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Competition Law: Safeguarding the Consumer Interest

A Comparative Analysis of US Antitrust Law and EC Competition Law

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Preface

It is a common assumption that competition law by maintaining competitive markets automatically maximizes consumer welfare and consumer satisfaction. This book explores the extent to which US antitrust law and EC competition law adequately safeguard consumer interests and argues that unless consumer interests are directly and specifically addressed in the assessment process such maximization of consumer welfare would not be sufficiently achieved. After showing that conceptually the neoclassical theory of consumer welfare is related more to economic efficiency than to consumer well-being and that a true consumer welfare standard should be sensitive to income distribution effects detrimental to consumers, it is argued that the promotion of such consumer welfare should be the sole or at least the paramount goal of any antitrust regime.

While the US has come close to this ideal following periodic oscillations, though it still tends to follow a neoclassical notion of consumer welfare, EC competition policy notwithstanding recent reforms remains indirectly saddled with a myriad of conflicting goals, the most prominent being the market integration objective that it has at times allowed to prevail over consumer welfare. The book shows how, with these different perspectives underlying their antitrust systems, the two jurisdictions have gone about evaluating collusive practices, abusive conduct by dominant firms and merger activity and how this has impacted upon the promotion of consumer interests. Unfortunately, length constraints did not allow me to extend the scope of the book to a discussion of private enforcement of competition law and the impact that more effective use of damages actions and collective redress mechanisms might have on consumer interests and consumer redress in particular, a subject that is increasingly coming under the spotlight of the European Commission's attention. This would merit a separate treatise in its own right.

The book is intended for scholars and legal practitioners interested in the application and development/reform of competition law and policy as well as

the interaction of competition and consumer policies. It should also be of interest to academics and lawyers interested in comparative studies as it compares and contrasts the US and EC competition regimes. The book which makes substantial use of economic literature is also informative to the lawyer who is unfamiliar with the economic arguments on the consumer welfare enhancing or welfare reducing effects of various practices such as tying, price discrimination, price and non-price vertical restraints and so forth; arguments that a lawyer may use in litigation to strengthen his case.

It is impossible to thank all those who at some stage throughout the years spent in the writing of this book, which had its origins in my University of London Ph.D. thesis, offered advice and support. However, I would like to single out Professor Mads Andenas of Leicester University and Professor Richard Whish of King's College London who first as thesis supervisors and then subsequently as my informal mentors provided invaluable advice and encouragement throughout. I would also like to thank the staff of the library of the Institute of Advanced Legal Studies, London where most of the research undertaken for this project was carried out.

In particular, however, this project would never have materialized without the constant support of my wife, Marica; to her and our children, Marie Claire, Elise and Aidan William and to the loving memory of my parents I dedicate this book.

This book takes into account developments up to the end of September 2008.

Eugène Buttigieg
November 2008

List of Abbreviations

AAG	Assistant Attorney General (US)
AG	Advocate General of the European Court of Justice
BEUC	Bureau Européen des Unions de Consommateurs
BIICL	British Institute of International and Comparative Law
CADE	Conselho Administrativo de Defesa Econômica (Economic Defence Administration Council) (Brazil)
CEE	Central and Eastern European
CFI	Court of First Instance (EU)
DG Competition	Directorate General of the European Commission responsible for Competition Policy
DGFT	Director General for Fair Trading (UK)
DOJ	Department of Justice (US)
DTI	Department of Trade and Industry (UK)
ECJ	European Court of Justice (EU)
FTC	Federal Trade Commission (US)
HHI	Herfindahl-Hirschman Index
IP	Intellectual Property
IPRs	Intellectual Property Rights
MMC	Monopolies and Mergers Commission (UK)
NAAG	National Association of Attorneys General (US)
NERA	National Economic Research Associates
OECD	Organization for Economic Cooperation and Development
OFT	Office of Fair Trading (UK)
RPM	Resale Price Maintenance
SLC	Substantial Lessening of Competition Test under US Merger Control Law
SMEs	Small and Medium-Sized Enterprises

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Chapter 1
The Objectives of Competition Policy and the Consumer Interest

'Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give.'[1] Every competition law system has a number of objectives that it seeks to achieve, some of which may be particularly linked to the peculiarities of the economy of the country or region and others that might change with the passage of time or with changing political or scholarly ideologies.[2]

One objective, however, that should never be lost sight of nor diminish in prominence and that should be common to all national and regional systems so as possibly to serve as the cornerstone of a future global competition law is that of consumer welfare; consumer welfare however not in the pure technical and economic sense of the notion as understood by the Chicago School[3] and now generally in antitrust law but in the more popular sense of consumer protection or the protection of the consumer interest, here understood in terms of price, service, quality and choice.

