Faculty of International Relations
Working Papers

12/2011

Impact of the Financial and Economic Crisis on the Paradigm of the European Union's Antitrust

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Volume V

Vysoká škola ekonomická v Praze
Working Papers Fakulty mezinárodních vztahů
Výzkumný záměr MSM6138439909

Název: Working Papers Fakulty mezinárodních vztahů
Četnost vydávání: Vychází minimálně desetkrát ročně
Vydavatel: Vysoká škola ekonomická v Praze
Nakladatelství Oeconomica
Náměstí Winstona Churchilla 4, 130 67 Praha 3, IČO: 61 38 43 99
Evidenční číslo MK ČR: E 17794
ISSN tištěné verze: 1802-6591
ISSN on-line verze: 1802-6583
ISBN tištěné verze: 978-80-245-1860-2
Vedoucí projektu: Prof. Ing. Eva Cihelková, CSc.
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University of Economics, Prague
Faculty of International Relations Working Papers
Research Plan MSM6138439909

Impact of the Financial and Economic Crisis on the Paradigm of the European Union's Antitrust

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Summary:
The EU competition policy and law were undergoing a modernization process inspired by neoliberal ideas when it had to cope with countervailing influences brought about by the crisis of the *laissez-faire* model of capitalism. Especially since the outbreak of financial and economic crisis in 2008 the protection of competition in the EU began to adapt its targeting to these countervailing influences. Nowadays, the paradigm of this policy and law seems to resemble to the first decades of European integration when the protection of competition promoted market unification, protected fair chances to succeed and guarded efficient functioning of markets.

Keywords: competition policy and law, European Commission, economic crisis.

Dopad finanční a ekonomické krize na paradigma ochrany hospodářské soutěže v EU

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Abstrakt:
Politika a právo hospodářské soutěže Evropské unie procházely procesem modernizace inspirovaným neoliberálními myšlenkami, když se musely vypořádat s protichůdnými vlivy vyvolanými krizí modelu kapitalismu založeném na principu *laissez-faire*. Ochrana hospodářské soutěže v EU se zvláště po vypuknutí finanční a ekonomické krize v roce 2008 začala zaměřovat na tyto protichůdné vlivy. Dnes se paradigma této politiky a práva zdá podobné první dekádě evropské integrace, kdy ochrana hospodářské soutěže podporovala sjednocení trhu, chránila rovné šance na úspěch a střežila efektivní fungování trhů.

Klíčová slova: politika a právo ochrany hospodářské soutěže, Evropská komise, ekonomická krize.

JEL: K21

Content

Introduction

This paper is dedicated to an issue that is usually introductory in most competition law textbooks: what is the competition and in what a way exactly and why the competition should be protected. Expressed briefly, it is about the basic paradigm of competition policy.[1]

The starting hypothesis of the paper is that in the period of 2007–2011, i.e. just before and during the financial and economic crisis the dominant paradigm of EU competition policy and law has been challenged and subject to attempts of change. Visible indicators of such attempts were not changes in the legal basis. Articles 101, 102 of TFEU are faithful followers of Articles 85 and 86 of the Treaty of Rome (or later articles 81 and 82).[2] Symptomatic was the lively debate about the place of competition within the objectives and principles of the Lisbon Treaty and also the efforts of the European Commission's DG Competition representatives to protect the standards of EU competition policy and EU law from short-sighted attempts to promote, in times of crisis, help to "national champions," rescue mergers or crisis cartels between competitors. As the current EU Commissioner for Competition, J. Almunia described the situation: "The articles of the Treaty remain unchanged but their application; both in substance and procedure has adapted in light of changing needs" (Almunia 2011e).

Such adaptation is nothing extraordinary or revolutionary. The antitrust has always been shaped by (in addition to its natural maturation through the accumulation of internal application experience) the rivalry between liberalism and mercantilism (today in their neo-versions), i.e. developed in the tension between those who believe in free markets and those who would like to regulate them by economic or industrial policies in the name of economic growth, export expansion, social stability, etc. In parallel to this essentially political-ideological conflict, the debates and tensions within liberalism itself have always influenced the development of antitrust. This can be summarized for EU competition policy and law by words of A. Weitbrecht from Trier University, as a development "From Freiburg to Chicago and Beyond," i.e. from the green years influenced by German ordoliberalism (Freiburg school) to certain "Americanization" under the influence of neo-liberal Chicago, or rather post-

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1 The protection of competition is primarily understood here in terms of classical "antitrust," i.e. as a fight against the two main types of anti-competitive practices, cartels and abuses of dominant position, as they are defined in Articles 101 and 102 TFEU.

2 In order to avoid repeated explanation of the historically changing numbering of antitrust Treaty articles, as well as of EEC, EC, EU denomination depending on to what historical period of European integration the sentence relates, the preference is given throughout the text to the current numbering (101, 102 TFEU) and the "EU" for the integrating Europe and its law from its beginnings to the present.

