Model Competition law for new Jurisdictions

Session 1

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Features of the EU Model- 1

The objective that competition in the common market is undistorted, reformulated as creation of a competitive Social Market economy underlies the legal framework that consists of the following prohibition rules:

>Prohibition of Restrictive agreements between undertakings unless such agreements provide countervailing procompetitive benefits

>Prohibition of Abuse by dominant undertakings

>Prohibition of structural transactions that create or reinforce a dominant position

Features of the EU Model- 2

The prohibition rules are conditional on

-Affectation of trade between member States

-Jurisdictional scope in the sense of having an effect in the Internal market

-Pertaining to the agreements or conduct of undertakings

-Structural transactions refer in practice to acquisition of or change in *control* over an undertaking

And subject to the principles of non-discrimination and proportionality

Features of the EU Model- 3

The legal basis is the Treaty rather than adoption by the legislature: Member States' competition laws are adopted by the National Legislature

Enforcement

Enforcement of the law and development of policy fall to the Commission as the guardian of the Treaty subject to full review by the European Courts

A system of parallel enforcement is also in place by National Competition Authorities (and national judges). They enforce both community law and their national competition laws (largely modelled on the Treaty provisions).

Enforcement by the Commission is in close cooperation with National Competition authorities (and viceversa).

Features of the EU model -4

The close nexus with the objective of creation and development of the Internal market implies that:

- no sectors are exempted from the application of Law

-state owned entities that operate in the market are subject to the provisions of the law : so no business entity is exempted

-affectation of trade between MS has been interpreted in a broad sense to cover most goods and services

-any National Court in the EU has competence to apply directly the Treaty provisions. In practice however national Courts have no investigative resources so seldom antitrust cases are adjudicated by national Courts.

EU Competition Law- Legal Provisions-1

Article 101 TFEU

- 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EU Competition Law- Legal Provisions-2

Art101 cont.

- 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
- 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- — any agreement or category of agreements between undertakings,
- — any decision or category of decisions by associations of undertakings,
- — any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

EU Competition Law- Legal Provisions-3

Art102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

- Such abuse may, in particular, consist in:
- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Comparative text of Thai competition law- 1

The relevant provisions in sections 27 and 25 of Thai law are in fact very similar in content.

Some differences can be noted

>art 101(3) sets out the test that restrictive agreements have to fulfil to escape the prohibition of art.101(2). Section 27 and procedural rules of sections 35-39 foresees an implicit legal standard, to be defined by the Authority's decisional practice as reviewed by Appellate Committee

>art.101 and 102 address an undertaking which is the single economic entity that comprises all the controlled subsidiaries. It is not possible for a business to subdivide itself as business units to avoid market share aggregation

Comparative text of Thai competition law- 2

>the texts of art 101 (d)&(e) and of 102 (b),(c)&(d) foresee some defences to reflect normal commercial business practices/agreements or absence of prejudice to consumers. Sections 27 and 25 leave these elements implicit.

Conclusions

>Broadly similar content

>A clear need for Guidelines and Explanatory notes by competition authority to clarify concepts and to outline authorities enforcement priorities and how the legal standard applied to practical situations of different vertical agreements, horizontal agreements and joint ventures and to types of abusive conduct

Enforcement by EU Commission- 1

Enforcement by the Commission is by DG Competition which is under the authority of Commissioner for Competition.

Investigations are undertaken by DG competition and adjudication is by the college of Commissioners.

Administrative procedure of the Commission has specific steps- opening of procedure, market investigation, statement of objections sent to party(ies) concerned, access to Commission's evidential file by parties, parties' individual reply, oral hearing before Hearing officer, followed by either prohibition decision or by closure of case.

Commission's decisions are appealable before the European Courts, who have full jurisdiction in cases where fines are imposed.

Very similar steps at the national level, where national competition authorities are usually independent enforcers subject to judicial review by domestic Courts (even when they apply Community law)

Enforcement by EU Commission- 2

Commission's enforcement under art. 101 and 102 are triggered by either complaints or by leniency applications or by own motion enquires including sectoral enquiries.

Since 2004 there is no procedure of notification of restrictive agreements for a clearance decision by the enforcer. Business operators must self assess with their legal advisors the compatibility with the law of their commercial agreements, making full use of Guidance Notes issued by the Commission. Case Law precedents supplement in providing the most definitive interpretation.

Enforcement in EU

Comments on attached table

>enforcement is by Commission and by NCAs

>the figures (albeit partial) show the reduction of COM cases once notification system ended

>important number of antitrust cases investigated and decided upon by NCAs

>of the total the average split between restrictive agreements and abusive conduct is 2/3 to 1/3 respectively

>most of COM cases are EU or global cartels

Anti-trust Cases in EU

	2004	2005	2006	2007	2008	2009	2010	2011
Total cases in ECN	301	203	165	150	159	150	169	49
COMP cases	101	22	21	10	20	21	11	23
NCA cases	200	181	144	140	149	129	158	26
Decisions foreseen	32	76	64	72	60	70	94	30

Non merger cases in US

year	Sherman §1	Sherman§2	Other non merger	FTC actions
2010	n.a.	n.a.	n.a.	7
2009	92	7	32	7
2008	76	0	26	4
2007	77	6	19	11
2006	104	3	24	6
2005	118	8	9	4
2004	79	7	19	9

Assessing enforcement

>Tables reveal similar levels of enforcement actions initiated. The big difference is that most antitrust cases originate in the US from private litigation.

