THE TRANSFORMATION OF GLOBAL GOVERNANCE PROJECT

16 OCTOBER 2018 SEMINAR

EXTRATERRITORIALITY AND COOPERATION IN COMPETITION POLICY

Seminar insights - George Papaconstantinou, Jean Pisani-Ferry and Guntram Wolff

In a context where a few global firms dominate key sectors worldwide, the proper functioning of product markets rests on enforcing both a non-distortive trading regime and pro-competitive competition laws. Whereas trade is governed by multilateral rules, however, there is no global competition law nor a global competition authority. Competition policy remains in the sole remit of national authorities operating under national law. National decisions, however, have strong extraterritorial effects. This raises significant international coordination issues.

1. A case of voluntary cooperation amongst national authorities

Competition provides an illuminating case of global governance through voluntary cooperation of independent national authorities. The key ingredients of this model are the following:

- Policy objectives are largely similar across countries;
- Policy implementation is almost everywhere delegated to independent national authorities whose mandates are therefore largely similar;
- National authorities cooperate informally in assessing potential cross-border effects of policies;
- They recognise the right of their partners to take decisions which apply to firms in their own jurisdiction, provided they are respond to demonstrably harmful effects of firms' behaviour;
- Within the framework of their mandates, national authorities refrain from taking decisions that would be disproportionately harmful to partner countries.

While this model has some resemblance to the one at work amongst central banks, there is a significant difference: central bank decisions do not target specific economic actors in partner countries, whereas competition authorities do. In merger control cases, they may impose remedies such as the sale of assets located outside the border of their jurisdiction.

2. A model whose permanence cannot be taken for granted

This model has been in operation successfully for more than two decades. About half of the competition cases dealt with by authorities in large countries explicitly involve cross-border dimensions. The global competition network includes about 130 countries. The resilience of this model however rests on ingredients whose permanence cannot be taken for granted:

- The convergence of competition mandates was largely due to the similarity of those of the two main players: US and EU. Until recently, China's competition policy was underdeveloped and competition laws were largely copied on those of the two incumbent powers. As China develops its own competition policy philosophy and as other newcomers play a greater role, the commonality that has characterised competition regimes worldwide may not last;
- Even if legal texts remain similar, the environment of competition authorities may change. Pressures from policy departments in charge of industrial or trade policy may undermine the peaceful coexistence between competition policy authorities;
- Ad-hoc cooperation between competition policy authorities does not deliver a first-best result. Depending on the size of the corresponding market and the degree of concentration of the firms involved, decisions by national authorities may suffer from under-enforcement (for small countries) or over-enforcement (for large ones). Equity in the distribution of costs and benefits of competition rulings can therefore not be taken for granted. Such asymmetry will grow as digital business develops and gives rise to heightened competition concerns.

Seminar minutes

- **Session I - The extraterritorial reach of competition policy decisions: evidence, successes and pitfalls**

There is no global competition policy, nor a global authority in charge of coordinating national competition authorities (CAs). National (or European) authorities rule independently on the basis of their domestic mandate, which is to uphold the welfare of domestic consumers. But intensified cross-border economic integration increasingly leads them to pronounce on the behaviour of foreign firms and to impose extraterritorial remedies (for example, to condition the approval of a merger on the divestiture of assets held outside the jurisdiction of the competition authority). Such extraterritoriality especially regards merger control, but may also apply to cases of abuse of dominant position or to cartels. More than half of merger or cartel cases investigated by the European Commission nowadays involve an extraterritorial dimension.

"It is a strange system, that shouldn't work on paper, but does in practice"

The origins of the extraterritorial reach of competition policy are to be found in the US Sherman Act of 1890, which spelled out what became known as the "*effects doctrine*": that the reach of competition policy decisions can extend beyond borders when foreign firms' behaviour is having "direct, substantial and reasonably foreseeable effects" on domestic consumers. This was broadly endorsed by the EU and provided the basis for a series of landmark decisions, of which best known is the 2001 decision declaring the GE-Honeywell merger incompatible with EU law.

Extraterritoriality in competition policy raises five main issues.

