



European  
University  
Institute



ROBERT  
SCHUMAN  
CENTRE FOR  
ADVANCED  
STUDIES

Issue 2016/04  
November 2016

# *Emerging Trends in US Antitrust and EU Competition Law ENTrANCE Annual Conference*

*Maria Luisa Stasi & Silvia Solidoro  
European University Institute  
San Domenico di Fiesole, Florence*

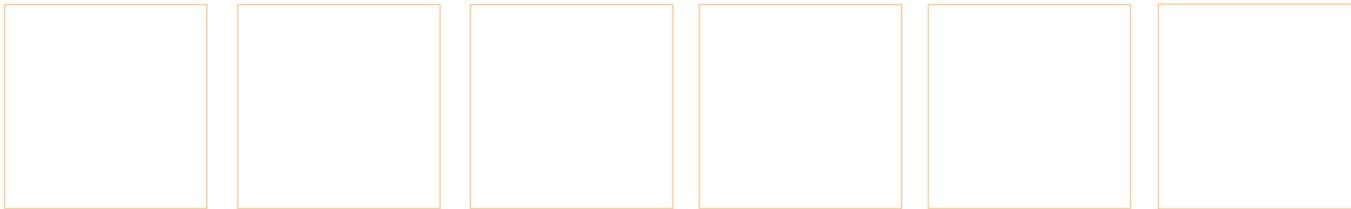
## **Abstract**

The first ENTrANCE Annual Conference was held on 14-15 October 2016, with the aim of discussing the most recent developments, both in the US and in the EU, while estimating the degree of convergence between the two main antitrust jurisdictions.

The event was divided into four panels, which dealt, respectively, with (i) recent developments in relation to the assessment of horizontal and vertical agreements in online markets; (ii) merger trends in innovation markets on the two sides of the Atlantic; (iii) antitrust enforcement in innovation industries: Google and the SEP cases, on both sides of the Atlantic; (iv) private enforcement in the EU and the US in the aftermath of the EU Damages Directive.

The Annual Conference gathered different stakeholders together, including representatives from National Competition Authorities (NCAs), international organisations, academia, industry, and law and consulting firms. The diversity of views ensured a lively debate. While participants agreed on various issues, the discussion revealed the need for further research on those issues that have not yet been sufficiently explored. This policy brief summarises the main points raised during the discussion, and it seeks to stimulate further debate.

POLICY  
BRIEF



## Recent developments in relation to the assessment of horizontal and vertical agreements in online markets

The first session of the event dealt with the assessment of horizontal and vertical agreements in online markets. Within this framework, the payment card market represents one of the most prominent and interesting examples. Participants thus shed light on the fact that the payment card market's network rules and pricing mechanisms have been subject to several Commission's investigations. In 2002, the European Commission granted an exemption for VISA's multilateral intra-European cross border interchange fees ('MIFs'), after the Bank card association made major changes to its own system. In particular, Visa reduced the level of its MIFs; it also capped them at the level of relevant costs, significantly improving the situation for retailers and, ultimately, for the consumer. Furthermore, in 2007, the Commission adopted a decision prohibiting MasterCard's MIFs for cross-border card payments between Member States of the EEA.<sup>1</sup> Within this framework, EU Regulation 2015/751<sup>2</sup> was adopted with a view to further encouraging competition and the integration of the European market for payment cards, in particular, through the avoidance of unreasonably high interchange fees and the imposition of transparency obligations on banks and retailers.

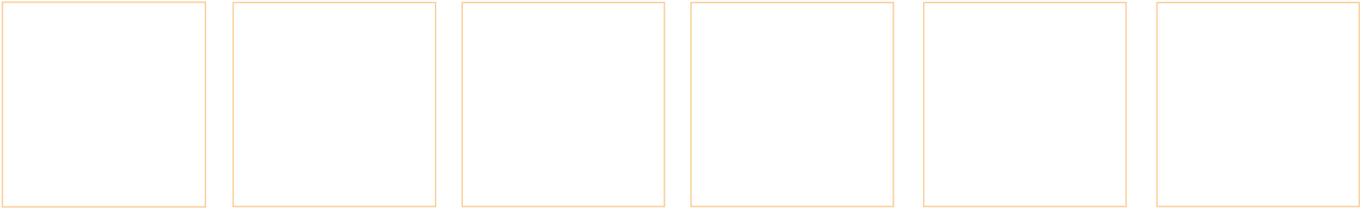
Participants also noted that preventing geo-blocking practices and other forms of discrimination against consumers, on the grounds of their place of residence or nationality, is at the heart of the actions that the European Commission is currently undertaking

to protect cross-border sales in the Digital Single Market ('DSM'). The draft Geo-blocking Regulation aims to ensure that consumers seeking to buy products and services in another EU country (be it online or in person) are not treated differently, unless this is objectively justified for reasons such as VAT or certain public interest legal provisions. Similarly, with reference to trade in services, Article 20(2) of the Services Directive 2006/123/EC requires Member States to ensure that companies do not apply higher prices or deny access to trade recipients, and especially consumers, in the DSM.

