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LeadershIP EU

Innovation, IP & Competition Challenges

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The March 2019 CPI Antitrust Chronicle addresses issues related to the second annual LeadershIP EU Conference, "Innovation, IP and Competition Challenges for Global Businesses in the 21st Century," which took place in Brussels, Belgium on November 13, 2018. The panelists at the conference came from the private and public sectors: regulators, academics, and private practitioners.

A focus of the day-long conference featured ranging views on innovation policy, intellectual property policy, and international antitrust policy. Notably, the intersection and overlay of IP and antitrust with respect to the development of standardized technology and the continuing "Great Patent Debate" were hotly-discussed topics.

The **sixth annual LeadershIP Conference** will take place later this month on **March 26, 2019 in Washington, DC.** The agenda themes for the day are: (i) The impact of 5G: Why Innovation Policy Matters; (ii) The IP Policy Landscape: U.S. and The World; (iii) IP and Antitrust: Global Agency Dynamics; and (iv) International Antitrust: What Rules and Whose Standards? Among the many great panelists, the conference will feature a Fireside Chat with **Makan Delrahim**, Assistant Attorney General, United States Department of Justice Antitrust Division; and **Andrei Iancu**, Director, United States Patent Trademark Office. We hope to see many of our readers there.

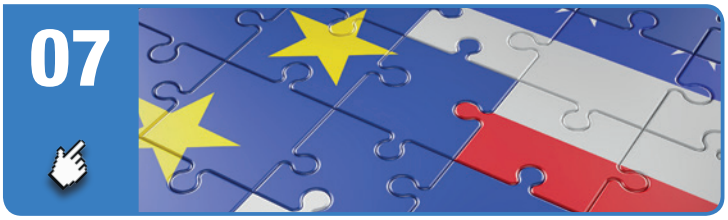
As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks Qualcomm Inc. for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle, and takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate.

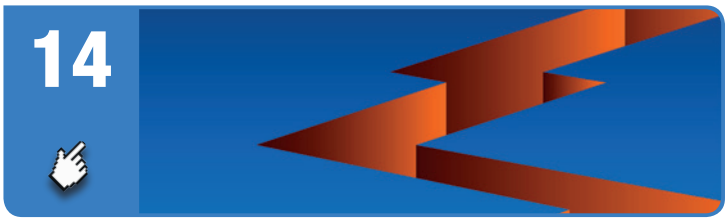
SUMMARIES



Effects-Based Analysis: Where Do We Stand on Both Sides of the Atlantic?

By Douglas Ginsburg, Robin Jacob & Jean-François Bellis

A recap of the fireside chat which took place at LeadershIP between U.S. and EU judges exploring the competition law trends in each jurisdiction. The panel featured the Honorable Douglas Ginsburg Senior Circuit Judge, United States Court of Appeals for District of Columbia; Sir Robin Jacob, Sir Hugh Laddie Chair of Intellectual Property Law, University College London and former Justice in the Court of Appeal of England and Wales; and moderated by Jean-François Bellis, Partner, Van Bael & Bellis.



New Fault Lines in Antitrust: The Rising Threat of Growing Divergence to IP-Centric Business Practices

By Paul Lugard & David Gabathuler

The last two decades have shown a remarkable degree of convergence in the area of antitrust enforcement and the dissemination of antitrust regimes around the globe has brought significant welfare gains. However, the wide adoption of antitrust regimes as a preferred model for economic regulation also comes at a price: as a result of the multitude of agencies that may each claim jurisdiction over particular transactions, the potential for incorrect and inconsistent outcomes and "system clashes" increases. International, IP-centric, and innovation-intense business transactions are the most likely recipients of the negative consequences of these frictions. It is in our view highly questionable whether the current, traditional cooperation mechanisms are in and of themselves sufficient to avoid major frictions between jurisdictions. The call for supplemental bilateral and multilateral mechanisms to ensure effective, coherent, and economically rational antitrust enforcement, such as the proposal for a Multilateral framework on procedures in competition law investigation and enforcement, is legitimate and should be taken seriously and further explored.

Substantive Criteria and Legal Standards in Recent Abuse of Dominance Decisions in Hi-Tech Markets: EU vs. U.S. and Lessons Learned

By Yannis Katsuolacos

We focus on recent Abuse of Dominance antitrust cases in high-tech markets and discuss the important role of differences in the Substantive Criteria in explaining differences in the Legal Standards adopted in EU and U.S. Also, we consider the reasons that the rule of reason is not adopted in either EU or U.S. in these cases and, finally, we consider whether and how recognising the potential impact of anticompetitive (exclusionary) conduct on innovation in hi-tech markets, such as the "digital platforms," should affect enforcement procedures.

Abuse of a Dominant Position: A Post-*Intel* Calm?

By Giorgio Monti

While the *Intel* judgment might be a watershed moment for the ECJ's interpretation of Article 102 TFEU, there may be risks that this development is countered by two trends: first, a concern by some competition agencies that a more aggressive approach is required to counter firms with exorbitant market power; second, a retreat to formalism by competition agencies who find the effects-based approach too problematic to implement. Moreover, for a proper integration of an effects-based approach, agencies focusing on prohibiting likely anticompetitive effects could develop improved approaches to the design of remedies and the measurement of fines.

SUMMARIES

With Increased Powers to National Competition Authorities in the EU, Will We have Appropriate Procedural Safeguards too?

By Kaarli H. Eichhorn

Following the recent adoption of the EU's "ECN+ Directive," this article highlights the importance of the rule of law in the EU, including in competition proceedings. It applauds the Directive's many improvements to enhancing national competition enforcement, and contends that due process issues should have received more attention, in parallel with the substantially increased powers given to EU Member State competition authorities. This article finds that a genuinely effective competition regime can only be attained with robust procedural safeguards to accompany the greater powers that competition agencies across Europe will exercise in the future.

WHAT'S NEXT?

For April 2019, we will feature Chronicles focused on issues related to (1) **Public Procurement**; and (2) **Online Advertising and Antitrust**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MAY 2019

For May 2019, we will feature Chronicles focused on issues related to (1) **Healthcare**; and (2) **Common Ownership**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

EFFECTS-BASED ANALYSIS: WHERE DO WE STAND ON BOTH SIDES OF THE ATLANTIC?

PANEL MODERATED BY JEAN-FRANÇOIS BELLIS[1] FEATURING JUDGE DOUGLAS GINSBURG[2] & SIR ROBIN JACOB[3]

1 Founding partner of Van Bael & Bellis.

2 Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the International Board of Advisors of GAI, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice.

3 Sir Hugh Laddie Chair of Intellectual Property Law, University College London and former judge at the Court of Appeal of England and Wales.

J.–F. Bellis: I wish to thank Judge Douglas Ginsburg and Sir Robin Jacob, two famous judges and noted scholars in the field of competition and IP law, for having agreed to participate in this panel. The effects-based analysis is a topic which has attracted much attention in Europe in the last 20 years.

Before I launch the discussion, I would like to say a few words about the context in which the concept of effects-based analysis developed in Europe. It all started 20 years ago when the Commission embarked on what has been known as the modernization of European competition law. For a long time, from the early sixties until 2004, the European Commission had applied a very broad and formalistic concept of restriction of competition under which any agreement that restricted the freedom of action of a party was considered to fall within the prohibition of Article 85(1) of the EEC Treaty (now Article 101(1) TFEU) and was therefore null and void unless it qualified for an exemption under Article 85(3) which the Commission had the exclusive power to grant. The Commission used this monopoly over exemptions to force undertakings to adjust the terms of their contractual arrangements to make them compatible with EU competition policy which initially was focused on fostering market integration.

It is in that context that the Commission created this characteristic EU competition law instrument, the block exemption, with its list of contractual provisions which made an agreement ineligible for exemption, the so-called "black clauses." The block exemptions also contained lists of so-called "white clauses" which were consistent with the grant of the exemption, and also sometimes "grey clauses" which had an intermediate status. An essentially regulatory and form-based approach to the enforcement of competition law.

The Commission eventually grew tired of regulating contracts in that way and, at the end of the 90s, it published a white paper on the modernization of European competition law in which it proposed to give up its monopoly over exemptions and replace its form-based approach to competition law with a more sensible analysis of the actual effects of agreements on competition, hence the concept of effects-based analysis. These ideas were implemented in Regulation 1/2003, which entered into force in May 2004. Modernization was aimed at Article 85 of the EEC Treaty, the provision dealing with restrictive agreements, not at Article 86 (now Article 102 TFEU), dealing with abuses of dominance, which had also been enforced in a rather formalistic way by the European Commission since the 1960s.

Voices were heard advocating for the introduction of an effect-based analysis in Article 102 TFEU and this became a very controversial issue, even within the European Commission. In this context, there was an extraordinary development last year. In September 2017, the Court of Justice annulled a judgment of the EU General Court which had upheld the form-based approach applied by the European Commission in the *Intel* abuse of dominance case and referred the case back to the General Court. I would like to ask our panelists, starting with Judge Ginsburg, how they see the *Intel* judgment in the broader context of convergence or divergence between EU and U.S. antitrust laws. So, Judge Ginsburg, what is your take on *Intel*?

D. Ginsburg: Along with most observers in the U.S., I was pleased to read the *Intel* judgment. I view *Intel* as a major step towards modernization of the law, towards acknowledging the centrality of economic analysis in the administration of Article 102, and towards convergence of how the U.S. and the EU consider vertical restraints. The judgment itself seems to be a ringing endorsement of the notion that the Commission must engage in a realistic empirical assessment of the actual competitive effects of a restraint – or at least one that is capable of having pro-competitive consequences. It provides rather clear instruction to the General Court and ultimately to the Commission: If the defending firm asserts there is an efficiency justification that has beneficial consequences for the consumer, then the Commission is required to engage in significant analysis to inquire whether the restriction is one that would be prejudicial to an equally efficient competitor. The judgment speaks in realistic terms about how the law is not intended to shelter a competitor from the competition of a more efficient dominant firm.

In this way, the judgment seems to be an enormous stride forward. But immediately after the judgment was issued, the Director-General of DG COMP said that he interpreted the judgment as being essentially procedural, requiring no significant change in the Commission's way of doing business. This seemed, from a distance at least, clearly incorrect. Indeed, this interpretation of *Intel* has occasioned a good deal of criticism within Europe as well. The Director-General has since reiterated and perhaps softened his interpretation of the judgment a little – but a troubling gulf nonetheless remains between what the Director-General has said and how others have read the judgment. A good example would be the opinion rendered by Advocate General Wathelet in *Orange Polska*, in which he said the position taken by DG COMP was inconsistent with the *Intel* decision. *Intel* will not be the great stride forward that it appears to be if the Commission has to be dragged into the modern age in order to comply with it – which could take several years and several decisions more than if the Commission were willingly to embrace the decision.

Admittingly, the *Intel* judgment does put more of an onus on the Commission. If in the aftermath of *Cartes Bancaires* the standard is no longer by object, the Commission necessarily has a greater task on its hands. An effects-based analysis requires more work and will make it harder for the Commission to prove some cases. And it's understandable that bureaucracies resist being taxed with greater obligations – but in my view, it's very important that the judgment be implemented as it is written.

J. Bellis: And in the U.S., how would that issue be addressed?

D. Ginsburg: The doctrine in the U.S. has been effects-oriented for quite a long time now. Occasional decisions – usually in the intermediate courts – may backslide a little bit, but the drift has been quite clear. Our Supreme Court has been clear that the agencies are not able to rely upon *ipse dixit* presumptions in lieu of real analysis of real effects. Now, it's not always possible to ascertain the effects of a restraint that has been implemented in a particular case, so one may have to draw an analogy to related restraints in similar cases. Nevertheless, some restraints may be so often pro-competitive and beneficial to consumers that it would be a Type One error to condemn the restraint without particularized analysis. This has been the standard for at least 30 years, perhaps longer.

The so-called modernization undertaken in the early years of this century by the European Commission was in some ways modeled upon what had already transpired in the U.S. And what had transpired in the U.S. was itself a revolution, overthrowing the *ancien regime*, which was full of just the sort of unfounded presumptions and condemnations that you described as pre-existing here. It is unsurprising that, if the body of law grows up without significant reference to real world effects, then when one does start to look at real world effects, a lot of the law is going to be overturned. All sorts of vertical restraints were condemned *per se*, that is, by object, for many decades in the U.S. It was only in the *Sylvania* case in 1977 that the Supreme Court looked to the economic literature in order to decide that a territorial restraint on dealers could be pro-competitive. Agencies and private plaintiffs cannot condemn the conduct *per se*; they must actually prove their case. The consequence was that over a period of 30 years, ending in 2007, the Supreme Court overruled about five of its prior decisions on vertical restraints. Those cases did not stand up to scrutiny when the Court probed for actual effects. And something like that has seemingly begun now in the European Court of Justice, though perhaps not yet in the Commission and all the Member State competition agencies.

J.-F. Bellis: In the EU, the policy on vertical restraints was very much influenced by the political objective of eliminating barriers to trade between Member States. Distribution agreements which provided for import or export bans were seen as being directly inconsistent with the EU market integration. This led to the development of a very formalistic *per se* type approach to many vertical restraints. Now, Robin, your field is more IP law than competition law proper but there are, of course, many interactions between these two fields. In the last five years, there have been a number of very interesting cases in which the Commission and the Court of Justice have proved to be very interventionist in that area. What is your view on the application of the effects-based analysis to the licensing of IP rights?

R. Jacob: Right. It's different from this one altogether. I very much welcome the effects-based analysis. For many years in my life I have battled from time to time with competition authorities who have taken a theoretical approach. Sometimes actually leading to quite serious drags on innovation.

I was counsel for example, in *Nungesser*, for the British government…a long, long time ago. The European Commission actually had got to the point where it was saying every exclusive license of an IP right is anti-competitive, and would need an exemption. The theory was that the patent owner, or in the case of Nungesser, the holder of rights in seeds, was putting it out of his power to exploit his own invention because he'd handed it over to somebody else. Therefore, he'd agreed not to do it. Therefore, he'd agreed to not do something, so that was anti-competitive. And so, you had to have the Commission's permission to grant an exclusive license for any IP right. That was a very serious matter at the time. And I've seen it again from time to time.

I have a feeling we've got a bit of a worry about the regulators: they lose contact with the businesses they're regulating. More recently the Commission's attitude towards standard essential patents fell in the same box. They invented, or, didn't invent, but adopted, the theory of hold-up by patentee. Theory was that when he sued he was somehow going to get more than the FRAND royalty because he was holding a gun to the defendant. That was never real. Anybody who'd looked at the effects, said: "well, what's actually happening? Well. It isn't happening." And the U.S. court in *D-Link* when somebody was suggesting hold-up, said that is theory, but show me it is real which they couldn't do. And nobody ever has shown it.

