THE ROLE OF CONSUMER WELFARE IN COMPETITION POLICY

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CCLP Presentation
26 November 2010, Oxford

OUTLINE

- Following the modernization of EU competition law can ‘consumer welfare’ be identified as its primary aim?
  - I. Reflections on the Aims of EU Competition Policy
  - II. Defining ‘Consumer Welfare’: An EU Approach
REFLECTIONS ON THE AIMS OF EU COMPETITION POLICY

- Competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally’ [R Whish, Competition Law (OUP 2009) 19]

- ‘...Competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political, and social context’ [Commission (EC), XXIInd Report on Competition Policy, (1992) 13]

EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

- Legal
- Economic
- EU
- Political
- Social
EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

Attempting a categorisation of the aims based on the above quadrants

I. Historical, Political and Social Context
   1. EU Competition Law in its Historical Context ➔ Ordoliberal Influence – Competition as a Process
   2. Market Integration Objective ➔ Political or Economic Nature?
   3. EU Competition Law as a ‘Public Policy’ Tool ➔ Environmental, Social, Industrial and Cultural Policy Considerations

II. Economic (and Political) Context
    ‘Consumer Welfare’ Objective
**EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY**

<table>
<thead>
<tr>
<th>Economic Aims</th>
<th>Social Aims</th>
<th>Political Aims</th>
<th>Historical Context</th>
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<tr>
<td>- Consumer Welfare</td>
<td>- Environmental aims</td>
<td>- Market Integration</td>
<td>- Ordoliberalism</td>
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<tr>
<td>- Market Integration</td>
<td>- Industrial policy</td>
<td>- Consumer Welfare</td>
<td>- Market Integration</td>
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<tr>
<td>- &quot;Ordoliberal Economic Freedom&quot;</td>
<td>- Employment (etc)</td>
<td></td>
<td>- Efficiencies</td>
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**Competition Policy**

**Ordoliberalism**
- Focus on market structure - Skepticism towards accumulation of private economic power
- Preservation of Economic Freedom [Restriction of economic freedom = Restriction of competition]
- Formalistic Approach - Reflections in the EU jurisprudence [e.g.]
  2. Case *Hoffmann La Roche v Commission* [1979] ECR 462 para 91
EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

II. Market Integration

- Drafters of the Treaty → competition law as a tool for opening the fragmented national markets
- Market integration both as an objective and as a means to enhance competition (Commission (EU), ‘Guidelines on Vertical Restraints’ (Revised Notice) SEC (2010) 411 para 7)
- Reflections in EU jurisprudence [e.g.]
- Reinforced after Lisbon Treaty?

III. Public Interest Considerations

- Integration Clauses for a Number of EU Policies
- Reflections in EU jurisprudence [e.g.]
  1. Environmental considerations
     - CECED, OJ 2000 L 187/47 paras 30-37, 48
     - DSD, OJ 2001 L 319/1 paras 143-145
  2. Social and Employment consideration
- Changes (or not) after Lisbon Treaty
EU CONTEXT: IDENTIFYING THE AIMS OF COMPETITION POLICY

IV. Consumer Welfare

- Consumer welfare dominates Commission rhetoric post ‘modernisation’ [e.g]

- Caveat → Gap between policy pronouncements and enforcement → ‘Consumer welfare’ often cited in policy documents because it is politically appealing → But what does it actually mean and how it is reflected in competition law enforcement?

CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

- Where does EU competition law positions itself on the ‘consumer welfare’ spectrum?
- Where should it position itself?
- Variables shaping the respective answer
CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

Economic Theory Variable

- Allocative Efficiency (Static Efficiency)
- Productive Efficiency (Static Efficiency)
- Dynamic Efficiency

Efficiencies

CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

Economic Theory Variable

Productive Efficiency

Allocative Efficiency
CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

Economic Theory Variable

- Static Efficiencies
- Dynamic Efficiencies

US Legal Scholarship

- Chicago School (Bork, Posner)
  Economic Efficiency as the Sole Goal of Antitrust Law = ‘Consumer Welfare’ = Total Welfare, i.e. the sum of consumer and producer surplus

- Post Chicago (Fox, Lande, Sullivan)
  Distributive Goals of Antitrust - Consumer welfare as consumer surplus
CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

EU Approach

- Different to the Chicago School Approach – Similar to Post Chicago Approach
- 1. Wording of the Treaty Competition Provisions
- 2. Commission Pronouncements (e.g. First Report on Competition Policy, 12)

