



COMPETITION LAW AND ECONOMICS

Advances in
Competition Policy Enforcement
in the EU and North America

EDITED BY
Abel M. Mateus
Teresa Moreira

IN ASSOCIATION WITH
THE PORTUGUESE COMPETITION AUTHORITY



AUTORIDADE DA CONCORRÊNCIA

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Advances in Competition Policy Enforcement
in the EU and North America

Edited by

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Preface

Competition policy is at a crossroad on both sides of the Atlantic. Although the fight against cartels is today a broad area of consensus, with some countries criminalizing this type of agreement, there is a large debate on the questions of monopolization or abuses of dominant position, brought vividly forward by the recent *Microsoft* case. Also on mergers there are today diverging views on the interplay of business strategies and the control of market power on a global and national scale. And, finally, there is the perennial issue in Europe of the conflicts between competition and industrial policies, again bringing the theme of national champions to the fore. In this book, judges, enforcers and academics in law and economics from both sides of the Atlantic look at the consensus built so far and try to clarify controversies in these areas. The contributions presented here also try to make a final judgement on the efforts of modernization brought about in both the US and the EU.

The Portuguese Competition Authority is, under its statutes, fully committed to further research in competition policy and to nurturing a competition culture among economic agents. In this regard, it organized the Second Lisbon Competition Law and Economics Conference, that took place at Centro Cultural de Belém, 15–16 November, 2007.

The objective of the Conference was to debate current issues related to competition law and economics, by leading experts in academia, Competition Authorities and judges from Europe and North America. This book presents the proceedings of this Conference and should be read by lawyers, economists, judges, academics, and all economic and law practitioners active in competition policy and enforcement.

The Conference addressed five issues: (i) judicial control of administrative decisions and private enforcement; (ii) merger control in regulated markets with network economies; (iii) stocktaking on major debates in the EU and USA about abuses of dominant position and attempts at monopolization; (iv) challenges that globalization raises to national and EC competition and industrial policies; and (v) assessment of new package of the EC state aid policy.

First, we would like to thank all speakers who graciously participated. We also thank Drs Rui Manchete and Basílio Horta for the co-sponsorship of the Conference by the Luso-American Foundation and the AICEP

Portugal Global-Business Development Agency. Finally, we thank Dra. Mariana Tavares for her diligent work in organizing the Conference and putting this volume together:

Abel M. Mateus

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Introduction

Abel M. Mateus

The Second Lisbon Conference on Competition and Economics, held in Lisbon on 15 and 16 November 2007, was intended as a forum to debate current issues related to Competition Law and Economics, where leading experts from Europe and North America were invited to address the following current issues: (i) the role of public versus private enforcement of competition and its benefits and costs in the US and EU. How to make more effective the control of administrative decisions by competition authorities? (ii) The specific economic problems posed by merger control in regulated sectors, and in particular in energy and telecommunications. (iii) The results of the modernization package in the US. (iv) The outcome of the extensive discussions about Section 2 in the US and Article 82 in the EU. What are the intrinsic differences in the law on monopolization and attempts to monopolize and dominant position, and what does the case-law teach us? Contrasting US and EU views. (v) The doctrine of national champions and competition policy. What role has industrial policy played on both sides of the Atlantic? and (vi) the EU's new approach to state aid: a report card.

President Cavaco Silva, after recognizing the importance of competition policy in a modern economy and its increasing role in building the single market, stresses the need for independent and competent competition authorities. Pointing out the need for clear rules and strong institutions that apply the laws in a credible and speedy process, he stresses the requirement for firms to cooperate with authorities to pursue the public interest. In response to the dynamic strategies of enterprises in the modern business world, authorities need to take decisions, especially merger decisions, that do not unduly constrain those strategies. The State should also avoid unduly distorting markets. For that purpose competition authorities should have the possibility of controlling state aid and States should take into due consideration recommendations made by independent regulators.

