NETWORK LAW REVIEW

ARTICLE

Do competition agencies harm welfare?

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This post continues a conversation initiated by an (in)famous post in this Concurrentialiste series, which set out the proposition that a well-functioning competition regime involves, amongst other things, the interplay between the legislature, executive, public authorities, universities, businesses, representative associations, and a well-informed, critical and unbiased media. Attention was placed on the "significant role…assigned to the competition lawyers." And the question asked was whether "the behaviour of competition lawyers …militate[s] against competition law functioning as it should do." That latter question generated a considerable response.[1] And I have wondered whether the same question could and should not be asked of the other actors listed as being involved in a well-functioning competition regime. So, picking up the baton, the question I wish to be addressed is whether *competition authorities* act in ways that may be injurious to a properly functioning system of competition law?

I must start with a disclaimer—this post contains a series of naked assertions and unsubstantiated claims. I do however think the assertions and claims are important (or important to quash) and hope to stimulate discussion as to how the asserted problem might be substantiated and a solution to a substantiated problem achieved. A second preliminary point is that what follows is not in any way prompted by a sense that competition authorities lack competence and brilliance. Paraphrasing what is said in the (in)famous post, I have witnessed "the enormous competence…indeed often brilliance" displayed by those at competition authorities and of the authorities themselves. These musings are instead, like the original post, prompted by a book I have been reading and re-reading. Not *Thieves at the Dinner Table* (2012), which

[1] My contribution is very much not a "response"—though there is a response and responses to the response: https://www.linkedin.com/pulse/do-competition-lawyers-harm-welfare-response-richard-whish-foster/

prompted the original, but, for me at least, the no less invitingly titled, *The Shaping of EU competition law* (2018).

The basic question addressed in *The Shaping of EU competition law* is whether the European Commission does a good job. Doing a good job is difficult to define, but a point made in the (in)famous post is:

"that there appears to be something in the nature of lawyers that suggests that winning an argument is more important than reaching the right result in the broader good."

What I take this to mean is that we ought to question whether a "win" is the same as a job well done and to reflect on the wider costs of "winning."[2] A claim made in *The Shaping of EU competition law* is that:

"As a repeat player, the Commission is not necessarily, interested in the outcome of an individual case, but in the long-run evolution of the law."[3]

The Shaping of EU competition law continues to explain that:

> *"an authority like the Commission can be expected to behave differently to firms in private litigation. The choice of cases, and the arguments, can be expected to be motivated by public-interest considerations".*[4]

So, unlike competition lawyers caricatured in the (in)famous post, *The Shaping of EU competition law* imagines competition authorities as entities interested in reaching the right outcome rather than winning at all costs—and this is the claim I wish to (con)test.[5] My broad hypothesis is that competition authorities are very much keen on winning—but that the win might be detrimental to "the broader good."

Size matters

The first "detriment" resulting from the desire to "win" at all costs is the increasing length of agency decisions. There have been complaints that competition authorities take too long to reach decisions. For example, in FEG, the European Commission accepted that it must adopt decisions within a reasonable time and that eight years to reach a decision was unreasonably long.[6] The concern I am raising is not

[2] My descent to "footballising" so early in this post is deeply regretted. See https://chillingcompetition.com/2022/01/28/case-t%E2%80%91286-09-renv-intel-v-commission-or-the-sign-of-an-effective-competition-law-system/

[3] Pablo Ibáñez Colomo The Shaping of EU Competition Law (Cambridge University Press, 2018), 11.

[4] Pablo Ibáñez Colomo The Shaping of EU Competition Law (Cambridge University Press, 2018), 49.

[5] The book contains much more nuance than I am capturing in my account. I am here conflating an interest in the long run with an interest in the right outcome. While the right outcome might entail losing in the short run it may be the optimal strategy for winning consistently in the long run.

[6] Case IV/33.884 – Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU) . (OJ L39/1) [152], citing Case C-185/95 P Baustahlgewerbe [1998]

that competition agencies *take* too long but that what competition authorities end up producing *is* too long. Physically. The detailed work of demonstrating how much longer the "product" has become remains to be done, but gone are the halcyon days of Decision IV/29.725 – Wood pulp, which runs to a manageable 52 pages. Instead, the Commission has given us Decision AT.39612 – Perindopril (Servier) running to 812 pages, and the UK Competition and Markets Authority has gifted us Case CE-9531/11 Paroxetine, admittedly with annexes, running to 717 pages.[7] This inflation has not gone unnoticed. Recently, the Competition Appeal Tribunal has commented that:

> *"Both the Hydrocortisone Decision and the Liothyronine Decision are long and complex documents. The Hydrocortisone Decision runs to some* ***1090 single spaced pages, with Annexes on top****. The Liothyronine Decision is about half the length – **433 pages, again with Annexes on top**. [...] Simply reading the decisions under appeal, and the pleadings in the appeals, is the work of several days."*[8]

