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"Consumer choice" is where we are all going - so let's go together

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@Foreword

@ See also in the electronic supplement:
La notion de choix du consommateur : Point de rencontre des politiques de concurrence Neil Averitt, Robert Lande, Paul Nihoul

"Consumer choice" is where we are all going - so let's go together

@Abstract

Globalisation of business makes it important for firms to predict how their behaviour is likely to be treated in the roughly 200 nations that have competition laws. In that context, a crucial question is: are we in a position to develop a common intellectual framework that would give coherence to policy statements made on specific competition related issues and, at the same time, be acceptable, broadly, in a variety of legal systems, not necessarily based on identical assumptions? We believe that the answer is "yes". A concept is emerging as a possible source of unification for competition policies around the globe: the concept of "consumer choice".

Avec l'internationalisation des échanges, il devient essentiel pour les entreprises de prédire comment leur comportement est susceptible d'être appréhendé dans les 200 nations qui, à ce jour, ont adopté des règles de la concurrence. Dans ce contexte, un défi majeur est de construire un cadre intellectuel commun qui permettrait de justifier en profondeur les positions que nous adoptons à l'égard de problèmes particuliers en droit de la concurrence, tout en demeurant acceptable, en substance, dans un ensemble de systèmes juridiques, qui ne sont pas nécessairement fondés sur des valeurs identiques. Nous pensons que le défi peut être relevé. Un concept est en train d'émerger comme une source possible d'unification pour les politiques de la concurrence menées dans le monde entier : le concept de "choix du consommateur".

Recent years have witnessed the usual type of competition-related activity on both sides of the Atlantic. In Europe, new regulations and guidelines have been published on horizontal and vertical relationships. In the United States, a new standard on resale price maintenance has been issued by the Supreme Court and new horizontal merger guidelines were released by the Department of Justice and the Federal Trade Commission.

But all these specific developments have left unanswered the fundamental policy question that should be on the lips of competition lawyers around the globe: Ultimately, what are we after? What are our fundamental goals when we apply antitrust and competition rules?

Some will say this question already has been answered by our colleagues with a Chicago School orientation: we should only be concerned about economic efficiency, so what we should do is to figure out the most efficient legal rules.

Others contend, however, competition regimes around the world want to take account of a wider variety of values. The laws of some jurisdictions care about a number of different values, even including non-economic concerns.

Regardless, surely we all agree that to the extent possible it would be better for international firms to be able to better understand the competition laws that roughly 200 nations have today, in the hope that this understanding will help them better to predict how they will be treated around the globe. This is especially important because even the very vocabulary used to characterize these laws is diverse. Whether in English or in French, people speak different languages when it comes to antitrust and competition. Different words can be used to mean the same thing, and sometimes the same term can mean something different in different nations.

And so the crucial question for the next generation of competition law is: can we develop a common intellectual framework that will both give coherence to the specific policy statements that are made, and also be broadly acceptable in a variety of legal systems?

We believe that the answer is "yes". We are optimistic because a concept is emerging as a possible unifying concept for competition policy around the globe: the concept of "consumer choice." This is basically a way of systematically taking account of short term variety and non-price competition, and also long term innovation, as well as the traditional choices made on the basis of price and efficiency.

The Emerging Concept in Europe

In Europe the concept of choice has mainly come to the foreground in Article 102 TFUE cases, which concern abuses by firms in dominant position. Traditionally, these cases are the ones where policy questions are asked and doctrine is developed.

In Article 102 cases the European Commission has adopted a series of decisions, and the European courts have issued a number of rulings, which all go in the direction of protecting consumer choices in general, rather than only focusing on price competition.

In *Microsoft*, for instance, the Commission took great pains to explain, very clearly and explicitly, that consumer choice is the foundation of competition policy – and indeed of proper market functioning.[1] The Commission's main point was that by withholding substantial information and by tying its media software to its platform, *Microsoft* created a situation where customers were prevented from making real choices based on their non-price preferences: choices that would have allowed them to opt for the products corresponding best to their needs if the markets had been competitive.

The reasoning underlying this holding is that the effects on variety, non-price competition, and innovation can be most accurately assessed if they are assessed directly. In theory one could translate these factors into some measure

1 Commission Decision, of 24.03.2004, relating to a proceeding under article [102] of the EC treaty (case COMP/c-3/37.792 Microsoft), available in full on the web site of DG COMP.

of "quality adjusted price." That translation is, however, extraordinarily difficult to perform when it comes to innovation or qualities of fashion or personal preference, and it is not often even attempted very often. Considering "choice" explicitly will make it possible to consider these non-price issues more effectively.

