The first ENTraNCE Annual Conference was held on 14th-15th October, 2016, with the aim of discussing the most recent developments, both in the USA 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 USA in the aftermath of the EU Damages Directive.

I. The first session dealt with the assessment of horizontal and vertical agreements in online markets. Participants 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. In the Pierre Fabre case, 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\(^3\). 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.\(^4\)

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) across-
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). The analysis
of the impact of vertical restraints on the
realisation of the potential benefits that are
associated with online markets is key.

Another strand of the debate dealt with the
diversity and fast-changing nature of platform
ecosystems in the digital economy. The
question was posed whether an online platform
can act as a facilitator of collusion. For
instance, in the Eturas case\(^5\), the participation

\(^3\) Court of Justice of the EU Case C-439/09 of 13th 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 of 16th
December, 2002, on the implementation of the rules on
competition that are laid down in Articles 81 and 82 of the
Treaty).

\(^5\) 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

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 the competition watchdogs’
scrutiny. In Meyer v. 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 only to the US. 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 algorithm for the fees.

Within this framework of discussion, the
payment card market represents one of the
most prominent and interesting examples.
Participants shed light on the fact that the
payment card market’s network rules and

referred to the ECJ. See C-74/14 UAB Eturas and Others v
Lietuvos Respublikos konkurencijos taryba.
pricing mechanisms have been subject, first, to several Commission’s investigations, and afterward, to the EU Regulation 2015/751\(^6\) aimed at the avoidance of unreasonably high interchange fees and the imposition of transparency obligations on banks and retailers.

II. The debate in the second section was enriched by an overview of the latest developments recorded in the field of merger control at the EU level. It was argued that the international dimension is becoming increasingly important for 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.\(^7\) The trend certainly reflects the increasing convergence of the two antitrust models towards a new global framework that requires coordinated enforcement actions. In the digital era, it also seems important to investigate whether the current thresholds, which are based on turnover, are still able to capture all the cases that would need to be examined.\(^8\)

Next, it was submitted that the Commission has intensified the scrutiny of the potential loss of innovation in its merger reviews. 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 EU and US jurisdictions, the respective Guidelines invite NCAs to be particularly cautious in authorising the acquisition of a “maverick” firm.\(^9\)

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 large consensus on this point, both in the EU and in the USA. On the other hand, post-Schumpeterian theories that assume that innovation increases with the firm’s size and market concentration, make this point still controversial.\(^10\) However, the mixed results drawn from more recent empirical studies suggest that there are some methodological

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\(^7\) 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%).

\(^8\) 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.


\(^10\) In particular, in the USA, 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.
problems that are associated with the use of proxy variables for innovation that reduce the significance of any hypothesis of this type.\textsuperscript{11}

Participants 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.\textsuperscript{12}

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.

III. The third panel examined technological developments as 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. 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 USA 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 addition, 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.

\textsuperscript{11} Cohen and Levin (1989); Scherer (1980); Bound, Cummins et al. (1984); and Cremer and Sirbu (1978).

\textsuperscript{12} OECD, The Impact of disruptive innovations on competition law enforcement, 2015.
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 produce 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.

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. 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 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.

Discussions then focused on the competition challenges that are related to the search markets. As is known, the major legal case relating to searching concerns the investigations of Google by the EU Commission. 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 extremely 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 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.

IV. The final panel dealt with the private enforcement of antitrust rules. As known, the US system is characterised by a number of elements: 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 USA. In fact, private actions have gained an impressive power to decide which theories of harm deserve more attention, thus, somehow, they act as gatekeepers and agenda-setters. In reaction, the US authorities are increasing their role as amicus curiae.

The second mentioned consequences is deterrence. Class actions constitute a very powerful tool to dissuade people/companies from committing infringements. Moreover, usually, private actions stress the theory of harm, while public ones often end in a negotiated solutions.

Furthermore, it was noted that currently, in the USA, there is a fierce debate on whether the private enforcement system can lead to over-deterrence. Although there is no convincing study that demonstrates this thesis; nevertheless, the US authorities seem somehow to endorse 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.

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, among which, the provisions that deal with the right of disclosure and the access to information, using black lists and grey lists, which so doing attribute to the Directive the role of game changer.

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 clear 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 one.

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. Perhaps, a more interventionist attitude from the competition authorities, acting as amicus curiae and providing support to national judges, could be of help. In addition, it was suggested that NCAs should provide more data and more detail about the infringement in their decisions, especially in the current context, where settlements are very common. Otherwise, it becomes difficult for all, not only the courts, to investigate cartels, other infringements, and the theory of harm behind them, if judgments and decisions do not provide details on their functioning and do not attempt to quantify the harm.