



## WITH FREDERIC JENNY



Thank you, Professor Jenny, for granting this interview to CPI.

### 1. In your view, what are some hot button issues or developments that will potentially shape the antitrust landscape in 2017?

The development of the digital economy and the growing importance of disruptive innovations create a challenge for competition authorities. As the rate of innovation accelerates, competitors may be using vastly different business models and be on different markets, markets may be multi-sided, etc... Hence there is a need for competition authorities to fine tune their enforcement instruments (to define markets, assess market power, evaluate pricing behaviors, anticipate disruptive innovations, etc...) to make them more relevant in the complex environment in which we live today. This is an urgent task as we already know that there are diverging approaches on the same cases across jurisdictions. The *Booking.com* case in Europe is an excellent example of a situation where different European competition authorities have had different views about the business model of online booking accommodations services which has led them to different conclusions about parity pricing mechanisms. This creates a legal uncertainty for firms and exposes the competition community to a risk of incoherence. While, the autonomy of each national competition authority should be protected, collective thinking about the challenges we face and exchanging experiences among competition authorities and economists could be helpful to promote a much desired soft convergence in enforcement.

The OECD has a vast program on the digital economy and as part of this large program, the OECD Competition Committee, with the help of academic economists and chief economists of competition authorities, will be investigating the ways in which traditional instruments used in enforcement can be adapted.

At the European level, I believe that the upcoming judgment on the *Intel* case by the European Court of Justice will be of great importance for the future of competition law enforcement in Europe. What is at stake is the relevance of economic analysis in European competition law enforcement.

### 2. The European Commission recently announced the final elements of its long-awaited Digital Single Market strategy for Europe (and May 2017 will mark the two-year anniversary of the initiative). Moving forward, how do you see the Digital Single Market strategy playing out? Any potential pitfalls?

Given the rapid development of the digital sector, one can only support the goals and ambitions of the Commission's digital single market agenda. However, one should not forget that the digital world is not only expanding rapidly but that it is also a sector characterized by innovations and rapidly changing services, products and business models. At any one time there is a wide diversity of actors competing with one other. Thus there is tension between the desire to adopt *ex-ante* regulations which will accelerate the achievement of the single market and the burden imposed by those regulations on platforms, online intermediaries, data and cloud computing and the collaborative economy players with a risk of thwarting innovative developments which may benefit consumers. It is not clear whether the Commission has sufficiently considered this tradeoff in its proposals and there is some concern that it may err on the side of too restrictive "one-size fits all" *ex-ante* regulations either where there is no discernible market failure or where market mechanisms could have developed innovative solutions to protect consumers. The issue of geo-blocking is, for example, clearly an issue where the desire to achieve the unique market may clash with perfectly legitimate reasons for service

providers to price discriminate (such as differences in costs). The issue then is whether an *ex-ante* regulation is preferable to the use of competition law instruments to eliminate illegitimate geo-blocking.

### **3. Antitrust authorities are increasingly focusing on big data and its effects on competition and consumer choice. We have been talking about big data for almost two years, where do we stand now? Any progress?**

There is indeed some pressure on competition authorities to tackle the possible competition issues related to big data. Part of this pressure arises from competition among competition authorities themselves because they want to be seen as innovative and relevant. But part of the pressure for competition authorities to intervene comes from public opinion, legislators, etc. . .

A number of approaches are being explored. Big data as an asset and the risks that the ownership of this asset or the conditions of access to this asset may constitute barriers to entry, privacy as an element of the quality of internet service which risks being degraded as the result of increased market power, big data as a vehicle for price discrimination, big data and artificial intelligence leading to the creation of pricing algorithms which are exploring profit maximizing strategies and may choose collusion, etc. . . The variety of approaches testifies to the fact that we are still struggling with the issue (or issues) of how to treat big data issues in competition law.

There are further questions about the legitimacy of considering privacy issues in the context of competition law and the proper interface between privacy laws and competition laws. We are still missing a unified intellectual framework to consider the interaction between big data and competition. We are also missing some of the tools which may be necessary to deal with quality as an element of economic performance in antitrust matters. Overall more questions are raised than answers provided.

### **4. With the arrival of the President Trump Administration and the expected “Hard Brexit” looming, what are your initial thoughts on the outlook for antitrust enforcement in the U.S. and the EU? For instance, merger enforcement may not be as vigorous under the Trump Administration.**

I would not want to speculate on what the merger or antitrust enforcements are likely to be in the U.S. But I do think that the British have played a particularly important role on the EU competition scene and that there is a risk that Brexit will have a negative impact on competition law enforcement in the EU. Not only have the British consistently argued within the Commission for a more economic approach to competition law enforcement in the EU, but it is also noticeable that British judges in Luxemburg have played a particularly important role at the level of the European Court in promoting a better fit between legal and economic considerations in the jurisprudence on competition. Thus Brexit and the subsequent disappearance of British civil servants in the Commission and British judges on the European courts runs the risk of slowing down the modernization of competition law in Europe and of strengthening the camp of those who think that the promotion of consumer welfare was never intended to be the goal of European competition law enforcement and that the interpretation of European competition law should be informed by the goal of promoting the internal market.

