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## Editorial - Competition: Efficiency and Other Things

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In a memorable essay Richard Hofstadter considers the motivating force behind competition law in the US and identifies three possibilities:

‘The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition ... The second class of goal was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to be in need of protection.’<sup>1</sup>

Hofstadter considered the ‘antitrust movement’ to have been motivated by the second and third goals: competition law existed to do many things. However, Robert Bork famously asks whether ‘the antitrust judge to be guided by one value or several?’<sup>2</sup> He then went on to articulate why an antitrust judge is to be guided by a single value and why that single value ought to be efficiency.<sup>3</sup> In *GlaxoSmithKline*, the Court of First Instance sided with Bork, both in relation to the pursuit of a single value and in the choice of the value pursued, when it states that the purpose of European Union competition law ‘is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing *the welfare of the final consumer* of the products in question’.<sup>4</sup> This choice would mark the end of the ‘modernisation’ of the Union’s competition rules.<sup>5</sup>

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<sup>1</sup> Hofstadter, ‘What Happened to the Antitrust Movement’ in Sullivan (ed), *The Political Economy of the Sherman Act: The First One Hundred Years*, Oxford University Press, 1991, 20-31, 23-24.

<sup>2</sup> Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, 1993, 50

<sup>3</sup> Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press, 1993, 72-89

<sup>4</sup> Case T-168/01 *Glaxosmithkline Services Unlimited, Formerly Glaxo Wellcome Plc v Commission* [2006] ECR II 2969, para 118, emphasis added, citing Joined Cases T-213 & 214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-0000, para 115; Case 8/72 *Consten and Gründig v Commission* [1972] ECR 977, p 493; and Case 28/77 *Tepea v Commission* [1978] ECR 1391, para 56.

<sup>5</sup> Other milestones can be seen in the Commission’s Article 81(3) Guidelines, paragraph 33; DG Competition Discussion Paper on Article 82 EC, paragraph 4; Commission, Article 81(3) Guidelines, paragraph 13; Commission, Vertical Guidelines, paragraph 7. Respectively, OECD (2003), pages 3, 4 and 12 and UNCTAD (1995), page 6. See also, Ehlermann (1998), pages ix, 323, 347 and 354; UNCTAD’s submission to OECD (2003), page 4. see for example: Green Paper on Vertical Restraints in EC Competition Policy Com (96) 721 Final [1997] 4 CMLR 519, [54], [65], [82], [85], [293]-[300]; Guidelines on Vertical Restraints, OJ 2000, C291/1, para 8-11; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC

That an end-point in modernisation has been reached in which competition law does not challenge efficient outcomes, even when contrary to prevailing public ideology, leaves unanswered the challenge of what is to be done about the other things with which European Union competition law has historically been concerned.<sup>6</sup> Reviewing *GlaxoSmithKline*, the Court of Justice rejected the position of the Court of First Instance, finding that ‘neither the wording of Article 81(1) EC nor the case-law lend support to such a position’.<sup>7</sup> The Court went on to report that:

‘there is nothing in Article 81 EC to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. ... [Union competition law] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. ... it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price’.<sup>8</sup>

Given the importance and implications of this debate, in April 2009 CLaSF held a workshop to consider the place of the non-efficiency objectives in competition law: an ASCOLA Conference taking place in May 2010 will also consider the issue.<sup>9</sup> It is thus timely for these essays on the role of non-efficiency objectives in Union competition law to be published. The essays in this volume consider the extent to which competition law accommodates or excludes consideration of things other than efficiency. When non-efficiency values are concerned there seem to be two options. The first is to immunize the activity achieving a non-efficiency objective from competition law control. Whether the pursuit of a non-efficiency objective excludes the application of Union competition law is a theme pursued by van de Gronden when he considers the ability of Member States to intervene in healthcare markets to protect and promote the value of universal coverage. He finds that the Court waxes and wanes between exclusion of universal healthcare provision from the scope of Union competition law, and inclusion within the scope but capable of exemption based on the incompatibility of competition and public service provision. When the method of intervention is state subsidy it is possible for the healthcare regulator and regulatory

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Treaty Commission Programme No 99/027, OJ 1999, C132/1; and, Peeperkorn ‘The Economics of Verticals’ June EC Competition Policy Newsletter (1998), 10-17. Implications of the evolution of thought from an idea that ‘antitrust is for competition to the notion that antitrust is for efficiency’ are considered in Fox ‘The Efficiency Paradox’ in Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust*, Oxford University Press, 2008, 77-101.

<sup>6</sup> For one such challenge see, Townley, *Article 81 EC and Public Policy*, Hart, 2009 .

<sup>7</sup> Para 62.

<sup>8</sup> Para 63. See also Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia EE and Others v. GlaxoSmithKline*, paragraph 65.

