

CPI Antitrust Journal

December 2010 (1)

Twenty Years After: The Future of Competition Enforcement in the European Union

Renato Nazzini

University of Southampton &
Bonelli Erede Pappalardo LLP

Twenty Years After: The Future of Competition Enforcement in the European Union

Renato Nazzini¹

I. WHERE ARE WE COMING FROM?

Any prediction on where Union competition law enforcement will be in 20 years time must start by taking stock of the progress so far, or the lack thereof. Nor can an attempt at such a prediction be limited to the realm of procedure. Substantive law is as important to enforcement as procedure. In particular, the type of rule that prevails—to simplify, object, effect or, in U.S. terminology, *per se* rules or rule of reason—is a crucial determinant of the level and style of enforcement at a given time.

The drafters of the Treaty of Rome of 1957 did not have a clear idea of the goals of European competition law. Nor did they give much thought to the enforcement regime best suited to it. They had, however, the fundamental intuition that a common market (now the internal market) without competition would be not only futile but, almost, a contradiction in terms. And the common market was necessary for the very survival of post-war Europe as a competitive world economy and for the well-being of its peoples. As for the enforcement mechanism, the drafters chose, almost by default, the only model that was obviously available to their common legal traditions: enforcement was entrusted to a strong administrative body—now the European Commission—subject to the scrutiny of the courts. And according to the French tradition of administrative law—which an analysis of the original text of the Articles of the Treaty dealing with judicial review suggests must have been the most influential precedent—judicial scrutiny was to be respectful of the degree of discretion that the executive has in making the decisions entrusted to it.

For a while, this system worked reasonably well. A powerful—even though at times overcautious—DG IV (now DG Competition or DG Comp) was given the monopoly over the granting of exemptions, based broadly on efficiency considerations, for restrictive agreements that were duly notified to it. This gave DG IV the opportunity to shape a competition law on agreements with the overarching objective of ensuring the well-functioning of the internal market. The European judiciary endorsed this approach and contributed to its development. The result was a competition policy not dogmatically enslaved to short-term welfare analysis but focused on the development of the market in the long-term by preserving pluralistic, open, and dynamic market structures. European competition law is not, and never was, purely a market-integrationist tool although it cannot be explained without the internal market objective.

The internal market is not only one of the goals of European competition law. It is also the premise on which an efficient, competitive, and sustainable European economy is predicated. This economic model requires an effective competition law in order to function. Thus, competition law has a dual role: fostering the creation of the internal market and ensuring its

¹Renato Nazzini, Reader, University of Southampton and Of counsel, Bonelli Erede Pappalardo LLP, London.

well-functioning. In this way, competition law benefits the peoples of Europe: not only consumers, but also employees, and shareholders.

The market-integrationist agenda did mean, however, that European competition law was concerned about vertical restraints to an extent that is perhaps inexplicable otherwise. The strict prohibition of resale price maintenance (“RPM”) and absolute territorial protection (“ATP”), which has been retained in the new and slightly improved version of the Block Exemption for Vertical Agreements and the Vertical Guidelines, is the prime example of this approach. But one must not forget the somewhat regulatory approach to distributional practices that still pervades European competition law in other areas; for instance, in the “regulation” of aftermarkets in the motor vehicle sector.

On the other hand, one must also not forget the huge steps forward that European competition law has made in the past two decades or so. In 1989, the first merger regulation was adopted, based on the one-stop-shop principle for mergers having a European dimension. In 2004, a new merger regulation introduced a test that was supposed to be less structuralist than the previous one. Complemented by a set of guidelines inspired by a mix of sound pragmatism and modern economic thinking, the merger regime is by and large working reasonably well.

In 2003, a new procedural regulation abolished the Commission’s monopoly on the granting of exemptions for restrictive agreements that also produced efficiencies. Undertakings are now required to assess their agreements by themselves. Furthermore, the new regulation introduced a system in which the Commission and the national competition authorities of the Member States all share the power and the duty to apply and enforce the European competition rules in a coordinated fashion.

Finally, in the past ten years or so, the fight against cartels has been taken to a new level, with fines much higher than they used to be and ever improving leniency programs to help destabilize and detect secret cartels.

Against this background of changes and what also what many critics would call at least moderate success, what are the developments to be expected over the next 10 to 15 years? What will European competition enforcement look like 20 years after? The challenges ahead can be broadly divided into three headings: 1) the substantive legal framework; 2) sanctions and procedure; 3) globalization.

