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Plenary Networking Event and Fireside Chat

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JAMES KEYTE: Fred, we are in a Fireside Chat now, with people out on the floor in the ballroom.

I do think it is an amazing thing we can do, and it's very cool, and we will certainly work in the future on making it easier for people to access and also run their mics and cameras when they access. It's just part of what we are going to have to go through as we get used to this kind of technology and use it even when we are in a world where it is not

forced upon us.

Many people out there obviously know who you are and what you have been doing, but for those who do not, let me start with an introduction.

Fred Jenny is Professor of Economics at ESSEC Business School in Paris. Since 1994 he has been the Chairman of the OECD's Competition Committee. He is Co-Director of the European Center for Law and Economics. He was a judge on the French Supreme Court – I assume probably the only economist on that court. He was a Vice Chair of the French Competition Authority. He has a Ph.D. in Economics from Harvard and a Doctorate in Economics from the University of Paris. The list could go on. I don't know if I have missed any of the major highlights.

He is just an incredible figure, always active in the antitrust academic community. The pieces coming out of the OECD are incredibly thorough and balanced.

What I want you to do first, Fred, is just

explain to people what the OECD does in the competition space, your role in it, and what you are up to even now in that space.

FREDERIC JENNY: First of all, thank you very much for having invited me to this Fireside Chat.

The OECD – it's interesting that you asked this question. A few years ago I was asked that question by a visiting delegation from the U.S. Senate – I think it was the Senate Foreign Relations Committee – and they sat in front of me and asked, "Why should the United States support a United Nations organization?" I told them, "OECD is not a United Nations organization."

JAMES KEYTE: I know that much.

FREDERIC JENNY: The OECD is a gathering of thirty-six countries now, and more countries are becoming members. In the Competition Committee, in addition to the delegates of the member states, we have fifteen observers, so we are talking about fifty-three country delegations really.

The OECD is divided into various directorates and committees. One of the aspects of the OECD which is particularly important is that it covers the whole spectrum of economic policies. One is competition; taxation, anti-corruption, trade, consumer protection, investment etc., etc. What this means is that the institution is designed to promote policy coherence and to explore complementarities among economic policies. So we look at issues such as trade and competition or competition and employment or growth and competition etc... with our colleagues in other Committees as well as at pure competition issues.

About fifty-four delegations come to Competition Committee meetings. In most cases, these days, the delegates are heads or high officials of the competition authorities of the Member countries. When I was first elected Committee Chair, the members of the Committee were for the most part officials from ministries . But since then Competition authorities in

numerous jurisdictions have become independent.

In the context of OECD our committee is free to decide what we want to focus on.

The way we work is quite different from that of the International Competition Network.

First, we have a very able secretariat team of lawyers and economists. Among other things, when we take up a topic the secretariat prepares background notes. Background notes are tremendously useful because, for each topic, they explain the underlying issues, the jurisprudence in various countries and the challenges for the future.

Second, when we have a roundtable on a topic, we invite experts, who are often academics, but may also be judges or business people or specialists of other fields, to come and dialogue with us. This dialogue is generally very open and enlightening. The experts may express their opinions on this or that decision by a competition authority or judgment by a court. This type of discussion brings out what these

experts see as a possible criticism or what they see as the strong points of what we do. They also help us think about new challenges facing competition authorities.

Third, the delegates of the Competition Committee present a large number of contributions in which they express their approaches, describe their cases and discuss the relevance of various issues and I cannot thank them enough for that.

The roundtables are extremely valuable not only for the competition authorities themselves but for the legal and economic community as well.

They allow us to explore difficult or new topics in competition law enforcement. For example, we have had more than ten different panels related to the challenges of competition law enforcement in the digital sector – on artificial intelligence, on blockchains, platforms and multisided markets etc... These exchanges allow competition authorities to learn from one another as well as to learn from the best

experts in the world.

