The EU’s exclusive competence in competition law

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Introduction

• Article 3 TFEU reads:

  ‘The Union shall have exclusive competence in the following areas:
  [..]
  (b) the *establishing* of the competition rules *necessary for the functioning of the internal market*;
  [..]’
Introduction

Treaty provisions (e.g. Article 102 TFEU)

Factual scenarios
Introduction

Treaty provisions (e.g. Article 102 TFEU)

Regulation 1/2003

Factual scenario
Introduction

‘116. As far as concerns the principle of conferred powers, it must be stated that the rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003, are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU’

Case C-550/07 P, AKZO Nobel Chemicals Ltd v Commission
Introduction

Treaty provisions (e.g. Article 102 TFEU)

Regulation 1/2003

Enabling regulations

Block exemption regulations

Concrete factual scenarios
Introduction

• How do concerns emerge in practice?
  • Horizontal concerns: relationship with other areas of EU law
    • Substantive standpoint: boundaries of EU competition law
    • Institutional standpoint: circumvention of ordinary legislative procedure?
  • Vertical concerns: relationship with national competition law and national authorities
    • Substantive standpoint: relative boundaries of EU and national competition laws
    • Institutional standpoint: substantive decentralisation and institutional recentralisation?
Horizontal issues

• Competition law is a very versatile discipline
  • Across-the-board applicability of the provisions
  • Negative (e.g. *cease-and-desist*) and positive obligations (e.g. *obligation to supply*) can be imposed
  • Behavioural (e.g. *non-discrimination obligation*) and structural (e.g. *divestiture*) remedies
• The range of instruments through which policy can be expressed is also very broad
  • Individual decisions (e.g. *prohibition* and *commitment decisions*)
  • Soft law (e.g. *Guidelines* and *Sector Inquiry Reports*)
Horizontal issues

‘Having regard to the legal effects actually produced by the Banking Communication, and given that the European Union has exclusive competence in the State aid sector, in accordance with Article 3(1)(b) [TFEU], and the Commission has competence to give decisions relating to the State aid sector, pursuant to Article 108 TFEU, must the Banking Communication be regarded as binding on Member States seeking to remedy a serious disturbance in the economy by granting State aid to credit institutions where such aid is intended to be permanent and cannot easily be revoked?’

Case C-526/14, Kotnik and Others (pending)
Horizontal issues

• Concerns about the legitimacy of intervention have regularly been raised:
  • In the telecommunications sector, access obligations (local loop unbundling) predated sector-specific regulation (e.g. Telia/Telenor)
  • In the energy sector, it has been claimed that the Commission achieved through competition law what it did not achieve via legislation (e.g. E.On)
  • In the context of the Digital Single Market Strategy, copyright reform and competition law are relied upon to address concerns with geo-blocking
Horizontal issues

• The case law of the EU courts casts doubts on the validity of these legitimacy concerns:
  • Primary EU law cannot be overruled by secondary EU law; similarly, EU law takes precedence over national law (*Deutsche Telekom*)
  • Claims about the misuse by the Commission of its competition law powers are seen with scepticism
    • If competition law and a sectoral regime have a common objectives, convergence is inevitable
    • Claims about the misuse of powers are in reality claims that the Commission made an error of law in the interpretation of competition law provisions
Horizontal issues

‘93. Even on the assumption, and this question will be examined below, that the finding that one of the proposed commitments is insufficient or that the Commission’s requirement of a particular commitment should be considered excessive by reference to the resolution of the competition concerns identified by the Commission in the contested decision, such an error would constitute a breach of Article 2(3) of the Merger Regulation and not a misuse of powers’

Case T-87/05, EDP v Commission
Vertical issues

• Regulation 1/2003 introduced different devices to ensure the (consistent) enforcement of Articles 101 and 102 TFEU
  • Articles 101 and 102 TFEU are to be applied to practices that have an effect on trade between Member States
  • National competition law may not contradict Article 101 TFEU
  • NCAs are required to inform to the Commission when they open proceedings, or when they contemplate the adoption of a decision
  • When the Commission starts proceedings, NCAs are relieved of their competence to apply Articles 101 and 102 TFEU
Vertical issues

• Is it possible to distinguish between the substantive and the procedural/institutional aspects of an EU policy?
  • Policy is expressed in a variety of ways, not only through the substantive interpretation of the provisions
  • If the enforcement of the provisions is decentralised, the procedural and institutional aspects appear to require harmonisation

• The experience that has followed Regulation 1/2003 confirms this view
  • Decentralisation revealed gaps and divergences in several areas (fines, access to documents)
  • A second wave of intervention (via Articles 103 and 114 TFEU) has taken place