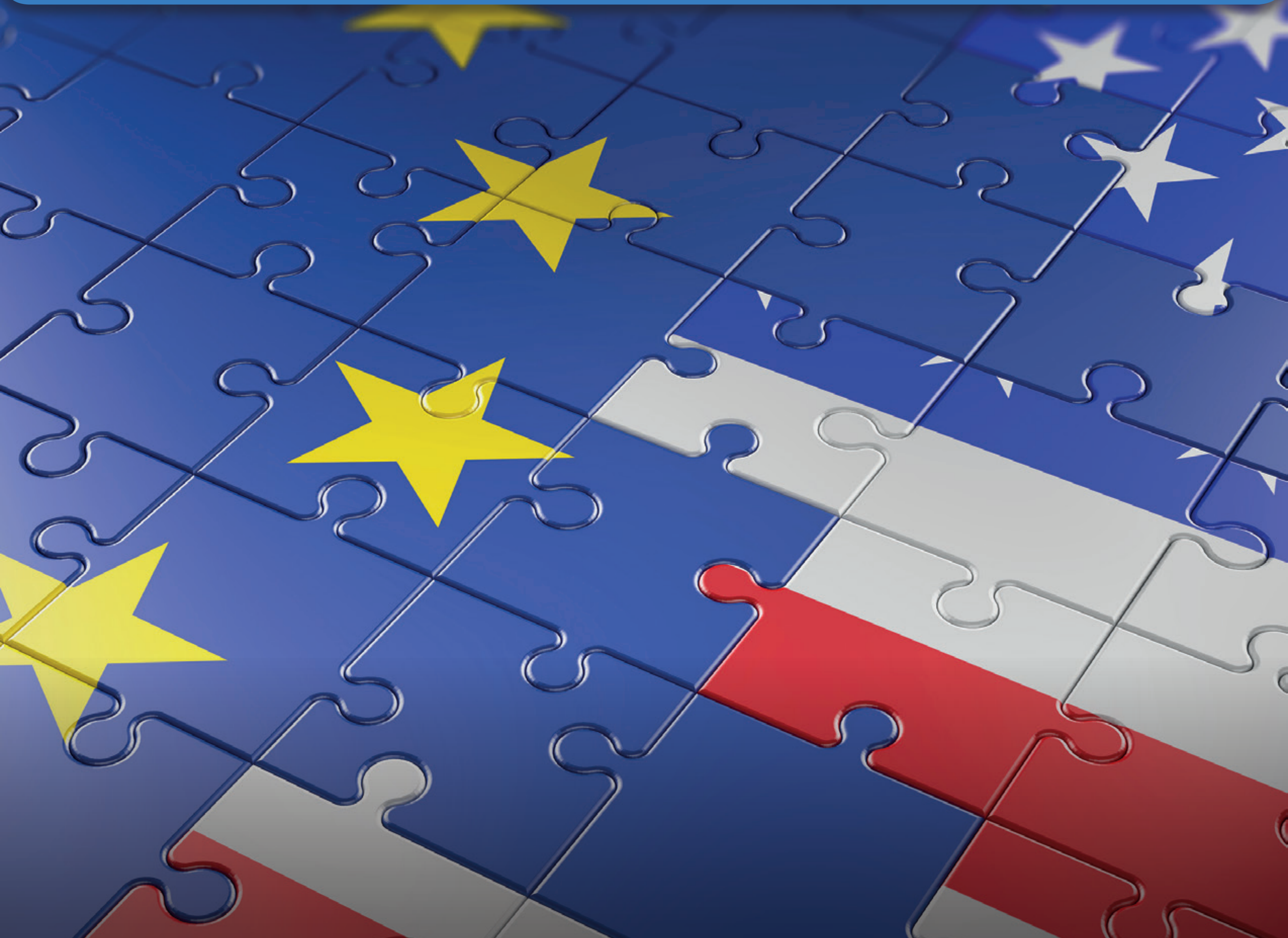
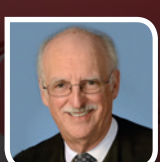
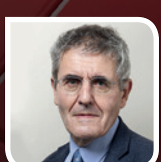
# EFFECTS-BASED ANALYSIS: WHERE DO WE STAND ON BOTH SIDES OF THE ATLANTIC?



