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Comments

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The Evolving Enforcement of E.U. Competition Laws

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Abstract

Entrepreneurship and new business development has been increasingly moving to the forefront of media, public and governmental attention. Many countries have enacted competition laws to curb abuses and specifically prevent unfair competition. Unlike the United States, enforcement of competition law in Europe has historically been the domain of the government, generally under the of the European Commissioners for Competition, and does not rely on private actions of entrepreneurs and new business developers. By combining existing worldwide case law, legislation and governmental policies as a lens, this paper is intended to fill a gap in the existing literature relating to the impact of European competition law and the growth of entrepreneurial enforcement of unfair competition practices. The conclusion and recommendations reached are generalizable and appropriate for use in developing best practice solutions.

Keywords: *Antitrust, Competition Law, Entrepreneurship, Europe, European Union,*

Introduction

Although laws prevent various types of unfair competition have been around since Roman Times, modern competition law, referred to in the United States as antitrust law, is generally regarded as having been established with Canada's Act for the Prevention and Suppression of Combinations formed in restraint of Trade in 1889. The United States followed shortly thereafter with the Sherman Antitrust Act of 1890 (the "Sherman Act").

The basic architecture of the Sherman Act divides antitrust violations into two major categories. Section 1 of the Sherman Act agreements and other arrangements in restraint of trade. Section 2 of the Sherman Act outlawed monopolization and attempted monopolization.

A broader concept of anti-competitive behavior arose with the Clayton Antitrust Act of 1914 (the "Clayton Act"). The Clayton Act introduced new prohibitions on acts that could be done unilaterally by a business enterprise and which could be considered anti-competitive.

Predatory pricing – pricing below cost, primarily to put competitors out of business

Tying arrangements – requiring that the purchase of one item be tied with the purchase of another item.

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Price discrimination – charging a higher price to competitors than to others, or otherwise requiring more onerous terms in contracts

More modern EU law appears to have features analogous to U.S. law. However, it would be misleading to overstate the similarities, as there does not appear to be any attempt in the EU to mimic U.S. law for its own sake. Unlike perhaps some other areas of the law, it is not always clear what are the ideals and goals of competition law. So, a difference in underlying values between Europe and the U.S. is reflected both in the language of the law as well as the manner in which it is enforced.

The main similarity is the basic structure. Like U.S. law, the EU has two main branches. First, there is the restraint of trade branch, contained in TFEU Article 101. That article prohibits “...all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...” Unlike U.S. law which relies on case law for further elaboration, TFEU goes on to describe with specificity the types of agreements which are prohibited, as well as the types of agreements that may be permitted.

The second branch, which in the U.S. appears as a prohibition on monopolization, appears in TFEU Article 102 as a prohibition as “abuse of a dominant position.” In the words of Article 102,

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

A threshold requirement is that it only applies to “undertakings of a dominant position.” Typically, this would mean a business enterprise with a large market share. Although a market share of more than 50 percent is significant, of greater significance is the difference between the market share of the enterprise and its nearest competitor. Thus, a large difference can mean dominant position, even if that market share is less than 50 percent.

The rights of entrepreneurs to seek protection from illegal anti-competitive behavior would apply to both of the branches, the counterpart of Sherman Act section 1, as augmented by the Clayton Act, which is contained in TFEU Article 101, and the counterpart of Sherman Act section 2 which is contained in TFEU Article 102. It should be noted, however, that the second branch, monopolization (in the U.S.) and abuse of dominance (in the EU), will more likely be the violation harming the entrepreneur, and the one for which an entrepreneur is more likely to seek a remedy. And, this second branch sees a greater disparity between U.S. and EU law.

Enforcement by the European Union

One of the differences between U.S. antitrust law and EU competition law is the manner of enforcement. In the U.S. 90 percent of antitrust cases are brought by private parties. (Pakamanis 2016) Because U.S. antitrust enforcement largely relies on private enforcement, there is a legal structure in place that supports that enforcement. As we will see, this includes claimant-friendly features such as the availability of class actions, and the ease of obtaining punitive damages in a winning case.

Enforcement of competition law in Europe has historically been the domain of the government, generally the European Commissioners for Competition. This is not necessarily a bad thing for enforcement, and in fact competition law has been aggressively enforced in the EU in recent years. This is the result of a line of European Commissioners for Competition since 1999 who redefined the office as actively pursuing competition law violations: Mario Monti (commissioner from 1999 to 2004), Neelie Kroes (2004-2010), Joaquín Almunia (2010 - 2014), and now Margrethe Vestager (commissioner since 2014). Some of the most famous competition law cases have played out entirely differently in the United States than in Europe.

Some examples of the aggressive stances taken by these commissioners, generally in contrast with more lax enforcement in the U.S:

Under Mario Monti, the EU blocked the merger of General Electric and Honeywell. The commission felt that the merger would create an unwarranted monopoly in several aspects of the aerospace industry, and required that certain divisions be sold before merger was approved. Ultimately the merger was abandoned.