Chicago school to yet unclear presence (Weitbrecht 2008: 81). Although such a description simplifies the plasticity of historical influences that shaped both the legal basis of EU antitrust as well as its case law, it is a useful (and widely accepted) shortcut, which would allow featuring the key elements of the current paradigm.

The author is convinced that the analysis of the current EU competition policy and law through the prism of the dominant paradigm is not just a theoretical exercise. It has its practical significance for predicting the decisions of the EU competition bodies and, quite pragmatically, for a deeper, historically and theoretically well-founded arguments in any individual competition dispute.[3]

1. Changing Objectives of EU Competition Policy and Law

Question about the dominant paradigm is, in the practice of competition policy and law, often narrowed down to the issue of objectives pursued. For goals setting in the field of protection of competition it was significant from the beginning of an integrating Europe that such a policy must, in contrast to the same protection at the national level, fulfil the role of a promoter of the markets' unification.

Even Jean Monnet, although he was more a French planner that an economic liberal, knew well that he needed to prevent large corporations from conducting Western Europe according to their own interests, however at the expense of the original objectives of the ECSC, later EEC and the EU today. The first ever EEC Commissioner for Competition, Hans von der Groeben, quoted in the very beginning among the first two objectives of competition policy 1) To prevent companies or member states from erecting trade barriers where the EEC has previously removed them, 2) to support integration (Martin 2007: 54, von der Groeben 1961). Given that the integration of national markets into one EU internal market is still a hot issue and, also, that the tendency of firms to market-sharing agreements, as well as returns of national governments to mercantilism, do periodically re-appear, it is not surprising, that even the current competition Commissioner, J. Almunia in June 2011 stated: "Integrating our internal market remains our most important task, and this is still very much unfinished business" (Almunia 2011f). The inextricable link between building the EU internal market and protecting competition is, last but not least, postulated in the legally binding manner since 1957 by the two "antitrust" Articles of the Treaty (now 101 and 102 TFEU), which prohibit practices "incompatible with the internal market" and newly also by the Protocol No. 27 to the Lisbon Treaty.

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[3] Author pays to this issue a long-term attention, and this text is a continuation of previous research and publications, see: Šmejkal 2008, 2008b, 2009, 2010, 2010b.

This primary and permanent objective of EU competition policy and law is inherently anti-protectionist and anti-mercantilist, at least within the EU itself. However due to its specific mission and value neutrality in situations where there is not a typical case of national markets sharing by exclusive dealer agreements or the foreclosure of national market by a dominant competitor, such a goal cannot be a sufficient guide for decision making. In most cases therefore the competition policy has needed to have in parallel other goals. In this respect the EU competition policy and law do not differ from antitrust of nation states as they all found their goals (apart from specific ad hoc circumstances and political pressures that might influence individual decisions), in the changing economic and politico-legal theories. Above cited H. von der Groeben featured as the third objective of EEC competition policy and law the protection of the economic and social order based on the freedom of business, consumers and workers. This can rightly be understood as directing the competition policy and law against abuses of economic power at the expense of freedom to compete, to the detriment of consumers and employees that would in the end threaten the socio-economic order of society. In retrospect, such a goal must be described as the essence of the ordoliberal concept of competition policy.

Free competition was for so-called Freiburg School, i.e. German ordoliberals, one of the key principles of the social market economy order. It required protection by the state otherwise it could degenerate through concentration and cartelization into its opposite, i.e. into a situation where an excessive market power of trusts and concerns would not only destroy free competition, but economic freedom as such, which will inevitably threaten political freedom as well.[4] Although modern research in the field of legal history, of economics and legal theories, has shown that neither the wording of competition articles of the Rome Treaty of 1957, nor the first decades of development and application of EU competition law were influenced by the German ordoliberalism only (not surprising for multilateral integration, that, in addition, FRG entered with the mark of a defeated perpetrator of World War II), on the other hand there is no doubt that distinctive and indelible traces of ordoliberalism in the EU antitrust can safely be found.[5]

Besides highlighting the fact that the central role of "investigator, prosecutor and judge" was entrusted to an administrative body, the European Commission, it is enough to recall the text of Articles 101 and 102 TFEU: they forbid the practice of limiting the contractual freedom of competitors (see Article 101(1)e,

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[4] In short, it was a reaction to the unfortunate experience of pre-war Germany, and of efforts to manage the postwar chaos by establishing such an economic order that would provide individual freedom within the "disciplined pluralism." See for details Kay 2003: 334, Brozova 2006: 99–100, Krabec 2006: 44–51.

