Chillin'Competition

Relaxing whilst doing Competition Law is not an Oxymoron

Against the Fragmentation of EU Competition Law: A Proposal for Reform

with 3 comments

Not so long ago it seemed like we had arrived to the end of history in competition law. The level of substantive convergence at the international level was remarkable and unique by reference to most other areas of the law. The level of substantive convergence within the EU (and the EEA more generally) was even more impressive. All national competition authorities and judges understood and respected the European Commission's role as *primus inter pares*, the Commission exercised this role flexibly but responsibly, and politicians had not yet shown an interest in transforming the discipline.

But things have changed, and EU competition law enforcement is now facing a fragmentation threat. This post seeks to (A) demonstrate the existence of this threat; (B) identify the reasons why the existing safeguards may not be working; and (C) throw out there a proposal intended to spur some debate

A) Is there a risk of fragmentation of EU competition law?

Let me give you some very recent examples (for full disclosure: I have worked on some of them so I tend to view them critically, but I will leave aside the question of whether individual cases are right or wrong and, instead, will focus on the wider trend):

- Last week the German, French and Dutch Government asked for "leeway" to craft and apply different national competition rules going beyond EU law. In parallel, several other Member States (like Italy or Sweden) are considering the adoption of additional national rules inspired by the DMA.

- Also last week Germany already announced new investigations under its reformed Competition Act, which the European Commission itself has consistently invoked (e.g. here, p. 111) as a source of potential fragmentation so troubling that it would justify the adoption of the DMA.
- A couple of weeks ago the German Supreme Court confirmed the prohibition of Booking.com's narrow MFN clauses, a conduct accepted by competition authorities in other EU jurisdictions. In spite of the risk of divergent interpretations of EU law, this is a case where the European Commission had not intervened and where the German Supreme Court decided not to submit a preliminary reference to the CJEU.
- Earlier this month the Italian Competition Authority adopted its *Android Auto* decision which, as discussed by Pablo, has little to do with EU case law as we know it (the decision in fact admits – para 315– that it relies on a "gatekeeper" theory of harm that cannot be traced back to the case law but to recent reports…).
- A few months ago the European Commission recently opened a formal investigation into Amazon but carved out Italy from the legal effects of the initiation of proceedings, thereby enabling parallel proceedings to take place at the EU and national level in relation to the very same conduct.
- Last October the Polish Competition Authority imposed the highest fine ever imposed under competition law (6.7 billion on Gazprom~~, a figure slightly higher than that imposed by the Commission~~) without, as explained by EVP Vestager, ever informing the European Commission about its intentions.

B) Why aren´t the existing safeguards working?

Most people would agree that regulatory fragmentation is a serious problem. The DMA proposal, in fact, is based on the premise that this is a serious problem threatening the proper functioning of the internal market. The concern is not new; the uniformity in the application of EU competition law has always been a priority; ensuring effectiveness and uniformity were in fact the two drivers behind the adoption of Regulation 1/2003 and of the ECN+ Directive.

To be sure, differences and divergent outcomes are partly inevitable in a decentralized system, and there should be some margin for authorities to innovate and even perhaps explore the boundaries of the law. But if we truly believe in an internal market governed by common rules, there need to be limits or safeguards. And while we currently do have tools and safeguards to ensure the uniformity in the application of the rules, these do not appear to be working as intended. Until now, those tools were mainly:

- **The obligation to apply EU law in parallel with national law** whenever there is a likely effect on trade between Member States (an obligation that may arguably not have been strictly complied with in the German *Facebook* case or in the Polish *Gazprom* case). This is a problem that has also been discussed by Wouter Wils in this interesting paper. As Wouter explains, the Commission could theoretically take action against Member States breaching EU Law on this point but, for various reasons, that is extremely unlikely.
- **The obligation not to prohibit under national law conduct that would not be prohibited under EU Law** (an obligation diluted by the possibility for Member States to apply stricter national laws in relation to unilateral conduct under Article 3 of Regulation 1/2003; a crack in the system of increased interest to Member States, as illustrated by the joint German/French/Dutch position paper from last week);
- **The possibility for the European Commission to comment on draft national decisions** under Art. 11(4) of Reg. 1/2003. This, however, is something that the Commission often does cautiously, mostly orally, and always confidentially, even vis-à-vis the parties to each case. In addition, the Commission does not have sufficient resources to deal with almost 100 draft decisions every year. The Commission, moreover, has political and legal priorities of its own, and it is also an enforcer of the of the very same rules it is called upon to interpret (and so has a stake in the interpretation

of such rules). There might be a certain tension between the missions of advancing a certain interpretation of the law and promoting its uniform and consistent interpretation. There are recent examples of cases where the Commission intervened at the national level to advance an interpretation of the law that was later (too late?) corrected by the CJEU (e.g. compare para. 82 of *Budapest Bank* with the Commission's *amicus curiae* observations here). To be sure, this is no criticism; it is simply a natural result of a system in which the Commission is placed in a privileged, yet tough, spot (and, as we often hear nowadays, dual roles may result in conflicts of interests). At the end of the day, in my view, the Commission may not always be in a position to privilege the uniform application of the law over other perhaps equally legitimate interests.