It seems to me that we've got to be very careful with competition law. I don't blame the regulators, but they are sitting in offices and they've got pieces of paper. And they never get involved in the actual business. And if you don't have to, if you have nice easy rules, you don't have to go any further. So, it's this sort of natural lazy way to go, to have a bunch of rules. I'm very welcoming of the change, which is happening.

And I think it's going to be pushed. And always the regulators will kick back. but it's the job of those who favor realism to advance the scientists' way of thinking. If you develop a theory as a scientist, it starts off with a sort of tentative idea. And you call it the hypothesis. And then you form a theory, which fits all the facts you've known. And it seems to sort of work. And now you have to test it. And if you can't test it, right, you've got a problem, and you can always only regard it as provisional. In fact, all scientists regard all theories as provisional. Maybe it'd be quite a good idea if competition lawyers did the same thing. Their theories must fit all the known facts.

J.-F. Bellis: Very interesting. I did not remember you were involved in the *Nungesser* case. My partner, Ivo Van Bael, wrote an article on that case entitled "Seeds of Hope." The title reflected the fact that, in that judgment, the Court of Justice opened the door to a more sensible approach to vertical restraints, departing from old ideas, some of which originated in the U.S.

D. Ginsburg: Oh, we were the principal offender. Until 1981, there had been a longstanding policy called the "Nine No No's of Patent Licensing," which prohibited almost anything worth doing with a patent. That was repudiated outright by the head of the Antitrust Division in 1981, as we had come to learn that many patent licensing practices can be procompetitive. The kind of hold-up that was implicitly behind the Nine No No's was very rare given how businesses actually operate. Even now, there are concerns about and calls for regulation of such things as royalty stacking, and some commentators would require that royalties be calculated on the basis of components rather than unit sales in the case of, for instance, smartphones.

The original practice had grown up completely without regulation and without difficulty, without any significant complaints. It was the uniform practice in the industry that royalties were calculated on the basis of unit sales rather than the manufacture of components. There's a reason for that. As is usually the case when businesses have converged upon a particular operating model, it's because that practice is efficient. It is a lot easier to count units of, say, mobile phones, than it is to count components or the number of times that a particular component is incorporated into a final product unit. At the time, there was a perfectly sensible, stable environment in which both sides of every licensing agreement were in accord — but then some self-interested parties lobbied competition agencies to prohibit this model. Their complaints then gained traction because regulators, and maybe courts, are just not familiar with the business practice and, as Robin described, tended to approach it from a non-scientific point of view.

R. Jacob: Yes, well, indeed. There is a slight complication here because the subject matter isn't nearly always subject to FRAND or RAND undertakings. And, the wording of some of those undertakings can be interpreted, perhaps quite easily interpreted, as including anybody who might have an interest, including just a chip maker, as being entitled to a license. I think Judge Lucy Koh has just so held in California on the basis of the FRAND or RAND undertaking. Then you have a big fight about what the rate of royalty will be for the chip. Well, the logical amount of royalty for the chip is exactly the same amount of royalty as you would say for the final phone, in which it ends. But, says the chip maker, that's much, much, more than it costs me to make the chip. I'd say "so what? That's that real value of it." A chip has no value unless it's in the phone. So, there's going to be battles along the line about that.

I just wanted to comment because it is said that the Commission is very worried about the level of litigation. They shouldn't be. It's very small. Again, their problem is they only see the cases that happen. They don't see all the cases that don't happen. There's a vast network of licenses, cross licenses, and a complex web of relationships going on behind the scenes which the whole of the mobile industry is working. So, before you start getting too excited again, it's an effects base, before you get too excited about this and start intervening, say "well, if it's working, why fix it?" And that's my basic attitude, this is really a pretty well-working worldwide industry. In fact, it's probably the biggest example of collective competitive human cooperation that has ever existed, ever. Leave well alone.

J.-F. Bellis: To play the devil's advocate, a mobile phone is covered, I was told, by thousands if not hundreds of thousands of patents. So, what if every patent owner claims for example, 3 percent, or even just 1 percent, of the sale price of the mobile phone? You might then end up with royalties which are a multiple of the sale price of the product. What is your answer to that objection?

R. Jacob: Well, there's a bunch of answers. First of all, it doesn't happen. I mean, people have calculated the sort of total royalties paid on a mobile phone. There've been a couple of really good academic studies. It is between about 10 and 15 dollars for the whole lot of patents – for those hundred thousand. So, if that's not happening, then stop saying "what if." I mean, what if there might be an asteroid coming. We don't have to cope with things that are not actually happening yet. So, first of all, it isn't happening. Royalty stacking is not a phenomenon of reality. It's a figment of some people's imagination. There are reasons perhaps, why that is so. Partly it is because a lot of the manufacturers also are patentees, and therefore, they have to pay royalties as well as get them in. No manufacturer has had more than 50 percent of the standard essential patent. So, that has kept them down. And that's kept them down traditionally. Also, it is not in anybody's interest to have rates of royalties so high nobody can afford to manufacture. Nobody makes any money then. Whatever the reason, it isn't a problem. If you go on the effects base,

say well, there isn't an effect so I'm not going to worry about it. Let's go and worry about something else. There are plenty of other things in the world that need sorting: this is not one of them.

D. Ginsburg: I think an estimated $10 to $15 or about 3 percent of the total cost goes to patent royalties, so it really ends up having a minor effect. The consolation about Judge Koh's decision last week in the *Qualcomm* case is that, as Robin said, her reading of the FRAND provision as an obligation to license all comers was done by way of interpreting a contract. Judge Koh did not get to the point of asking, or answering, whether it was a violation of competition law to refuse to license a competitor – a topic that has been much debated among academics in the U.S. Some influential commentators argue it is a violation of the antitrust laws to refuse to license anyone. A refusal may be a violation of the contract obligation, but the argument that it should be deemed a competition violation seems to me extremely, shall we say, imaginative. It is a rather ordinary proposition when you have a contract of this sort. Turning such refusals into a violation of competition laws, with a potential for treble damages in the U.S., without the stamp of legislative approval, would be completely inappropriate and very, very inefficient. It would push all licensors into a position where they virtually have to grant a license and then argue later about the terms.

Imaginative thinkers also have had some success merchandising the idea that a holder of a standard essential patent should not be able to get an injunction against infringement. And unfortunately, our antitrust agencies have twice extracted a commitment from a company to refrain from seeking an injunction to enforce its standard essential patents worldwide in merger cases that have nothing to do with the use or abuse of intellectual property. The agency was simply deciding whether to approve a merger; there was no suggestion that the two companies involved were holding substitute patents. So, that idea has gained some circulation and has more recently been incorporated into the judgment of the Korea Fair Trade Commission in its *Qualcomm* case. The KFTC prohibited Qualcomm from seeking an injunction anywhere in the world to enforce its standard essential patents. What this means for the patentee is that it must tolerate the infringement, be paid nothing, and go seek damages in court, though not an injunction. Ultimately, the patentee ends up with a judgment that is no more than the FRAND rate it was entitled to at the beginning. This marks another way the value of patents has been degraded in recent years, which if allowed to stand surely threatens to diminish the degree of innovation and creativity in the economy.

J.-F. Bellis: In Europe, we have experienced exactly the same development with the *Motorola* decision, the *Samsung* settlement, and the *Huawei/ZTE* judgment of the Court of Justice, which have embraced that idea. But, it's true that many of those cases deal with issues which are in fact non-existent.

One of the best examples is the judgment rendered in the *IMS Health* case, which also involved an IP right, or at least something that a number of people thought was an IP right, on databases under German law. The issue was whether a company which had developed a data gathering service that competed with that offered by IMS Health could lawfully present the relevant data by reference to a map of Germany divided into 1850 blocks, which IMS Health claimed was protected by an exclusive IP right. The Court of Justice essentially ruled that IMS Health was required under EU law to grant a license of that right to its competitor. The case had been referred to the Court of Justice for a preliminary ruling by a German court before which IMS Health had sued its competitor. What is really interesting is how that case ended.

At that time, I was representing Microsoft in a case which raised similar issues. I was anxiously waiting for the judgment of the German court to see how the Court of Justice ruling had been applied. We were calling the German court from time to time to know when the case would be decided. And one day the judge told us, "Oh, very soon. In fact, next week." We were wondering what the outcome would be and it turned out to be very surprising. The judge ruled that there was no IP right. And thus, the whole issue, the supposed abuse of the IP right by IMS Health, was an abuse of a non-existing right. Nobody speaks about the actual outcome of that case. Robin, on IP rights and competition law, what else would you like to tell us?

R. Jacob: I think what I'd like to do is ask people to go back and look at history. I mentioned the Commission getting concerned about a lot of litigation. A lot of litigation is often a sign of huge rates of innovation…much competition. The very opposite of bad things going on. It is a sign of good things going on.

The sewing machine wars, classically in the United States in the 1850s-60s. The sewing machine was the equivalent of your modern mobile phone. Everybody had to have one. Fights between big pharma are the signs of huge innovation, great new medicines coming to cure us. So, my message is, do try and understand IP, please, competition authorities. Jeremy Bentham, a kind of quasi-founder of my University, UCL talked about it in 1792, said "If you don't really understand it, you'll be against monopolies in inventions but when you come to understand them, you can only be interested and reckon they should have the right of property." He said it in 18th century language. It really does involve understanding how it really works. It is not self-evident that a right to stop people doing things is pro-competitive, but it is in the case of inventions.

D. Ginsburg: In the library at the Harvard Law School, where I used to teach, there is an engraving on the walls that says, "Laws are the wise restraints that make men free." So, too, with intellectual property laws. They act as a restraint, but one that in fact advances the wealth and material well-being of society. Yes, intellectual property can be abused but, the idea that it should be suspect is really counterproductive.

Just think about the term: intellectual property. The hallmark of property is the right to exclude others. I have a monopoly on my backyard, and I can exclude any private individual from that without giving or even having a reason. This kind of exclusion hardly offends competition in any way. In fact, it gives me an incentive to buy, develop, and maintain the backyard because I don't have people trespassing all the time. In 1995 the two U.S. competition agencies jointly issued a statement on IP licensing that expressly provided that intellectual property shall be treated the same way as other property, except where something inherent in the nature of the intellectual property requires a deviation. That is an extremely important principle. As I said, we've had a little backsliding from this principle – those two commitments extracted by the U.S. agencies in the merger cases – but these instances have been exceptions, and the current Administration of the Department of Justice has been very clear in repudiating decisions of that sort and reaffirming the importance of respecting the integrity of intellectual property.

J.-F. Bellis: What I find a bit alarming in the discussion that we have had as far on the application of competition law to IP rights, is that there does not seem to be much effect-based analysis currently, at least in Europe. The picture seems to be a bit more nuanced in the U.S. This is very concerning bearing in mind how the Commission applies the concept of dominant position in practice. The mere fact that a company holds an IP right and is faced with another company which, for any reason, believes that it needs a license of that right automatically puts the holder of the IP right in a dominant position in relation to that potential licensee regardless of its actual position on any actual market. It is a very form-based approach.

Now, what about vertical restraints, which is an area which the European Commission has recently started enforcing again? After the entry into force of Regulation 1/2003 in 2004, the Commission decided to focus its enforcement activity on the fight against cartels. Practically all its decisions under Article 101 involved cartels. The Commission kept the block exemptions it had adopted in the pre-modernization era and drew up guidelines on how to apply them but it largely left the enforcement of EU competition law on vertical restraints to Member State authorities.

One could say that the Commission was acting consistently with the Chicago school approach to vertical restraints by taking no enforcement action itself in that area. Over the years, however, significant divergences have appeared in the enforcement policy applied by the Member States, with Germany being extremely tough on vertical restraints while other Member States, such as the Netherlands, have been more liberal. In the last two years, the Commission has again initiated investigations on vertical restraints and it recently adopted a decision imposing fines on resale price maintenance practices.

There are a number of cases in the pipeline in the wake of the e-commerce sector inquiry conducted by the Commission a few years ago. There have also been a few judgments of the Court of Justice on vertical restraint cases referred to the Court by Member State judges. The most recent one was the famous Coty judgment, which was extensively discussed in a panel in New York which was headed by Judge Ginsburg. It looks as if the Commission is going back to the pre-modernization approach on vertical restraints, which raises the question of whether we are truly living in an effects-based analysis era. Douglas, what is the current attitude on vertical restraints in the U.S.? You started explaining how the approach radically changed in the 70s.

D. Ginsburg: It started in 1977 and ended in 2007. As I said, this involved overruling about five prior Supreme Court cases, based upon a very simple insight backed by a lot of empirical economic evidence. The insight is this: Because distribution is the cost of getting the product from the manufacturer to the customer, the manufacturer and the customer have the same interest in minimizing that cost. The more expensive it is to get the product to the customer, the more expensive the price of the product. With this complete alignment of interests, we should be indifferent to the ways manufacturers devise to distribute their products, as they will choose various contractual arrangements that they think will serve themselves – and therefore their customers – well.

There's an easy metric we can use to measure the effects of these kinds of restraints. We can assess the effects of the vertical restraint by looking at the quantity of goods sold before and after the restraint is imposed. Take a case that the courts found most difficult: resale price maintenance, where the manufacturer says there must be no sales by its retailers below the price of, let's say 100 Rupees, thereby giving the retailer a greater profit margin than it would realize if it could discount the price. Clearly, the restraint leads to a price higher than before the restraint; that was the inevitable effect of imposing the restraint. But why would the manufacturer impose a restraint that makes distribution more expensive? The manufacturer wants to induce the retailer distributor to expend more effort promoting the product because doing so results in more sales and profit for it. The retailer will continue to expend money to promote the manufacturer's product until the margin of doing so is no greater than the margin the retailer would get by spending the money to promote other products on its shelves.

You might ask, "Well, why doesn't the manufacturer promote the product?" The answer is that sometimes it does, for example by buying national advertising. Other times it wants the retailer to take on some of the promotional effort because the retailer knows its customers and its community, or because the promotion is best done in the store. We end up with a variety of practices as a result. Some manufacturers take on all their own promotion; others delegate it all, and still others end up doing some of each. Firms are simply seeking out different ways in which to compete effectively in their particular product and geographical market.

Here's another way of looking at resale price maintenance. Look at what happened to the quantity of goods sold when RPM was introduced. The price increased, which means that, all else equal, the quantity sold should go down – yet the quantity sold increased. Resale price maintenance worked a rightward shift of the demand curve, just as if there were an improvement in the quality of the product. In fact, the dealer did make improvements with that increased margin – whether it increased availability, improved delivery times, offered more favorable credit terms, or whatever it may be. If the quantity sold goes up and more consumers are benefited, then this should be the end of the story. When we see these results in the market, we should stop looking at vertical restraints with suspicion. Perhaps we should entertain a claim that a particular instance was in fact, anti-competitive or was the product of a horizontal conspiracy among the manufacturers, or perhaps among the dealers, but short of these circumstances, we really have no reason to be concerned about vertical restraints at all.

