PART I

Theory

1

Introduction

1 Institutions and Substance in EU Competition Law

The substantive and institutional aspects of a legal discipline are closely intertwined. One cannot be properly understood without the other. The substantive evolution of a discipline may prompt institutional change. Conversely, the structure through which the law is applied can influence the interpretation of substantive provisions. For instance, a field may evolve differently depending on whether enforcement is entrusted to a generalist court or to a specialist agency instead. The choice of cases – and thus the direction into which the law moves – may vary depending on the model followed. Private parties litigating in court have motivations and incentives that differ from those of an agency acting in the public interest. The approach to the interpretation of the relevant provisions may also be influenced by the institutional structure. Generalist courts may place an emphasis on legal certainty and the administrability of the system. In this sense, they may be inclined to look beyond the outcome of a specific dispute when shaping rules and standards. Expert agencies, on the other hand, may give more weight to the circumstances of each case.[1]

The impact that the institutional structure has had on the evolution of US antitrust is well understood.[2] In this sense, US antitrust provides a prime example of the influence of the enforcement model on the

[1] This is a question that has long attracted the interest of commentators. For some examples specifically related to competition law, see for instance, Joshua D. Wright and Angela M. Diveley, 'Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission' (2013) 1 *Journal of Antitrust Enforcement* 82; Douglas H. Ginsburg and Joshua D. Wright, (2013) 36 *Fordham International Law Journal* 788; and Javier Tapia and Santiago Montt, 'Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust' in Ioannis Lianos and D. Daniel Sokol (eds.), *The Global Limits of Competition Law* (Redwood City: Stanford University Press, 2012).

[2] This issue is covered in Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford: Oxford University Press, 2011).

substantive dimension of a legal discipline. Some of its most salient features are known to be the consequence of the dominance of private enforcement over public enforcement. US antitrust is primarily applied by generalist courts. The constraints faced by such courts inform, and sometimes determine, how substantive analysis is performed. The former are inseparable from the latter. In practice, the question of whether a practice should be declared unlawful – or whether it should be seen as an antitrust matter in the first place – is, at least in part, determined by considerations relating to the ability of generalist courts to impose or supervise the remedy that a finding of infringement would require.[3] More generally, the US antitrust system reflects a concern with the avoidance of enforcement errors by courts – and more precisely the so-called Type I errors, which result from over-enforcing of the law.[4]

This monograph considers how the substantive peculiarities of EU competition law[5] relate to, or have been exacerbated by, the institutional framework in which it operates. The interest of the question lies in the fact that the enforcement model in the EU differs in fundamental respects from the US one. Since its inception, the EU system has revolved, by and large, around expert administrative authorities. As a result, the factors that have marked the evolution of US antitrust are not prominent in the EU. In particular, the concern with Type I errors is far less pressing.[6] The same can be said of the issue of remedies. It is easy to think of cases in which the difficult implementation of a remedy did not deter the European Commission (hereinafter, the 'Commission') from intervening.[7]

[3] On the relationship between remedies and substance, see Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 *Antitrust Law Journal* 841; and Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge: Harvard University Press, 2005) 50–6. For a concrete practical example in which this factor came into play, see *Verizon Communications v Law Offices of Curtis V Trinko*, LLP, 540 U.S. 398 (2004).

[4] See in this sense Frank H. Easterbrook, 'The Limits of Antitrust' (1984) 63 *Texas Law Review* 1; and Alan Devlin and Michael Jacobs, 'Antitrust Error' (2010) 52 *William & Mary Law Review* 75.

[5] This monograph focuses on Articles 101 and 102 TFEU as well as EU Merger Control. EU State aid law is thus not a central part of the analysis.

[6] See in this sense Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007) 18.

[7] For instance, the remedies imposed by the Commission in the two *Microsoft* cases included a duty to supply interoperability information and a duty to carry competing applications in the operating system. See in this sense Commission Decision of 24 May 2004 (Case COMP/C-3/37.792 – *Microsoft*) OJ (2007) No. L 32/23 ('*Microsoft I*') and Commission Decision of 16 December 2009 (Case COMP/C-3/39.530 – *Microsoft (tying)*) ('*Microsoft II*').