[5] See for details Maier-Rigaud 2010 or Montalban et al. 2009

102d), discrimination of other competitors in the competition (Article 101(1) d), emphasize the maintenance of competition (i.e. of an open polypolistic market structure) in all circumstances (Article 101 (3)b), prohibit discrimination between comparable trading partners (Article 102c), etc. Ordoliberal foundations can be traced in the Commission's and ECJ's approach to potential abusers of dominant position as these strongest competitors are burdened with "special responsibility" to preserve competition on the market. Ordoliberals argued that the dominant market player had to behave "as if" competition was undisturbed work and even the strongest company was at the mercy of competition pressures.[6] Ordoliberalism typically targeted against excessive market power and its exploitative practices which must be banned for their "unfairness" to other market participants. Efficiency and consumer interests are not foreign to this paradigm, but they were secondary as by-products of the freedom which competition law preserves (Gormsen 2006: 9, Padilla, Ahlborn 2007: 15).

Nevertheless, the fight against excessive market power and for the protection of the freedom to compete, hand in hand with promotion of market integration, were not the only goals that the EU competition policy and law pursued in the first three decades of integration. The Commission's competition decisions have been adopted by the College of Commissioners and the Commissioner for competition, as petitioner, has always depended, to some extent, on the fellow Commissioners responsible for social issues, industrial development or protection of the environment, that have brought to a debate various extra-competition goals. And in particular, the Article 101(3) TFEU admits such goals as it permits to exempt from the ban those cartels that help technical and economic progress and share their benefits with consumers. Historians of competition law also showed that the motives behind initiation and enforcement of competition rules have been primarily socio-political in Europe, as well as in the U.S.[7] Protecting competition was very often about protecting "small" against "big," about equal chances of success, about reducing socially and politically destructive manipulation with prices, deliveries, etc. by powerful firms (Odudu 2009a, Valentine 1997). It is simply the fact that among the EU competition authorities' decisions one could find such goals as the job protection (when a takeover was designed to ensure the survival of an important

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6 For evidence see the decisions of the ECJ in Cases C-6/72 *Europemballage Co. and Contitental Can v. Commission, C-85/76 Hoffmann-La Roche v Commission* and C-322/81 *Nederlandische Bänden Industrie Michelin v Commission*. As to the "as-if" approach advocated by ordoliberal economist Leonhard Miksch, see Martin 2007: 47–48.

7 According to D. J. Gerber had the protection of competition in post-war Western Europe "not only to foster economic growth, but also to demonstrate to the sceptical social classes that supported greater equality and democracy that large businesses would not be allowed to utilize their power to the detriment of either consumers or competitors […] therefore they represented means of securing political support for market ideas and of enhancing social integration" (Gerber 2004: 7).

employer), the fight against inflation (since competition suppresses price increases), or even preservation of opinion and cultural diversity (which would be threatened by extinction minority publishers).[8]

This pluralism of aims, in a situation of weakening influence of German ordoliberalism and of continuous efforts to promote market integration, persisted in the field of the EU protection of competition up to 90s of the past century. EU competition policy and law thus became a phenomenon sui generis, which according to (liberal oriented) Competition Commissioner L. Brittan (in office 1989–1993) could not be subsumed under any single school of economic analysis commonly used in other jurisdictions (Lowe 2007: 3). The EU was however getting into an ever greater contrast with developments in the U.S., where at the turn of the 60s and 70s the thesis prevailed that "efforts to apply these democratic and decentralizing goals had led to arbitrary results that made law unpredictable and business planning problematic" (Odudu 2010: 599). The same trend gained momentum in the EU in the late 80s and during the 90s of the last century. Opening of the EU internal market without internal barriers increased the importance of protecting equal conditions of competition. The adoption of the first-ever regulation of merger control, Regulation 4064/89/EEC, in 1989, gave the Commission for the first time an unquestioned power to intervene into plans of multinational companies, including those of non-European origin. This increased importance of EU competition policy and law came at a time when from the U.S. of R. Reagan and the UK of M. Thatcher radiated neo-liberal trends in politics and economy throughout the Western world. Attractiveness of U.S. antitrust was also at that time enhanced by a clearly formulated and intellectually charming Chicago school.

According to its followers, the neo-liberal Chicago school rescued the antitrust from the paradox into which it had got by focusing on protection of competition through following different politically, economically or socially beneficial objectives. Such antitrust enforcement was however done at the expense of the most obvious fruits of free competition, i.e. to the detriment of efficiency (especially in allocation of resources) and of total welfare from which could ultimately benefit consumers. Therefore, these microeconomic-based