R. Jacob: It's time I got a joke in. *Coty*, you recall what the restriction was. That Coty had a luxury goods market and they had exclusive distributors that had to maintain the image of this stuff which cost very little to make, but you sell on. And so, they had a particular distributor who wouldn't agree to restriction not to sell on Amazon. Coty said, "You can sell over the internet, but you got to go from your own website because it's an upmarket website." It reminds me of a story a long time ago when people didn't make love until they got married. This very upper-class couple got married. And in the morning, she said to her groom, "Do the common people do this, dear?" And he said, "Yes." She said, "It's much too good for them." Well, so, for Coty, does Amazon sell it? Not good, for the common people. I mean, really! The restraint was upheld on that theory. It's a worrying thing that the competition people seem to value trademarks a good deal more than patents, whereas our future depends on patents and not highly-priced nice-smelling water.

J.-F. Bellis: The *Coty* judgment is about luxury products: perfume. There have been cases, one in Germany and the other in the Netherlands, where the question was raised whether sports shoes were or not luxury products, with the Dutch court ruling that they are and the German court ruling that they are not. So, you see to what kind of issues the application of EU competition law may boil down…

D. Ginsburg: The distinction between luxury goods and other goods in terms of what I described in the economics of distribution is completely immaterial. It's medieval. They're arguing over how many angels can dance on the head of a pin.

J.-F. Bellis: But at the end of the day, it's for the manufacturer to decide how to organize the distribution of its products and a lot of people still have a hard time accepting the idea that the interest of a producer in how its product is distributed and reaches the consumer survives the sale of the product to a distributor.

D. Ginsburg: Well, this is why I think it's very important that agency staff and judges have a better understanding of basic economics. The agencies, particularly DG Comp and the two U.S. agencies, have very sophisticated economic staffs. Tommasso Valleti, now the Chief Economist at DG Comp, is a highly distinguished industrial organization economist, as his predecessors have been. But it's quite clear that having economists in key roles does not prevent the Commission from reaching some seemingly uneconomic decisions.

J.-F. Bellis: The problem with the Chief Economist and its staff in DG Comp is that their intervention tends to be confined to merger control. This is an area where the importance of proper economic analysis is accepted but this is not necessarily the case in other areas, such as Article 101 and abuses of dominance.

D. Ginsburg: Those of us who serve for any length of time in government understand that most of what we do is ephemeral. You make a decision and it can be reversed later on as politics and policy change. The one thing that I did when I was in charge of the Antitrust Division of the Department of Justice that is of lasting significance is to make the Chief Economist equal to the Chief of the Legal Staff, so that the final decision maker receives input directly from both the legal and the economic analysts. It was often the case that the lawyers would say, "This is a case we can win," and the economist would say, "Yes, but it would be wrong." The economist would then demonstrate why. That model has been instituted in a number of the agencies that have been founded in the last decade or two, such as in Singapore, in Chile, and in a number of other countries, because it gives the economic analysis its proper due.

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NEW FAULT LINES IN ANTITRUST: THE RISING THREAT OF GROWING DIVERGENCE TO IP-CENTRIC BUSINESS PRACTICES

BY PAUL LUGARD & DAVID GABATHULER[1]

1 Paul Lugard is a Partner with Baker Botts LLP (Brussels), David Gabathuler is a Consultant with Baker Botts LLP (Brussels).

I. INTRODUCTION

The proliferation of antitrust regimes, often with divergent rules and practices, the growth of international business transactions affecting competition in multiple jurisdictions, and the push for greater national or multilateral protectionism is leading to new fault lines in antitrust. The results of the current divisive opinions regarding the "proper" enforcement of antitrust law are likely to become ever more apparent as antitrust enforcement agencies increasingly respond to the call for early and pro-active intervention and ramp up globally to address real or perceived antitrust threats caused by the emergence of new, often IP or platform-based, technologies and business models and grapple with novel and complex antitrust issues associated with those new economic phenomena.

However, while the potential for divergent antitrust enforcement and outcomes increases, the existing international mechanisms to address such incongruence of antitrust practices are generally consensus-based and typically lack strong legal authority in domestic law. Accordingly, the question arises whether the conventional mechanisms intended to lessen the frictions between antitrust regimes are fit for purpose or require reconsideration. This paper discusses these trends and argues that IP-centric business transactions are among the most likely candidates to feel the negative consequences associated with divergent antitrust intervention. This is a worrying prospect as innovative, IP-intense business models are also particularly likely to bring about significant welfare gains.

II. PROLIFERATION OF ANTITRUST REGIMES AND THE THREAT OF INCREASING DIVERGENCE

Antitrust rules have now become almost universal; over 100 countries have rules in place and many agencies are increasingly well resourced and active. The globalization of antitrust has been driven by the recognition that enhanced firm rivalry leads to greater productivity and promotes growth and innovation.[2] Countries and international organizations, such as UNCTAD, nowadays consider that antitrust rules are an essential part of a country's industrial toolkit, in particular by preventing rent-seeking by private actors and that antitrust agencies can play a vital role in advocating the reform of economically harmful government laws and practices.

As a result, antitrust enforcement is no longer the preserve of agencies (and courts) in developed western economies. Globally, companies are increasingly aware of the need to pay heed to the actions of antitrust agencies in, among others, Brazil, China, India, Japan, and Korea and, in some cases, in the Middle East and Africa. In many instances, cases brought in these jurisdictions can have equally severe ramifications for companies' operations internationally as cases brought by more established agencies in Europe and North America.

Not surprisingly then, antitrust enforcement is not only widespread, but also increasingly cross-border in nature. For example, between 2010 and 2017, the European Commission ("Commission") cooperated with competition agencies outside of the EU in 65 percent of all cartel cases and in 54 percent of complex merger cases.[3]

One remarkable fact is that antitrust regimes generally adhere to common overarching principles and goals, especially substantively, as the rules are typically built on well-established economic theories. However, looking beneath the surface, there is still considerable diversity, both analytically and procedurally. This is notwithstanding the significant efforts by the antitrust community to arrive at greater uniformity, in particular through the work of the Organisation for Economic Co-operation and Development ("OECD") and the International Competition Network ("ICN").

We are not opposed to diverging antitrust enforcement standards. Indeed, divergence is not in and of itself harmful – and may even be welfare enhancing – as each country's antitrust rules must mesh with the local laws, customs, and practices if they are to be implemented and enforced effectively. However, divergent antitrust standards become harmful if they undermine the economic (welfare) gains that arise from effective, economically rational, and consistent enforcement.

In sum, divergence in antitrust enforcement has been a constant facet of antitrust, but friction between antitrust regimes arising from diverging practices and outcomes risks becoming more notable and prevalent due to the rapid expansion of antitrust enforcement globally and the different levels of enforcement standards among antitrust agencies. Paradoxically then, while it can be assumed that the proliferation of antitrust regimes has resulted in very significant welfare gains over time, that same spread of regimes also enhances the risks of "system clashes," incorrect outcomes, and welfare-destructing over-enforcement.

2 Stephen Nickell, "Competition and Corporate Performance," (1996) Journal of Political Economy, pp. 724-746; World Bank Group, "A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth," (2017).

3 Speech by Johannes Laitenberger, European Commission, Fordham Antitrust Law and Policy Conference "Developments in EU competition control in the global and digital age," (September 6, 2018).

III. DIVERGENCE IS NOT A NEW PHENOMENON

Divergence is not a new phenomenon both internationally and regionally. For example, the U.S. and Europe have long adopted different approaches to assessing the competition risks associated with unilateral conduct.[4] The treatment of exclusionary conduct is far stricter in the EU than under the U.S. antitrust rules and the Commission often intervenes to ensure a "level playing field." In contrast, U.S. agencies are more inclined to wait for the market to self-correct. This is evident from the different approaches to the *Google Search* investigations. The FTC closed its investigation, whereas the Commission concluded that Google had abused its dominant position in search by illegally favoring its own comparison-shopping service.[5]

Historically, there have also been notable differences in the treatment of mergers with, for example, the U.S. criticizing the EU approach to conglomerate mergers "as inconsistent with the central tenet of U.S. antitrust policy – that the antitrust laws 'protect competition, not competitors.'"[6]

The issue of convergence (and divergence) between EU and U.S. antitrust regimes has been regularly highlighted by senior officials from the different agencies.[7] Generally however, over the past twenty years, there has been a consistent trend towards greater convergence, especially with the EU's shift from a formalistic approach to enforcement towards an effects-based analysis with its focus on protecting competition and promoting consumer welfare.[8]

Sokol has, however, pointed out that "one area of increasing divergence across the Atlantic is in markets characterized by high technology and dynamic innovation … Europe seems to be the more aggressive enforcer in areas where the stakes are high, the issues complex, the likelihood of mistaken enforcement may be high, and the industrial policy broadly defined may be influencing European competition policy."[9] The risk of divergence between the EU and the U.S. on antitrust is only likely to increase further if calls in Europe for industrial policy considerations to have an explicit role in merger analysis leads to substantive changes to the EU merger rules.[10]

There are also periodically major differences coming to the fore even within well-established and generally internally closely aligned regimes such as the EU. For example, at least initially, agencies in the EU took diverging approaches to rate parity ("MFN") clauses applied by online booking platforms, in particular Booking.com. The Bundeskartellamt ("FCO") found that such clauses, i.e. wide and narrow price parity clauses, were anti-competitive whereas concerns raised by the French, Italian, and Swedish competition authorities were addressed through commitments, leaving narrow price parity clauses intact.[11]

There are also particular challenges when it comes to issues of due process. It is hard to dispute the proposition that different legal traditions may entail different processes and that despite those differences, antitrust agencies may still arrive at equivalent end results, albeit through different ways and means. However, this obviously does not mean that the lack of safeguarding of essential procedural rights of parties subject to an antitrust investigation should be allowed to stand, because the outcome "might still be correct."

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4 Speech by William E. Kovacic, FTC, Bates White Fifth Annual Antitrust Conference, "Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms?," (June 2, 2008).

5 U.S. Federal Trade Commission Decision and Order in the matter of *Motorola Mobility LLC and Google Inc.*, Docket No. C-4410, July 23, 2013; Case AT.39740 *Google Search (Shopping)*, Decision, June 27, 2017.

6 William Kolasky, "Conglomerate mergers and range effects: It's A Long Way from Chicago To Brussels," (2001) George Mason Law Review, pp. 533-550.

7 Speech by Maureen Ohlhausen, FTC, Georgetown Global Antitrust Symposium Dinner, "U.S. – E.U. Convergence; Can We Bridge the Atlantic?," (September 19, 2016); Speech by Mario Monti, European Commission, General Counsel Roundtable American Bar Association "Antitrust in the US and Europe: A History of Convergence," (November 14, 2001); Speech by Margrethe Vestager, European Commission, Press Event, Washington D.C., "Competition Enforcement in the EU and US," (September 19, 2016).

8 This is also true for the analysis of non-horizontal mergers. However, a marked difference between the U.S. and the EU remains the treatment of intra-brand restrictions of competition, in particular resale price maintenance, which in Europe remains subject to a pseudo *per se* illegality standard.

9 Daniel Sokol, "Troubled waters between US and European antitrust," (2017) Michigan Law Review, p. 964.

10 For example, nineteen EU Member States issued a joint statement in December 2018 calling for the "identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis." Joint statement, 6th Ministerial Meeting, December 18, 2018.

11 Bundeskartellamt, Case B9-121/13, *Most-favoured-nation clauses at Booking.com* (2015); Décision n° 15-D-06 du 21 avril 2015 sur les pratiques mises en œuvre par les sociétés Booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne; L'autorità garante della concorrenza e del mercato nella sua adunanza del 21 aprile 2015; Konkurrensverket Decision of 15 April 2015; ref.no. 596/2013.

There are – unfortunately – still too many examples of procedures in various jurisdictions that have failed to follow any reasonably conceivable minimum standard of due process. Specifically, parties under investigation in some jurisdictions may not be provided with sufficient information on the nature of the alleged infringement, the theory of harm and the underlying evidence to be in a position to properly defend their position. This is often compounded by a lack of opportunity to make effective representations before the competition agency. Other concerns that are often cited are insufficient protection afforded to confidential business information and a perceived lack of impartiality or integrity in the system of enforcement.[12]

There have been particular criticisms directed at Asian antitrust regimes due to their apparent lack of due process safeguards.[13] For example, in testimony before a U.S. House of Representatives Committee in 2016, former FTC Commissioner Ohlhausen indicated that deficiencies with the Chinese procedural rules include insufficient transparency, failure to provide a meaningful opportunity for defense, and limitations on the ability to be represented by counsel.[14] There has also been criticism directed at the lack of due process in procedures before the Korean Fair Trade Commission ("KFTC")[15] and the Taiwan Fair Trade Commission ("TFTC").[16]

Concerns about divergent (and deficient) approaches to due process are likely to remain acute, as more agencies investigate complex cross-border behavior, but lack the resources and capacity to manage such cases effectively and fairly. As discussed further below, a new approach to address a number of these concerns was proposed last summer by Assistant Attorney General Makan Delrahim ("AAG Delrahim").

IV. PARTICULAR RISK OF DIVERGENCE AFFECTING IP-CENTRIC BUSINESS PRACTICES

There has been a rapid expansion of antitrust enforcement in the field of intellectual property as those cases are often viewed as strategically significant given the critical role that intellectual property can play in technology markets. Agencies are also under significant and increasing pressure to demonstrate to their stakeholders and the public that the antitrust rules can address new and transformative technologies. This creates a heightened risk of incorrect outcomes and divergence, particularly as many agencies are still unfortunately ill equipped to successfully investigate complex and novel questions of antitrust.

Former Assistant Attorney General Renata B. Hesse herself remarked that "international differences are perhaps the greatest with conduct related to intellectual property."[17] She pointed out the growing trend at that time for newer competition agencies outside Europe to identify a wide range of circumstances under which they would impose liability for refusals to license intellectual property rights.

This insight is in line with research published last year by staff at the WTO regarding the application of competition policy to intellectual property by agencies in developed and key emerging jurisdictions which found that the focus of newer competition agencies was expanding to encompass new frontiers such as abuses of standards essential patents ("SEPs").[18]

12 Philip Lowe, Mel Marquis & Giorgio Monti, "Effective and legitimate enforcement of competition law," European Competition Law Annual (2016), [forthcoming].

13 Daniel Sokol, "Due process, transparency and procedural fairness in Asian antitrust," CPI, January 2015. U.S. Chamber of Commerce report on "Competing interests in China's competition law enforcement: China's anti-monopoly law application and the role of industrial policy," (2014).

