

THE COMPETITION LAWYER

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Telos: What is the role of competition enforcement and policy in the economy?

Mark Luddy: Much of the 20th century was consumed with the struggle between the market economies of the west and the centrally-planned economies of the Soviet Union, China, and their respective satellites. In centrally-planned economies, resources are allocated through a government planning process that determines which products are produced, their price, and the method of distribution and consumption. In a market economy, society's resources are allocated through the price mechanism and by the efforts and decisions of economically and politically free market participants to produce what consumers want. Many countries now employ a mix of market-oriented and regulatory policies. But it's fair to say that with the fall of the Soviet Union in 1990 and the two-decades long shift in China away from a centrally-planned economy to a mixed planned and market economy, the world's resources and products are today predominantly allocated through market mechanisms. A vibrant, competitive market process increases the quality and variety of goods and services and reduces the costs of producing and distributing those products. But market mechanisms are not immune from interference by private and public entities that reduces consumer welfare and choice. Competition policy is designed to deter and address artificial constraints on markets like cartels, mergers that reduce competition, certain state aid, and enduring monopolies that suppress competition through unduly exclusionary or predatory conduct. Competition policy is not regulation in the classic sense – it does not regulate prices or determine who can enter a market, or who the winners or losers are (except when it's misapplied).

In short, competition law plays a critical role in bringing the benefits of market-oriented systems to the greatest number of people. Consider, for example, the consumer benefits from the fierce price and innovation competition in the automobile industry over the past decades, and the well-paying jobs created by that industry.

One way to appreciate and measure the current role and increasingly global scope of competition policy and enforcement is simply to count the number of competition enforcement regimes around the world. In 1971, when I began my career as a competition lawyer at the US Justice Department, there were only 4 enforcement regimes, i.e., the US, a nascent European Commission, Germany, and Japan. And the German and Japanese systems were in substantial part the product of post-war US involvement. Today, there are over 100 countries with cartel enforcement and merger control regimes, many of which also deal with state aid and other competition-related issues. Some of the newer agencies are less sophisticated, lack the resources to perform rigorous economic analysis, and often make mistakes. But they are learning from the more established agencies and are largely well-meaning. Perhaps most importantly, in a very broad sense there is global convergence on basic competition policy, e.g., cartels hurt consumers, some business combinations reduce competition, and preventing consumer harm should be the ultimate policy goal.

US vs EU competition enforcement and policy. What are, in your view, the biggest differences between US and EU as far as antitrust laws are concerned?

The two enforcement regimes largely agree on what should be unlawful: cartels, mergers that lessen competition, unduly exclusionary conduct by dominant firms, *etc.* Each also has dedicated and hardworking employees who in good faith pursue their mission to protect consumers and to keep markets open. Nonetheless, there are several significant differences between the two agencies.

First, in respect of state aid, in my view the European Commission has a more enlightened and effective policy than the US. No system is perfect, but the state aid principles and their enforcement in Europe serve to deter governments from using tax dollars to unfairly advantage home-based companies that compete with non-subsidized competitors across Europe and the world. These subsidies distort markets. There are numerous ways for governments to favor their home companies, and many do just that. But in my view, the European system deters these subsidies more effectively than the federal and state governments in the US, which have no comparable law. In short, the US has a lot to learn from the European state-aid system.

Second, the Commission is an administrative agency, which means in practical terms that it is both the investigator and decision-maker, i.e., the European Commission's Competition Directorate can on its own block an M&A transaction, declare an illegal cartel and impose a fine, and investigate and prosecute an allegedly dominant firm. Unlike in the US, in Europe there is no need to go to court to prove a case. This gives the Commission enormous discretion, in particular but not at all limited to mergers and acquisitions (as a practical matter, judicial review of European Commission merger decisions is unavailable in the overwhelming majority of cases because transactions can't wait the three or more years for the appellate process to conclude). Given its discretion and its administrative structure, which in effect gives the Commission a veto over transactions, some of the

Commission's decisions in my view are not as rigorous, disciplined, or as tightly reasoned as they should be. Also, in the nature of things, any unbridled administrative structure in any area of the law is more likely to allow extra-legal factors such as popular opinion, personal bias, and other non-competition-based factors to affect its decisions.