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[8] Literature points also out such objectives of competition decisions as maintaining employment (e.g. clearance of a joint-venture between Ford and VW, in 1993), stabilizing the labour market (e.g. case C-26/76 *Metro-SB-Grossmarkte GmbH v. Commission*), coordinating reduction of capacity at a time of crisis to mitigate its social impacts (e.g. Commission's decision in *Synthetic fibres* case, 1984), facilitating introduction of energy saving products (e.g. Commission's decision in *CECED* case, 2000), protecting public health (e.g. Commission's decision in Pasteur *Mérieux* case, 1994), safety of products (e.g. Commission's decision in *BMW* case, 1975), preventing social impact of personal indebtedness (e.g. case C-238/05 *Asnef-Equifax v Ausbanc)* and others. For details on a variety of goals of EU competition law see: Monti 2007, Bejček 2007, Whish 2005, Schweitzer 2007.

fruits of free competition should have supplied both the method and the aim of competition policy and law: microeconomic analysis of competitors' behaviour had to determine whether their acts were increasing efficiency and, if so, state power did not have to interfere with, because the effectiveness beneficial for consumers had to be the only goal. Earlier over-enforcement of competition law (the so-called *false positives*) was for Chicagoans far more damaging than under-enforcement (so-called *false negatives*), because the market undistorted by state interference could and should rectify all inefficient deviations by itself. Thus this neo-liberalism refused, unlike ordoliberalism, active and strong antitrust policy. In principle, only horizontal cartels artificially increasing prices for consumers were considered as inefficient allocation. Especially in relation to the dominant or monopolistic firms Chicago school completely diverged with previous competition policy theories as it refused to protect the competitive structure of markets or the freedom to compete, as it believed that an inefficient monopoly could not survive on an open and functioning market.[9] Although the EU has never accepted (given the unchanged wording of Articles 101 and 102 of the Treaty it simply could not), the Chicago School for its competition paradigm, it nevertheless conducted its well-known modernization of competition policy and law at the beginning of this century under the influence of their post-Chicago (i.e. less dogmatic and more econometric) successor.

Microeconomics has fully settled in the EU competition analysis, the effect-based approach became the basis of evidence on competition effects of any behaviour. In terms of objectives pursued even the support to the unification of markets was outshined in the Commission's documents and its representatives' declarations by a new clear priority of efficiency and consumer welfare (although uncertainty persisted as to when the consumer is understood as any buyer and when as the end-consumer). Already in 2001, a key mover of modernization, the competition Commissioner Mario Monti (graduate in economics from Yale University) in Washington, said: "Almost after 50 years of application and development of antitrust rules in Europe, we can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumer interest and its primary concern" (Monti 2001b). Although the ECJ has not always shared the enthusiasm for the Commission's "consumer welfare and efficiency" and has not given up, even in the second half of the first decade of the new millennium, its traditional case law built on the protection of markets integration and the conservation of competitive-market structure (e.g. decisions C-95/04P *British Airways*, C-202/07 P *France Telecom*, C-478/06 *Sot. Lélos kai EE*), legal science altogether clearly identified this change of paradigm as a shift "from rivalry to efficiency," "from

[9] For introduction to history, authors and concepts of Chicago School see Ginsburg 2008, Priest 2008, Easterbrook 2008.

fairness to welfare," "from a form to consequence" or from "legal normativism to economic pragmatism" (Padilla and Ahlborn 2007: 3, Gormsen 2006: 19, Bejček 2006). By this the shift "from Freiburg to Chicago" mentioned in the introduction was, at least schematically, completed in the EU antitrust.

2. Neo-Mercantilist Attack on Competition Policy

Although the EU competition policy and law has never fully become Chicago-like – just as Europe did not give up under the influence of neo-liberal doctrine its social-market model – it became, mainly in words and deeds of the Commission, strongly "economized" in terms of its methods and re-orientated, on consumer welfare, as to the objective pursued. The concept of consumer welfare as understood by the Commission, however, has not been the same as total welfare of Chicago economists. Also because Articles 101 and 102 of the Treaty simply could not tolerate practices efficient for the company, and the economy as a whole, albeit leading to significant reduction of free competition in the market, it has been somewhat unfair to blame the Commission for being the nest Anglo-Saxon ultra-liberalism or for dogmatically protecting competition for the competition's sake, regardless of the broader societal impacts. Nevertheless, in the spirit of these media-made catchy acronyms, the French President Nicolas Sarkozy attacked at the European Council in June 2007 in Brussels the place and rank of protection of competition in the primary EU law.

Article I-3 of the draft Treaty establishing a Constitution for Europe, which should have been transposed into the text of the Lisbon Treaty, included among the objectives of integration also the "single market with free and undistorted competition." It was a sign of increasing importance of competition in the social model of European integration that resulted from evolution on the threshold of centuries as it was described above. Under Sarkozy's pressure the protection of competition, disappeared from Article 3 of the new EU Treaty which codified more than two dozens of priority objectives of the EU and did not get either into Title II of the Treaty on the Functioning of the EU that stipulates the provisions of general application across all EU activities. Although "competition" is mentioned 13 times in the Lisbon Treaty and classical antitrust Articles 101, 102 remained unchanged, the protection of competition is not listed any more among those provisions of EU primary law that govern common principles and key activities designed to accomplish the mission of integration. Internal analysis of this development by the European Commission leaked to media and was published by Reuter's news service on June 22, 2007:

- For the first time since 1957, undistorted competition is not mentioned among the horizontally effective provisions of the Treaty.
- Member states gain stronger arguments for the protection of their "national champions" that they are unable to pursue at the expense of undistorted competition under the (then) current Treaty.

