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Competition Law

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Dominance: A Distinction without a Difference?', *European Competition Law Review*, **1**, pp. 24–39. Copyright © 1996 Trevor Soames, Norton Rose; Rosa Greaves (1998), 'The Herchel Smith Lecture 1998: Article 86 of the E.C. Treaty and Intellectual Property Rights', *European Intellectual Property Review*, **20**, pp. 379–85; Daniel Glasl (1994), 'Essential Facilities Doctrine in EC Anti-Trust Law: A Contribution to the Current Debate', *European Competition Law Review*, **6**, pp. 306–14; Thomas Sharpe (1987), 'Predation', *European Competition Law Review*, **8**, pp. 53–76; Pierre-Emmanuel Noël (1997), 'Efficiency Considerations in the Assessment of Horizontal Mergers under European and U.S. Antitrust Law', *European Competition Law Review*, **8**, pp. 498–519; Ignacio De León (1997), 'The Dilemma of Regulating International Competition under the WTO System', *European Competition Law Review*, **3**, pp. 162–77. Copyright © Sweet & Maxwell & Contributors.

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Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
Charles Sturt University

Introduction

Competition law, or 'antitrust law' as it is known in the United States (US), was absent from the first series of *The International Library of Essays in Law and Legal Theory*. This is not surprising since competition law/antitrust law, as a separate body of law, is very much a creation of the twentieth century and grew only into maturity in the latter half of that century. This area of law consists of rules adopted by states, such as the US, or supranational organizations, such as the European Community (EC), in order to regulate the activities of economic entities (private or public) in competitive markets. These activities embrace agreements or arrangements between undertakings, conduct by undertakings in dominant market positions, mergers, unfair practices (e.g., dumping) and aid granted by states to certain undertakings.

The legislative history of antitrust law in the US is founded in the Sherman Act, adopted by the US Congress in 1890 in order to deal with the trusts that controlled and consolidated American industry at the end of the nineteenth century. Thus antitrust legislation in the US was enacted just after their industrial revolution. In the early part of the twentieth century the American Supreme Court adopted rules such as the 'rule of reason' and the 'per se' rules[1] which have resulted in the modern law of antitrust. The Clayton Act and the Federal Trade Commission Act, adopted in 1914, completed the initial legislative package. As far as Europe is concerned, competition law is a post-Second World War legal phenomenon which flourished with the establishment in 1957 of the European Economic Community (now known as the EC). Although it is often stated that the origin of competition law in Europe was a consequence of the US's influence on post-war Germany, the influence of the neo-liberalism pre-1950s movement in Germany should not be underestimated.[2] The establishment of the European Economic Community in 1957 gave German thinkers an ideal opportunity to introduce innovative competition rules (Articles 81–90 of the European Community Treaty (EC Treaty))[3] into the new legal order they had created (European Community law) to deal with the restrictive practices and problems that arise from the exercise of economic power. The scope of these rules have been supplemented by secondary legislation[4] and by the interpretative rulings of the European Court of Justice (ECJ) resulting in a body of law known as 'EC competition law'. The EC Treaty envisaged the establishment of a common market based on four fundamental freedoms concerning the key factors of production (goods, persons, services and capital) and on the operation of common rules such as the competition rules. Thus, unlike the situation in the US where antitrust law was enacted long after free interstate trade had been established, EC competition law is an important element in the fundamental goal of establishing free movement of goods and services between member states. Article 3(f) of the EC Treaty requires the European Community to create a system ensuring that competition in the common market is not distorted.

As the 'common market' – now renamed the 'single European market' or the 'internal market' – has grown in importance, the usage of the term 'competition law' has become more common than 'antitrust law' in legal writing outside the US. The term 'competition law' is very much a European one which has enabled economic theories to be put into practice within the

context of a political goal of economic integration in Europe. However, as markets become global, academic lawyers and practitioners argue for the creation of a World Competition Authority under the auspices of the World Trade Organization. Should the idea come to fruition, I have no doubt that 'competition law' rather than 'antitrust law' will be the term used globally. Thus the title of this volume is *Competition Law*. However, given that there are significant differences in competition law concepts between the US and the EC, the terms 'US antitrust law' and 'EC competition law' have been used accordingly when commenting on specific practices or concepts pertaining to these two jurisdictions.