>section 27 type or restrictive agreements including cartels dominate in both jurisdictions

>the proportion of monopolisation cases initiated is much higher in the EU and in its Member States

>significant proportion of investigations not leading to a formal decision is a constant feature

> proportion of formal decisions on serious infringements is a good measure of enforcement credibility

US model

US enforcement by FTC and DoJ as well as by States is an important benchmark for enforcement

>Legal framework is comprehensive being a precursor for all other jurisdictions

>Competition Authority's role limited to prosecution

>well developed Court system

>custodial sanctions imposed on cartel infringements

>most cases settled following plea bargaining hence short duration of procedure; conversely case law limited

>private enforcement of antitrust is of considerable significance (since in the US discovery powers by judges are much more important and not saying the truth to a judge is punished much more severely)

EU Competition law as model?

A number of arguments favour EU model as a template

-provides a comprehensive legal framework

-a very substantial and growing body of case law

-applicable in administrative system of law and common law systems where public enforcement dominates

-Legal framework compatible with procedural specificities of any particular jurisdiction

-sanctions limited to fines on undertakings

Negative aspects are

-separation of roles of investigation and adjudication less clear (but administrative decisions can nonetheless be appealed)

-criminal sanctions procedurally incompatible with an administrative system (but criminal sanctions are important just for cartels …)

Thai Competition Law

>Text of section 27 is not explicit regarding the Standard of assessing notifications under 27(5)- 27(10)

>previous notification system in EU demonstrated that authority resources are dedicated to minor infringements

>Guidance notes would considerably clarify decisional practice

>definition of business operator could clarify all distinct controlled subunits of a corporation are considered as a single business operator

>Guidance on market dominating operator and standard applied in assessing abuse would clarify application of section25

Comparing EU and Thai competition law

>Legal provision are similar but coverage in terms of exempted sectors and business operators differ

>in the EU all sectors and all undertakings come under the law

>Enforcement in the EU is primarily in terms of prohibition decisions

>In Thailand the authority is required to assess notifications of restrictive agreements

>enforcement priorities differ and hence also significant difference in the portfolio of cases

-Thus : similar legal framework but substantially different pattern of enforcement

International and Regional cooperation

>regional cooperation with other ASEAN competition agencies

>experience of European competition network (ECN)

>principal elements for enforcement cooperation in the ECN

The experience of the ECN

- **Until the entry into force of Regulation 1/2003, cooperation in Europe was only vertical (between national authorities and the Commission) and one sided (national authorities would comment on Commission proposals). Commission draft decisions were sometimes criticized but never blocked. Domestic decisions were taken in isolation.**
- **The great advantage of the European model has been the role of the ECJ that, in order not to be overwhelmed by jurisdictional appeals, developed the concept of the *Effet Util***
- **Since June 2004, both the Commission and national authorities apply Community law. The ECN was created in order to coordinate in the allocation of cases and to cooperate if cases require evidence to be gathered from a number of jurisdictions. Plus information is shared about cases that are opened and concluded, allowing comments to be received and ideas to circulate.**

A comparison with other regional agreements

- **The success of the EU as a Regional agreement on competition originates for a number of distinctive features:**
  - **The EU institutional structure was very balanced, with a Commission in charge of enforcing the rules of the Treaty and the ECJ in charge of making sure that it did not abuse its powers**
  - **Competition was considered a key instrument for achieving market integration and therefore no exemptions envisaged**
  - **Enforcement of competition was left with the Commission and not under the supervision of the Council**
  - **The ECJ has been very careful not to restrict Member States sovereignty beyond what provided in the Treaty**
  - **The ECJ has been very careful not to engage in jurisdictional issues**
  - **Last but not least the Commission has been adequately funded**

Model Competition law for new Jurisdictions

Session 2

Alternative authority institutional structures

Models range from

>role limited to investigation and prosecution only-decisions made by Court (US system)

>non-autonomous investigation body to which cases are referred but all decisions made by sponsoring ministry (subject to judicial review) (Morocco, Egypt, etc.)