- Short Term or Long Term Consumer Welfare? (e.g. case law on exploitative abuses; Microsoft case; Glaxo saga; Commission, Guidelines on [81(3)] para 87; Opinion of AG Trstenjak in Case C-209/07 Competition Authority v Beef Industry Development Society Ltd [56-57])

CONSUMER WELFARE IN EU COMPETITION LAW: ATTEMPTING A DEFINITION

EU Approach

- Consumer Notion
  - Consumer → Umbrella Term
  - Instances where the focus was on the final consumer
    1. Commission Policy Documents
    2. CJEU Jurisprudence
FORMING THE ‘CONSUMER WELFARE’ SPECTRUM IN EU

- Consumer Welfare = Consumer Surplus
- Short Term or Long Term Consumer Welfare?
- From a Normative Perspective Should it be taken as synonymous to Long Term Final Consumer Welfare? Consider:
  1. Interests of Final Consumers not necessarily aligned with intermediate customers and competitors [see Akman, ‘“Consumer” versus “Customer”: The Devil in the Detail’ (2010)(2)JLS 315]
  2. As final consumer voice rarely heard in competition policy, this enforcement standard could increase legitimacy

3. The introduction of the single currency in EU and the combat against trade barriers (either public or private) have brought a significant change in the way that products reach the final consumers; thus, it has been argued that it is very timely to explore consumer interests in retail sectors [Marsden and Whelan in Ezrachi and Bernitz (eds) OUP 2009]

4. Difficulties of tracing the harm at the level of final consumers → But, in some markets final consumer welfare can act as the appropriate enforcement standard
‘CONSUMER WELFARE’ IN EU COMPETITION LAW ENFORCEMENT

- In CJEU jurisprudence, ‘consumer welfare’ not the guiding principle. Use of presumptions. Some examples:
- **Article 101 TFEU**
     ‘...It is not necessary for there to be actual [restriction of competition] a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object.’ → Restriction between inter firm rivalry = Restriction of competition

2. Case C-501/06P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2010] 4 CMLR 2 [63]
   ‘...Article 81 EC aims to protect not only...but also the structure of the market, and in so doing competition as such...for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of advantages of effective competition in terms of supply and price’ ≠ T-168/01 *GlaxoSmithKline v Commission* [118-119], [121] → Limits on parallel trade = Restriction by object
‘CONSUMER WELFARE’ IN EU COMPETITION LAW ENFORCEMENT

➢ Article 102 TFEU
1. Exploitative Abuses
   - Few Cases  e.g. General Motors [1975] [12];
     United Brands [1978] [250-251]
   - Interests of Final Consumers  1998 Football
     World Cup OJ [2000] L5/55 [100]
   - Criticism  Adverse Impact on Long term
     consumer welfare?

2. Exclusionary Abuses
   - T-201/04 Microsoft v Commission [664]
     …It is settled case law that [Article 82 EC] covers not only
     practices that may prejudice consumers directly but also
     those which indirectly prejudice them by impairing an
     effective competitive structure. In this case, Microsoft
     impaired the effective competitive structure  […] by
     acquiring a significant market share on that market.
   - ≠ AG Jacobs in C-53/03 SYFAIT V GlaxoSmithKline
     Plc [2005] ECR I-4609  Restriction of economic
     freedom of competitors
'CONSUMER WELFARE' IN EU COMPETITION LAW ENFORCEMENT

- Joined Cases C-468/06 to 478/06 Sot Lelos kai Sia EE v GlaxoSmithKline AEVE [2008] ECR I-7139[57]

... without it being necessary for the Court to rule on the question whether it is for an undertaking in a dominant position to assess whether its conduct vis-à-vis a trading party constitutes abuse in the light of the degree to which that party’s activities offer advantages to the final consumers, it is clear that, in the circumstances of the main proceedings, such an undertaking cannot base its arguments on the premiss that the parallel exports which it seeks to limit are of only minimal benefit to the final consumers Market integration objective prevails

CONCLUSIONS

1. Discerning a primary goal in EU competition law ‘Sisyphean Task’
2. Following ‘modernisation’ of EU competition law increased attention on ‘consumer welfare’ standard.
3. Inconsistency between policy documents and competition law enforcement standard ‘Consumer Welfare’ not the standard adopted in EU competition law enforcement
4. Alternative ways to align Commission policy pronouncements and Competition law enforcement Consumer Involvement in private competition law enforcement