Reflecting upon the interplay between competition and regulation, the discussion confirmed that EU competition law is also perfectly able to deal with certain restrictions in an effective way. The *Pierre Fabre* case, which recognises the freedom of retailers to have an on-line presence, represents a landmark ruling in the context of e-commerce in the EU.<sup>3</sup> In this judgement, the French Competition Authority deemed that selective distribution contracts, stipulating that sales must be made exclusively in a physical space, are contrary to both French and EU competition law. The decision was challenged before the Court of Appeal of Paris and was referred to the Court of Justice of the European Union ('CJEU'), which finally held that the exclusion of the Internet as a distribution channel influences the competitive position of the purchaser and, simultaneously, affects consumers, by restricting their choice of the products available to purchase online. A general and absolute ban on internet sales contained in a selective distribution agreement therefore constitutes a restriction of competition by 'object', within the meaning of Article 101(1) TFEU.<sup>4</sup>

1. Decision C (2007) 6474 final was adopted by the Commission on 19 December 2007. It was found that from 22 May, 1992, to 19 December 2007, MasterCard's intra-EEA MIFs infringed Article 81(1) TEC, (now 101(1) TFEU).
2. Regulation (EU) 2015/751 of the European Parliament and of the Council of 29th April, 2015, on interchange fees for card-based payment transactions.

3. ECJ, Case C-439/09 of 13 October 2011, *Pierre Fabre Dermo-Cosmétique vs. President of the Autorité de la Concurrence*.
4. Furthermore, the Court held that the selective distribution agreements containing such a ban could not benefit from the provisions of the Vertical Restraints Block Exemption Regulation (Council Regulation (EC) No. 1/2003



Participants then focused on the analysis of some of the trends that have emerged following this decision, clarifying that the most typical vertical restraints in the Internet retail market have so far included: (i) cross-platforms parity agreements (APPAs), i.e., a special form of a most-favoured customer clause; (ii) price-related restrictions (e.g., dual pricing systems); and (iii) non-price related restrictions (e.g., platform bans). Participants stated that the analysis of the impact of vertical restraints on the realisation of the potential benefits that are associated with online markets is key.

Furthermore, moving from the assumption that the newest developments in the economy are caused by the expansion of the Internet have changed the type of concerns that may arise in the market, participants agreed that NCAs are called upon to fine-tune their approach in order to be effective enforcers of EU competition law. On the other hand, the need to ensure that both businesses and consumers can rely on a *consistent* application of competition rules made participants emphasise the importance of the role played by the ECN in this context. This does not necessarily entail aligning all of the NCAs' actions; what really matters is the presence of a forum where enforcement projects can be discussed, and in which a constant flow of dialogue can be guaranteed for consistency purposes.

Another strand of the debate dealt with the diversity and fast-changing nature of platform ecosystems in the digital economy. First, it was pointed out that online platforms have revolutionised the access to, and provision of, both information and services, and that the vast majority of them originate from the US. Although it is difficult to agree on a single definition<sup>5</sup>, there are certainly common features

that they share, such as the ability to extract and create digital value from users' transactions and interactions; the capacity to create and shape new markets, while disrupting the traditional ones; and the strong relationship between the increase in the value of the services they offer with the number of their users.<sup>6</sup> Second, it was pondered whether an online platform can act as a facilitator of collusion, in light of the most relevant case law. An important decision rendered by the CJEU has recently clarified the boundaries of the notion of concerted practice when it comes to technology markets.<sup>7</sup> For instance, in the *Eturas* case, the participation of an undertaking in an arrangement could not be inferred from the mere dispatching of an anticompetitive message, as this is not sufficient to trigger the presumption of awareness. The main lesson learned from the case is that competitors sharing some IT functions with each other, as normally happens when relying on a common platform, should closely monitor the operations carried out and consider the appropriate reaction to be undertaken in order to avoid antitrust liabilities. Similarly, US case law seems to suggest that the creators of online platforms may be forced to take antitrust legal implications into consideration in the future, if they want to rely on a robust business model that is capable of withstanding