In the US, in any case challenging a transaction, a cartel, or a monopoly position, the antitrust agencies (Department of Justice, Federal Trade Commission) must be prepared to go to court and prove a violation of antitrust law before a federal judge. Defendants can confront witnesses and challenge the government's version of the facts, its theories, and its experts. The prospect of having to carry this "burden of proof" at a trial if the parties opt to challenge a government decision forces the US enforcement agencies to be extremely careful with the facts and rigorous in their economic analysis. It also dilutes the influence of self-interested third parties over the outcome of a case unless those parties are willing to go to court and be subject to cross-examination.

The US system is far from perfect, and some judges are ill-prepared, but before the agencies bring a case to court (without knowing who the judge will be) they must anticipate that their theories and factual conclusions will be rigorously contested in a public forum before an objective judicial body. That prospect helps to deter overzealousness, bias, and extra-legal factors from finding their way into the agency's review process.

Third, speaking more broadly, in my view competition enforcement in the US and the EU differs because traditionally the Commission, sometimes but not always with justification, has exhibited less confidence in market forces than the US courts and agencies. Given the discretion that the Commission has to decide cases (see above), it is more likely to intervene, at least in close cases, in the good-faith hope of improving the market's competitive dynamics. This can be beneficial, for example, if the intervention is targeted at specific exclusionary conduct by a dominant firm. But it can be harmful if the remedy is not carefully crafted and limited to well-defined anticompetitive conduct.

Looking back on enforcement in the US over the last 60 years or so, the challenged monopolies of Alcoa, IBM, Kodak, Microsoft, and others were all dissipated largely by market forces, whether by rivals or by new technologies, and not in my view by government intervention. For a time, one or more of these firms may have exercised monopoly power (which some would say was their due reward for innovation or efficiency), but over time each was successfully humbled by market forces. Many economists believe that the market process of "creative destruction" should be left to work itself out, and that most of the time, the costs and risks of government intervention aren't justified.

On the other hand, even relatively *laissez-faire* economists and lawyers would agree that the government should intervene in cartels, mergers to monopoly, and cases where a dominant firm engages in unambiguously exclusionary conduct with no business justification. They would insist, however, that great care be exercised to avoid doing more harm than good to innovation incentives and to the market as a whole.

Do politics have a role in the US or EU competition agencies' decisions? If so, to what extent?

In the US, in my experience, political intervention in competition enforcement (if defined as a person seeking to influence the decision of an agency for political gain) is rare. The Watergate scandal of the 1970s, which included a Nixon White House attempt to force DOJ to drop a Supreme Court case, produced legislation discouraging such efforts and more importantly put fear in the minds of politicians tempted to try to alter the course of an antitrust enforcement decision. That legacy endures. On the other hand, recently some in the US apparently believe that the Department of Justice's challenge to AT&T's acquisition of Time Warner may have been politically motivated because of President Trump's declared animosity to CNN, which is owned by Time Warner, during the 2016 campaign.

In the European Commission, in large part because of the nature of its administrative structure and of the enormous discretion it provides, the process may be somewhat more susceptible to popular opinion and often to intense lobbying by self-interested and opportunistic third parties than the law enforcement system in the US. This is unfortunate, in my view, because competition cases should be decided solely on the legal and economic merits and not on the basis of third party biases, popular opinion, or political agendas. Having said that, in my experience, in the vast majority of cases in Europe effective political intervention is the exception rather than the rule.

