CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
June 2015 (1)

# Teaching Antitrust In Bruges

Philip Marsden

College of Europe, Bruges
&
U.K. Competition and Markets Authority

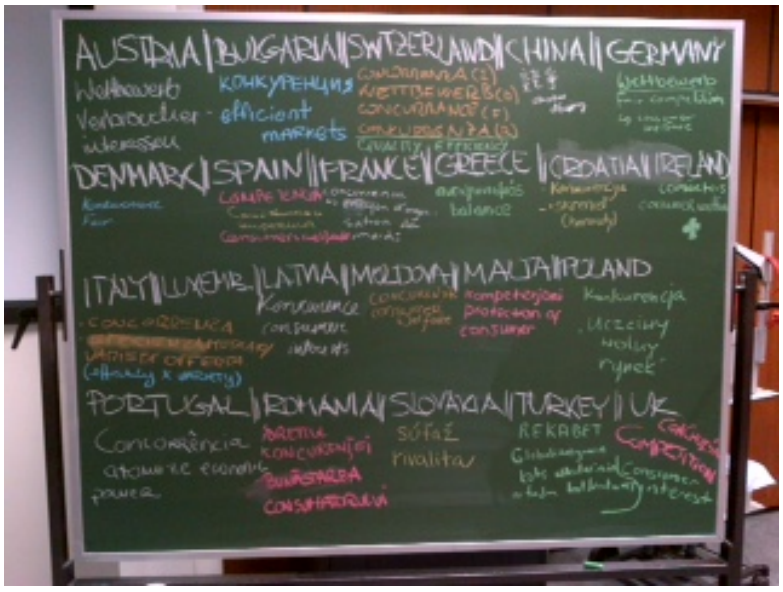
# Teaching Antitrust in Bruges

Philip Marsden[1]

I teach the core competition law Masters at the College of Europe, Bruges. There are three things I like about this: the students, the students, and the students. First, I have both lawyers and economists in my class. This enables a richer discussion, particularly when we begin contrasting form-based and effects-based enforcement approaches and the varying levels of harm on which prohibitions may be founded.

Second, the students are from all over Europe; I usually have 50-60 students, representing over 20 Member States (and sometimes beyond). This allows a great range of views. Whether they know it or not at the start of the course, the students come with their own sets of rather firmly held priors, particularly regarding what competition on the merits means; and the degree to which markets should be allowed to self-correct or when intervention is needed.

To reveal these priors, one exercise I enjoy doing, usually in about minute one of my first lecture, is to get them all up to the board and write out the word "competition" in their own language, and what it means to them in English. This is not just to give them a hint that they are going to spend a good deal of the course on their feet. It is mainly to reveal some interesting similarities and differences. So, "competition" can be "concurrences," "concurrenza," "competencia," or similarly with a k. Or we can have "Wettbewerb" or some derivation of "rivalita."




[1] Dr. Philip Marsden is Professor, Law and Economics, College of Europe, Bruges and Deputy Chair, Competition and Markets Authority, London.

This leads rapidly to a discussion of the concept of "participating in a contest," "running together," or "sharing a river:" the word-origins of competition, concurrence, and rivalry. As a runner and rower myself, it is not a great leap for me to then inflict on them my views of how these concepts can help us discuss what we think matters most in competition law: Is it that the best competitor wins? Is equal opportunity to participate important, or what about handicapping stronger participants? Why would we do this?

A rich debate ensues. Soon we bring in the words they used for what competition means to them: "efficiency" pops up, as does "consumer welfare," usually from those who have read ahead or are economists; others focus on "rivalry," "fairness," and "balance;" some jot down (and sternly defend) "atomize power." This lets me bring in concepts that underpin some aspects of competition law in Europe: Ordoliberal traditions that I suggest still operate, focusing on ensuring "market order."

I hint to the class that they will find case law during the year which holds that there are some competition law offenses that don't depend on proof of actual consumer harm. This usually raises some eyebrows. Then I note some offenses don't even require that consumer harm be likely. There can be offenses that are object-based, rather than dependent on evidence of actual or likely effects.

Similarly there can be a concern in some cases for competition as an "institution," rather than a process. Here we see some cases where no consumer harm is even possible, but there has been some harm alleged to the structure of competition itself. So even before we've really started, we've got some great debate points on which to anchor further analysis.

The third thing I love about my European students is that none of them have ever experienced the case-study method. From their previous degrees on the Continent, they are used to four- to six-hour lectures by the top expert in the field, usually reading from his or her textbook, expounding clear rules and codes. This they are not going to get from me.