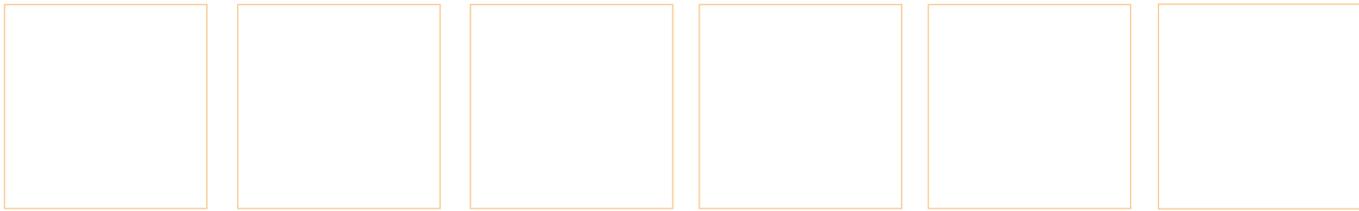
according to which platforms are “*undertakings that, in the role of an intermediary, enable direct interaction between two or more sides of users, between which there are indirect network effects*”.

6. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe*, COM(2016) 288 final, Brussels, 25.5.2016.

7. The *Eturas* case originates in a decision of the Lithuanian Competition Council, which fined an online travel booking system for coordinating the discounts applicable to clients among 30 travel agencies in the country. The decision was appealed to the Supreme Administrative Court and was referred to the ECJ. See C-74/14 *UAB Eturas and Others v Lietuvos Respublikos konkurencijos taryba*.

of 16 December 2002, on the implementation of the rules on competition that are laid down in Articles 81 and 82 of the Treaty).

5. As an example, see the definition proposed by the German Bundeskartellamt Paper on the Digital Economy (2015),



the competition watchdogs' scrutiny. In *v. Meyer Kalanick*, Uber drivers allegedly agreed to participate in a conspiracy among themselves, giving rise to a horizontal price-fixing arrangement, by accepting the terms and conditions of the technology company. Although the case is still pending, it is likely to have a huge impact that will not be limited to the US only. If the application commonly used on smartphone devices is found to contravene antitrust law, it might undergo a strict process of revision involving the main features of its fare algorithm.

### **Merger trends in innovation markets on both sides of the Atlantic**

The debate was enriched by an overview of the latest developments that had been recorded in the field of merger control, at the EU level. It was argued that the international dimension is becoming increasingly important in the matter of merger control. In fact, between 2014 and 2015, the European Commission had to cooperate with the US authorities in more than 70% of its merger cases.<sup>8</sup> There was consensus among participants that only 10 years ago this would not ever have been predicted. The trend certainly reflects the increasing convergence of the two antitrust models towards a new global framework that requires coordinated enforcement actions. With a view to refining the current merger control system, the 2014 White Paper has identified potential areas of reform and has proposed a set of options to foster simplification, so that those transactions that are unlikely to harm competition can go through even more quickly and simply than they currently do. In the digital era, it also seems important to investigate whether the current thresholds, which are based on turnover, are still perfectly able to capture all the cases that would need to be examined. In 2014, for instance, Facebook paid 19 billion dollars to buy

WhatsApp, a company with 600 million customers. A substantial proportion of those users were in Europe. Yet the merger did not have to be notified to the Commission, because WhatsApp's turnover was not high enough to meet the European thresholds. All these aspects require careful thought and they have already encouraged an interesting debate in Europe among NCAs.

Next, it was submitted that the Commission has intensified the scrutiny of the potential loss of innovation in its merger reviews. In this respect, the EU and US authorities have already emphasised the contribution of merger control enforcement to the promotion of innovation. At the same time, the challenges associated with the rapid growth of intellectual property-intensive industries is certainly stimulating a debate that questions the effectiveness of the most traditional tools of antitrust analysis everywhere. If, generally speaking, innovation may suffer from a strict application of merger control rules, it was also recognised that when it comes to disruptive innovation, the NCAs' role become even more delicate. In this case, authorities are called upon to determine whether the acquired firm is a potential disruptor; and whether the transaction has the potential to slow down innovation. In both jurisdictions, the respective Guidelines invite NCAs to be particularly cautious in authorising the acquisition of a "maverick" firm.<sup>9</sup>

Participants then debated whether innovation could be deemed to be a relevant parameter of competition, alongside price, output or quality. In the case of the merger control policy, this would entail that reduction or elimination of competitive pressure should be presumed to harm innovation. It was stated that there seems to be a consensus on this point, both in the EU and in the US.