On the other hand, if one defines "politics" to include the results of elections, then most definitely there is a difference between the US and Europe. In the US, presidential elections typically have a significant impact on enforcement policy at both the DOJ and the FTC because the President appoints the people who run these agencies. President Obama's enforcement agencies were viewed as much more aggressive than those of President George W. Bush, and while President Trump's appointments suggest a more conservative approach, it's still too early to tell whether that will be the case. This important political dynamic is largely absent in the EU. In the US, the "give and take" and turnover of competing philosophies of antitrust enforcement is healthy and provides a basis for a continuing and lively intellectual debate about enforcement policy and practice. The decades-long contest between the so-called Harvard (more interventionist) and Chicago (less interventionist) schools of antitrust generated much intellectual rigor that has improved policy and enforcement both in the US and around the world. This dialectic is largely absent in Europe.

You have led a law firm with a global presence for six years. This allows you to have your finger on the pulse of what is going on all around the world. Where do you think the most exciting changes (in general, in business, in law) are taking place?

Yes, Cleary Gottlieb has 16 offices, 14 of which are outside the US and include Abu Dhabi, Beijing, Buenos Aires, London, Moscow, Italy (2), etc. We represent sovereign governments, large and small companies and individuals. Our Firm's goal is to be involved in the most complex and difficult national and cross-border matters, and we are fortunate to have had some significant success.

Over the last few decades or so a notable development has been the increasing number and complexity of transactions and disputes that cross national boundaries and involve multiple legal regimes and standards of practice. These matters are a huge challenge for lawyers as clients seek the best available advice on difficult legal and business issues that typically have no easy answers. One has to be adept at risk assessment and to learn to live with and provide for uncertainty and for foreseeable and

unforeseeable contingencies.

A related development, and in a way for me the most striking, is to observe around the world in developed and developing countries the power of political and economic freedom to advance the welfare of all levels of society, from micro-financing to young technologists and entrepreneurs on every continent. Giving individuals the education, opportunity, and incentive to create products and services that consumers want benefits everyone and is an engine for growth and for an increase in social welfare. Just look at what China has done in two short decades of opening (to a degree) its formerly wholly centrally-planned economy.

On the negative side, growing income equality is a profound challenge to free markets and democratic societies, as is the ongoing degradation of the environment from a lack of attention to the negative consequences of unrestrained growth. My main concern looking forward is at the same time my main hope, which is that enlightened centrist leadership in the political and business communities can come to broad agreement on sensible competition and environmental policies that foster free markets but at the same time reduce income inequality and protect the environment. It is hard to be optimistic given the severe divisions that currently predominate global and national politics, but it has to be done or we'll all soon be much worse off than we are today.