The English Court of Appeal laments the fact that competition decisions are now "regrettably long" and that "the sheer size … makes them quite difficult to manage."[9]

A long decision is inherently objectionable. From Fuller, we know that it is difficult to claim that our purpose is to guide future action if the published decision is not clearly understandable by those it is intended to guide.[10] The English Court of Appeal's expressed concern over competition decisions is that the heft may retard the ability to "digest and analyse the … reasoning." The Court of Appeal goes on to plea for the competition regime:

> *"to do its utmost to produce, if at all possible, shorter [decisions] for the benefit of everyone in the future.… we cannot believe that it would not be possible to resolve the issues more concisely."*[11]

ECR I-8485 and the General Court in Joined Cases T-213/95 and T-18/96 SCK and FNK [1997] ECR II-1739, [56])

[7] Pablo Ibáñez Colomo and Andriani Kalintiri 'The Evolution of EU Antitrust Policy: 1966-2017' 83 Modern Law Review (2020), 321-372, 346-349 illustrates a dramatic increase in the length of decisions over time.

[8] Case Nos: 1407/1/12/21; 1411/1/12/21; 1412/1/12/21; 1413/1/12/21; 1414/1/12/21; 1419/1/12/21; 1421/1/12/21; and 1422/1/12/21 ALLERGAN PLC; ADVANZ PHARMA CORP. LIMITED & OTHERS; (3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & OTHERS; AUDEN MCKENZIE (PHARMA DIVISION) LIMITED & AN OTHER; INTAS PHARMACEUTICALS LIMITED & OTHERS v COMPETITION AND MARKETS AUTHORITY (Hydrocortisone) and HG CAPITAL LLP; CINVEN (LUXCO 1) S.A.R.L. & OTHERS; MERCURY PHARMACEUTICALS LIMITED & OTHERS v COMPETITION AND MARKETS AUTHORITY (Liothyronine) [2022] CAT 2 (31 January 2022) [9]-[10], emphasis added.

[9] Argos Limited v Office Of Fair Trading [2006] EWCA Civ 1318 [4]. The CA is actually concerned with the length of the CAT judgment, though that is itself a function of the length of the agency decision.

[10] Fuller's Morality of Law refers to promulgation and clarity. David Foster's response invoked Dworkin and I wish to do my part in maintaining the vitality of jurisprudence.

[11] Albion Water Limited v Water Services Regulation Authority [2008] EWCA Civ 536 [131-132]

The function of a decision

The length of a decision makes the reasoning difficult to follow, and if the reasoning cannot be followed the decision cannot guide the future conduct of others. Why has the length of competition decisions increased over time? This question prompted me to question an assumption: *Is* it a function of an agency decision to give guidance to others as to how to act in the future? Maybe the provision of guidance is not, or is no longer, an intended function of agency decisions. The proliferation of "guidance," "guidelines," "notices," and other soft-law instruments may mean that the role of a formal decision is no longer, were it ever, to give guidance as to future conduct. With instruction on how to behave coming from soft-law instruments, is the function of a decision now simply to "win?"

The kitchen sink

If the function of a decision has changed from guiding to winning, is the changed function of a decision behind the increasing length of decisions? One feature that can unduly lengthen a decision is the inclusion of an "alternative case." A point made in the (in)famous post relates to the number of grounds of appeal raised by the caricatured competition lawyers, when:

"a few really strong grounds of appeal would be more likely to convince a court than a multiplicity, in which the good ones might be lost among the weak ones. However, I regularly see appeals in which everything, including the proverbial kitchen sink, has been included."

Perhaps the same might be said of authority infringement decisions. Does the inclusion of an alternative case serve a function other than to increase the chances of a "win"? Think about the way the "object" and "effect" routes to establishing an infringement are used in agency decisions. It is often the case that a decision will rely on "object" and "effect" in the alternative. The pursuit of an alternative case is objectionable on two grounds. First, it undermines the very reason for the existence of the alternative—to reduce the number of resources consumed in reaching a decision. The effort of "effect" is to be avoided if "object" is established. The "alternative case" however doubles the burden–consumes greater resources–than if the agency were simply required to establish "effects." The agency begins with a claim that this or that is an "object case" and so "effects" need not be considered, but then goes on to consider "effects"—just to be certain. Why does a competition authority spend so much energy on a task that it simultaneously argues, in the words of the Court in CB v Commission, is "*redundant*, for the purposes of applying [Article 101(1) TFEU]".[12] What does a competition authority gain from the "alternative case" other than an increased chance of a "win" and what is the cost? One