<sup>9</sup> For previous considerations see Bouterse, *Competition and Integration: What Goals Count? EEC Competition Law and Goals of Industrial, Monetary, and Cultural Policy*, Kluwer Law and Taxation, 1994, Elzinga ‘The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?’ 125 U Pa L Rev (1977), 1191-1213, Schwartz, ‘Justice and Other Non-Economic Goals of Antitrust’ 127 U Pa L Rev (1979), 1076-1081, Ehlermann and Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy*, Hart Publishing, 1998, and Monti, ‘Article 81 EC and Public Policy’ (2002) 39 CML Rev 1057-1099.

regime to be excluded from Union competition law on the basis that the market operates on the principle of solidarity. State aid rules are also inapplicable when the subsidy merely compensates an undertaking for the performance of a public service obligation. The value of universal service is one of the other things we are required to consider in competition law and policy. Efficiency is shown not to be everything. However, Dan Wilsher considers problems that arise when competition law scrutiny is wholly excluded because of a concern with other things, in his case, environmentally sustainable energy production. First, Community measures fall outside the scope of the competition rules since neither the Community nor its institutions constitute 'undertakings'. However, the evidence is that measures thus far adopted by the Community are at least ineffective and likely counterproductive. Subjecting the measures to the type of efficiency analysis the Treaty state aid rules require would have enabled a more efficient regime to be developed. Further, Wilsher is concerned that competition law immunity for specific actors charged with meeting particular values, such as environmentally sustainable energy production, creates the risk of interest-group lobbying and regulatory capture; paradoxically preventing the most effective pursuit of the objective for which immunity was initially conferred.

As an alternative to immunizing activity achieving a non-efficiency objective from competition law control, a second approach is to develop justifications within competition law that take account of non-efficiency concerns. Such an approach is not without problems: as van de Gronden observes, such an approach gives the Union a role in determining how those in a sphere may operate in order to benefit from competition law justification, even when the sphere is expressly outwith the competence of the Union. However, Hans Vedder considers a broad scope of application to, and review of, non-efficiency objectives through the mechanism of justification is a justifiable approach. As Oles Andriychuk seek to demonstrate with the use of parenthesis analysis, competition is not as a utilitarian instrument, but must be seen deontologically as an intrinsic feature of a liberal democracy. And it is the function of competition law in a liberal democracy Vedder has in mind, viewing competition law as a mechanism by which administrative action may be reviewed and thus providing an important check against regulatory capture, neocorporatism and protectionism. Such an approach addresses the concerns raised by Wilsher. However, whilst various justifications must be made available to ensure that values other than efficiency are respected, Vedder argues that the discipline of competition is all too easily avoided by the mere mention of non-efficiency goals: the intensity of review is insufficiency rigorous and non-efficiency values are given too much weight (ultimately, to the detriment of the extra-efficiency goals, as they are inefficiently pursued). Vedder focuses on environmental values when he identifies a low intensity of review. A more rigorous review of the need to curtail competition law is identified by Szymon Gebski, arguing that the value of financial stability in the banking sector, despite Member State attempts, has not resulted in competition law immunity for state subsidies. Instead, whilst falling within the scope of the state aid rules, Article 87(3)(b) EC has been used to ensure that the value of a stable financial sector is preserved. Thus, this value is subject to the judicial review that Vedder considers appropriate and at an appropriate

intensity. This raises the possibility of a different intensity of review for different non-efficiency values, in addition to the different approaches that may be taken in relation to non-efficiency values (i.e., exclusion from the scope or justification).

Whilst the authors identify the consideration of non-efficiency values, though not explicit, it seems that the argument for immunity or claim of justification is not being claimed in relation to pure private conduct. This is particularly so in Vedder and van de Gronden: the former seeking judicial review, the latter seeking state immunity of the particular values at stake. Both Wilsher and Gebski are also concerned with state action. Yet it is not surprising that states are subject to more, different, or higher standards than pure market participants and the role of non-efficiency values absent state involvement is less than clear. An example is seen in Floris Vogelaar's consideration of the extent to which the value of freedom to choose contractual partners is recognised, protected, or challenged by competition law. This private value is subject to increasing scrutiny under competition, even when efficiency is not impaired. Thus values other than efficiency, such as the need to prevent accretions of private power, may motivate competition law intervention, just as they may motivate competition law immunity. The ability to challenge conduct with no detrimental impact on efficiency leaves us exactly where we started, questioning the very purpose of the antitrust enterprise. It is thus abundantly clear that in antitrust, as elsewhere, we are far from the end of history. The contributions show a vitality in the idea that 'we can enhance efficiency and economic welfare (and other goals as well)'.<sup>10</sup> The battle for the soul of antitrust may be won, but the war is far from over.<sup>11</sup>

### Note From the Editors

The papers in this Issue of the Review were prepared before the Lisbon Treaty came into force, but published shortly thereafter. All of the papers are therefore 'pre-Lisbon'. The competition provisions in the new Treaty on the Functioning of the European Union are textually unchanged from their precursor provisions in the EC Treaty. They are however renumbered with, for example, Art 81 EC becoming Art 101 TFEU. The main textual change in competition terms is that the reference to 'undistorted' competition that formerly appeared in Article 3(g) EC, now appears in a Protocol to the Treaty.

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<sup>10</sup> Fox, 'The Efficiency Paradox' in Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust*, Oxford University Press, 2008, 77-101, 80, bold emphasis added, italics in original, citations omitted.

<sup>11</sup> Fox, 'The Battle for the Soul of Antitrust' (1987) 75 Cal L Rev 917-923.