- First is the obvious question of *sovereignty*: states targeted for the allegedly anti-competitive behaviour of undertakings based in their jurisdiction may complain of overreach and infringement into their domestic affairs. Until now cooperation has prevailed and disputes have been avoided, but this is by no means guaranteed.
- Second is the issue of *consistency*. Peaceful coexistence among national authorities requires as a necessary (though not necessarily sufficient) condition a high degree of convergence of competition laws and their applications.
- Third is increasing *complexity* in the system and the widening scope for potential conflict. The number of competition authorities and regimes has more than doubled in the last decade, numbering some 130 currently, forming a network of different rules, standards and procedures, with both overlaps and gaps. Their status vary: they can be independent authorities, or tied to the judicial system, which can impact their work and cooperation.
- Fourth is the *opportunistic use of competition policy*. A state's competition authority, especially if it is insufficiently independent, may selectively or strategically enforce its rules, furthering domestic interests and favouring protectionism. One participant pointed out that a CA's mandate can include elements that go beyond competition policy as commonly understood, which can enable this kind of behaviour (South Africa's competition authority's remit over "diversity of ownership" of undertakings, for example).
- Fifth is the problem of *under- and over-enforcement* of competition regimes depending on the size of the relevant markets. No firm can disregard the EU market, but the competition regime of small, less economically robust states might be under-enforced, even if there is significant economic harm to people, because of little effective power on the global stage. Conversely, a state's competition regime may be over-enforced due its global power; or because that state's competition authority is the last one involved in a case to deliver its ruling, and thus will hold much greater bargaining power and influence on the final result.

Cooperation among competition authorities: principles and practice

In legal terms, extraterritoriality is asserted, in principle, to preserve the integrity and proper functioning of one's own market. In the US, the well-established *effects doctrine* has led to quite broad claims. The EU's dominant approach is similar but slightly narrower: its *implementation doctrine* aims to catch activities "implemented" by undertakings in its jurisdiction. The EU has been prudent in adopting the effects doctrine approach, though it has been less shy to do so for merger control cases. Participants all acknowledged that legal determination of where and when it is justifiable to claim extraterritoriality is necessary and important, but many highlighted the fact that in practice, however, it cannot ignore political concerns, as well as the geopolitical and geoeconomic weight of the parties involved.

In practice, competition authorities manage these concerns by coordinating on three levels. First is the important, still emerging practice among competition authorities of the use of *comity*, whereby they attempt to take into account principles, rules and interests of their counterparts in elaborating their rulings. This is meant to avoid direct jurisdictional conflict and calling the sovereignty of another state into question.

Comity can be *negative* or *positive*. In its negative form, a CA will voluntarily refrain from intervening if that would lead to a hard conflict of law in implementing the remedy it deems appropriate. In its positive (and less frequent) form, one competition authority may ask its counterpart to remedy the anti-competitive behaviour affecting it, which originates in its counterpart's jurisdiction. Comity can be stronger or weaker, and more or less institutionalised. One practitioner, however, cautioned that comity is observed more in books than in practice, and that the main competition authorities do not often formally invoke this principle.

Negative comity corresponds to unilateral restraint, and positive comity consists in asking and relying on another authority to provide redress. In between are less defined forms of cooperation, based on case-specific discussions between competition authorities. For example, the Australian competition authority may assess a global merger, and decide to defer to the EU and the US authorities, which are investigating the same case. One participant estimated that around half of merger cases are settled this way.

Fully institutionalised comity consists in a formal bilateral cooperation agreement on competition policy. This corresponds to a second level of cooperation and was inaugurated between the US and the EU in 1991. This kind of agreement officialises agreed-upon cooperation processes, a step up from unilateral notification regimes and *ad hoc* consultations, and has proliferated internationally in the past decade.

On a third level, CAs participate in exchanges in international forums, most often within the OECD and the International Competition Network (ICN) established in 2001 following the failed attempt to create a global competition system with a home in the WTO. These interactions have allowed progress on aligning views and establishing best practices, creating a solid epistemic community. ICN principles (as well as the OECD ones) help ensure convergence of views between competition authorities and provide guidance in case of differences.