What is less clear, on the other hand, is whether, and how, the institutional features of the EU system have influenced the evolution of the law.

The institutional structure of EU competition law enforcement has the potential to affect its substantive dimension in various ways. To begin with, it is intuitively appealing to assume that a system revolving around an expert authority is less prone to enforcement errors and inconsistencies. Moreover, unlike generalist courts (which have to rule on the cases that are brought before it), a public agency often has the discretion to devote its efforts to what it deems the most socially important and harmful infringements. On the other hand, the fact that an administrative authority combines the roles of an investigator and a decision-maker may pave the way for opportunistic behaviour. As a result, and somewhat paradoxically, it cannot be excluded that the system eventually becomes less predictable, and also more prone to enforcement errors, than one revolving around generalist courts. Administrative action tainted by opportunism may become less concerned with predictability and consistency and more with advancing the policy objectives of the authority. This attitude may be exacerbated if the review courts show deference to the knowledge of the expert decision-maker.

This question – the link between the substantive and institutional dimensions of the EU competition law system – has not been studied to the same extent as it has in the US. There are many aspects that remain elusive, or that have not been explored in a systematic way in Europe. As a result, some of the most common claims are rarely ever substantiated, if at all. For instance, it is simply accepted as self-evident that the behaviour of, and the interaction between, the Commission and the EU courts has an impact on the evolution of the discipline. In the same vein, greater curial deference to the activity of the authority is generally assumed to lead to the expansion of EU competition law. If the EU courts systematically accept the substantive analysis carried out by the Commission, the intuition suggests, the latter may seek to advance a relatively broad interpretation of the substantive provisions – and thus of the scope of its powers. The fact that the Commission is at the same time investigator and first-instance adjudicator is also seen as problematic insofar as it may be a source of prosecutorial bias.

It is a challenge for commentators to evaluate, beyond received ideas, concerns with the behaviour of the Commission and the EU courts. When raised explicitly, these concerns are generally not supported by theoretical or empirical evidence. As a result, little progress has been made in the understanding of the institutional dimension of EU

competition law and its impact on the evolution of the system. Unsubstantiated claims that the EU courts are overly deferential to the Commission, or that the combination of investigation and decision-making powers by the latter is a source of bias, can be – and have been – easily rebutted by commentators.[8] In the absence of an analytical framework against which the accuracy of such views can be assessed, it is indeed difficult to establish whether, and to what extent, the existing institutional structure can explain some of the substantive features of the discipline.

This monograph analyses the patterns underlying the behaviour of the Commission and the EU courts and evaluates the consequences of these patterns for EU competition law provisions. The methodological approach on which the project is based brings together two major strands of the literature. The dominant theme – whether, and how, the enforcement model contributes to shaping the various legal notions – makes it indispensable to do away with the marked tendency of commentators to draw a stark dividing line between substance and procedure and to integrate the two under a common framework. The substantive dimension of the institutional concerns discussed above – the alleged bias of the Commission and the perceived deference of the EU courts – has not been placed at the centre of discussions. Conversely, institutional factors are not systematically considered in the analysis of competition law provisions.

In the current state of the literature, debates about institutional matters often revolve around whether the structure of EU competition law enforcement is compatible with due process principles, in particular as enshrined in Article 6 ECHR. The default approach is to consider the case law of the European Court of Human Rights (hereinafter, the 'ECtHR') and ascertain whether the features of the EU system –the dual role of the Commission as 'prosecutor' and 'judge' and the intensity with which administrative action is reviewed – are in line with the requirements set out in the said provision. Any conclusions about the need to adjust or amend the system are drawn primarily from this exercise. For instance, the need for reform may be inferred from the fact that judicial review is deemed marginal in the EU system. The default approach to the analysis

[8] For an overview of these positions, see Henry Vane, 'The House Always Wins' *Global Competition Review* (London, 29 September 2014) and Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201.

of these institutional issues is unconvincing – or incomplete – for a number of reasons.

