HOW COLLATERAL EFFECTS OF COMPETITION LAW ENFORCEMENT OCCASIONALLY IMPEDE A FULL ATTAINMENT OF COMPETITION LAW GOALS.

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Abstract *The present article explores how unintended collateral effects of competition law enforcement by competition authorities sometimes impede competition law to fully reach its goals. This is illustrated with Spanish competition case-law showing that, notwithstanding competition authority´s proactivity and high fines, collateral enforcement effects occasionally lead to less competition rather than more competition on the affected markets.*

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1. INTRODUCTION.

Competition law, working at the confluence of law and economics and at the confluence of private and public power in the marketplace, is aimed at guaranteeing a level playing field for market operators, which benefits price, quality, and boosts innovation to the benefit of the consumer. It shapes global business conduct and indirectly determines which products are produced and consumed.

The enforcement of competition law by competition authorities world--wide is aimed at securing that competition law attains its goals.

However, the tools provided to competition authorities to attain these goals are sometimes not fully adequate in order to effectively attain them.

This article illustrates this stance in Spain, where the instruments to duly counter competition law infringements have occasionally come to trigger collateral effects impeding that the goals of competition law be fully attained, both on the side of the complainants and on the side of the infringers.

2. COMPETITION LAW GOALS: A JELLYFISH HARD TO NAIL DOWN.

Despite the key role of competition law in the economy, it is relatively rare that objectives of competition law are spelled out explicitly in constitutions, treaties or implementing legislation[1]. Competition laws are usually succinct and cryptic. Where spelled out, the goals of competition law are broadly defined, open for interpretation and sometimes even potentially conflicting.

According to the OECD, well-designed competition law, effective enforcement and competition-based economic reform promote consumer welfare and economic growth while making markets more flexible and innovative[2].

However, these broadly defined goals are open for a variety of interpretations and evolve over time. EU institutions, scholars and practitioners attribute a multitude of values and goals to EU competition law based on the Treaties, the case-law of the European Courts and the decision-making practice of the European Commission, reflecting *"a multitude of primarily interdependent and consistent goals which culminate in, but are not limited to, the protection of consumer welfare"* [3]. Inherent to the discipline is its evolutionary nature and the lack of sole permanent benchmarks for intervention.

1 Weber Waller, 2022.

2 OECD, 2024.

3 Ezrachi, 2018.

To further add to the wooliness of the goals of competition law, there are regional differences. E.g. since the 1970s, US competition law has been almost exclusively dominated by the concern for efficiency and consumer welfare[4], with limited efforts to incorporate broader, non-economic policy goals into the law, even though there is a passionate debate as to whether this should encompass total welfare or fairness, address inequality and development needs, promote and protect democracy or support climate change[5]. EU competition law, by contrast, has always had broad goals, including European integration and the creation of a single market alongside the protection of consumer welfare[6], as well as the protection of small and medium-sized enterprises, employment, regional development, and the preservation of a competitive market structure[7]. In terms employed by the European Commission, *"competition policy is about applying rules to make sure businesses and companies compete fairly with each other"* and *"this encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality"* [8]. It defines the goals, therefore, as low prices for all, better quality, more choice, innovation, and better competitors in global markets[9].

Due to the multitude of goals promoted by EU competition law, it has become a versatile enforcement tool that is particularly useful in dynamic markets: (i) consumer welfare is useful to solve welfare consequences on various customer groups, both from a price and non-price perspective, e.g. a drop in quality; (ii) protecting an effectively competitive market structure aims at avoiding distortions that can potentially block innovation or access and consumer choice; (iii) promoting efficiencies is key to foster innovation; (iv) fairness is useful to address discrimination; (v) economic freedom, plurality and democracy is valuable to tackle market manipulations that can potentially impact on consumers´ freedom and plurality; (vi) market integration aims at avoiding artificial barriers between EU Member States, e.g. by ensuring equal access to domestic markets or guaranteeing substitutability between

4 Weber Waller, 2022.

5 Fox, 1997.

6 C-56/64 and C-58/64, *Consten and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, ECLI:EU:C:1966:41.

7 Bradford; Chilton; Linos & Weaver, 2019.

8 European Commission, 2024.

9 *Idem*.

regional technologies[10]. Interestingly, an empirical investigation on the goals of EU competition law came to the conclusion that different Commissioners seem to emphasize different goals during their terms (*"with Kroes promoting welfare and Vestager promoting fairness"*), that the Commission places emphasis on different goals than the Court and Advocate Generals and that Commissioner speeches reflect yet different emphasis too. *"The Commission assigns more value to welfare and to the protection of competitors and commercial freedom, but less value to efficiency than the Court and the Advocate Generals. Speeches emphasise welfare and fairness more than EU institutions in their decisions."* [11] The same investigation concludes that the research shows that no goal has ever been predominant and no goal has ever subsumed other goals[12].

