixed operators. They were regarded as two very different animals with quite distinct needs, the one being young and dynamic, the other a former state-run incumbent. This trend reversed to the exact opposite in less than 10 years, when the mobile and fixed business were merged to one entity in 2010.

Obviously, these restructurings were mainly driven by the technological evolutions. At the outset, mobile technologies and services were very distinct, a fast-growing business with rapid changes: 2G, GPRS, EDGE, 3G, 4G, LTE-A – sometimes bringing drastic changes to the ways we communicate or even to our overall lives, if you think about the impact the introduction of the smartphone has had on our daily routine. Now with fixed – mobile convergence, technologies have grown together and we see more integrated services, like multiplay offers. With the full

virtualisation of future networks (such as 5G) fixed and mobile access networks will be unified in one core network, and the devices and services will be agnostic to access technology.

These trends can also be observed on the M&A side. While in-market consolidation remains critical you now see a clear increase in fixed – mobile convergent mergers or even broader mergers to offer more diversified service, e.g. mergers with media companies. In the context of the digitalisation, the trend of convergence extends way beyond the telecoms industry. We can observe cross-sectoral convergence, where connectivity, content and other OTT (over-the-top) services are growing together and directly competing with each other. Also on the network side, there will be wider convergence beyond just telecoms and cable operators. Other vertical players, such as platforms or the automotive industry, will enter at all levels of the value chain, including in networks.

Deutsche Telekom is ever-increasingly active in a broad variety of digital markets including the Internet of Things (IoT), big data, AI, cyber security, cloud computing and storage, digital solutions and consultancy, etc. What, in your view, are the biggest competition law challenges of the digital revolution for the telecoms industry?

The digital revolution opens up an array of opportunities, but undeniably also some serious challenges for the telecoms industry. Like most other traditional industries, we need to adapt to new business models, changing competitive dynamics and different consumer needs. This raises different competition law issues and questions along the value chain.

Let's take the retail level, for example: operators' SMS services are being substituted by messaging apps and traditional voice telephony is being replaced by VoIP (voice over Internet protocol) services offered by the platforms. These services can be used without having to rely on our networks and actually, this is quite frequently done by using WiFi hotspots as alternative infrastructure. This raises multiple questions,

starting with what is the right market definition. Which services beyond the traditional telecommunication services are part of the same market? Beyond that it has implications on the assessment of market power and how to factor in the competitive constraints exerted by the platforms.

In relation to the large online platforms there is also a bigger picture challenge that the telecoms sector faces in competing with the disruptive technologies and services. European telecoms markets are very fragmented, heavily regulated and given less flexibility by investors, which naturally leads to a competitive disadvantage. Looking at Deutsche Telekom's subsidiary in the US we already see that the different structures and regulatory approach in the US market lead to a more favourable investment climate. How drastic this difference plays out in relation to large platforms can be seen if you take a look at their market caps, which are the highest worldwide. This lack of level playing field in combination with missing scale makes it difficult to compete with the platform industry. In particular, this applies to innovative technologies, such as AI or cloud computing, where scale is crucial and the only way to achieve such competitive scale is consolidation or cooperation. In order to enable more competitiveness in these digital ecosystems it is essential to at least lower the hurdles for industry cooperation, which is something that could be tackled in the ongoing review of the Horizontal Guidelines and the Horizontal Block Exemption Regulations. At the same time, the significance of efficiencies in the context of consolidation needs to be acknowledged and the role they play in merger analysis must be strengthened.

Looking at our networks, there is a more fundamental challenge for the telecoms industry when it comes to scale and the roll-out of digital infrastructure. The roll-out of next generation networks, such as 5G, will be even more capital intensive than previous generations, while at the same time revenues in Europe are shrinking. On the fixed network side, the large-scale investment needed for the fibre build-out are generally

recognised by promoting co-investment schemes in the new European Electronic Communications Code, but in practice still face some difficulties. On the mobile network side, the need for network-sharing, in particular in the context of 5G, should be equally acknowledged by the authorities. Network-sharing among operators is critical in order to ensure a fast rollout and efficient investments, and to avoid building redundant access networks. It creates significant cost-savings for network deployment by freeing up resources for other investments in innovation, while at the same time preserving the independence of – and differentiation between – operators at retail level.