14 See Hearing before the Committee on the Judiciary House of Representatives, June 7, 2016, in particular Oral Testimony of former Commissioner Maureen Ohlhausen, FTC, p.8 and Prepared Statement of the FTC before the U.S. House of Representatives Committee on the Judiciary Subcommittee on regulatory reform, commercial and antitrust law, "International antitrust enforcement: China and Beyond," Washington DC, June 7, 2016, p.12.

15 For example, Qualcomm has opposed the KFTC's decision finding that certain of the company's IPR licensing practices are contrary to Korean competition law on the grounds, among other things, that there has been a denial of procedural safeguards, including the right to have complete access to evidence and the right to cross examination at the hearing. See statement "Qualcomm responds to announcement by Korean Fair Trade Commission," December 28, 2016.

16 The authors understand that under existing procedures before the TFTC, an investigated party does not receive a detailed statement of facts and legal theories on the basis of which it is being accused of violating the Fair Trade Act until the Commission has already made a finding of violation and that the Commission will act as a judge from which there is no effective appeal.

17 Speech by Renata Hesse, DOJ, Global Antitrust Enforcement Symposium "Can there be a 'one-world approach' to competition law?," (June 23, 2016).

18 Robert Anderson et al., "Competition agency guidelines and policy initiatives regarding the application of competition law vis-à-vis intellectual property: An analysis of jurisdictional approaches and emerging directions," WTO Staff Working Paper ERSD-2018-02 p. 64.

The challenge for many agencies has been the lack of enforcement experience in this area, which cannot be simply overcome by issuing soft law instruments. Moreover, the WTO staff report highlighted the concern that "the proliferation of guidelines and policy initiatives … carries the potential for coordination failures and even outright conflicts."[19, 20]

Evidence of conflicts in the interplay between antitrust and intellectual property are already prevalent. For example, the Competition Commission of India ("CCI") ruled that Ericsson's licensing practices were incompatible with FRAND and constituted *prima facie* evidence of an abuse of a dominant position. However, the CCI decisions only provide a cursory analysis of the legal and economic issues involved. In addition, the agency took issue with the fact that the royalty was based on the sale price of the device notwithstanding that this is standard industry practice. The approach of the CCI was also at odds with the Delhi High Court rulings concerning the same parties and issues.[21]

China has also taken enforcement action against the licensing practices of standard essential patent holders. The National Development and Reform Commission ("NDRC") found that Qualcomm had engaged in abusive patent licensing practices and fined the company U.S.$ 975 million. The agency was, however, accused of combining competition policy with industrial policy by using its investigative power to give additional leverage to would-be Chinese licensees, affording them a competitive advantage in both domestic and global telecommunications markets.[22]

In addition, there has been a radical change in the views of the U.S. Department of Justice with regard to the application of antitrust law to intellectual property. AAG Delrahim has called for a "New Madison" approach to enforcement and argues, among other things, that "hold-up is fundamentally not an antitrust problem."[23] He has argued that antitrust law should not be used to police FRAND commitments and that a unilateral and unconditional refusal to license a patent should be considered *per se* legal. If the proposed approach is followed in the U.S., it cannot be excluded that this will lead to greater divergence between the U.S. agencies and agencies in other countries, including in Asia and, potentially, Europe.

Turning to mergers, it seems clear that antitrust agencies are increasingly carrying out complex reviews of IP-centric transactions, in an attempt to ensure that there remains strong competition in innovation post-merger. Dow's merger with DuPont and Bayer's acquisition of Monsanto both involved detailed assessments of the intellectual property aspects of the transactions. There was close coordination between the various agencies, intended to ensure a common approach to resolving competition issues and structuring remedies.[24]

However, there are recent examples of the diverging approaches to the same IP-centric transactions. The *Essilor-Luxottica* merger was cleared unconditionally in the EU and the U.S., but the Chinese authorities required the parties to offer a set of remedies, including offering trademark licenses on FRAND terms, in order to clear the transaction. There have also been concerns that China's State Administration for Market Regulation ("SAMR") may take into account broader industrial policy goals when reviewing mergers in strategic sectors given its failure to approve Qualcomm's acquisition of NXP.[25]

Problems also arise with regard to the implementation of remedies in antitrust cases involving intellectual property. In an increasingly complex global antitrust landscape, agencies with different substantive enforcement standards need to take into consideration the potential extraterritorial impact of proposed remedies if they are to avoid divergence and conflicts. The need for the remedies to be carefully constructed to ensure that they remain consistent with an "agency's international comity analysis" is specifically emphasized in the U.S. agencies' international enforcement and cooperation guidelines of 2017.[26]

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19 *Id.* p. 65.

20 The WTO Staff Working Paper also called for a "modest degree of coordination with respect to competition policy-IP interface" and stressed that the need was particularly compelling (as compared to other aspects of competition policy) given the fungible nature of the underlying assets that are affected. *Id.* p. 65.

21 J. Gregory Sidak, "FRAND in India, the Delhi High Court's emerging jurisprudence on royalties for standard-essential patents," (2015) Journal of Intellectual Property Law & Practice, pp. 609–618; Ameya Pant & Jain Dipesh, "Complexities surrounding SEP cases in India: An overview of decisions by the High Court and Competition Commission of India," (2018) Journal of Intellectual Property Law & Practice, pp. 132–142.

22 U.S. Chamber of Commerce, International Affairs, "Competing interests in China's competition law enforcement," (2014), p. 62.

23 Speech by Makan Delrahim, DOJ, University of Pennsylvania Law School Event, "The 'New Madison' approach to antitrust and intellectual property law," (March 16, 2018).

24 This does not mean, however, that the economic insights on which the decisions in these cases are based in Europe, are now equally well accepted in other jurisdictions.

25 See in this respect for example, "Qualcomm ends $44 billion NXP bid after failing to win China approval," Reuters, July 25, 2018.

26 Federal Trade Commission and Department of Justice, "Antitrust Guidelines for International Enforcement and Cooperation," (January 13, 2017), para. 47.

However, the KFTC took an approach that ignored principles of jurisdiction and comity when ordering global changes to Qualcomm's licensing and sales practices.[27] The KFTC considered that Qualcomm's conduct had not only affected "Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world …"[28] It concluded that "[i]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market."[29, 30]

V. INTERNATIONAL EFFORTS TO ACHIEVE GREATER UNIFORMITY

There have been numerous bilateral and multilateral efforts at capacity-building among agencies to reduce the risk of inconsistent and inappropriate outcomes, in particular as a result of the work of the OECD and the ICN. However, the greatest future challenge arises in respect of the actions of antitrust agencies in developing countries, as they typically lack sufficient enforcement experience to venture into international cooperation.[31]

The OECD and its Competition Committee has been particularly active in seeking to spread best practices through enhanced cooperation. Notably in 2014, it adopted a Recommendation that sought to promote further international cooperation.[32] The text makes a number of far-reaching recommendations including calling on governments to allow agencies to exchange confidential information without the prior consent of the providers of the information and to permit enhanced cooperation in the form of investigative assistance (e.g. assisting in obtaining information and executing searches on behalf of another agency). Such measures are intended to be accompanied by appropriate safeguards.

Strengthening international cooperation among antitrust agencies is also a central tenet of the ICN and, through the activities of its working groups, the organization has been instrumental in developing and sharing practical experience and knowledge of antitrust enforcement.[33] In particular, it has sought to enhance inter-agency cooperation by issuing reports, guidance, and recommendations on specific topics of direct relevance to cross-border enforcement.[34] The ICN has been successful in helping ensure that agencies understand each other as they carry out their responsibilities and that by "speaking a common antitrust language," they are better able to cooperate on individual matters.[35]

The International Chamber of Commerce ("ICC") has also provided concrete and practical guidance to the antitrust community by issuing best practices on effective procedural safeguards in competition proceedings ("ICC Best Practices").[36, 37] The ICC Best Practices set out a number of fundamental overarching principles in due process that should apply in antitrust proceedings and provide specific standards that antitrust agencies should adopt to ensure that their rules and procedures conform to due process norms.

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27 James Rill & John Taladay, "The KFTC's Extraterritorial Overreach," (November, 2017), Competition Policy International.

28 KFTC, Case No. 2015SiGam2118, at 139, unofficial translation.

29 *Id.*

30 The KFTC took a similarly broad extraterritorial approach to remedies when addressing perceived antitrust concerns arising from its acquisition of Nokia's device business. In order to obtain approval from the KFTC, Microsoft gave commitments in respect of licensing practices concerning its global smartphone patent portfolio. See John Jurata & Inessa Owens, "A new trade war: applying domestic antitrust laws to foreign patents," (2015) Geo. Mason Law. Rev., Vol.22:5, p.1127.

31 UNCTAD Secretariat, "Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures," paper presented at The Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 5-7, 2017, p.3.

32 OECD Recommendation concerning international co-operation on competition investigations and proceedings (2014); Antonio Capobianco & Aranka Nagy, "Developments in international enforcement co-operation in competition field," (October, 2016) Journal of European Competition Law & Practice.

33 "The International Competition Network at Ten, Origins, Accomplishments and Aspirations," (2011) edited by P. Lugard, Intersentia.

34 For example, ICN Recommended practices for merger notification and review procedures and Practical guide to international enforcement cooperation in mergers (2015).

35 Alden Abbot, blog entry, "The International Competition Network at Seventeen," (March 28, 2018), available at https://truthonthemarket.com.

36 ICC Commission on Competition, "Effective procedural safeguards in competition law enforcement proceedings," (225/765), published on July 7, 2017.

37 Due process and the ICC Best practices were also discussed by P. Lugard in "IP and Antitrust: the importance of due process and the ICC Best Practices," CPI Antitrust Chronicle, November 2017.

More recently, AAG Delrahim proposed the establishment of a Multilateral framework on procedures in competition law investigation and enforcement ("MFP"). The goal of the MFP is to promote global due process and improve cooperation among antitrust agencies.[38] It aims to establish minimal, widely accepted procedural norms such as non-discrimination, transparency, timely resolution, confidentiality, etc. These goals are derived from principles found in existing international texts promulgated by organizations such as the OECD and the ICN as well as in the competition chapters of certain free trade agreements ("FTA") (e.g. Korea-U.S. FTA).

The MFP is not intended to be a binding international agreement in the traditional sense, but it is proposed that agencies that sign up to the framework will nonetheless be subject to an adherence and review mechanism, namely in the form of dialogue, agency self-reporting on adherence, and periodic assessments of the functioning of the framework.[39]

Concerns have been raised that the proposal bypasses and undermines the work of international organizations with Commissioner Vestager stressing that "we need to do it through organizations like the OECD and the ICN."[40] Such criticism is not surprising given the EU's own origins and its strong support for formal multilateral structures, but both the head of the FCO in Germany and the Brazilian competition agency have also stressed the importance of working through the ICN.[41] The main obvious limitation of these approaches is the lack of any mechanism that binds the agencies or requires them to adhere to the agreed policies or best practices. Indeed, while highly authoritative, OECD recommendations generally require further implementation in OECD Member States. The organization's influence in non-OECD countries is also less prominent. Similarly, ICN work products are generally not-binding and the organization has largely been successful through non-binding, soft harmonization, and peer pressure among competition enforcement agencies. In addition, China's lack of participation in the ICN significantly limits the organization's ability to ensure a truly global take-up of its policies. Given the growing role of China in antitrust enforcement, this it is an important limitation.

VI. THE HIGH-WATER MARK OF ANTITRUST CONVERGENCE?

Over the last two-to-three decades, there has been a remarkable and significant degree of convergence in the area of antitrust enforcement and the dissemination of antitrust around the globe has undoubtedly brought significant welfare gains. However, the wide adoption of antitrust regimes as a preferred model for economic regulation also comes at a price: as a result of the multitude of agencies that may each claim jurisdiction over particular transactions, the potential for incorrect and inconsistent outcomes and "system clashes" increases. International, IP-centric, and, more generally, innovation-intense business transactions are the most likely recipients of the negative consequences of these frictions. Indeed, it is precisely these types of transactions that tend to raise complex and novel issues of law, fact, and economics, that may give rise to industrial policy and other concerns that go beyond strict competition-related considerations and that are likely to fuel the call for early and effective antitrust intervention.

It is clear that a number of competition enforcement agencies are not yet sufficiently attuned to each other and that there is a need for cooperation mechanisms that can effectively ensure a level of consistency in antitrust enforcement, both substantively and procedurally. However, it is in our view highly questionable whether the current, traditional cooperation mechanisms are in and of themselves sufficient to avoid major frictions between jurisdictions, especially in the current climate, where competition agencies are increasingly called upon to remedy the perceived evils of the new economy and where trust between nations is not at a high point.

Assuming that the traditional consensus-based cooperation mechanisms may be suboptimal in dealing with the challenges of international antitrust enforcement in the 2020s and beyond, the search for additional and alternative bilateral and multilateral mechanisms to ensure effective, coherent, and economically rational antitrust enforcement, is legitimate. It should be taken seriously and further explored.

38 Speech by Makan Delrahim, DOJ, University of Pennsylvania Law School Event, "The 'New Madison' approach to antitrust and intellectual property law," (March 16, 2018).

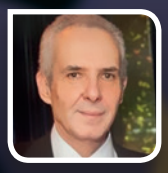
39 Comments by Roger Alford, DOJ, LeadershIP EU 2018 Annual Conference, "Designing a System to Secure the Fair Administration of Competition Laws," (November 13, 2018).

40 Speech by Margrethe Vestager, European Commission, Global Antitrust Enforcement Symposium, "Hitting the sweet spot in antitrust enforcement," (September 25, 2018).

41 "Brazilian competition agency says ICN is best forum for U.S.-led global antitrust initiative," MLex, January 4, 2019; "U.S.-led antitrust initiative should come under International Competition Court, Germany's Mundt says," MLex, November 19, 2018.

SUBSTANTIVE CRITERIA AND LEGAL STANDARDS IN RECENT ABUSE OF DOMINANCE DECISIONS IN HI-TECH MARKETS: EU VS. U.S. AND LESSONS LEARNED

BY YANNIS KATSOULACOS[1]



1 Professor of Economics, Athens University of Economics and Business; Visiting Professor, European Institute, London School of Economics (2018 – 2019).
Email: yanniskatsoulacos@gmail.com.

I. INTRODUCTION

The main objectives of this article are, first, to show the important role of differences in Substantive criteria or Standards[2] ("SSs") in explaining differences in the Legal Standards[3] ("LSs") adopted in Competition Law ("CL") enforcement in the EU vs. the U.S. Second, to discuss the important role of the Courts and the judicial review process in explaining how the EU and U.S. agencies choose their LSs. Third, to explain why in both jurisdictions (EU and U.S.) the rule of reason is not adopted in assessing abuse of dominance ("AoD") cases in hi-tech markets. Fourth, to discuss whether and how the recognition of the impact of potentially anticompetitive (exclusionary) conduct on innovation in hi-tech markets, such as that related to "digital platforms," should affect enforcement procedures.

