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Is consumer welfare the (only) way forward? A re-appreciation of competition law objectives ante portas in both US and EU

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The Goals of Antitrust in the Wake of Crisis

Calls for a re-appreciation of competition policy have never ceased on both sides of the Atlantic. However, the current financial crisis has unsurprisingly provided a particular backdrop against which there has been increased willingness to discuss so-called "fundamental" issues both within as well as across different competition law jurisdictions (for a comprehensive analysis of the impact of financial crises on competition law and policy, in particular with regard to whether a more lenient approach to competition law standards and exceptions to it should be adopted to ensure an adequate handling of possible crisis-related systemic risks, *cf.* Kokkoris, I./Olivares-Caminal, R., *Antitrust Law Amidst Financial Crises*, 2010, CUP).

In a recent article ("Reconsidering Antitrust's Goals", *Boston College Law Review*, Vol. 53 (2012), pp. 551-629; *cf.* also "Reconsidering Competition", *Mississippi Law Journal*, Vol. 81 (2011), pp. 107-188), Maurice Stucke has drawn on those developments, particularly phenomena like the emergence of "too-big-to-fail" constellations, subsequent bailouts with taxpayers' money and the rise in analytical relevance of the notion of systemic risk, to argue for what he considers a long overdue rethinking of antitrust policy: the definition of competition and the goals and objectives thereof must be reconsidered. Stucke questions the current antitrust policy's perception and definition of competition and its reliance on the pursuit of a single economic goal. He argues in particular that the (near-)exclusion of other antitrust objectives besides consumer welfare and allocative efficiency has to be abandoned in favour of a broader approach incorporating further (e.g. social, political, moral etc.) goals as well.

Focusing on US antitrust law, Stucke highlights the lack of an explicitly specified definition of antitrust and its goals in US legislation. Stressing the importance of defining antitrust objectives, Stucke reviews what he calls "historical antitrust cycles" in the US (respectively: (1) 1900-1920; (2) 1920s-mid-1930s; (3) mid-1940s-1970s; (4) late 1970s-2010) and concludes that during the last cycle antitrust contracted under the influence of Chicago and post-Chicago Schools' neoclassical economic theories. The latter have, according to Stucke, led to some enforcers setting aside antitrust's more salient political, moral and social goals, which they perceived to exercise, to a certain extent, a diluting effect on antitrust policy, thus "broaden[ing] the gap between antitrust enforcement and public concern". At the core of this development was the reliance of antitrust policy on an "incomplete, distorted conception of competition" which disregarded the reality of the

markets that were assumed to be “self-correcting” and composed of “rational, self-interested market participants” (*cf*. p. 556). Fixation on “certain economic beliefs” on the part of certain courts and enforcers has allegedly led to a sacrifice of “political, social and moral values” and to an acceptance of increased risks from excessive concentration in certain industries that resulted in the outcomes mentioned above”.

Stucke questions the US antitrust law and policy persistence to seek a single economic objective. He points out that neither US legislation nor the legislative history allow for identifying a single specific economic goal (p. 559). The Supreme Court has in the course of time identified in its approach to legislative history a range of objectives including e.g. the prevention of concentration of markets through acquisitions; the preservation of an organisation of industry in small units which can effectively compete with each other; promotion of consumer welfare, allocative efficiency and price competition; preservation of economic freedom; protection of firms’ right to trade; ensuring equality of opportunity and protection of the public against evils commonly incident to destruction of competition through monopolies and combinations in restraints of trade etc. (*cf. op. cit.* pp. 560 *et seq*.). Stucke points out that the above run contrary to Chicago School scholars’ argumentation that sought to impose an approach inspired by that very school of thought in the US. The variety of antitrust goals in further jurisdictions as well is evident: aims include not only consumer welfare and allocative efficiency but also securing economic freedom, ensuring an effective competitive process, promoting fairness and equality, securing a level playing field for small and medium-sized undertakings, promoting fairness and equality, ensuring market integration etc. According to Stucke, the “narrow” path US antitrust has taken during the last cycle by pursuing a single economic goal stems from the tenets of Chicago School thinking, in particular the assumption that market participants behave rationally. His thesis is that the currently dominant in the US single economic goal is negatively affecting antitrust’s impact.