Marco Sonsini

Editorial

2001 GE–Honeywell merger approved in the US

2001 Rejected by the European Commission

2011 NYSE–Deutsche Börse merger approved in the US

2012 Rejected by the European Commission

2016 Merger of AT&T–Time Warner approved by the European Commission

2017 US Department of Justice blocks merger

On 12 June 2018 federal judge Richard Leon approved the AT&T–Time Warner merger after a nail-biting trial, lasting weeks. ‘We are disappointed in the court’s decision today. We will closely review the court’s opinion and consider next steps,’ said Makan Delrahim, US Assistant Attorney General of the DOJ’s Antitrust Division: by far the most powerful antitrust agency in a system such as that of the US, where antitrust law is mainly applied through the courts. The other person who will be disappointed is President Donald Trump, who, when he was just a candidate for the White House, pointed out that the potential merger between AT&T and Time Warner was a perilous example of the concentration of power *‘in the hands of the few’*. There are just some significant examples of proposed mergers that were examined and assessed differently in the US and the EU. As Assistant US Attorney General Charles A. James once said when he was head of the antitrust division of the DOJ, the European Commission’s decision regarding the GE–Honeywell merger ‘reflects a significant point of diversion’ with the US regulator. But was this just a diversion in viewpoints on the transaction or does it reflect more substantial differences in how antitrust law, as well as competition policies, are applied and interpreted in the US and the EU? PRIMOPIANOSCALA^c posed this and other questions to Mark Leddy, lawyer and one of the foremost global experts on antitrust and competition law, a reputation he built up over 14 years at the US Department of Justice, where in 1984 he was appointed Deputy Assistant Attorney General: the highest career position in the US antitrust division. He also worked as a competition lawyer in Brussels in the 90s. From 2011 to the end of 2017 Leddy led Cleary Gottlieb Steen & Hamilton, a US law firm present throughout Europe and the rest of the world for 70 years. Today, Leddy is the head of the firm’s antitrust department. Before we begin, there’s one thing that must be made clear: when a company announces a merger or acquisition, this is just the first step in a long process that might never reach a conclusion. Here’s some data that’s hot off the presses: in Europe from 1 January to 31 March 2018 M&A transactions were announced equalling 454.7 million dollars (an increase of 152% compared to 180.5 million in the same period of 2017). However, in the US this figure amounted to 443.7 million (a 59% increase compared to 279.1 million in the first quarter of 2017). Yet if you look at the M&A transactions that were announced and have actually already been completed, the transactions closed in the US, equalling 258.5 million, far surpass those of Europe at only 117.8 million. What does all this mean? That the transactions completed were pored over by the antitrust regulators that gave them the green light. This green light is crucial to the companies involved. M&A announcements are not issued on the basis of a mere handshake; they are the result of months of toil by the companies, which, just to prepare these transactions, invest time, resources and money. Besides what is required for the financial transaction. So understanding the antitrust policies, not *just* the antitrust law, of the different jurisdictions is extremely important for these companies. Leddy, in an articulate, in-depth interview, provides us with a series of fundamental elements, including cultural ones, to help us figure it all out. According to Leddy, the impact of the application of antitrust law on the economy is crucial; and if regulators have different ideas about what is meant by competition, well, then we’re in trouble. For instance, and here Leddy answers a question that we posed right from the outset, the US and the EU clearly agree on what is considered illegal *‘cartels, mergers that lessen competition, dominant positions, etc.’*. Yet in other sectors, there are significant differences. Here, I’d just like to mention one of them: according to Leddy, the EU has made far greater progress in preventing and deterring state aid: *‘the US has a lot to learn from the European state-aid system’*. Though maybe less in other areas. Then we talk about politics and competition, providing very sophisticated arguments regarding what is meant by ‘politics’ and how and to what extent politics affects these two parts of the world depending on how they define it. We conclude by going off topic to talk about how Leddy, from his privileged viewpoint, sees the future, with all its lights and shadows and the hope that *‘the political and business communities can come to broad agreement on sensible competition and environmental policies that foster free markets but at the same time reduce income inequality and protect the environment’*.

One last comment: since the time of Mario Monti, former European Commissioner for Competition, Europe has given the impression that the principle underlying many rejected mergers has been that the resulting conglomerate would be ‘too big to be controlled’. However, in the US that’s not how things are. On many occasions, Delrahim has publically argued that *‘for US*

law big is not synonymous with mean; bad; we have to take action when big companies behave badly. It isn't a bad thing if companies try to obtain the largest market share, as long as they do this by offering better products, not by illegal means'. Are these differences irreconcilable?

Mariella Palazzolo



Mark Leddy is co-chair of Cleary Gottlieb's global antitrust/competition practice. His practice focuses on U.S. and European competition law, and includes appearances before competition regulatory agencies and before U.S. federal courts in civil and criminal litigation.

Mark joined the firm as a partner in 1986 and was its Managing Partner from 2011 to 2017. From 1991 to 1994, he was resident in the Brussels office.

Prior to joining the firm, Mark was with the US Department of Justice for 14 years. He joined the Antitrust Division in New York in 1972, became Chief of the Division's Special Litigation Section in Washington, D.C. in 1978, and was named Deputy Assistant Attorney General, the highest career position in the Antitrust Division, in 1984. He also has been an adjunct professor at Georgetown Law School.

Mark enjoys biographies (currently Khlevniuk's "Stalin") and fiction (favorites include W.G. Sebald, Elena Ferrante, J.M. Coetzee, and Elizabeth Strout). He also enjoys cycling, running, and swimming.

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