BŁACHUCKI, M., ed., (2021)
International Cooperation of Competition Authorities in Europe:
from Bilateral Agreements to Transgovernmental Networks.
Warsaw: Publishing House of ILS PAS
DOI: 10.5281/zenodo.5011848
pp. 15-20.

REFLECTIONS ON INTERNATIONAL COOPERATION – FOREWORD[1]

BY STEPHEN CALKINS

From 2011 to 2015, I had the honor of serving as a Member of the Irish Competition Authority and its successor organization, the Competition and Consumer Protection Commission. For part of that time I served as Director of the Mergers Division, in which capacity I participated in the EU Merger Working Group.[2] This experience was a particular pleasure, so when Mateusz Błachucki invited me to contribute to a book devoted to international cooperation among National Competition Authorities ('NCAs'), with articles by a good number of current and former participants in the Merger Working Group, I was delighted to set out a few thoughts, reactions, and observations.

Although the plan was for me to read two or three of the chapters and offer some reflections, I ended up asking for chapter after chapter, eventually reading them all. And what a delight that was! Different perspectives, different points of emphasis, but all supporting Mateusz's brilliant common theme: 'from networks of authorities to networks of people'. Indeed, my counting so many of the contributors as friends is powerful support for the theme.

Complementing the book's central theme are several subsidiary themes: the intersection with private advising and enforcement; tensions between technocratic and political control; relations between NCAs and the European Commission ('Commission');[3] and – a related point – NCAs learning from and about each other. I will address each sub-theme in turn.

1 All views expressed in this text are in author's individual capacity.

2 EC, *European Competition Network Cooperation in merger control. The EU Merger Working Group*. Available from: https://ec.europa.eu/competition/ecn/mergers.html [Accessed September, 12 2020].

3 See the website for the Directorate-General for Competition. Available from: https://ec.europa.eu/dgs/competition/index_en.htm [Accessed September, 12 2020].

Private Parties

Three chapters focus on private parties, each from a very different perspective. Eduard Paulus sets out a careful chronology of steps taken to encourage private enforcement in Europe. It is hard to overstate the difference made by a vigorous program of private enforcement. It provides for compensation and deterrence, of course. But it also shapes the law and the legal landscape.[4]

Wolfgang Heckenberger points to, among other things, the potential 'enormous amounts' involved in civil damages when he sets out the importance of corporate compliance programs. He reviews the hallmarks of effective programs and also notes that the US Justice Department recently reversed its long-standing refusal to give 'credit' for a compliance program (one that, by definition, did not work to prevent a violation).[5] There has been a long-standing debate about this issue (my own preference, has been to leave it to the business entity to choose the appropriate mix of good hiring, sound incentives, appropriate compensation, and compliance programs, with the reward being the avoidance of liability[6]).

Finally (of these three chapters), Marta Michałek-Gervais addresses the important initiative, ECN+,[7] which is also discussed in some other chapters. Reading analyses of ECN+ is a bit like the story of blind men describing an elephant, since one observer might emphasize the call for additional enforcement tools (an important issue in Ireland), one the call for agency resources and independence, and another the recognition of the importance of due process. Dr. Michałek-Gervais addresses this last issue, which is another issue of importance to the current US Justice Department.[8]

What kind of control?

As noted, one ECN+ theme is agency independence. But what does agency independence mean, and is it necessarily an unqualified virtue?

4 CALKINS, S. (2018) Reflections on Matsushita and 'Equilibrating Tendencies': Lessons for Competition Authorities, *Antitrust Law Journal* 82, p. 201.

5 US Department of Justice. Office of Public Affairs (2019) *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 11, 2019). Available from: https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance [Accessed September, 12 2020].

6 CALKINS, S. (1998) Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties, *Law & Contemporary Problems* 60, p. 127.

7 See EC, *Empowering National Competition Authorities* [Directive (EU) 2019/1 was signed into law 11 Dec. 2018]. Available from: https://ec.europa.eu/competition/antitrust/nca.html [Accessed September, 12 2020].

8 US Department of Justice. Office of Public Affairs (2019) New multilateral framework on procedures approved by the International Competition Network (April, 5 2019). Available from: https://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network [Accessed September 12, 2020].