PANEL MODERATED BY JEAN-FRANÇOIS BELLIS[1] FEATURING JUDGE DOUGLAS GINSBURG[2] & SIR ROBIN JACOB[3]

1 Founding partner of Van Bael & Bellis.

2 Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the International Board of Advisors of GAI, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice.

3 Sir Hugh Laddie Chair of Intellectual Property Law, University College London and former judge at the Court of Appeal of England and Wales.

# CPI ANTITRUST CHRONICLE MARCH 2019









**J.–F. Bellis:** I wish to thank Judge Douglas Ginsburg and Sir Robin Jacob, two famous judges and noted scholars in the field of competition and IP law, for having agreed to participate in this panel. The effects-based analysis is a topic which has attracted much attention in Europe in the last 20 years.

Before I launch the discussion, I would like to say a few words about the context in which the concept of effects-based analysis developed in Europe. It all started 20 years ago when the Commission embarked on what has been known as the modernization of European competition law. For a long time, from the early sixties until 2004, the European Commission had applied a very broad and formalistic concept of restriction of competition under which any agreement that restricted the freedom of action of a party was considered to fall within the prohibition of Article 85(1) of the EEC Treaty (now Article 101(1) TFEU) and was therefore null and void unless it qualified for an exemption under Article 85(3) which the Commission had the exclusive power to grant. The Commission used this monopoly over exemptions to force undertakings to adjust the terms of their contractual arrangements to make them compatible with EU competition policy which initially was focused on fostering market integration.

It is in that context that the Commission created this characteristic EU competition law instrument, the block exemption, with its list of contractual provisions which made an agreement ineligible for exemption, the so-called "black clauses." The block exemptions also contained lists of so-called "white clauses" which were consistent with the grant of the exemption, and also sometimes "grey clauses" which had an intermediate status. An essentially regulatory and form-based approach to the enforcement of competition law.

The Commission eventually grew tired of regulating contracts in that way and, at the end of the 90s, it published a white paper on the modernization of European competition law in which it proposed to give up its monopoly over exemptions and replace its form-based approach to competition law with a more sensible analysis of the actual effects of agreements on competition, hence the concept of effects-based analysis. These ideas were implemented in Regulation 1/2003, which entered into force in May 2004. Modernization was aimed at Article 85 of the EEC Treaty, the provision dealing with restrictive agreements, not at Article 86 (now Article 102 TFEU), dealing with abuses of dominance, which had also been enforced in a rather formalistic way by the European Commission since the 1960s.

Voices were heard advocating for the introduction of an effect-based analysis in Article 102 TFEU and this became a very controversial issue, even within the European Commission. In this context, there was an extraordinary development last year. In September 2017, the Court of Justice annulled a judgment of the EU General Court which had upheld the form-based approach applied by the European Commission in the *Intel* abuse of dominance case and referred the case back to the General Court. I would like to ask our panelists, starting with Judge Ginsburg, how they see the *Intel* judgment in the broader context of convergence or divergence between EU and U.S. antitrust laws. So, Judge Ginsburg, what is your take on *Intel*?

**D. Ginsburg:** Along with most observers in the U.S., I was pleased to read the *Intel* judgment. I view *Intel* as a major step towards modernization of the law, towards acknowledging the centrality of economic analysis in the administration of Article 102, and towards convergence of how the U.S. and the EU consider vertical restraints. The judgment itself seems to be a ringing endorsement of the notion that the Commission must engage in a realistic empirical assessment of the actual competitive effects of a restraint – or at least one that is capable of having pro-competitive consequences. It provides rather clear instruction to the General Court and ultimately to the Commission: If the defending firm asserts there is an efficiency justification that has beneficial consequences for the consumer, then the Commission is required to engage in significant analysis to inquire whether the restriction is one that would be prejudicial to an equally efficient competitor. The judgment speaks in realistic terms about how the law is not intended to shelter a competitor from the competition of a more efficient dominant firm.