On the other hand, post-Schumpeterian theories that assume that innovation increases with the firm's

8. Notably, the percentage of cases recording institutional cooperation with other jurisdictions is much lower: e.g., Brazil as for Latin America (12%), and China (8%).

9. See US 2010 Horizontal Merger Guidelines and EU 2004 Horizontal Merger Guidelines.



size and market concentration, make this point highly controversial.<sup>10</sup> However, the mixed results drawn from more recent empirical studies suggest that there are some methodological problems that are associated with the use of proxy variables for innovation that reduce the significance of any hypothesis of this type.<sup>11</sup>

Participants agreed on the fact that competition law not only applies to existing product markets, but also to rivalry in the development of new products. Mergers justifying intervention would thus be those between an existing competitor and a firm developing a new product, and *a fortiori*, those between the two only firms developing a new product. This is particularly relevant for sectors where the poles of R&D can be easily identified.

Nevertheless, the peculiar competition dynamics of each industry suggest that building a general conceptual framework is not an easy task.<sup>12</sup> In 2004, the US Federal Trade Commission gave a green light on Genzyme's acquisition of Novazyme, the only two pharmaceutical companies working on finding a preclinical treatment for a rare life-threatening

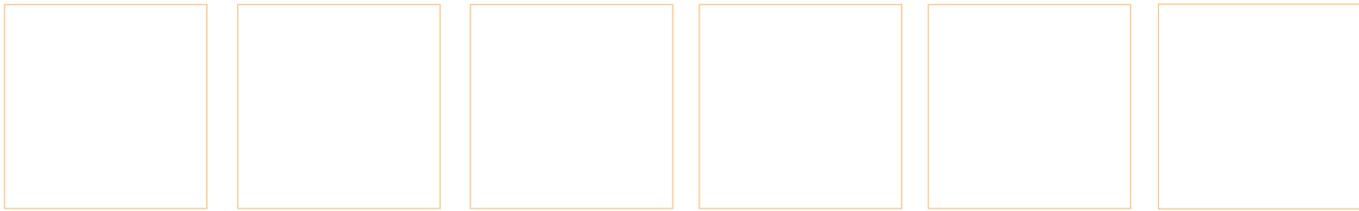
medical condition that affects infants and young children. The FTC's investigation focused on the transaction's potential impact on the pace and scope of research into the development of the new treatment, concluding that "*there is no reason to believe, a priori, that a particular merger is more likely to harm innovation than to help it*".<sup>13</sup> It was finally submitted that the application of competition law to such instances seems less controversial than in the past, given some recent pharmaceuticals and medical devices cases that witness that the same approach to innovation markets has been undertaken in both the EU and the US.<sup>14</sup>

Participants thus highlighted the fact that different concerns are associated with vertical and conglomerate mergers, an area where there is probably greater divergence between the two sides of the Atlantic. In fact, in these cases, the European Commission took into careful consideration the risk that merged entities could reduce the ability of other competitors to innovate. In the Intel and McAfee merger, whereas the FTC did not raise any concern about the transaction, the European Commission enforced a behavioural remedy to prevent Intel from foreclosing the market to other potential innovative companies offering anti-virus software.<sup>15</sup>

It was concluded that merger analysis from an innovation market perspective should aim to identify three key effects: (i) investigating if the merger has the ability to reduce total market investments in R&D; (ii) assessing if the merged firms have the incentive to reduce the innovative effort; (iii) determining if the merger may have an impact on efficiency and R&D expenditures.

10. In particular, in the US, some commentators have advanced the idea that a reduction in competitive pressure cannot be presumed to harm innovation. See Pablo Ibáñez Colomo, *Restrictions on Innovation in EU Competition Law*, LSE Law, Society and Economy Working Papers 22/2015. The counter-argument is based on the finding of Arrow (1962), and this has been generalised as stating that a competitive environment spurs innovation.
11. Cohen and Levin (1989); Scherer (1980); Bound, Cummins et al. (1984); and Cremer and Sirbu (1978).
12. As for the pharmaceuticals sector, a recent strand of research that analysed 65 pharma mergers were all scrutinised, but were eventually approved by the European Commission, shows that R&D and patents within the merged entity decline substantially after the completion of the transaction. On average, patenting and R&D expenditures of non-merging competitors also fall by at least 20% in the 4 years following a merger. Justus Haucap and Joel Stibale, *How Mergers Affect Innovation: Theory and Evidence from the Pharmaceutical Industry*, Düsseldorf Institute for Competition Economics, 218/2016.