This is an issue with which the US is awkwardly grappling. It has long been the accepted view among members of the US competition community that competition enforcement is and must be independent and non-political. One of the two agencies, the Federal Trade Commission, *is* an 'independent agency', with five commissioners serving staggered, seven-year terms (longer if necessary to have a successor confirmed), removable only for cause (meaning serious malfeasance), a principle that was upheld in the landmark Supreme Court case, *Humphrey's Executor v. United States.*[9] Although the President nominates all Commissioners for Senate confirmation, no more than three Commissioners may come from the same party; the opposition party effectively controls the selection of the Commissioners who are members of that party; and the agency has long operated in a bi-partisan fashion.[10]

The generally-accepted insistance that enforcement by the other US competition agency, the Antitrust Division of the Department of Justice, also is 'independent' is a bit trickier because the President not only nominates (for Senate confirmation) the Attorney General and the Assistant Attorney General ('AAG') (the head of the Division), but can remove them at will, since they serve at the pleasure of the President. In spite of this, the accepted tradition of US competition enforcement is that it nonetheless is independent and unpolitical. One of the great stories illustrating this principle is of AAG William Baxter, who faced down the opposition of the entire government and pursued the case that led to the breakup of AT&T. (Baxter's position was that he would drop the case only in response to a highly unlikely direct order from the President.)[11]

Now the continued independence of both US agencies is being questioned. In *Seila Law LLC v. Consumer Financial Protection Bureau,*[12] the Supreme Court held that the Constitution mandates that the President be able to remove at will the single head of an agency, and read *Hemphrey's Executor* as protecting for cause removal only for 'multimember expert agencies that do not wield substantial executive power'.[13] Given the FTC's substantial current enforcement powers, there is considerable uncertainty as to whether its for cause removal can survive future attack and what the consequences of eliminating that protection would be.[14] Meanwhile, the competition community has been distressed to witness suggestions that the Trump Antitrust Division has not

9 295 US 602 (1935) (Sutherland, J.) (9-0). A Commissioner may be removed only for 'inefficiency, neglect of duty, or malfeasance in office'. 15 U.S.C. §41.

10 CALKINS, S. (2019) *Remarks Intended for Delivery on the Acceptance of the American Antitrust Institute's 2019 Award for Antitrust Achievement.* Available from: https://www.antitrustinstitute.org/wp-content/uploads/2019/08/Calkins_201-Antitrust-Achievement-Award.pdf [Accessed September, 12 2020].

11 SCHMALENSEE, R. (1999) Bill Baxter in the Antitrust Arena: An Economist's Appreciation, *Stanford Law Review*, 51, pp. 1317, 1326.

12 *Seila Law LLC v. Consumer Financial Protection Bureau* [2020] US Report 591, 140 S. Ct., p. 2183.

13 Ibid, p. 2199-2200.

14 The Supreme Court will be addressing the question of the Constitutionality of protections for heads of agencies again in the forthcoming term. *Collins v. Mnuchin* (2020) Dkt. 19-42 (cert. granted July 9, 2020) (consolidated with Dkt. 19-563).

operated with traditional independence.[15] Whatever the truth of such suggestions, it is worrisome that they are even being made.

It is thus particularly interesting and timely to see related issues being addressed by European authors. Given the ongoing political controversy, we are fortunate to have two chapters written from a Polish perspective. It was fascinating to read Professor Błachucki's account of the Polish NCA directly participating in negotiations over the ECN+ Directive, including agreeing to guarantees of agency independence that are contrary to decisions of the Polish parliament. In contrast, Professor Stankiewicz asks hard questions about how we can achieve both independence and accountability. It is a very delicate balance, made much more challenging in these troubled times.

A related challenge is discussed, with an insider's perspective, in the insightful chapter by Dr. Andreas Bardong. Using helpful illustrations, he points out that the Merger Working Group is a forum for exchanges among experts. That was my experience, too, and as Dr. Bardong explains, the nature of the body has both advantages and limitations. Independent expertise takes one only so far.

Relations Between NCAs and Commission

American competition enforcement features two federal agencies, countless 'private attorneys general', and the public attorneys general of all fifty states, the District of Columbia, and more.[16] States – the original competition enforcers – have seen their roles rise and fall, but in modern times they have been an important part of the competition landscape at least since the Reagan Administration. Today, the National Association of Attorneys General has a standing Antitrust Committee and a Multistate Task Force,[17] both established to help the states play an important role separate from that of the federal enforcers. (When not living in Europe, I have spoken regularly at the Committee's annual training program, and thus have come to know something about the state perspective.)

Both US federal and state enforcers seek to protect competition and consumers, and their efforts are often complementary. Almost inevitably, however, there are occasional tensions and varying perspectives. State enforcers may believe that they have a better understanding of what consumers want and how local markets work; federal enforcers tend to have greater resources and sometimes advanced expertise. Relations are often good, but there can be tensions.

15 GOODMAN, R. (2020) *11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Bar—and Office of Professional Responsibility's Opinion*. Available from: https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibilitys-letter/ [Accessed September 12, 2020].