In this way, the judgment seems to be an enormous stride forward. But immediately after the judgment was issued, the Director-General of DG COMP said that he interpreted the judgment as being essentially procedural, requiring no significant change in the Commission's way of doing business. This seemed, from a distance at least, clearly incorrect. Indeed, this interpretation of *Intel* has occasioned a good deal of criticism within Europe as well. The Director-General has since reiterated and perhaps softened his interpretation of the judgment a little – but a troubling gulf nonetheless remains between what the Director-General has said and how others have read the judgment. A good example would be the opinion rendered by Advocate General Wathelet in *Orange Polska*, in which he said the position taken by DG COMP was inconsistent with the *Intel* decision. *Intel* will not be the great stride forward that it appears to be if the Commission has to be dragged into the modern age in order to comply with it – which could take several years and several decisions more than if the Commission were willingly to embrace the decision.

Admittingly, the *Intel* judgment does put more of an onus on the Commission. If in the aftermath of *Cartes Bancaires* the standard is no longer by object, the Commission necessarily has a greater task on its hands. An effects-based analysis requires more work and will make it harder for the Commission to prove some cases. And it's understandable that bureaucracies resist being taxed with greater obligations – but in my view, it's very important that the judgment be implemented as it is written.

**J. Bellis:** And in the U.S., how would that issue be addressed?

**D. Ginsburg:** The doctrine in the U.S. has been effects-oriented for quite a long time now. Occasional decisions – usually in the intermediate courts – may backslide a little bit, but the drift has been quite clear. Our Supreme Court has been clear that the agencies are not able to rely upon *ipse dixit* presumptions in lieu of real analysis of real effects. Now, it's not always possible to ascertain the effects of a restraint that has been implemented in a particular case, so one may have to draw an analogy to related restraints in similar cases. Nevertheless, some restraints may be so often pro-competitive and beneficial to consumers that it would be a Type One error to condemn the restraint without particularized analysis. This has been the standard for at least 30 years, perhaps longer.

The so-called modernization undertaken in the early years of this century by the European Commission was in some ways modeled upon what had already transpired in the U.S. And what had transpired in the U.S. was itself a revolution, overthrowing the *ancien regime*, which was full of just the sort of unfounded presumptions and condemnations that you described as pre-existing here. It is unsurprising that, if the body of law grows up without significant reference to real world effects, then when one does start to look at real world effects, a lot of the law is going to be overturned. All sorts of vertical restraints were condemned *per se*, that is, by object, for many decades in the U.S. It was only in the *Sylvania* case in 1977 that the Supreme Court looked to the economic literature in order to decide that a territorial restraint on dealers could be pro-competitive. Agencies and private plaintiffs cannot condemn the conduct *per se*; they must actually prove their case. The consequence was that over a period of 30 years, ending in 2007, the Supreme Court overruled about five of its prior decisions on vertical restraints. Those cases did not stand up to scrutiny when the Court probed for actual effects. And something like that has seemingly begun now in the European Court of Justice, though perhaps not yet in the Commission and all the Member State competition agencies.

**J.-F. Bellis:** In the EU, the policy on vertical restraints was very much influenced by the political objective of eliminating barriers to trade between Member States. Distribution agreements which provided for import or export bans were seen as being directly inconsistent with the EU market integration. This led to the development of a very formalistic *per se* type approach to many vertical restraints. Now, Robin, your field is more IP law than competition law proper but there are, of course, many interactions between these two fields. In the last five years, there have been a number of very interesting cases in which the Commission and the Court of Justice have proved to be very interventionist in that area. What is your view on the application of the effects-based analysis to the licensing of IP rights?