A related facet of our work is the production of recommended good practices. Those recommendations are proposed by the committee by consensus and endorsed by the Council of the OECD. They carry a certain amount of weight because by the time they are adopted by the OECD Council they have already become governmental recommendations adopted on the basis of the work that the Committee has done in various sectors. It has produced recommendations on the fight against cartels, on international cooperation, on structural separation in network industries etc...

The Committee meets twice a year, and there is a third session with competition authorities from non-OECD member countries, called the OECD Global Forum on Competition, which is held back to back with one of the two Committee sessions. At each Global Forum usually around 110 competition authorities are represented together with a number of international

organizations such as the WTO, the World Bank etc...
For the discussions during this Global Forum, we
choose topics which are of interest both to the
developed country members of OECD and to less-
developed countries.

We also have three regional centers – one in
Latin America, one in Hungary for Eastern Europe, and
one in Korea for Asia – and organize many teaching
and programs for judges and competition officials in
those regional centers.

JAMES KEYTE: That's perfect, Fred.

Is the output of the OECD's Competition
Committee easily available to the public? Is it a
Google search away or is there some way to access it?

FREDERIC JENNY: One of the characteristics
of the OECD Competition Committee is transparency.
Everything, meaning all the written contributions of
delegates, the background note of the secretariat, the
papers of the experts and the summary of the

discussion is on the OECD competition web site.

To be honest, when I became chairman of the Committee, I had been a delegate for a few years and I had seen the pain of negotiating long reports. Even though there were fewer OECD members at the time, a lot of time was wasted in trying to find common language on issues where competition authorities had differences. We decided to do away with this and to publish everything that is produced. All of this is available on the OECD Competition website.

What we have published in the past and what we continue publishing is an extremely useful source of information for the competition community. We have been doing this for twenty-five years, so there are a great many topics that have been selected by the members. Going to the OECD competition website is a great source to find out, about nearly every topic, what are the issues and what are the cases that have been dealt with by various competition authorities on this particular topic.

JAMES KEYTE: I didn't even know about the background notes. So if you want to dive deep into different positions that were put forward by different constituents —

FREDERIC JENNY: The OECD Competition website is used by a large number of competition specialists. It is used by lawyers in many countries, but it is also used by judges and competition officials. Very often, when competition officials or judges or lawyers have a case, the first thing they do once they have identified the issue is to go to the OECD site to see whether we have background notes and contributions on the topic, to quickly learn about similar cases, what decisions were made, and what the issues are.

JAMES KEYTE: When you are on a topic — let's say the digital economy — certainly many years ago that was on the horizon; you probably started talking about it; maybe you had a report. Do you have some reports that kind of take a historical

retrospective on a topic? Is the general approach that when you are now doing a report on Big Tech you are going to incorporate learning from all those past reports as well?

FREDERIC JENNY: Yes, we do. I would say that about every ten years we go back to the same topic. We do not want to do it too often, because that would be a bit boring, but after eight to ten years we go back to the same topic and build on previous contributions, background notes and experts' papers.

JAMES KEYTE: It is interesting that part of the scope includes, in a sense, non-pure competition issues.

Last year, I think there was a lot of discussion about industrial policy in Europe in the Member States, in particular about creating national champions, wanting perhaps even to modify or have some kind of – I don't know if you want to call them veto rights, but certainly a way to trump a competition

decision based on national champions.

Did the OECD take that subject up?

FREDERIC JENNY: Of course we try to anticipate what the important issues are going to be. In recent years, we had a close look at the interaction between competition and industrial policy and a discussion about the institutional design of competition authorities.

JAMES KEYTE: What was the outcome of that? That is a very politically charged topic.

FREDERIC JENNY:

The relationship between industrial policy and competition policy has been a topic which was discussed in the Global Forum, so the forum in which we looked at this issue was even larger than the OECD Committee. The reason is that the relationship between these two policies is an issue worldwide.