13. Statement issued by the FTC Chairman, Timothy J. Muris.
14. For instance, in 2015, the European Commission approved both GSK's acquisition of Novartis' vaccines business and a consumer healthcare joint venture between the two undertakings, which was subject to conditions.
15. OECD, *The Impact of disruptive innovations on competition law enforcement*, 2015.



## Antitrust enforcement in innovation industries on both sides of the Atlantic

The second half-day conference focused on two major topics. On the one hand, the attention was drawn to antitrust enforcement in the innovation industries, and speakers looked closely at standard essential patents (SEPs) and at the main competition challenges in the search markets. On the other hand, discussions concentrated on private enforcement, and its role and efficacy in the United States and the European Union, respectively.

Technological developments are one of the main factors that have triggered the boom in digital markets. In fact, the innovation industries are leading the digital revolution. In this scenario, SEPs have often played a fundamental role.

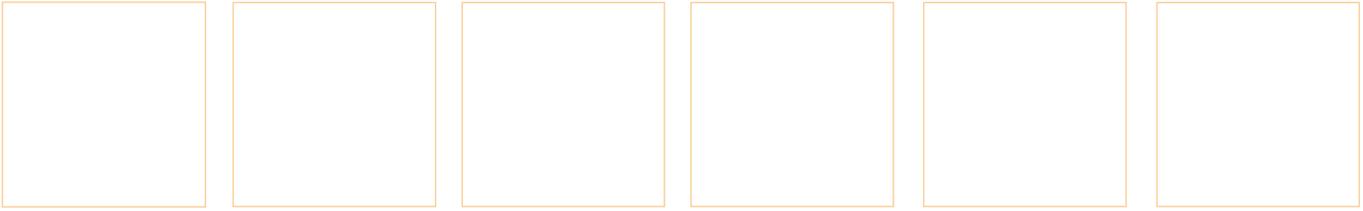
As a background, it was noted that the digital innovation industries have a number of characteristics that make them unique. Just to mention a few, they usually operate in multi-sided markets, where the definition of market power can be challenging, and also the geographic scope of the market may be difficult to identify; innovation plays an important role in this environment, and may contribute to the blurring of market boundaries. In addition, networks effects are amplified; if, on the one hand, this often leads to an improvement in the quality of services and enlarges the sources of revenue, on the other hand, it facilitates the establishment of dominance, and thus watchdogs have to be particularly careful. Moreover, a number of services are offered free, and price discrimination may be favoured by techniques like geo-blocking. Furthermore, digital innovation markets are highly dynamic; subject to rapid change and evolution, and therefore enforcers often have difficulty in intervening in a timely fashion. Another element concerns the impact of free services on the data flow, both in terms of the gathering and the processing of data. In order to guarantee data protection and privacy, a case-by-case analysis was suggested as being the best option.

From a purely antitrust perspective, it was indicated that three types of challenges commonly occur in the digital innovation markets: (i) those related to the increased use of vertical restraints in e-commerce, (ii) those linked to potentially exclusionary conduct, and (iii) those concerning IP rights.

As for the first, a focus can be put on resale price maintenance (RPM) clauses. While, in certain cases, the efficiencies deriving from these clauses may not be easy to identify, on the contrary, such clauses can facilitate collusion. Currently, the approach to RPM in the EU and in the US differs significantly, as, in the former, such restrictions are considered hard-core, while, in the latter, they are treated under the rule of reason scheme. One can wonder if this diversity is sustainable or productive in digital markets, which have no clear geographical borders.

Concerning exclusionary conducts, one of the main issues relates to the burden of proof, and how to distribute it among competition authorities and market players. In any case, it was underlined that the majority of the emerging exclusionary issues in the innovation industries appear to be linked to big data, which clearly constitute an immense source of innovation, but which can, nonetheless, create some concerns from an antitrust perspective, and not only from that. Cases of exclusionary conduct occur frequently, but may not be easy to address. In fact, sometimes remedies are simple to set up, but others they can be extremely complex as, for example, when an intervention is needed to the algorithm, which could be the basis of the company's business model. Considering how invasive the remedy may be in those circumstances, it becomes even more important to look carefully at the conduct (i.e., the functioning of the algorithm) to assess whether there is an economic justification behind it, or if collusion or exclusion is its main scope.

There was consensus among participants on the fact that self-learning machines, including, but not limited to, algorithms, raise the biggest challenges for antitrust enforcement. In fact, they no longer



act as *longa manus* of the programmer, but, on their own, can come to a cartel-like outcome while setting prices, and this is usually helped by the wide transparency of the market. In this scenario, retaliation mechanisms are also easier to set and to implement.

