Pillars of Wisdom for Enforcing Competition Law in the Digital Era

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In the 1990s, competition agencies were first confronted by challenges posed by the "new economy." Over the past quarter century, these sectors have grown ever more important to our lives, and to our agencies. They are now called the "digital economy."

Whether existing laws and economic tools are adequate to cope with the challenges of the digital economy is much discussed. I offer quite general advice on how to cope with these challenges.

I borrow from T.E. Lawrence and from Proverbs in the Old Testament by offering "pillars of wisdom." Lawrence and the Bible had seven pillars, but I find four are sufficient.

And I must note that I do not purport to state the views of the U.S. Department of Justice.

Primum non nocere, "first, do not harm." This principle from medicine should be a principle in competition law.

The digital economy harnesses the power of modern computing and communications technologies to produce endless innovation and extraordinary consumer benefit. Mistakes in competition enforcement have the potential to inflict significant consumer injury, just as the wrong medicine can do great injury to a patient.

We should not be paralyzed by doubt in cases involving the digital economy. But we should hesitate to act, even when some call for immediate action.

Further, in my view, no action should be taken when the conduct at issue is of a type that can be expected to benefit customers directly, for example, the introduction of a new product or the improvement of an existing product.

Primum non nocere is a pillar of wisdom on which a competition agency may rest many no-action decisions in the digital economy. And this pillar is especially important when a competitor is complaining about something that makes its rival's product more attractive to customers.

Among the seven deadly sins, the worst is the sin of pride, or hubris. In competition enforcement, we fall prey to hubris when we are not content to protect the competitive process, and try to change the process the hope of promoting consumer welfare.

In 1958, our Supreme Court beautifully explained the philosophy of U.S. competition law. The Court referred to our Sherman Act, which goes back to 1890:

> The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

The genius of the Sherman Act was that so much could be accomplished just by protecting the competitive process.

An enforcer who comes to believe that he or she is smarter than the market itself has missed the point of competition law.

In the digital economy, innumerable companies pursue diverse paths to create value. It is not our job to block the path of a successful company so its rivals can catch up. To imagine that we can improve on the competitive process is hubris.

The Pope is infallible in all matters of the faith. In competition enforcement, we must all remain humble. In my ICN work, however, I have sometimes encountered a striking lack of humility—an unwillingness to acknowledge fallibility.

Of necessity, we enforce competition law with incomplete facts and an imperfect understanding of the economic forces at work. We should recognize our limitations, which are apt to be greatest in the digital economy.

Even in the digital economy, some conduct is clearly anticompetitive and undoubtedly warrants enforcement action. But in some cases, we cannot come close the level of confidence we should have before taking action. In ***those*** cases, the best policy is to remain humble and take no action.

Almost twenty years ago, a well-known U.S. judge, acting in an unofficial capacity, posed the question: Does competition law enforcement have a comparative advantage over the market in correcting competition problems? In addressing the question, he made insightful comments applicable to the digital economy.

Among his insights was that markets are likely to have the comparative advantage when we are dealing with novel practices or novel contexts. In the digital economy, we see both, and the humble competition enforcer appreciates the comparative advantage of the market.

The digital economy is more challenging for competition enforcers than the traditional economy because we are less able to comprehend how it works and where it is going. If we remain humble, we admit this to ourselves, and we act accordingly.

In the U.S., we view the possibility of error in competition enforcement as quite significant. This may be because we readily acknowledge the error of some past enforcement actions.

The United States has had competition enforcement for well over a century, and that makes it possible to point to errors from so long ago that everyone involved is dead and most have been forgotten. I will give one example. It is ancient history on the competition law time scale, but it has parallels to recent cases.

My story begins in 1878, when a man named George Huntington Hartford assumed control of a few coffee and tea shops in New York City. He renamed the company The Great Atlantic & Pacific Tea Company. All Americans would later know it as The A&P.

The company thrived did not really take off until Hartford's sons took control. In 1912 they began opening "economy stores," with no frills and low prices. In less than two decades, they opened more than 15,000 stores. That is more than two per week.

The A&P began the chain store movement. The chain store does not make any lists of most important 20th Century inventions, but that is an oversight.

Because of its success, The A&P became a target of journalists and politicians. And it became a target of the U.S. Department of Justice, which brought a monopolization case in 1942. The judgment of history is that the attack on The A&P was, for the most part, ill conceived. We should have cheered, but instead we acted to protect inefficient competitors.

Carved in the façade of the library of the college I attended some years ago was a line I have not forgotten: "Wisdom is the principal thing; therefore get wisdom." This line comes from the same book of the Bible as the seven pillars of wisdom.

Wisdom comes from experience, and my four decades of experience as a competition enforcer leads me to offer this advice:

As you face the challenges of competition enforcement in the digital economy, stand on four pillars of wisdom:

First, do no harm.

Second, hubris is the most deadly sin.

Third, humility is a cardinal virtue.

And finally, confession is good for the soul.