For the last months, competition agencies and experts in Europe have been reflecting on the direction that EU competition policy should take to address new challenges posed by the digital economy, yet promoting innovation. Reports authored and presented by these agencies anticipated more antitrust enforcement within the existing antitrust legal framework they deemed fit for purpose with some "adjustments". However, recent trends show a shift in the scope of EU antitrust enforcement with increasingly more interventionist proposals to regulate the digital industry and platforms more specifically. What is your take on the ongoing digital debate?

What we can clearly see from the various reports around the world contributing to the policy debate with regard to the digital economy is that there is an agreement on the different characteristics of these markets that lead to more structural problems such as gatekeeping and tipping. Most of the reports also suggest that the solution to keeping these markets innovative and contestable would be twofold, on one hand an adjustment of competition law enforcement and on the other hand additional regulation of digital players would be necessary. The question of which role competition law and regulation should play with regard to digital markets is also reflected in the most recent DG Comp initiative to make competition law fit for the digital economy. The Commission has launched two parallel consultations on the potential Digital Service Act

on the regulatory side and on the possibility of a new competition tool on the competition law side, both at least partially aimed at addressing the same issues. Here the orchestration of the interplay between the suggested competition law enlargement and new regulation will be a delicate task. Given the identified enforcement gap, arguably the scope for a new competition tool may be very limited, if a case by case ex ante regulation will be introduced and the existing competition toolbox is adapted. In reality, given the fundamental changes driven by digitisation an even broader view may need to be taken looking at the interaction of various policy areas together, for example data regulation and consumer protection laws.

Looking more closely at competition enforcement, multiple reports have identified the need for adaption to the challenges of the digital economy which is characterised by strong network effects, increasing return to scale and strong economies of scope which result in more concentrated markets. Another important particularity are indeed the business models in these markets, where services are often zero-priced for consumers and one of the most valuable assets – data – is obtained at very low cost. Clearly here there are still some shortcomings in adequately capturing the characteristics and effects that arise in the context of the digital economy, which then as a consequence produce more type 2 errors, arguably in some instances at a higher error cost. To correct such imbalance of false negatives and false positives requires the authorities at least to be more agile and innovative regarding the enforcement of competition law with regard to the digital economy.

There are also areas where more concrete adjustments could be made to existing competition law rules. One instance here could be the ongoing review of the Market Definition Notice. Some very obvious changes that need to be addressed here are the adaption of price-based tools, such as SSNIP test, to other criteria like quality. Another one is the role of data which could be captured with more focus on the supply-side

substitutability. The Commission's Special Adviser Report argues that in digital markets, there should be less emphasis on market definition and more attention to the theories of harm and anticompetitive strategies. While market definition is a very helpful tool to set the frame for the following analysis in traditional markets, it actually may be less informative in digital markets, especially against the background that in the digital economy we are often looking at more conglomerate structures or ecosystems with multiple interlinked markets, and it is more difficult to identify potential competitors in markets that are more dynamic and in flux, in particular, where we are more likely to have competition for markets and not competition in markets. In any event, regardless of the role you assign to market definition, it is necessary to have a more dynamic, forward-looking approach with more attention to potential competition.

At the same time, it is not only the abovementioned characteristics and substantive analysis, but also, on the procedural side, enforcers will need to adapt, given the pace of these markets. It is important for them to keep up with the digital markets, which can be prone to irreversibly tipping, leaving intervention then no longer able to restore competitiveness. Timely intervention is crucial and beneficial to all market participants as it creates legal certainty in this, for the time being, somewhat uncharted territory. With a view to reacting promptly in these fast-moving markets, closer monitoring of these markets, early intervention and streamlining procedures should be envisaged. Another option to prevent digital markets from irreversibly tipping could be a wider use of interim measures, a revival of which we have seen in the Commission's ongoing *Broadcom* case.

