

Is There Anything More Important Than Competition?: reflections of an EU lawyer

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Why Discuss This at All?

“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... Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.”

Bork, R., *The Antitrust Paradox* (1978).

Introduction - 1

- Can fundamentally alter the outcome - Article 101(2) TFEU
- Very important to resolve issue today:
 - No notification - less certainty
 - Many decision-makers:
 - need consistency
 - differences emerging
 - Institutional problems - legislative blockages

Introduction - 2

Commission:

- “The objective of Article 81 [Article 101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”
Commission, *Article 81(3) Guidelines* (2004), paragraph 13
- “...to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations.” Commission, *White Paper on Modernisation* (1999), paragraph 57

Schaub (Director-General DG Competition (1995-2002)):

- “Political, social or environmental aspects, in my view, have no place in the direct application of competition law. And – at least since I have been Director-General – [they]...have never been taken into consideration.” EUI Competition Conference (1997)

How to analyse PP's place

Place Article 101 in its EU context. So, look at:

- EU and TFEU Treaties
- EU Courts
- Commission

EU Treaties: creating conflicts 1

Conflicts are created in two ways:

- Hierarchy of Treaty Articles
- Policy-linking clauses

EU Treaties: creating conflicts 2

Conflicts are created in two ways:

- Hierarchy of Treaty Articles:
 - EC Treaty
 - Article 2 – broad inter-related Treaty purposes
 - Article 3&4 – activities for achieving Article 2
 - Implementing provisions (unclear if one or many)
 - TFEU and TEU
 - Aim - promote peace, EU values and well-being of its peoples
 - Article 3(6) maintains (and makes explicit) the current hierarchy between values and implementing provisions
 - Competition no longer mentioned in Article 3 TEU
- Policy-linking clauses

EU Treaties: creating conflicts 3

Conflicts are created in two ways:

- Hierarchy of Treaty Articles
- Policy-linking clauses:
 - 7 of them in EC Treaty
 - "A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities." Article 152(1)
 - environmental protection, employment, culture, public health, consumer protection, economic and social cohesion and development policy
 - TFEU contains many more and a general one
 - "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account...", Article 7

EU Treaties: solving conflicts

Is Article 81 merely there for Article 3(1)(g) -end in itself? Harder to accept with EU Treaties.

Four methods of conflict resolution:

- Express exclusion – Article 346(1)(b)
- Express compromise – Articles 34 and 36
- Policy-linking clauses (imply balance)
- Silence (Article 34 and environment)

Article 101 has express balance/ or silence?

The EU Courts: creating conflicts

Hierarchy:

- ECJ accepts the Article 2 and 3 hierarchy; and
- Article 81 aims at Article 2 *purposes* and Article 3 *activities* (balancing), Case 32/65 *Italy v. Council and Commission* [1966], page 405
- Similar to other areas Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* [1985]

Policy-linking clauses:

- ECJ holds (by implication) that the Policy linking clauses demand balance, Case C-233/94, *Germany v. EP and Council* [1997]

The EU Courts: dealing with conflicts

- Exclusion – RARE (*Échirolles* and *Albany*)
- Balancing:
 - Article 81(1)
 - *Wouters* (Dutch bar council, no accountants, found a restriction of competition then proportionality test with admin of justice)
 - Article 81(3)
 - Widely interpret, e.g. *Metro I* (supply forecasts, stabilise employment, helps production)
 - “...in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) [now Article 81(3)] of the Treaty.”
Joined Cases T-528/93, etc., *Métropole Télévision v. Commission* [1996], paragraph 118

The EU Courts: conclusion

- EU Courts have filled Treaty gaps, Article 19(1) TEU and done this teleologically
- Generally reticent to ignore objectives
- Article 81:
 - Slow to exclude competition
 - Slow to allow competition to trump
 - Construed it against its natural meaning (teleological interpretation)