



Competition Policy Use and Abuse: The Impact on Multinational Corporates. Davos 2016

The role and performance of competition agencies and the broader use and abuse of competition policy has been in the news with increasing frequency in recent years, and these themes were the focus of a session at the WEF meetings in Davos.

The focus of the discussion was whether or not competition policy authorities in some jurisdictions implement or enforce competition law in a discriminatory way. With 130 competition agencies operating around the world, each in a different environment with widely differing cultural considerations, needs and resources, there are frequently questions about whether these agencies are treating foreign companies fairly and equally in all cases.

The panel discussed a number of reasons why companies may consider the application of competition policy to be unfair.

A country might decide that its application of competition policy will take into account economic growth or employment, or positive discrimination for certain social classes. In such cases, foreign companies might receive

different treatment than national companies. This shouldn't necessarily be described as an abuse, however, the panellists argued, because the authority is still acting in a way that corresponds to that country's laws. At the same time, differences in the law may mean that companies experience discrimination in certain jurisdictions.

On the other hand, a competition authority and government may abuse their powers by acting in a way that does not correspond to its own law and policy, which can lead to several categories of abuse. For example, panellists noted, government authorities may fall under the influence of vested interests to discriminate against foreign companies or to not apply competition law, explicitly or implicitly, to domestic incumbents to ensure that they are protected. A competition authority itself may also be

tempted to selectively enforce because it needs to prove its reputation to its wider audience; in some jurisdictions, it may be trying to show that using competition law is a more effective way of helping the consumer and business than, for example, legislation.

The Google case at the European Commission is a case in point, where observers have been claiming that US and EU competition laws may not always be applied in a non-discriminatory manner across the two jurisdictions. Voices in the EU have criticized the United States competition agencies openly for failing to enforce competition law against Google, Amazon, Facebook, Apple and others, claiming, the US wanted these companies to expand worldwide and did not want to enforce competition law in their own country for fear of undermining this aim.

On the other side of the Atlantic, there have been complaints that many European proceedings involving US companies are driven by the fact that Europe is lagging behind from a technical point of view, leading it to try to take action against huge U.S. firms that are dominating markets.

Finally, due process is an important issue inside any competition authority. The work of the International Competition Network (ICN) is focused on developing best practices, but there is still progress to be made in jurisdictions where authorities don't necessarily have the experience or the capacity to attain the established standards of due process and rights of defence, or to produce rigorous economic analysis.

Ensuring that competition agencies work in a non-discriminatory manner is clearly a challenge. Panellists considered that competition agencies should ideally

be independent from political influence so that they can apply the law in a non-discriminatory manner. Institutions such as the International Competition Network (ICN) help to ensure that agencies are getting along well and seeking the same types of evidence to solve their cases; however, while the forum is well-placed to set standards for competition law it has no formal influence over competition agencies themselves, and a few countries are not yet involved with the ICN.

It was observed that trade policy and competition policy may be misaligned, even though it seems obvious that competition policy needs to take into account changes in competitive pressure resulting from an increasing number of countries opening to trade. The existing trade system is seen by many as a solid, rules-based process with dispute settlement that has

formidable impact and discipline. In comparison, on the competition side there is a virtual ICN, acting as a forum between competition authorities, but without formal global principals. The World Trade Organisation (WTO) has not agreed on an international competition system, but the environment has evolved significantly over the past 20 to 30 years; consequently, the current view is that some sort of global mutual recognition and regulatory convergence - if not harmonisation - of both law and its implementation is important.

Given the presence of policy elements that make sovereign states reluctant to concede part of their policy space, these pressures haven't translated into a global approach. It remains to be seen how far this much-needed convergence will take place.

PANELLISTS WERE:

Jorge Padilla

Senior Managing Director and Head of Compass Lexecon Europe.

Pascal Lamy

Former General Director of the WTO and Commissioner of Trade at the European Commission. Global Chair of the Global Agenda Council, and he's also affiliate professor at HEC.

Philip Lowe

Former Director-General of the European Commission for Development Cooperation, for competition and energy, Philip works with FTI Consulting as a senior advisor.

Andreas Mundt

President of the German Federal Cartel Office, Steering Group Chair of the International Competition Network, a member of the Bureau of the OECD Competition Committee.

Simon Wilson

BBC Brussels' Bureau Chief. He runs BBC's news operations in many parts of Europe.

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