**R. Jacob:** Right. It's different from this one altogether. I very much welcome the effects-based analysis. For many years in my life I have battled from time to time with competition authorities who have taken a theoretical approach. Sometimes actually leading to quite serious drags on innovation.

I was counsel for example, in *Nungesser*, for the British government…a long, long time ago. The European Commission actually had got to the point where it was saying every exclusive license of an IP right is anti-competitive, and would need an exemption. The theory was that the patent owner, or in the case of Nungesser, the holder of rights in seeds, was putting it out of his power to exploit his own invention because he'd handed it over to somebody else. Therefore, he'd agreed not to do it. Therefore, he'd agreed to not do something, so that was anti-competitive. And so, you had to have the Commission's permission to grant an exclusive license for any IP right. That was a very serious matter at the time. And I've seen it again from time to time.

I have a feeling we've got a bit of a worry about the regulators: they lose contact with the businesses they're regulating. More recently the Commission's attitude towards standard essential patents fell in the same box. They invented, or, didn't invent, but adopted, the theory of hold-up by patentee. Theory was that when he sued he was somehow going to get more than the FRAND royalty because he was holding a gun to the defendant. That was never real. Anybody who'd looked at the effects, said: "well, what's actually happening? Well. It isn't happening." And the U.S. court in *D-Link* when somebody was suggesting hold-up, said that is theory, but show me it is real which they couldn't do. And nobody ever has shown it.

It seems to me that we've got to be very careful with competition law. I don't blame the regulators, but they are sitting in offices and they've got pieces of paper. And they never get involved in the actual business. And if you don't have to, if you have nice easy rules, you don't have to go any further. So, it's this sort of natural lazy way to go, to have a bunch of rules. I'm very welcoming of the change, which is happening. And I think it's going to be pushed. And always the regulators will kick back. but it's the job of those who favor realism to advance the scientists' way of thinking. If you develop a theory as a scientist, it starts off with a sort of tentative idea. And you call it the hypothesis. And then you form a theory, which fits all the facts you've known. And it seems to sort of work. And now you have to test it. And if you can't test it, right, you've got a problem, and you can always only regard it as provisional. In fact, all scientists regard all theories as provisional. Maybe it'd be quite a good idea if competition lawyers did the same thing. Their theories must fit all the known facts.

**J.-F. Bellis:** Very interesting. I did not remember you were involved in the *Nungesser* case. My partner, Ivo Van Bael, wrote an article on that case entitled "Seeds of Hope." The title reflected the fact that, in that judgment, the Court of Justice opened the door to a more sensible approach to vertical restraints, departing from old ideas, some of which originated in the U.S.

**D. Ginsburg:** Oh, we were the principal offender. Until 1981, there had been a longstanding policy called the "Nine No No's of Patent Licensing," which prohibited almost anything worth doing with a patent. That was repudiated outright by the head of the Antitrust Division in 1981, as we had come to learn that many patent licensing practices can be procompetitive. The kind of hold-up that was implicitly behind the Nine No No's was very rare given how businesses actually operate. Even now, there are concerns about and calls for regulation of such things as royalty stacking, and some commentators would require that royalties be calculated on the basis of components rather than unit sales in the case of, for instance, smartphones.

The original practice had grown up completely without regulation and without difficulty, without any significant complaints. It was the uniform practice in the industry that royalties were calculated on the basis of unit sales rather than the manufacture of components. There's a reason for that. As is usually the case when businesses have converged upon a particular operating model, it's because that practice is efficient. It is a lot easier to count units of, say, mobile phones, than it is to count components or the number of times that a particular component is incorporated into a final product unit. At the time, there was a perfectly sensible, stable environment in which both sides of every licensing agreement were in accord — but then some self-interested parties lobbied competition agencies to prohibit this model. Their complaints then gained traction because regulators, and maybe courts, are just not familiar with the business practice and, as Robin described, tended to approach it from a non-scientific point of view.

