

EDITORIAL
INTELLECTUAL LEADERS STILL NEED GROUND TO STAND ON

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In the past, European competition law has been seen to diverge from antitrust law in other jurisdictions, primarily due to its market integration motive. However, over the past few years less weight appears to have been given to this aim, reflecting the fact that the European market has indeed become more integrated. We have also seen international convergence among competition regimes increase, in some part reflecting this change. Convergence has also been helped by the greater acceptance within the Commission of the need for economic analysis and effects-based tests. This has driven much of DG-COMP's modernisation efforts, particularly with respect to the review of individual agreements and mergers.

Of course, there has also been a modernisation of enforcement itself, and in some ways this represents a move away from formal, centralised control towards a more efficient, and likely more effective, allocation of decision-making. Our symposium section in this issue introduces papers that examine such developments from legal, economic and political science points of view. We felt that the latter perspective in particular must be kept in mind in any legal or economic discussion of competition policy—and thus are pleased to introduce this element to the journal. Political economy—which includes systemic issues and the institutional balance of the Community legal order itself—is also an aspect that arises to some extent in the most important competition cases.

Microsoft may be an example. The Judge Rapporteur in that case, Judge Cooke, recently stated that, “I tell my clerks that these (Article 81 and 82) cases are 20 percent fact, 20 percent law and 60 percent policy”. We will never know how much of the *Microsoft* case was decided on policy grounds, rather than on the facts or the law itself. It might be viewed simply as following European case law quite closely, but expanding its scope in some areas to accommodate the facts. There is no doubt, however, that a significant defeat would have dealt a severe blow to the European Commission, particularly following on from other defeats in court. We will not know how much this was in the minds of the judges, or how much it was discussed in their deliberations, but hopefully policy considerations were not determinative, as judgments must rest on sound law first and foremost.

The law in the area of Article 82 has been the subject of a lot of discussion over the past few years. This journal has devoted a special issue to Reform of Article 82, and our editorials have criticised DG-COMP for failing to implement a genuine effects-based test. The Commission is constrained by its case law, however, and in particular by the many cases it has won. It is difficult for it to give it up, particularly after having its theories of harm and analysis supported in *British Airways* and *Microsoft*—despite these cases having been heavily criticised by supporters of an effects-based approach on both sides of the Atlantic. The question, of course, is what to do when such decisions uphold essentially an out-of-date form-based prohibition of fidelity rebates and tying which differs so strongly from the direction DG-COMP appeared to want to go in its Discussion Paper. We have seen the *Tomra* case, of course, which officials have said incorporates the new approach following the Discussion Paper. They argue that the decision rests on detailed economic analysis, which just happens to come to the same conclusion on foreclosure as a form-based approach would do. Whether this case represents the beginning of a genuine policy change remains to be seen.

Supporters of the *Microsoft* and *BA* prohibitions and judgments applaud the Commission and the Court for having the discipline to press on with their own decisions, without reference to the way the cases have been decided—or even dismissed—in other jurisdictions. This is as it should be of course. With such strong international divergence on a handful of important cases, however, the spotlight is on the Commission: either it must abandon its support of an effects-based approach or it must set out a coherent theory of harm that it can back up with relevant effects-based evidence. Take the Commission's finding of abusive tying in *Microsoft*, and the remedy imposed: the offering of Windows without Media Player. The Commission clearly has a theory of harm; whether it has the right one can be disputed. But one thing is equally clear: we have yet to see sufficient supporting effects-based evidence of likely harm to competition and consumers.

International convergence exists, but with respect to dominant firm conduct, the European case law on fidelity rebates, tying, refusal to deal and predation stands in stark contrast to the state of the law in other systems. Supporters of the Commission's approach have tried to portray this difference as one of European competition law having a greater concern for the ability of competitors to access the market effectively. This stance allows in rhetoric that European competition law protects competitors, not competition, which is often unfortunate and clouds rational discussion of the issues.

The theories of harm espoused by the European Commission, and endorsed by the Community Courts, are informed by decades of legal rulings that dominant firms have a “special responsibility” to their customers and their rivals. This was a unique development in competition law, but it is now very much the

law throughout Europe, and Member States cannot diverge from this primary principle. Of course, much has been written about how this concern about the elephant in the china shop is particularly acute in Europe, where market forces have traditionally not been as effective in constraining dominant firm conduct for a range of reasons. These include the historic creation of many dominant firms by the state and the continued segmentation of markets and consumer preferences along national lines. Nevertheless, when considering product markets that are global, or at least Europe-wide, one would expect different and more modern analytical tools to be used.

This is not the case though, as European competition law still diverges starkly from that of the US, for example, on these few, hard but important cases. Is it simply that European competition law has a different philosophical starting point—that of ordoliberalism, and its concern that a dominant firm's very existence skews the "structure" of competition and thus must come under greater regulatory scrutiny and pressure? Or if *Microsoft* and *BA* are not ordoliberal decisions—as some Commission officials have asserted—then what is the economic thinking on which they rest? Are they instead based on theories of harm that the US eschewed in the 1970s? If not, if they are truly modern, then what is this new school of thinking in Europe, and what is it based on?

Whatever one may say about the seeming pendulum swing of political influence on American antitrust—with one administration opening a case and another closing it—no one can deny that economic analysis has taken the front seat in cases for the past 30 years. Is European competition policy more populist, more structuralist and simply reflecting theories from US antitrust's history—theories that have long since been discounted as resulting in false positives, over-regulation and a chilling of pro-competitive behaviour? Commission officials may argue that this is not the case; that the Commission is asserting intellectual leadership and should not have to justify their theories of harm by reference to any particular American economic theory.

As far as we know, economic theories do not have any nationality—there is instead a marketplace for the best ideas. If the Commission is grasping the reins and beginning a new surge of intellectual leadership as its next phase of modernisation, then we trust it will be one that has the intellectual support of leading economists in Europe. The old formalistic case law is there; the new case law is based on it; the urge to reform is there, but only a firm grounding in economics will allow European competition policy to take the lead and move things forward in any meaningful way.

Many jurisdictions have adopted European-style competition laws. They, too, are now looking to the Commission for guidance on how they should be enforced. We in Europe are eagerly awaiting guidelines, a notice or at least some principles on how Article 82 will be truly reformed, and to understand how the decisions and judgments of the form-based past can be squared with the desired

effects-based future. We wish the Commission the best in this endeavour, and we call for papers to help explain how the Commission's activity on Article 82 represents new and coherent economic analysis. If it is not to be Chicago School, Harvard School or the Freiburger Schule, then to what European School shall we turn to understand European competition law now and in the future?