- **The possibility for the European Commission to resort to Article 11.6 of Reg. 1/2003 to open proceedings and deprive NCAs of their competence**. As the Commission has explained (here, Chapter 3, Section 5), the Commission would do this when, for example, where "*network members envisage a decision which is obviously in conflict with consolidated case law*", or where "*there is a need to adopt a Commission decision to develop European competition policy in particular when a similar competition issue arises in several Member States*". The examples identified above, and the experience of the past 17 years, also confirm that the Commission is very unlikely to make use of this power.
- **The main tool conceived to ensure the uniform interpretation of EU law (the preliminary reference procedure) is not available to national competition authorities**, because these are not "Courts" (see here). This is of course correct as the law currently stands but, in a way, it is also an anomaly. There is arguably no other area of the law where a public authority can impose *cuasi criminal* sanctions pursuant to a direct application of EU law, but cannot request guidance from the EU Courts. In practice, this means that, in the best case scenario, decisive questions will only be raised before the EU Courts several years into an investigation and only once an administrative decision is final (like in the German *Facebook* case). This is far from ideal.

C) A proposal for (some) improvement

Unfortunately, growing political interest in competition enforcement means that Member States will continue to maintain enforce and enact national competition rules going beyond EU competition law as regards unilateral conduct. Again, this is the very risk that the Commission invokes to justify the adoption of the DMA but, as explained here, the content of the DMA Proposal does not prevent, but rather encourages, fragmentation. I suspect, however, that some stakeholders will prefer a legally vulnerable EU instrument if that means strong national powers.

Beyond harmonization, improvements could also come from a more effective use of the powers that Reg. 1/2003 vests on the Commission but, for the reasons explained above, the Commission may not be ideally placed to put the uniformity of the law above all other relevant interests.

My proposal would be to preserve the Commission's powers, but to give national competition authorities the power to consult also an independent and well-resourced judicial body interested only in the correct application of the law, namely the General Court.

Enabling NCAs to pose questions to the General Court would, in my view **(i)** lead to the creation of a new and welcome body of authoritative guidance not constrained by the limitations inherent in actions for annulment; **(ii)** avoid legal disputes dragging on for years without the possibility to get to Luxembourg; **(iii)** ensure that the case law can come in time and decide on present, not past issues (we are still discussing Intel's rebates); (**iv**) liberate Commission resources, which could be devoted to running more cases; (**v**) make a good use of the increased resources of the General Court; and **(vi)** free up CJEU resources at a time when its workload continues to increase.

There has been a debate for quite some time about whether to grant the General Court the power to render preliminary rulings in certain areas. As a matter of fact, the Treaties already open the door to this possibility. Article 256(3) TFEU provides that "*the General Court shall have jurisdiction to hear and*

determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute [of the Court of Justice]". The transfer of this competence has, however, never materialized, possibly due to the CJEU's arguably understandable reluctance to have a "first instance" Court deliver a final interpretation on the law of the land. There are, I think, ways of alleviating such concerns in addition to those already envisaged in Art. 256.

For example, one could conceive a system under which the General Court would issue Opinions (as opposed to "preliminary rulings") on those questions. These could even be delivered by a judge appointed as Advocate General (the possibility of appointing AGs among the judges is also already envisaged in the existing rules). These Opinions would only be delivered in the context of administrative proceedings. Since the administrative decision resulting from those could always be appealed before national Courts, the latter would still enjoy the possibility of requesting a preliminary ruling from the Court of Justice. This, in turn, would enable the Court of Justice to retain the last word and correct the General Court's approach if necessary. If not, the CJEU could simply validate the GC's Opinion, possibly via an expedited procedure resulting in an Order.

In my view, some kind of solution along these lines would be good for the law, for NCAs, for the General Court, for the CJEU and for all those interested in an effective, uniform and faster application of the law. This proposal could be a small step in the direction outlined by General Court President van der Woude at our last conference (see here, min. 25-28.42), but a great leap for substantive competition law.

Written by Alfonso Lamadrid

31 May 2021 at 11:07 am

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3 Responses

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I am completely agred with you on A8 and B), Even you are the expert, on the proposal of the GC Preliminary Rules the problem is that GC and CJ are not always in line . Another option would be a reform thar let NCA present Preliminary Rules to a reforced CJ

José Antonio Rodríguez Miguez

1 June 2021 at 10:37 am

Reply

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