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## Imagining EU Antitrust Enforcement in 2030

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### I. INTRODUCTION

On October 20, 1932, in the midst of the Great Depression, the *Pittsburgh Press* reported on a meeting of American Institute of Steel Construction at which representatives of 166 steel concerns heard Charles N. Fitts, president of the Institute, and Charles F. Abbott, executive director, deliver their annual reports.

Fitts berated law-makers for the lack of assistance available in the recessionary climate and highlighted the:

narrow policy of our legislators who enact laws to guarantee the freedom of competition, but offer no assistance to those who are forced into bankruptcy because of ruthless competition.

He added that

our antiquated Anti-Trust Laws with many uncertainties prevent any group action to stabilize either prices or profits. They will undoubtedly be clarified by intelligent interpretation or modified to bring them into harmony with modern conditions.

Following the same theme, his colleague Abbott advocated a government program with the aim of “educating industrialists to the realization that it is for their own good to co-operate and not indulge in cut-throat competition.”<sup>2</sup>

Even today’s gloomy economic climate seems mild in comparison to what Fitts and Abbott were witnessing. In the three years prior to their 1932 meeting, industrial stocks had lost 80 percent of their value, 10,000 banks had failed, GNP had fallen 31 percent, over 13 million Americans had lost their jobs, and international trade had fallen by two-thirds.<sup>3</sup>

Despite these astonishing conditions (and Fitts and Abbotts’ impassioned entreaties for “reform”), the key tenets of competition law found in the U.S. Sherman Act of 1890 not only survived the Depression unchanged, but also remain substantially unchanged to this day. In short, the core principles of competition law seem so engrained in Western economies that even great shocks are unlikely to bring about major changes at the level of principle. In 1991, then EU Commissioner for Competition Sir Leon Brittan, mulled the constancy of competition law and the limitations of each Commissioner’s role:

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<sup>2</sup><http://news.google.com/newspapers?id=IvkaAAAAIBAJ&sjid=YEsEAAAAIBAJ&pg=1273,4404715&dq=history+competition+policy+enforcement&hl=en>

<sup>3</sup> [http://www.hyperhistory.com/online\\_n2/connections\\_n2/great\\_depression.html](http://www.hyperhistory.com/online_n2/connections_n2/great_depression.html)

I am ever conscious that I have inherited responsibility for a system with an impressive constitutional pedigree. The founding fathers showed considerable foresight in grounding the Community competition scheme in Treaty rules. Not only have these rules, as part of the Community's highest law, been accepted by twelve Member States with widely varying traditions, but the rule of law has been reinforced by the existence of a firm set of principles which can only be altered by means of an amendment to the Treaty itself. Neither I, nor any of the competition Commissioners before me, write competition policy on a clean slate. Rather, we come to a structure whose broad contours have been in place for some time and whose architecture we must respect.”<sup>4</sup>

The former Commissioner’s point is compelling for two reasons. First, (like in the United States) no changes had been made to the base principles of EU competition law between their adoption in 1957 and his 1991 speech, and no changes have been made since. Second, the twelve Member States he referred to serve as a reminder that so much else has changed within the EU and the global economy in a relatively short time-span, but the core competition principles have remained constant.

## II. WHAT WILL DRIVE CHANGES TO COMPETITION ENFORCEMENT POLICY AND ENFORCEMENT PRACTICE?

On the other hand competition policy (that is the event-driven, reactive, and substantially more political business of deciding how to *apply* the constant competition laws), and the way that those rules are actually applied in practice are in a permanent state of evolution and flux. Against a backdrop of constant principles, these changes must occur as policy and enforcement practice try to catch up and adapt to new business models, new patterns of consumer behavior, new economic realities, and, potentially, new political realities.

What future economic conditions will mean for competition policy and enforcement practice cannot be known and in any event will probably not be driven by the EU. In March 2000, the EU Heads of States and Governments agreed to make the EU “the most competitive and dynamic knowledge-driven economy by 2010.”<sup>5</sup> Although not many would argue that this has been achieved, readers need not despair because the plan has been replaced by an even catchier one—“Europe 2020”—which includes a multitude of initiatives such as promoting Europe’s “Digital Agenda” and enhanced investment in research and development (“R&D”).<sup>6</sup> This ambition is necessary and laudable, but is it really likely to determine the EU’s economic future?

