THE DEVELOPMENT OF COMPETITION LAW

Global Perspectives

Edited by
ROGER ZÄCH
ANDREAS HEINEMANN
ANDREAS KELLERHALS

ascola
Academic Society for Competition Law

The Development of Competition Law

Global Perspectives

Edited by

Roger Zäch

Europa Institut, University of Zurich, Switzerland

Andreas Heinemann

Europa Institut, University of Zurich, Switzerland

Andreas Kellerhals

Europa Institut, University of Zurich, Member of the Swiss Competition Commission

ASCOLA COMPETITION LAW
The Third ASCOLA Workshop on Comparative Competition Law

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2009937922

ISBN 978 1 84844 446 1

Printed and bound by MPG Books Group, UK

Contributors

Josef Bejček
Professor of Law; Director of the Department of Commercial Law, Masaryk University Brno; Member of the Appellate Committee of the Czech antitrust authority in Brno, Czech Republic

Srinivasan Chakravarthy
Civil servant, competition expert, consultant to World Bank, ADB etc., India

Paulo Furquim de Azevedo
Commissioner at Conselho Administrativo de Defesa Econômica (CADE), Brazil and Professor of Economics at Getúlio Vargas Foundation – FGV-EESP, São Paulo, Brazil

Rainer Geiger
Professor of International Economic Law; Senior regional advisor, OECD, Paris, France

Warren S. Grimes
Professor, Southwestern Law School, Los Angeles, CA., Senior Fellow, American Antitrust Institute, Washington, D.C., USA

Andreas Heinemann
Professor of Law, Member of the board of the Europa Institute, University of Zurich, Switzerland

Alexandre Lauri Henriksen
Conselho Administrativo de Defesa Econômica (CADE), Brazil

Yong Huang
Professor of Law, Director of the Economic Law Department, University of International Business and Economics, Beijing, P.R. China

Shan Jiang
Economic Law Department, University of International Business and Economics, Beijing, People's Republic of China

Andreas Kellerhals
Professor of Law, Director at the Europa Institute, University of Zurich, Member of the Swiss Competition Commission, Switzerland

Adrian Künzler
Dr.iur., District Court of Zurich, Switzerland

Giorgio Monti
Reader in Law, Law Department, London School of Economics, UK

Iwakazu Takahashi
Professor of Law, Faculty of Law, Meiji University, Tokyo, Japan

Wouter P.J. Wils
Member of the Legal Service of the European Commission, Brussels, Belgium, Visiting Professor at King's College London, UK

Roger Zäch
Professor of Law em., Director at the Europa Institute, University of Zurich, Switzerland

Daniel Zimmer
Professor of Law, University of Bonn, Institute for Commercial Law, Member of the German Monopolies Commission, Bonn, Germany

Preface

Competition law has substantially changed since 1990. The worldwide tendency towards market-based economic systems has induced many countries to adopt competition rules. On the other hand, in those countries with a long-standing competition law tradition, the foundations of competition policy have undergone considerable change. The third conference of the Academic Society of Competition Law (ASCOLA) in Zurich took this development as a starting point for a deeper analysis. In the contributions collected in this book, the focus is on three main topics. As regards methodology, the relationship between law and economics has become blurred. This is not only true for US antitrust law, which always has been relatively open for economic thinking, but also for Europe where the transition to a more economic approach animates the debate. The discussion is not only theoretical but has an enormous impact on the formulation of substantive law.

The second issue is the competition law experience in selected countries (Japan, India, China, Czech Republic, Brazil). No matter if the competition law tradition is rather long or more recent, competition law has to adapt to the political, economic, geographic and socio-cultural conditions of states. The institutional framework heavily influences the outcome of competition policy. The variety of selected countries gives a fascinating insight into the specific problems which may occur.

Thirdly, the perspectives of competition law are explored. Competition law has never been so international. What impact does this fact have on the global level? In most parts of the world, competition law is enforced by administrative authorities. Should there be more space for private enforcement and criminal sanctions? And, finally, what should be the role of economics for competition policy in the future?

The Zurich ASCOLA conference would not have been possible without the support of the Europa Institute Zurich (EIZ). The editors especially would like to thank Daniela De Marco, Marietta Zürcher and Robert Lesjak for their constant and most valuable support, as well as Fabio Babey for the preparation of the manuscript. We are very grateful to Peter Behrens, Ulrich Immenga, Joël Monéger and Rolf H. Weber who

moderated the lively discussions which are reflected in the contributions to this volume.