First, this approach presents due process considerations as relating to the institutional set-up of the EU competition law system alone. From this perspective, the only relevant question is whether the current enforcement model should be altered – for instance, by entrusting different bodies with the investigation and the decision-making functions – to make it compatible with fundamental rights principles. As a result, it is an approach that fails to consider the impact of due process (or its absence) on the substantive evolution of the law. This omission seems regrettable if one takes into account that inconsistent and unpredictable enforcement is a likely consequence of biased decision-making that is not subject to appropriate checks. Arguably, due process could be seen as a concern of an essentially substantive, rather than a procedural, nature, at least in the long run. After all, such considerations are closely linked to other fundamental principles, such as legal certainty.

In the same vein, the default approach to the analysis of due process considerations tends to be somewhat formalistic. Typically, it revolves around the compatibility of the system with fundamental rights provisions. This monograph departs from this approach in that it is instead based on the premise that the concerns underpinning the debate on due process are not and cannot be exhausted simply because the EU competition law system is deemed compatible with the ECHR (or any other benchmark). Arguing that the risk of bias disappears simply because the institutional framework is not considered to be in breach of a particular fundamental rights regime is unconvincing. Similarly, prosecutorial bias is unlikely to disappear simply because full review is exercised in the Commission cases that reach the EU courts. What the compatibility of the system with the ECHR (or a comparable regime) suggests, at most, is that the risk of bias and deference in the system is tolerable. Bias and deference – and, more importantly, the concerns underpinning the two phenomena – are independent of, and should not be confused with, the legal status of the institutional structure.

Finally, the default approach does not provide the necessary tools to address or to examine bias and deference concerns and thus to consider the compatibility of the institutional structure with fundamental rights. In this sense, it is not even capable of providing a satisfactory answer to the relatively narrow institutional issues on which it focuses. Under the case law of the ECtHR, the relevant question is whether administrative action is subject to 'full review' by an independent tribunal within the

meaning of Article 6 ECHR.[9] This question is not obvious to establish. It cannot be examined in the abstract, or from a purely formal standpoint. For instance, the fact that the review courts declare their commitment to the intense scrutiny of administrative action – or, conversely, that they formally agree to defer to the authority – is insufficient to conclude that decisions are subject to full review – or the opposite. According to the ECtHR, what matters is whether, in practice, full review has actually been exercised. This question is empirical in nature. It requires an analysis of the substance of relevant provisions, which is not undertaken under the default approach.

That the analysis of these institutional questions remains relatively underdeveloped is unsurprising if one considers that the thrust of research efforts in EU competition law is still devoted to the substantive aspects of the discipline. This project is intended to enrich ongoing debates on substance by introducing an institutional dimension, which has so far remained elusive. If at all, institutional considerations have informed the analysis of substantive issues in a fragmentary and anecdotal manner. As a result, there has been no systematic examination of, first, the context in which EU competition law provisions have been shaped and, second, of their evolution over time – including the question of whether the interpretation of a given concept has remained stable or has fluctuated when the Commission and the EU courts have interpreted it.

This monograph provides a comprehensive analysis of the institutional context in which some key substantive concepts in the case law and administrative practice have been defined. The analysis relies on data that sheds light on issues such as the frequency with which a particular substantive concept has been central to the outcome of cases, or the frequency with which it has been litigated before the EU courts. In the same vein, the analysis provides insights about the institutional drivers behind the definition and the shaping of substantive concepts. In some instances, the substantive concept has been framed by the Commission, which has then been followed by the EU courts. In other instances, the EU courts have departed from the substantive approach favoured by the Commission (whether in an administrative decision or in the context of a preliminary reference).

