

S Law in Context

EC Competition Law



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Preface

In the pages that follow I hope the reader finds a clear, yet challenging and controversial characterisation of competition law. The theme that underpins each chapter is that the substantive rules of competition law are best studied by avoiding exclusive reliance on legal method. Rather, other disciplines offer necessary assistance. I draw mostly on economics, but have also tried to incorporate some approaches used by political scientists. In brief, the gist of this book is that whether one looks at competition law doctrine as a whole, or at a single decision, one should ask three questions in order to understand it best: What is the policy behind it? What economic theory (if any) supports this policy? And who enforces the law? I think these questions receive different answers at different moments in the history of the development of competition law, and perhaps even conflicting answers at the same moment. Enforcers have diverging policy preferences, and different economic theories can be used to justify diametrically opposed conclusions as to the legality of a given practice. Asking these three questions, about the politics, the economics and the institution, reveals valuable information about the application of the law, its evolution and direction. The focus is on the competition law of the European Community, in the way it has been developed by the Commission and the European Courts; I hope that the method of analysis can be transplanted and applied to other legal systems and frame an inquiry into other competition laws.

The cover of the book (a painting by Lisa Graa Jensen entitled 'Big Spenders') illustrates a market in full flow, the domain of competition law. How are markets to be regulated? One of antitrust law's most eminent personalities, Richard Posner, published an influential book in 1976 under the title *Antitrust Law: An Economic Perspective*. This was a reaction against a populist streak of antitrust which considered that the rules were not just to ensure the big spenders had plentiful and cheap goods to buy, but were also designed to protect traders from each other, or to safeguard local markets like this against the competition from large out-of-town shopping malls. In the second edition in 2001 the subtitle was dropped because any other perspective had waned and there was no need to persuade the reader of the value of the economic perspective.¹ This

¹ R. A. Posner *Antitrust Law* 2nd edn (Chicago: University of Chicago Press, 2000) p. vii.

might be true for US competition law (and I try and explain why this might be so in chapter 3), but EC competition law has not yet become applied micro-economics. A range of policies, some misguided, some less so, affect the application of the law. EC competition law is nonetheless increasingly embracing economic analysis. On many occasions, members of the Directorate General for Competition suggest that the law is being reformed to embrace a 'more economics-oriented approach' or moving towards an application of 'mainstream economics'. However, these two utterances are unhelpful. The first one refers to there being 'more' economics, but this implies that other perspectives are also deployed to determine the application of EC competition law and quite what these are is never explained. The second claim is erroneous in that, bar some shared ground, there is no such thing as mainstream economics. Instead, there are different perspectives on how to regulate industrial behaviour, as I hope to illustrate with the review of how economists would regulate commercial practices. In sum, economists are still debating about how firms behave and about how to regulate firms. Trying to engage in these debates is more illuminating than believing that there are a set of economic postulates and formulae that one can apply to solve all competition cases. And exploring why certain economic prescriptions are followed by competition authorities and courts while others are not sheds light on how the competition rules are interpreted.

It follows, then, that to explain and assess EC competition law, we need to look at it from a range of perspectives. Some of the perspectives suggested in the book might be about to be buried (for example, the role of competition law in safeguarding the economic freedom of vulnerable firms) while others are today's spring chickens (for example, the still vacuous reference to consumer welfare). But both are worth considering to explain what has shaped the law and what might shape it in years to come. The study of competition law proposed here requires reflection on what economic theory is chosen and why, how the economic theories are translated into workable rules, how judges and competition authorities respond when economic paradigms shift, and how public policy considerations undermine or complement the application of competition law according to economic prescriptions.

I have tried to write this book in a way that is accessible to those whose background is law, economics or political science, and hopefully for a general audience interested in gaining a critical introduction to this topic. At times this has meant that I have simplified and perhaps exaggerated certain concepts to make them more accessible and I may have omitted certain critical qualifications, but the reader can chase up the footnotes to check the original sources and see the argument in full. I have also tried to make competition law sound exciting, because competition authorities seem bent on making the law dull by publishing guidelines on every substantive and procedural topic. Guidelines are probably the most problematic manifestation of a competition authority's powers today. As I show in the chapters that follow, some of the guidelines are

attempts to make new law. This is in stark contradiction to the avowed purpose of guidelines, which is to enhance transparency. I struggle to see how a competition authority whose interpretation of the law should be subject to review by a court feels empowered to change the law by issuing guidelines. Moreover, a business will likely follow the guidelines to avoid being investigated by the competition authorities. In this way law is enforced by declarations that are not susceptible to the rule of law. And I struggle to see how transparency is enhanced when the change in policy is not even alluded to in guidelines but must be inferred by noting how the guidelines qualify earlier cases. Finally, guidelines hide the conflicts and differences of opinion about competition law. They present competition law as a seamless web of clear, consistent and complementary principles, obscuring the conundrums, contradictions and conflicts that require attention and debate.

A few notes on the text: First, the material is not arranged in the conventional manner that readers of other competition law books might anticipate. Instead, I have arranged topics so that certain cases and doctrines are brought together because of shared policy or economic goals. I hope nonetheless that the section headings are sufficiently clear for the reader to navigate through the text, while persuading the reader that the different perspective suggested in this book has value. Second, while I have tried to address the majority of the legal issues that are covered in undergraduate and postgraduate courses on EC competition law, the coverage is not always comprehensive, and at times I have preferred to draw the reader's attention to certain trends that are not part of the mainstream textbook presentations, to emphasise developments that are under-reported but significant if one is trying to understand how competition law is evolving. Those looking for a more conventional coverage of the law are well served by a variety of books, some (relatively inexpensive) addressed to students and some (extremely expensive) written by and for practitioners. Whether these two types of book are in different product markets is something the reader can ponder after reading chapter 5 on market definition. (This is a joke.) Third, several documents are only available electronically and, while I have cited the relevant home page where the document appears, as this seems to be academically correct, websites are updated very regularly and I advise the reader interested in finding any web-based document cited here to use internet search engines. This is much more efficient than trying to navigate some of the websites. Finally, I have refused to use the word 'undertaking' until chapter 12. Instead I use the word 'firm' to describe the entities that are the subjects of competition law. This seems to me more accurate. (Other language versions of the EC Treaty, and the UK's Enterprise Act 2002, refer to the subject of competition law as an enterprise, a more apt term.)

The following is a non-exhaustive list of debts, with the caveat that none of those mentioned are responsible for the errors and infelicities in the text. First, my thanks go to the staff at Cambridge University Press for their support for

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I have taken into consideration developments up to 31 July 2006. A blog accompanies this book where recent cases and other developments are discussed, and readers are invited to add their comments. This is available at <http://competitionlawboard.blogspot.com/index.html>.

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