The rollout of 5G is destined to revolutionise mobile communications and data transmission. Real-time data transmission, in particular, will play a key role in the data economy. The advisers to Margrethe Vestager noted in their 4 April 2019 report that there are cases where an obligation to ensure data access,

and possibly data interoperability, may need to be imposed, and this would be the case for data needed to serve complementary markets or aftermarkets, i.e. markets that are part of the broader ecosystem served by the data controller. Do you have a view on data access or data interoperability remedies and the implications of such remedies for the telecoms sector in particular?

Driven by new technologies, like AI, blockchain and IoT, the role of data has dramatically changed. In the digital economy data is an indispensable asset for virtually all industry sectors. Data and data analytics will be key to remaining competitive, allowing businesses to become faster, more efficient, more accurate and ultimately deliver better output for consumers. In light of this importance, data access could be an effective remedy against distortion of competition emanating from information asymmetries.

The challenges with a data access and interoperability remedy arise with practical implementation. There remains a lack of clarity around the concrete design of such a remedy. For instance, one unsolved question is what actually is the threshold that triggers intervention in the context of data. What amount or which kind of data actually leads to an anti-competitive advantage that justifies mandated access? Should this only be the case if the criteria of the essential facilities doctrine are met or do the different characteristics of data, e.g. being a low cost, non-rivalrous good, call for a different standard? These open questions are not limited to intervention thresholds, but also the level of execution. To what kind of data should access be granted: personal or non-personal, raw or aggregated, one-off or continuous real-time? How can you deal with data protection issues in the context of personal data, to effectively safeguard a user's rights under the GDPR? And last but not least, to whom should access be granted? Identifying markets and competitors can be more difficult in the digital economy. Not least because of the conglomerate structures with competition for markets instead of competition within markets. Beyond that, the dynamics of these markets make it more complicated to detect new entrants.

However, data access remedies are just one side of the coin in order to achieve a competitive data economy and keep markets contestable where the facilitation of data pooling/sharing may be even more important. Data pooling/sharing enables companies to exchange data on a commercial basis in order to achieve scale and maximise the potential of data assets. One example of a tool to enable such data sharing/pooling are data marketplaces, such as Deutsche Telekom's Data Intelligence Hub, which allows providers and users of data to exchange information across sectors via a secure interface. In general, such data sharing/pooling will be of procompetitive nature, given the efficiencies created by the combination of the data. Beyond that data sharing/pooling is critical for the more fragmented European economy to maximise the value and economic benefits of the data for society and to drive innovation. Therefore, it is necessary to eliminate barriers to such cooperation and create the right conditions for industry-led initiatives to develop.

In this context, interoperability and standardisation will play an important role for both data access as mandated remedy on the one hand and industry-led data sharing/pooling on the other. Beyond EU competition law mandating interoperability requirements to address market concentration on a case-by-case basis, it is crucial to develop common standards to further facilitate data-sharing across different applications, specifically for non-personal industrial data.

In the aftermath of the European Commission's decision to block the *Alstom/Siemens* merger in 2019, and in light of the ongoing debate around "killer acquisitions", there is a call for increasing vigour in competition enforcement. How do you see the current debate?

In my opinion, these are two very distinct debates: (i) the blocking of the *Siemens/Alstom* merger has sparked a discussion around too vigorous enforcement and the role of industrial policy in competition law ; and (ii) the "killer acquisitions" debate, is about underenforcement in the digital economy.

Looking at *Siemens/Alstom*, certainly blocking a merger is a very drastic decision, but the Commission rarely resorts to this measure. I cannot speak in detail on the merits of the case, but one valid question following this decision seems to be how the competitive assessment should factor in the future developments of the analysed markets, for instance with a more dynamic market definition recognising the increasing role of global competition. On the industry policy angle, I would concur that competition law cases should not be decided on political grounds, despite this being very valid debate, and undoubtedly the concerns will have to be addressed with other policy tools. I also do not think that we need political intervention in European merger control, such as a ministerial intervention.