**R. Jacob:** Yes, well, indeed. There is a slight complication here because the subject matter isn't nearly always subject to FRAND or RAND undertakings. And, the wording of some of those undertakings can be interpreted, perhaps quite easily interpreted, as including anybody who might have an interest, including just a chip maker, as being entitled to a license. I think Judge Lucy Koh has just so held in California on the basis of the FRAND or RAND undertaking. Then you have a big fight about what the rate of royalty will be for the chip. Well, the logical amount of royalty for the chip is exactly the same amount of royalty as you would say for the final phone, in which it ends. But, says the chip maker, that's much, much, more than it costs me to make the chip. I'd say "so what? That's that real value of it." A chip has no value unless it's in the phone. So, there's going to be battles along the line about that.

I just wanted to comment because it is said that the Commission is very worried about the level of litigation. They shouldn't be. It's very small. Again, their problem is they only see the cases that happen. They don't see all the cases that don't happen. There's a vast network of licenses, cross licenses, and a complex web of relationships going on behind the scenes which the whole of the mobile industry is working. So, before you start getting too excited again, it's an effects base, before you get too excited about this and start intervening, say "well, if it's working, why fix it?" And that's my basic attitude, this is really a pretty well-working worldwide industry. In fact, it's probably the biggest example of collective competitive human cooperation that has ever existed, ever. Leave well alone.

**J.-F. Bellis:** To play the devil's advocate, a mobile phone is covered, I was told, by thousands if not hundreds of thousands of patents. So, what if every patent owner claims for example, 3 percent, or even just 1 percent, of the sale price of the mobile phone? You might then end up with royalties which are a multiple of the sale price of the product. What is your answer to that objection?

**R. Jacob:** Well, there's a bunch of answers. First of all, it doesn't happen. I mean, people have calculated the sort of total royalties paid on a mobile phone. There've been a couple of really good academic studies. It is between about 10 and 15 dollars for the whole lot of patents – for those hundred thousand. So, if that's not happening, then stop saying "what if." I mean, what if there might be an asteroid coming. We don't have to cope with things that are not actually happening yet. So, first of all, it isn't happening. Royalty stacking is not a phenomenon of reality. It's a figment of some people's imagination. There are reasons perhaps, why that is so. Partly it is because a lot of the manufacturers also are patentees, and therefore, they have to pay royalties as well as get them in. No manufacturer has had more than 50 percent of the standard essential patent. So, that has kept them down. And that's kept them down traditionally. Also, it is not in anybody's interest to have rates of royalties so high nobody can afford to manufacture. Nobody makes any money then. Whatever the reason, it isn't a problem. If you go on the effects base, say well, there isn't an effect so I'm not going to worry about it. Let's go and worry about something else. There are plenty of other things in the world that need sorting: this is not one of them.

**D. Ginsburg:** I think an estimated $10 to $15 or about 3 percent of the total cost goes to patent royalties, so it really ends up having a minor effect. The consolation about Judge Koh's decision last week in the *Qualcomm* case is that, as Robin said, her reading of the FRAND provision as an obligation to license all comers was done by way of interpreting a contract. Judge Koh did not get to the point of asking, or answering, whether it was a violation of competition law to refuse to license a competitor – a topic that has been much debated among academics in the U.S. Some influential commentators argue it is a violation of the antitrust laws to refuse to license anyone. A refusal may be a violation of the contract obligation, but the argument that it should be deemed a competition violation seems to me extremely, shall we say, imaginative. It is a rather ordinary proposition when you have a contract of this sort. Turning such refusals into a violation of competition laws, with a potential for treble damages in the U.S., without the stamp of legislative approval, would be completely inappropriate and very, very inefficient. It would push all licensors into a position where they virtually have to grant a license and then argue later about the terms.