Inadequacy of the Current Policy?

The article further discusses the shortcomings of the current antitrust goals that render the unification of antitrust policy impossible:

Stucke discards an “effective competitive process” criterion as unsatisfactory, as it “shifts the debate to a larger, unresolved issue, namely defining an “effective competitive process”, upon which no consensus in the US or elsewhere allegedly exists and the desired effects of which policymakers cannot define – the latter may namely conflict. The same applies to “efficiency” enhancement considerations: efficiency, as a generic term, can encompass concepts as different as allocative, productive or dynamic respectively. Furthermore, difficulties exist when it comes to calculating efficiencies regardless of the particular category in question. He rejects promoting “economic freedom” as a primary objective as well. The latter “inherently involves trading in some people’s freedom to promote others’” and hence “to make that trade-off, one invariably relies on other values and goals besides economic freedom” (p. 592).

Stucke then focuses on the “consumer welfare” criterion and the controversy surrounding its proper definition as an antitrust goal. The resulting lack of clarity regarding its meaning is accentuated through inconsistent judicial application both terminologically and substantively (*cf*. p. 571 fn. 133). Adequate solutions can be expected neither from invoking consumer surplus to measure consumer welfare (in light of the limitations this would have in the case of industries characterised by dynamic rather than static price competition) nor from seeking to “equate a reduction of consumer welfare with an increase in price or reduction in quality” (as in that case

other aspects of competition, such as variety or innovation, are not reflected).

Stucke subsequently questions US antitrust policy's persistence in seeking a single unifying goal, though acknowledging (p. 596) potential merits derived by the pursuit of a single well-defined object of antitrust law: besides advantages linked to a possible reduction of compliance costs, it could enhance a possible convergence between major jurisdictions and bring about a certain harmonisation among competition authorities.

A "Blended" Approach

Stucke proposes a so-called "blended approach" instead: He calls for the acceptance of a perception of competition as a means to an ultimate end rather than as an aim per se. The ultimate end is the "improvement of well-being", which in turn comprises both material well-being and "quality of life" (the latter term, in accordance with Economics of Happiness, affecting aspects/factors such as e.g. health or unemployment). According to Stucke both tiers have to be addressed satisfactorily.

A blended approach leading to a maximisation of well-being cannot rely on the pursuit of exclusively economic values. Antitrust policy relies on trade-offs inherently when it comes to inescapably choose between possibly conflicting aims. According to Stucke those trade-offs can only be addressed adequately by recourse to non-economic values as well; bearing in mind not only the possible benefits but also the risks of applying such a blended approach, the question should not focus on whether to accept non-economic values and the disengagement from a single economic goal, but rather the "degree of freedom that courts and enforcers should have in weighing multiple goals in their analysis" (p. 611). Then the approach could also accommodate aspects/criteria potentially not covered by the dominant sole economic paradigm, such as "variety from competing independent news sources even at the cost of some efficiency" in the case of media industries, consumer choice, propensity to innovate and differentiate products etc.

In any case, the feasibility of a blended approach has, according to Stucke, already been proven not only in the US but in the EU competition context as well: In the case of abusive exclusionary conduct by dominant enterprises and pursuant to its Guidance on Art. 102 TFEU the European Commission relies on the latter's behaviour that "prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product" (para. 22).

The Debate in Europe

Stucke's reference to the EU competition law and policy in that respect comes at a time that marks the ongoing apparent gradual rise in significance of the consumer welfare paradigm. The latter's rise to prevalence has been such that it could be considered to be at the root of concerns similar to the ones expressed in Stucke's article. A series of questions arises: Has the consumer welfare and efficiency-centred progressing economisation in EU competition law through the European Commission-driven application of a More Economics-Based Approach ("MEA") been leading to a mutatis mutandis introduction of a single economic goal? Moreover, to what extent and in what way are concerns formulated above and relating to a single economic goal in a US antitrust context, of relevance for EU competition law as well? Is a discussion about the merits and problems in the conception and application of the consumer welfare and about the goals that EU

competition law does and/or should pursue in order? Dealing with these issues in the EU law context involves namely inescapably certain common aspects with those described in Stucke's article, as the impact of the financial crisis has been present on both sides of the Atlantic. Furthermore, the discussion is taking place in the light of the emergence of further paradigms and calls for taking into account considerations that were hitherto not included in what was traditionally perceived as the scope of EU competition law goals.