Similarly, the debate around "killer acquisitions" in the context of digital markets has intensified lately based on the concern that the large online platforms are buying up potential competitors. According to the Commission's Special Adviser's Report, this is all the more worrying when it is done systematically as part of their strategy. While you can clearly observe the increasing acquisitions by the large platforms, it is less clear which competitive effects these acquisitions have. So far, we are lacking in-depth assessment in a systematic and substantive manner that would give us a good understanding of what impact the acquisition of start-ups has on innovation.

Besides the substantial questions revolving around these "killer acquisitions" there are also some procedural issues, since such acquisitions are currently not captured by the European merger control notification thresholds. One of the main questions is whether a transaction value – based threshold needs to be introduced, similar to that in Germany and Austria. In my opinion, such a transaction value – based threshold would not be a very efficient tool to capture these "killer acquisitions". The transaction value would have to be set very low in order to actually capture the acquisition of these start-ups, but a low threshold would in turn produce a very high amount of unwanted

notifications, thereby overburdening industry and authorities. Alternatively, if the transaction value is set high, e.g. for instance in Germany it was set at €400 million, only very exceptional cases would be captured. Other options also under discussion regarding "killer acquisitions" could be to change the burden of proof once a buyer has a certain position or to look at the acquisition of start-ups by dominant platforms under the regime of article 102 TFEU going back to *Continental Can*.

Deutsche Telekom is one of Europe's largest telecoms providers. The group also operates a number of subsidiaries across the world, including under the well-known brand name T-Mobile. Can you share a few words as to how you manage Deutsche Telekom's exposure in an increasingly global, complex and robust antitrust enforcement environment? What are the principles and guardrails that you apply in your practice?

The business of Deutsche Telekom is based on integrity, respect and compliance with the law. Deutsche Telekom's ambition to be Europe's leading telecoms operator is not limited to the telecommunication network but extends to all units, including leadership in compliance. Compliance is crucial for Deutsche Telekom and its trustworthiness. One recent example is that Deutsche Telekom was among one of the first companies to self-impose digital ethics guidelines in relation to AI, before the EC High Level Expert Group on AI was even discussing this.

More concretely, at Deutsche Telekom compliance means adhering to legal provisions, the company's internal policies and ethical principles. In the area of antitrust this translates to a mix of policy-setting, constant risk analysis, continuous communication, repeated training and advice. This can range from individual advice on a case-by-case basis to on-the-spot training for whole departments. Beyond the central unit at Deutsche Telekom headquarters, there are also decentralised units within the subsidiaries to deal with specific national antitrust compliance elements. The antirust compliance management system has been carefully designed in cooperation with the

compliance department, and the correct implementation on a day-to-day basis is performed by the entire antitrust team of Deutsche Telekom, which, by the way, won the ACC Global Competition Team Award in 2019.

The antitrust compliance management system is implemented throughout the whole Deutsche Telekom group. In fact, Deutsche Telekom was one of the first companies to get a certification from external auditors confirming that the Deutsche Telekom group has an effective compliance management system to avoid antitrust violations and to recognise them in time.

What in your view, should be the Commission's focal point for competition policy?

One of the current priorities for the competition policy of the Commission rightly is the digital economy, as the follow-up to the Commission´s Special Adviser Report. Here, the ongoing initiatives of the consumer IoT sector enquiry, the review on the Market Definition Notice and the DSA & NCT consultation are an important step. The necessary exercise, in my opinion, is twofold. One, analysing what changes can be already be directly adopted and put into practice immediately. Two, where open questions remain, work towards a better understanding of the competitive forces in these markets, which the Commission can do quite efficiently with sector enquiries.

The overall aim here should be on how to ensure that digital markets are competitive and innovative, and to prevent high concentration and tipping of these markets. In my view, that means that the focus needs to shift from a more static assessment to a more dynamic perspective. The assessment should not only look at the current market structure, but also factor in future developments and potential competitors. When it comes to looking at the theories of harm in a more dynamic approach, barriers to entry, innovation capabilities and incentives will play a more important role. With regard to remedies, interoperability, portability and access will be crucial to ensure competitiveness in digital markets.