To start with, we note that, following U.S. doctrine, we will think of LSs as lying along an analytical *continuum* the boundaries of which are the Strict *Per Se* ("SPS") LS (which we will call the "lowest" or "minimum" LS) and the Rule of Reason or Full Effects-Based ("FEB") LS (the "highest" or "maximum" LS).[4] As Jones and Kovacic (2017)[5] note "the general progression in U.S. doctrine has been toward recognition of an *analytical continuum* whose boundaries are set, respectively, by categorical rules of condemnation (*per se* illegality) or acquittal (*per se* legality) and an elaborate, fact-intensive assessment of reasonableness (Rule of Reason). These poles are connected by a range of intermediate tests that seek to combine some of the clarity and economy of bright-line rules with the greater analytical accuracy that a fuller examination of evidence can produce." The Modified *Per Se* ("MPS") and the Truncated Effects Based ("TEB") are LSs lying along the continuum between SPS and FEB and often recognized in antitrust decision discussions and the literature.[6] In summary and simplifying somewhat, under (strict) *Per Se* only conduct characteristics are examined and assessed; under MPS these are examined as well as market characteristics and extant market power; under TEB additional analysis establishing exclusionary or market power enhancing effects is undertaken; and under FEB the above are supplemented by additional analysis/evidence to establish the net effect of the specific conduct on some measure of welfare, taking into account potential efficiencies.[7]

A number of lessons have been learned from recent EU hi-tech AoD cases (*Intel, Google, QUALCOMM*), which we can summarize as follows:

1. The substantive standard (SS) (or, liability standard) in the EU is non-welfarist. Also, the main responsibility for the substantive criterion adopted lies with the European Courts – which are "charged with responsibility for interpreting EU law" (Jones and Kovacic, 2017).

2. The legal standards (LSs) are much closer to *Per Se* than to FEB (specifically, MPS Illegality).

3. The ECJ *Intel* decision is in the right direction but it is not going to lead to the adoption of a FEB LS.

Let us then turn to consider in detail the SSs and LSs in the EU and how they differ from those in the U.S.

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2 *Criterion* for reaching decision about whether or not there is violation of law (i.e. criterion that governs antitrust case adjudication). In much of the economic literature this is assumed to be consumer welfare or total welfare. However, in practice many other criteria are used and often other criteria are dominant. See below for the EU case.

3 Decision rule that describes *how* decisions are reached. How do we show that substantive criterion is (or is not) satisfied? Through an *inference* (*Per Se* LS) or not (effects-based LS)?

4 We will not use lawyers' terminological distinction between "rules" and "standards" and consider *Per Se* and rule of reason (or effects-based) as alternative "legal standards."

5 Jones A. & W. Kovacic (2017), "Identifying Anticompetitive Agreements in the US and the EU – Developing a Coherent Antitrust Analytical Framework," Antitrust Bulletin, 62(2).

6 See Gavil A., W. Kovacic & J. B. Baker (2008), "Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy," West Academic Publishing, p. 358; Gavil Andrew (2008), Burden of Proof in U.S. Antitrust Law, in 1 ISSUES COMPETITION LAW AND POLICY 125 (ABA Section of Antitrust Law 2008); Hovenkamp, H. J. (2018), "The Rule of Reason," Florida Law Review, available at https://ssrn.com/abstract=2885916; Katsoulacos Y. (2018a), "A Note on the Concepts of Legal Standards and Substantive Standards (and how the latter influences the choice of the former)," DP available at http://www.cresse.info/default.aspx?articleID=3388. Katsoulacos Y. (2018b), "On the Choice of Legal Standards: a Positive Theory for Comparative Analysis," 2018b. DP available at http://www.cresse.info/default.aspx?articleID=3388. Jones & Kovacic, *supra* note 5.

7 Consumer or total welfare. See, for example, Blair R. D. & D. Sokol (2012), "The Rule of Reason and the Goals of Antitrust: An Economic Approach," Antitrust Law Journal, 78 (2), 471 - 504.

II. THE SSS AND THE LSS IN EU AND U.S.: A COMPARATIVE DESCRIPTION

In the EU there are multiple goals guiding antitrust enforcement and, under the influence of a strong Ordo-Liberal tradition, the dominant SS is not welfarist: it is that of the impact of the investigated conduct on rivals (or, impact on the "competitive process"). In *Intel*, for instance, the GC 2014 Judgement on EC's Decision ((T-286/09) explicitly rejected the idea that the criterion of "non-disadvantaging rivals" is not the main criterion governing adjudication in the EU. And the 2017 ECJ Judgement did not contradict the GC on this point. References concerning the goals of European antitrust that confirm this point include Korah (2010), Blair & Sokol (2013), Wils (2014), Gifford & Kurdle (2015), Jones & Kovacic (2017).[8]

With regard to LSs in AoD cases, there is nothing new in the use of *Per Se* Illegality type legal standards in the EU in recent Article 102 cases. As Geradin & Petit noted in 2010, under a presumption of illegality, the assessment of abuse of dominance cases in the EU has relied on "old, formalistic legal appraisal standards, and (has shown) a reluctance to endorse a modern economic approach."[9] For another review and appraisal reaching the same conclusions, see Neven (2006) and the recent analysis of Ibanez Colomo (2016).[10] The latter's careful and extensive review of the *European Courts' choice of legal standard* in abuse of dominance cases shows that, for a large number of practices associated with such cases, the standard is one of *Per Se* Illegality while for the rest the standard is what we call here the TEB LS (which certainly falls short of FEB or rule of reason).

But there are a number of problems with the criticisms of EU enforcement in AoD cases:

1. First, the criticisms concentrate on the (*Per Se* type) LSs applied. But the choice of the substantive criterion is the more fundamental issue.

2. Second, and related to the above, the relation between the substantive criterion and the LSs adopted, and the influence of the former on the choice of the latter, is not clarified or properly taken into account.

3. Third, too much emphasis is placed on the EC, while not enough emphasis has been given to the role of the Courts and the judicial review process: however, for reputational reasons, the EC has to adjust to the standards adopted by the Courts.

4. Finally, the fact that AoD cases in hi-tech markets in the EU usually end-up with infringements while in the U.S. they end up with acquittals is often confused with the relative use of FEB LSs in these two jurisdictions. The truth is that in neither jurisdiction do we see use of FEB LSs in these cases, as we discuss further below.

Concerning the situation in the U.S., this can be summarized as follows:

(i) Up to the end of 1970s there were also many "goals" – including, importantly, that of protecting the competitive process – and monopolization cases were assessed using *Per Se* Illegality legal standards.

(ii) Since the end of 1970s, the U.S. Courts have accepted the view that antitrust law is a "consumer welfare prescription" (Jones and Kovacic, 2017). But it is worth noting that recently there have been quite a few voices that have argued that this should change,

8 See Korah (2010), "The Reform of EC Competition Law: The Challenge of an Optimal Enforcement System," in *The Reform of EC Competition Law*, by I. Lianos & I. Kokkoris (eds), Kluwer Law International, The Netherlands; Blair R. D. & D. Sokol (2013), "Welfare Standards in US and EU Antitrust Enforcement," Fordham Law Review. Volume 81, Issue 5; Gifford D. J. & R. T. Kudrle (2015), "The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy," University of Chicago Press; Jones & Kovacic, *supra* note 5; Wils W. (2014), "The Judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance," World Competition, 37, no 4.

9 Geradin D. & N. Petit (2010), "Judicial Review in EU Competition Law: a Quantitative and Qualitative Assessment," TILEC DP No. 2011-008.

10 Neven, D. (2006), "Competition economics and antitrust in Europe," Economic Policy 21(48), 741-781. Ibanez Colomo P. (2016), "Beyond the 'more economic-based approach': a legal perspective on article 102 TFEU case law," Common Market Law Review, 53 (3). See also Papandropoulos P. (2010), "The implementation of an effects-based approach under art. 82: principles and application," Chapter 14 of "The Reform of EC Competition Law – New Challenges," edited by I. Kokkoris & I. Llannos, Kluwer Law International; Peepercorn Luc (2015), "Conditional Pricing: "Why the GC is Wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates," Concurrences Journal; On the recent EU *Intel* decision see Rey P. & J. S. Venit, (2015), "An Effects-Based Approach to Article 102: A Response to Wouter Wils," World Competition, 38, no 1: 3-30; Marsden P. (2010), "Exclusionary abuses and the justice of 'Competition on the Merits,'" Chapter 14 of "The Reform of EC Competition Law – New Challenges," edited by I. Kokkoris & I. Llannos, Kluwer Law International.

and the emphasis should return to the protection of the competitive process (e.g. Werden & Froeb, 2018 and Wu, 2018).[11]

(iii) With regard to legal standards, from the end of the 1970s, there have been two competing schools: the Chicago School arguing that the appropriate LS is that of Modified *Per Se* Legality (i.e. presuming legality even when significant extant market power has been established, and allowing the conduct) and the Post-Chicago School arguing for FEB (or Rule of Reason ("RoR")) (see, e.g. Padilla & Evans, 2005[12]).

(iv) In monopolization cases, especially perhaps in hi-tech/innovation – intensive markets, the FEB prescription has been losing – despite of the increasing number of voices that things should change.

Table 1: A summary: EU vs. U.S. in AoD cases

	Substantive Standard	Presumption for dominant firms and approach to errors	Legal Standard
EU	Non-disadvantaging rivals	Illegality (i.e. conduct assumed to have exclusionary effects, on average). Emphasis on false acquittals.	Mostly MPS Illegality
U.S.	Consumer Welfare	Legality (i.e. conduct assumed to increase consumer welfare, on average). Emphasis on false convictions	Mostly MPS Illegality

Ideology, the culture of competition, tradition, and the role and influence of economics and economists, explain the different substantive standards. But: what explains the different presumptions and types of legal standards and the fact that these are not FEB in either case?

III. EXPLAINING THE DIFFERENCES IN PRESUMPTIONS AND LSS

In recent positive theory on the choice of LSs (Katsoulacos 2018a,b), the latter are adopted by Competition Authorities ("CAs") in anticipation of the standards that are adopted by appeal Courts, taking into account reputation-related concerns (CAs prefer not to have their decisions reversed or annulled by Appeal Courts) and implementation costs (higher LSs have higher implementation cost per decision reached). In turn, the Courts' choice of LSs is influenced by their SSs and, given the latter, by the Courts' priors concerning the implications of different LSs for decision errors, deterrence and administrability considerations[13]. As the theory establishes, non-welfarist SSs, for example using the criterion of "non-disadvantaging rivals," are more likely, ceteris paribus, to lead to the adoption of *Per Se*-type LSs (Katsoulacos, 2018a).[14] Positive theory offers a basis for explaining the differences in LSs in different countries and why LSs may be lower (closer to *Per Se*) than we would expect on welfare maximization grounds (Katsoulacos, 2018b).[15]

11 Wu T., "After consumer welfare, now what? The 'protection of competition' standard in practice," CPI (April, 2018); Werden G. J. & L. M. Froeb (2018), "Back to School: What the Chicago School and the New Brandeis School get Right," Symposium on "Re-Assessing the Chicago School of Antitrust Law."

12 Padilla, J. & D. S. Evans, "Designing Antitrust Rules for Assessing Unilateral Practices: a Neo-Chicago Approach," University of Chicago Law Review, Vol.72 (2005).

13 Katsoulacos & Ulph (2009, 2016a and 2016b) provide an analysis of the factors that influence the choice of LSs when the objective is that of social welfare maximisation – taking into account decision errors, deterrence effects and legal uncertainty. Katsoulacos Y. & D. Ulph (2009), "On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis," Journal of Industrial Economics; Katsoulacos Y. & D. Ulph (2016a), "Regulatory Decision Errors, Legal Uncertainty and Welfare: A General Treatment," International J. of Industrial Organization; Katsoulacos Y. & D. Ulph (2016b), "Legal Uncertainty, Competition Law Enforcement Procedures and Optimal Penalties," European J. of Law and Economics, 41(2). The Katsoulacos & Ulph analyses can be thought of as formalizing and generalizing Padilla & Evans (2005), *supra* note 12.

14 Katsoulacos Y. (2018a), *supra* note 6.

15 Katsoulacos Y. (2018b), *supra* note 6.

A. Explaining Different Presumptions

According to Table 1, conduct by firms with a dominant position, which is considered presumptively illegal in the EU, is considered presumptively legal in the U.S. Both positions can be right, if we consider the differences in SS in the two jurisdictions (first column of Table 1). Conduct that is considered on average to have exclusionary effects (and so is considered presumptively illegal under the EU SS) can simultaneously be considered, on average, not to reduce consumer welfare (and so is considered presumptively legal under the U.S. SS). In the latter case, the conducts are presumed to generate significant procompetitive effects (that are not considered or are not given significant weight in the EU).

B. Explaining Different LSs: The Importance of Differences in SSs

We note that under the "non-disadvantaging rivals" substantive criterion the *maximum* LS that can be chosen is lower than the FEB LS (or rule of reason), which is the maximum LS under the consumer welfare criterion. This becomes clear once we consider that under the first criterion we do not need to consider procompetitive effects or efficiencies and how they balance with anticompetitive effects. Also, and importantly, as noted above, recent theory shows that the likelihood of using an MPS LS is higher when the substantive criterion is "non-disadvantaging rivals" rather than consumer welfare (Katsoulacos 2018a). This is because the strength of the presumption of illegality under MPS is higher in the former case. In summary, *given the SS of EU Courts, it is natural to find that conduct by dominant firms is considered presumptively illegal and is assessed using the MPS Illegality LS.*

In the U.S., on the other hand, the SS of consumer welfare leads to a presumption of legality, but this is not so strong as to justify a *Per Se* (or, more accurately, MPS) Legality LS. In order to justify the choice of TEB Legality LSs (Table 1) we need to explain also why, in the U.S. too, a FEB LS (or RoR) is not used. We turn to this in Section 4 below.

C. Will the ECJ Intel Judgement Change the Situation in the EU?

The ECJ (2017) Judgement on *Intel* represents a move in the right direction. Interpreting the judgement in terms of the above discussion, the ECJ decision does ask the GC to move away from the MPS Illegality LS, towards *truncated effects-based illegality*, whereby it must be established, by *undertaking an AEC investigation for the specific case* (and *not* just relying on an inference as under MPS Illegality) that rivals are indeed disadvantaged. But, this is certainly not a request for a FEB LS (or RoR) that takes efficiencies seriously into account and undertakes a balancing test, given that the ECJ, as does the GC, also adopts the "non-disadvantaging rivals" SS under which, as indicated above, there is no scope for a FEB LS.

