Where European antitrust policy is headed

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Competition policy in the European Union, with regard to energy and banking, as compared to the other major model: that of the United States.

With the signing of the Treaty of Rome in 1957, European nations established the foundations upon which to search for common competition policies. Though the move came much later than the United States' Sherman Antitrust Act of 1890, Europe was in accordance with the U.S. on one essential aspect: antitrust legislation should seek economic efficiency and consumer welfare.

The link between antitrust protection and consumer welfare is of particular relevance, perhaps even more so in Europe, where competition has often been met with suspicion and where the lack of competition in certain industries may, in fact, be the reason for their reduced level of innovation.

To address this problem, the Lisbon Strategy was launched in 2000 and reaffirmed in 2005. Clearly, if competition is the key to desired innovation, then competition policy must have a prominent position in the European Union.

European efforts over the past 50 years have translated into a number of substantial advances:

- merger regulations have been introduced (1989) and revised (2004);
- case law has given rise to Articles 81 and 82 as fundamental tools for controlling and preventing anticompetitive practices;
- state aid control has been consolidated and has taken a more economic approach;

- the authority of the European Commission (E.C.), and the judicial review of the Court of First Instance and the European Court of Justice, has been firmly established.

We must now ask ourselves: what has been successful, what has failed, what still needs to be done?

Competition Policy in the E.U. Fifty Years On From the Treaty of Rome, edited by IESE Prof. Xavier Vives, delves into numerous aspects of European competition policy - analyzing the current situation, identifying deficiencies, proposing solutions and shedding light on some potential future trends.

The design of institutions that steer competition policy is fundamental for the control of mergers and state aid. Philip Lowe reviews the experience of the E.C. in this field, placing a special emphasis on organizational and process issues. The author sifts through the modernizing efforts of the Directorate General for Competition, such as new checks and balances on decisions and the recently created office of the Chief Competition Economist. Still, these reforms raise another question: What is the best solution for investigation, rulings (handled by the Commission) and judicial review (with possible appeal to the European courts).

Vertical and horizontal agreements are coordinated practices whose purpose or ultimate effect is to restrict competition, and as such, they are illegal. Jorge Padilla and Matthew Bennett analyze the structure, objectives and implementation of Article 81 of the E.U. Treaty, which provides the framework for evaluating those agreements. The authors make note of certain vertical restrictions that, while undermining competition, can maximize efficiency. There are two methodologies for evaluating agreements between competitors: a quasi per se rule or one of structured reason. Padilla and Bennett advocate the latter of these.

Abuse of a dominant position is one of the matters covered in Article 82 of the E.U. Treaty. John Vickers makes note of how European competition policy is increasingly more economically oriented and poses the question of whether the same will occur in this case. For instance, he discusses safe harbor thresholds, arguing that it would be preferable to have a market participation of over 50 percent, a figure exceeding that contained in E.C. statements. The author also reviews several examples of controversial rulings, involving predatory pricing (Wanadoo), rebates (British Airways) and the refusal to supply information to competitors (Microsoft). For the application of Article 82, Vickers suggests using guidelines similar to those used for non-horizontal mergers: oriented toward consumers, as opposed to competitors.

Collusion is an agreement between several companies to coordinate their prices so as to keep them above a certain benchmark. Massimo Motta examines the factors that facilitate this practice (such as the exchange of information) and the E.U.'s experience in fighting against cartels, which are covered by Article 81. The problem is how to infer collusion from market data in cases where parallel behavior by businesses could be simply the result of a competitive market. Based on the references taken from both the Treaty and specific rulings, the standard of proof for a cartel infringement depends on extensive documentary evidence, in which the analysis of market data is merely a complement. Leniency policies have also helped detect cases of collusion, but the author maintains that, given their deficiencies, stiffer fines could be taken into consideration.

Merger control in the E.U. is in sharp contrast to that of the American system, one based on judicial processes. In Europe, judicial review - handled by the Court of First Instance, with subsequent appeal to the European Court of Justice - comes after the ruling of DG Competition. Bruce Lyons reviews the European system from its beginnings to its reforms, such as the substantive test based on market participation being replaced by that of "significant impediment of effective competition," which is more akin to the American system. Nevertheless, the analytical models used to determine the possible damages caused by non-horizontal and horizontal concentrations are complex and do not always turn out to be definitive, particularly in the second case, which entails potential gains in efficiency. The author suggests some improvements for merger control, such as not ruling out behavioral remedies and keeping an eye on potential collusion between buyers and sellers of divested assets.

