Interview with Johannes Laitenberger, Director-General for Competition, European Commission

Editor’s Note: Johannes Laitenberger, the Director-General for Competition, European Commission, took office on September 1, 2015. He has been Deputy Director-General of the Commission’s Legal Service (2014–2015), Head of Cabinet of President Barroso (2009–2014), Spokesman of the European Commission (2005–2009), and Head of Cabinet of Commissioner Reding (2003–2004). He started his career in the European Institutions in 1996 as an adviser in the General Secretariat of the Council. In 1999, he joined the Commission as a case handler in the Directorate-General for Competition (formerly DG IV) and soon became a Member of Cabinet of Commissioner Reding (1999–2003). Mr. Laitenberger studied Law at the Rheinische Friedrich-Wilhelms-Universität, Bonn, and qualified as a German lawyer. He was interviewed for The Antitrust Source on March 29, 2017, by Juergen Schindler.

THE ANTITRUST SOURCE: Thank you so much for this interview with the Antitrust Source. Today, the UK government submitted its formal letter notifying the EU of its intention to leave the Union. Considering Brexit and other political developments around the world, where some countries are adopting a much more inward-looking and protectionist posture, do you think that competition policy will become more political again? In general, might we see a resurgence of certain concepts from social or industrial policy?

JOHANNES LAITENBERGER: I think that the financial and economic crisis of the last decade has had an effect on the discussion on economic policy in general and also about competition policy in many parts of the world. At the same time, I think that if there is one tool of economic governance that is capable of restoring trust and confidence of citizens in the economic process, then it is competition policy and competition enforcement. In fact, I think we would not have had, despite the crisis, the benefits of globalization that we have enjoyed over the last 20 or 30 years without, at the same time, this extraordinary process of cooperation and convergence in terms of competition law standards and competition policy enforcement all over the world.

If you look at the extraordinary history of the International Competition Network (ICN) over the last two decades, I think that the fact that we now have competition authorities in over a hundred jurisdictions is a confidence-building measure. In that sense, I would say that we have every interest and every incentive to continue with that cooperation because it will also help us to trust each other in economic exchanges.

You are right that there are discussions out there. They have different and multiple sources. This goes from security considerations to strategic, economic considerations. And, of course, there are legitimate points of public policy that can and must be discussed and taken into consideration in public policies.

I think at the same time, it has been a sound development over the last 20 to 30 years to clearly separate the discussion and the attainment of certain non-competition public interest considerations from the competition policy instruments because competition enforcement can achieve its mandate and objectives if it can concentrate on competition standards. Which is why, without
calling into question other public considerations, I would not advocate a mix between different public interest considerations in the same instrument.

**ANTITRUST SOURCE:** One concept that Commissioner Vestager has recently emphasized is “fair competition.” What does “fair competition” actually mean? Does it mean a departure from the Commission’s previous policy of excluding other public interest considerations from any competition analysis, or is it actually just a confirmation of the concepts of competition enforcement to date?

**JOHANNES LAITENBERGER:** I think the discussion about fairness and Commissioner Vestager’s contribution to this is, in the first place, a reaction and a response to the feeling of disaffection, the loss of trust and confidence that many people in many places in the world have with respect to the development of the political and economic system. There is a strong perception out there with many people that somehow the game is rigged and that economic outcomes are not determined on the merits. If we speak about fairness and competition policy and enforcement as a fair process, it’s, in the first place, because competition on the merits is an expression of fairness. The underlying rationale of competition policy and competition enforcement is one of fairness, of equity, of a level playing field. And that needs to be brought forward time and again. It does not, and I would like to be very clear about this, nobody has advocated this, dispense us from meticulous legal analysis, from meticulous economic analysis, from sound reasoning on the details. But behind all of this, there is the fundamental rationale and the impetus to make sure that there is a fair competitive process. And in that sense, I think acknowledging this discussion is also stepping out a little bit of the comfort zone in the competition policy family, if I may say.