IV. EXPLAINING AVOIDANCE OF FEB (OR RULE OF REASON) (IN BOTH JURISDICTIONS)

From the above, the fact that FEB is not used in the EU is easy to justify. Under a "non-disadvantaging rivals" SS and a presumption of illegality for AoD practices, the maximum LS that could be adopted is that of a TEB Illegality LS. In fact, under the European SS an even lower LS, the MPS Illegality LS, can be justified[16] and this was indeed the position of the GC in the *Intel* case (but see also below), as well as the position in many other cases, for a large number of AoD practices, as identified in the recent study of Ibanez Colomo (2016).[17]

To explain the avoidance of FEB LSs in AoD cases in recent enforcement in the U.S. hi-tech markets, we provide two considerations. The first is that the discriminatory quality[18] of economic models and economic evidence in AoD cases may be considered by Courts to be lower than in mergers and vertical restraints. This has the implication that Courts may then prefer to use lower LSs than FEB, such as TEB LSs.[19] Agencies then follow the Courts and also adopt the lower LS, since the additional analysis and evidence examined under the higher standard, that involves an additional cost, will not be considered by the Courts. The second is that, even if the FEB LS is considered appropriate by Courts, the economic analysis, modelling and related evidence under FEB increases the disputability of the decisions reached by Agencies, thus making these decisions

16 Katsoulacos Y. (2018a), *supra* note 6.

17 Ibanez Colomo, *supra* note 10.

18 In terms of their ability to distinguish, for some conduct category, harmful to welfare from benign cases.

19 As the theory of socially optimal legal standards suggests, which is the appropriate theory to apply for welfare maximising Courts (Katsoulacos & Ulph, (2009), *supra* note 13). Welfare optimal LSs are the LSs that minimise decision errors and adverse deterrence effects. Katsoulacos & Ulph (2009), *supra* note 13.

more likely to be rejected (or reversed, or annulled) when FEB LSs are used (Katsoulacos, 2018b).[20] This constitutes a very serious disincentive for the use of FEB by Competition Agencies (CAs) in AoD cases. This is because reputation-sensitive CAs must make decisions on LSs considering the risk of annulment under alternative LSs. This, plus the higher implementation cost of FEB, may lead them to choose *a lower* LS (such as a TEB) even when the Courts prefer FEB (Katsoulacos, 2018b).[21]

There is empirical evidence showing that, for conducts in which FEB LSs are used, the annulment rate is higher than it is for conducts in which *Per Se* type standards are used. Thus, for example, Neven (2006) looks at all the appeals against EC decisions in the period 1994 – 2006, and computes the proportion of cases in which the EC prevailed (so decisions were not annulled). He finds a success rate of Article 82 (AoD) decisions, that "have remained focused on form," of 98 percent which, as he comments, "is striking." For mergers and Article 81 cases focusing on effects the fraction is much lower – 75 percent. Neven considers this "probably the most important insight…(from his findings)….."[22] For a similar appraisal, using again evidence from the EU, see also Geradin & Petit, 2010.[23] Further, the evidence presented by Neven is confirmed with a much larger/updated dataset (that considers EC decisions from 1992 until 2016) by Katsoulacos et.al., 2018.[24]

The U.S. *Google* case perhaps best illustrates the importance of the above argument (relating to the incentives of agencies to avoid decision reversals in appeal Courts) for the situation in the U.S. Concluding its *Google* investigation in 2013 the FTC noted that "the law protects competition, not competitors" and that there was not enough factual evidence of alleged "search bias" to support a complaint. Kovacic (2018), interpreting the outcome, wrote that "Supreme Court rulings have given dominant firms more freedom (than in the EU) to control pricing, product development and marketing…" noting that "I believe that *the crucial factor that led the FTC to back down was its perception that Google ultimately would prevail in the Courts*. If U.S. doctrine resembled EU antitrust doctrine regarding dominant firms, there is a strong chance that the FTC would have brought its own case."[25]

These remarks are consistent with our evaluation of EU – U.S. differences in recent high-tech AoD cases. Specifically, in the EU Courts need, for a finding of infringement, *only* to demonstrate exclusionary potential[26] for a conduct considered presumptively illegal. Given this, and that the presumption of illegality is considered to be sufficiently strong once dominance is established, the MPS Illegality LS is the optimal standard and the EC would have no incentive not to follow this. In the U.S., Courts require *for infringement* evidence of a reduction in consumer welfare (by the use of FEB) for a conduct considered presumptively legal.[27] Given this, as noted above, the TEB (or MPS) Legality LS is the optimal LS for the Agencies – attempting to show infringement through a FEB would be too risky in terms of the expected rate of annulment (and more costly).

V. COMMENTS ON THE IMPORTANCE AND IMPLICATIONS OF INNOVATION FOR ENFORCEMENT

One characteristic of hi-tech markets in recent antitrust enforcement in the EU and U.S., which has drawn a lot of attention, is that these markets are highly innovation intensive. It has been stressed by many authors that enforcement in innovation-intensive markets must be re-calibrated to preserve the incentive to innovate (by placing more weight on dynamic over static competition). The question is exactly what this re-calibration should involve.

It has been suggested by some that the current situation could be improved by abandoning, in the U.S., the consumer welfare SS and moving to a "protection of the competitive process" SS. For example, Wu (2018) writes that "this small change…would make antitrust far more

20 Katsoulacos Y. (2018b), *supra* note 6.

21 The likelihood of this happening is greatest when the alternative to FEB is TEB Legality: under the latter the CA will acquit the firm under investigation and thus avoid appeals (acquittals are usually not appealed) and potential reversal of its decision while incurring lower costs. Katsoulacos (2018b), *supra* note 6, shows that the CA may choose a lower than FEB LS even if the alternative is TEB (or MPS) Illegality.

22 Neven, *supra* note 10.

23 Geradin & Petit, *supra* note 9.

24 Katsoulacos, Y., G. Makri & E. Metsiou (2018), "Antitrust Enforcement in Europe in the Last 25 Years: Developments and Challenges," Forthcoming in Review of Industrial Organisation.

25 Our italics.

26 Exclusionary potential (rather than reduction of consumer welfare) been the criterion that governs case adjudication.

27 If conduct is considered presumptively legal, the only way to establish infringement is on the basis of a FEB LS.

attentive to dynamic harms."[28] Other prominent writers, such as Werden & Froeb (2018) also favor, more generally, a switch from consumer welfare to the "protection of the competitive process"[29] SS. Opposing views have, however, been expressed by, among others, Blair & Sokol (2012 and 2013), Coniglio (2017), Farrell & Katz (2007), Salop (2010), and Carlton (2007) – who favors a total welfare SS.[30]

We think that the starting point in discussions on whether/how innovation should affect enforcement practice, before advocating a switch in SS, must be to consider the question of how innovation is related to the intensity of competition. While this is a subject still open to additional theoretical and empirical analysis, there is a high degree of consensus that, according to existing knowledge, innovation in a market is positively influenced by competition intensity and that we are in general likely to be on the "upward part" of the inverted U-shaped curve (which relates innovation to intensity of competition according to empirical analyses) in the AoD cases under consideration here. This suggests that exclusionary conduct, which lowers competition intensity, is likely to lower total innovation in a market in the long-run. This is one factor that needs to be considered.

The other factor concerns the weight one gives to Type I vs. Type II errors. As noted above, traditionally in the U.S. there is more emphasis on avoiding Type I decision errors while in EU there is much more concern with Type II errors. One could argue that when thinking of "digital platforms" the European position is more accurate, given that in many of the cases with which we are concerned here, involving these platforms, tipping in the market has already occurred and this suggests that the impact of exclusionary behavior on competition is unlikely to be reversed by market forces (hence, making Type II errors presents a major problem – as the long-term harm from exclusion can be very substantial).[31]

These two considerations suggest that in the highly innovative digital platform markets it may be appropriate to switch the presumption regarding potentially exclusionary practices from a presumption of legality (as is currently the case in the U.S.) to a presumption of illegality (as is currently the case in the EU). If a consumer welfare SS is maintained, this then implies that one has to choose either the TEB Illegality LS, if we consider the presumption of illegality (i.e. a negative effect on consumer welfare on average) sufficiently strong, or the FEB LS if we consider that, relative to the strength of the presumption of illegality, the discriminatory quality of economic models and evidence is sufficiently high in terms of accurately distinguishing welfare-harmful from welfare-benign exclusionary conduct. Now, it may indeed be true that effects on consumer welfare in specific cases "might be difficult to demonstrate to a high standard of proof even when harm to competition is clear and substantial" (Werden & Froeb)[32] and agencies may thus wish to avoid adopting a FEB LS. Then, demonstrating infringement in such cases can follow one of two routes. Under the first, though consumer harm cannot be convincingly demonstrated in the specific cases investigated, an infringement finding is the outcome of a strong presumption that this will be the result as a consequence of the adverse effects on competition: in this route we maintain a consumer welfare SS and adopt a TEB Illegality LS. Or, if no strong presumption about the effect on consumer welfare can be formed for competition-reducing conduct, we can abandon the consumer welfare SS and adopt a "protection of the competitive process SS," as practiced in Europe and as advocated for in the U.S. by Werden & Froeb (2018) and Wu (2018).[33] Under this second route, the demonstration that the conduct affects adversely rivals or the competitive process is sufficient for an infringement finding.

28 Wu, *supra* note 11.

29 Werden & Froeb, *supra* note 11.

30 See Blair & Sokol (2012), *supra* note 7; Blair & Sokol (2013), *supra* note 8; Carlton D. (2007), *Does Antitrust Need to be Modernized?*, (21 (3) J. Econ. Perspectives; Coniglio J.V. (2017), "Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism," CPI Antitrust Chronicle, (August 2017); Farrell, J. & M. L. Katz (2006), "The economics of welfare standards in antitrust'" CPI Journal, Competition Policy International 2(2); Salop S. (2010), "Question: what is the real and proper antirust welfare standard? Answer: the true consumer welfare standard," 22 Loyola Consumer L Review, 336. For a recent review see Katsoulacos Y., E. Metsiou & D. Ulph (2016), "Optimal Substantive Standards for Competition Authorities," Journal of Competition, Industry and Trade.

31 On these two considerations, see also Caffara C. (2018), "On the need for a 'radical' manifesto for competition enforcement in digital space," mimeo.

32 They point to the case of *Ohio v. American Express Co.*, 138 S Ct 2274 (2018). Werden & Froeb, *supra* note 11.

33 Wu, *supra* note 11; Werden & Froeb, *supra* note 11.

VI. CONCLUSIONS

In this article we have stressed the implications for enforcement, of the European Courts adopting non-welfarist SSs. This influences their presumptions and choice of LSs in AoD cases: the former are presumptions of illegality and the latter are (mostly) *Per Se* Illegality LSs. The EC, in turn, chooses these LSs, anticipating the choice of the Courts and minimizing the cost of enforcement. Clearly, it does not make sense to criticize the EC for acting in anticipation of the Courts' choices. Nor does it make sense to criticize the Courts for a LS choice that is rational given their SS. But, on the assumption that welfarist SSs are most appropriate for CL enforcement, it may indeed make sense to criticize the EU Courts for continuing to use non-welfarist SSs. Having said that, our discussion of the implications for enforcement of recognizing the importance of innovation in hi-tech digital platform markets suggests that it may be more appropriate for the U.S. to base assessment of AoD cases in such markets assuming, as under European antitrust doctrine, that exclusionary conduct is presumptively illegal (rather than presumptively legal).

ABUSE OF A DOMINANT POSITION: A POST-*INTEL* CALM?

BY GIORGIO MONTI[1]

1 Professor of Competition Law, European University Institute and Ronald Coase Visiting Professor, Tilburg University.

I. INTRODUCTION

The publication of the Guidance Paper on Exclusionary Abuse in 2009 raised expectations of a paradigm-shift in the application of Article 102.[2] Broadly speaking the EU's abuse of dominance doctrines have been criticized for two reasons: the first is the focus on the form of conduct rather than on developing a theory of harm; the second is the appearance that the application of the law was likely to protect rivals of the dominant firm without a showing that this would improve economic welfare. Several commentators considered the Guidance Paper brought a paradigm shift to the analysis of Article 102, one so significant as to ask whether we would ascend from hell to heaven.[3] Observers have queried how far the Court's jurisprudence would embrace the (non-binding) Guidance Paper, which applies an effects-based approach and places emphasis on consumer welfare, and thus legitimate this new approach.

The Court's case-law has produced effects like those of a see-saw. In *Telia Sonera* the ECJ confirmed that margin squeeze would constitute a distinct form of abuse, contrary to the Guidance Paper's intimation that such cases could be analyzed within the framework of refusals to deal. The Court also restated the generous breadth of Article 102 indicating that the function of the competition rules is to prevent distortions of competition to the detriment of "the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."[4] Then in *Post Danmark 1*, the ECJ refused to find that above cost discounts could be abusive absent proof of likely anticompetitive effects in a judgment whose rhetoric accepted that Article 102 only protected firms as efficient as the dominant undertaking.[5] It appeared the policies in the Guidance Paper might finally take root. However, in *Post Danmark 2*, the Court appeared to return to a more traditional stance in assessing loyalty rebates, and doubted the general applicability of the as-efficient-competitor test.[6]

In this optic, is the judgment in *Intel* just another move of the see-saw in the direction of the Guidance Paper or might we see a more stable shift? This paper asks this question from three different perspectives: first it asks if post-*Intel* the European Courts are more cohesive; second it considers whether the enforcement efforts by the Commission and certain National Competition Authorities may relish an aggressive stance that might be at odds with the post-*Intel* settlement, and might instead be searching for a different paradigm to apply abuse of dominance. Finally, the paper asks how *Intel* might affect our thinking on remedies and sanctions of dominant firms. The purpose of this discussion is to provide a high-level account of post-*Intel* developments and explore the challenges these raise.

II. A POST-*INTEL* ORTHODOXY?

The *Intel* judgment is the most subtle reformulation of an existing legal standard that is possible short of formally overruling a line of cases.[7] It will be recalled that this was an infringement decision where the Commission spent considerable efforts applying the as-efficient competitor test to determine whether the rebates Intel granted were likely to have anticompetitive exclusionary effects. On appeal, after restating the general rule under which loyalty-inducing rebates constitute an abuse of a dominant position, the Court suggested that a "further refinement" was necessary in cases where the dominant firm submits evidence that its conduct is not capable of having anticompetitive effects.[8] In such cases, the ECJ continued, the Commission has a duty to look for evidence of likely foreclosure effects, and if appropriate to apply the as-efficient-competitor ("AEC") test.[9] This test is a mechanism to determine whether the real prices paid are predatory: It is a resource-intensive exercise which the Commission committed itself to in the Intel decision.