The discussion about the definition and interplay of the current goal(s) in EU competition law and policy has never been a muted one. This had already been so before the shift towards "economisation" that picked up speed in the aftermath of transatlantic divergence in dealing with prominent cases (e.g. *GE/Honeywell*, COMP/M.2220), and before the rise to [apparent] prevalence of the consumer welfare standard. The particularity of EU competition law lay in its also being perceived as a means to achieve (internal EU-wide) market integration. This was explicitly reflected in primary Community Law (cf. former Art. 3 g) EC – despite the omission of the explicit reference to the aim of ensuring undistorted competition from the TFEU treaty post-Lisbon it is suggested that no significant change has occurred regarding the relevance of this goal as a means to achieve market integration), so that the common/internal market integration goal was considered prevalent compared to other objectives. The latter have for example included promoting the protection of small and medium-sized undertakings; safeguarding economic freedom (of market participants including competitors – *cf.* in this respect Parret, L., "Do we (still) know what we are protecting?", *TILEC Discussion Paper*, April 2009, p. 14 e*t seq*.), bearing the influence at least to a certain extent of the ordoliberal school of thought; non-discrimination and fairness. In that sense it could be argued that the market integration goal was ab initio neither an exclusive goal nor a strictly economic one, certainly not in the sense of a fixation on price-related criteria similar to the ones prevailing in the US.

With the drive for an MEA the European Commission seems to have embraced the consumer welfare (allocative efficiency) paradigm in what appears to be an effort to emulate mutatis mutandis the US antitrust approach that has been dominant during the last "antitrust cycle". Concerns regard the following:

(a) The European Commission seems to have been increasingly embracing Chicago and post-Chicago insights in recent years; this may support the quest for international antitrust convergence – however, at least in the case of the former this response occurs more than 30 years after the prevalence of Chicago School thinking in US antitrust; the time elapsed naturally bears its own significance. Moreover, the feasibility of international convergence is questionable and disputed (*cf.* Rosch, J.Th., *Can Consumer Choice Promote Trans-Atlantic Convergence of Competition Law and Policy? Remarks before the Concurrences Conference on "Consumer Choice": An Emerging Standard for Competition Law Brussels, Belgium, June 8, 2012*, p. 5 et seq.), due to differences chiefly in the respective US and EU approaches, historical backgrounds and competition policy thinking (compare e.g. US, where market leaders mostly acquired their status through private, non-state entrepreneurship as opposed to EU where numerous ones were former state monopolists; cf. also different schools of thought, e.g. German ordoliberalism, French mercantilism, neo-mercantilism etc.)).

(b) It has been argued that the perception of what "consumer welfare" constitutes in the EU competition law context, particularly with regard to the Commission's stance, lacks clarity; accordingly contours are blurred regarding terminological precision, as a variety of terms have been used either interchangeably – e.g. "interests of the consumer" rather than "consumer

welfare"; *cf.* Parret, L., *op. cit.*, p. 25 – or without clear delineation of the respective content and limits. It is further unclear who falls under the category of "consumer" for the purposes of EU competition law (*cf.* Cseres, K.J., "The Controversies of the Consumer Welfare Standard", *Competition Law Review* 2007, Vol. 3 (2), p. 131 *et seq*.), so that concerns in Stucke's article are mirrored here. Whilst consumer welfare as an economic concept has been accurately defined, the same does not seem to apply in the case of its normative counterpart. This seems to be further accentuated by the fact that confusion often obscures the relationship between "consumer welfare" and overall "efficiency" (as opposed to "allocative efficiency"). In the EU, as in the US, concerns seem to focus on whether opting for a consumer instead of a total welfare standard is best, rather than on the conceptual definition of consumer welfare for normative purposes.