Commissioner **Neelie Kroes** underlines the aim of competition policy on both sides of the Atlantic: consumer welfare. As the main theme of the

European Competition Day, state aid is undergoing a major reform. Less and better targeted aid should be used to tackle market failures, including environment and social objectives. It is particularly important to support research and innovation and to give access to risk capital. Economic analysis should be used to balance the benefits and costs of each project, and procedures are being implemented to simplify applications and to make decisions more predictable. On the question of competition and industrial policies in a globalized world the Commissioner points to the danger of subsidy races at a global level and the need to avoid shielding European companies from competition through artificial entry barriers. On regulated markets the Commission has recently issued a new energy package that proposes the unbundling of the generation and transmission network, and through its merger decisions ensure that open markets are not foreclosed in telecommunications.

Commissioner **Kuneva** stresses the importance of single market policy delivering tangible benefits to consumers. Ensuring a competitive environment on the supply side may not be enough to guarantee such benefits. She cites cases like switching costs in energy markets, international roaming charges and tying in financial markets. Two particular areas that the Commission has acted on Consumer Protection are transparency in sales of on-line air travel tickets and improving mechanism for consumer redress for European consumers.

After pointing to the fact that competition policy has remained at the core of the Treaty of Lisbon, **Abel Mateus** stressed the importance of law enforcement and the role of courts to upholding the reputation of competition authorities both in Europe and the United States. On state aid he calls attention to the externalities generated by bad decisions that are frequently emulated by other States, and the use of this instrument to pursue industrial policies that may be detrimental to the single market. He also points to the need that instruments used to further energy or environmental objectives should not distort competition and be market friendly. We are still a long way from building a single market in energy, and it is necessary to complement unbundling with more competition in power generation. National governments should avoid building national champions to confront state firms in non-member States, and the level playing field in international trade should be preserved by the Commission. Finally, the new retail payment system (SEPA) should not increase consumer costs to the benefit of large banks. He also addresses other important issues like maintaining an open system for company takeovers, a reevaluation of the 'two-thirds' rule used by the Commission in merger assessments and the need to apply a more comprehensive competition impact assessment by member states.

Part II addresses *judicial control of administrative decisions and private enforcement*. Courts continue to play a major role in competition enforcement, in terms of control of administrative decisions by Competition Authorities in the EU and in private enforcement in the US. What are the prospects for private enforcement in the EU? How to combine public and private enforcement? Are there major differences between common law and roman law based systems? The chapters aim to compare the EU and US experiences.

The first two chapters were written by magistrates with more than three decades of experience in courts and contrast their experience in private versus public enforcement in the competition area. They defend opposing views that largely reflect the characteristics of the US and EU systems. However, as the first chapter defends, the US has a structure of incentives very much different from that of the EU, with treble damages and payment of attorneys' and litigation costs by the party that loses coupled with a success fee arrangement. The EU system does not have a structure that encourages private enforcement. **Judge Douglas Ginsburg** compares the benefits and costs of private and public enforcement as shown by the US experience. How can we achieve optimal enforcement (deterrence) by allocating responsibility between public and private complainants and then calibrating the incentives for private enforcement? Judge Ginsburg answers this question from the perspective of incentives for law enforcement, concluding that optimal antitrust enforcement can almost certainly be achieved only by relying primarily upon private plaintiffs. The most important exception is merger control, since the only relief available is an injunction, and consumers do not have enough incentive to block anti-competitive mergers. There are very important reasons for courts to be suspicious of competitors that bring cases against a merger, so merger control should be entrusted to a public agency. In the case of cartels, a private plaintiff can recover treble damages, plus costs and attorneys' fees. Coupled with a substantive law per se rule against horizontal price-fixing and market-sharing cartels is a very powerful incentive for private litigation. He defends the rule of treble damages in this case because of the deterrence effect and the evidence that only 10 to 30% of cartels are detected. Non-horizontal agreements are subject to a rule of reason which has made them difficult to prosecute, but probably most of them are not anti-competitive. On monopolization or attempt to monopolize he defends that the rule of treble damages should be cut to actual damages in order to prevent over-litigation. Finally, he discusses the question of financing the costs of litigation and concludes that class actions in the US are a very useful instrument for consumer redressing.

While private enforcement is prevalent in the USA, public enforcement