As for exploitative abuses in digital markets, it was noted that, again, the approaches in the EU and US diverge. In fact, in the US, the attention is concentrated on potential damages for final users, which may be rare in cases of exploitation, while often, in the EU, the impact on the competitive dynamics in the market is also taken into account.

Narrowing down the attention to SEPs, one of the major points of discussion is the so-called “hold-up” theory. More specifically, this theory focuses on the concern that SEP holders may seek to take advantage of the related market power to exclude competition or to obtain unjustifiably higher rents.

There are major concerns with this theory, for example that market power cannot be presumed. Moreover, many elements that are related to the dynamic of standardisation should be taken into due account. For example, in the case of complex standards, the research and development of technologies contributed to the standardisation process is costly and uncertain; the selection of technologies is made based on performance and efficiency, which is lengthy process; yet the great percentage of participants to standardisation do not make technology contributions to standardisation, yet review and vote on the acceptance of that technology, that may be deemed essential to the resulting standard. In addition, technology developers sustain the high costs and uncertainties of developing and contributing technologies, with additional uncertainty about the outcome of the standardisation process and the dissemination of standardised technologies, affecting returns on investments.

Concerning more specifically the issue of the

availability of injunctions for infringement of SEPs under the current system, SEP holders who seek injunctive relief bear burden of demonstrating that they deserve such a remedy. However, convincing a court that an injunction is warranted this is not a simple task. The role of antitrust regulation should be seen in this context.

In comparing the EU and US approaches, it was noted that there are a number of meaningful differences. For example, Article 102 TFEU expressly contains excessive pricing provisions, while the Clayton Act does not and Section 5 of the FTC Act remains controversial. As a result US policy has tended to evolve more through ‘soft law’ mechanisms, such as mergers review remedies. The significant use of ‘soft law’ instruments in this area might not create the legal certainty needed for both patent holders and implementers about their obligations.

The discussions then focused on the analysis of the most recent case law, and in particular on the Samsung and Motorola decisions of the European Commission and the Huawei v ZTE case of the European Court of Justice . It was highlighted that there have been differences in the way a number of issues have been approached, including the theory of harm, the burden of proof, the definition of the ‘willing licensee’ test, the balance of rights and, more ultimately the role of antitrust in disputes over what the ‘right’ royalty level should be.

It was noted that a number of questions related to the interplay between essential patents and antitrust remain, at least partially, open. By way of example, it is still unclear which is the standard of risk related to SEPs hold-up that should trigger antitrust enforcement. Moreover, there are doubts on the fact that antitrust is suited to address claims of “excessive” royalties absent objectively established exclusionary conduct.

To conclude on this topic, a more cautious common approach appeared to be evolving that considered the risks to innovation of excessive reliance on



preconceived notions and of theoretical competitive harm as well as the potential inefficiencies of specific rules-based IPRs policies that may be more related to the patent system than the antitrust system. There was consensus also on the need for an increased understanding of SEPs dynamics, which will help to ensure the appropriate balance between the protection of IP rights and other interests involved.

Discussions then focused on the competition challenges that are related to the search markets. Search is particularly important because of its impact on many other services and businesses. By way of example, the mobile apps market is underpinned by search: the way users usually discover a service is to search, while the app comes afterwards.

As is known, the major legal case relating to searching concerns the investigations of Google. There, a number of criticalities were debated. First, it was noted that the timing of the enforcement is excessively long, and this is to the detriment of both interested parties' rights and the legal certainty in the market. Second, doubts were cast on the fact that the relevant behaviours are not avoidable, because there is no other effective way to programme the algorithm. Other delicate issues concern the exclusionary potential of data collection, which can reinforce market power, build barriers to entry, and make switching more difficult, or even impossible, for final users.

It was underlined that, here again, there is a need for deeper research and reflections on the likely theory of harm. On the one hand, the right link between the extra-profit and the users' damage should be clearly spelled out. On the other hand, the efficiencies that are related to the relevant behaviours should also be carefully assessed, and to properly do so, it appears to be important to increase the understanding of the engineering behind the algorithm, its limits and its potential.