(c) The foremost concern is that discussion as well as critique of the consumer welfare paradigm and of alternative approaches to the definition of competition law objectives is being formulated against the backdrop of the ECJ's stance on the matter: the Court has not yet clarified its position regarding the relevance of consumer welfare in EU competition law. Whether this can be attributed to a deliberate "bypassing" of economics-related analysis by the Court or rather an implicit rejection of the consumer welfare standard, remains to be seen (*cf.* ECJ in *GlaxoSmithKline* (2009) and the discussion of the decision in question).

Shortcomings of the European Approach? Towards the Emergence of Novel Paradigms?

The merits of the consumer welfare paradigm and its shortcomings are to be examined against the proposed emergence of alternative goals. For example, calls have been made to focus on achieving the maintenance of employment levels in times of crisis or prefer the concept of ensuring consumer choice as a competition law objective and an emerging standard.

Rethinking concerning competition objectives may involve alternative goals that can range from entirely non-economic ones to those that retain focus on economic objectives without however focusing exclusively on the price criterion. To refer to such an example, in the case of the proposal for the adoption of the "consumer choice", the proponents of the latter (*cf.* Averitt, N./Lande, R./Nihoul, P., "'Consumer choice' is where we are all going – so let's go together", Foreword, *Concurrences* No 2-2011; Averitt, N./Lande, R., "Using the 'Consumer Choice' Approach to Antitrust Law, 74 *Antitrust L.J.* (2007), pp. 175-264) argue that it would better accommodate aspects such as short term variety, non-price competition and long term innovation that seem to pose difficulties when assessed by means of the consumer welfare standard. Proponents have referred to particular cases in which the "consumer choice" criterion would seem to be crucial, such as *Microsoft* (COMP/C-3/37.792), where in its media player tying decision the European Commission focused on the anticompetitive effect stemming from preventing customers to base their choices on their non-price preferences, hence taking into account factors the consideration of which would be rendered easier if a consumer choice paradigm were explicitly introduced. Similar traits are detected by the proponents of the switch to a consumer choice goal in further both EU (*France Telecom* (C-202/07 P [2009]; T-340/03 [2007]); *Wanadoo* (COMP/38.223); *cf.* in detail Nihoul, P., "'Freedom of choice': The Emergence of a powerful Concept in European Competition Law", 05.06.2012, available here) and US cases (*Realcomp II* (6th Circuit Court of Appeals, *Realcomp II, Ltd. v. FTC*, 2011 WL 1261180)).

The proponents of the new paradigm suggest that the new goal could prove to be beneficial in particular areas that are sensitive to consumer choice considerations. They argue that in its theoretical conception and subsequent practical application the consumer choice criterion would

not undermine the existing case law and policy. Moreover, it would contribute significantly to the quest for convergence and would be more approachable by the wider public.

Reservations, on the other hand, could be expressed regarding the contours of the choice criterion and whether more research related to matters of choice should be undertaken, for the new criterion to develop its full potential in terms of operability and justitiability. The concerns could be considered representative for other proposals as well and should be taken into consideration when juxtaposing the latter to the consumer welfare standard and the criticism levelled at its alleged lack of clarity.

The necessary and very intriguing next stage is to observe whether and to which extent it will be possible for proponents of alternative to consumer welfare approaches to turn the questions posed regarding the latter's suitability into specific suggestions for a further evolution of EU competition law. It remains to be seen whether the range of areas where a multi-faceted approach in terms of the pursuance of (multiple) goals might resonate and have practical implications can be identified (*cf*. Stucke focusing for example on exclusionary conduct – stating explicitly the European Commission's approach – as well as media industries).

Where do we stand?