Zurich, April 2009

Roger Zäch, Andreas Heinemann, Andreas Kellerhals
Europa Institut at the University of Zurich

Contents

PART I

The methodological foundations of competition law

1. EC Competition Law: The Dominance of Economic Analysis?

Giorgio Monti*

1 INTRODUCTION

Nobody can doubt that the most noticeable trend in EC competition law since 1990 has been the increased use of economics by the EC Commission. This is manifested at a range of levels: personnel in Directorate General for Competition (DG Competition) (e.g. creation of the post of Chief Economist, an increase in economists working in the DG); decisions with increased economic sophistication;[1] legal instruments designed by reference to economic studies; and general policy ambitions (e.g. the liberalisation drive that began in the early 1990s affecting utilities and other sectors shielded by state legislation; the plan to reform Article 82 EC; prosecutorial focus on hard-core cartels and away from less significant vertical restraints). Even the Commission's sternest critic for many years, Valentine Korah, has acknowledged that there has been an improvement in this respect if one compares the concluding chapter in the Fifth and Ninth editions of her well known 'yellow book'.[2] In the earlier edition she criticised the paucity of economic analysis, while in the latest edition she notes a dramatic improvement over the last decade, although identifying discrete areas of concern. Thus, this chapter shall not call into question the fact that there is more economic analysis in EC competition law today than there was in the past, nor provide a detailed account of how economic analysis is applied in all aspects of competition enforcement.[3] Instead we examine the

* Reader in Law, Law Department, London School of Economics, UK.

[1] E.g. COMP/34.579 *Europay (Eurocard-MasterCard)* 9 December 2007, where the Commission even cited an economics journal at footnote 846.

[2] Korah, V. (1994), *An Introductory Guide to EC Competition Law and Policy* 5th edition, London: Sweet & Maxwell; Korah, V. (2007), *An Introductory Guide to EC Competition Law and Policy* 9th edition, Oxford: Hart Publishing.

[3] *See* Monti, G. (2007), *EC Competition Law*, Cambridge: Cambridge University Press for an overview.

extent to which economics plays a role and ask questions, such as whether the use of economics is legitimate and about how economics is used. While the scope of issues covered is too wide to allow for detailed discussion of each point, an overview that joins up a variety of themes can offer a helpful critical evaluation of the role of economics in EC competition law.

It helps to break down three dimensions of the decision-making function in a regulatory sphere: the design of rules, the application of rules to a given scenario, and their enforcement.[4] This allows us to examine the extent to which economics plays a role in each of these three stages. The bulk of this chapter (sections 2 and 3) is concerned with the first function because if economics plays no role at that stage, then it can hardly play a meaningful role in the other stages. Having demonstrated that there is a significant, but limited, role for economics in the formulation of legal rules in EC competition law, and that there are arguments that legitimise this role, we next look at some instances of the interaction of economics with competition law in section 4 to question the extent to which the two disciplines are as well integrated as a cursory glance might suggest at first. Having noted these limitations, we turn (in section 5) to examine whether the proposed shift towards greater private enforcement of EC competition law (a trend that also began meekly in the early 1990s but might see more bold legislative action soon) might affect (or be affected by) the increased role of economics in EC competition law.

2 A 'MORE' ECONOMICS-BASED APPROACH

This is how the competition Commissioner summarised the aim of competition enforcement under the more economics-based approach:

> to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy.[5]

This statement contains three important assumptions and conclusions: it blurs the line between positive and normative economic analysis, it sets out a welfare paradigm based on distributive considerations, and it signals

---

[4] Along similar lines, *see* Brunt M. (1998), 'Antitrust in the Courts: The Role of Economics and Economists' Fordham Corporate Law Institute 357 (Hawk ed 1999).

[5] Kroes, N. (2005), 'European Competition Policy: Delivering Better Markets and Better Choices', speech of 15 September). The same distinction is found in Guidelines on Article 81(3) [2004] OJ C101/97 para 21.

a commitment to eliminate the consideration of other goals when enforcing competition law. An important qualification about the economics-based methodology that the Commission makes regularly is that it is a 'more' economics-based approach,[6] which is ambiguous because it may either mean that it is not an exclusively economic approach, or that more economics is used today than in the past. These official statements are scrutinised below.

