Kluwer Competition Law Blog

Competition shaped by EU policy: A voyage into the unknown

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I. Setting the scene: The EU policy agenda

The European Union (EU) treaties have set out a particular goal: the establishment of the single market. Achieving the single market is an objective with unclear boundaries regarding tools, stages and expected final outcome. The EU treaties established a goal that implied a voyage into the unknown. The European Commission (Commission) is the entity in charge of ensuring the application of the EU treaties. It has a central role to achieving the EU objectives and setting the EU policy agenda. Another important element of its remit is the enforcement of antitrust. EU competition law is linked to the establishment of the rules necessary for the functioning of the internal market. The Commission's practice and the caselaw seem to demonstrate that EU competition law has specific enforcement patterns showing an expansion towards a nascent 'single market regulatory regime'. EU competition law has a dynamic scope and a powerful influence across different markets such as utilities, e-commerce and pharmaceutical products. Its expansive character is supported by the single market imperative. However, competition law is regarded as a tool to pursue economic efficiency. In several cases the Commission -with the CJEU oversight- has enforced competition to integrate the single market disregarding economic arguments or the most efficient outcome. EU competition law enforcement has proved problematic in two different areas. It has raised questions regarding the institutional balance in the EU and the goals of competition law.

II. EU competition law and its expanding universe

Since the foundation of the European Community in 1957, the Commission has been entrusted with the development of the single market.[1] Its ultimate goal is to push forward with the European integration process. The Commission has a broad remit in this regard. The latter includes the proposal of EU legislative measures, supervising the application of EU law and the enforcement of antitrust at the EU level. The Commission is the main EU policy maker as spearheads European integration. From such position, it will use its powers in a systematic way to achieve market integration. The CJEU has also played a meaningful role as it has upheld the actions of the Commission and confirmed the enforcement of competition to develop the single market.

Competition is another tool in the EU regulatory box. Market integration has been pursued in at

least three different scenarios involving the enforcement of competition. Firstly, the integration of utilities at the EU level (i.e. telecommunications, energy and gas). The Commission has sought market liberalisation in the telecommunications, electricity and gas sectors. The latter entails introducing competition into markers that were traditionally subject to a monopoly controlled by a State-owned company. Liberalisation seeks to benefit end-users by increasing choice and reducing prices. This is also an opportunity for the Commission to push forward with its own agenda and develop the single market (i.e. striking down barriers that may deter entry of potential competitors).[2] Even though there is a national regulator already dealing with market liberalisation, the Commission has enforced competition to accelerate this process. For example, as a result of antitrust investigations it has extracted commitments to reduce market power and in some cases break-up energy companies.[3] It has introduced competition infringements such as 'strategic underinvestment'.[4] The latter consists of an alleged refusal to develop new infrastructure that could be used by competitors.[5] A common theme across these cases is that the Commission has broadened the scope of access obligations (e.g. refusal to deal cases). This enforcement strategy was accurately identified by Larouche as the 'new EU competition law' back in 2000.[6] 'New' in the sense that competition is involved with liberalisation goals by promoting the access of competitors into the market.[7]

Secondly, the field of agreements. Geographic restrictions to the selling of goods are deemed anticompetitive as they create divisions within the EU's single market. For example, this has happened in vertical agreements in the pharmaceutical sector.[8] In GlaxoSmithKline (2009), a distributor acquired pharmaceutical products to resell them in a specific member state. The agreement restricted the selling of the product in member states where the products had higher prices (i.e. price differences exist between member States for different reasons such as divergences between the national regulatory framework). The distributor had strong incentives to breach such agreement as it could profit from price differentiation between member states. The Commission and the CJEU have considered that these agreements are in breach of competition law as they create or reinstate market divisions between member states. The problem with this position is that it shows a superficial level of understanding regarding the specificities of the industry involved.[9] As it was argued by the parties in this case, the pharmaceutical sector requires a high level of investment for research and development. Pharmaceutical companies make significant profits in member states with higher prices. Cutting prices may have detrimental consequences regarding future pharmaceutical developments and a negative impact on public health services. The enforcement of competition could be regarded as undesirable in cases in which specialised knowledge and a clear understanding of the industry is necessary. Nonetheless, EU market integration appears to trump any other consideration that stands on its way.