Former British Prime Minister Harold McMillian, when asked by a journalist what was most likely to blow his government off course, reputedly replied: “events, dear boy, events.” Likewise, competition policy and practice are perhaps more likely to be driven by unpredictable “Black Swan”<sup>7</sup> market events than careful planning—so much so that one could legitimately wonder whether it is worthwhile to gaze into the future at all.

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<sup>4</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/91/85&format=HTML&aged=1&language=EN&guiLanguage=en>

<sup>5</sup> [http://europa.eu/legislation\\_summaries/education\\_training\\_youth/general\\_framework/c10241\\_en.htm](http://europa.eu/legislation_summaries/education_training_youth/general_framework/c10241_en.htm)

<sup>6</sup> [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

<sup>7</sup> As characterized in NASSIM NICHOLAS TALEB, *THE BLACK SWAN* (2007) on the disproportionate role of high-impact, hard to predict, and rare events that are beyond the realm of normal expectations in history, science, finance, and technology, 9/11 being a prime example.

The first mobile phone call in the United Kingdom was made in 1985. The European Organization for Nuclear Research (“CERN”) released the “www” domain name prefix in 1991, the same year as Lord Brittan’s speech. Facebook has been in existence only since 2004, and Twitter has added more than 190 million accounts since its launch in 2006.

Some estimates indicate that no more than one in ten start-up businesses survive. How many of the 90 percent that have failed had an idea that—with different luck or management—might have been the next revolution?

Henry Ford is reputed to have said “if I had asked my customers what they wanted, they would have said a faster horse.” Arguably, it is *because* of the constancy of competition law that business revolutions can occur, as a stable economic and legal infrastructure provide the conditions necessary for business risk-taking, like the risks the Ford Motor Company undoubtedly took. All great businesses have, in their infancy, challenged the *status quo* or market position of previous incumbents and, without stable competition law principles, the business infant mortality rate would almost certainly be higher.

Competition policy and enforcement practice, on the other hand, are often scrambling to catch up and respond to market events and revolutions, in many cases while the outcome of those revolutions remains unknown.

In 2000, the Commission came close to blocking the merger between AOL and Time Warner because it was concerned that AOL could capture control of the Internet. AOL had a strong subscriber base and the Commission was concerned that it might use Time Warner’s attractive movie content as a lure to encourage customers to stay within a private AOL subscriber-only area of the Internet known as a “walled garden,” and not explore the Internet more broadly. The Commission argued that “the more content AOL acquires and the bigger its community of users, the less the reasons for a user to abandon AOL’s walled garden and the more the reasons for potential Internet users to join AOL.”<sup>8</sup> The argument that the Internet would be open and could not be owned, and the argument that Time Warner would have an incentive to show its movies to everyone that was prepared to watch them (and not only AOL subscribers) fell on deaf ears, such was the uncertainty regarding the future development of the Internet at that time. The case was cleared only after substantial remedies had been offered. The merged company had an initial value of some \$350 billion (it had been the largest corporate deal in history). A vastly weakened AOL was spun off in 2009; by December 2010 AOL’s market capitalization was \$2.69 billion.

The fact that the Commission’s concerns may now seem almost quaint is not a criticism. The point is that no one knew how the sector would develop.

So, to gaze into the crystal ball, as the Commission was required to do in 2000 and has done in other cases, and speculate about the likely development in European competition policy and enforcement practice requires a degree of courage, as the chances of being entirely wrong are high (as the events which will drive change remain unknown). So—with all humility and advance recognition of the chances of being far off target—the following are some of the changes and adjustments that might occur before 2030.

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<sup>8</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0718:EN:HTML> at ¶ 70.

### III. NARROWING OF ENFORCEMENT EXPERIENCE IN THE EU

The 27 EU Member States currently have vastly different levels of experience and resources devoted to the enforcement of EU competition law. “Mature” antitrust jurisdictions, Germany being one example, are at least a decade ahead in terms of the judicial and administrative enforcement facilities and the degree to which antitrust has penetrated business culture compared to some of the newer EU Member States, who have been applying EU antitrust laws only since accession in 2004 or later.

