1. Introduction to the research project and its results

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1 INTRODUCTION

This volume brings together all the contributions to the seminars held between March and May of 2009 at the Universities of Molise and Rome ‘La Sapienza’ on the 2009 Guidance on the European Commission’s enforcement priorities in applying Article 82 of the EC Treaty (Article 102 of the Treaty on the Functioning of the European Union: TFEU). The research was organised and financed within the framework of the Jean Monnet ‘European Union and Competition Law’ programme (www.european-law.it), of which I am the Director.

Because the contributions were prepared in 2009, most of them do not take account of the changes occasioned by the Lisbon Treaty (in particular the changes to the numbering of the Treaty articles).

2 THE OBJECTIVE OF THE RESEARCH PROJECT

The results of the research project have a value that goes well beyond that of a simple commentary on the 2009 Guidance. The project had three different objectives.

In the first place, one aim was to provide a critical commentary by eminent scholars from various member states on the Commission’s Guidance. In particular, something which emerged, and which for me is significant, is that the modification of the criteria for the application of Article 102 TFEU is not simply an issue of interpretation. Quite the opposite: these modifications, along with those contained in the Commission’s Communication on the interpretation of Article 101 TFEU¹ by changing

The impact of the Commission's Guidance on Article 102

of European antitrust law, have had a direct effect on the content of the right of economic initiative, which is recognised in the various national Constitutions, by the European Convention on Human Rights and by the general principles of European Union law.

The second objective of the project was to examine the influence that the new interpretation of Article 102 TFEU contained in the Guidance might potentially exercise on the ways in which the various antitrust authorities apply the national prohibition of abuse of a dominant position. This second objective seeks to tackle this question from an angle which is different from the typical approach of competition law commentaries, which tend to concentrate on comparing European and United States competition law (i.e. they make a horizontal comparison). This approach is undoubtedly interesting but it takes insufficient account of a fundamental aspect of the legal order of the EU, which is that the application of the European system for the safeguarding of competition is not limited to the European level. It is, rather, a two tier system divided between the European and national level. This is why we have set out a ‘vertical’ comparison between the European experience and the experience in individual member states in these pages.

Precisely with reference to this vertical comparison I wanted to integrate into the research project a third objective, which was to investigate how the member states’ rules for the protection of competition (in particular those concerning monopolistic behaviour of undertakings) have evolved over time inter alia in relation to Community law. This aspect of the research puts antitrust rules into a broader historical context. It seemed to me important since the general approach of commentators on European competition law has either been to take for granted (albeit quite wrongly) that antitrust rules have always been present in the different European legal orders or, at least, not to enquire too closely into the national rules on monopolistic behaviour of undertakings as they were before the 1960s. However, such an approach entails overlooking the point that from 1870 to the end of the 1940s the European economy was based largely on cartels between undertakings and, in some states (for example Germany and Italy) rules were even in force that required the establishment of cartels between undertakings. This is a fact that it is fundamental to bear in mind in order to understand the process of European integration. The traditional approach equally fails to take account of the fact that the Briand

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2 On the changes in the objectives of European antitrust law, see Lorenzo F. Pace, European Antitrust Law (Cheltenham, UK and Northampton, MA, USA, Edward Elgar Publishing, 2007), pp. 37 ff.
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A project that was put forward in the 1930s proposed the establishment of a European Union which was to be based not on free competition but on cartels between undertakings. And, by failing to take account of the national rules as they were prior to 1960, we fail to attribute sufficient importance to the fact that the first antitrust law in the European area was German; it is no coincidence that this law came into force on 1 January 1958, the date of entry into force of the Treaty of Rome.  

I asked the participants in this project, to whom I offer my warmest thanks, to take these three objectives on board when writing their contributions.

I chose France, Germany, Italy, Spain and the United Kingdom as the member states which the project would take as reference points. Those countries were chosen primarily because they were (and are) the most developed economies in the European Union, which is a prerequisite for the existence of political awareness of the importance of safeguarding competition. Furthermore, the development of the national rules to that end is substantially different in each of those countries.

