What if competition law was easy?

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To contribute to the Young Competition Law Scholars Conference on ‘Competition Law and Future Technologies’, I wanted to remind and assure the participants that the complexity and speed of such markets does not mean that there is no role for ex post competition law. Of course, I am also a proponent of ex ante regulation with respect to some firms that act as gatekeepers to markets and have an opportunity to exclude rivals or exploit customers and other users. That is a big change, but competition law still has much to offer in high tech markets. Sometimes it can all seem too difficult though. Indeed, competition law itself has become more difficult and complex, primarily because of a switch from formal conduct-based offences, particularly in finding against dominant firms, to a more economic approach that relies on actual evidence of likely harm. But the entire concept of dominance and the conduct itself can be very complicated to identify, particularly when much tech conduct offerings are spectacular and observers miss the ‘sleight’ of (a just barely) visible hand that can cause harm.

The complications of the business models and practices in high tech, while daunting, really aren’t all that new – not to these old eyes anyway. There is a lot we know about such structures and conduct from other markets. And yes, while we should always be evolving our analysis and approaches, a lot of what we know already can help us identify some rules of thumb for all forms of application of competition law.

I offer ten, in reverse order:

10. Please please please have a theory of harm. This sounds obvious now, but it wasn’t always the case, and as I mentioned, a formalistic form of approach meant that if dominance was found, then practically any listed practice or even others, could become an offence. That changed when economists entered the field, and demanded a theory of harm, rather than a form-based offence. That made competition law enforcement more difficult but better targeted and less likely to harm aspects of the business that may be efficiency-enhancing. So, have a theory of harm, and make sure it is economically-literate, for example by including an analysis of incentives.

9. Complex markets do not always require effects-based evidence. This rule may seem to contradict rule 1, but actually it does not. The current practice is not completely formal, but there are some object offences that may require application of experience with similar problems or the existing circumstances etc. – but not full economic effects analysis. We still see exclusion and exploitation in tech markets, but these are just analog models in digital clothes, or old wine in new bottles and shouldn't be allowed to fool anyone – least of all enforcers. But what if we meet a type of conduct that we haven't seen before, and have no experience with or we are faced with completely new circumstances? Can we still use an object-based approach? Yes, we can: if the harm is clearly obvious. This leads me to a corollary rule though.

8. If running an object theory of harm, let the harm be obvious. This means that a case team can not ask decision-makers to reserve days or even hours to assess the actual theory of harm at the core of the case. If a case team asked me for that long to look at the core legal and economic theory of harm, I would say, go back and run it as an effects case. Because if you can't explain it quickly, then the harm isn't obvious, and, by definition, a by object approach would be inappropriate and arguably unfair. Which takes me to another observation.

7. Fairness is not a theory of harm. Fairness and trust appear in so many competition enforcer speeches lately it is almost as if the officials are trying to create a vibe to prepare us for decisions that apply those concepts.

Now, I like fairness. I like trust. I like motherhood and apple pie. But an allegation of unfairness is not a theory of harm. And it certainly is not a concept that can be operationalised in enforcement cases. Keep the concept for the testimony to parliament, a press release or a speech, but in any area of life, including enforcement, people's views of what is fair for them can conflict with others – and create actual or real conflict.

Let me tell you what I think about fairness. I said it is not operational as an enforcement concept, but it does motivate a core aspect of competition law, and perhaps is the core itself. That said, if you think of competition as about improving markets through genuine rivalry, improving performance, advancing innovation, and the like, then if you work hard, use superior skill foresight and industry, and pull ahead of your rivals, then you shouldn't be turned upon when you win. I think it is absolutely fair that competitions have losers. In fact, if there isn't a loser, then it isn't a competition, it's a participation sport where everyone wins. That said, if the conduct is not performance-based competition on the merits, but instead is a form of sabotage of rivals, or their exclusion, then that harms the competition itself, and any benefits it might bring.

