»WUW1457075

"Polycrisis" and the changing "Life" of Competition Authorities

Prof. Ioannis Lianos, PhD, LL.M., holds the chair of Global Competition Law and Public Policy at UCL Faculty of Laws and is a member of the UK Competition Appeal Tribunal. He was President of the Hellenic Competition Commission between 2019-2023 and elected member of the Bureau of the OECD Competition Committee between 2021-2023. The views expressed are strictly personal.
Contact: autor@wuw-online.de

Polycrisis

Over the last few years, various socio-economic and political developments (the emergence of digital behemoths, the Covid-19 pandemic, recent geopolitical tensions, and the recent tidal wave of inflation) challenged the traditional perception of the role of competition authorities. The current calls for competition law to integrate sustainable development concerns also introduce an additional level of institutional complexity, within the context of an inclusive (that is, inclusive of constitutionally protected socio-economic values) competition law [I. Lianos, Polycentric Competition Law, (2018) 71(1) Current Legal Problems 161]. This situation of 'polycrisis' does not only result from the sudden simultaneous eruption of these various policy agendas but also stems from their interconnection and interdependence [The term polycrisis was coined by complexity science theorists Edgar Morin and Brigite Kern: see A. Tooze, Welcome to the World of Polycrisis, FT (Oct. 28, 2022)].

The way competition law systems around the world have dealt with the cost-of-living (inflation) crisis and, more generally, the distributional implications of the (perceived) lack of competition in certain oligopolistic sectors of the economy highlights this transformation. Initially dismissed as irrelevant, the role of higher corporate profits as drivers for inflation (greedflation) has been recently recognized, including by some official institutional voices. Recent research has shown that since the outbreak of the Covid-19 pandemic, in the euro area as a whole, unit profits have grown faster than unit labour costs. Of course, unit profits do not only account for the profits of large corporations, and a more systematic study of this phenomenon in each economic sector is necessary. However, even if the fight against inflation remains primarily the responsibility of monetary policy by central banks, or of economic policy by governments (e.g., taxation, profit margin regulations and/or price controls), this debate has engulfed competition authorities, as a link was made between greedflation and research on the rise of economic concentration and markups [BEUC, 'Why Competition authorities must act now against greedflation' (July 17, 2023); J. de Loecker, J. Eeckhout & G. Unger, The Rise of Market Power and the Macroeconomic Implications, (2020) 135(2) The Quarterly Journal of Economics 561]. Competition authorities are increasingly expected to contribute, within their competence, to the collective effort to contain the "unfair" distributional effects of inflation (transfer of wealth to sellers/suppliers from final consumers or input producers) linked to distortions of competition.

Legal experimentation

Competition authorities may employ the traditional tool of *ex officio* investigations in concentrated sectors of the economy and in product markets of significance for vulnerable consumers. However, cartel investigations often take years to be completed. The choice of settlement decisions may accelerate enforcement and offer substantial procedural economies, but this is at the price of effective deterrence and stagnation in the development of the law. Cartel enforcement is also subject to limitations (tougher conditions for conducting dawn raids, high evidence standards, less effective leniency programmes) and abuse of collective dominance cases are rare. Market transparency has also increased with the development of the data economy and the systematic use of algorithms to sustain tacit collusion even in non-tight oligopolies.

One option would be to complement the current business tort-based model of competition law with the power to adopt prophylactic remedies in economic sectors in which adverse effects on competition are identified through sector inquiries (or market investigations). The role of competition authorities may also expand to control more effectively unilateral conduct such as below the notification thresholds M&A activity, invitations to collude, price signalling, exploitative abuses and unfair commercial practices affecting competition. In the context of "responsive antitrust" [see, S. Makris, Responsive Competition Law Enforcement: Lessons from the Greek Competition Authority, (2023) 46(2) World Competition 205], competition authorities could also make use of market mapping tools, such as the UK CMA's Annual State of Competition Report, enabling them to flag out economic sectors in which markups and concentration have risen for further public scrutiny, not just by them but, taking a "whole of government" approach, by all public bodies (independent agencies and central ministerial departments) with a role in overseeing markets. Remedies may also be adopted through the Market Investigation tool. The tool has been adopted by a number of jurisdictions, including Greece (since 2005), and most recently Germany (with the 11th amendment of the GWB – § 32f). Competition authorities, including the European Commission (if the reform of Regulation 1/2003 finally introduces this new competition tool in EU competition law), should benefit from wide discretion in its use, and there should be no limitations to its use other than the requirement of the substantiation of likely distortions of competition. For instance, the requirement under Art. 11 of Greek law 3959/11 that such tool may be used only if the distortion of competition in question cannot be dealt sufficiently with the implementation of the collusion and abuse of dominance competition law provisions, in my view, introduces an unnecessary level of complication, as it is difficult to determine such issue *in abstracto*, and this may lead to significant delays in dealing with the competition

problem, if the competition authority opts for the choice of first enforcing Art. 101 and/or 102 TFEU and/or their national equivalents, in particular if the distortion can be linked to some form of anticompetitive conduct within the scope of these provisions, and then resorting, if these provisions are not deemed 'sufficient' to dealing with the distortions of competition in question, to the use of the market investigation tool. Arguments concerning the lack of constitutionality of such (broad) legislative delegation to competition authorities do not withstand serious scrutiny, to the extent that such tools are used following an elaborate investigation process and public consultation. They address complex technical and economic questions for which competition authorities should benefit from a large margin of appreciation. Systematic price comparisons for consumer products across the EU Internal Market may also bring scrutiny to economic sectors marked by softened competition and in which parallel trade remains limited. Finally, information-heavy computational tools, such as 'agent-based models' may enable competition authorities to account for non-price parameters of competition (e.g., innovation, resilience, privacy), thus allowing for a more complex set of interactions and relationships between economic actors (for example, competition, cooperation, co-opetition, ownership, control, influence) to be considered.

The social dimension of competition law

As competition law reclaims its missing social dimension [see I. Lianos, Competition Law and a Form of Social Regulation (2020) 65(1) Antitrust Bulletin 3], its role in taming economic oligarchies and in reinvigorating democracy goes hand in hand with the inclusion of a wider group of stakeholders and social partners in competition law decision-making (e.g., consumers, workers, civil society groups, academia). This is crucially absent from the current international debates about competition, in which specific vested interests have acquired an asymmetric position of influence. An important effort needs thus to be undertaken to re-balance international fora, such as the ICN and OECD [see C. Townley, M. Guidi, M. Tavares, The Law and Politics of Global Competition: Influence and Legitimacy in the International Competition Network (OUP 2022)], by putting strict limits to the participation of business lobbyists and business legal counsel and by integrating more systematically academia and a more representative set of stakeholders.

METATAGS: zeitschrift_WUW; doctype_gk; SiriusID_1457075; RawID_0; angelegt_20240118;