One participant deemed the resulting rules to be fairly robust, and remarked that states are in fact changing their laws to comply with them, but also observed that they may have been "low-hanging fruit" and that further convergence may prove more difficult, for example on tools of industrial policy, or on issues raised by digitalisation.

State of play

The strongest points of convergence so far have involved, for the most part, catching the worst offenses and risks in competition policy, where enforcement interests are highest, namely cartels and horizontal mergers. One participant noted no major divergences in approach across the world, both in legal and effective terms. The weaker points, where divergences remain, are more ambiguous categories of cases, such as foreclosures, abuses of a dominant position, or export cartels. Participants agreed on the difficulty of getting states to agree on what constitutes anti-competitive behaviour for these.

Furthermore, legal mandates may represent obstacles to a proper enforcement of competitive behaviour: whereas the EU law neither mandates nor prohibits taking into account the effect of anti-competitive behaviour on foreign consumers, US law explicitly excludes it. One participant underlined the fact that the legal appreciation of these cases is still evolving, even in the EU, while reminding that there is a strong incentive for common approaches to avoid conflicts and diverging outcomes, as they may damage a competition authority's legitimacy. Peer pressure was deemed an effective tool.

"Ironically enough, competition authorities may work best as a cartel."

Participants speculated on what a global competition authority might look like. Such a global body would require a large-number multilateral agreement, establishing rules compatible with all involved states' sovereignty claims. It would be optimal for enforcement in theory, though the cost and methods of doing so remain open questions. It would also raise serious redistribution issues. Thus, it is far from clear that it is a realistic possibility.

Participants also debated the scope for including competition policy in the WTO, as has long been proposed, and as was the original plan for the International Trade Organization in the Havana Charter of 1948. They tentatively agreed that while the issue of subsidies could be integrated to the WTO, there is little scope for

much else. The idea of an international body dealing with competition issues is by no means new, and its repeated failure has led to cooperation between CAs as a "third best".

- **Session II - Rivalry and cooperation among competition authorities: towards fragmentation or convergence?**

The China challenge

The multiplication of competition authorities in recent years has raised the fear of more frequent international tensions. Of particular concern has been China: first due to its unsanctioned, or even government-led anti-competitive behaviour of its state-owned enterprises (SOEs), and second due to the evolution of its competition policy and authorities and their increasing assertiveness on the international stage.

"Protectionism and easy politicisation make it difficult to deal with China"

The concept of competition policy in China was in large part "imported", so the mandate of its authorities is quite similar to those it mimics in the West. In practice however, there is a lack of experience and expertise, and much depends on which authority is dealing with which undertaking. Fundamental questions such as the respective role of SOEs, the Party, and the government in competition policy, or the very compatibility of a planned socialist market economy and competition policy, remain unanswered, if not unasked.

China's competition policy has developed gradually and very recently. Its Antimonopoly Law came in force in 2008 with three main bodies tasked with enforcing it (including the Ministry of Commerce), in different domains and at different levels. Consumer protection is not a key objective; rather, it is to curb inflationary pressure. The enactment of the Fair Market Review System followed in 2016, designed to allow some of the competition agencies to review local government actions for potential negative effects on the market. Only a few cases have been examined though, and there are no clear guidelines or sanctions. Finally, three large agencies, including one of the CAs empowered by the Antimonopoly Law, were merged in March 2018 into a "super market supervisor". It is an ongoing process whose effects are not yet discerned.

Three avenues can be envisaged for cooperation with China. The first is to give China some latitude, while making efforts to elaborate rules for a proper role of SOEs at the technical level. A second is to refuse to let competition policy be used for protectionist purposes. At this point, this means discouraging China's temptation to escalate the trade war the US has launched. The third would be to aim for a higher goal, namely co-writing new rules for a new economy, characterised by platforms, big data and AI. China is moving very fast in these fields, aided by Chinese consumers who adopt technology avidly as well as by Chinese governmental support; one participant assured there is genuine interest in cooperating with the EU and US in this field.