- Efforts to increase Europe's competitive power in the global economy will be weakened and European legislature on the control of competitor mergers and provision of state assistance will not have political coverage.
- In competition disputes between the European Union and member states, member states find it easier to protect national interests, for example in energy or culture.[10]

Opponents of these neo-mercantilist tendencies (designed to promote the "national" champions through industrial policy and to protect them against takeovers by competitors from other member or non-EU countries) secured at least the Protocol 27 on the Single Market and Competition, by which the importance of protecting competition to achieve the priority objective of the EU, i.e. the functioning internal market, was "rescued." However, uncertainty about how the ECJ, fond of the teleological interpretation of EU law, would decide cases in which the protection of competition will stay against the socio-economic priorities of the EU Treaty, survived and was further reinforced only a year later by the outbreak of the financial, economic and nowadays debt crisis of the EU. This crisis was for many statesmen and theorists of social science a demonstration of a failure of the neoliberal model of capitalism, as it was at the highest levels expressed at the conference "New Word, New Capitalism," in January 2008 in Paris. The (right-wing) leaders of France and Germany agreed there that even after the crisis is over, there would be no return to *laissez-faire* economic policy.[11]

The fact that the protection of competition, conducted by the EU has come, at a time of economic crisis, under pressure, has been repeatedly recognized even in the high places. The Head of the DG Competition of the European Commission, P. Lowe, said several times that: "There has been pressure on us to set aside the competition rules, both the state aid and the antitrust rules and merger rules in general [...]" (Lowe 2009b, 2009e). In the same spirit, some representatives of national competition authorities issued warning statements, for instance the President of the Czech Competition Office, M. Pecina, in March 2009, spoke of the "encouraging of crisis cartels by certain governments or regions, which sometimes occurs." In particular he ascribed such tendencies to France, Italy and Spain (Pecina 2009a, 2009b). These trends were also described by independent analysts and commentators: "Many industries in

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[10] See for details Reuters 2007 and for analysis see Šmejkal 2010a.

[11] The international conference "New World, New Capitalism," convened on 8–9 January 2009 in Paris, on which were the main speakers N. Sarkozy, A. Merkel, Tony Blair, as well as economists seeking to overcome the neo-liberal approaches (A. Sen, J. Stiglitz). For reports on the conference with eloquent headlines see eu.observer.com January 9, 2009 (*Merkel and Sarkozy call for global security council*), International Herald Tribune January 9, 2009 (*Sarkozy, Merkel, Blair call for new capitalism*), La Tribune.fr Janvier 8, 2009 (*Nicolas Sarkozy se penche de nouveau sur la moralisation du capitalisme financier*).

distress have already requested greater tolerance towards cartels, abuses of dominant positions and other anti-competitive practices and, as the social impact of recession unfolds; political pressure to retrench competition enforcement is expected to intensify" (Van Rompuy 2009).

Banks and enterprises affected by the crisis were certainly calling for governmental support, for protection or at least tolerance of their self-protective acts. That however did not necessarily mean that they shared the same ideological ground as Sarkozy's neo-mercantilist attack on neo-liberal tendencies in the protection of competition. Nevertheless, especially at the turn of 2008 and 2009, these attitudes fused in the same pressure. EU representatives were not much heard in the first weeks of the crisis, but since late 2008, the DG Competition built up a fundamental and vociferous opposition to any questioning of principles and standards of economic competition. They rejected any concessions on principles and institutions of competition policy and law, admitting only the necessary adaptation of procedures (length of proceedings) with respect to the crisis. They consistently coined that not protectionism, but competition is the most reliable way out of recession and that pragmatically applied protection of competition brings real effects for ordinary consumer.[12] They spoke with confidence against protectionism, against crisis cartels or advantages for "national champions" and succeeded to build a coherent image of a well-founded, pro-active EU competition policy and beneficial to the public, which only by a tragic mistake could be sacrificed to solve the crisis. It was a successful strategy, because the Commission retreated neither in the field of cartels, nor in the fight against abuse of dominant position, and even in times of crisis did not hesitate to impose fines in the record-breaking amount.[13]

Nevertheless, in the atmosphere of general efforts to mitigate the effects of the crisis on the electoral masses, the DG Competition had to change the rhetoric and to issue statements that were strikingly different from that liberal-reformist vocabulary promoting microeconomic analysis and consumer welfare and efficiency as the "new guiding principles" of competition policy (Lowe 2007). Commissioner N. Kroes, a liberal politician and economist by training, openly casted aside *laissez-faire* as a "solution not good for a society" and repeatedly said that markets should not be left on auto-pilot (Kroes 2009g, 2009h). Even more substantial concession to the neo-mercantilist pressures can be seen in the fact that the DG Competition by voices of its liberal-oriented representatives

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12 For detailed analysis of Commission's response to crisis see Šmejkal 2010b.