However, learning to apply a pre-existing and already mature system takes far less time than devising such a system in the first place. With the increasing emphasis on the ECN and co-operation among EU authorities, and the task allocation framework established by the Commission, the pace of implementation of antitrust law in some of the newer Member States has been impressive. Poland recently imposed a record fine of almost EUR100 million on participants in a domestic cement cartel which, if nothing else, is a sign of real confidence in applying the EU rules.

Accession of new Member States, potentially even as large as Turkey, will slow the speed of convergence. In twenty years though, it seems likely that a great many (though not all) of the differences one can expect to witness when dealing with different EU antitrust authorities will have been ironed out. A recent anecdote suggests that a judge in one of the “old” Member States with a long antitrust tradition served copies of a Commission and national authority “dawn raid” authorization to the target company several days before the surprise investigation was due to take place, in order to preserve the company’s rights of defense. Regardless of legal convergence, the EU will always have its complications!

### IV. EVER GREATER INTERNATIONAL CO-OPERATION AND HOMOGENEITY

Over time, the competition laws of all major global economies are becoming more homogenous and the degree of co-operation is increasing constantly. One already sees high levels of information sharing and co-ordination between the European Commission, the Canadian Competition Bureau, the U.S.’s Federal Trade Commission and Department of Justice, the Japanese FTC, the Korean FTC, the Brazilian CADE, and others. This co-operation includes the simultaneous conduct of “dawn raids” in relation to suspected offenses in different jurisdictions.

Vast economies, such as China and India, are moving fast towards the expansion of this net with the adoption of broadly similar competition laws (the Chinese Anti-Monopoly law in force since 2008 has its own peculiarities, but is largely based on EU competition law and contains concepts which will be familiar to antitrust practitioners everywhere). The direction of international trade policy has been ever greater inter-dependence and co-operation (as a result of, and in response to, globalization) and in twenty years it seems very likely that all major economies will apply broadly similar competition laws (for example outlawing cartels) and will have forged active co-operation links (as opposed merely to good relations through the ICN or similar) in the way that has already happened with a handful of authorities. For antitrust enforcement this will mean that jurisdictional differences and ambiguities will diminish in importance, and there truly will be no escape for those found to have breached core principles.

## V. TECHNOLOGY/INFORMATION SHARING—WHAT HOPE FOR INFORMATION PRIVACY?

At the time of writing, the storm surrounding the *Wikileaks* publication of U.S. embassy cables is at its height. The European Court of Justice in its 2010 *Akzo* judgment denied the right of in-house lawyers to assert legal privilege in EU competition law investigations. An extremely artificial, convoluted, and legally risky process exists to allow EU leniency applicants to submit information to the European Commission without generating documents which might be subject to the long-arm of a U.S. court's discovery order. The physical location (and therefore legal jurisdiction) over electronically stored information with servers dotted around the globe is already a jurisprudential labyrinth, though this pales in comparison to the legal complications presented by cloud computing, where information is simultaneously everywhere and no-where.

In these circumstances, it is not hard to conclude that something has to “give” in response to the way that the globalization of business had led to the globalization of information and the way that computing has led to a massive proliferation of the volume of information that businesses generate. The multitude of overlapping and conflicting legal regimes that exist in relation to the ability to access information are already a drain on businesses and antitrust enforcers alike. In 20 years time, what volume of information will need to be handed over in a “second phase/second request” scenario or in response to the sort of broad information requests that antitrust enforcers or litigants typically are entitled to raise? As volume and complexity grow, as they surely will, it seems inevitable that some antitrust enforcement rules (beyond the very limited rules that already exist) regarding information retention, cross border disclosure obligations, and the scope of those obligations, will be agreed, perhaps initially, in the pre-existing co-operation agreements between authorities.

## VI. EU PATENT

In 20 years, the EU Member States will still be bickering about which languages should be used for the conduct of the EU's institutional activities, though advances in translation technology will finally remove the question which has now held up the EU-wide patent since the 1970s: Which language should EU patent applications be filed in? The existence of an EU-wide patent should allow a consistent body of antitrust law to develop around the exploitation of such intellectual property rights, and put an end to the system's current ambiguities (for example, in which the Commission can find the exploitation of a patent to be an abuse of dominance because what it protects is not, in the Commission's view, innovative enough).

## VII. CIVIL ACTIONS

In many respects, the development of EU antitrust law and policy has mirrored, with a time lag, the development of antitrust law and policy within the United States.