One clear lesson is that an enlightened competition policy and strong law enforcement are necessary conditions for achieving efficiency and for

the promotion of consumer welfare but they may not be sufficient to deal with some market failures and to promote economic growth. So there is a legitimate economic role for industrial policy. There may also be socio-political reasons why governments may want to intervene in markets mechanisms. And there may be cases where industrial policy measures are designed to restrict competition because governments have willingly or unwillingly been captured by special interest groups. Altogether, industrial policy is a bit like cholesterol. There is good cholesterol and there is bad cholesterol.

I think that what the competition community has not done and what it should do is to spend some time thinking about what a procompetitive industrial policy would look like and to promote this type of industrial policy as a useful complement to competition policy.

That is too bad, because in fact when you study industrial policy in details, you find that in

some countries, the United States for example, some industrial policy programs conceived by the Defense Advanced Research Projects Agency (DARPA) succeeded in achieving technological advances, maintaining competition among lines of research, engaging the business community, facilitating the dialogue between researchers, and weeding out the failing projects from the successful ones.

This approach, which combines industrial policy and competition, is quite different from the type of industrial policy that used to exist in Europe, where a national champion was chosen and entrusted with the task of developing a new technology.

I think that there would be a lot of value in trying to, first of all, show that industrial policy is a natural complement to competition policy and not in opposition to competition policy; and second, that there are procedures that allow countries to have an active industrial policy while at the same

time respecting competition.

JAMES KEYTE: Yes. And really the great thing about the transparency at the OECD is if someone put forth that position paper, you would have all the notes debating that and all the contrary positions. I look forward to that.

Let me move to what's very current now in this part of our conference and ask if you think that the antitrust principles and analytical frameworks currently being used in Europe and elsewhere can accommodate the digital economy and the rapid changes even within the digital economy. Do we need something else or can we do it with what we have?

FREDERIC JENNY: That's a pretty broad question.

JAMES KEYTE: It is. Barry Hawk would go for hours I suspect.

FREDERIC JENNY: Do I have three hours to answer that question? [Laughter]

I think that there are different issues.

First, there is the question of whether competition authorities are able to identify anticompetitive situations in the digital sector.

Second, there is the question of: If we find them, should they be sanctioned in the same way as similar practices in the non digital world?

To be honest, on this second issue my answer is yes.

The most troubling question is: How difficult is it for competition authorities to identify anticompetitive practices or transactions in a digital economy? To try to answer this question, I think one needs to differentiate between information technology and communication technology.

The technological developments in communication technology have basically allowed us to overcome distances, to make communication easier, to facilitate matching, and, in fact, to encourage the division of labor. Roughly speaking, those technological developments are procompetitive.

Competition authorities have, of course, had many difficulties applying their traditional tools to communication markets because those markets have different features from traditional one sided markets. They are much more difficult to define, not only because they can be multisided, but also because a communication technology firm is not really associated with one particular industry or one particular market. It can diversify and it can benefit from scope economies as well as scale economies, so therefore it can move from sector to sector.

While I was a non executive board member of the OFT (from 2007 to 2014) there was a review of the *Facebook/Instagram* merger in 2012. I remember that we felt that the evidence before the OFT did not show that Instagram would be particularly well placed to compete against Facebook. Furthermore, there were many other likely candidates to compete with Facebook. So the OFT concluded that the merger did not raise a competition issue. Yet, in less than two years

Instagram had become a social media competing with Facebook. This is to show that it can be difficult to identify a potential competition issue.

Identifying markets is one challenge.

Identifying a business model for platforms is another one. Understanding how competition among ecosystems works, as opposed to competition among firms, has been quite challenging. Those are some of the difficulties that we have faced in this particular area.

Now if we go to information technology, I think that the issues are a bit different.

First of all, information technology has been dominated by the emergence of artificial intelligence and machine learning algorithms. Those developments have had a number of consequences.

One of them is to create a link between the consumers and suppliers because the information that the consumers provide during their consumption becomes an input into the production process of suppliers, so there is a loop there that does not

exist, at least not with comparable importance, in the non digital world.