II. THE SUBSTANTIVE LEGAL FRAMEWORK

Among the areas in which European competition law has yet to develop a robust approach, three are particularly important and will undergo significant scrutiny and change over the next two decades: a) the objectives of the law; b) the “regulation” of distribution; 3) abuse of dominance.

The debate about the objective of European competition law may seem very remote from enforcement. However, there is, both in theory and—more importantly—in practice, a direct link between the objective of the law and enforcement practice. Currently, the European Commission is pursuing a consumer welfare agenda with the clear aim of incorporating modern economic thinking in the legal analysis. Consumer welfare seems the politically acceptable way of doing so as the focus is on the consumer or, rather, on a particular conception of consumer, which is already at the center of the European consumer protection agenda and has an immediate populist appeal.

The problem is that consumer welfare is not, in law, the objective of European competition law and has not been endorsed as such by the European courts. This mismatch between the law and the Commission policy creates significant uncertainty and enforcement errors. Furthermore, the consumer welfare narrative has been hijacked by those quarters that, for the most disparate reasons, favor a light-touch approach to competition enforcement. This approach risks leading to a lack of enforcement and the alienation of the business constituency that benefits the most from competition law and can do much for its legitimacy, i.e. small and medium-sized enterprises (“SMEs”), market entrants, and small innovators. On the other hand, the almighty consumer still struggles to understand the wondrous benefits that the new “economic” approach brings to him. In the years to come, European competition law should quickly jettison the consumer welfare myth in favor of a more complex narrative placing competition law at the center of long-term sustainable growth, social welfare, productivity, and global competitiveness. And consumers, needless to say, will also benefit.

As regards vertical agreements, European competition law still adopts an excessively regulatory approach to distribution and an unreasonably strict prohibition of RPM and ATP. In 20-years time we will have moved away from this approach under the pressure of globalization. The issue will not be, any more, to regulate the European distributional practices of large German and French producers but to allow new players from new strong economies such as India and China to enter the European markets. A flexible use of distributional tools, including RPM and ATP, will be necessary to allow many new entrants (particularly when they are unable to enter all European national markets at the same time) to compete effectively against the European incumbents. The continued prohibition of RPM and ATP would no longer be a way of protecting the European consumer and creating an internal market, but a protectionist tool raising obstacles in the way of effective competition from outside Europe.

From an enforcement perspective, the alternative to the prohibition of RPM and ATP as practices having the object of restricting competition is not necessarily a full-blown rule of reason approach. European law can accommodate flexible presumptions of harm requiring a bit more than simply a certain form of conduct (for instance, the analysis of the market power of the parties or evidence of an established pattern of behavior in the industry). The parties may then adduce evidence to rebut; including, for examples, a presumption showing that the market is not foreclosed, that prices cannot possibly be higher as a result of the conduct under review, or the conduct in question is justified on grounds of efficiency.

Finally, abuse of dominance is still an area where much uncertainty reigns in the European Union. The European Commission published a set of prioritization guidelines in 2008 that are, by and large, out of tune with the case law of the European courts. In 20-years time these guidelines will be remembered for what they are: a well-meaning but a bit clumsy attempt to move the law forward in the right direction. Such an attempt would have been justified, however, if the Commission not only adopts decisions based on the new framework but also defends them in judicial review proceedings by inviting the European courts to reinterpret the old jurisprudence in light of the objectives of the Treaties. If this happens, the European courts are likely to develop, over time, a more coherent set of principles under which dominance and abuse are examined in a more sophisticated and yet structured and predictable way. Once a sufficient body of new cases have been decided by the European courts, a new set of guidelines on abuse of dominance may be adopted, no longer on prioritization but on the substance, in line with the new case law.

III. SANCTIONS AND PROCEDURE

The main problem of competition enforcement in the EU is that it currently relies only on one instrument: fines on the undertakings. This leads to higher and higher fines, within the cap of 10 percent of world-wide turnover, to achieve deterrence. Significant questions arise as to whether optimal deterrence is being achieved and, if it is, whether there are better ways of doing so. Two more tools are, in theory, available in the EU: sanctions on the individuals (including, but not limited to, criminal sanctions) and civil remedies, particularly damages. Currently, sanctions on individuals are only available if the law of a Member State provides for them. Civil remedies are available as a matter of EU law but the procedures and the content of the remedy are largely left to the national laws of the Member State. Some jurisdictions, such as Germany and the Netherlands, are emerging as effective fora to litigate mass claims and the same jurisdictions, together probably with England and Wales, are also perceived as venues of choice for business-to-business litigation. The situation in other Member States is, however, patchy and competition litigation, particularly for mass claims, is still perceived as excessively difficult and risky. Will this situation change in 10- to 15-years time?