Imaginative thinkers also have had some success merchandising the idea that a holder of a standard essential patent should not be able to get an injunction against infringement. And unfortunately, our antitrust agencies have twice extracted a commitment from a company to refrain from seeking an injunction to enforce its standard essential patents worldwide in merger cases that have nothing to do with the use or abuse of intellectual property. The agency was simply deciding whether to approve a merger; there was no suggestion that the two companies involved were holding substitute patents. So, that idea has gained some circulation and has more recently been incorporated into the judgment of the Korea Fair Trade Commission in its *Qualcomm* case. The KFTC prohibited Qualcomm from seeking an injunction anywhere in the world to enforce its standard essential patents. What this means for the patentee is that it must tolerate the infringement, be paid nothing, and go seek damages in court, though not an injunction. Ultimately, the patentee ends up with a judgment that is no more than the FRAND rate it was entitled to at the beginning. This marks another way the value of patents has been degraded in recent years, which if allowed to stand surely threatens to diminish the degree of innovation and creativity in the economy.

**J.-F. Bellis:** In Europe, we have experienced exactly the same development with the *Motorola* decision, the *Samsung* settlement, and the *Huawei/ZTE* judgment of the Court of Justice, which have embraced that idea. But, it's true that many of those cases deal with issues which are in fact non-existent.

One of the best examples is the judgment rendered in the *IMS Health* case, which also involved an IP right, or at least something that a number of people thought was an IP right, on databases under German law. The issue was whether a company which had developed a data gathering service that competed with that offered by IMS Health could lawfully present the relevant data by reference to a map of Germany divided into 1850 blocks, which IMS Health claimed was protected by an exclusive IP right. The Court of Justice essentially ruled that IMS Health was required under EU law to grant a license of that right to its competitor. The case had been referred to the Court of Justice for a preliminary ruling by a German court before which IMS Health had sued its competitor. What is really interesting is how that case ended.

At that time, I was representing Microsoft in a case which raised similar issues. I was anxiously waiting for the judgment of the German court to see how the Court of Justice ruling had been applied. We were calling the German court from time to time to know when the case would be decided. And one day the judge told us, "Oh, very soon. In fact, next week." We were wondering what the outcome would be and it turned out to be very surprising. The judge ruled that there was no IP right. And thus, the whole issue, the supposed abuse of the IP right by IMS Health, was an abuse of a non-existing right. Nobody speaks about the actual outcome of that case. Robin, on IP rights and competition law, what else would you like to tell us?

**R. Jacob:** I think what I'd like to do is ask people to go back and look at history. I mentioned the Commission getting concerned about a lot of litigation. A lot of litigation is often a sign of huge rates of innovation…much competition. The very opposite of bad things going on. It is a sign of good things going on.

The sewing machine wars, classically in the United States in the 1850s-60s. The sewing machine was the equivalent of your modern mobile phone. Everybody had to have one. Fights between big pharma are the signs of huge innovation, great new medicines coming to cure us. So, my message is, do try and understand IP, please, competition authorities. Jeremy Bentham, a kind of quasi-founder of my University, UCL talked about it in 1792, said "If you don't really understand it, you'll be against monopolies in inventions but when you come to understand them, you can only be interested and reckon they should have the right of property." He said it in 18$^{th}$ century language. It really does involve understanding how it really works. It is not self-evident that a right to stop people doing things is pro-competitive, but it is in the case of inventions.

**D. Ginsburg:** In the library at the Harvard Law School, where I used to teach, there is an engraving on the walls that says, "Laws are the wise restraints that make men free." So, too, with intellectual property laws. They act as a restraint, but one that in fact advances the wealth and material well-being of society. Yes, intellectual property can be abused but, the idea that it should be suspect is really counterproductive.

Just think about the term: intellectual property. The hallmark of property is the right to exclude others. I have a monopoly on my backyard, and I can exclude any private individual from that without giving or even having a reason. This kind of exclusion hardly offends competition in any way. In fact, it gives me an incentive to buy, develop, and maintain the backyard because I don't have people trespassing all the time. In 1995 the two U.S. competition agencies jointly issued a statement on IP licensing that expressly provided that intellectual property shall be treated the same way as other property, except where something inherent in the nature of the intellectual property requires a deviation. That is an extremely important principle. As I said, we've had a little backsliding from this principle – those two commitments extracted by the U.S. agencies in the merger cases – but these instances have been exceptions, and the current Administration of the Department of Justice has been very clear in repudiating decisions of that sort and reaffirming the importance of respecting the integrity of intellectual property.