16 CALKINS, S. (2003) *Perspectives on State and Federal Antitrust Enforcement*. Duke Law Journal 53, p. 673.

17 See website of National Association of Attorneys General. Available from: https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php [Accessed September, 12 2020].

So it is, also, with relations between European NCAs and the Commission. The NCAs and the Commission work together, but also separately – harmoniously or sometimes at odds. (As for the importance of NCAs, Marta Michałek-Gervais reminds us that the vast majority of enforcement actions are brought by NCAs.) When working smoothly, the Merger Working Group can facilitate the best. Ricardo Bayão Horta and Rita Prates do a nice job of reviewing the surprisingly complicated procedures for deciding which mergers are reviewed at which level. Martin Sauermann and Fabian Pape address the same important subject, but add in the tricky question of whether Big Data has exposed flaws in our system of notification thresholds.

David Viros develops one important but sometimes overlooked issue, namely the importance of enforcers being able to share confidential information, which so often involves obtaining waivers from private parties. All too often the issue is dismissed with a casual assertion that parties usually grant waivers. Although that may be true, a waiver-based system has the unfortunate effect of putting the government agency at the mercy of the private party, and it relies upon private parties' acting responsibly. Moreover, if a private party is facing multiple investigations, any normal instinct to cooperate may be put aside, which would serve suddenly to make the need to obtain a waiver more significant.

A key point is that, in the US and in Europe, good personal relations make everything work more smoothly. This is emphasized in many of the chapters, including those by Adriana Meijide Vidal and Marta García Álvarez, and by Erika Lovásová and Daniela Lukáčová. The latter chapter also sets out the important role the Commission can play by serving as an amicus in court proceedings.[18]

Learning From and About One Another

Personal relations really do make a difference. Meetings of the Merger Working Group were invaluable in part because of the substantive learning, but even more because of the building of personal bonds. Dr. Bardong enchantingly captures this with his reference to 'the «lounge» of the NCA merger network.' Erika Lovásová and Daniela Lukáčová elaborate on the benefits that come from exchanging ideas and harmonizing procedures. Everyone has something to learn, and it is so very helpful to be able to talk with another enforcer about what worked (and what did not!), how they accomplished something, or why they proceeded the way they did. Information is also exchanged at meetings of the International Competition Network,[19] but the active participation of lawyers and economists working to influence enforcers, although beneficial in some respects, makes candid communication more challenging.

18 See CALKINS, S. (2016) The Antitrust Conversation (Continued). *European Competition Law Annual*, pp. 231-278.

19 See website of ICN. Available from: https://www.internationalcompetitionnetwork.org/ [Accessed September, 12 2020].

Several other chapters, also emphasize what can be learned by exchanging views. Michele Pacillo (with whom I overlapped at the Irish agency) looks at the way in which mutual trust and established working relationships are key. The benefits of collaboration – and how to facilitate it – also are emphasized by Maarit Taurula.

Cleo Alliston tells a great if bitter-sweet story of the importance of exchanging information and working together. Europe saw a series of 4-3 telecom mergers, usually with controversial commitments often involving mobile virtual network operators. The Austrian experience was not a happy one, and the Irish merger faced significant opposition. Inevitably, participation by unhappy, say, Austrian representatives makes for a sharper review. It should not have surprised anyone that finally enough was enough, and the UK merger was blocked. (The story is bitter-sweet, of course, because presumably after the chapter was written, the General Court annulled the Commission's decision blocking the merger.[20] The Commission is filing an appeal.)

Conclusion

It was a pleasure to read these chapters. They offered information, stimulation and insight. For me personally, however, the greatest benefit was in helping me recall warm memories of interactions with members of the Merger Working Group. Working out the best approach to remedies, minority shareholdings, and referral procedures – to pick three issues referenced in a couple of chapters – was any enforcer's idea of a good time.

Although this book's chapters address in varying ways the benefits of cooperation, I want to close by emphasizing one specific benefit: the ability to make a telephone call. Good relations come from working together and exchanging views. But once agencies *have* good relations, they can check on some fact or learn some background information by a simple telephone call. And that can make all the difference.

My understanding is that the Merger Working Group has not met, even virtually, since the pandemic arrived. Perhaps the Group does not play as vibrant a role as it did only recently. Regardless of the mechanism, there should be no doubt that international cooperation among enforcers is of critical importance. If nothing else, when a score of global law firms have more than a thousand lawyers and at least a dozen law firms have 30 or more offices, enforcers that don't cooperate with each other are at a severe disadvantage. And as the chapters in this book so vividly illustrate, cooperation can mean networks of authorities leading to networks of people.

20 *CK Telecoms UK Investments Ltd. v. Commission* [2020] ECLI:EU:T:2020:217.