>autonomous preliminary investigation body referring cases to another administrative body with decision powers (partly the UK)

>monolithic and autonomous investigation and adjudication functions (subject to judicial review) (Eu system)

Administrative authority limited to investigation and prosecution - decisions made by Court

- **The independency of the judge guarantees that decisions are made on the basis of the legal provisions only (politics is left out). However there is a risk that legal provisions are interpreted very literally, contrary to an evolutionary approach to the law (+-)**
- **The biggest advantage is the possibility of full exercise of the right of defense: the case is decided by someone that has not invested in investigation and looks at the case with a new pair of eyes (++)**
- **The biggest disadvantage is that, if the Court system is inefficient and it takes years to decide on a case, the importance of antitrust enforcement weakens substantially (-)**
- **A further disadvantage is that the incentives to build a reputable antitrust Authority weakens substantially, since the case would be attributed to the judge (-)**

negatives (3) and positives (3) are balanced

Non-autonomous investigation body and decisions made by Minister

- **Ministers do not like to follow the law. They make the law. So there is the risk that antitrust decisions are erratic and not very well argued (- -)**
- **Ministers base their power on electoral results, so may be very unlikely to sponsor unpopular cases (--)**
- **Ministers in charge of antitrust enforcement may become advocates of competition within government, with positive results in terms of regulatory reform (+)**

More negatives (4) than positives (1)

Autonomous preliminary investigation body referring cases to another administrative body with decision powers

- **The independence of decision making is guaranteed, since the decision to investigate is separate from adjudication (++)**
- **Having two institutions may duplicate functions and be very costly, especially because antitrust enforcement competences mainly originate by doing (-)**
- **If the investigation body is under a Ministry, the enforcement of the antitrust law may become politicized and some high-profile case may never be referred (- -)**

More negatives (3) than positives (2)

Monolithic and autonomous investigation and adjudication functions

- **The time and effort spent into investigation biases decision making (--), even though some organizational issue may be introduced (fresh pair of eyes, chief economist, have offices investigate and the Authority decides etc.) that re-establish independence (+)**
- **There is a strong incentive to make decisions because this is where the reputation of the authority originates (++)**
- **The Authority may acquire the reputation to become a credible competition advocate with the Government (+)**
- **The Authority's decisions are nonetheless subject to judicial review (++)**

More positives (6) than negatives (2)

The US and the EU model

- **The US model works very well in the United States. It cannot be exported.**
- **The EU model is much more flexible and capable to be adapted to different cultures, different stages of development, different market structures.**
- **In 1957 when the Treaty was signed no EC country (they were 6) had a competition law. Today all 27 member have a competition law and an institutional structure very similar to the EC one.**
- **No difficulties in the process of adaptation.**

The example of Italy

- **Italy did not have a domestic competition law until 1990. The EU Treaty had been in force in the country for over 30 years. Very little enforcement against Italian companies: an average of less than 1 case a year.**
- **The Italian law created an independent Authority in charge of enforcement and introduced substantive provisions of clear European origin. Furthermore it constrained the Authority to interpret these provision in line with EU principles: A new law with a 30 years case law!**
- **In the first five years of existence the Authority decided an average of 10 cases a year.**
- **Furthermore the Authority was given a power to advocate in favor of competition and because of its report competition issue were for the first time discussed in the Italian Parliament**

The example of Italy 2

- **The Italian Authority is like the European Commission (it investigates and it adjudicates) subject to judicial review. Very new model for Italy. The Minister is completely left out.**
- **The independence of the Authority increased the credibility of its policy advice and the confidence of business of its impartiality. It was a win-win solution.**
- **The Authority was created with a high status among Italian institutions and it was ruled that the salary of staff was that of the Central Bank. As a result high profile professionals joined the Authority. Not much turn over.**
- **Judicial review has been a problem at the beginning because judges were not expert of competition law and the staff of the Authority did not have much experience with administrative law. Now there is a strong improvement**

Enforcement of Competition law in Practice- 1

>In the EU legal framework has not changed but enforcement has moved away from assessing notifications to initiating enquiries on serious infringements

>many of the member states' national competition laws have converged to EU law and EU institutional structure. Principal changes:

-prohibition of serious infringements, higher sanctions merger control

>Explaining the decisional practice of the authority in the form of Guidelines and developing case law have made this transition possible

> Much of the focus of change has been in terms of ensuring adequate powers for the competition authority

Enforcement of competition law in Practice -2

>within EU trend in form of competition authority is towards an independent enforcement body

>models of institutional from vary considerably to adapt to existing practice

>in some cases covering also consumer protection

>important increase in resources to undertake enforcement actions and merger control

>focus on serious infringements of competition law in particular cartels and serious abuses of market power

>market monitoring

Enforcement of competition law in Practice -3

Elements in developing credible enforcement

- **Initiating ex officio enquiries on the basis of complaints, whistleblowers, cooperation with other authorities**
- **Investigative tool kit – leniency programme, appropriate fines, powers for unannounced inspections**
- **Adoption of prohibition decisions with fines and withstanding scrutiny of judicial review**

Enforcement of competition law in Practice -4

Elements in developing credible advocacy reports

- **Having developed a reputation of a credible enforcer helps the Authority in gaining reputation also in advocacy**
- **Convince government to consult the Authority early on and on projects that are particularly significant.**
- **Write reports that are well argued and that address major issues in your country economy. One page reports are hardly relevant**
- **Make these reports public so that they represent a contribution to the debate that everyone can read.**