What I make clear right from the start is that the reading list is relatively light but expected to be done; and the cases in full. Class time is spent with me initially limbering them up with case studies, and then it is over to them to present some themselves—sometimes alone, sometimes with another student to take the part of the parties, or the authority, or the court. This ensures not only a more alert and more engaged class, but also brings the cases to life and thus allows students to get closer to the facts, to the dynamics that happen within a particular case law stream, to the ramifications of decisions and judgments, and also of particular stances and interventions.

For example, what comes from a harsh approach to vertical restraints? How did the parties react? Did they just decide to merge? Why was that tolerated but the restraint not? Or if case law is vague, for example on information exchange, how do companies react? Is some pro-competitive business conduct thus chilled? Shouldn't we care about that, particularly if it means that some consumers and the market are deprived of innovations? What are the underlying reasons for some arrangements being banned in some jurisdictions, and allowed in others? Is it all about the facts, or is something deeper going on?

This readily takes us to debates, so we can look at a line of case law as a whole, and then uncover various views about it and what it might mean for competition, innovation, and consumer harm on a range of levels. I'm very pleased that the students engage so well in these exercises; not just when I'm personally fired up about a subject but also when I find a particular topic deeply tedious to lecture about, but enormously important to grasp.

I do this with 101 (3) matters, for example. I don't find lecturing about this particularly effective; and if it seems dry to me then that will be communicated to the students and they won't realize how important some of these issues are. So for this, I throw them into groups with various real-life case scenarios where businesses want to (or have been told by governments to) get on with a particular collaboration, but have to self-assess whether they can actually do so in a competition law-compliant way. Initiatives to stop binge drinking inevitably come up, and this usually lubricates the discussion; but also environmental initiatives like reducing plastic bags in groceries or CO2 emissions in distribution channels. It is so rewarding to see a relatively under-studied area such as this come to life when I ask the students from each group to devise and defend their collaboration initiative in front of a European Commission of their peers.

In preparing this article I canvassed my consumers (the students) and was pleased that they reported that these key activities of live engagement with the issues—whether through case studies, group work, or debates—were what they particularly enjoyed and what helped them most not only in understanding competition law but also preparing for the exam. I appreciate that my approach is hard for some who come from a culture where a law course has clear rules, with clear answers, and students just want that told to them. Nevertheless if they are contemplating working in the competition law world, it is better—in my view—that they realize early on how fact-specific it is, how important (and even determinative) economic analysis is, and how underneath the case law are small "p"—political or philosophical—approaches to the respective roles of markets and government intervention.

One final thing I like about teaching these students in Bruges is that many of them do go on to work in competition authorities. I reassure them right from day one that I will indeed teach them the law (with their considerable help). I will indeed go through with them the impeccably reasoned opinions of some Advocates General that have been the basis for firm European Court case law. I confess to deriving some mischievous satisfaction though from telling the class that there is an awful lot out there with which I fundamentally disagree.

I think it is good to be open about this. Law schools are about training critical minds after all. My students can readily identify the underlying priors of the dusty academic roaming about at the front of the class that are causing him to bleat away about opinions and judgments he thinks are mad. I want to expose them to these differences of opinion so they can learn to think for themselves, and be able to challenge—if necessary—any doctrine they come across later on in their careers, particularly where it lacks evidential foundation.

I don't do this to undermine the law. I do it because I'm a firm believer that challenge and debate is essential to develop robust antitrust decisions. Moreover, as Milton Handler has pointed out "In no branch of law has dissent played a more significant role than in antitrust." We still don't have dissent at the European Court and that is why change is so glacial, or has to happen within authorities rather than waiting on judgments.

I want my students to enter their authorities, law firms, economics consultancies, or even the courts, with an even more questioning mind than when I first stood up in their class. I want them to be ready to challenge dogma rather than accept it blindly. And above all I want them to go on to work hard to develop soundly reasoned theories of harm backed up with evidence. That will make them better advisors and officials, and competition policy will be better for it.

*A final note*: the Competition and Markets Authority, where I also work, has adopted a somewhat similar aim in developing our CMA Academy. Its vision is to "foster and embed intellectual curiosity and excitement and facilitate a culture of excellence," going beyond know-how and having officials share experiences—from econometrics and evidence gathering to witness interviews and litigation—so that we benefit from what is an inherently multi-disciplinary enforcement and policy environment, and thereby make our decision-making processes more robust and enforcement more effective.