6. Cui Bono? And about benefits, the businesses will always argue that there are benefits to their conduct. Usually, we assess these benefits after setting out the offence. I don't think an authority should have to wait to engage with these questions, for example at the later Art. 101 (3) TFEU stage – in all cases. Surely, at early meetings with the company, we can ask who benefits from their pro-competitive, pro-efficiency rational for the practice in question. If that evidence stacks up, it might be possible for the authority to at least deprioritise the case earlier. Equally if the company can't answer the question about who benefits (other than pointing to themselves), then that too is telling. I like to try to work out if the practice makes any economic sense. If it doesn't other than to benefit the company and harm others then, we advance to a more involved analysis. We do need to understand the business model, incentives, and as for benefits, we should 'follow the money'. In tech this often means following the data to see how the business model is paid for, used and how available it is.

5. A case closure should be written up. At least to show where conduct is safe. The authority has done all the work, weighed the evidence, debated it all internally, and decided not to intervene, after a considerable expenditure, paid by the public. During any investigation the defendant firm and often other firms are chilled from doing much new activity. That can be good if there was an offence, but if the case is closed, then there is an opportunity, and I would say responsibility, to spend a bit more of the authority budget to write it up. Business is a minefield for all companies in a sector under investigation, or where the law is vague. A well-written no grounds for action decision should not be seen by the authority's lawyers as a dangerous precedent that binds their hands. It can be suitably qualified to still show all companies where safe is, the path through the mine field if you will. It's also a benefit to the authority in terms of signalling to complainants that the enforcers don't want their case pipeline clogged up with such matters.

4. Commitments should meet the competitive concerns. In fact, clarity and communication is key. An authority should write up its concerns clearly, so the parties can better see the problem and craft a solution through commitments, equally drafted clearly so the two sides balance. And a note for authorities: one market test of clear concerns and clear commitments and please take a view, have some self-discipline, write and test clearly and move on.

3. A watchdog needs more than one tooth. Fines are fine, they punish and they deter, they get the word out that certain conduct will not stand, man. Authorities should want to face those who violate the law with a full array of tools to clamp down on anticompetitive conduct. Director disqualifications make liability for wrong-doing personal, and this tends to focus executive minds. Direct compensation arrangements for harmed consumers can also be trialled by authorities. Some authorities have even benefitted by being more in the public eye, explaining their work in terms that laypeople can appreciate.

2. Always be enforcing. This is another obvious one, but policy statements, speeches, and guidance only go so far. An authority needs some steel in its sword, to make its other statements listened to, and to indicate to firms that they help with compliance or face the consequences, which are much more distracting, disruptive to the business and expensive.

1. Do no harm. Another obvious rule, but one that authorities need to adopt as a form of Hippocratic oath. We shouldn't intervene to replace winners with less efficient firms, and we shouldn't inflict harm or distort incentives. Obviously, if we find something malignant, we shouldn't kill the patient just to get rid of it. We are not here to change business models, but to keep them clean.

Our remedies should go with the grain of technological developments, accelerate change and innovation and do not push tech or other markets backwards. Authorities should not order firms to create products that are less innovative, or price them higher, just to help rivals catch up. That way madness lies. And would obviously harm consumers and again, not be representative of true competition. So don't handicap the leaders so the less capable can catch up. Instead, do things to spur the chasing pack and to provide opportunities for new entry too, and this will itself add competitive discipline – like chasing runner's breath on your neck – to work harder. That's what we did in our CMA banking investigation. We could have broken up the banks but that wouldn't have helped. So, we opened them up, got them to release data they were just sitting on. Fintechs and other banks can use that data to devise apps that help consumers choose between providers. And this in turn creates new services and more competitive offerings which in turn wakes up the sleepy incumbents.

Now, you may say, my 10 rules are too simple and won't always apply. You may say competition law is supposed to be hard. And I assure you it will stay that way… that's what makes it intellectually satisfying and what justifies enforcers' care, and some advisors' huge fees. But what I would say to you is that we do these things, we work in competition law, because it is hard. All I would add is that always ask yourself, you the true future of antitrust, to do two things: first, when you are working late at night on a paper, or a file or some impossible, intractable problem, step back, nibble some chocolate and ask, ‘what if this was easy?’ I’m not saying this will always work, but it might give you some perspective and lift you out of the grinding nature of some analysis and let you find some insight that unlocks the problem. Secondly, please please please try to remember that if you’re not having fun, there’s probably something wrong. You have one life to live, if you are going to devote a large part of it to competition law, at least make it both intellectually satisfying and personally rewarding, collaborative and yes, sometimes, fun.