Chosen Structure and Overview

The task of selecting essays for this collection has been harder than anticipated. European literature in particular tends to respond to specific problems which are raised in competition cases rather than to engage in theoretical or jurisprudential academic debate. Most of these works are problem-solving short pieces or critiques of judicial application of competition rules. They are written by academics, practitioners or policy makers, thus providing a variety of perspectives, and they are published in designated specialist journals, such as the *European Competition Law Review*, which are accessible to the legal profession.

American antitrust scholarship on the other hand, is extensive and focused on economics and antitrust policy. These articles are lengthy, published in a variety of university law reviews as well as in specialist journals such as the *Antitrust Law Journal*. The major influence in the United States in the second half of the twentieth century was the Chicago School's scholarship.[5] The Chicago School followers maintain that the only goal of antitrust policy and law is market efficiency, that is, the maximization of consumer welfare. Furthermore, rigorous economic analyses were applied by followers of the School to test the propositions in antitrust laws and to understand the impact of business practices on consumer welfare. The School's ideas were expounded by such writers as Bork, Easterbrook and Posner.

There are several well-known books on competition law. A non-exhaustive list would include: *The Anti-trust Paradox: A Policy at War with itself*;[6] *Antitrust Law: An Economic Perspective*;[7] *Antitrust and the Bounds of Power*;[8] *Law and Competition in The Twentieth Century Europe: Protecting Prometheus*;[9] *Competition Policy in the European Community*;[10] *EC Competition Law*;[11] *Monopoly Law and Market*;[12] and *The Rule of Reason in Antitrust Law*.[13]

Although notions of what is antitrust in the US differ significantly from those in the EC, EC competition law owes much to US antitrust law. As developments in US antitrust law have had, and continue to have, an important influence on the development of competition law in Europe and worldwide, articles have been selected from both sides of the Atlantic. Thus, under several headings I have selected works from both American and European perspectives. As competition law is a form of common law, it is not surprising that articles written by Europeans or Americans contain discussions or analyses of case-law decisions.

The collection focuses on the following aspects of competition law: the objectives and nature of competition law; the scope of competition law; selected legal concepts and challenges in competition law; and the global application of competition law. The collection does not include literature on state aids. Although state aids are of particular concern to EC competition law, they are beyond the scope of this volume.

Part I The Objectives and Nature of Competition Law

In the US there has been an ongoing debate as to the objectives or goals of antitrust law and policy.[14] In Europe the key objective of competition law, namely market integration, has never been seriously challenged. Willimsky (Chapter 1) provides a brief introduction to the underlying concepts of competition law and explains the basic characteristics of the two leading schools of thought, namely Chicago and Brussels. The policy differences between the US and the EC are then developed in Hawk's essay (Chapter 2). In both jurisdictions, politics play a significant role.

The Economic Concerns of Competition Law

Competition law is in a class of its own. It is generally agreed that it is shaped by economics but there is less agreement as to whether economics alone plays the vital role. Since it was in the US that the first antitrust legislation was adopted, American commentators have had the principal lead in evaluating the role of economics in the development of antitrust law. Many leading specialists (Areeda and Turner, 1980; Bork, 1978; Posner, 1976) argue that maximization of economic efficiency (consumer welfare) is the only goal and any other criteria is without legal foundation.[15] However, other commentators maintain that other goals are of equal importance. A critical review of these two schools of thought is given in Lande's essay (Chapter 3). Lande rejects both views and expresses his own theory that the primary goal of the drafters of the US antitrust legislation was to prevent 'unfair transfers of wealth from consumers to firms with market power' (Chapter 3, p. 68). An exhaustive evaluation of the economic goals of US antitrust law is undertaken by Lande.