The future of US-EU cooperation

Participants engaged in a historical analysis of the development of competition policy in the EU and the US and their relationship, in order to review critically claims of convergence and divergence. As one recounted, the US led in this area before the EU caught up around the turn of the century, fostering deregulation in member states and establishing the Single Market. Now, most EU member states rate better than the US in industry competition indexes. The same participant compared a fragmented US competition policy system to a more coherent EU one, and shared three concerns: that broadening the sphere of public policy will raise the risks of conflict between competition policy stakeholders; that a self-proclaimed "political" Commission can lead to increased misunderstandings, especially on state aid; and that populism could unwind competition policy and impact European integration itself.

What can be expected from US competition policy looking forward? In the last decades US authorities seem to have been more lenient than their EU counterpart. Will the stance of the Trump administration lead to a more pronounced departure from pro-competition practices and a divergence between EU and US policy philosophies? This would involve heightened risks of transatlantic conflict. Beyond the bilateral dimension, divergence between the US and the EU would have profound consequences for competition policy globally.

Several participants pointed out elements of continuity in the US approach. As far as competition policy is concerned, until now the current administration has not broken with past behaviour. But things may change, and President Trump's apparent willingness to selectively enforce competition policy risks damaging its reputation. One may question how resilient current arrangements may prove to be in the face of potential profound changes in behaviour.

Participants debated whether the fact that competition authorities share common objectives ensures similar outcomes: one participant made a parallel with central banks, their domestic objective of price stability, and their tradition of cooperating closely. Several participants remained unconvinced that disputes can be avoided, pointing out competition authorities' differentiated effects on customers of different countries, temptation to interpret or distort their mandate in service of other objectives, and lack of dispute settlement mechanisms.

There was also debate over the definitions and delimitations of competition policy and industrial policy. As one participant characterised it, to general approval, industrial policy means industrial development spurred by the state, using tools that can be categorised as anti-competitive behaviour such as exclusionary practices, vertical mergers or state aid. Thus, competition policy, with its focus on non-discrimination and a level playing field, is perceived to have a strong potential to hinder industrial policy, especially in China. One participant asserted that industrial policy seldom works, generating instead negative spill-overs such as overcapacity and bad loans, giving examples from the Chinese solar and electric vehicle industries.

How resilient is the global competition regime?

"The functioning of the global competition policy system is a miracle to be preserved."

Participants agreed that changing patterns of trade and the development of services and digitalisation made closer cooperation in competition policy a necessity, and some regretted the impossibility of a global body dedicated to dealing with this field. It was recalled that strong epistemic communities, like that of competition policy, can fall prey to self-absorption and disconnection from the flow of events, even if it is underpinned by a robust body of theory and common understanding of its practice.

Another participant judged that global governance of competition policy has functioned fairly well as a "second best" system, buttressed by a commonality in its implementation and understanding of its relevant law, coexistence (or comity) promoting cooperation and limiting damaging assertions of extraterritoriality, and a common culture reflected in the epistemic community. But the governance system seems to be somewhat fragile and non-resilient, relying on assumptions that all stakeholders are pursuing the same goals and playing by the rules.

Adrien Bradley

Seminar programme

16 OCTOBER

14:00 – 14:15 Introduction by **Maria Demertzis** | Bruegel, **Jean Pisani-Ferry** | EUI and **Guntram Wolff** | Bruegel

14:15 – 15:45 **Session I - The extraterritorial reach of competition policy decisions: evidence, successes and pitfalls**

Introductory remarks: **Laurent Eymard** | MAPP and **Carles Esteva Mosso** | DG COMP

15:45 – 16:15 *Coffee break*

16:15 – 17:45 **Session II - Rivalry and cooperation among competition authorities: towards fragmentation or convergence?**

Introductory remarks: **Fan He** | Peking University, **Mario Monti** | Bocconi University, and **André Sapir** | Bruegel

17.45 – 18.00 Concluding remarks and discussion led by **George Papaconstantinou** and **Jean Pisani-Ferry** | EUI

18:00 – 19:00 *Closing reception*

Seminar participants

Geneviève Barré	Asia-Europe Foundation
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Joachim Glatter	Merics
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Brit Hecht	BBVA
Mathew Heim	Bruegel
Alexander Italianer	European Commission
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Mario Monti	Bocconi University
Julian Nowag	Lund University
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Pier Luigi Parcu	EUI
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José Rivas	Bird & Bird
André Sapir	Bruegel
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