The second consequence has to do with the fact that because of the way artificial intelligence has been developed means that there actually is an impetus towards concentration because when algorithms are trained the more data they are fed, the better they get at predicting or finding regularities. This means that the firm that has more data, everything else being equal, has an advantage over its competitors. Thus there is a natural tendency toward the concentration of data gathering, as well as a concentration of firms which use those algorithms.

So developments in information technology have really been a force against competition rather than a force moving in the direction of competition.

We have been struggling with this because the catch is that as data gets concentrated and as concentration of firms on the market increases, the quality of the digital services they offer improves,

so it is very hard to separate the anticompetitive part of the mechanism from the pro-efficiency part of it.

JAMES KEYTE: Let me stop you there.

Executive Vice President Vestager used the phrase several times "contestable markets" and wanting to make markets more contestable.

From the U.S. perspective, markets are what they are and you are either engaging in misconduct or you are not, whether or not your market is contestable or not. Obviously, that goes to entry barriers and market structure and concentration and durability of market power.

But it seemed that what I was hearing is that there is a policy of wanting to make markets more contestable. It goes right to your issue of there are positive network effects and scale and scope in this kind of space that are good for consumers but yet might make the market less contestable. How do you balance that? That is a tough question.

FREDERIC JENNY: That is a very tough question, and that is a question that can lead to very different answers from one country to another.

You know that in Europe we have a particular concern with dominant firms and a particular focus on market structure. There are many historical reasons for this which I do not have time to go into but one of the most obvious is that many dominant firms in Europe did not become dominant because they were efficient but because they enjoyed some kind of protection from competition. Thus there is no particular reason to have a favorable a priori with respect to dominant firms. This explains why Europeans have the notion that dominant firms should have a special responsibility to ensure that they do not restrict competition.

This starting point is quite different from the general assumption underlying U.S. antitrust law that market power is usually the sign of superior economic performance and that it is only if it is

demonstrated that firms with market power have abused their position that they should be sanctioned.

Thus in Europe, the tolerance for aggressive strategies by dominant firms is much lower than the tolerance in the US for aggressive strategies by firms with market power. In the US such aggressive tactics will be considered normal in most cases and only reprehensible if they are shown to eliminate efficient competition on the market. In Europe they will be considered violations of competition law if they are likely to alter the structure of the market and to make life "unnecessarily" difficult for their current or potential competitors.

This difference between approaches in Europe and the US, combined with the fact that European competition law enforcers and courts are more concerned with type II errors and the US with type I errors, is not specific to the digital economy, but is of course applicable to the digital sector. Hence, I think this explains partly what Mrs. Vestager was

saying.

Now, I have not yet read the House report.

JAMES KEYTE: I haven't either. I will.

FREDERIC JENNY: And I will.

But I hear that there is some European inspiration in views sometimes expressed in the US that concentration is bad in itself irrespective of whether or not it leads to improved services.

JAMES KETE: Yes. I had a question in one of our instant surveys: "Are you in the Schumpeter camp, the Arrow camp, or 'I don't know what you're talking about?'" There was a lot of "I don't know what you're talking about."

This battle between what is good for innovation and consumers – is it concentration through innovation with positive network effects, or is it better to structure the marketplace so that you have more people trying to innovate but you structure it through antitrust enforcement or regulation – I think is the critical debate.

I hear that the House report indicates that "Well, if you don't do it in the courts, we are going to do it through legislation."

Part of the question is: Does that in some sense avoid the difficult question of balancing something that inspires innovation and is good for consumers but could have effects on deterring entry and innovation from smaller rivals?

What is your view on whether this should be played out through enforcers or in the marketplace versus "Let's just stop and legislate this kind of situation?"

FREDERIC JENNY: That is another tough question which will take quite a while to answer.

JAMES KEYTE: It's a Fireside Chat question.

FREDERIC JENNY: There are again several considerations to keep in mind to answer your question.

First of all, I think that one has to distinguish between various options.

One option is to propose a specific sectoral regulation for the digital economy with one or a set of regulators.

JAMES KEYTE: Right.