It is unlikely that the EU will be given the power to prosecute individuals. Regardless of the merits of such an initiative, this would be seen a step too far in the direction of a federal Europe, a development favored by some, but not by all. And there would be practical difficulties in enacting a criminal law system for one single offence, although the precedents of the international tribunals for war crimes or genocide may be useful (even though the gravity of the offences obviously differ tremendously).

However, Member States may be required by directive to provide for sanctions on individuals in their own national legal systems. Once this is achieved, it is conceivable that the European Competition Network, namely the Commission and the national competition authorities working together, may be able to prioritize and coordinate cases based on whether individual sanctions are being pursued. So, for example, in the investigation of a world-wide cartel, the European Commission may wait until individual sanctions are imposed on the individuals involved in the relevant Member States. Any fine imposed by the Commission on the undertakings would then take into account the deterrent effect of the sanctions imposed on the individuals. There are considerable challenges in implementing such a system, not least the need for swift action in several Member States with different legal regimes. But, in the best case scenario we have chosen to imagine here, it is conceivable that this may happen.

The problem with private enforcement is different. The overarching objective over the next two decades will be to establish a level playing field in Europe for those who have been harmed by competition law infringements. Some weak degree of harmonization is likely in the short term but in 20-years time it is likely that minimum standards will be in place for a robust private enforcement regime, including not only collective actions and settlements but also mediation and other forms of ADR.

What about the much discussed issue of an independent competition authority outside the Commission, perhaps acting as a prosecutor before the General Court or a specialist “European Competition Court”? This is unlikely as it would undermine an important function of the European Commission and many competition authorities in the EU: that of interpreting and shaping competition law as a coherent system in a quicker and more efficient fashion than courts could ever do by deciding cases in a fully adversarial judicial setting. But the bet is that we will have an independent investigation unit within or even outside DG Comp and a formalized

decision-making procedure within the Commission or, less probably, by an independent competition authority that would dissipate any appearance of lack of administrative impartiality or bias.

There are several ways of devising such a system but the cornerstones on which it would be based are probably two: a) a clear structural and functional separation between the investigative/prosecutorial function and the decision-making function; b) formalized decision-making procedures based on the principles of transparency, impartiality, and full information of the decision maker. This system will be complemented by a more robust judicial review that has abandoned, for all practical purposes, any deference for the administrative discretion of the decision-maker in competition law investigations. Such deference was never appropriate in the judicial review of law enforcement activity in the strict sense, probably not even on a sound analysis of the traditional principles of French administrative law that originally inspired it.

IV. GLOBALIZATION

A final word on globalization. Over the next 20 years, the position of the U.S. economy and its antitrust regime will be significantly different. The EU will no longer be—it is not today—a nascent regime that has much to learn from across the Atlantic. New models will have established themselves in China and India where competition law is part of a wider social and economic “philosophy” rather than an exercise in static welfare analysis or game theory.

In this new world, the EU will have a fundamental role to play. Its competition law will be more in tune with the complex cultural reality of non-U.S. competition regimes. In 10 to 15 years time, the issue of a multi-lateral framework for global competition enforcement will have become crucial. The EU has the opportunity to establish itself as the new center of a world-wide competition network. In order to achieve this, three conditions must be fulfilled. First, the EU must develop a coherent narrative about the objectives of competition law, integrating the consumer welfare goal into a wider and more sophisticated framework based on sustainable economic growth, social welfare, productivity, and global competitiveness. Second, the EU must have invested, and continued to invest, significant resources in international development as the U.S. agencies are doing today. Third, EU law must have freed itself of the remnants of the early days of the market-integration experience, which is more and more out of tune with the competition regimes of the major world economies.

V. POST-SCRIPTUM

The above reflections are an attempt to predict the state of competition enforcement in Europe over the next 15 to 20 years. Any prediction is, by its nature, uncertain. Those made in this article are based on a best-case scenario. If one had wanted to be pessimistic, the article would have far exceeded the word limit imposed by the publisher. “*On ne sait ce qui peut arriver.*”²

² Nobody knows what can happen.