13 Cartel of flat glass producers was fined in November 2008 1.38 billion euro and its European participant, French company Cie de Saint Gobain SA had to cope with the largest part of it (at the time the highest ever fine imposed on one company: 896 million euro (EC IP/08/1685, 2008). In May 2008 the company Intel was sanctioned for an abuse of its dominant position: total fine 1.06 billion euro, i.e. for the first time in the EU history the penalty for a single competitor overcame the psychological one billion euro threshold (EC IP09/745, 2009).

adhered to the concept of competition policy, which could be summarized in the equation, "competition policy = *ex ante* regulation + competition law" (Lowe 2009b).

Commissioner Kroes and her Director General, P. Lowe, repeatedly called for a right balance between the regulation and protection of competition, so that the regulation remains pro-competitive and allows the protection of competition to complement it in those areas where, notwithstanding the rules in force, infringements occur (Kroes 2009c, 2009j, Lowe 2009b). If we consider that, from the perspective of the neo-liberal Chicago School, all *ex ante* regulation is equivalent essentially to macro-economic engineering, while the state should reduce its interventions in markets to an indispensable minimum, it is clear that this new concept of the EU's competition policy as being the sum of the *ex ante* regulation and *ex post* application of competition law, has drifted significantly away from the neo-liberal inspiration sources. According to the present Commissioner for Competition, J. Almunia, the *ex ante* regulation will be needed wherever the analysis shows that markets do not generate structurally free competition, while the *ex post* application of competition rules will be a proper tool to ensure level playing field in markets open to such competition (Almunia 2010g). On case by case basis, DG Competition would apparently push for either a competition-compatible regulation at EU level targeted against attempts by companies (or national governments) to find an egoistic solution to problems resulting from economic globalization or it would apply *ex post* the competition rules in markets where structure close to perfect competition would prevail.

Such a demonstrative support to the *ex ante* regulation of markets was not yet the mercantilist takeover of the protection of competition. On the one hand, it was a pragmatic acceptance of one of the consequences of the crisis, which was the abandonment of faith in the ability of free markets to regulate themselves and the resulting strengthening of the role of the state, which could no longer be just a night watchman intervening only in rare cases of fatal market failure. Europe never fully professed the neo-liberal faith in free markets and after overcoming the current crisis European politics will be more likely seeking to modernize its model of social-market economy (that comprises also various sectoral policies and regulations that DG Competition would like to implement in a market-consistent manner). The EU, doing that, would only return to its traditions, i.e. to approaches that had been proper to EU institutions before the neo-liberal ideas jumped on the European continent in the 90s of last century. On the other hand, this old-new mix of competition policy still does not say anything directly about antitrust as such, about goals of competition law enforcement.

3. Back to Green Years of Integration?

The objective or rather set of objectives that would guide the decision-making under Articles 101 and 102 TFEU had to undergo certain changes under the influence of the above described circumstances and pressures. These changes have been again affecting more the Commission as the engine of competition policy and law modernization, which originally aimed at economizing the analysis of competition cases and at unifying the focus on the protection of consumer welfare. The ECJ has not needed to move as it has never abandoned its traditional case law.[14] Looking back on the crisis years 2008–2011 some shifts in the focus of competition policy became evident already under the first Barroso Commission, with N. Kroes, the Dutch liberal economist with experience in politics and big business, in charge of competition until the end of 2009. This shift became even more considerable under the second Barroso Commission, from 2010 on, which entrusted the competition portfolio to, J. Almunia, the Spanish left-wing politician, economist and lawyer by training, subscribing to neo-keynesianism and social market economy.

N. Kroes had already in her speech at a conference on "New Capitalism" in January 2009 employed a remarkably compromisory vocabulary, mixing neo-liberal and ordoliberal terms, and even returning to the programming equipment of the Commission those concepts, that had been gradually abandoned at the time of the modernizing efforts of the EU competition policy and law. Her statement that "the concern for social justice should not lead us to deprive citizens of the freedom and benefits that come from flexible markets [...]. But it should lead us to carefully design our social institutions so that everybody can truly participate in the economy on equal terms," can much more easily be interpreted from the standpoint of ordoliberalism (freedom, equal conditions of participation, institutional framework), than neo-liberalism (emphasis on the fruits of flexible markets only) (Kroes 2009a). And her Director General, P. Lowe, put it even more bluntly several months before, in Autumn 2008, when he stressed that although the ultimate goal of the Commission's intervention remains consumer welfare, this concept "should also be interpreted dynamically in the sense of the effects of any structure or conduct on price, choice, quality and innovation in the short and long term." He admitted, however, that these effects often "are difficult to quantify it and the only way to protect consumer welfare in the longer term is by safeguarding the process or