The objective of competition law in the European context was never in doubt. Although maximization of efficiency was an important goal to a Europe devastated by war in the middle of the twentieth century, other policies such as political stability, integration of national markets and the protection of small and medium-sized enterprises, were (and remain) of equal concern. However, conflict between maintaining competition and achieving market efficiency has emerged. The conflict only arises where the business practice lessens competition (i.e., increases market power) but also produces economies (i.e., market efficiency). Jacquemin (Chapter 4) examines the constraints (legal and economic) on the US and the EC competition authorities in dealing with these situations where market efficiency and market power consequences coexist. The differences are explored. American tradition condemns any combination or agreement which increases market power, whilst in the EC the public interest prevails at least in the case of restrictive agreements (Article 81(3) EC Treaty). The only limit is to be found in abuses of a dominant position which are condemned.

The Political Concerns of Competition Law

Competition law is a hybrid type of law. The legislative measures and the judicial rulings implementing these measures reflect political goals expressed as competition *policy*. The policy seeks to prevent unfair acquisition of market power by undertakings, without being over-protective of competitors. The legislation therefore seeks to prevent restrictive agreements

or concerted practices between undertakings (e.g., s1 Sherman Act, UK 1998 Competition Act and Article 81(1) EC Treaty), to prevent undue acquisition of power by undertakings through mergers, monopolization of markets (e.g., s2 Sherman Act and s7 Clayton Act) or through the abuse of a dominant position (Chapter 2 prohibitions UK 1998 Competition Act and Article 82 EC Treaty).

The major difference between US Antitrust law and EC competition law in dealing with restrictive agreements between undertakings is that under EC competition law, the prohibition (Article 81(1) EC Treaty) is mitigated by provision for administrative exemptions (Article 81(3) EC Treaty) based on public interest, efficiency and competition.[16]

Under this section, Pitofsky's essay, and the commentary by Schwartz that follows (Chapter 5), consider the political content of antitrust law, focusing on mergers as a means of illustration. Pitofsky starts with political values and how non-economic concerns are manifested in US legislation on mergers (s7 (as amended) Clayton Act). This is followed by an evaluation of how political concerns influence the development of rules applied to horizontal mergers. The author demonstrates that US antitrust law, although primarily concerned with economic considerations, is also dependant on political values. Schwartz's commentary strongly supports Pitofsky's argument and highlights examples where considerations of 'justice' have prevailed.

As far as the European Community is concerned, political and economic values are two sides of the same coin. The EC competition rules are complementary to the establishment of the common market and the removal of state barriers to trade. In his essay van der Esch (Chapter 6) focuses on the comprehensive character of these rules and on how the basic severity of them is mitigated by the possibility of an exemption being granted in the public interest and according to the conditions set out in Article 81(3) EC Treaty.

The Extraterritoriality Application of Competition Law

A controversial issue giving rise to much academic debate has been the question of the extraterritoriality application of competition law. As markets become global, undertakings accused of anti-competitive behaviour may not always be established or have a presence in the state where the consequences of that behaviour are felt. Public international law confers state jurisdiction on the basis of nationality or territoriality principles.[17] Thus other solutions were developed. The US favours the 'effects doctrine' whilst the EC has adopted the 'implementation doctrine'. Torremans (Chapter 7) considers how these two doctrines fit within international law principles and discusses critically the cooperation agreement signed between the EC and the US which is aimed at preventing clashes between these two regimes.

Part II The Scope of Competition Law

The scope of competition law is wide-ranging, covering primarily cartels, mergers and abuses of positions of market power. However, two matters are particularly interesting. As far as the US is concerned, there has been much debate as to whether antitrust law should be applied to vertical restraints, whilst in the EC an interesting question is to what extent public undertakings in member states are immune from the application of competition law.

