



CPI EU News Presents:

Highlights from the OECD Forum on Competition, Day One

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January 2021

As governments around the world contemplate calls for fundamental reforms to competition policy, the OECD Global Forum on Competition convened virtually to exchange views and ideas on December 7, 2020. The four-day event began with a keynote address and panel titled “Competition Policy: Time for a Reset?” moderated by OECD Competition Committee Chairman Frédéric Jenny.

Discussion revolved around whether public interest goals should be added to prevailing competition standards and how best to address the unique issues presented by digital platforms, among other topics.

Problems with “Public Interest” Goals in Competition Law

Much of the panel discussion focused on whether the consumer welfare standard (“CWS”) should be replaced with a standard looking beyond effects on competition to reflect other public interest goals such as employment. With one exception, the panelists generally expressed skepticism and/or concern towards the idea of incorporating public interest goals into competition policy.

Keynote speaker Margrethe Vestager, executive vice president of the European Commission’s “A Europe Fit for the Digital Age” task force, was first to address the question of whether it is “time for a reset” in competition policy. “The answer very much depends on what you mean by a ‘reset,’” she said. “If we are asking if it’s time to change the aims of competition policy,” as advocates for a public interest standard have argued, “the answer has to be no,” she said. “Quite the contrary, it’s more important than ever that we take effective action to keep competition working the way it should.”

This view was echoed by U.S. Federal Trade Commissioner Christine Wilson, who said that she “remain[s] confident that competition is the best way to achieve the best results for consumers, and that antitrust law informed by economic analysis is the best way to achieve the most good for the greatest number.”

Panelists generally agreed that many public interest goals are better served through other policy tools. People often “lose sight of the fact that [competition law] is one tool in a broader toolkit that really does include a variety of levers that we can use to address larger public policy problems,” said Diana Moss, president of the American Antitrust Institute.

South Africa’s Approach - Chairman Jenny observed that the presence of public interest goals in some countries’ laws may reflect differences in the value placed on competition. On one hand, there are jurisdictions such as the United States and European Union, “where there is enough support for competition as a value to society.” On the other, there are certain developing countries, often with higher unemployment, “where it is not so evident to people that competition is a good thing, and where the only way to actually promote competition is, in fact, to have some public interest goal in the law.”

Panelist Thando Vilakazi offered views from South Africa, a country falling into the latter category that has long integrated public interest considerations into its

competition law.² In that region, the question is not whether such goals should be included but whether they should be broader and whether they are performing as intended, said Vilakazi, the executive director of the Centre for Competition, Regulation, and Economic Development at the University of Johannesburg. In South Africa, current law provides for consideration of a merger's effects on "(a) a particular sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (d) the ability of national industries to compete in international markets."³

While South Africa has published guidelines describing the process for consideration of these goals, they do not indicate the weight to be given to each factor or how conflicts between the various policy goals will be resolved.⁴

Transparency & Accountability - Incorporation of public interest goals, as done in South Africa, "puts a premium on the clarity with which policymakers are willing to describe what they've done and not hide tradeoffs they're making," said Bill Kovacic, professor at George Washington University. This is "a degree of transparency that is hard to achieve in practice" because "the tradeoffs are so hard that there is an enormous temptation to mask them." Under such standards, regulators "owe it to the public" to do as they would on a math exam and "show their work."

The addition of public interest goals posed similar concerns for Damien Neven, an Economics Professor at the Graduate Institute of International and Development Studies in Geneva and Senior Academic Advisor for Compass Lexecon. "If you have multiple objectives," he explained, "at the end of the day it is difficult to reach a decision for which the agencies can be accountable," and there is greater risk and scope of regulatory "capture."

Because antitrust enforcement "is law enforcement," it is "an evidence-based investigatory process and subject to judicial review," explained Moss. As such, "concepts of standards and administrability do play in a very important way." There is also a "danger" of replicating public interest standards already in place for regulated industries at other agencies, Moss said. Speaking from her experience as an industrial policy regulator at the Federal Energy Regulatory Commission, Moss said she and her colleagues there "struggled with [the] public interest standard at FERC."