Having re-joined that family after a number of years, I’m very positively surprised, very struck how interconnected the competition policy community is, and we see this on occasions like here at the ABA Spring Meeting of the Antitrust Section. At the same time, of course, we must reflect a little bit on how to bring the product that we represent more directly to the clients. And in that sense, there is also a case for competition advocacy beyond our circles to engage economic operators, consumers, employees in that discussion. And I think that is what is called for at this point in time.

**ANTITRUST SOURCE:** So “fair competition” is not a new concept but a way of translating, as you said, complex legal and economic analysis so that regular citizens can understand what competition policy will actually achieve for them and how important it is for European policy?

**JOHANNES LAITENBERGER:** I think there is a lot of truth in what you say. Of course, we must also from time to time take a step back and look at whether our instruments, our analysis rosters, are absolutely fit for purpose, whether we are really catching what we should catch. We must avoid false positives as much as we must avoid false negatives and, in that sense, part of fair competition enforcement is also the honing of our capabilities.

So if I look at our present discussion in the European Union, I think the so-called ECN+ initiative, which aims at equipping the National Competition Authorities in a, not harmonized, but better coordinated way, is an expression of that because what we would like to see is that all the competition authorities have adequate independence, have adequate resources, have adequate tools.

We would like to see that, when it comes to the application of leniency programs, there are standards that also offer certain guarantees to leniency applicants. We are speaking about rights of
the parties in this initiative, so that is one example. Another example is the reflection that we are having about the modernization of the EU merger regulation, where so far we have not yet come to a conclusion. So all of this I think is part of the impetus in that direction.

**ANTITRUST SOURCE:** In one of your previous answers, you mentioned the International Competition Network (ICN) with which I have had the privilege, ever since I was a fellow at the FTC, of working as a Non-Governmental Advisor. I have to say it has been amazing to see the development of the ICN during the last 10 years. How do you see its future? What might the future challenges be and what contribution do you think the ICN can make to competition policy going forward?

**JOHANNES LAITENBERGER:** You know that we are engaged in the ICN with the Second Decade Project, and DG Competition is also contributing strongly to these reflections. That being said, I think the ICN is a unique forum in the sense that it exists with a minimum of organizational and institutional operators and a maximum, I think, of intense discussion, exchanges of best practices, and mutual support. Of course, and in particular under the auspices that you mentioned, the discussions that we are having worldwide, we would do well to look in particular at those areas of competition law where we still have less convergence. So we should continue on the one hand with the concrete production of the ICN tools that will help enforcement agencies, young and developing, big and small, to have a joint basis for enforcement practices and for enforcement standards.

And, on the other hand, we should try to look at up and coming discussions and issues that we are seeing. Of course, we also do that at the OECD by the way, but if you think about, for instance, two things like big data or algorithms and their impact, I think we have a lot to learn from each other. And different developments and different parts of the world will also help to hone our own possibilities. I would say the stronger our multinational exchanges and standards, the more effective competition enforcement can be.

**ANTITRUST SOURCE:** There is strong transatlantic cooperation between the European agencies and the U.S. agencies. The U.S. agencies recently released revisions of the U.S. International Guidelines. Are there any reactions on those revisions from the European Commission?

**JOHANNES LAITENBERGER:** I would first say, indeed, we have a very intense transatlantic cooperation. This includes the FTC and the Department of Justice. We also have a very strong cooperation with the Canadian Competition Bureau. This cooperation is underpinned by a number of realities of which the one I would really like to point out is the strong cooperation on an almost daily basis on the cases that we have to handle.

If I look at the present practice in mergers and acquisitions for DG Competition last year, 2016, it was the second busiest year ever in merger control. In a multitude of filings, we have been able to bring case teams together on a day-to-day basis. I think this is the most important element and one which also avoids a number of problems that uncoordinated investigations and decision-making could raise.

**ANTITRUST SOURCE:** You mentioned that the European Commission has been looking into how to modernize the EU merger regulation. While this is an ongoing process, do you have any initial reactions based on the feedback that you have received? For example, on issues such as the modification of thresholds, the treatment of minority shareholdings, or whether modifications are needed in the way mergers are notified—for example in the short form process?
JOHANNES LAITENBERGER: I’m not today in a position to give you an immediate reaction on the assessment that we have made of the submissions in the public consultation on the EU merger regulation. I think we have correctly identified the issues. And, of course, now we need to assess in detail the reactions in order to make sure that, both for our clients and for us, we really do the meaningful thing and are able to concentrate on what matters.