The multitude of goals does, however, not trigger unpredictability or far-stretched discretion. Rather, it leads competition authorities to carefully balance these goals, with various tools such as sector studies, market enquiries, information requests, dawn raids and leniency. Market operators may challenge the chosen competition policy tools before these authorities and, further down the line, in appeal proceedings.

3. THE COMPETITION GOALS OF THE SPANISH MARKETS AND COMPETITION AUTHORITY.

The Spanish Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia* or CNMC) is, as per its own task description, *"the body that promotes and ensures the proper operation of all markets in the interest of consumers and corporations"* [13].

Since the merger of regulatory and competition authorities in 2013, the CNMC intervenes both in the regulatory and competition arena. As regards competition, its objective is to *"preserve and guarantee the existence of effective competition in the markets throughout Spain, since this is fundamental for proper functioning of a free market economy and for the well-being of consumers"* [14].

10 Ezrachi, 2018.

11 Stylianou & Iacovides, 2022.

12 *Idem*.

13 Comisión Nacional de los Mercados y la Competencia, 2024a.

14 Comisión Nacional de los Mercados y la Competencia, 2024b.

The CNMC is known as being an efficient, proactive competition authority in the international arena.

4. COLLATERAL EFFECTS OF COMPETITION LAW ENFORCEMENT IMPEDING THE FULL ATTAINMENT OF THE GOALS OF COMPETITION LAW ON THE SIDE OF THE COMPLAINANTS.

Occasionally, competition law enforcement triggers collateral effects that impede a full achievement of the goals of competition law from a perspective of complainants.

This is illustrated with an example in Spain. In 2011, the CNMC was informed in detail on a fully confidential basis of the existence of the Spanish Milk Cartel[15], *inter alia,* by small farmers grouped in unions and cooperatives. Very few milk farmers so far had dared to complain about the generalised practice of the major dairy companies to share the milk-supplying farmers among themselves, to buy their raw milk at artificially high, fixed prices and to keep farmers captive. Milk farmers can easily be made captive because they need to sell their milk to retain their quotas, because production cannot be stopped and because surplus milk cannot simply be thrown away due to its polluting nature and farmers need to bear the costs of having surplus milk destroyed[16].

The milk farmers´ bravery allowed the CNMC to pull the thread and sanction Spain´s major dairy companies with a fine totalling €81 million for a cartel that lasted from 2000 until 2013. Yet, even though they unravelled one of the major Spanish cartels, most farmers involved in the complaint went out of business. Indeed, somehow the dairy industry eventually became aware of the farmers´ involvement. As a result, no single dairy company agreed to purchase their milk following the CNMC´s decision, despite the fact that Spain is a milk-deficient country. And there was nothing illegal in doing so: contractual freedom implied that dairy companies could legitimately choose not to trade with some milk farmers. This retaliatory boycott made those farmers sell their cows and go out of business. Yet some farmers had repeatedly requested the CNMC to allow for interim measures that would oblige

15 Comisión Nacional de los Mercados y la Competencia, Decision S/0425/12 – *Indústrias Lácteas 2*.

16 In accordance with the Ascola Declaration of Ethics, the author discloses that she formerly acted for the complainant in this case but has not been involved in the case since 2015. The views in this post are strictly her own and have not been requested nor paid for by any party. The present statements are of general relevance to competition law and not case-specific.

a randomly designated dairy company to purchase their milk and avoid that they be penalized for having decried a major economic crime. The competition authority did not act upon those requests which would have saved the farmers from going out of business. The very large fine imposed on the Spanish dairy industry was not able to avoid this from happening. Harming complainants of a cartel is certainly not one of the goals of competition law.

Paradoxically, even though these few farmers became the victims of their bravery, it opened the way for many milk farmers to file massive damages claims following-on from the Spanish Milk Cartel´s decision[17].

The milk farmers´ fate proves that the competition enforcement tools, which have carefully set out comprehensive and meticulous rules regarding whistle-blowing by cartel-members and their corollary protection against the negative consequences of leniency, are perhaps not sufficiently carefully crafted when it comes to protecting complainants against the negative effects of their complaints, e.g. for cartels on upstream purchasing markets. The legislator did not sufficiently consider all potential effects of competition law enforcement for a particular type of complaints.

5. COLLATERAL EFFECTS OF COMPETITION LAW ENFORCEMENT IMPEDING THE FULL ATTAINMENT OF THE GOALS OF COMPETITION LAW FROM AN INFRINGER´S PERSPECTIVE.