This objective shall be termed the goal of 'consumer well-being' throughout this book to distinguish it from the neoclassical notion of 'consumer welfare' and to clearly denote that the concern here is with the impact of business behaviour on the end user or 'man in the street' (be it direct or indirect as the consequences are transmitted down the distribution chain); the consumer as the weaker party on the

1. RH Bork *The Antitrust Paradox* (2nd edn Free Press New York 1993) 50.
2. The objectives are rarely defined expressly in the competition statutes, Canada and Japan being exceptions; rather, objectives have to be inferred from legislative provisions that are broadly worded. This is the case with the US and EC legislation and so this book will be looking at academic writings and competition authorities' and courts' inferences of the underlying goals of such legislation.
3. Bork (n 1).

market acting outside his trade or profession who needs protection against economic power or market failures as opposed to the Chicagoan notion of consumer as society at large encompassing everyone including the monopolists and cartelists themselves or the European Community's notion of 'consumer' in competition law as any 'customer' or 'user' who might be another market operator purchasing the product for processing or other industrial or commercial use. Consequently this book advocates a 'consumer interest standard' as opposed to the Chicagoan 'consumer welfare standard' to achieve this goal of consumer well-being maximization.

From this perspective, antitrust could also be seen as the study of market behaviour and the effect of business behaviour on consumers and consumer interests.[4] As Vickers exclaims: 'Competition is increasingly being recognised as a core consumer issue . . . [C]ompetition policy and consumer interest should, and indeed, must be seen as inextricably linked and interdependent.'[5] Although consumer interests in themselves cannot be precisely defined, being in the nature of diffuse interests which cannot be described with relation to a specific group of persons,[6] they are inherent to every person who acquires goods or services for private consumption; in a general sense one can define consumer interests in the market as related to the four market characteristics of price, service, quality and choice.

The diffuse character of consumer interests makes it difficult to cope adequately with these interests through competition policy alone because while consumers obviously want to enjoy as much competition as possible on the market in order to have optimal free choice, on the other hand an excess of competition may lead to deception and inefficiency.[7] But in tandem competition law and consumer law can guarantee adequate protection for the consumer. While competition policy aims primarily at safeguarding the consumers' right of economic self-determination or private autonomy and its exercise, unhampered by exploitation of market power, and guarantees the efficiency of the market on a macroeconomic level, consumer law through specific protective measures aims at raising the quality of life and redressing situations where economic self-determination fails due to incomplete or misleading information through laws dealing with advertising and promotion techniques, unfair contract terms, product safety and product liability, labelling, distance selling, doorstep selling and the like, which correct market failures. Together these two branches of law guarantee fair trading in the market and in the US as in the UK (Office of Fair Trading) this interlink between them is embodied in the Federal Trade Commission which is responsible for the administration of both the federal antitrust laws and the federal consumer laws.[8]

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4. See Bork (n 1) 90.
5. J Vickers 'Healthy Competition and Its Consumer Wins' (2002) 12 CPR 142.
6. N Reich 'Competition Law and the Consumer' in L Gormley (ed.) *Current and Future Perspectives on EC Competition Law* (Kluwer London 1997).
7. Ibid. See also J Stuyck 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (2000) 37 CMLRev 367.
8. For an examination of the dual mandate of the FTC see NW Averitt and RH Lande 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust LJ 713.

What weight a competition authority gives to consumer interests depends on which of the three main objectives the relative antitrust law pursues – whether it is a consumer well-being approach, a total welfare approach or a public interest approach.[9] A consumer well-being approach (the consumer interest model) is the approach being advocated in this book whereby collaboration, conduct or transactions that lead to a restriction of output and an increase in consumer prices through the exercise of market power would be prohibited. It is a model that therefore takes into account and proscribes wealth transfer from consumers to producers. The total (economic) welfare model sees the main goal of antitrust as being the maximization of total wealth by allocating resources through the price system to those users who value them most but is insensitive to the effect the collaboration, conduct or transaction might have on consumer surplus and wealth transfer – this is the Chicago School's (deceptively called) consumer welfare model based on economic efficiency. The public interest approach permits consideration of a broad variety of factors beyond economic efficiency and would therefore take into account extra-competition considerations in its assessment, some of which might conflict with consumer interests.[10] Of the three, only the consumer interest model is the one that can guarantee maximum protection to consumer interests.