Vertical Restraints

The debate on vertical restraints has been carried out in the US more rigorously than in Europe.[18] Although, in the early sixties, the European Court of Justice (ECJ) interpreted Article 81(1) EC Treaty as to apply to vertical agreements,[19] the issue became academic once the European Commission (the EC's competition authority) adopted legislation to exempt most of these agreements from the prohibition of Article 81(1).

Proponents of the Chicago School, such as Easterbrook (Chapter 8), argue strongly that only where restrictive dealings arise out of a cartel situation should antitrust laws be applied. In his essay, Easterbrook is highly critical of judicial reasoning in US decisions. He argues that most vertical arrangements are pro-competitive. Posner's essay (Chapter 9) on the '*Sylvania* Decision' centres on a crucial issue, namely, how resale price maintenance and non-price restrictions in distribution agreements are considered under US antitrust law. These restrictions had been treated as being illegal per se until the US Supreme Court ruling in *Sylvania*. The US Supreme Court accepted for the first time that a rule of reason approach was the correct one, thus taking into account the argument that restrictions imposed by manufacturers on their distributors are often intended to prevent free-riders and to enhance the manufacturer's interbrand competition, rather than to encourage the distributors to gain monopoly profits.

Public Undertakings and State Aids

What is the effect of EC competition law on the freedom of member states? Both Bright (Chapter 10) and Gardner (Chapter 11) consider the relationship between the EC competition law and public monopolies or undertakings on whom special or exclusive rights have been granted by member states. This is a delicate issue in the European context where community law claims supremacy over national law. The EC Treaty provides a compromise in Article 90. Although member states are free to confer such rights, the undertakings themselves must operate within what is permitted by EC competition law unless the assigned tasks are being undertaken in the 'general economic interest'. This is often referred to as 'public mission' exemption. In interpreting this provision, the ECJ has made several inroads in limiting the opportunities for undertakings to rely on this derogation. Gardner analyses most of these key rulings.

Part III Selected Legal Concepts and Challenges in Competition Law

The Rule of Reason and Per Se Rules

There are many unresolved legal issues/concepts in competition law which are still being debated. The selection of topics for this section is purely a personal choice. Apart from the 'rule of reason' and 'per se' rules and the defence of efficiency in merger investigations, all other issues considered in this section are primarily concerned with the development of competition law in Europe.

As far as 'per se' illegal practices are concerned, there is a very limited role for them in EC competition law. In view of the multiple goals of EC competition law, it is impossible to

identify certain types of practices which can never be justified. If there are beneficial effects, they may well be exempted for a limited period of time. In the US, per se prohibitions are a prominent feature of the enforcement system.

From a European point of view one of the most fascinating issues has been the application of the 'rule of reason' rule by the American judiciary as an analytical tool to identify unreasonable 'restraint of trade' conduct. This is an ongoing debate on both sides of the Atlantic.[20] In Chapter 12, Peritz demonstrates how the US Supreme Court shifted its analysis of antitrust cases to a 'rule of reason' approach. As far as EC competition law is concerned the jury is still out. However, Whish and Sufrin (Chapter 13) argue strongly and persuasively that such an approach should be resisted in the development of EC competition law.[21]

Dominance, Concerted Practices and Joint Dominance

The drafters of Articles 81 and 82 EC Treaty and the ECJ opted for a *sui generis* vocabulary for EC competition law which inevitably has led to new legal concepts such as 'dominance' and 'concerted practices'. The concept of dominance is unique to EC competition law. Specific rules have been devised by the European Commission with approval from the ECJ on how to determine whether an undertaking is in a dominant position for the purposes of Article 82. Korah (Chapter 14) not only authoritatively analyses the concept but she is also critical of the perceived absence of consideration by the European enforcers of the competitive pressures that come from outside the market defined as relevant.[22] In Chapter 15, Soames evaluates the case-law jurisprudence of two concepts: concerted practices and joint dominance. These concepts are distinct and different but their application may in some circumstances overlap. The European Commission sees the extension of joint dominance as a possible solution to the problem of controlling oligopolies. Oligopolies cause many problems to competition authorities who fear that high prices will be maintained to the disadvantage of consumers. But how far and when should competition authorities interfere in an oligopolistic market?[23] Often, oligopolies emerge in markets which have high entry barriers due to the costs of infrastructure provision, ownership of intellectual property rights or simply efficiency which has resulted in a few undertakings controlling the market.