There is an issue of whether our current thresholds, the turnover-based thresholds, really capture all the transactions that one would need to look at or whether they could be or should be usefully complemented by a transaction value-based threshold. The concern is that we will not always capture certain transactions where, say, one of the transaction partners does not really have a meaningful turnover, as may be the case for pipeline products in pharmaceuticals or technology startups. But I think we need a little more time to really crunch the evidence from the review, and then see how this can be best translated. Of course, as always, there are different possibilities to address the matter.

I guess that when it comes to simplification, we will also be looking at measures that we can take, short of legislation. We have made quite a bit of progress in that respect in the past few years. And then one would need to assess, in a very sober cost benefit analysis, whether further measures would yield significant improvement or not.

ANTITRUST SOURCE: Will you be looking at developments in other Member States to see how changes turn out there before you take action yourself, or is this something that you would decide independently based on the data that you have collected?

JOHANNES LAITENBERGER: Again, no deliberation has been made on this. Of course, the exchanges with the Member States, the National Competition Authorities, the analysis of the legislative changes that may be taken in some Member States, all inform our assessment which is, however, an autonomous assessment.

ANTITRUST SOURCE: Commissioner Vestager has recently given a speech saying that DG Competition is looking at a number of cases in which it might double check whether the information that has been provided by the merging parties was correct. Comparing the EU with the United States, for example, where there’s a very strong body of case law on gun jumping cases and merger notification modalities, we clearly don’t have an equivalent in European law. Are these cases driven by the belief that we need to build up some case law and guidance in Europe?

JOHANNES LAITENBERGER: Well, we do have precedents in EU case law on gun jumping so this is not, I would say, the first situation where the question has come to our attention. I think more generally the system can only work if procedural fairness is respected. Procedural fairness means no gun jumping indeed. It also means the submission of correct information. And if one or the other is not the case, then I think the system is damaged and also there are obvious disadvantages for all those involved.

So it’s reasonable and sound that we are looking into the situation that has come to our attention. We do so simply based on the evidence that we are seeing. Where we have the impression something is not as it should be, we look at it. We look at it thoroughly and we simply take into account what we see.

ANTITRUST SOURCE: Besides the cases on gun jumping, which you mentioned, there are also
cases addressing the issue of the provision of incorrect or misleading information. Will these cases provide us with some new analytical concepts, such as the relevance of the information in question or causality, or is this something that is not envisaged at this point in time?

JOHANNES LAITENBERGER: Look, I think that, at the end of the day, we need to look at the complete situations that we are presented with. And then, of course, how we assess them taking into account the parameters that you have mentioned; negligence or not, all of that will play a role in the assessment. But the starting point will always be the concrete situation and then the way we assess it and how we handle it. Then, of course, guidance will arise. This being said, I would say it's not rocket science what gun jumping is and what information is required. In this sense, there is very easy guidance: don't gun jump and make sure that what you submit is really correct.

ANTITRUST SOURCE: Of course, it's not rocket science, but at the same time, merger notifications can be a messy business, as we all know. In the European Union, we have the advantage of having a pre-notification system—although as a private practitioner I might also say that this can sometimes be a disadvantage. On the one hand, it's good because you can actually discuss the transaction with the case team before notification and drill down to the real issues while quickly sorting out the non-issues. At the same time, of course, the parties have to wait until they get “the green light” for notifying.

I was wondering how these upcoming decisions could affect the pre-notification process as it's not always easy to gather and provide the required information. It's not always easy to understand what the Commission is actually looking for, or what is really relevant for the notification. Having that kind of open discussion is the positive side of the pre-notification process. If we end up with case law that is too stringent, don't you fear that the pre-notification process might be a more guarded and less forthcoming one?