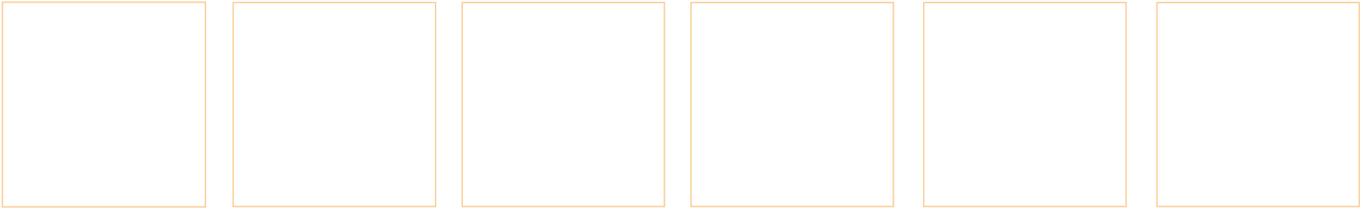
It was noted that the European Commission is moving slowly in this field, which, in any case,

appears to be a priority for many antitrust authorities around the world (among others, the FTC, the Brazilian authority, and the Korean one). It was argued that, this being the scenario, the European Commission could take the lead, but, in order to do so, it should be able to carefully define what the specific harm that consumers suffer is, and why it is so in that particular case. That said, transparency and cooperation mechanisms could be extremely useful for competition authorities, if they want to be able to coordinate their responses to similar behaviours.

During the debate that followed the panel, the issue of technology mandates was tackled. It was recalled that a mandate may have different meanings in different contexts. Concerning SEPs, the European Commission appears to mandate the process, not the result. However, questions were raised on the risks that are related to this approach, especially in terms of its impact on the technological neutrality principle.

Moreover, it was argued that, considering that monetising a patent is the common way to obtain a return on investments, if regulation makes it too difficult to perform this, companies may be tempted to let someone else do it for them, in other words, to adopt a wait and see approach. In this scenario, patent aggregators could become even more attractive. In any case, it was highlighted that patent law has a role that should not to be forgotten, and it should be duly applied when it is necessary.

Part of the debate concerned the helpfulness of soft law. If, on the one hand, some sustained that guidelines, best practices and similar tools could constitute a precious instrument for agencies, on the other hand, some noted that, at least on key issues, in order to ensure legal certainty it is important to have courts that can decide. Alternatively, national competition authorities should be able to issue non-infringement decisions, or to declare that the issue raised does not concern antitrust law, but, rather, relates to other fields of law. In the US, this approach



was taken in the *Trinko* decision<sup>16</sup>, but in the EU there appears to be no similar precedent.

## Private Enforcement in the EU and US in the aftermath of the EU Damages Directive

The second panel of Saturday morning dealt with the private enforcement of antitrust rules. The scene was set starting from the major reason that lies behind private actions, i.e., victims' compensation. In addition, private enforcement is considered to be an additional tool in terms of deterrence, as it creates incentives for the law not to be violated. Finally, it can also constitute a mechanism to supplement public enforcement if the latter is underutilised for whatever reason. Notwithstanding private enforcement's potentials, the European Institutions needed many years to issue the Damages Directive, and one might wonder why this was the case.

In considering the United States, there are a number of elements that characterise its regime: mandatory treble damages, class actions, fee recovery (although with an asymmetry: if the defendant wins, s/he will receive more satisfaction, but will not recover the fee), jury trials (with the annexed peculiarities that are related to the jury's composition), discovery rights, to mention just a few. In addition, it is not possible to access leniency documents, although, after the reform of the year 2000, the first leniency applicants that cooperate with private actors can avoid treble damages, which become single ones.

It was noted that the major consequence of this system is perhaps the change in the role of public authorities in the US. In fact, private actions have gained an impressive power to decide which theories of harm deserve more attention, thus, somehow, they act as gatekeepers. In other words, private enforcement takes away the agenda-setting from the

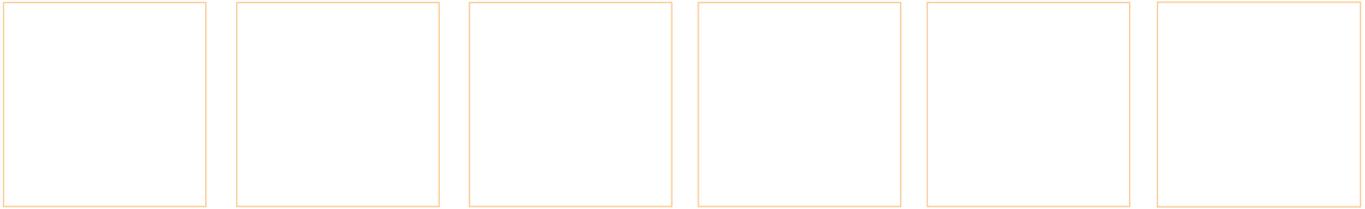
public enforcers. In reaction, what the US authorities are doing is to increase their role as *amicus curiae*.

