

Aims and Values in EU Competition Law



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COMMENTS ON BERGQVIST AND GORMSEN

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C. Bergqvist's Paper

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- Draft paper entitled “*Use and Abuse of Competition Law in Pursuit of the Single Market. Has Competition Law Served as Regulation Subject to a Quasi Industrial Policy Agenda?*”
- Research problem
- Proposed approach
- Place in existing literature

Critical Remarks

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- **Key assumption is disputable**
 - Industrial policy \neq Single Market
 - Industrial policy $>$ Single Market (Sauter, *Competition Law and Industrial Policy in the EU*, OUP)
- **Impact on conclusion?**

Definitional Issues

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“Picking winners, saving losers”

“Competitiveness” policy

- *“smart regulation”*
- *“access to finance for businesses”*
- *“single market” (“approximation of law” and “European IP rights”)*
- *“counterfeiting and piracy”*
- *“competition policy”*
- *“energy transport and communication infrastructure”*
- *“stronger role for european standard setting”*
- *“industrial innovation policy”*
- *“education and training policies”*
- *“international trade regulation”*
- *“ensuring access to raw materials and commodities”*
- *“stimulate resource efficient investment throughout industry”*
- Removal of *“structural overcapacities”*

Empirical Testing

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- Under existing law **HAS** Industrial Policy informed merger analysis?
 - “*Picking winners, saving losers*”
 - ✦ Clearance of anticompetitive mergers involving national/European champions?
 - No
 - Almunia, about Deutsche Börse/NYSE: “*The price of creating a European champion cannot be to let a de facto monopoly dictate its commercial conditions on thousands of European firms operating with European derivatives.*”
 - “*Competitiveness*” policy
 - ✦ Integration of the various components of competitiveness policy into merger analysis?
 - Only in respect of one item => “*Energy, transport and communication infrastructure*”
 - All other items irrelevant in merger analysis

Positivist Testing

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- Under existing law, **CAN** the Commission salvage an anticompetitive merger, or forbid a pro-competitive one, out of industrial policy reasons?
 - No basis in Treaty
 - No basis in EUMR
 - No basis in other instruments (“*efficiency defense*” in horizontal guidelines?)
 - ✦ But efficiency defense is competition based
 - ✦ Yet, analogy with Article 101(3) TFEU case-law?
 - Simply an industrial policy defense
 - Sole ground for industrial policy offense is Article 21(4) EUMR

Conclusion

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- No space, as a matter of law and practice, for industrial policy considerations

L. Gormsen's Paper

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- Draft paper entitled “*Can Consumer Welfare be said to be an objective of Article 102 when the methodology relies on an inference of effect on consumers?*”
- Research question => in light of recent cases, is “*consumer welfare*” still an objective of Article 102 TFEU?
- Observation => recent cases pay only lip service to Guidance Paper, no quote
- Submissions:
 - Those standards of the Guidance paper that are not based on judicial precedent are, and will be, implicitly discarded by Court
 - Deliberate judicial policy to ignore Guidance paper
 - Guidance paper is maybe useless

Critical Remarks

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- My take? => Too early to tell
 - Court rarely refers to Commission's soft law, except when invoked as annulment ground (legitimate expectation principle)
 - *Tomra*, §81, "As the Advocate General observes in point 37 of his Opinion, the Guidance, published in 2009, has no relevance to the legal assessment of a decision, such as the contested decision, which was adopted in 2006"
- GC also ignores Guidance paper because LS does not plead the Guidance Paper's standards
- Discrepancy between GC and CJ?

Critical Remarks

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- Other cases show a clear evolution of the substantive standards towards effects-based, and the CJEU's willingness to change of existing precedents
 - *Post Danmark* endorses “anticompetitive foreclosure”
 - ✦ §22 “Thus, not every exclusionary effect is necessarily detrimental to competition (see, by analogy, *TeliaSonera Sverige*, paragraph 43). Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation”
 - *Post Danmark* endorses Article 102(3) defense:
 - ✦ §42, “as the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition”

Critical Remarks



- **Relevance?**
 - A CJ ruling that overrides GC case-law
 - A Grand Chamber ruling (!), unlikely coincidental given state of doctrinal controversy
 - Under Article 267 TFEU, a procedure intended to make statements of law