[14] By its very recent case law the ECJ confirmed that economics would be required for analysis of cases but not for deciding their outcomes. In October 2009 ECJ (cases C-515/05P and C-519/06P) rejected an efficiency-only approach of the General Court, concluding that it is not necessary that final the consumer must be deprived of the advantages of effective competition in terms of supply or price for competition to be infringed. Then in 2010, ECJ (case C-280/08 P) stated that the abusive nature of the incumbent's conduct is connected with the unfairness of the spread between its prices for wholesale access and its detail prices.

dynamic of competition on the markets. In this sense, there is convergence between the German and Anglo-Saxon antitrust traditions" (Lowe 2008: 6).

In other words, the micro-economic welfare of consumers will be among the goals of competition policy interventions supplemented (and often even overshadowed) by macro-economic focus on the competitive process, i.e. on an open and fragmented market structure, where any efficient competitor will be free to compete. This can already be seen in the Commission's standards for assessing exclusionary practices of dominant firms, issued in February 2009.[15] The so-called effect-based approach to dominance-cases advocated by the Commission is to work with the equally-efficient competitor test, which leads to proof of predatory pricing or of margin squeeze, if in consequence of them a competitor, as efficient as the dominant company (perpetrator of such practices), has to leave the market. It is therefore not the consumer harm test, which would, e.g. in case of predatory pricing, require the proof that recoupment of losses, and thus the establishment of monopoly – high prices to the detriment of consumers, would likely take place. The test preferred by the Commission entails the prohibition of such a practice immediately when economically viable competitors would be about to leave the market. The use of equally-efficient competitor test was, not surprisingly, confirmed by the ECJ, for example, in 2009, in the decision C-202/07P *France Télécom*, and in 2010, in the decision C-280/08P *Deutsche Telekom*.

This shift in the objectives of competition protection is even more highlighted in the statements and declarations of representatives of DG Competition during last two years, i.e. since J. Almunia took the office. Already in the Commission's Report on Competition Policy for the Year 2009, J. Almunia wrote in the foreword: "I see competition policy as a means of safeguarding our social market economy and enhancing its efficiency and fairness" (European Commission 2010: 4). If the modernization of the EU competition policy was, among other things, described as a shift from fairness to efficiency, these two goals are by now equivalent and they are moreover set not in the framework of liberal *laissez-faire*, but into one of social-market economy. Commissioner Almunia expressed his credo even more clearly in February 2011: "Our competition policy is the expression of the model born in Europe after World War II and known as 'social market economy.' Competition policy, contrary to what some think, is not about neo-liberalism or the jungle. Its purpose is completely different and positive. Competition policy in Europe is about encouraging entrepreneurship and innovation, the creation of jobs and the placing in the market of innovative products and services that bring choice and competitive prices for the consumer. The role of competition enforcers is to

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[15] See for details the document Communication from the Commission – *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02).

make sure that companies play fair, do not gain excessive power and when they acquire power through organic growth, not to abuse it [...]. Competition policy, therefore, has a regulatory role and this role is essential to preserve social economy and social fairness [...]" (Almunia 2011a). Such a statement obviously cannot be read in other way than as a total return of EU competition policy to its roots, i.e. to a basically ordoliberal policy protection (in addition to the integration of markets) first of all the competitive structure of markets that ensures freedom to compete and social considerations proper to social-market economy.

However, the reality is not so straightforward and simple. The legal basis of the Articles 101 and 102 TFEU would not prevent such a focus, of course, but there are also fifty years of economic theory and competition law development, not only in the EU, but also in the U.S. It cannot be ignored due to the globalization of business and therefore due to the global impact of competition decisions. Numerous other speeches and declarations of Commissioner Almunia and his colleagues rather suggest that a modern, more macro- than micro-economic analysis of competition cases, will serve a broader range of objectives pursued, as it used to be the case, to a certain extent, from the 70s to 90s of the 20th century, when the original ordoliberalism had been already losing its doctrinal impact and neo-liberal voices advocating the clear targeting of interventions in favour of efficiency and consumer welfare were yet weak to prevail.[16] This flexible concept of goals of competition policy is also evidenced by Almunia's resolution to find the "golden mean" between over-enforcement and under-enforcement (Almunia 2010j) as well as his conviction that competition should not be seen as an end in itself but as a tool necessary for achieving the ambitious goals of prosperity, growth and employment [...] as a tool serving consumers and businesses, serving the European economy and society as a whole (Almunia 2010a).