The second mentioned consequence was deterrence. Class actions constitute a very powerful tool to dissuade people/companies from committing infringements. To recur to some data, in the past few years, private recovery has been granted over 3 billion dollars, while, in the same period, public sanctions amounted to only about 1 billion dollars. Moreover, usually, private actions stress the theory of harm, while public ones often end in a negotiated solutions.

Having set this scene, it was noted that currently, in the US, there is a fierce debate on whether the private enforcement system can lead to over-deterrence. It was noted that, so far, there is no convincing study that demonstrates this thesis; nevertheless, the US authorities seem to endorse it. The role of the Congress was mentioned, and it was reported that some believe that the latter has a major influence on the change of doctrine and in the definition of what harm means, and this is supposedly so because the Congress deliberately told the courts to provide details about the theory of harm in specific cases, and it gave instructions on how to adjust it. As for the academic scenario, the modern Harvard School, which appears to be very institutional in its approach, supports the argument of over deterrence, and it sustains that imposing treble damages is as negative as imposing criminal imprisonment. It was recalled, on the other hand, that the last case of public enforcement before a US court dates back to the 1970s. Since then, no public authority has gone before a court to articulate a theory of harm in relation to monopolisation.

Irrespective of the approach taken concerning the specific arguments that are mentioned above, there appears to be a consensus on the fact that as long as US companies remain afraid of the courts' reactions in private actions, this will over deter, and will make the convergence between the US and the EU systems more difficult to achieve.

16. The Supreme Court of the United States, case *Verizon Communications v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).



Bearing in mind the US experience, the audience wondered whether, in the European Union, judges will be convinced that private damages play an important role, or whether they will be more careful and hesitant in order to avoid the system going out of control.

As the debate went on, the axis was moved to the EU Damages Directive, and its major features were analysed and discussed. First, it was recalled that it has two main aims: to ensure full compensation and to guarantee the parallel development of private and public enforcement. It was noted that this second aim is particularly evident in the provisions that deal with the protection of leniency documents. In addition, the Directive acts as a game changer, because it establishes, and disciplines in detail, the right of disclosure and the access to information, using black lists and grey lists.

Among the other specific provisions that were debated during the session, it is worth mentioning those concerning interests, which could play an important role especially in the case of prolonged infringements, the dispositions in case of umbrella damages, or those that relate to the territorial scope of infringement, as challenges are raised where such scope goes beyond the national, or even the EU's, borders.

It was also noted that another key provision allows co-cartelists to be sued in one proceeding before one competent court. As a consequence, the decision about where to bring the case becomes strategic. Other elements which may impact on such a decision are the costs associated with the litigation, the private international law regime that is applied by each Member State, as it will be the one deciding the applicable law and solving possible conflicts of laws.

All in all, it was argued that the Directive calls for a step change in the enforcement of competition rules; it impacts on a scenario of unbalance between public and private enforcement, trying to find a new

equilibrium and to solve the gap between zero- and full-compensation. In order to do so, the European Institutions have concentrated on private actions' major obstacles, i.e., mainly, procedural issues, as well as cultural legacy. From this perspective, the Directive constitutes a global cultural effort, not just a legal issue.

On this path, a fundamental role is also played by the guidelines on the quantification of damages, which are especially important for their harmonisation effect, rather than for the specific content itself. In fact, through them, the European Commission provides national courts with guidance on how to estimate damages and this contributes to the overtaking of the traditional reluctance of European judges to hear antitrust cases.

While the implementation process is going ahead, it remains to be seen how national courts adapt to the new rules. A number of elements that could be of help in this transition phase were identified during the final discussion. One of them is a more interventionist attitude from the competition authorities. This could take the form of acting as *amicus curiae* and providing support to national judges, but it could also be implemented by providing more data and more detail in the authorities' decisions, especially in the current context, where settlement decisions are very common, but they are extremely vague, and often do not contain enough information on the infringement. It was noted that this scenario makes it difficult for all, not only the courts, to investigate cartels and the theory of harm behind them if judgments and decisions do not provide details on their functioning.



ENTraNCE  
Robert Schuman Centre for  
Advanced Studies

European University Institute  
Villa Raimondi, Via Boccaccio  
121/111, I-50133 Florence

Contact:  
[Entrance@eui.eu](mailto:Entrance@eui.eu)

## ENTraNCE

*ENTraNCE aims to provide training to a variety of enforcers of competition rules, to carry out research and to promote informed discussion on key policy issues in competition law and economics. ENTraNCE builds upon and complements the experience gained during the past five years in organising ENTraNCE for Judges, a training programme co-financed by the European Commission and addressed to EU national judges dealing with competition cases.*