**J.-F. Bellis:** What I find a bit alarming in the discussion that we have had as far on the application of competition law to IP rights, is that there does not seem to be much effect-based analysis currently, at least in Europe. The picture seems to be a bit more nuanced in the U.S. This is very concerning bearing in mind how the Commission applies the concept of dominant position in practice. The mere fact that a company holds an IP right and is faced with another company which, for any reason, believes that it needs a license of that right automatically puts the holder of the IP right in a dominant position in relation to that potential licensee regardless of its actual position on any actual market. It is a very form-based approach.

Now, what about vertical restraints, which is an area which the European Commission has recently started enforcing again? After the entry into force of Regulation 1/2003 in 2004, the Commission decided to focus its enforcement activity on the fight against cartels. Practically all its decisions under Article 101 involved cartels. The Commission kept the block exemptions it had adopted in the pre-modernization era and drew up guidelines on how to apply them but it largely left the enforcement of EU competition law on vertical restraints to Member State authorities.

One could say that the Commission was acting consistently with the Chicago school approach to vertical restraints by taking no enforcement action itself in that area. Over the years, however, significant divergences have appeared in the enforcement policy applied by the Member States, with Germany being extremely tough on vertical restraints while other Member States, such as the Netherlands, have been more liberal. In the last two years, the Commission has again initiated investigations on vertical restraints and it recently adopted a decision imposing fines on resale price maintenance practices.

There are a number of cases in the pipeline in the wake of the e-commerce sector inquiry conducted by the Commission a few years ago. There have also been a few judgments of the Court of Justice on vertical restraint cases referred to the Court by Member State judges. The most recent one was the famous Coty judgment, which was extensively discussed in a panel in New York which was headed by Judge Ginsburg. It looks as if the Commission is going back to the pre-modernization approach on vertical restraints, which raises the question of whether we are truly living in an effects-based analysis era. Douglas, what is the current attitude on vertical restraints in the U.S.? You started explaining how the approach radically changed in the 70s.

**D. Ginsburg:** It started in 1977 and ended in 2007. As I said, this involved overruling about five prior Supreme Court cases, based upon a very simple insight backed by a lot of empirical economic evidence. The insight is this: Because distribution is the cost of getting the product from the manufacturer to the customer, the manufacturer and the customer have the same interest in minimizing that cost. The more expensive it is to get the product to the customer, the more expensive the price of the product. With this complete alignment of interests, we should be indifferent to the ways manufacturers devise to distribute their products, as they will choose various contractual arrangements that they think will serve themselves – and therefore their customers – well.

There's an easy metric we can use to measure the effects of these kinds of restraints. We can assess the effects of the vertical restraint by looking at the quantity of goods sold before and after the restraint is imposed. Take a case that the courts found most difficult: resale price maintenance, where the manufacturer says there must be no sales by its retailers below the price of, let's say 100 Rupees, thereby giving the retailer a greater profit margin than it would realize if it could discount the price. Clearly, the restraint leads to a price higher than before the restraint; that was the inevitable effect of imposing the restraint. But why would the manufacturer impose a restraint that makes distribution more expensive? The manufacturer wants to induce the retailer distributor to expend more effort promoting the product because doing so results in more sales and profit for it. The retailer will continue to expend money to promote the manufacturer's product until the margin of doing so is no greater than the margin the retailer would get by spending the money to promote other products on its shelves.

You might ask, "Well, why doesn't the manufacturer promote the product?" The answer is that sometimes it does, for example by buying national advertising. Other times it wants the retailer to take on some of the promotional effort because the retailer knows its customers and its community, or because the promotion is best done in the store. We end up with a variety of practices as a result. Some manufacturers take on all their own promotion; others delegate it all, and still others end up doing some of each. Firms are simply seeking out different ways in which to compete effectively in their particular product and geographical market.