This sort of reasoning was backed by the European courts in *Microsoft*[2] and in many other cases. In *Wanadoo*[3], for instance, the incumbent telecom operator argued that it had no incentive to sell at a loss because it would not be in a position to increase prices after the elimination of competition because barriers to entry were low, and thus high prices would immediately and inevitably attract potential competitors onto the market. So, the firm asserted, there was no likelihood it would actually engage in predatory behaviour. That argument appeared particularly powerful in terms of traditional competition law, which is price-centered and focused on maximizing productive efficiency.

Not at all, said the Court in its judgment: the goal of competition law is not only to ensure that prices remain low; it is also to guarantee that consumers are granted an opportunity to choose among a sufficient array of possibilities. On the facts of the case, the Court continued, the behaviour adopted by *France Telecom* may have caused prices to go down. But it also endangered the survival of a sufficient number of alternatives among which consumers would be able to choose the services which best suited their preferences.

Similar trend in the United States

The concept of consumer choice has been similarly developing in the United States, as new ideas grow up through the cracks in the old Chicago School doctrines.

One example may be found in the new Horizontal Merger Guidelines, issued in August, 2010. That contains a new idea, in section 6.4, to directly assess "innovation and product quality." The Guidelines note that adverse effects in these respects can constitute an antitrust violation in themselves: "If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product."

Consumer choice has also been taken into account by a large number of courts in the United States, and often has resulted in the condemnation of practices that had no direct effects on price. In the 2011 *Realcomp II* decision, for example, the Sixth Circuit Court of Appeals considered the conduct of a real-estate listing service that tended to exclude low-price, low-service discount brokerages from the market.[4] The court assumed that *Realcomp* did not set commission rates or prices and, in any event, firms offering more or less elaborate brokerage services might all have the same quality adjusted price.

But the court nonetheless found a violation of the antitrust laws: "*Realcomp* does not regulate rates of commission, offers of compensation, or other price terms; thus, we examine the effect of *Realcomp*'s restrictions on consumer choice, specifically, the reduction in competitive brokerage options available to home sellers."

These developments do not mean that enforcers or courts in Europe or the United States ignore consideration of price and efficiency, of course. In most cases those will be the most relevant dimensions of competition, and the most relevant subjects of consumer choice. In both Europe and the United States, however, they no longer appear to be the *sole* subjects.

Choice as a point for global convergence

In light of these developments we believe that consumer choice is now a viable center point for the global convergence of competition law. It is broadly consistent with a variety of national values, representing neither an extreme efficiency focus nor an extreme emphasis on social or political values. And it is also consistent with the specifics of a wide variety of particular statutes. It does not replace those statutes, but acts as an implementing concept to help explain, interpret and apply each of them in its own context.

Programme ahead

There is no doubt that more work needs to be done on and around the idea of "choice" in competition and antitrust before the concept can be used on a regular basis. For instance, behavioural economics has pointed out that

2 General Court, judgement of 17 September 2004, T-201/04, *Microsoft* v Commission, Report p. II- 3601. No appeal was lodged against the judgment.

3 *Wanadoo*, Commission Decision (EEC) relating to a procedure under Article 82 EC (Case COMP/38.233 – *Wanadoo* Interactive); *France Telecom SA v Commission of the European Communities* Case C-202/07 P [2009] ECR I-2369; *France Telecom SA v Commission of the European Communities* Case T-340/03 [2007] ECR II-107.

4 *Realcomp* II, Ltd. V. FTC, 2011 WL 1261180 (April 6, 2011).

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"choice" is not a value that should simply be maximized. For example, at times consumers may be paralyzed by having too many choices. So the optimal level of choice must be that which competition and the free market would have offered, not the maximum possible number.

There is also a question of the possible limits on "choice" as the best means of protecting consumer interests. Often we compel firms to provide information or stop providing deceptive information and then let consumers choose from among the products on the market. The question, however, is when we should protect consumers by using consumer protection law and when we should do this by the use of competition law! Or when we should use both?

And there is the issue of "public choice theory", which looks into the enforcers'own decision-making process and the reasons why official agents behave as they sometimes do. The question is whether competition choice theory might leave these agents with too much discretion.

However, these issues should not prevent us from investigating the possibility that "choice" may prove an ideal meeting point between traditions within, and between, the United States and the European Union. In fact, that possibility is so real that, now, already, around the globe, several academics are proposing to make it the focus of their analysis and meetings in the months ahead. ■

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