Second, the project develops a set of operational benchmarks that make it possible to evaluate the substantive evolution of EU competition

[9] See in particular *Menarini Diagnostics SRL v Italy* App no 43509/08 (ECtHR 27 September 2011).

law – that is, of the interaction between the Commission and the EU courts over time. The purpose of these benchmarks is to capture the various ways in which the relevant provisions can be construed, and to identify and compare the choices made by the Commission and the EU courts. This is a response to the challenge that scholars face when trying to make sense of administrative action and judicial review, and in particular of the way in which the Commission engages with the case law and, conversely, the way in which the EU courts deal with the decision-making practice of the authority. These questions are not immediately conducive to objective analysis. They are only straightforward when the Commission ostensibly departs from the relevant case law. To take a clear example, the authority never attempted to claim in *Microsoft I* that the firm's refusal to supply its information prevented the emergence of a 'new product', as required in *Magill*.[10] This aspect of the decision was not found to be manifestly incorrect, even though the GC reviewed the legality of the Commission decision against the 'new product' condition.[11] In less obvious cases, however, determining whether the behaviour of the Commission departs from the case law, or is based on a reasonable interpretation of it, may not be easy to establish. For the same reasons, evaluating the behaviour of the EU courts can be equally challenging.

2 Purpose, Scope and Approach

2.1 What This Monograph Is About

This monograph examines, first, how the Commission interprets and enforces EU competition law provisions. It seeks to identify patterns in its approach to the definition of the scope of its powers. The questions considered include, in particular, whether the Commission shapes provisions broadly or narrowly, and how it engages with the case law and with mainstream economic theory. Second, the monograph evaluates the review of administrative action by the EU courts. In this sense, it considers how the EU courts engage with the choices made by the

[10] Compare the conditions set out in Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission ('Magill')*, EU:C:1995:98 and Case T-201/04, *Microsoft Corp v Commission*, EU:T:2007:289. This is a matter that will be discussed at length in subsequent chapters.

[11] Case T-201/04, *Microsoft I*, para. 665. For an analysis, see also Bo Vesterdorf, 'Article 82 EC: Where do we stand after the Microsoft judgement?' (2008) 1 *Global Antitrust Review* 1.

Commission. More precisely, it seeks to establish whether the EU courts show deference to the interpretations advanced by the authority, and whether there are exogenous factors that influence the intensity with which administrative action is scrutinised. For instance, the EU courts may be reluctant to review a decision in full if they understand that it amounts to questioning the policy choices of the Commission. Conversely, they may be more inclined to do so if administrative action contradicts a long and stable line of case law. The analysis of these questions makes it possible to draw a picture about the evolution of EU competition law over the years. It also provides insights about the consistency and coherence of the system.

As argued by some commentators, an authority that combines the roles of prosecutor and adjudicator may display a bias in favour of establishing an infringement. Prosecutorial bias is a complex phenomenon that is not easy to establish empirically. If it exists, it may be manifested in various ways. Some of the manifestations are intractable, while others are more conducive to analysis. The phenomenon may be reflected, inter alia, in the way facts are established and assessed by the authority, or in the way it applies the law to the facts at hand. The premise of this monograph is that claims of prosecutorial bias are valuable as a proxy. Put differently, they are valuable insofar as they are a powerful reminder that due process has a substantive dimension. Over the long run, due process is important in a legal system not so much for the procedural guarantees it may provide in a specific case, but because administrative action may become arbitrary and unpredictable in the absence of such guarantees. Moreover, establishing bias as such looks like a most daunting challenge. On the other hand, it is possible to assess, as this monograph does, how the Commission crafts EU competition law provisions, and to map how its behaviour has influenced the evolution of the system.

Claims of undue curial deference are equally difficult to establish empirically. Typically, commentators assess deference in light of the rate of annulment of Commission decisions. From this perspective, a judgment upholding a decision would be an indicator of deference, whereas one annulling it would suggest the opposite. The reasons why this approach is unreliable are well known. If a Commission decision is in line with the relevant case law and it is carefully crafted from a factual and a legal standpoint, it is only natural that it is upheld by the EU courts. The reluctance of the EU courts to deviate from a stable line of case law cannot be taken as an indicator of deference. Conversely, the (partial or