



eSAPIENCE CENTER FOR COMPETITION POLICY

VIEWPOINT:

**RECENT EVOLUTIONS IN ANTITRUST ENFORCEMENT: A
COMPARATIVE PERSPECTIVE**

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Recent Evolutions in Antitrust Enforcement: A Comparative Perspective*

By

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There are many philosophies of antitrust enforcement in the world, but in recent years we are witnessing greater and greater convergence. At the first ICN conference in Naples in 2002, Giuseppe Tesauro, then Chairman of the Italian Competition Authority, discussing the then ongoing debate on the test to apply in merger control, whether dominance or substantial lessening of competition, said “the Atlantic Ocean is not a one way street.” What he meant was that the Sherman Act of 1890, the EC merger regulation of 1989, the Italian law of 1990, and the Romanian law of 1997, all have something to say to the world and a message to deliver.

There have been important developments in European antitrust enforcement since the 1960s. The original philosophy of EC antitrust originates from the *ordoliberal* German tradition which already in the 1920s had distinguished “impediment competition” (to be prohibited), such as predatory pricing, loyalty rebates and boycotts, from “performance competition” which included all conduct that made a firm’s product more attractive to consumers (to be favored). The *ordoliberal* tradition was mostly based on form. Indeed for many years antitrust enforcement in the EC meant applying article 81, paragraph 3, on notified agreements and on developing form-based block exemption regulations. The introduction of the merger regulation in 1989, and the emphasis on economic analysis that it brought with it, started to move the Commission away from form-based to effects-based enforcement. The communication on the relevant market was issued in 1997; the new block exemption on vertical restraints in 1999. Economic analysis is now playing an increasing role in interpreting the substantive antitrust provisions.

This was not a revolution. As Valentine Korah recalls, already in 1966 in its judgment in *La Technique Minière v Maschinenbau Ulm* the ECJ clearly stated that “the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.” The counterfactual was the absence of the agreement, not a different less restrictive agreement. The whole course of antitrust enforcement in Europe would have been different if that standard (counterfactual) would have been followed. On the contrary three weeks later in *Etablissements Consten SA and Grundig Verkaufs v EEC Commission* the ECJ ignored that statement and the counterfactual was a different less restrictive agreement. The European Commission bureaucracy became actively involved in the identification of the clauses that would

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make a notified agreement not restrictive. Only recently with the new technology transfer regulation and with the guidelines associated with it the counterfactual is again the absence of the agreement. This is the philosophy implicit in Regulation n. 1/2003 and in the elimination of the notification system. Article 81, paragraph 3, now has direct effect. Positive decisions are no longer possible and what matters is the substance of the restriction (even though the burden proof on Article 81, paragraph 3, is on who alleges its legality). After 40 years, substance is what matters in European antitrust enforcement.

The U.S. influence was very important in this respect. The definition of the relevant market, the treatment of vertical restraints, and the way to analyze mergers have a clear U.S. origin. The achieved convergence is U.S.-driven; at least up until now. I believe that the current debate on unilateral conduct is Europe-driven, and on this Europe can become quite influential with regard to enforcement practices worldwide.

Antitrust enforcement is both a regulation for a market failure and a political statement. What is the market failure that antitrust is trying to correct? Here is where some differences still exist. Originally the aim of antitrust was to maintain a competitive market, optimally a market where both suppliers and customers were so small that they could not individually influence equilibrium market conditions (textbook-type perfect competition). Under this approach market failures are very common and can occur any time a market is structurally different from a perfectly-competitive one. Under this very broad approach, antitrust authorities should intervene quite extensively to promote the emergence and the maintenance of competitive markets. The problem is that the legal instruments (prohibition of restrictive agreements, of abuse of dominance and of anticompetitive mergers) are much less intrusive than the theory of harm would suggest.

The Chicago critique brought antitrust enforcement in line with the antitrust toolkit. The Chicago School made clear that form-based antitrust enforcement is completely ineffective, with the exception of hard-core cartels which are always prohibited. Economic analysis, and its insistence on efficiency, has provided the glasses through which to interpret antitrust enforcement provisions.

Efficiency is very often interpreted as a brutal objective of economic policy. Many of its critics suggest that by pursuing efficiency antitrust has forgotten solidarity. I disagree. Efficiency is probably not the best term to use. Competition on the merits is better. The latter implies that antitrust enforcement makes sure that the best wins. As such antitrust represents a moral standard as well. Competition on the merits is the standard for a newly-defined economic democracy. The problem is what we actually mean by competition on the merits. The OECD Competition Committee held a roundtable discussion on competition on the merits in 2005. Although some agencies continue to maintain a form-based approach, many others are moving towards an effects-based one. Indeed only by considering the effect of a given practice can the special responsibility of dominant companies have any meaning. One example of such a special responsibility, as the Commission suggests in the discussion paper on the application of Article 82, is that a

dominant company should not adopt strategies that would exclude equally efficient competitors and also harm consumers.

Unfortunately the European Court of Justice has not yet fully adopted this view. In the recent judgment on the *Virgin/BA* case the ECJ has confirmed the Commission decision that the discounting policy of BA was abusive, even though the Commission had not proved that BA discounts would lead an equally efficient competitor to price below costs. More importantly however, and in my view more worrisome, is the fact that the ECJ fully endorsed the finding of the Commission that these rebates were also abusive because they were discriminatory. Since travel agencies with the same turnover would receive different margins, the Commission concluded (and the ECJ upheld) that these discounts were discriminatory and therefore abusive.

After the *Virgin/BA* ECJ judgment the question is whether the Commission will be able to depart from this well-established case law by the European Courts and actually promote an effects-based approach in the interpretation of Article 82. Certainly the Commission is free to announce its policy objectives and how it intends to interpret the law. However, the judgments by the Courts on the interpretation of Article 82 provisions will not be overruled by a policy statement of the Commission. Until new cases will be decided and appealed other 10 years may go by. In the meantime nothing could prevent national judges from following the judgments of the European Courts. National competition authorities and the judges that hear their cases on appeal will be in the same situation. The burden on the European Commission to convince decision makers (national authorities, national and European judges) on the validity of the new approach it proposes will be now heavier. It is extremely important for the European Commission not to lose momentum and to act for the benefit of growth and competitiveness in Europe.

Europe of course has a model of enforcement to share with the world. The division of responsibility between the Commission and member States is unique and so are the institutional settings that allow convergent outcomes (the advisory committees, Regulation no. 1/2003, the European Competition Network, and also the advocacy powers with respect to national courts). In this we are far ahead of everybody else, including the U.S. The use by the Commission, and by national authorities, of all these tools will certainly lead to greater convergence. Of course this will be soft convergence based on voluntary adherence to common interpretations.

We are not the U.S. There is not much private enforcement in Europe. The case law is determined by public enforcement only, and as a consequence the guidance it provides to firms, authorities, and judges is not very rich. Guidelines and communications by the Commission are therefore necessary for all stakeholders. The ECN, the meetings of DGs, and the Association of European Competition Authorities (ECA) are the fora where national authorities, regardless of the period of EC membership or of how long a national competition law has been in place, actively participate in the development of new interpretations and approaches. The Romanian Competition Council is expected to contribute fully, also and especially with well-argued cases that can

represent a model for us all. The cement case Frédéric Jenny just described is one of such cases. Congratulations for these very intense ten years, my best wishes for the future and thank you, Chairman Gavril, for having invited me to this very interesting and important conference.

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