3 THE RESULTS OF THE RESEARCH; FIRST OBJECTIVE: A CRITICAL COMMENTARY ON THE COMMISSION’S GUIDANCE

Reviewing briefly the results of the project, it is significant that, as regards the first aspect, every contributor makes reference to the Ordoliberal School. The contribution of Professor Mestmäcker, an eminent adherent of that school and a pupil of Franz Boehm, one of its founders, is also very interesting. In his contribution, he stresses how, even within the Ordoliberal School, there are different schools of thought. He also develops an interesting criticism on how, in his celebrated work in English, Law and Competition in Twentieth Century Europe: Protecting Prometheus, Professor David Gerber had presented the ideas of the school (according to Professor Mestmäcker) inaccurately.

Given the consistent and sometimes virulent criticism of the Ordoliberal School over the last few decades by British commentators, it was a surprise for me to learn during the tranquil sessions with the guest professors that, for example, Professor Mestmäcker and Professor Korah had never met and had thus never had the opportunity to engage in an exchange of views on their respective approaches.

3 On these points see Pace, European Antitrust Law, p. 5.
Furthermore, in some contributions (see Mestmäcker, section 2) it is pointed out, quite correctly, that the changes set out in the Guidance do not represent a mere modification of the criteria used to evaluate Article 102 TFEU but actually change the objectives of European antitrust law. In consequence, they have an impact on the substantive content of the rules for the protection of the right of economic initiative. Seen from this angle, Professor Mestmäcker’s contribution is extremely interesting in that it clarifies the theoretical differences between the one school of thought that advocates ‘freedom of competition’ as the objective of competition law and the other that advocates ‘efficiency’.

The individual commentaries on the Guidance vary considerably. At one end of the scale, some contributors clearly take a positive view on the role which the Guidance may play in the future and on its having introduced new analytical tools in a maturing process (Whish, Prieto). However, other contributors are lukewarm. In particular, some of the commentaries, while taking a generally positive view, nevertheless stress the contradictions contained in the Guidance (Korah). This is the case in particular with reference to the inclusion of the concept of the special responsibility of undertakings in a dominant position and of the difficulties in foreseeing the results of the application of the rules. Another contributor (Ortiz Blanco) voices similar criticisms regarding the absence of legal certainty. His contribution places the Guidance (and in reality also the new Spanish rules) within an original concept of the evolution of the interpretation of antitrust law which it claims is moving from the protection of the market structure to the protection of efficiency. According to that interpretation, which I share, the Guidance represents first and foremost a voluntary exercise of self-restraint by the Commission in the enforcement of Article 102 TFEU. Lastly, we encounter commentaries which are as critical as they are rigorous (Mestmäcker).

Along with these general assessments we also have some contributions in which specific elements of the Guidance are analysed. These include the legitimacy or otherwise of the justification of a breach of Article 102 TFEU through the efficiency defence (Mestmäcker, Pace, Prieto, Whish) and also some critical remarks on the choice of the instrument chosen for the Guidance, which is in the form of a Communication rather than a Notice (Pace).

The second objective is the relation between the present practice of the national authorities as regards the application of the national rules prohibiting the abuse of a dominant position and the interpretation of Article 102 TFEU presented in the Guidance. Here, too, the results are interesting and diverse. In some cases national practice is in line with the Commission’s new reading of Article 102 TFEU. For example, in France, we can speak of ‘anticipated enforcement in France of the Commission’s Guidance on Article 102’ (Prieto) and, in the UK, ‘the position . . . would appear to sit comfortably with the position advocated by the European Commission’ (Whish). Then we have diametrically opposed positions in which it is explained that ‘some principles of the Guidance will likely not be adopted in German law’ albeit the differences between the principles that inspire present European competition law and those that underpin German competition law will not necessarily lead to contradictory results (Mestmäcker). After that we have the Spanish experience, where the practice of the national authority is significantly different, not because of any difference of approach but simply because Spanish law is at a different stage of development, as explained by the authors. There, despite the criticisms sketched out above, the Guidance is seen as a positive stimulus to the improvement of Spanish practice in that it will move that practice towards a clearer effects-based approach. Finally, the Italian experience shows a consistent effects-based approach towards the prohibition of abuse of a dominant position despite the fact that the residual definition of the scope of national Italian antitrust law and the frequent recourse to commitment decisions considerably limit the development of a national practice in respect of the prohibition of abuse of a dominant position.