The final matter considered in this section of the collection relates to the relationship of intellectual property rights and Article 82 EC Treaty (Greaves, Chapter 16). Protecting the ownership of intellectual property rights is extremely important for the EC as a player in the global market. However, there can be significant conflicts between the rights conferred by the ownership of intellectual property and competition law particularly in the exercise of those rights. Intellectual property rights are powerful marketing tools in the hands of undertakings in dominant positions.

Essential Facilities Doctrine

The essential facilities doctrine is an example of an attempt to deal with industries where infrastructure costs or ownership of intellectual property rights makes it almost impossible for competitors to enter the market where the owner of the infrastructure or intellectual property right operates. A typical example is in the transport industry where the owner of a port facility will usually also operate maritime services from that facility. It is unlikely that the owner of the

port will allow a competitor to use its facilities to offer competing maritime services. The doctrine was formulated in the US.[24] As far as the EC competition law is concerned, the issue is perceived in terms of the importance of market access for all competitors on equal terms (Glasl, Chapter 17). Thus, in Europe, references have not been made by the ECJ to the essential facilities doctrine as such but to 'third party access'. This is another example of the ECJ being determined to develop EC competition law concepts for community law rather than to import them from the US.

Abuse

Another pure EC competition law concept is that of 'abuse'. Having a dominant position is not anti-competitive. It is the abuse of that position which is prohibited by Article 82 EC Treaty. A thorough analysis of this concept is undertaken by an American scholar (Gerber, Chapter 18). Since the concept of abuse of economic power is not familiar to US lawyers, Gerber in his essay analyses its origins and comments on its application by the European Commission and the ECJ. One of the most difficult abuses the European competition authorities have had to consider is predatory pricing, and whether it is a legitimate business practice. In Chapter 19, Sharpe discusses the economics of predation and how it can be determined.[25]

Efficiency Defence in Mergers

Mergers have also caused a number of difficulties to competition authorities in trying to apply efficiency goals as the only or main objective of competition law. Noël (Chapter 20) undertakes a comparative assessment of how the defence of efficiency in merger situations has been considered by EC and US competition authorities. Unlike in the US, an efficiency defence is not a formal part of the standards of appraisal contained in the EC Merger Regulation. This is an area for development and only recently has the European Commission considered the defence.

Part IV Competition Law and the Global Economy

EC competition law has reached a degree of maturity that has persuaded the European Commission to propose decentralization of EC competition law to the national competition authorities of the member states. However, as markets become global (and the undertakings operating on those markets tend to be multinationals) and more and more states adopt national competition laws, there is a growing call for the regulation of anti-competitive practices to be carried out at global level. The World Trade Organization (WTO) system is already in place to regulate international trade and is an obvious candidate to take on the role of World Competition Authority. De León (Chapter 21) explores this possibility whilst Weber Waller (Chapter 22) critically analyses the transferability of national law from a number of perspectives and proposes a 'neo-realist' approach to harmonizing international economic (antitrust) law.