In any case unanswered questions remain:

Are there a considerable number of cases where a single economic goal, particularly consumer welfare, systematically falls significantly short of expectations? Averitt/Lande, for example, argue that certain cases in US antitrust law would probably have been decided otherwise under a choice analysis (*cf. op. cit*., p. 223 et seq. – those cases concern markets and industries which the authors have identified as appropriate for the choice paradigm to be applied rather than the consumer welfare standard: e.g. regulated industries, media enterprises, vertical restraint cases etc.). Could cases like those be adequately addressed without a switch to alternative paradigms?

Are there risks involved in questioning the merits of the choice of consumer welfare as a standard/goal? On the other hand, as consumer welfare is currently perceived, could it possibly dilute assessment in the EU law context? Certain scholars (*cf.* e.g. Orbach, B. Y., "The Antitrust Consumer Welfare Paradox", *Journal of Competition Law & Economics*, 2011, pp. 133-164) point out the "haziness" of the consumer welfare standard that has been applied in the US as well as the distortions that accompanied its "translocation" from economics to judicial antitrust law application. They claim antitrust law should no longer rely on it – is there indeed a convincing case that consumer welfare suffers the same weaknesses in EU competition law and should therefore be treated in a similar manner?

A satisfactory answer to these questions would require a though examination of whether consumer welfare has so far, with the possible exception of certain constellations and/or industries, provided reliability as a point of reference/benchmark.

There remain, however, some certainties as well:

While emphasis on economisation and consumer welfare in recent years has been undeniable, the reality of EU jurisprudence and decisional practice in competition law and policy suggests that multiple goals are being pursued. The ECJ's stance on the matter of the progressing economisation and the relevance of consumer welfare may have yet to be confirmed. However, and in any case,

the goal of internal market integration continues to play a major role, as do economic considerations focusing on the consumer (regardless of how the latter is to be defined).

Echoing critique on US antitrust policy in this regard – and most, if not all, proponents of alternative paradigms seem to agree on this, regardless of how intensive a broadening of antitrust objectives, to include non-economic ones, they may propose – the quest for economic efficiency (and its beneficial impact on citizens) remains and should remain the primary concern for antitrust policy across jurisdictions.

A possible benefit for both proponents of consumer welfare as the sole goal of EU competition law and policy, as well as possibly for the whole of the competition law community and the consumers themselves could lie in these, to a significant extent crisis-related, developments signalling a need to re-approach consumer welfare more rigorously. Consumer welfare has already been at the centre of a certain degree of controversy in EU law, and current developments might contribute to seeking further and in-depth adjustment of the concept to the particularities and specific concerns of EU competition law and policy. This enterprise would require contributions from both economists and legal scholars, so as to deal appropriately with both the normative and economic aspects.

Furthermore, regardless of whether the way forward lies in a blended approach as described by Stucke, matters of weighing / balancing possibly conflicting goals ought to be focused upon. As EU competition law and policy has been applied against the backdrop of a multiplicity of goals for considerable time, experience may prove to be beneficial in that respect. Nevertheless, also in that regard conceptual and terminological clarity of the paradigm, sound economics and law analysis and awareness that the weighing process might bear implications on the degree of justitiability and the effectiveness of institutional design, are of the essence.

The merits of the discussion on the on the suitability of EU competition goals and the pursuit of non-economic goals in EU competition law are thus more or less evident. It will be interesting to observe which direction the discussion will take in the near future. One implication is already obvious: what could, in the recent past, be interpreted and criticised as an EU law-specific discussion against the backdrop of the creation of the internal market and away from focusing on solely economic objectives and the application of up-to-date economics, is now openly discussed on both sides of the Atlantic. Criticism and/or discomfort regarding the alleged “pollution” or “dilution” of EU competition law by to a greater or lesser extent “political”, “social”, “moral” or at least not “purely” economics-related (stricto sensu: price- and efficiency-related) considerations (such as the ones related to e.g. ordoliberal school of thought insights, internal market integration, protection of small- and medium-sized enterprises etc.) may not have as yet receded in favour of an outright “legitimisation” of the latter; what seems to have been “legitimised”, however, is intensive discussion about the merits of and the problems associated with an approach towards competition law objectives that encompasses multiple goals.

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Source: OECD">Consumer welfare, Enforcement, Policy
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