FREDERIC JENNY:

In Europe a second regulatory option is considered. The idea is that competition authorities should have tools allowing them to intervene on the structure or on the behavior of firms even if there is no competition law violation. The argument is that the focus of competition law enforcement is too narrow to deal with the situation in the digital sector. To intervene European competition authorities must find a violation such as an abuse of dominance. This is sometimes too complicated and it takes too long. So two ideas are being floated. First, one idea would be to allow competition authorities to intervene in the digital sector, on their own initiative or at the request of parties, with structural or behavioral remedies as interim measures (i.e. before having

established a violation). A second idea would be to allow competition authorities to impose structural or behavioral remedies on the basis of a market investigation or enquiry.

This line of reasoning is akin to a suggestion to give competition authorities regulatory powers.

JAMES KEYTE: But without the predicate, as you said, of having to prove a violation.

FREDERIC JENNY: But without having to prove a violation, absolutely.

This second approach is considered to have two advantages. First of all, it would allow competition authorities to intervene earlier or faster than in the classical adjudicative process. Second, at least with respect to the proposal to give competition authorities the power to impose structural remedies following a market investigation, this would allow competition authorities to intervene without risking being overturned by a court.

JAMES KEYTE: Right. And the disadvantages are probably the same ones. [Laughter]

FREDERIC JENNY: That's right. When I say it has an advantage, it has an advantage from the point of view of competition authorities that want to intervene more freely.

The clear risk of these proposals is that they will lead to over enforcement.

Finally, there is a third possible option which is to let competition authorities intervene with the tools they already have and have courts review their decisions.

A perceived problem with this third option is that competition law enforcement is a slow process which may not be effective when applied to a type of activity which is very dynamic and where scope economies, scale economies, network effects, tipping effects and the power of information technology tools may lead to firms very rapidly acquiring entrenched positions which cannot be undone easily ex post.

Another perceived problem with this process is that the judges who review competition authorities' decisions will need to understand highly complex and technical details about the economics and the dynamics of the digital economy, a challenge for which they may not be well prepared.

Everybody has in mind the precedent of the credit cards payment services. Those were cases that in many countries were the first cases for which competition authorities and courts had to deal with competition issues on multi-sided markets. For more than a decade we have had contradictory competition authority and court decisions on how to analyze competition issues on such markets and many of those decisions and judgments revealed a poor understanding of what multisided markets were all about. Avoiding a similar long lasting level of confusion and contradictions in the digital sector seems to be advisable. So traditional competition law enforcement can be a very slow, very erratic, very costly process

when the competition issues are new in a complex environment such as in the digital sector.

My own take on these issues is twofold.

First, I believe that if competition authorities are given ex ante regulatory powers for the digital sector there will be a double risk. First, the risk that those powers will be extended to other non digital markets and, second, the risk that the distinction between competition law enforcement and regulation will be blurred, thus making competition law enforcement less transparent, less consistent and less understandable.

Second, I think that because, first, all competition authorities throughout the world are faced simultaneously with the challenge of finding the appropriate way to analyze competition issues in the digital sector, and, second, because digital competition issues are transnational by nature, this is a perfect opportunity for competition authorities to cooperate and work together on the production of

guidelines or best practices which could serve as a common reference for all competition authorities throughout the world when they face competition issues in the digital sector. A joint initiative in this direction between the OECD, the ICN and UNCTAD with the help of the business and the academic communities would be most welcome.

JAMES KEYTE: That's perfect.

I could ask you so many more questions about this, but I will leave the open question: What do you think will happen in Europe, in the United States, and in the United Kingdom with respect to this difficult balance and these strategies and tactics that are going on between the enforcement agencies, the courts, and even at the OECD?

But we will have to leave that for another chat, perhaps next September live.

FREDERIC JENNY: In person.

JAMES KEYTE: Yes, in person.

I thank you so much for such an interesting

conversation. It is so relevant and present right now. It was just fascinating. Fred, thank you so much. I'm sure everybody in the virtual ballroom appreciated it, and I hope to see you very soon, and certainly next year live.

FREDERIC JENNY: Thank you for having me.