Thirdly, the CJEU has also played a meaningful role to develop e-commerce. In Pierre Fabre (2011) it held that a vertical restraint regarding a ban on online sales was an infringement of competition law.[10] Pierre Fabre, a non-dominant French cosmetic and personal care manufacturer, obliged distributors to commercialise its products in a physical space in presence of a qualified pharmacist. The manufacturer argued that such condition was necessary to preserve the image of its products. In a controversial ruling the CJEU held that the condition imposed on distributors restricted competition by object as it was effectively a ban on online sales. To support its reasoning, the CJEU argued that it was a limitation to the free movement of goods.[11] In this case, it does not seem to be entirely relevant if there was an antitrust infringement but whether the condition imposed by the manufacturer was in line with the development of the online sales market. This seems to be the case as in another ruling, Coty (2015), the CJEU upheld a similar restraint that did not involve online sales.[12] An important reflection arising from Pierre Fabre is

if the development of e-commerce should be left to market forces themselves (i.e. free interaction of market players and consumers choice) instead of enforcing competition as a tool for its promotion.

III. Questioning EU competition enforcement

Antitrust enforcement to pursue market integration is problematic from at least 2 perspectives. Firstly, in the specific case of utilities it may upset the institutional balance between the Commission and Member States. Secondly, it raises questions regarding the goals of competition law.

The Commission has become a 'de facto' EU regulator of utilities. Even though member states have not agreed to fully transfer such competences into the EU level, the Commission enforces competition law with a view of replacing or supporting the competences of national regulators in the utilities sector (i.e. telecommunications, gas and electricity). In Deutsche Telekom (2008), the CJEU has confirmed that the Commission may detect an antitrust infringement materialised in pricing practices even if the national regulator has approved the prices charged by the operator.[13] In the electricity sector, the Commission has enforced competition to extract remedies involving the cross-border flow of electricity between Member States, clearly acting as a 'de facto' utilities regulator.[14] The goal of the Commission is to ensure that the liberalisation goals are achieved across the EU and ultimately the creation of the EU energy market. A criticism to such actions is that the overarching enforcement of competition could be regarded as another case of competence creep. The Commission seems to have acquired a competence (i.e. half-baked utilities regulator) that has not been explicitly granted to it.[15] The big question is how far can the Commission stretch its powers to achieve market integration. The answer should be provided by the CJEU. Nonetheless, the latter has left the boundaries open. The most problematic part is not that the CJEU has failed to provide a clear answer but that its judgements are sometimes not well-argued and lack sufficient explanation as to what can be considered as an antitrust infringement.[16]

A second area of contention is the goals of competition, this point is better exemplified by contrasting the goals of EU competition law and US competition law. Contemporary enforcement in the US has a strong influence from the Chicago school.[17] In the US it is widely accepted that competition law is a tool to achieve total welfare or consumer welfare. Its underlying assumption is that market players are free to compete because market allocation is the most efficient outcome. The enforcement of competition is a residual mechanism only if something goes wrong. Competition comes as a second-best solution only in case of market failure (i.e. anticompetitive behaviour or concerted practice).[18] It has even been argued that antitrust enforcement is costly and should only be applied if the benefits outweigh the costs incurred, even in the case of market failure.[19] This idea implies a less active role from the antitrust enforcer. The US Supreme Court confirmed this position in the landmark ruling Trinko (2004). 'The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system', the US Supreme Court held.[20] This judgement could be considered as deeply rooted in the Chicago school of thought as it defends the existence of monopoly and monopoly prices.

On the other hand, EU competition law has a different objective. From the outset the Commission has a specific task to develop and protect the single market. For this purpose, the EU -and more

specifically the Commission- has the exclusive competence to develop competition rules necessary for the functioning of the single market. The CJEU has also consistently held in several key rulings that market integration is a goal of EU competition law.[21] Creating and shaping a single market presupposes a more active role from the antitrust enforcer because it is an objective that has a positive element (i.e. a duty to act), in the sense that it requires delivering a specific outcome.[22] For example, it would be reasonable to expect that the EU antitrust enforcer is harsher towards dominant market players as their actions could deter entry into the market and erect barriers to limit the competition process. The enforcement of competition is therefore meant to be more active and interventionist if compared to US antitrust law.

The subsequent question is whether competition law is properly equipped to pursue other goals disregarding economic efficiency. It has been argued that market failure cannot be considered as the main rationale to create a regulatory regime (i.e. competition law).[23] Other justifications may include protecting rights, social solidarity or even pursuing a political goal that transcends economic efficiency such as the EU single market. In the US, competition law is a tool to achieve a particular social value: economic efficiency. In the EU there is room to pursue economic efficiency but the latter is trumped by a political goal: market integration. As a central element of the European project it could be regarded as a social value itself.