Notes

1 *Standard Oil Co.* v *United States*, 221 U.S. 1 (1911).
2 Gerber, D.J. (1994), 'Constitutionalizing the Economy: German Neo-Liberalism', *American Journal of Comparative Law*, **42**, pp. 25–84 and Oliver, H. (1960), 'German Neoliberalism', *QJ Econ*, **lxxiv**, pp. 117–49.
3 ex-Articles 85–94. The EC Treaty articles were renumbered after the Treaty of Amsterdam, 1997. Most of the essays in this collection will refer to the original numbering.
4 For example, Council Regulation 4064/89, OJ 1989 L395/1 (the Merger Regulation); Commission Regulation 240/96 OJ 1996 L31/2 (Transfer of Technology Agreements); and Commission Regulation 2790/99 OJ 1990 L336/21 (Vertical Agreements).
5 Posner, Richard A. (1979), 'The Chicago School of Antitrust Analysis', *University of Pennsylvania Law Review*, **127**, pp. 925–52 provides a useful historical perspective of the Chicago and Harvard Schools; Sullivan, Laurence A. (1994/95), 'Post-Chicago Economics Economists, Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World', *Antitrust Law Journal*, **63**, pp. 669–81.
6 Bork, R. (1993), New York: The Free Press.
7 Posner, R. (1976), Chicago: University of Chicago Press.
8 Amato, G. (1997), Oxford: Hart Publishing.
9 Gerber, D. (1998), Oxford: Clarendon Press.
10 McLachlan, D.L. and Swann, D. (1967), Oxford: Oxford University Press.
11 Goyder, D.G. (1998), 3rd edn, Oxford: Clarendon Press.
12 Fejo, J. (1990), Kluwer.
13 Joliet, R. (1967), The Hague: Martinus Nijhoff. Joliet was one of the first European academics to argue for market analysis under the EC competition rules.
14 Blake, H.H. and Jones, W.K. (1965), 'In Defense of Antitrust', *Columbia Law Review*, **65**, pp. 53–87 provides an historical review of the debate on goals of antitrust; Posner, R.A., n.5.
15 Strong support for this proposition is to be found in the Chicago School of Antitrust which had a major influence in the direction taken in US antitrust enforcement. See generally, Posner, R.A., n.5.
16 NB there is no possibility of exemption for an abuse of a dominant position under the EC competition rules. However, the EC Treaty rules do not prohibit positions of dominance, only the 'abuse' of those positions. Specific legislation had to be adopted in order to regulate concentrations/mergers which might lead to a position of dominance.
17 See Slott, P.J. and Grabandt, E. (1986), 'Extraterritoriality and Jurisdiction', *Common Market Law Review*, **23**, pp. 545–65.
18 For an historical and detailed discussion of the tension between US competition policy and common law property rights, see Peritz, Rudolph J. (1988–9), 'A Genealogy of Vertical Restraints Doctrine', *The Hastings Law Journal*, **40**, pp. 511–76.
19 Cases 56 and 58/64, *Consten & Grundig* v. *Commission*, [1966] E.C.R. 299.
20 See Bork, R. (1965), 'The Rule of Reason and the Per Se Concepts: Price Fixing and Market Division', *Yale Law Journal*, **75**, pp. 3273–475, where he argues for the adoption of a doctrine of ancillary restraints rather than the per se rules applied to price fixing and market division agreements.
21 See also, Forrester, I. and Norall, C. (1984), 'The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be Applied', *Common Market Law Review*, **21**, p. 11.
22 An economist's assessment can be found in Baden Fuller, C.W. (1979), 'Article 86 EEC: Economic Analysis of the Existence of a Dominant Position', *European Law Review*, **4**, pp. 423–41.
23 Posner, Richard A. (1969), 'Oligopoly and the Antitrust Laws: A Suggested Approach', *Stanford Law Review*, **21**, pp. 1562–1606.
24 Areeda, Phillip (1990), 'Essential Facilities: An Epithet in Need of Limiting Principles', *Antitrust Law Journal*, **58**, pp. 841 et seq.

25 For an American context, see, Areeda, P. and Turner, D. (1974/75), 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act', *Harvard Law Review*, **88**, pp. 667–733 and Scherer, F.M. (1976), 'Predatory Pricing Under Section 2 of the Sherman Act', *Harvard Law Review*, **89**, pp. 868–903.