European Competition Policy in a Transatlantic Perspective

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(*) The views expressed are those of the author and not necessarily reflect those of the European Commission.
Overview

The Transatlantic Relationship in Competition Policy

Soft Convergence
  i. Merger Control (horizontal and vertical)
  ii. Abuse of Dominance (Art. 82)
  iii. State Aid

Factors leading to different outcomes

The Role of Economists and Economics
The Transatlantic Relationship in Competition Policy

- most important trading relationship
- US influence over EU approaches (office of the CE)
- US academic debates
- close cooperation between agencies
- very little disagreement (GE/HWL)
The Transatlantic Relationship in Competition Policy
Example: Merger Control

very close (almost daily) contacts with FTC or DOJ

in the last 12 month 40 cases where at least one firm was US based (this is certainly not going down...)

Oracle/ Peoplesoft, Sony/ BMG, Air France/ KLM, Sanofi/ Aventis, etc.

bilaterals and meetings (including CET)
The Transatlantic Relationship in Competition Policy

- Multi-jurisdictional approach is a reality (no hard convergence)
- Procedural convergence
  - “best practice” agreements
  - Reduce regulatory burden (ECN) / increase legal certainty
- Soft convergence
  - Same objectives (same micro-economics)
  - Close cooperation between agencies (cases & guidelines)
- Multilateral frameworks
  - ICN => forum for advocacy - role of US-EU
  - OECD, WTO
Soft Convergence

i. Merger Control (horizontal and vertical)

ii. Abuse of Dominance (Art. 82)

iii. State Aid
i. Merger Control - horizontal mergers

- New EU test: whether a merger “would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position”

- EU Guidelines
  - Distinction: unilateral (“non-coordinated”) effects and co-ordinated effects
  - Consideration of efficiencies (open but cautious)
    - benefit to consumers timely, and substantial, likely to be realized
    - merger-specificity
    - Verifiability

- Economic approach: effects based, integrated approach
- Focus on intermediate cases: reduce type I and type II errors
... ... .overall approach to horizontal Merger Control

- approach is rooted in sound economic analysis of competitive effects and efficiencies
- modern economic analysis has advanced (analysis of competitive effects, empirical methods: econometrics, simulations, “reduced form” evidence)
- strong similarities with US Guidelines and methodology

=> soft convergence
i. Merger Control - vertical mergers

- consumer approach & effects-based
- role of efficiencies

⇒ there will be guidelines… (pending case: GE/ HWL)
⇒ soft convergence likely
ii. Abuse of Dominance (Art. 82)

- approach to dominance / market definition / efficiencies
- effects based approach
- consumer standard (as efficient competitor, “but for”)
  - rebates (Michelin II and BA)
  - predation
  - tying & bundling
  - refusal to deal
  - accessive pricing
  - price discrimination

=> internal working group, ECN, EAGCP

=> soft convergence possible
iii. State Aid

The current framework

Article 87.1 of the treaty identifies four criteria defining State aid:

- Granted through State resources
- Favours certain undertakings or the production of certain goods (economic advantage and selectivity)
- Distorts or threaten to distort competition
- It affects trade between member states

De minimis rule for aid: less than €100,000 for 3 years period is considered no aid

Based on case law the last two criteria are assumed to hold where selectivity is exists.
The legal framework:
When is it compatible?

General provisions

- Art. 87.2
  Compatible: individual social measures, natural disaster

- Art. 87.3
  May be compatible: areas with low living standard, aid to facilitate the development of certain economic activities, render serious disturbance in the economy, culture, etc.

Guidelines
- R&D (2005)
- risk capital (2006)
- Regional aid (2006)
- MSF (2007)
- Sectoral (2006)
- environment (2007)
- Rescue & Restructuring (2009)
- SG EI (2005)

Block exemptions
- Employment (2006)
- training (2006)
Assessing State aid
(economic principles)

Benefits => achieve Objectives (+)

- Correcting Market Failures
  - Externalities
  - Asymmetric information
  - Provision of public goods

- Equity / Social Reasons
  - Social and Economic Cohesion
  - Economic adjustment

Distortion of Competition (-)

- Create Market Failures
  - Create or strengthen Market Power (Dominant position)
  - reduce dynamic efficiency
  - Subsidy / tax competition
  - Increase budget deficits / tax burden

- Reduce Fairness
Factors leading to different outcomes (1)

- Legal Systems differ
  - administrative system - judicial control
  - treatment of efficiencies - burden of proof
  - private action

- Markets may differ
  - The impact of globalization (Neven and Röller, JICT)
Factors leading to different outcomes (2)

- Differences in Prior Beliefs matter...
- The road to dominance
- Dynamics of markets (entry)
  - Reactions by competitors
  - Customers & consumers
  - Technology, etc.
- „Speculative“ dynamic benefits vs. „sure thing“ static benefits
- Competition as an institution (Hayek)
Factors leading to different outcomes (3)

- Political/Policy Environment
  - Institutional set-up differs
  - Lisbon agenda: national/european champions debate
- Industrial policy/social objectives
  - Varies across fields – Ex: state aid (SGEI)
In sum: Convergence

- Soft convergence well advanced and is likely to increase (Challenge is the ICN and the ECN)

- Despite similar guidelines and tests, we will not necessarily always get the same outcome (legal framework, markets, institutional set-up, and prior beliefs differ)

... ... ... what is the role of economic analysis
The Role of Economists and Economics
Potential Benefits of Economics

- emphasis on markets and efficiency (not politics)
- reduces Type I and II harm
- leads towards convergence….. (Bayesian world)

Prior Beliefs + economic analysis + new evidence => decisions
Potential for abuse through Economics

- "the more economic approach" critique
  - efficiencies in mergers
  - market failures in state aid
  - complexity of economic analysis (no capacity)
- simple rules vs. discretion critique
  - simplicity, transparency, legal certainty, predictability
What “kind” of economics?

- robust economic principles (refining and re-assessing „per se“ rules)
- Capacity building
  - CET (EU Model as compared to FTC and DOJ)
  - Best Practice for empirical evidence
  - Expertise in empirical analysis
    - [econometrics & simulations, reduced-form evidence, facts, natural experiments] => Identification
- ECN, FTC-DOJ, EAGCP
Conclusion

- US-EU relationship in Competition Policy is strong
- Convergence not in outcomes, but on process and substance
  - Economics is a contributor
  - Potential to reduce political interference
  - It is good for consumers and business
- Emphasis on “economics” reduces the likelihood of conflict
- Challenges to economists/economics in antitrust