State aid control in the E.U. is aimed at alleviating failures in both markets and government. In the first case, it can correct failures associated with externalities and public goods (e.g., R&D), as well as information asymmetries in capital markets, and can occasionally create competition. But these potential positive effects must be considered along with the possibly greater consequences of government failures. David Spector highlights the limitations of economic analysis and the lack of clear remedies in this area. The current review of state aid control focuses its attention on a broader economic approach. Here, the author poses a compelling question: Could that focus be the Trojan horse of the paternalism generally attributed to the decisions of the E.C.?

Network industries, such as electricity, gas, telecommunications or transportation, involve a significant degree of natural monopoly due to the fixed investment in infrastructures. Martin Hellwig studies the relationship between the specific regulation of each sector and competition policy. He argues that these policies cannot regulate the prices or quality of access to services, while specific regulations - whose approaches range from naïve (e.g., the energy sector) to sophisticated (e.g., telecommunications) - present a different set of problems. These include the challenge of defining crucial terms (i.e., the limits of a given market), the institutional design of regulators and judicial review.

The regulations for the telecommunications sector have been built around two legal frameworks, one coming in 1998 and the other in 2003. Jordi Gual and Sandra Jódar Rosell review the objectives and respective successes of each of these. The former was supposed to increase competition and integrate the E.U. market. Consequently, efficiency was maximized; however, there was limited success in terms of broadband penetration and competition in conventional telephony. In 2003, as the convergence of digital network technology increased, the E.C. launched a new framework. That reform has allowed for a readjustment of rates and has minimized the risks of standards being set by dominant businesses. At the same time, though, it creates uncertainties about the incentives for investing in the deployment of next-generation networks.

The regulation of energy companies, studied by Richard Green, got past the initial post-liberalization obstacles thanks to two instruments: guidelines to inject competition, and the application of competition policies, as the sector was no longer beyond the scope of antitrust laws. The E.C. has intervened in deals between companies and in mergers, including those of the cross-border variety (e.g., Endesa and Enel). He has also researched cases of alleged abuse of a dominant position and has promoted a legislative package based on such issues as the consolidation of national regulators and the creation of an E.C. agency of energy regulators. Moreover, a clause regarding non-E.C. countries has been added so that foreign firms cannot control transmission unless there is reciprocity.

The banking sector, one of the most highly regulated, has long since been exempt from competition policy due to a supposed potential imbalance between competition and stability. Elena Carletti and Xavier Vives examine that theoretical imbalance and conclude that, after a certain threshold, an increase in the level of competition will tend to increase both the incentives for taking risks, and the probability of bankruptcies. The question mark is about establishing the maximum degree of market power allowable in banking and whether the application of competition policy should be modulated in line with the concerns about stability. The E.C. has made landmark decisions on numerous issues, such as those opposing anticompetitive mergers. All things considered, the authors feel that competition policy should revolve around the sources of the market power and carry out economic analysis that accounts for the sector's inherent complexities. They also call attention to potential conflicts between market integration and competition.

The competition policies of the U.S. and the E.U., broadly speaking, are converging. Bill Kovacic explains that Europe's more restrictive policy, based on civil law, is the one setting the standard. Nevertheless, many of the innovations in antitrust policy come from the United States. The systems used on both sides of the Atlantic have the same general objective: consumer welfare. They essentially coincide with a number of facets, such as the treatment of cartels and horizontal mergers, the principles following state intervention, and the idea that consultations between the two jurisdictions work for the good of the consumer. One example of the existing divergence is the American adversarial procedure versus the European administrative procedure.

The next 50 years

In general, European competition policy over the past half century can be considered a success, given its resilience and capacity for self-reform. One of the challenges lying ahead for the E.C. is how to attract human capital. In the near future, we will also see the effects of private litigation in the E.U., as well as more decentralized policy enforcement in the national courts.

Within another 50 years, says Xavier Vives, the role of the E.C. could evolve considerably, but the importance of competition policy is not likely to wane. One plausible change could be the development of both the institutional framework for implementing competition policy and judicial review. In such a situation, it would be appropriate to discuss the creation of an independent agency, along the lines of the U.S. Federal Trade Commission.

Meanwhile, the author feels that the challenge facing the economy is to provide tools that translate know-how into guidelines and practical advice.

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