The next two chapters will analyse and contrast the extent to which the objective of consumer well-being underlies the EC and US antitrust law systems so that in the following chapters the degree and effectiveness by which the two respective regimes seek to achieve this objective will be examined. It will be argued that where there results a conflict between the perceived goals of antitrust, the consumer well-being objective should prevail. However, prior to embarking on an assessment of the objectives underlying both systems, it is in order that certain economic concepts relevant to the theme of this book, not least the economic concept of consumer welfare, be explained and distinguished.

1 MEANING OF COMPETITION AND CONSUMER WELFARE

At least six different meanings have been given to the economic models of 'competition' and 'monopoly'.[11]

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9. R Shyam Khemani and R Schöne 'Competition Policy Objectives in the Context of a Multilateral Competition' in CD Ehlermann & LL Laudati (eds) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Oxford 1998) 187.
10. See e.g., s. 84 of the UK's Fair Trading Act 1973. For harsh criticism of this notion see the House of Commons Select Committee on Trade and Industry's report *UK Policy on Monopolies* (1995), T Sharpe 'The Competition Act 1998' (1999) 9(1) CPR 8, M Furse *Competition Law of the UK & EC* (2nd edn Blackstone London 2000) Chs 12 and 14 and M Howe 'Competition Law Implementation at Present' in CD Ehlermann & LL Laudati (eds) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Oxford 1998) 433-451.
11. Bork (n 1) 58-61.

1.1 Competition as a Process of Rivalry

'Competition' may be read as the process of rivalry. This is the meaning normally attributed to the word because rivalry is the means by which a competitively structured industry creates and confers benefits and because the event that triggers off the application of the law is often the elimination of rivalry by merger or cartel agreement. Yet it has rightly been observed that such a loose usage of the word invites the wholly erroneous conclusion that the elimination of rivalry is always illegal.[12] This sort of misguided interpretation of 'competition' has occasionally been made in the US[13] and possibly has occurred more generally in the EU in the early years of application of Article 81 EC.[14]

Identifying competition with rivalry makes rivalry an end in and of itself, no matter how many or how large the benefits flowing from the elimination of rivalry. In the US this was realized by the Chicago School and through its writings it destroyed the erstwhile myth of the pre-1980s US antitrust era that concentration is always bad.[15] It will be shown in Chapters 4 and 5 that likewise in the application of Article 81 EC the Commission has appreciated that competition is not rivalry at all costs, as at times restricting rivalry might be more beneficial to economic efficiency and consumers.

1.2 Competition as the Absence of Restraint

'Competition' might be understood as the absence of restraint over an undertaking's economic activities by another undertaking. Thus, competition is the absence of what some US commentators have termed 'bondage'. This is not a useful definition, however, for the preservation of competition would then require the destruction of all commercial contracts and obligations. In the US, Judge Brandeis adopted this meaning of 'competition' in *Chicago Board of Trade*.[16] It will be shown in Chapter 4 that even in the EU there were times when even the Commission seemed to take this approach and was very heavily criticized for it, in contrast with several Community Court judgments that

12. Ibid.
13. According to Bork ibid., 58 one case where this occurred was *White Motor Co v United States* 372 US 253 (1963).
14. See Ch. 4.
15. Bork (n 1) 58 notes that society in the civilized industrial world is founded upon the elimination of rivalry since that is necessary to every integration or coordination of productive economic efforts and to the specialization of effort. He remarks that the ideal cannot be the complete atomization of society as that would reduce wealth and bring about poverty.
16. *Chicago Board of Trade v United States* 246 US 231 (1918). Though not all courts in the early years of the Sherman Act took this approach as in *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) the court argued that since any commercial action established some restraint on trade it had to devise 'a rule of reason' to determine whether any particular action was legal under the Sherman Act; an action would be legal if it only had an ancillary consequence of reducing competition, i.e. ancillary to legitimate business purposes.