### **5. The OECD, as well as the ICN, plays an important role in promoting international cooperation in antitrust enforcement and best practices. On January 13, 2017, the DOJ and FTC issued their revised Antitrust Guidelines for International Enforcement and Cooperation. Where do you see room for improvement in the year ahead and where have international antitrust authorities made significant progress towards convergence, with particular focus on the U.S. and EU antitrust authorities? How do you see Donald Trump’s proposed policy of “America First” fitting in with this?**

First, I think that everybody would agree with the fact that competition laws throughout the world have significantly converged over the last decade and that international cooperation on antitrust (for example on cartel enforcement) or on merger enforcement has also developed considerably both among competition authorities of countries which have a long experience in antitrust or competition law and between those agencies and relative newcomers.

As a consequence, there is less tension between competition authorities than used to be the case in the 1990s. As the revised Antitrust Guidelines for International Cooperation on Enforcement indicate, the U.S. Antitrust agencies expect that conflicts of law will be “rare” as “more jurisdictions have adopted and enforce antitrust laws that are compatible with” U.S. law.

There is a great appetite for more cooperation between competition agencies and work on the ways to deepen international cooperation figures high on the agenda of both the ICN and the OECD. What we are looking for are new instruments to facilitate cooperation.

International cooperation on competition is always voluntary. Each national competition authority can decline to cooperate on a specific case but what we have witnessed a collective realization that cooperation is a positive sum game in the long run for the cooperating agencies. International cooperation is based on mutual trust and assistance among competition agencies. So Donald Trump’s policy of “America First” should not necessarily contradict the idea of pursuing international cooperation in the field of antitrust. By cooperating with other competition agencies, U.S. agencies will ensure that when the interests of U.S. consumers are threatened by foreign firms they will be in a better position to get those foreign authorities to cooperate.

## **6. American and European regulators have set the path for other countries’ competition policies. Do you see the rising tide of nationalism personified in "America First," Brexit and the far right movements across Europe influencing or antagonizing the antitrust agencies of BRICS (especially China) and other developing countries to the detriment of consumer welfare?**

One should be careful about asserting that American and European competition regulators have set the path for other countries’ competition policies.

First, a number of countries adopted a competition law because it was a requirement for the country to be able to enter into a bilateral trade agreement with the U.S. or the European Union or to join the WTO. In other words, trade policy rather than the experience of North American or European competition authorities has been the leading force behind the proliferation of competition laws.

Second, when adopting competition laws, developing countries have, for the most part, not copied U.S. and European laws but have adapted the instrument to their own needs, or their history or their strategic interests. China, for example, has adopted an Anti-Monopoly Law which, among other more classical goals, aims to promote the healthy development of the socialist market economy. In South Africa, one of the purposes of the Competition Act is the promotion of employment and the advancement of the social and economic welfare of South Africans. The competition law in Russia aims at curbing the economic power of administrative monopolies (which is a much wider concept than state owned enterprises).

Third, when it comes to enforcement, it is true that there is a great deal of convergence among competition authorities, thanks to the work done at the OECD and in the ICN, both on some procedural issues (for example on merger control) and on substantial issues (such as the importance of the fight against international cartels or the necessity to have a robust, economically based theory of harm in competition cases). However, there is less convergence on the enforcement of monopolization or abuse of dominance or dependency or even on vertical agreements provisions.

Finally, some countries, China in particular, aim at combining standard analysis and innovative remedies. So developing countries’ competition authorities cannot be described as mere “followers” of the North Atlantic competition authorities.

America First, Brexit and the far right movements across Europe have less to do with competition law enforcement than with a concern about the destructive effect of international trade on the fabric of societies in the North Atlantic industrialized nations. But economic globalization and international trade are, in general, seen more positively in developing countries because there is a perception in those countries that they can contribute to economic development and poverty reduction.

International trade is based on mutual concessions since each nation state has the power to exclude or restrict foreign products or services competing with domestic products. So one can expect that in response to protectionist tendencies in some countries there will be retaliations in the form of further international trade restrictions by the targeted countries. This may well weaken competition in some markets. But I do not believe that it will have a lasting effect or that it will impact competition law enforcement. If a country wants to limit international trade it has much more direct and effective ways to do it than using competition law strategically. Furthermore, I am skeptical of the value of the evidence regarding the alleged strategic use of competition law enforcement in some developing countries. Just because most of the cartels sanctioned by the U.S. Department of Justice are foreign based does not mean that the U.S. DoJ strategically targets foreigners and ignores domestic cartels. I think that the same logic applies to the activities of competition authorities in the BRICS countries. The fact that the GAFAs or other powerful pharmaceutical firms of North American or European origin are the subject of competition investigations does not necessarily reflect a protectionist bias by the national competition authorities of the countries which investigate them.

What is most important to avoid deviant tendencies is to keep building up the consensus of competition authorities on the proper way to investigate mergers and alleged antitrust violations and to promote the idea that competition authorities should be independent and should act in a transparent manner. This is where international organizations such as the OECD, the ICN and UNCTAD have a crucial role to play.