The focal point of the competitive assessment of digital markets should be on innovation and not on prices. To that end, a priority should be the further development of methodologies to better analyse the ability and incentives to innovate. Likewise, advancing competition law analytics regarding data should be a preeminent concern for the Commission.

Another issue that should be a key priority for the Commission, in my opinion, is how to deal with the growing importance of scale in a global economy. From a competition policy perspective this translates to consolidation on one hand and cooperation on the other. While consolidation will remain an important strategy to reach a level playing field required to globally compete, I believe that in future we will see more collaboration between companies in order to achieve greater scale. Cooperation, whether on a horizontal or vertical level, will allow European players to overcome the structural and regulatory disadvantages and gain the necessary scale and efficiencies. Industry collaborations will be one of the vehicles that will drive competitiveness and innovation in the European markets. Therefore, it should be one of the priorities of EU competition policy to reduce the burden and hurdles for collaboration initiatives in order to enable growth and not stifle industry dynamics. This can be achieved by establishing more guidance for the industry and legal clarity in the Vertical and Horizontal Guidelines and by creating more freedom by adapting the Vertical and Horizontal Block Exemption Regulation.

Finally, the Commission should as a priority further ensure a harmonised approach to competition policy in Europe. Avoiding fragmentation of competition law across Europe is crucial, this is particularly important with regard to digital markets, which often operate beyond national boundaries and where we see increasing initiatives to address concerns on a national level. In this context the speed of enforcement by DG Competition will be one of the pivotal factors in securing a unified approach across Europe.

You started your career at Deutsche Telekom as a Mergers and Acquisitions (M&A) lawyer. What drew you into competition law and what fascinates you most about being a competition lawyer in the telecoms industry?

Actually, although both are very different, in the telecoms sector M&A and competition law go hand in hand. Most telecoms M&A transactions will trigger an in-depth merger control procedure, and competition law will be factored into the M&A analysis right from the very start and will be the determining factor for the closing of a transaction.

Starting in the corporate law department of a multinational company seemed like a very compelling opportunity, coming from university with a specialisation in international private and corporate law. Undeniably, the diversity of transactions and experience gained on Deutsche Telekom's M&A activities was exceptional and continues to be so, only that now I have authorities and not another company sitting at the other side of the table.

Besides this being a whole new challenge, having had very little knowledge of competition law before I started, one of the compelling aspects in telecoms antitrust is the constant evolution. Each advancement in technology, new trend and the dynamics of the telecoms sector brings new challenges for the competition assessment. In addition to the "classic" issues you can now observe a new M&A landscape with the convergence trend, the investment needs of next-generation networks triggering a wave of co-investment and network-sharing cooperation.

Last, but certainly not least, the current policy debates at European level triggered by digitisation, globalisation and climate change are very stimulating. These challenges are enhanced by the current crisis and may lead to some more fundamental rethinking of policy approaches.

Finally, what advice would you share with others who are thinking about embarking on a similar career path?

I would say the career path as in-house lawyer is not as straightforward as it may be in a law firm. There are multiple options, from a very linear career as specialist in a particular legal field to a more disruptive career path by moving around within the organisation outside the legal department. Actually, over time I saw many colleagues discover their passion for the business side, leaving the law behind.

Another difference is that being an in-house lawyer you are naturally closer to the business, so you are not merely advising a client but are part of it. For one this means that you will need a better understanding of the financial, commercial and strategic needs and constraints, but this also means you are closely involved in business decisions and their implementation, as a member of the team responsible for the solutions from start to finish.

Women & Antitrust
Voices from the Field

Vol. II

Curation & Foreword
by Kristina Nordlander

Leading competition professionals from around the world present reflections and forecasts on topical issues in antitrust and competition law and policy in this second volume of Women & Antitrust. Over a series of candid conversations, enforcers, in-house counsels, lawyers and academics take on questions about an extraordinary year. Nestled among the exchanges are insights into the professional paths of the women interviewed. Through personal anecdotes, they share perspectives on their chosen roles, if and how gender has informed their career choices, and offer advice to young practitioners interested in joining this field.

This volume has been published in cooperation with Women's Competition Network (WCN). Another volume was previously published in cooperation with W@Competition.

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