showed that the Court appreciated that a contractual restriction does not necessarily result in a restriction of competition.[17]

1.3 Competition as a State of Perfect Competition

'Competition' may be read as that state of the market in which in Stigler's words 'the individual buyer or seller does not influence the price by his purchases or sales. Alternatively stated, the elasticity of supply facing any buyer is infinite, and the elasticity of demand facing any seller is infinite'.[18] For such a competitive market to arise, according to Stigler, four conditions must be satisfied – perfect knowledge, large numbers, product homogeneity and divisibility of output. But Bork says that although this is a very useful model for economic theory it is useless as a goal of law as the model deliberately leaves out considerations of technology in the broadest sense that prevent real markets from approximating the model. The economic model of perfect competition can never serve as a policy prescription and it is also wrong to assume that markets do not work efficiently if they depart from this model.[19]

1.4 Competition as the Existence of Fragmented Industries and Markets

In the US at one time 'competition' was also understood as the existence of 'fragmented industries and markets' preserved 'through the protection of viable, small, locally owned businesses'.[20] This differs from the economist's model of perfect competition primarily in that it lacks clarity as to what 'fragmented' means and in the introduction of a rather vague social value – the requirement that business units be locally owned. This definition of 'competition' has however been heavily criticized in that it could lead, as it nearly did in the US, to the court outlawing all horizontal mergers as any merger between firms in the same market, no matter how small, decreases fragmentation.

1.5 Competition as a State of Economic Freedom and Dispersal of Private Economic Power

The German Freiburg School of ordoliberalism in the first half of the last century likewise developed a theory that competition is a process whereby market players

17. See Case 23/67 *Brasserie de Haecht v Wilkin* [1967] ECR 407 and Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR I-935.
18. GJ Stigler *The Theory of Price* (3rd edn Macmillan New York 1966) 87-88.
19. Bork (n 1).
20. Chief Justice Warren in *Brown Shoe Co v United States* 370 US 294 (1962).

participate in the economy without constraints from accumulated private or public power.[21] So the goal of competition policy is seen as the protection of individual economic freedom as an end in itself so that distributive concerns lead this school to use competition law to protect competitors and small and medium-sized enterprises (SMEs).[22] This ordoliberal conception of competition has, it is claimed, influenced EC competition law to such a degree that even today Community Courts persist in interpreting the notion of a restriction of competition under EC law as a restriction on the freedom of action of market participants.[23]

1.6 Competition as a State of Affairs That Maximizes Consumer Welfare

The best definition of 'competition' is the one provided by the Chicago School, namely that 'competition' may be read as designating a state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through the intervention of antitrust law and that, conversely, monopoly designates a situation in which consumer welfare could be so improved so that to 'monopolize' would be to use practices inimical to consumer welfare. Bork claims that this interpretation of 'competition' coincides with everyday parlance as competition for the man in the street implies low prices, innovation and choice among differing products. Competition thus equates with consumer welfare.

Bork notes that consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the economic wealth of the nation. If we are to understand that antitrust law's sole goal is the maximization of consumer welfare, as Bork and the Chicago School contend, then antitrust has a built-in preference for material prosperity. But it has nothing to say about the ways prosperity is distributed or used. Those, for Bork, are matters for other laws. He explains that his notion of consumer welfare has no sumptuary or ethical component but permits consumers to define by their expression of wants in the market place what things they regard as wealth. The consumer welfare model does not look at antitrust legislation as a process for deciding who should be rich or poor, or for deciding how much wealth should be expended to reduce pollution etc. It can only increase collective wealth by requiring that any lawful products be produced and sold under conditions most favourable to consumers. Thus, the law's mission is seen as one to preserve,

21. DJ Gerber *Law and Competition in Twentieth Century Europe* (OUP Oxford 1998) and G Monti 'Article 81 EC and Public Policy' (2002) 39 CMLRev 1057.
22. R Whish *Competition Law* (5th edn Butterworths London 2003) 19-20.
23. Whish ibid., and Monti (n 21) who at n 19 cites as examples Case T-112/99 *Metropole Television (M6) v Commission* [2001] ECR II-2459 [76]-[77] and Case C-309/99 *Wouters, Savelbergh and Price Waterhouse v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 [97] and even finds evidence of this ordoliberal influence in a decision of the UK Competition Appeals Tribunal (at n 144).