2.1 Positive and Normative Economics

There is an important distinction between a positive economic analysis, which explains the economic consequences of certain events (e.g. why monopoly prices are high) and a normative economic analysis, which prescribes action (e.g. that monopolies should be broken up). Often, when one speaks of economics in competition law this distinction is blurred. Typically one starts with the fundamental measure of economic performance from a positive perspective, efficiency, which is defined as a situation where the economy cannot increase the welfare of anyone without harming someone else. This measure of performance however, is quickly turned into the goal to be pursued by competition law, so one moves from the positive to the normative without questioning whether efficiency ought to be the sole goal of competition law enforcement. Thus, one of the major United States (US) economics textbooks proclaims: 'in recent years, under the prodding of economists, antitrust policy has been evolving away from the "big is bad" philosophy and toward the economic approach to antitrust. Emphasising the intrinsic rivalry of oligopolists, the economic approach holds that the most powerful incentives for large business to reduce prices and improve quality occur in a deregulated world . . . antitrust policy should be reserved for the worst abuses of market power.'[7] This approach uses economics both in the positive sense (studying the performance of markets) and in the normative sense (regulating markets based on efficiency). The same can be seen in the Commissioner's statement quoted above.[8]

---

[6] *A Pro-active Competition Policy for a Competitive Europe* COM(2004) 293 final, para 3.1.

[7] Samuelson, P.A. and W.D. Nordhaus (1998), *Economics* 16th edition, Boston: Irwin McGraw Hill, p. 313.

[8] Similarly Gerber, D. J (2008), 'Two Forms of Modernisation in European Competition Law', *Fordham International Law Journal*, **31**, 1235 and 1240 noting how the more economics-based approach 'posits that neo-classical economics provides not only the goals of competition law, but also its standards and methods'.

One criticism of this kind of reasoning is that it ignores that, from a normative perspective, society might not wish for competition law to be enforced with an economic approach that focuses only upon whether the actions of firms are inefficient. From a positive perspective, it may well be true that inefficient outcomes are rare, and that open markets and free trade tend to make markets contestable, but this is not enough to say that society should not demand that antitrust law enforcement serves other goals. It follows that, strictly speaking, a normative economics approach to competition law could be consistent with the design of rules to protect vulnerable people in society, or to promote employment, or to sustain an industrial policy. Furthermore, the economic approach summarised above owes a lot to the so-called Chicago School of antitrust analysis, which insists upon efficiency as the sole goal of antitrust enforcement. In contrast, other economists have suggested a wider range of normative goals for economic regulation: progress, full employment (especially of human resources), and an equitable distribution of income.[9] This chapter is not the place to decide what the goals of competition law should be, but in what follows it is important to note that the EC Commission views the economic approach summarised above as relevant both as a matter of positive and normative economics, so that efficiency is both a measure of performance and the test for legality.

2.2 Economic versus Consumer Welfare

Almost all economists say that the basic norm of economics is the maximisation of the overall wealth of society, not a concern about a selected group, e.g. consumers.[10] For example, the reason economists object to monopsony power is that it reduces overall wealth, while a consumer welfare standard might decide that if the exercise of monopsony power (by say supermarkets) leads to lower consumer prices, then there is no reason for competition law to intervene. Conversely, if price discrimination allows sellers to extract more money from consumers willing to pay more, a consumer welfare standard might require intervention even if the action of the price discriminator is efficient. In spite of this, very few competition authorities say that their aim is to maximise total welfare.[11] Instead, competition law is normally about

---

[9] Scherer, F.M. and D. Ross (1990), *Industrial Market Structure and Economic Performance* 3rd edition, Boston: Houghton Mifflin Company, p. 4.

[10] Buccirossi, P. (2008), 'Introduction' in P. Buccirossi (ed.) *Handbook of Antitrust Economics*, Cambridge, MA: MIT Press, pp. xv–xvii.

