

Interview with Prof. Frederic Jenny



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WHO IS BEST PLACED TO GRANT DAMAGES IN COMPETITION CASES, REGULAR COURTS OR SPECIALIZED COURTS?

FJ: I'm not sure I'd put it in those terms. It seems clear that courts in general are better placed than Competition Authorities. But on the other hand, competition authorities have a big advantage because they have teams of economists together with their legal teams. So I think one of the questions is the extent to which competition authorities should play a role in providing as much information, or help as possible to the courts that handle damage cases. To help courts assess for example elasticity of demand, things like this.

Now, between specialized courts and regular courts - I think that courts, whether regular or specialized, are used to dealing with damages issues - that's what civil judges do. So they do have quite a bit of experience in the kind of techniques, the before-and-after, counterfactuals, benchmarking comparisons between two sectors, and so on. So I don't think that the issue is so much on how you assess the effect of the practice, it's more how does one provide the courts with the data and the economic interpretation of the data. That's why I think that, in follow-on cases, competition authorities have data that could be very helpful for the courts.

There are some interesting provisions organizing cooperation between the competition authority and the court in some countries. For example, in Spain the Court can ask the Competition Authority to give an opinion on the methodology of the economic expertise that is presented by the parties to the civil proceeding in front of the court. So it helps the Court understand what makes sense, what doesn't make sense, and it seems to me that the important point is to organize the cooperation between the competition authorities and the courts to enable the courts to have as much information and methodological support as possible when they assess damages due to anticompetitive authorities.

WHY IS IT SO DIFFICULT TO GRANT DAMAGES?

I don't know if it is difficult. There is an argument that there are few, maybe too few, damage cases in Europe. But I think that the figures, which show that there are indeed few judgments awarding damages to the victims of antitrust violations, are somewhat misleading. A lot of cases end up with the parties settling out of court and, therefore, no court decision. So when we count the number of judgments awarding damages we may underestimate the importance of civil enforcement in Europe.





One serious difficulty, however in many European jurisdictions is the fact that in civil proceedings, the firms alleged to have violated the competition law can defend themselves by arguing that their increase in price has been passed-on by the victims to their customers. This imposes a heavy burden both on the victims but also on the courts because it is usually extremely complex to assess if there has been a pass-on and if so what the magnitude of the pass-on is. The pass-on defense is a serious obstacle to the successful development of civil enforcement.

The second difficulty (at least in Civil Law countries) is that general procedural rules which apply to damage cases in the competition law area as they apply to damage cases in other areas are not as favorable to victims as they are in the United States and that the legal concept of damages that can be compensated is fairly narrow

HOW EFFECTIVE IS THE EU COMMISSION'S COMPETITION DIRECTIVE ON CLASS ACTIONS?

The directive has had an effect, in the sense that a number of countries have adopted legislation to at least facilitate somewhat Class Actions. But you must realize that in continental Europe there has been considerable opposition to the development of class action in general with the result that the Directive is somewhat watered-down compared to the initial idea. This opposition was led by the business community, which was concerned not so much by class actions in the area of competition, but much more by the prospect of the possible development of class action in areas like food-safety, the environment or medicine. One cannot treat the legal regime of class actions in the area of competition as a separate regime from the general legal regime of class actions

WHAT IS THE OECD'S VIEW OF THE NEW SHARING PLATFORMS AND MULTI-SIDED TECHNOLOGIES?

One of the things that we discuss extensively at the OECD is, what is the impact of disruptive technologies on competition. Disruptive technologies may be linked to the development of the digital economy, but not necessarily. Like Tesla for example - it's a car that you don't need to maintain so the economy of the car's distribution and maintenance is completely changed. One typical reaction of firms displaced by disruptive technologies, for example taxis displaced by services like Uber, is to lobby the government or the parliament to pass protectionist regulations, that work against the public interest and against the development of the new technologies and competition, but in favor of their own interest of the firms which may be displaced. Competition Authorities should be very active on the front of Advocacy, to counter these forces pushing for anticompetitive or protectionist regulations.

But there is also a necessity to look at disruptive technologies from a different angle. Disruptive technologies are often technologies that destroy an existing business model and replace it with a different business model. But in such cases the traditional tools of economic analysis are not always relevant or useful to assess the situation from the competition standpoint. For example, take the notion of market definition. Is it relevant to assess the competitive situation between Uber and the taxis? Is Uber in the taxi market? Is Uber in a different market? Who knows? One can argue forever. I think, that most of these new disruptive technologies don't lead newcomers to 'Invade' a market with a new technology or a new process or a new product. They lead newcomers to invent something which is completely new but which destroys the value of an established market. Also, very often when a new type of service is created nobody knows for sure what the business model of this new service is going to be. Hence it is very difficult to know what is competition on the merits





because there is no established business model. So the competition issue is not easy to analyze with the traditional tools of economics. One needs to develop new instruments to assess the competition issue or at least to adapt our tools. Concepts that work pretty well in fairly static industries - even in industries that have innovation like new products and more efficient processes, but with stable business do not work very well in those cases of disruptive technologies.

We need to adapt our instruments to those situations, to see when we can use the traditional instruments, what are their limits, how much they can do. There's still work to do in this area, and we have started to look into those at OECD.

WHAT SHOULD JUDGES AND REGULATORS DO ABOUT THE SHARING ECONOMY?

The emergence of the sharing economy, which disrupts established markets and firms, may require some regulatory intervention. The issue is that of competitive neutrality: to what extent is it acceptable to allow people to use the new technology to offer a service which is competing with an established service which is subject to a regulation(for example , on safety or on public health)? It may be that the old regulation which, applied to the service providers before the arrival of the disrupters is no longer necessary or that similar standards should apply to the newcomers. Whatever the case may be you have to think about how the regulatory environment could promote neutral competition between the different providers of substitutable services. Aside from this, we should encourage both the development of innovative ways to provide services and an effective competition between the providers of substitutable services.

WHAT ARE THE CHALLENGES FOR AUTHORITIES AND REGULATORS WHEN DEALING WITH TWO-SIDED MARKETS?

The challenge is first to have a precise definition of what is a two-sided market and second when we want to analyze competition on such a market to adapt our traditional tools of analysis and not to fall into the trap of looking at one side first and then at the other side as if the two side were independent of each other.

We have to adapt our analytical tools because our traditional tools are not designed for two sided markets. Take for example the hypothetical monopoly test. When you are on a two sided market you have two prices, one for each side. How do you apply the hypothetical monopoly test when you have two prices to consider? Should you increase both of them by 5% or should you increase one of them holding the other constant? How should you administer the test of predation? Certainly not by looking at each price separately! etc... The one thing that I wish would disappear, is what still exists in many jurisdictions where there's a possible issue with a 2-sided market: the decision of the judge or the decision of the competition authority have one paragraph explaining that the market they look at is a 2-sided market, and then the rest of the decision forgets completely about it and talks about the competition issues on one side or on the other. We should at least agree that, if a competition authority believes it's examining a 2-sided market, it should (in the course of its competitive analysis) systematically take into consideration the interdependence between the two sides, to arrive at the decision, either that there's been a violation or there hasn't been a violation.

However, we have to face the fact that the analysis It becomes quite a bit more complex when one takes into consideration the interactions between the two sides of a two –sided market. The analysis will depend among





other things on the strength of the interdependence between the two sides, and the way in which people on each side are either single-homing or multi-homing. So what we really need is a guideline for how to apply the competition analysis to 2-sided markets. I think that competitions authorities will do it in the near future