IV. A voyage into the unknown

The Commission is the EU policy maker and its main economic goal is to achieve market integration. The latter is therefore a key element reflected in its policy. From a historical and political perspective this is nothing new. The CJEU is meant to provide certainty in relation to the boundaries of competition enforcement. So far, the CJEU has left this question open as it has consistently given ‘green light’ to the Commission and confirmed the enforcement of competition as a tool for the single market. It seems that the Commission and the CJEU have developed a regulatory regime to achieve a particular EU policy goal. A regulatory regime with a hybrid nature that falls somewhere in between competition law linked to economics and ‘single market regulation’. Unsurprisingly it has an uncanny resemblance to the EU itself and its own hybrid nature between an international organisation and a federation of states. But that is another story, another voyage into the unknown.

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[1] Susanne K. Schmidt, Arndt Wonka. ‘European Commission’ in *Oxford Handbook of the European Union*. Edited by Erik Jones, Anand Menon and Stephen Weatherill. (OUP, 2012).

[2] One of the first decisions in the gas sector is Marathon/Thyssengas, decided in 2001. The press release is available on the Commission’s website: http://europa.eu/rapid/press-release_IP-01-1641_en.htm?locale=en

[3] Some cases include: COMP/M39.388 – German Electricity Wholesale Market and COMP/39.389 – German Electricity Balancing Market, 26 November 2008. COMP 39.402/ – RWE gas foreclosure, 18 March 2009. COMP/39.316 – GDF foreclosure, 3 December 2009. COMP/39.351 – Swedish Interconnectors, 14 April 2010.

[4] Case COMP/39.315 – ENI, 29 September 2010.

[5] Pietro Merlino, Gianluca Faella. Strategic underinvestment as an abuse of dominance under EU competition rules. World Competition and Economics Review, Vol. 36, No. 4, 2013.

[6] Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publication, 2000) 112

[7] Another feature of the Commission's approach to enforcement is that the latter is actively pursuing competition infringements that are not directly related to the abuse of a dominant position but to tackle dominance itself.

[8] Joined Cases C?501/06 P, C-513/06 P, C-515/06 P and C?519/06 P, GlaxoSmithKline ECLI:EU:C:2009:610

[9] For an analysis on the enforcement of competition in the pharmaceutical sector in cases involving parallel trade, see AG Jacobs Opinion, Case C-53/03 – Syfait and Others.

[10] Case C-439/09 – Pierre Fabre Dermo-Cosmétique

[11] Effectively restricting one of the single market fundamental freedoms.

[12] C-230/16 – Coty Germany

[13] Case C-280/08 P, Deutsche Telekom AG v European Commission [2010] ECR I-955

[14] Case COMP/AT.40461 – DE-DK Interconnector.

[15] On Competence creep, see Sacha Garben, 'Confronting the competence conundrum: Democratising the European Union through an expansion of its legislative powers, Oxford Journal of Legal Studies, Vol. 35, No. 1 (2015) 55-89

[16] For example, Telia Sonera (2011) [Case C-52/09], a ruling in the telecommunications sector involving price squeeze, should be remembered for all the wrong reasons. Not for its clear line of argumentation and reasoning but because of its lack of it. In such case the CJEU refused to clarify the scope of refusal to deal as a competition infringement and instead created the notion of an 'independent form of abuse from that of refusal to supply'. The real goal in this case was promoting the entry of competitors. The problem was that the CJEU fail to find a clear 'competition path' to do it.

[17] Richard Posner, *Antitrust law* (The University of Chicago Press, 2001)

[18] Robert Baldwin, Martin Cave and Martin Lodge. Understanding Regulation. (OUP, 2012) 15

[19] Frank H. Easterbrook, 'Limits of Antitrust' 63 Texas Law Review 1 (1984)

[20] Verizon v. Trinko, 540 U.S. 398 (2004)

[21] Some cases include: C-56/64 – Consten and Grundig v Commission of the EEC, C-468/06 – Sot. Lélos kai Sia, C-403/08 – Football Association Premier League and Others.

[22] EU competition law is also influenced by ordoliberalism. The idea that market players have a right to compete as an economic freedom. Dominant market players are a threat the competitive process and their influence should be tackled.

[23] Tony Prosser ‘Regulation and social solidarity’ Journal of Law and Society. Volume 33, Number 3, September 2006. 364-87

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