Still on the subject of the second objective, it is interesting to note that, quantitatively speaking, the practice of the various national authorities varies considerably. In particular, in Spain the national prohibition has been applied frequently, for reasons which are clearly set out in the contribution of Ortiz Blanco, which in turn has led to a significant number of decisions in which an infringement has been found. On the other hand in
the UK, despite the large number of proceedings initiated by the Office of Fair Trading, and although UK law provides a variety of interesting instruments to deal with issues linked to market structure (Whish), there have been in recent years only nine decisions leading to a finding that the national prohibition has been infringed. Lastly, as we have seen, what characterises the situation in Italy is that there has been a radical reduction in the number of cases in which the national provision has been applied and an increase in the number of proceedings in which Article 102 TFEU is applied (even if many of those are closed by a commitment decision rather than culminating in a finding of infringement).

5 THE RESULTS OF THE RESEARCH; THIRD OBJECTIVE: THE DEVELOPMENT OF COMPETITION LAW RULES IN THE VARIOUS MEMBER STATES

As regards the third and final objective of the research project, namely the development of competition law rules (in particular the control of monopolistic behaviour by undertakings) in the various member states, the results of comparing the laws in the five states indicated above is very interesting. We can make out three phases in the development of national rules which are common to all five countries.

In the first phase, prior to 1958, no member state had laws protecting competition. Some even had laws which either imposed the conclusion of cartels (Germany\(^4\) and Italy\(^5\)) or which at least did not treat cartels between undertakings as illicit per se (France,\(^6\) the United Kingdom\(^7\)).

In the second phase, between 1958 and the end of the 1980s, the member states enacted laws to protect competition, albeit those laws were based on...

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\(^4\) Regulation of 2 November 1923 (Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen, known as the Kartellverordnung). On 26 July 1930 an emergency regulation (Notverordnung) was issued and in 1933, after the Nazis had taken power, the law on compulsory cartelisation (Zwangkartellgesetz) was enacted.

\(^5\) Law n. 834 of 16 June 1932 on compulsory consortia. The decree of 16 April 1936 (converted into the law of 22 April 1937) allowed the Italian state to control the production and pricing policies of the consortia.

\(^6\) Article 419 of the 1810 Penal Code did not prohibit cartels between undertakings but distinguished between mauvaises unions and bonnes unions (see also the law of 3 December 1926).

\(^7\) Monopolies and Restrictive Practices Act 1948.
principles that not only varied considerably from state to state (France, Spain, Germany, and the United Kingdom) but which differed from those principles underpinning Community law. In particular, in some cases the national enforcement system established a model in which competition was ‘administered’, in the sense that administration of the system might involve intervention at the political level, for example by the Economics Ministry (France, Spain, the United Kingdom).

In the third and final phase, which began in the early 1990s, there has been a natural trend towards harmonisation of the national prohibitions which have taken Articles 101 and 102 TFEU as their model. During this period, several member states have also amended their own system of enforcement of national law (France, Spain, Italy, Germany, the United Kingdom). It is worthwhile noting that in some member states (in particular France, Spain and the United Kingdom) the system has been amended to bring it into line with the European system through the establishment of independent national authorities.

I hope that the reader will find this book interesting and useful. I would invite anyone having comments to send them to me at the following email address: lfpace@european-law.it.

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8 The decree of 9 August 1953 prohibited agreements which were detrimental to competition but provided for significant exceptions to this principle. Only in 1963 (the law of 1 July) was the abuse of a dominant position prohibited.
10 Gesetz gegen Wettbewerbsbeschränkungen of 27 July 1957.
12 In France the bodies which applied the competition law rules had a merely consultative role and the Minister of Economic Affairs could therefore override the assessments made by the relevant authority (until 1977 this was the Commission technique des ententes et des abus de position dominante when it was replaced by the Commission de la concurrence).
15 Ordinance of 1 December 1986.
17 Law n. 287/90 of 10 August 1990.