[12] (C-67/13 P, EU:C:2014:2204) [50].

cost, and the second objection, is that the alternative case contributes to the lengthening of the decision but can also prevent the decision from contributing to the shaping of behaviour and shaping the law. So, in 2008 Advocate General Trstenjak reported that "The parties do not agree on the question of when a restriction of competition by object can be taken to exist" and in 2019 Advocate General Bobek was still able to express "surprise that this distinction, stemming from the very wording of the prohibition in (what is now) Article 101 TFEU, still requires interpretation by the Court."[13]

My purpose is to appeal to brevity. And in that regard, to argue against the use of the "alternative case." I have given an admittedly one-sided account. Of course, there are times when an authority is both trying to win and trying to give guidance. An example of this might be the CMA's action against comparethemarket.com. Compare the Market is a difficult case in an area (the "effects" of a parity clause) in which guidance as to how to behave in the future is required. In this decision:

"The CMA considers it is arguable that CTM's wide MFNs were by their very nature harmful to the proper functioning of normal competition. However, given the CMA's findings on the restrictive effects of CTM's wide MFNs, **the CMA has chosen not to reach a conclusion as to whether CTM's network of wide MFNs amounted to an object infringement** of the Chapter I prohibition or Article 101 TFEU (or both). The CMA therefore has not set out in this Section the legal framework for finding that an agreement restricts competition by object."[14]

Isn't it instructive that the option to pursue an alternative case is forsaken. And doesn't this mean that the judgment on appeal will be all the more valuable? It is clear however that the omission of the alternative case does not mean decisions will be short. Even absent the "alternative case," C*ompare the Market* runs to 763 pages (annexes included), and so we must be thankful for the mercy we have been shown.

The fear of challenge

I must return to my one-sided argument. And rather hypocritically, make an "additional case."[15] An agency has many ways to dispose of a matter, and the way it chooses to do so may be to the detriment of "the broader good." Think of the disposal of a case through commitment decision. The attraction of the instrument alighted on by *The Shaping of EU competition law* is that:

[13] Case C-209/07, The Competition Authority v Beef Industry Development Society and Barry Brothers [2008] ECR I-1000 (BIDS) [24] and (Gazdasági Versenyhivatal v Budapest Bank Nyrt and others (Case C-228/18, ECLI: EU: C: 2020: 265) [para. 1]

[14] Case 50505 Price comparison website: use of most favoured nation clauses (19 November 2020) [3.5], emphasis added.

[15] An "additional case" is acceptable, as it identifies an increased number of problems, rather than an increased number of objections to a single problem.

"the Commission can afford to be less specific, and more speculative, about the legal test and about whether it is consistent with the case law and its past practice. Because the decision would be the result of a negotiated outcome, moreover, the likelihood that the commitment decision will be challenged before the EU courts is significantly reduced."[16]

Recourse to a commitment decision, inherently "less specific, and more speculative," cannot be for the purpose of *shaping*. Losing the case or conceding defeat may be what "the broader good" demands, but the direction *The Shaping of EU competition law* gestures towards is of the use of the instrument to avoid being "challenged before the EU courts." Does "avoiding challenge" advance the interests that competition agencies are tasked to serve, or is the value to the agency simply that "avoiding challenge" can be counted as a win?

The road ahead

Why the (in)famous post and *The Shaping of EU competition law* have been so thought-provoking for me is that they call for all involved in the competition law enterprise to (re)consider the meaning of success. For me, a successful competition regime should produce decisions that guide and inform market behaviour—i.e., shape, to some degree, behaviour and the law. Rather than the *Shaping* function that *The Shaping of EU competition law* ascribes to agency action, I question whether what is currently being produced is aimed solely at "winning." I wonder whether two symptoms of this function are the increased length of decisions and the rendering of decisions in a way that makes them difficult to challenge but of diminished utility. Others can perhaps provide many more features of the competition regime that are better explained by an interest in winning than by an interest in shaping and guiding market behaviour.

Competition agencies not only take too long, but the promulgated decisions are also too long. The time it takes, and the sheer length of what is produced, should cause us to question the utility of the product, to ask whether something better is attainable, and to consider what that attainable improvement should look like. The search for something better can already be seen in the Competition Appeal Tribunal's order promoting the use of "Ambulatory Drafts." The aim there is to have a hearing focused solely on matters in dispute and hopefully to generate a final judgment very much shorter than the 1523 single-spaced pages plus annexes that are the subject of the appeals. Finally, looking at the list of those involved in a well-functioning competition regime, I see that courts, academics, and politicians remain to be admonished, and in due course, I am happy to take a fair share of that admonishment.

[16] Pablo Ibáñez Colomo The Shaping of EU Competition Law (Cambridge University Press, 2018), 71.

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