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Project

The Goals Of EU Competition Law: A Comprehensive Empirical Investigation

Problem addressed by our research

Recently, the question of the goals and purposes of competition law has surged in competition law practice as enforcers, including the European Commission (Commission), struggle to define the scope of their competencies and authority. Are considerations of fairness, consumer protection, privacy—to take some examples—relevant in assessing whether a practice is anticompetitive, or is it just all about welfare and efficiency?

This is not a new concern; it has troubled competition law since its inception (see, e.g., Case 6/72 *Europemballage and Continental Can v Commission*), succinctly summarised by Robert Bork's statement "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give..." (Bork, 1978:50). But it has recently and with increasing intensity started to re-emerge, especially in the form of a dilemma between welfare and fairness. It has been discussed in recent high-profile cases (e.g. AT.39740 Google Search (Shopping)), academic commentary, and a large number of public statements, speeches, and conferences.

While the goals and purposes of competition law have always been an issue of contention, the hegemony of the Chicago School heavily tilted the scales in favour of welfare (and associated concept of efficiency), initially in the US, but increasingly so in the EU as well, judging by the growing emphasis on a more economic and effects-based approach (e.g., Case T-168/01 *GlaxoSmithKline*, para 118; Case C-413/14 P *Intel*, paras. 133-135). However, a recent rising wave of discontent with the Chicago School and how far the perceived obsession with efficient welfare-maximising markets had gone, breathed new life into alternative considerations that competition law should care about and even prioritise. These include, most notably, fairness, a level playing field, the preservation of the market's competitive structure, but also privacy and consumer protection.

The arguments in favour and against both sides have been already analysed at length, particularly in academic circles. There is a big body of normative research into the goals of EU competition law. In this fertile ground for exploration, numerous attempts have been made to identify the role and objectives of competition law. These range from interpretations of legislative history to normative principle-based analyses on the correct scope of competition law, but whatever the approach, extant work in the area has remained predominantly theoretical with only anecdotal support from primary sources. Thus, we found there was a gap in the research when it came to actually looking at the entire practice of the Commission and the CJEU, as well as soft law sources such as speeches of the Commissioners for competition and

Opinions of Advocates Generals, from the beginning of EU competition law enforcement in the 1960s up to today.

Aim

Our research project undertook a comprehensive empirical investigation into the goals and purposes of competition law, as manifested through Court of Justice of the European Union (CJEU) case-law, Commission decisions, and soft law (Opinions of Advocates General, and official speeches and statements delivered by the Commissioners for competition).

Our aim was to collect all the above documents and through keyword search, to identify relevant instances of mentioning different goals of EU competition law, to see, empirically, what the practice suggests. In so doing we addressed numerous questions that occupy competition authorities, for instance, if various goals (e.g. fairness, welfare, structure etc.) are indeed mentioned in the sources, how often, and in which types of sources, and what does the data tell us about the evolution of EU competition law.

Method

We undertook an empirical investigation into the goals and purposes of competition law as manifested through Court caselaw, Commission decisions, Opinions of Advocates General and official speeches and statements delivered by the Commissioners for Competition. In this first of a kind investigation, we analysed almost 4,000 documents (1,802 CJ & GC decisions, 485 AG opinions, 1,015 Commission decisions, and 447 Commissioner speeches) dating back to 1962 and covering articles 101 and 102 TFEU as well as concentrations, to distil seven broad goals of competition law—efficiency, welfare, economic freedom and protection of competitors, competition structure, fairness, single market integration, and competition process—as expressed through 74 keywords. We then analysed them to extract quantitative results and qualitative patterns and insights.

Results and deliverables

Our results are available in our report ‘The Goals Of EU Competition Law: A Comprehensive Empirical Investigation’, available online at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795

We are currently working on an academic paper based on this research, to be submitted to a major European peer-reviewed journal. We are also in the process of making available the datasets we compiled for further use and enhancement by competition law scholars and authorities, at our registered website www.db-comp.eu.

The main insights from our research can be summarized as follows:

- EU competition law pursues a multitude of goals concurrently and it can therefore not be said that it is monothematic. This has also historically been the case.
- EU competition law prioritizes the process of competition rather than directly the achievement of a desirable outcome (e.g. efficiency, welfare maximization etc).
- Fairness, despite media popularity, does not fare highly in the decisional practice of any EU institution.

- The Commission places emphasis on different goals than the Court and AGs, and Commissioner speeches reflect yet different emphasis too. The Commission assigns more value to welfare and to the protection of competitors and commercial freedom, but less value to efficiency than the Court and AGs. Speeches emphasize welfare and fairness more than EU institutions in their decisions.
- Different Commissioners seem to emphasize different goals during their terms, with Vestager promoting fairness and Kroes promoting welfare.
- The rate of cases referencing competition law goals over the years has remained steady to slightly increased, with the Commission leading the increase, perhaps in response to the ‘more economic approach’.

Reception

The project and the final report have been very well received in academic circles and competition authorities. We have presented the project at 2 international conferences and also at online seminar. Some highlights from the positive reception of the Report:

- Wouter Wils, Hearing Officer at DG Competition, European Commission: “very impressive and very insightful piece of research”
- Ioannis Lianos, President of the Hellenic Competition Commission: “great work”