A case which commenced while Monti was commissioner, and concluded while Neelie Kroes was commissioner, was the case *British Airways plc v Commission of the European Communities* (case C-95/04 P), regarded by many as one of EU's most significant competition law cases. In that case, Virgin Atlantic Airways, Ltd., filed complaints against British Airways with the European Commission, based on the EU rule that was the precursor of Article 102.

The nature of the complaints was that British Airways paid performance reward bonuses to travel agents based on the volume of their sales of British Airways tickets. The rate of commissions earned by travel agents on the sales of tickets would increase as the volume of those ticket sales increased. Evaluating whether this system was abusive would depend on, "whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its

co-contractors to choose between various sources of supply or commercial partners". The Commission found that the practice was abusive, a holding that was ultimately affirmed by the European Court of justice.

Neelie Kroes as commissioner prosecuted the case against Microsoft, for bundling its web browser Internet Explorer and Windows Media Player with its Windows operating system. In *Microsoft Corp v Commission* (2007) T-201/04, Microsoft was ordered to offer these separately. Failing to do so, Microsoft was ultimately fined 860 million Euros. Under Joaquín Almunia, Microsoft was fined an additional 561 million Euros when it failed to offer Windows operating systems that offered users a selection of different Internet browsers.

Many of these cases faced very different results in the U.S. than in the EU. In the U.S., for instance, the Honeywell-GE merger had been approved by the U.S. Department of Justice. In the Microsoft case, although there had been a finding of antitrust violations, the case was ultimately settled for far less than the EU penalty.

A case with a very dramatic difference is the case involving Google, where the search engine was accused of abuse of a dominant position. It's important to note that while abuse of dominant position under EU law appears to be similar to monopolization under U.S. law, there is in fact no prohibition in the U.S. explicitly called abuse of a dominant position. After some examination, U.S. investigators found no antitrust violations by Google. The EU, first under the leadership of Joaquín Almunia, and then Margrethe Vestager, pursued the Google case, resulting in a series of high-priced settlements.

With its goal of protecting competitors as well as competition, a major beneficiary of EU competition law would be expected to be entrepreneurs. As stated by Schaper 2010, "An effective competition regime should theoretically facilitate an open, competitive environment in which new market entrants can flourish and give rise to high levels of entrepreneurial activity." Although Schaper did not find such a correlation, more recent developments would tend to support entrepreneurial activities.

Enforcement by Entrepreneurs

Although competition law enforcement in the EU does not rely on private actions to the extent that it does in the U.S., there has been greater use of the courts by private parties.

In fact, the entire idea of competition law enforced by private litigation is a relatively recent addition to the body of law in the EU. Decades after competition law was first enacted by Articles 81 and 82 of the Treaty Establishing the European Community, there was still a question about whether private litigants had the right to enforce EU competition law.

This was not completely settled until the European Court of Justice ruled in *Courage Ltd v Crehan* and *Inntrepreneur Pub Company v Crehan*, Case C-453/99 A (2001) that EU member states could not restrict the ability of individuals to seek damages in private litigation. There the court stated:

The full effectiveness of Articles 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed the existence of such a right strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

The appeal of private litigation is attributable to the limitations of government regulation. As has been noted:

...regulators do not have the power to award compensation to aggrieved companies that have suffered loss and damage due to anti-competitive conduct. Nor are they able to provide, where relevant, quick and effective injunctive remedies in the way the courts can.

Regulators have finite resources and do not have the time or the manpower to investigate every single infringement case. Therefore they prioritise their scarce resources. This inevitably means that many deserving cases do not get taken up by the regulators leaving the complainant without any adequate recourse. (Bell 2017)

The Crehan cases highlighted some of the problems with barring private enforcement. There, pubs were required to enter into agreements that limited where they could buy beer and fixed a price for that beer. Such an agreement was illegal under EU competition law. As both the pubs and the distributors had entered into this agreement, both sides were party to the illegal agreement.

U.K. law stated that a party to an illegal agreement could not recover damages, and the U.K. courts denied the pub owner's claim based on that rule. The European Court of Justice overturned the U.K. holding in determining that the pub owner's competition law claims could proceed. Although the Crehan cases addressed a narrow U.K. rule, in fact it came to stand for the much broader principle establishing the rights of private litigants to sue for violations of EU competition law.

The result of this was not felt immediately in the national courts to any large degree, but that has changed. "Recent years have seen a significant increase in the number of private competition actions brought before the EU national courts..." (Bell 2017)

There are two components of this: one, an increase in private litigation, and two, use of the national courts of the EU member states rather than EU courts themselves. It is the second of these that gives vitality to antitrust enforcement by private parties, as each EU member nation can, within the limits of EU rules, fashion its own procedures and remedies. "Injunctions can be obtained in days and damages can be very substantial often running into millions of Euros." (Bell 2017)

At this time, while injunction and compensatory damages are available through national courts, punitive damages are generally not. While not expressly authorized under EU law, neither is there a prohibition against individual EU member nations permitting courts to award such damages. (Sahin 2016)