[11] Two exceptions are said to be Canada and New Zealand. Motta, M. (2004), *Competition Policy*, Cambridge: Cambridge University Press. However this is not

consumer welfare, and it is so in the EC as evidenced by Commissioner Kroes' statement above. Dennis Carlton offers two reasons why this is so.[12] The first reason is the 'monitoring of antitrust policy.' By this he means that focusing on the anticipated short run effects on consumers allows third parties (even courts) to check whether the agency has done its job properly by seeing if prices fall after a prohibited transaction. Instead, a total welfare standard is less easily susceptible to scrutiny given the greater number of variables and also the long term justifications for allowing certain practices – e.g. a merger to monopoly that is said to be good for long term innovation. A second reason which is hinted at by Carlton is that the cost of running a total welfare standard is much greater than examining the effects of a practice under a consumer welfare standard, because one has to examine the impact over a larger range of players in the economy. A third reason we might offer is that although in theory the consumer welfare focus prioritises allocative over productive efficiency, clashes (e.g. a merger to monopoly that would lead to lower costs) are rare so the choice of consumer welfare over total welfare does not yield different outcomes frequently. Consumer welfare then is a proxy for total welfare.[13] But this does not seem to be quite what the EC Commission has in mind. Returning to Commissioner Kroes' statement, competition enhances consumer welfare and ensures an efficient allocation of resources.[14] By distinguishing allocative efficiency and consumer welfare this means that in addition to the loss of economic welfare resulting from output restrictions, the enforcement of competition law also looks at the money transfers from consumers to producers. While this might be criticised as simplistic (producers are firms owned by shareholders, their extra profits result in benefits to society unless there is a monopoly when there is a risk the extra profits are invested in rent-seeking activities), this distributive concern is at the heart of EC competition law.[15]

---

so if one looks at the statutes: Commerce Act 1986, s. 1 provides that the purpose is to 'promote competition in markets for the long-term benefit of consumers within New Zealand'; Canada's Competition Act 1985, s. 1 includes a range of purposes beyond efficiency including ensuring 'that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices'.

[12] Carlton, D. (2007), 'Does Antitrust Need to be Modernized?' EAG 07-3 January, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956930 (accessed 18 June 2009).

[13] Bishop, S. and M. Walker (2002), *The Economics of EC Competition Law* 2nd edition, London: Thomson Sweet & Maxwell, p. 25.

[14] *See* above, n 5.

[15] The efficiency defence in Article 81(3) and the Merger Regulation requires that the benefits of efficiency are passed on to consumers.

Furthermore, the quote above from the Commissioner raises another issue: whether by focusing on consumer welfare one can sensibly consider static and dynamic efficiencies and make the right policy call between these two kinds of efficiency: should an agency tolerate harmful effects for consumers today in exchange for benefits to consumers in the future? The issue was looked at in brief in the Microsoft decision by the Commission and although the CFI took the view that the discussion was unnecessary for the decision, it is still worth noting that the Commission is sceptical of the view that there may be instances where dominance should be tolerated to allow for increased dynamic efficiency.[16] In a recent case considering parallel trade in pharmaceuticals, the Grand Chamber of the ECJ refused to get involved in this kind of argument in spite of counsel pressing the Court to address the question of how dynamic efficiencies affect the interpretation of Article 82 EC.[17]

One difficulty with the consumer welfare standard is that while in many cases it is easy to see how consumers are hurt by anticompetitive practices, there are instances where putting the standard into operation is complex. Consider a typical vertical restraint that leads to higher prices but greater visibility for the product. The effect of this is that new consumers find out about the good and buy it, but those who already bought it before the restraint now pay higher prices.[18] How do you apply a consumer welfare standard to this kind of behavior? Do you take into account the losses of the consumers who pay a higher price? (No, an economist would say, but yes say antitrust agencies); does one ask whether consumers as a whole are better off? According to Carlton US agencies and courts look at overall consumer welfare, although he qualifies this by noting that 'technically under the Clayton Act, antitrust harm to any substantial consumer group could provide a basis to enjoin a merger.'[19] In the EU, it seems one must also look at the welfare of all consumers.[20] For example the Guidelines on Article 81(3) state that in order to establish that an anticompetitive practice merits exemption

---

[16] Case T-201/04 *Microsoft v Commission* judgment of 17 September 2007.

[17] Case C-468/06 à C-478/06 *Sot. Lélos Kai Sia E.E. (and others) v GlaxoSmithKline* judgment of 16 September 2009, para 70. The issue may be confronted in Case C-501/06 P *GSK v Commission* [2007] OJ C42/11.

[18] Similarly, RBB 'Art or Science? Assessing efficiencies under the Commission's Article 81(3) Notice' RBB Brief N.14 (July 2004) p. 3, available at: http://www.rbbecon.com/publications/downloads/rbb_brief15.pdf (accessed 18 June 2009).

[19] *See* Carlton above, n 12, p. 3.

[20] Case C-238/05 *Asnef Equifax v Ausbanc* judgment of 23 November 2006, para 70.