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2 Communication from the Commission, Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7. Monti, "Article 82 EC: What Future for the Effects-Based Approach?," (2010) 1(1) Journal of European Competition Law & Practice 2.

3 Akman, "The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?," (2010) 73(4) MLR 605; Marquis & Rousseva, "Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct Under Article 102 TFEU," (2013) 4(1) Journal of European Competition Law and Practice 32; Venit, "Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning," (2016) 7(3) Journal of European Competition Law & Practice 165.

4 *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09 ECLI:EU:C:2011:83 para. 22.

5 *Post Danmark A/S v. Konkurrencerådet*, C-209/10 ECLI:EU:C:2012:172.

6 *Post Danmark A/S v. Konkurrencerådet*, C-23/14 ECLI:EU:C:2015:651.

7 A less subtle reformulation is *Coty's* reinterpretation of *Pierre Fabre* where the court is at pains to explain away a carelessly lapidary formulation in the earlier judgment. See *Coty Germany GmbH v. Parfümerie Akzente GmbH*, C-230/16 ECLI:EU:C:2017:941, paras. 30-36.

8 *Intel v. Commission*, C-413/14P ECLI:EU:C:2017:632, para. 138.

9 *Ibid.* paras. 139-141.

The *Intel* investigation took place as DG Competition was drafting the Guidance Paper. The Commission's choice to apply the AEC test provided for in the Guidance Paper in the decision was curious. The Commission explained that it did not consider that applying this test was necessary to condemn Intel,[10] but used it anyway, probably as a way of signaling its commitment to such an approach. However, this came back to haunt the Commission for the ECJ held that the AEC test played an important role in the Commission decision and so the General Court was bound to examine whether the AEC test was carried out correctly in order to determine if Intel had indeed infringed Article 102 TFEU. At the time of writing, the case is back with the general Court to test whether the effects-analysis, including the AEC test, carried out by the Commission may be upheld.

The significance of the Court's very brief reformulation of the rebates case law cannot be under-estimated. There may be debates as to how much evidence the applicant will need to bring to require the Commission to carry out an effects-based assessment, but the tenor of the judgment indicates a willingness to shift away from a line of case-law that has been roundly criticized for facilitating an overly aggressive stance on discounting practices which may well enhance competition by reducing retail prices. Henceforth, an effects-based assessment will have to be carried out, whether by application of the AEC test, or by other means.[11] Of course, it may be suggested that by raising the Commission's costs of bringing such cases one errs the other way, towards under-enforcement. Yet, this is the policy choice the Court made.

Nor is *Intel* an aberration. Perhaps galvanized by AG Wahl's clear and crisp Opinions the Court has agreed to an effects-based assessment in testing whether price discrimination constitutes an abuse. The judgment in MEO concerned a complaint that the Portuguese collective management society for artists had set discriminatory prices to one of two pay-TV stations. For the purposes of this discussion, two points should be noted. First, the Court makes it pellucid that price discrimination is an exclusionary abuse.[12] Second, it clarifies the kinds of evidence that might help in diagnosing whether price discrimination is likely to harm a downstream player: The bargaining power of the licensee, the legal framework that applies to such bargains (in Portugal disagreements over license fees are solved by arbitration, which may remove the risk of exclusion), the amount of the fees relative to the costs of operating the business (the lower this is the less likely that there is an exclusionary impact), and any evidence of the dominant firm's intention to exclude the complaining firm. On the last point, since the dominant firm is not active on the downstream market it looks hard to see why a dominant firm might wish to exclude one of the two purchasers.[13]

Moreover, in giving further guidance on determining whether prices are excessive, the *AKKA/LAA* judgment (concerning again, collecting societies) appears set to increase the rigor with which National Competition Authorities must confront such claims.[14] The Latvian NCA had compared prices set by the collecting society in Latvia with neighboring Baltic states and with all other Member States. The ECJ advised that this looked appropriate provided the methods for comparison were convincing. It also added that high fees must be appreciable by reference to the significance of the difference as well as the persistence of such higher prices. Some aberrations remain in the manner in which exclusionary tactics are analyzed in newly liberalized markets, with the General Court recently justifying what may be seen as looser standards by reference to the fact that the dominant player has enjoyed a legal monopoly.[15]

III. DESTABILIZING TRENDS

The discussion above suggests that the ECJ might have now set the course of abuse of dominance doctrine along a path where one tests for likely anticompetitive effects with convincing evidence as opposed to form-based classifications of abuse. For exclusionary conduct, likely effects on efficient competitors must be shown. No comments are offered here as to whether this policy choice is desirable. It is however worth noting that alternative visions for how to read abuse of dominance may be on the horizon.

First, digital markets might lead competition agencies to look to establish novel concepts of market power or abuse that will require refinement though the courts and will entail an expansion of the abuse doctrine. In Germany, for example, the *Facebook* case which will help explore the relationship between antitrust and privacy. Moreover, a Report for the Federal Ministry for Economic Affairs and Energy entitled *Modernising*

10 Case COMP/37.990, *Intel*, (May 13, 2009), para. 925.

11 Fumagalli, Motta & Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance*, (2018) ch.2 suggests an alternative approach.

12 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, C-525/16 ECLI:EU:C:2018:270 para. 30.

13 *Ibid*. para. 31.

14 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Konkurences padome*, C-177/16 ECLI:EU:C:2017:689.

15 *Slovak Telekom v. Commission*, T-851/14, ECLI:EU:T:2018:929 para. 153.

the law on abuse of market power identifies gaps in antitrust when it comes to digital markets.[16] One of its recommendations is that in markets with network effects, an antitrust agency should be able to intervene before the market tips (i.e. one firm monopolizes it). Another is that in markets where actors provide intermediation services (e.g. platforms) there is a case for recognizing intermediation as a source of market power. Likewise, the report identifies data as a source of market power. While these recommendations are made to amend German antitrust law only, it is likely that others may emulate these approaches.

Likewise, the Commission's restatement of Article 102 in the *Google Shopping* case evinces a recognition that a dominant platform poses certain risks that a firm like Intel does not. In restating the principles underpinning the concept of abuse of dominance, the Commission enumerates a number of well-known aphorisms, but also indicates that "[a] system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators."[17] Moreover, the Commission adds that such operators should be free to compete for the entirety of the market.[18] Accordingly, a remedy ensuring equal treatment as between the dominant firm and all its downstream rivals is justifiable.[19]

These observations merit reflection. First, the notion of equal opportunities is found only in case of privileged undertakings: former state monopolies or undertakings that still benefit from exclusive rights.[20] Including a firm like Google in this group evinces a concern that certain forms of private power might create such serious risks to warrant the same kind of strict scrutiny that we find when regulating holders of exclusive rights. If this is what is intended then stronger justification is warranted and more discussion is required as to the scope of Article 102 in the framework of these manifestations of market power. The right to compete for the entire market is at odds with the recognition in the AEC test for rebates that a dominant firm may well hold a non-contestable share of the market and that therefore a rival may not, at least in the medium term, expect more than being able to compete for part of the relevant market. Why should one raise the expectation of Google's rivals higher?

Thus, while *Intel* may have now stabilized how we apply abuse of dominance to old economy markets, this occurs at a time when new economy markets pose different kinds of challenges which will require a retooling of our analytical framework and another round of dialectic between agencies and courts will be needed to settle the emerging legal order. Another reading might be that the steps just described are about invoking a different idea about the role of antitrust: rather that applying the law when there is a risk that efficient competitors are excluded, there is a (ordo-liberal? neo-Brandeisian?) policy to keep markets open to all entrants and to control the power of large firms, lest private power spills over into public power.

A second risk might be that the demands of an effects-based test leads agencies to rediscover form-based abuses. As has been noted in the context of Article 101, the so-called effects-based approach, which culminated in the *Cartes Bancaires* judgment, has led to the disappearance of effects-based cases and a resort to finding restrictions by object.[21] A development that might go in a similar direction may be found in Italy, with an emerging jurisprudence on abuse of rights as an abuse of a dominant position. There are traces of this also in the ECJ's early case-law, and one might see a re-engagement with this approach if the effects-based analysis proves unwieldy.[22]

16 H. Schweitzer, J. Haucap, W. Kerber & R. Welker, "Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)," (September 17, 2018), available at https://ssrn.com/abstract=3250742 or http://dx.doi.org/10.2139/ssrn.3250742.

17 Case AT.39740, *Google Search (Shopping)*, (June 27, 2017), para. 331.

18 *Ibid.* para. 339.

19 *Ibid.* para. 671.

20 See, e.g. *European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI)*, C-553/12 P ECLI:EU:C:2014:2083 paras. 43-47.

21 Witt, "The Enforcement of Article 101 TFEU: What has happened to the Effects Analysis?," (2018) 55 Common Market Law Review 417.

22 Siragusa, "Italy – New Forms of Abuse of Dominance and Abuse of Law," in Parcu, Monti & Botta (eds) *Abuse of Dominance in EU Competition Law – Emerging Trends* (Edward Elgar, 2017).

IV. REMEDIES AND SANCTIONS

There are two notable differences between remedies in infringement decisions and remedies in commitment decisions.[23] First, procedurally, remedies proposed by the parties in commitment decisions are subjected to a market test, whereby third parties are able to participate in the process. They are also sometimes designed to secure compliance via third party monitoring and might contain review clauses.[24] None of these attributes are to be found in most infringement decisions: parties are simply required to cease their conduct. In *Google Shopping* the governance of remedies was more sophisticated: The dominant firm had to explain to the Commission its proposed compliance path, it was then obliged to issue regular reports.[25] One might wonder if, in a setting where what matters are the anticompetitive effects of conduct, the process by which a dominant undertaking complies could be subjected to the kind of structure found in commitment decisions, in particular whether a public process by which remedies are market tested could be considered. This would be particularly helpful in fast-moving high technology markets, where obtaining information from a range of stakeholders can improve the precision of remedies. Clauses for reviewing and perfecting an agreed remedies package can also assist in perfecting remedies should circumstances change. Finally, a time-limit is often set for commitments and it may be appropriate to provide a timescale also for remedies in infringement decisions, if only to give the Commission and the parties a date to take stock whether the abusive conduct is no longer problematic given other market developments, or whether further supervision is required. For instance, if there is new entry, a previously-condemned rebates policy may no longer raise concerns.

Given that infringement and commitment decisions have been issued to address similar types of conduct, there seems to be no compelling reason why the process of identifying remedies could not be aligned. This recommendation might well be extended to many forms of abuse, even to a rebates case. For example, after the *British Airways/Virgin* decision, BA and the Commission cooperated to identify a set of principles to secure that BA's discounting strategy did not infringe Article 102.[26] In instances where welfare effects are ambiguous, an agreed safe harbor for the dominant firm would appear a helpful means of securing compliance.

Abuse of dominance decisions normally make the headlines because of what appear to outsiders as very high fines. AG Wathelet has suggested that the way to assess the basic amount of a fine should also take a leaf out of *Intel*. By analogy with the reasoning there, if an applicant raises evidence to indicate that the exclusionary impact is unlikely when challenging the fine, then the Commission should explore such claims and base the fines on the likely effects rather than on abstract formulations.[27]

One might supplement this recommendation (which the Court did not follow-up) by suggesting that, while the fining guidelines might be appropriate for cartel cases, they appear ill-suited to ensure a proportionate fine in abuse of dominance cases. For example, in cases where the conduct of the dominant firm makes no economic sense but for the exclusion of a rival a fine should be higher than in instances where proof of anticompetitive impact requires a detailed assessment of exclusionary potential. In the latter case it may at times even be harsh to conclude that the undertaking's conduct is negligent, or it may be a factor that mitigates the fine. The aggravating and mitigating circumstances in the Guidelines are targeted at cartel conduct, but there ought to be analogous examples for unilateral conduct, for instance exclusionary intent or the disrespect of sector-specific regulations might aggravate an infringement. Granted, the Commission may develop sensible fining principles without guidelines, but the legitimacy of such fines might be bolstered by a soft law document that constrains its discretion. One might also discuss whether, in cases where a behavioral remedy is imposed, a fine could be dispensed with and only levied in case of a repeat offense or when an undertaking "games the system" and circumvents the remedy.

23 For a significant reflection on remedies, see Lianos, "Competition Law Remedies in Europe," in Lianos & Geradin (eds.) *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013).

24 Svetiev, "Settling or Earning: Commitment Decisions as a Competition Enforcement Paradigm," (2014) 33 Yearbook of European Law 466.

25 *Intel*, supra, note 18, Article 4.

26 European Commission, XXIX[th] Report on Competition Policy 1999, pp.139-140.

27 *Orange Polska v. Commission* C-123/16 P ECLI:EU:C:2018:87 Opinion of AG Wathelet, paras. 79 et seq.

V. CONCLUSION

Perhaps the ECJ has now settled that exclusionary conduct is penalized so as to protect as-efficient competitors, and that this as-efficient competitor principle underpins a vast swath of conduct to be scrutinized under Article 102. If so, then the Guidance Paper might have matured into Guidelines, as had originally been hoped. At the same time, we have signaled that there may be countervailing forces that push for a more aggressive stance as the challenges of digital markets may call for a more extended scope of application, requiring more obligations on certain market players to keep markets open to rivals. A further risk is of a retreat to formalism if the effects-based tests prove too costly to run to ensure effective enforcement. Regardless of how abuse of dominance develops, further reflection is called for on designing remedies and finessing fining policies.[28] In particular, if agencies increasingly focus on newly emerging markets, where welfare effects from conduct are ambiguous, then some of the procedures in commitment decisions could usefully be replicated in facilitating the design of remedies. Moreover, guidelines on fines could be supplemented by specific criteria relating to dominant firms. Focusing on remedies can also serve to sharpen one's concerns about the impact of conduct on competition and thus consolidate a more robust approach to developing a theory of harm.

28 Not least given some early dissatisfaction, see S. van Dorpe, "How to make Google stronger: Punish it," Politico, January 30, 2019.

WITH INCREASED POWERS TO NATIONAL COMPETITION AUTHORITIES IN THE EU, WILL WE HAVE APPROPRIATE PROCEDURAL SAFEGUARDS TOO?

BY KAARLI H. EICHHORN[1]

1 *Advokat* (Member of the Swedish Bar), Antitrust Partner, Jones Day.

"If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

James Madison

President of the Unites States 1809-1817 and "Father of the U.S. Constitution."

I. INTRODUCTION

In January 2019, the European Union ("EU") issued Directive 1/2019, also known as the "*ECN+ Directive*," which primarily aims to broaden the powers of the EU's national competition authorities ("NCAs"). EU Member States now have two years to implement the Directive.[2]

This is another notable step by the European Commission ("EC") to increase harmonization of competition legislation in the EU. However, increased procedural safeguards must also follow with increased powers, to ensure a genuinely effective competition regime. The author regrets that the Directive may not strike the right balance between NCA powers and procedural safeguards.