JOHANNES LAITENBERGER: No, I don't think so because I agree with your assessment of the pre-notification process. It is a useful assessment on both sides of what is needed to be able to conduct the investigation. What I would expect we will learn from such cases, what parties can learn from this type of case, will make even clearer what to do and how to conduct a pre-notification procedure.

ANTITRUST SOURCE: You mentioned that you had a very heavy workload last year, very much driven by big merger cases. Some of the cases were in the agro-chemical sector, and the Commission has just cleared the merger of Dow Chemical and DuPont, one of the largest mergers seen in that industry. One of the points of public discussion in these cases was whether the Commission has developed a new concept—when analyzing mergers in this sector—of “harm to innovation.” If it is new, how will the Commission analyze potential “harm to innovation” in the future?

JOHANNES LAITENBERGER: I don't think that it is new. We have always said, and that is true both for the horizontal and the non-horizontal merger guidelines, that there are competitive parameters that go beyond prices. And innovation has been specifically named as one of these parameters.

It is true that we have been faced with a number of cases in recent years where innovation issues and the maintenance of an innovation capacity have played a role, the pharmaceutical cases for instance. But also a case like GE/Alstom had to do with the need to ensure that a certain innovation capacity, a certain pipeline for instance, stayed in the market. This has been
resolved in particular through divestments of certain pipelines and/or the part of the business that was needed to maintain innovation capabilities.

In the agro-chemical sector and, in particular, in the Dow Chemical/DuPont merger, we have seen a very concentrated market, high barriers to entry, and a very innovation-sensitive market. And so we had to look not only at the horizontal overlaps, but also at the earlier stages of the pipeline and in different innovation areas, the maintenance of the capacity to innovate. We conducted a very thorough analysis and found that Dow Chemical and DuPont were two of very few companies actually capable of competing on innovation against the specific background in this industry. And we also found in the investigation that, absent remedies, the merged entities would have had lower incentives to innovate.

The parties ultimately proposed the package of remedies that we have been able to accept. And so we have, in particular with the divestiture of components for R&D organization, been able to make sure that this innovation capacity stays in the market. We had already before that merger laid out our thinking about innovation in the Competition Policy Brief on merger control and innovation, which I think in many respects gave a clear indication of avenues that we are going to explore within the assessment of these situations.

ANTITRUST SOURCE: So in a way, innovation has always been a part of merger control analysis, but perhaps it's true to say it's becoming more prominent for certain sectors?

JOHANNES LAITENBERGER: You have certain industries I think where it plays a specific role. Take agro-chemicals. You have a very limited number of players. If you look at the situation right now, this is an industry where we have five global innovators. There are at present three big mergers going on so that the number of innovators is being reduced. Therefore, one has to look at innovation competition in such a concentrated industry, where the entry barriers are very high.

ANTITRUST SOURCE: You mentioned earlier that the Commission is looking at its toolbox and always has to reconsider whether it has the right tools to perform the required analysis in merger situations. One of the Commission's tools is economic analysis. Recently the General Court in Luxembourg has overturned the merger decision in UPS/TNT on the basis of the economic model used and the rights of the parties to have access to and the opportunity to discuss such an economic model. This is quite unusual because, in recent years, the Commission has actually fared quite well with merger decisions appealed to the European courts. Do you have any takeaway messages from that decision?

JOHANNES LAITENBERGER: We are still analyzing the UPS/TNT judgment. We have been overturned in this case on a procedural requirement where the analysis was that, in the final stages of the case, the final modulation of the econometric model had not been shared to a sufficient degree with the merging entities.

The court has set a standard in that respect, which we need to think through, without me being able today to prejudge the outcome. Two remarks, nevertheless: On the one hand, I think this case presents a number of specificities. And on the other hand, I think I can say with the best of conscience for DG Competition, for everybody involved here, that we take rights of defense extremely seriously, that we have every interest in making sure that all the relevant information that comes from the parties is taken into account in our proceedings, so that is an aspect on which I would not like to leave any doubts.
ANTITRUST SOURCE: Moving on from mergers to antitrust, in recent weeks and months there have been quite a number of interesting announcements and speeches from the Commissioner and new developments in case handling practice. Previously, the Commission had a binary approach to resolving antitrust cases, i.e., either adopting an infringement decision or accepting a settlement through the parties engaging in commitments. Recently, we have seen a kind of hybrid solution where the Commission has settled but at the same time imposed a fine. Is this something that we’re going to see more in the future and, if so, how does it tie in with other settlement processes that DG Competition already employs?

