**Is Fairness ruling us from its Grave? How open-ended Concepts continue to shape Competition Law**

The paper focuses on, and reviews the use of open-ended concepts such as 'fairness', 'competition on the merits', 'competition based on performance', based on a fairly complete review of the EU Court of Justice case-law.

The paper traces the origin of such concepts, which are grounded in German law and, tellingly, in German *unfair competition* law where they were meant to distinguish fair, though possibly vigorous, competition, from such conduct which had to be sanctioned as unlawful as not being based on acceptable parameters of competitive action.

The paper shows that such clauses have been used from the Court of Justice’s case-law in the 70s and, rather surprisingly, still are with great frequency, precisely in the most complex and relevant cases, i.e., the ones where one would expect economic analysis to be used more often and with greater efficacy. This was recently the case of the *Unilever* and *SEN* judgments. The way national courts reached the actual decisions of the case on the basis of the Court of Justice’s position, or, to put it more accurately, on the basis of its disregard, is also of considerable interest. The impression is that the national courts almost threw up their hands in despair, figuratively speaking, as the input coming from the Court was too vague and abstract to be of any help, and preferred to solve the case on alternative and more formalistic grounds, such as a lack of sufficient evidence.

This study may be relevant as it shows that the recourse to a “more economic approach” (as advocated a while ago by the Commission, under the influence of US-based law and economics criticism of the European ‘formalistic’ approach to competition law) or to more ‘scientific’ criteria, such as consumer welfare or the as efficient competitor test (which should enable the court to draw a line, with surgical accuracy, between legal and illegal conduct even in the most complex pricing foreclosure abuses), are often and in practice put aside by the Court and, thereafter, by the national courts on remand.

The author submits this may be due to a number of reasons: such standards are controversial both in their scientific foundation (e.g.: they disregard, quality, innovation, variety, and are not overly helpful in antitrust’s typically medium-term analysis), and in their legitimacy (e.g., they disregard wealth distribution, workers’ welfare): in fact, they are associated with a strongly conservative frame of mind which has succeeded, in association with a rather nonchalant recourse to decision theory and particularly, but not only, in the US setting, to steer antitrust case-law into a corner of quasi non-enforcement. They also, typically require the processing of vast and often unavailable amounts of data. This may be feasible in the context of merger control (though the role taken by economic models and econometric studies is often criticized if not ridiculed). This is, however, much less feasible in the context of typical behavioral cases, not to mention court litigation.

Also, such standards it its doubtful that these standards may be more predictable or better observable than more open and more typical legal standards, such as fairness which, at the end of the day, being deeply rooted in a community, can be retrieved and interpreted by a court with comparatively greater confidence. This is shown by, *i.a*., behavioral studies, indicating that any groups of people share fairly recurrent and predictable standards of fairness, and are easily communicable, if they are not held in the first place already, to courts and agencies alike. The criticism levied as to the variability of such ‘instincts’, is, furthermore, poorly placed in so far as courts and agencies are third parties not involved in the dispute and are, by definition, trained to be neutral and, well, fair.

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