The Commission is currently considering the introduction of EU collective redress mechanisms to allow for group recovery of damages for a range of legal wrongs, including for breaches of antitrust law. In broad terms, the international business community has been steadfastly opposed to the introduction of such measures precisely because they fear that the gross excesses and abuses that are witnessed in the United States will also become the norm in the EU. The Commission has offered reassurances that any collective redress model will have an “EU character” and safeguards will be built-in to avoid what has been termed the “toxic cocktail” of the U.S. system. However, with some justification, businesses are concerned that once the incentive for litigation profiteering exists, the drift towards the U.S. system will be unstoppable.

A study by the research firm Tillinghast Towers-Perrin estimates that the tort litigation system in the United States costs \$252 billion annually, or \$835 for every U.S. citizen, amounting to 1.83 percent of GDP, compared to between 0.5 and 0.7 percent in other OECD countries. Many commentators argue that litigation abuse dulls the U.S. competitive edge and diverts huge resources, yet the system is so ingrained in the United States that, despite recognizing its failings, successive U.S. administrations have struggled for decades and in vain to get it under control.

It seems inevitable that some form of collective action will be created in the EU. This will likely contain some safeguards against abuse, but these safeguards will underestimate the resources, energy, and innovation that will be deployed by an emergent EU plaintiff's bar (as well as investors in litigation) to profit from the system. By 2030, the face of the EU competition law bar will have shifted towards U.S.-style litigation and the EU itself will be struggling with proposals for litigation reform, because of the drag on the economy that the collective redress system has created.

### VIII. CRIMINALIZATION OF COMPETITION LAW

Although not required by EU law, Member States have gradually been criminalizing breaches of competition law. This may—in part—be further emulation of the U.S. system (though with the familiar time-lag), where prison sentences for executives who have breached antitrust law are common and prison sentences for *foreign* executives are ever more common (more than 50 non-U.S. executives have been jailed in U.S. prisons since 2000). The total number of jail days imposed upon individuals in the United States in 2001 was 4,800. By 2007, this had risen over 600 percent to 31,391.<sup>9</sup>

At the time of writing, only a handful of criminal convictions involving jail time (actual or suspended) for antitrust offenses have been handed down anywhere in the EU, though there have been some high profile attempted prosecutions. As an example, the outcome of the U.K. OFT's efforts to prosecute former British Airways executives charged with offenses related to the air-cargo cartel is best summed up by a contemporaneous newspaper headline: "OFT attacked for monumental incompetence in collapsed BA price-fixing trial."<sup>10</sup>

Having said that, it seems only to be a matter of time before a criminal law regime becomes a more prominent element of EU antitrust enforcement.

By 2030, the antitrust bar will also therefore include (in addition to civil litigators), many more "white collar" criminal lawyers. By that time one can reasonably expect later versions of the EU Arrest Warrant and EU Evidence Warrant (both already in existence) to be important tools as Member States rely upon each other to remove jurisdictional barriers to arrest and enforcement.

### IX. CONCLUSIONS—PLUS ÇA CHANGE...

In his speech on October 21, 2010 entitled *Competition Policy: State of Play and Future Outlook* Commissioner Almunia echoed the message of continuity offered by his predecessor in 1991 by

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<sup>9</sup> Scott Hammond, *Recent developments, trends and milestones in the Antitrust Divisions's Criminal Enforcement Program*, speech (March, 2008) available at <http://www.justice.gov/atr/public/speeches/232716.htm>.

<sup>10</sup> Daily Telegraph (May 11, 2010) available at <http://www.telegraph.co.uk/finance/newsbysector/transport/7707799/OFT-attacked-for-monumental-incompetance-in-collapsed-BA-price-fixing-trial.html>

stating that “we need to keep our rules in tune with today’s changing economy and ensure that we have a consistent framework, rooted in solid economic principles, that can give guidance to companies.”<sup>11</sup>

Internal and external co-operation, legal convergence, technological development, an EU patent, EU “class actions,” and real criminal risks for antitrust offenses are just a few of the areas in which changes are likely, within a framework of constant rules.

The true driver of developments, though, will be economic, technological, or political “events” entirely external to the world of competition and policy and which, almost by definition, will move faster than policy.

If businesses are not themselves trying to cause such events, all they can really do is brace themselves!

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<sup>11</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/576&format=HTML&aged=0&language=EN&guiLanguage=en>