JOHANNES LAITENBERGER: The cooperation procedure in antitrust that we have initiated, if I may say so, with the ARA decision last year is, of course, part of our larger effort to try to streamline antitrust proceedings. And I think here again this is not just of procedural interest.

At the end of the day, it is important that antitrust procedures come to decisions that offer guidance to the market and that also put an end to the infringements in a good and useful timeframe. And indeed, as you mentioned, the stringent dichotomy between an Article 7 decision with the finding of an infringement and an Article 9 decision with commitments (but no finding of infringement) has maybe not always allowed, on the one hand, to find an infringement and in that respect really establish a precedent that is clear for the market, and, on the other hand, to provide also an incentive for the parties to cooperate.

We base ourselves on the fining guidelines. We look at situations where parties are ready to acknowledge the infringement, including the facts, the legal characterization, and the liability of the parties for it. Where parties also offer a structural remedy, it can go beyond what might be achievable via a simple cease-and-desist order.

We will continue to assess cases and of course the readiness of parties to cooperate to see if they lend themselves to this type of procedure. In the ARA case, the fine reduction that was given to the party was 30 percent and, of course, one will need to see in further cases what kind of fine reduction would be justified.

There are three aspects on which parties can cooperate and the extent of the fine reduction will depend on whether they cooperate on one of them, or on some of these aspects, their contribution to the efficiency of the outcomes, the procedure, and so on.

ANTITRUST SOURCE: One point that you just mentioned, which I think is very interesting, is that there’s a certain desire to create more case law. I’ve also heard the Commissioner mentioning this in several of her recent speeches. Is that part of DG Competition’s thinking?

JOHANNES LAITENBERGER: I don’t think that there is a fundamental doubt about the usefulness of commitments. There are very many situations where commitments are the right way to solve the competition concern and to bring, at the same point in time, an immediate and clear solution to the market. But it’s correct that in certain situations, the pure dichotomy between the Article 7 and the Article 9 situation calls for a possibility of refinement and it is precisely this refinement that the cooperation procedure represents.

ANTITRUST SOURCE: You mentioned the ECN+ initiative, one important point of which is trying to improve cartel enforcement tools, including a whistleblower tool. I was just wondering how you see the future of this tool itself. How do you see the effect of the tool on the willingness of companies to go for leniency, given that lots of cartel cases are leniency-driven? Currently, it’s companies that come forward, not necessarily individuals. Will that change with the new whistleblower tool?
JOHANNES LAITENBERGER: I think it is a useful tool. Of course, we have already in the past had cartel cases that were not based on leniency applications or that were not initiated by leniency applications but by information from other sources. What the DG COMP whistleblower tool does in the first place is to allow for a back channel for an informant who wants to remain anonymous. The advantage of the whistleblower tool is that there is a secure line where an informant can deposit his or her information without needing to reveal his or her identity. We can also communicate back in a way that then does not require the informant to reveal himself or herself. I think this is simply an instrument that will allow for more spontaneous and more complete information.

One can expect a double effect. It will hone our ex officio capability. And it is clearly also a message for companies that, if there is a leniency application to consider, don’t hesitate. It’s better to submit it sooner rather than later because it’s always better to go for leniency than simply to wait for what hits you.

ANTITRUST SOURCE: So the idea is to supplement the toolbox that you have? The idea isn’t that whistleblowing would replace the current leniency procedure over time?

JOHANNES LAITENBERGER: There is no intention to replace leniency with the whistleblower mechanism. I think leniency has many advantages for businesses, for enforcers. And I think it’s important that businesses have the possibility to come clean. They should use that possibility. Nobody wants to take that incentive away. But businesses should also know that we are looking beyond leniency.