Are punitive damages the next frontier for litigants in EU competition law private actions? There are two competing views. One, that if one of the objects of private litigation is deterrence, then punitive damages will aid in that role. It has been argued that compensatory damages alone have not been fully effective in deterring anti-competitive behavior. As Almunia has stated: “Two words describe the damages-actions landscape in Europe today: ineffective and uneven. Often the rules are so complex and uncertain that starting a damages action in court means embarking in an endless procedural battle. Insufficient, uneven and costly access to compensation is simply unacceptable in the Single Market; where the costs of an infringement should be borne by the infringers, not by the victims.” (Pakamanis 2016)

The competing view is that punitive damages may encourage abusive litigation. In this regard, discussions on the subject tend to compare EU law with antitrust law in the U.S., where treble damages are expressly authorized. In response to the U.S. rules, it has been stated:

First, pre-judgment interest is not available to victims in the US whereas it is available in the EU. Secondly, public enforcement is not as strong as in the EU, which results in private actions playing a predominant role in the US competition enforcement system. The US private enforcement regime is designed for the enhancement of the entire competition law enforcement system and, in this sense, the availability of punitive damages represents the chosen goal. Claimants are encouraged to seek for competition infringements not only to obtain redress but also to supplement public enforcement efforts. This shows the importance attached to the deterrence objective in the US. (Sahin 2016, footnotes omitted)

Thus, it is at the present time an unanswered question whether punitive damages may at any time be available in the context of EU competition law. Although such damages would be beneficial to the private litigant, it may be that the concept does not travel well across the Atlantic, particularly given European antipathy to U.S.-style litigation.

One of the issues that arises when looking at private enforcement in national courts is the question of whether the court of a particular EU member nation is the appropriate location for a suit to be brought. A claim may be brought in the court of a particular nation only if that nation has specific interests to protect. Although this requirement isn't expressly coterminous with the rules of jurisdiction, jurisdiction rules are instructive of how this requirement might be applied.

Several member states are preferred by plaintiffs when making claims under EU competition laws. These are the United Kingdom, Germany, and Netherlands, which are favored because of increased likelihood that claimants will win compensatory damages. (Pakamanis 2016)

The U.K. has long been regarded as a jurisdiction friendly to private parties suing to enforce EU competition law. The question has been raised about the effect of Brexit on U.K.'s role in private enforcement of competition law.

As a result of the UK's vote to leave the EU, its future place within the European jurisdictional regime is in doubt. No changes to the powers and jurisdiction of the UK courts are likely to take effect prior to 2019 or such time as the UK actually leaves the EU. However it is hoped that, post Brexit, the UK's pre-eminent position as a venue for EU competition law claims will be preserved through its continued adherence to the European jurisdictional regime through the terms of the exit treaty agreed between the UK and the remaining 27 EU Member States. (Bell 2017)

It may be that this concern is overstated. Even without an overarching EU structure, general principles of jurisdiction in international law will continue to apply.

Another issue is the question of whether it is possible for claimants to pursue a class action. Given the fact that litigation is expensive, and punitive damages are unavailable, it may be difficult for a private party to pursue a legal claim. This would be particularly the case for an entrepreneur, who is unlikely to have the economic stability to withstand major litigation.

“One of the main problems for effective private enforcement of competition law infringements (in particular for private individuals, small and medium sized businesses) is that there is no effective uniform class action system across the European Union. The harm of the competition law infringement to one person may be small, and insufficient to merit the risk and cost of bringing an action for damages, consequently, the right to damages may be more theoretical than real in the absence of a possibility for a class action, a procedural mechanism enabling many single claims to be bundled into a single court action.” (Pakamanis 2016, citations omitted)

Related to the idea of a class action is the EU concept of “collective redress.” It has been argued that collective redress would be a preferable alternative to punitive damages, and would avoid the possibility of duplicative liabilities for the same acts. (Sahin 2016) However, at the present time there is no EU system for collective redress, rather, there are inconsistent systems among the EU member nations. (Pakamanis 2016)

The United Kingdom is again in the vanguard in the area of collective redress. Although using the term “collective redress” rather than “class action,” in fact U.K. law is similar to U.S. class action law. As with the U.S., the U.K. law provides for an “opt out” procedure, which means that members of the group are automatically included unless they explicitly opt out. This makes it easier to form the group for litigation. Portugal and Belgium specifically authorize class actions with opt-out procedures. (Pakamanis 2016) Outside of the U.K., Portugal, and Belgium, class actions and collective redress in private competition law litigation is likely to be unavailable.

Conclusion

Given the strong policy underpinnings of competition law, the social policy of lawmakers will have an oversized impact on the nature of those laws. Where U.S. competition law, referred

to there as antitrust law, has as its underlying policy the protection of markets and consumers, the competition law in both the European Union and individual European nations, is designed to protect individual competitors. Thus, the protection of entrepreneurship is stronger in Europe than in the United States. Since the official authorization of private litigation the protection of entrepreneurship is even stronger, however, further developments are needed in the areas of punitive damages and class actions.

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