Advantages of the CWS - Panelists identified a range of advantages to the prevailing CWS. "Precisely because it is tethered to economic principles," Commissioner Wilson explained, the CWS "provides predictability to market actors, administrability to the courts, and credibility to the decisions made by competition enforcers." These elements are necessary for competition law to have legitimacy and buy-in from stakeholders and citizens, she said. By contrast, a public interest approach would require enforcers to engage in an "unavoidably political calculus on who to serve" and "greatly increase subjectivity and uncertainty," she said.

As a standard for protecting competition, Moss observed that the CWS "is far more competent in addressing issues than it has been given credit for," noting that it "rightly focuses on the impact of anticompetitive mergers or conduct on market participants adversely affected by exercises of market power." This focus on the participants

affected, she said, enables the CWS to address (1) harm at any level in a supply chain, (2) both short-term static and longer-term dynamic effects, and (3) effects on non-price dimensions” such as quality and new products, she said. It also inherently accounts for the ability of consumers to discipline exercises of market power through consideration of barriers to entry/expansion and other competitive constraints, she said.

Dealing with Digital Platforms

The panel discussed several proposals under consideration in the U.S. and Europe that aim to address digital markets in particular.

Europe - The European Union is considering an approach that would designate specific digital platforms for additional regulation.⁵ These firms would be subject to a list of prohibited conduct (e.g. self-preferencing) and set of obligations to guarantee market contestability, which could include such requirements as data sharing, interoperability, and access to key inputs.

There is a risk with this proposal “of basically only allowing innovation by small firms and basically preventing large firms from innovating,” Neven said. The proposal would create “very strong presumptions about what large platforms can do and other platforms cannot do.” These presumptions should be informed by “stable economic theory, enforcement experience, and empirical evidence” that are not yet fully available.

Commissioner Wilson expressed skepticism about the economics underlying the potential obligations. “Economics teaches us that if you force companies to share certain assets with competitors, innovation and investment in those assets will decline.” This means that some proposals “may sound ‘fairer’ in how they would divide the pie, but they actually result in a smaller pie for policy makers to divide.”

United States - The U.S. panelists took a range of views on the idea of digital-specific antitrust legislation, which has been suggested in a recent report by select members of Congress. Moss suggested that further thought must be given “to the advent of the ecosystem business model,” which is “very unique” and gives rise to concerns about leveraging consumer data across platforms and about data and analytics “as assets.”

Commissioner Wilson disagreed, stating that antitrust laws in the United States “are broad enough to take into account the digital sector as it exists and will exist in the future,” and authorities have been grappling with these issues since the D.C. Circuit’s *Microsoft* case from the 1990s. Kovacic echoed that U.S. officials “have been so attuned to high tech innovation” for many years. “The notion that they were blind to these considerations is such a myth.”

Conclusion

Returning to the overarching question posed to the panel - whether it is “time for a reset” in competition policy - the answer was largely in the negative. While speakers differed in their views on how competition policy could be improved, there was significant skepticism about overhauling its goals or approach.

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² For example, South Africa’s Competition Tribunal imposed conditions on a 2011 merger between Walmart and Massmart despite a lack of competitive overlap due to public interest concerns related to employment. See generally Mark Griffiths & Wiri Gumbie, *The Public Interest Test in the South African Merger Control Regime*, 3 J. ANTITRUST ENFORC. 408, 409-11 (Oct. 2015), <https://doi.org/10.1093/jaenfo/jnv001>.

³ Guidelines on the Assessment of Public Interest Provisions in Merger Regulation Under the Competition Act No. 89 of 1998 (May 31, 2016), <http://www.compcom.co.za/wp-content/uploads/2017/11/Gov-Gazette-Public-Interest-Guidelines.pdf>.

⁴ *Id.*

⁵ See generally Kati Suominen, *On the Rise: Europe’s Competition Policy Challenges to Technology Companies*, CENTER FOR STRATEGIC & INT’L STUDIES, Oct. 26, 2020, <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies>.