From a perspective of the infringers in competition law proceedings, some competition law enforcement rules have also led to paradoxical consequences.

This can be illustrated, again, with an example in Spain. The fact that fines are reduced for large companies in order to take account of the fact that they are "multiproduct" companies, without properly defining the concept of "multiproduct" and without accordingly linking it to the Commission´s Market Definition Notice[18], has frequently reduced fines for large multinational corporations in major cartels, whereas small and medium-sized companies condemned in the same cartel have had to bear proportionally much larger fines. And this has led, paradoxically, to the result that, pursuant to the fine, some small and medium-sized firms have had to close part of their business, have had to file for bankruptcy or have been acquired by their large competitors, even, in some cases, fellow cartel members. This has ironically led to less

17 Bagley, 2022, De Félix Parrondo; Pérez Carrillo; Garralda & Nuñez, 2023.

18 European Commission, 2024.

competition rather than more competition in the affected markets following the CNMC´s decision.

In competition law infringements, the general rule is that fines are imposed on the basis of an individual penalty rate applied to the infringing company´s total turnover in the fiscal year preceding the CNMC´s decision. A deviation from this general rule for "multiproduct" reasons stems from the Spanish Supreme Court´s case-law[19] and implies that infringing companies active in multiproduct operations are allowed to obtain a reduction of their fines.

In the absence of a detailed market analysis to determine what is to be understood by "multiproduct" operations, this rule usually ends-up playing into the hands of multinational corporations. The CNMC´s decisions lack transparency on the employed parameters when dealing with the Supreme Court´s "multiproduct" reductions. From the CNMC´s 2018 fine recalculation communication[20] and relevant decisions[21], one can only infer that the "multiproduct" reductions are based on assumptions of economic parameters, including an estimate of the potential illicit benefit from the cartel. It is noteworthy that this estimate of the potential illicit benefit is essentially based on information provided by the infringing companies themselves in the course of the proceedings. Yet according to settled EU case-law (e.g. Case 107/82 *Allgemeine ElektricitätsGesellschaft AEG-Telefunken*), competition authorities cannot validly rely in support of their arguments on information contained in documents on which all parties have not had the opportunity to express their opinions. A detailed analysis of the calculation and the assumptions is not set out in a transparent fashion neither in the administrative files nor in the final decisions, albeit with due redaction of confidential data. Yet a duly motivated analysis should be provided to allow for checks and balances on such large fine reductions, with a clear explanation as to how they do not hamper the deterrent effect of the fines. A general duty to state reasons stems from the Charter of Fundamental Rights of the EU[22].

The application of the "multiproduct" reductions has led multinational corporations in some cases paying only 1% of the fine that they should have

19 Cases n.os 2872/2013, 1476/2014 and 1580/2013.

20 Comisión Nacional de los Mercados y la Competencia, 2018. The Communication states that the "multiproduct" test is based on a ratio of [turnover on the affected market during the cartel period]/[total turnover in the fiscal year preceding the fine] for each company. See also Suárez Valdés, 2022.

21 E.g. Comisión Nacional de los Mercados y la Competencia, Decision S/484/13 – *Redes Abanderadas*.

22 The European Parliament, The Council, The Commission, 2012.

been paying had the rule not been applied. Moreover, no exception is foreseen to avoid applying such reductions to the cartel instigators.

The enforcement of competition law leading to more concentrated markets pursuant to the CNMC´s decision due to the disappearance or acquisition of the small and medium-sized players is certainly not one of the goals of competition law.

6. CONCLUSION.

Competition laws exist for more than 100 years. The Canadian Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade was adopted in 1889 and the Sherman Act was adopted in 1890 in the US. It has been a cornerstone of EU law since the Treaty of Rome of 1957.

The goals of competition, even though coherent and consistent, are evolving and flexible to constantly adapt to societal changes. However, such goals can only be attained with enforcement tools that enable competition authorities to reach these goals. As has been demonstrated in this article, collateral effects deriving from inadequate competition law enforcement tools both from a complainant´s and an infringer´s perspective may impede the full attainment of the goals of competition law. The illustrations with Spanish competition case-law show that, notwithstanding competition authority´s proactivity and high fines, collateral enforcement effects occasionally lead to less competition rather than more competition on the affected markets. This can surely not be the goal of competition law.

In this context, legislators worldwide should constantly reflect on and monitor their competition authorities´ enforcement tools to ensure that those are watertight and evolve in line with the aspired goals. Such enhanced monitoring could avoid or reduce any undesired collateral effects of competition law enforcement.

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