ANTITRUST SOURCE: Another challenge that the Commissioner addressed in one of her speeches is where anticompetitive effects arise without the typical human interaction, i.e. where people sit down and agree to collude around a table, but rather where the collusive behavior takes place remotely, such as through algorithms. Is this something that you will be looking at more in the future? Do you think you’re well-equipped at this point in time to detect such kind of behavior, or will you need new tools to analyze this?

JOHANNES LAITENBERGER: The Commissioner, in Berlin at the International Cartel Conference, has set out the state of our thinking and of our analysis on the matter. Of course, algorithms play an ever increasing role in a number of fields in which we have to keep our eyes and ears and minds open. That also goes for cartel behavior where algorithms can play a role in collusion. We see this also in other circumstances. Think about vertical practices, the impact that, for instance, price monitoring software can have in the context of vertical practices and vertical restrictions.

So we need to follow up on this. We need to understand how this works. The rules that we have allow us to address the issues stemming from algorithms because the basic rule is obviously that what is illegal in the analog world is also illegal in the digital world.

Where we may need to hone our skills and our understanding is in the exact analysis of how an algorithm works and what it does. But this I would say is also an important element for market participants because I don’t think that it would be a reasonable attitude to simply say, we put the algorithm out there and then, maybe at a point in time when it is more sophisticated, the algorithm develops a kind of consciousness separate from the creator and enters into collusive behavior. There will also be a need for market participants to consciously take a step back from what algorithms can do. So it is a conversation that we need to have. And yes, of course, it raises the ongoing obvious point that we need also to keep our IT capabilities, our analytics up to date.
ANTITRUST SOURCE: You raised a very good point when it comes to liability. If you have artificial intelligence and self-learning algorithms, as the creator of the algorithm you may have to get back into the process because an algorithm might go wrong.

JOHANNES LAITENBERGER: Yes, absolutely. If it’s true that you can program an algorithm to learn illegal behavior, you can also program it to stop at the right moment. That may be a challenge for creators and programmers.

ANTITRUST SOURCE: Turning finally to the Damages Directive, certain deadlines for implementation have now expired. I was just wondering whether you have any concluding remarks on the state of that Directive?

JOHANNES LAITENBERGER: The deadline for the transposition of the Damages Directive by the Member States expired on the 27th of December of last year. As we speak, we have 12 Member States that have transposed the Directive (i.e., implemented into national law), and in most other Member States, the process is well underway.

We will, of course, do the necessary also in terms of infringement procedures against Member States to make sure that the process of transposition really comes to a swift end and we will do conformity checks when it comes to the transposition. This is really an important part of the completion of our competition policy, our competition law system. In this respect, it is important that consumers can avail themselves of this instrument in comparable conditions throughout the Member States. So we will be vigilant in this respect.

ANTITRUST SOURCE: Do you think that in the future you’re going to continue to assess the policy impact of the Directive? For private practitioners, one concerning development was the 100 billion Euro claim in the trucks case. Considering that’s a settlement case, the prospect of such large damages claims is something that makes companies think twice about whether they should go down the leniency route at all. Do you think the Directive will have a chilling effect on leniency applications?

JOHANNES LAITENBERGER: I think the Directive has a number of features that strike the right balance between keeping the incentive for leniency and at the same time giving the people who have been harmed a right to compensation. The mechanism of the Directive under which the immunity applicant is not jointly and separately liable for the damages from the cartel, but only for its direct damages, is an important element. And, of course, let's not forget that leniency was not instituted as a kind of leap of faith, but because there is a real risk for businesses to be detected if they are involved in cartel behavior.

Therefore it would also be imprudent if businesses now were not to step forward and not avail themselves of the leniency possibility. Because, in the end, not using leniency will always over time result in greater damage than the other options. This being said, this Directive, like any directive, will be evaluated and reviewed once we have sufficient experience of the functioning of the system. So a few years down the line, we will of course evaluate the functioning of the Directive and see whether it has met all the expectations that it needs to. That is part of our better regulation process.

ANTITRUST SOURCE: Thank you so much for this interview and safe travels back to Brussels.