Here's another way of looking at resale price maintenance. Look at what happened to the quantity of goods sold when RPM was introduced. The price increased, which means that, all else equal, the quantity sold should go down – yet the quantity sold increased. Resale price maintenance worked a rightward shift of the demand curve, just as if there were an improvement in the quality of the product. In fact, the dealer did make improvements with that increased margin – whether it increased availability, improved delivery times, offered more favorable credit terms, or whatever it may be. If the quantity sold goes up and more consumers are benefited, then this should be the end of the story. When we see these results in the market, we should stop looking at vertical restraints with suspicion. Perhaps we should entertain a claim that a particular instance was in fact, anti-competitive or was the product of a horizontal conspiracy among the manufacturers, or perhaps among the dealers, but short of these circumstances, we really have no reason to be concerned about vertical restraints at all.

**R. Jacob:** It's time I got a joke in. *Coty*, you recall what the restriction was. That Coty had a luxury goods market and they had exclusive distributors that had to maintain the image of this stuff which cost very little to make, but you sell on. And so, they had a particular distributor who wouldn't agree to restriction not to sell on Amazon. Coty said, "You can sell over the internet, but you got to go from your own website because it's an upmarket website." It reminds me of a story a long time ago when people didn't make love until they got married. This very upper-class couple got married. And in the morning, she said to her groom, "Do the common people do this, dear?" And he said, "Yes." She said, "It's much too good for them." Well, so, for Coty, does Amazon sell it? Not good, for the common people. I mean, really! The restraint was upheld on that theory. It's a worrying thing that the competition people seem to value trademarks a good deal more than patents, whereas our future depends on patents and not highly-priced nice-smelling water.

**J.-F. Bellis:** The *Coty* judgment is about luxury products: perfume. There have been cases, one in Germany and the other in the Netherlands, where the question was raised whether sports shoes were or not luxury products, with the Dutch court ruling that they are and the German court ruling that they are not. So, you see to what kind of issues the application of EU competition law may boil down…

**D. Ginsburg:** The distinction between luxury goods and other goods in terms of what I described in the economics of distribution is completely immaterial. It's medieval. They're arguing over how many angels can dance on the head of a pin.

**J.-F. Bellis:** But at the end of the day, it's for the manufacturer to decide how to organize the distribution of its products and a lot of people still have a hard time accepting the idea that the interest of a producer in how its product is distributed and reaches the consumer survives the sale of the product to a distributor.

**D. Ginsburg:** Well, this is why I think it's very important that agency staff and judges have a better understanding of basic economics. The agencies, particularly DG Comp and the two U.S. agencies, have very sophisticated economic staffs. Tommasso Valleti, now the Chief Economist at DG Comp, is a highly distinguished industrial organization economist, as his predecessors have been. But it's quite clear that having economists in key roles does not prevent the Commission from reaching some seemingly uneconomic decisions.

**J.-F. Bellis:** The problem with the Chief Economist and its staff in DG Comp is that their intervention tends to be confined to merger control. This is an area where the importance of proper economic analysis is accepted but this is not necessarily the case in other areas, such as Article 101 and abuses of dominance.

**D. Ginsburg:** Those of us who serve for any length of time in government understand that most of what we do is ephemeral. You make a decision and it can be reversed later on as politics and policy change. The one thing that I did when I was in charge of the Antitrust Division of the Department of Justice that is of lasting significance is to make the Chief Economist equal to the Chief of the Legal Staff, so that the final decision maker receives input directly from both the legal and the economic analysts. It was often the case that the lawyers would say, "This is a case we can win," and the economist would say, "Yes, but it would be wrong." The economist would then demonstrate why. That model has been instituted in a number of the agencies that have been founded in the last decade or two, such as in Singapore, in Chile, and in a number of other countries, because it gives the economic analysis its proper due.

*****