II. IMPORTANCE OF THE RULE OF LAW IN THE EU

Undoubtedly, the rule of law is one of the EU's most important priorities. It is at the foundation of the EU and enables regulatory predictability and effective enforcement of laws. In turn, this contributes to an investment-friendly environment and economic growth, employment, and innovation.

The rule of law appears to be correlated with economic prosperity and competitiveness. Jurisdictions that strongly adhere to the rule of law also perform well on competitiveness, as reflected in Transparency International's *Corruption Perception Index* ("CPI") or the World Justice Project's *Rule of Law Index* with the World Bank's *Global Competitiveness Report*. Northern Europe (the Scandinavian countries, for example) achieve particularly high scores throughout.

Any indifference to the rule of law or due process would therefore be incompatible with increasing the prosperity of our European economies and consumer welfare, which is also a key objective of our competition laws.

The EU has reacted very firmly to recent systemic threats to the rule of law in some Member States. In 2014, for example, the EU adopted a "rule of law framework" to address such threats.[3] In this respect, it has engaged in dialogue with Member States, issued detailed recommendations to remedy problems, and threatened with sanctions. Specifically, the EU has recently addressed concerns regarding, *inter alia*, judicial independence in Poland and policies in Hungary on refugees, migrants, and asylum seekers. With the political landscape changing so rapidly in "new" and "old" Member States alike, societal tensions and emerging political groupings may increasingly challenge past governance principles. Arguably, the rule of law, with robust and accountable government institutions, is more important than ever today.

A. The Rule of Law also Plays a Tremendously Important Role in Competition Proceedings.

Recently, *fairness* has become an increasingly important notion of competition enforcement policy in Europe. It has mostly been referenced in the broader sense, maintaining that companies' adherence to competition laws leads to fairer markets, fairer outcomes, and a fairer deal to consumers. However, the EC's leadership has also increasingly drawn attention to procedural fairness. As emphasized by Director General Johannes Laitenberger in a 2017 speech, "fairness is important to maintain confidence in the system…if a competition authority wants to maintain credibility and trustworthiness … it must help ensure fairness and above all guarantee procedural fairness."[4]

2 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, 14.1.2019, p. 3–33.

3 *Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, COM(2014).*

4 *EU competition law in innovation and digital markets: fairness and the consumer welfare perspective*, Johannes Laitenberger, Director-General for Competition, European Commission, October 10, 2017, available at http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.

The EC rightly highlights the crucial role of government in focusing on procedural fairness in competition proceedings. This is fundamental to the trust that citizens and companies put in public institutions. But it is also fundamental to the efficacy of competition enforcement. Integrity, credibility, and trust can lead market participants to more fully embrace competition compliance, better cooperate with authorities, and ultimately bring about better outcomes.

B. Due Process in Competition Law Proceedings is Equally Vital for Both the EC and NCAs in Europe.

Due process in competition law proceedings has long been a sensitive topic in Brussels. This is because, despite its impressive staff, resources, and formidable reputation, the fundamental structure of the EU's competition enforcement system has recurrently been put into question.

Critics argue that this system serves simultaneously as investigator-prosecutor-judge, with no meaningful internal checks and balances, and that politically selected competition commissioners generally lack any prior experience in competition laws or policies. Given this, it is questioned whether decisions formally taken by the entire College of Commissioners (in what the current EC President has called a "more political" Commission)[5] are genuinely independent of other EU policies or even Member State influence. At the same time, antitrust sanctions have increased substantially in the EU. A relatively light-handed approach against, e.g. cartels in the 1960s and 1970s shifted to higher cartel fines imposed in the 1980s. In the 1990s, combined cartel fines stood at just below €1 billion, rising to almost €13 billion in the following decade. The current period reflects a much more prominent level of fines, even if another 13-fold increase appears unlikely.

The EC has constructively responded to the critique of its procedures. Over time, it has injected various procedural improvements to strengthen due process through, for example, the introduction of hearing officers and peer reviews. It will no doubt continue in its efforts to improve and listen to outside stakeholders, *inter alia*, after the procedural deficiencies highlighted by the EU courts in *Intel* and *UPS/TNT*.[6] It has also increasingly had to stand its ground to demonstrate independence in competition proceedings.[7]

The EC acknowledges that rigorous due process must accompany its significant powers and an increasing level of enforcement. It sought to address inadequacies in national competition law enforcement, putting forward the proposed *ECN+ Directive* in early 2017, to strengthen powers. And yet, this Directive finally emerged with scarce details on safeguards with respect to NCA procedures.

III. THE ECN+ DIRECTIVE – STRENGTHENING NCA POWERS, BUT WHAT ABOUT RIGHTS OF DEFENSE?

The *ECN+ Directive* contains a number of important improvements to reinforce Member State competition law regimes. It sets out, for example, that agencies shall possess sufficient resources (including staff and finances) to perform their functions and be independent of political influence. Competition advocacy (i.e. the promotion of competition law compliance) should also be part of their tasks – an important new feature. The Directive also improves how leniency operates (including the availability of "markers"), and provides additional tools for cooperation between Member State authorities. Most competition lawyers could not but agree that these are accurately identified issues, and that addressing them is imperative.

The *ECN+ Directive*'s primary visible focus, however, is on beefing up NCA powers, notably through expanded rights in relation to inspections, requests for information, interviews, decisions, and fines. These are also the principal features that have been communicated by the EC when promoting the Directive.

These enhanced powers raise the issue of the need for more robust due process. As NCAs can now exercise greater powers to investigate or impose sanctions, it is all the more important for companies to know that their rights of defense are equally robust and meaningful. And, as noted above, such safeguards are crucial for the efficacy of enforcement and the credibility of the authority itself.

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5 "*The Commission is political. And I want it to be more political. Indeed, it will be highly political.*" A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission - Opening Statement in the European Parliament Plenary Session, Jean-Claude Juncker, Candidate for President of the European Commission, July 15, 2014.

6 Judgment in Case C-413/14 P, *Intel Corporation Inc. v. Commission*, September 6, 2017; Judgment in Case C-265/17 P, *European Commission v. United Parcel Service, Inc.*, January 16, 2019.

7 "*We will never play politics or play favourites when it comes to ensuring a level playing field.*" Keynote speech by President Juncker at the EU Industry Days 2019, Brussels, February 5, 2019.

The EC's Impact Assessment, which accompanied its proposal for the new *ECN+ Directive*, concluded that a "majority of stakeholders… also consider that other actions should be taken to boost the effectiveness of the NCAs." The Impact Assessment emphasized:

> There is in particular a **consistent demand** from lawyers, business and business organisations that any enhancement of NCAs' enforcement powers is **counterbalanced** by increased procedural guarantees, including ensuring that **rights of defence** can be effectively exercised by having greater transparency of investigations and **effective judicial review** (e.g. companies should receive a **Statement of Objections** and have effective rights of **access to file**). Other issues raised are the request of greater coherency within the ECN in the application of the EU competition rules, the recognition of **Legal Professional Privilege (LPP) for in-house lawyers** and of **compliance programmes as a mitigating factor for fines**, that NCAs should be able to defend their cases in court, a more consistent application of the effect on trade criterion or the abolition of the power of NCAs to apply stricter rules on unilateral conduct.[8] (emphasis added)

However, even if addressed to some extent, the Directive gives little prominence to such rights of defense, particularly in contrast to the dense detail dedicated to new and expanded powers (comprising multiple pages).

IV. PROCEDURAL SAFEGUARDS IN THE FACE OF INCREASED POWERS – A MISSED OPPORTUNITY

Safeguarding the rights of defense appears in only one key provision of the Directive. Article 3 succinctly requires that Member States "shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union" and "shall [possess] appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal."

In the face of such terse and general language, some consolation can be found in more meaningful guidance on safeguards in the Directive, even if these have been demoted to a single introductory Recital (14), which supplements the operative part of the Directive. Recital 14 refers *inter alia* to (i) the necessity of a statements of objections, or a similar document, to be issued prior to a decision finding an infringement; (ii) the opportunity for parties to comment on such objections; (iii) the need for decisions to be reasoned; (iv) access to case files; (v) protection of business secrets; (vi) right to an effective remedy before a tribunal; and (vii) timely proceedings.

During the EU's legislative process, modest improvements were achieved by the European Parliament and Council to afford greater procedural protections and to include these in the operative part of the Directive. As a result, the protection of business secrets was injected into the Directive's provisions. Last-minute attempts were also made in the European Parliament to address important aspects of legal privilege, but unsuccessfully.

The final result is a Directive that unfortunately can be considered as falling short of safeguarding due process at the Member State level. Ideally, the Directive's procedural considerations should have appeared in its operative part and given the same weight – or perhaps even more – as expanded NCA powers.

V. GETTING THE BALANCE RIGHT DEPENDS ON THE MEMBER STATES

Member States now have approximately two years to transpose the Directive. It is important for Member States to ensure the necessary balance between powers and procedural safeguards as they now adopt national laws to confer these new rights (and obligations) on their NCAs.

Member States can do so by placing equal focus on procedural safeguards and NCAs' new and expanded powers. Indeed, national implementing measures should take primary guidance not from Article 3, but from Recital 14, with its supplementary normative nature. This recital sheds greater light on the (minimum) measures that authorities must have in place, whereas Article 3 offers incomplete and more high-level instruction. In practice, implementation will also depend on individual Member States, each with their different legislative traditions and therefore inevitable variances in transposing Directives.

The EC had an opportunity to provide an arguably more balanced Directive. Perhaps it would be misplaced to now, during the implementation phase, count on the EC alone to promote safeguards beyond the Directive's strict scope. It can still consider to engage with Member States

8 Commission Staff Working Document - Impact Assessment, available at http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf.

and emphasize the importance of procedural safeguards, with the use of additional instruments, such as recommendations, communications, or guidelines. While these would not bind Member States, such measures would support the proper implementation of the Directive. Given its leading role in the ECN, and its knowledge of the NCAs' procedures, the EC is well-placed to offer additional guidance to individual Member States, as they embark on these wide-ranging legal reforms.

However, practically-speaking, the constant drive for timely transposition of EU laws will likely push Member States to move quickly. This may result in giving less consideration to areas that the EU has signaled until now as less important. Member States may also be concerned if they establish more stringent procedural safeguards, as these could be (erroneously) viewed as weakening the enforcement of EU competition rules.

With these challenges in mind, it will be important for all stakeholders (governments, corporations, competition lawyers, etc.) to closely follow the implementation of these new rules and to remain engaged in the pursuit of effective enforcement of our European competition rules.

NCAs should be enabled to control the full respect of competition laws, and in turn, to control themselves. This is key to fulfilling the *ECN+ Directive's* objective to achieve more effective competition enforcement. The end goal should be a comprehensive and thoughtful reform, worthy of our European legal traditions, as no doubt the EU also intended it to be.

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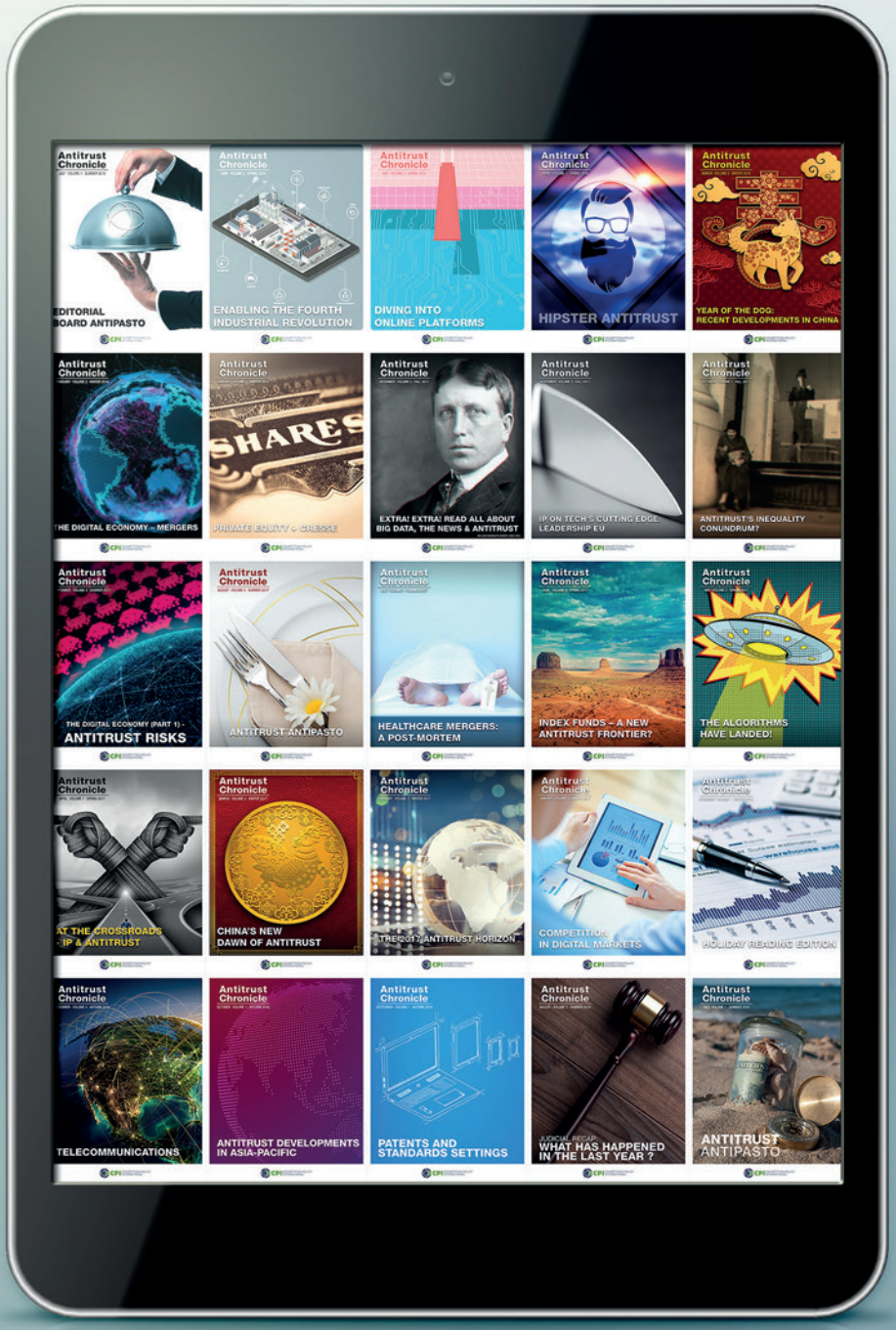


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