If we go deeper into the declarations of representatives of DG Competition in the years 2010–2011 one can see that the economic analysis and effect-based approach as methods should help the EU competition policy to achieve goals, among which one can find almost everything what has been pursued in the history of antitrust: the protection of consumers and of small and medium enterprises, protection of competitive market structure and of fair chances to succeed, internal market building and other strategic objectives of the EU, promotion of efficiency, of competitiveness and innovation as well as the fight against excessive market power and national protectionism.[17] It sounds like echo

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[16] "An antitrust enforcer cannot look solely at individual cases, but at the market," declared J. Almunia in April 2011 which can be read as a preference given to macro-economic analysis of markets (Almunia 2011e).

[17] Goals of competition declared during 2010–2011: the competitive structure of markets generating welfare for consumers (Calvino 2010, Almunia 2010a); to prevent or put an end

of the above-quoted words of D.J. Gerber that during socially and economically tense post-war years the protection of competition in Western Europe had to demonstrate to the sceptical social classes "that large businesses would not be allowed to utilize their power to the detriment of either consumers or competitors [...] therefore they represented political means of securing support for market ideas and enhancing social integration" (Gerber 2004: 7). It looks as if the competition policy and law returned back into a situation where they must justify their existence and authority by pointing to the beneficial socio-economic effects of their operation. To watch only the consumer welfare (forming in the understanding of neo-liberals only a subset of the total welfare) would simply be seen in the present EU as acting for the sole benefit of the strongest companies, which is socially unacceptable. The competition policy and law must therefore legitimize themselves by their involvement in the search for social-friendly solutions to the crisis, in the search for the "new capitalism."

Conclusion

The current crisis is far from over, so one cannot calculate its final bill for EU competition policy and law. The analysis however shows that EU competition policy and law in the years 2008–2011 set forward, or rather returned, to a kind of golden mean. This means that on the one hand, they successfully avoided possible limitations or even destruction in the name of national industrial and development policies, crisis cartels, and protection of national champions, but on the other hand, surrendered almost everything of its previously embarked upon neo-liberal transformation, except for consistent economic analysis of impact on markets and consumers. At present, it seems that the era of Commissioner M. Monti (in office 1999–2004) and that of the pre-crisis mandate of Commissioner N. Kroes (in office 2004–2010), was a mere liberal deviation from the long tradition of EU competition law and policy, which always followed variety of goals and which has always been not that much an application of a single standard but rather – in the words of M. Malaury-Vignal

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to consumer harm, rather than protecting "competitors" as such (Almunia 2010j); protection of vigorous competition of all players, including small and innovative ones (Almunia 2010i); to encourage companies to compete on the merits and to innovate, so that economy as a whole benefits from increased competitiveness (Italianer 2011a); to ensure a level playing field in markets open to competition (Almunia 2010g); to keep markets open and fair, promote innovation, make sure that no harm is done to consumers (Almunia 2010i); to prevent protectionism (Almunia 2010d, 2010e); to promote fair, stable and efficient environment (Italianer 2011b); full contribution to extend and deepen the Internal market; control of entrenched incumbents and other dominant companies; protection of consumers and SMEs which are often the first victims of the restrictions and the higher prices brought about by anticompetitive practices, such as cartels (Amlunia 2011b); to help to achieve EU's strategic agenda (Almunia 2010b); to ensure that we do not pay too much and do not place too heavy a burden on economic activity to attain public-interest objectives (Almunia 2010g).

from Paris Sorbonne: a tool for intervention in the service of economic and social objectives (Malaury-Vignal 2005: 7).

Defining a paradigm of such competition policy and law and using the generally accepted criteria is extremely difficult. It is neither ordoliberal (Freiburg) nor neo-liberal (Chicago), as it is not Harvard or post-Chicago-like. From similar labels it would be easiest to choose the term "European" and to postulate that for more than half a century the EU competition policy and law crystallized into a peculiar form, compromisory and ambiguous. It wants to serve the integration of European markets on the one hand and the EU's social market model (in the sense that it aims at balance between social fairness and market efficiency), on the other.

Market integration, fairness, and efficiency remain the most likely triangle of goals of EU competition policy and law. The EU cannot give up any of these three goals. Integration of markets remains an important goal because, as shown in the current turbulent period, European politicians and their electorates are not immune to protectionist, neo-mercantilist instincts. Fairness, thus account of equal opportunities, perhaps even of smaller businesses, is now back in the spotlight due to financial and economic crisis that accented the social and subsequently political idleness of neo-liberal ideology of capitalism. Efficiency (consumer welfare) has never been foreign to EU competition policy, because this policy was, by definition, always more liberal than other policies, always cared for functional markets and their contribution to growth and prosperity. Nowadays, in a fully developed global market competition, it can hardly be otherwise. For competitors and their competition advisors, however, this plurality of goals means that they will need to know the whole development of EU competition policy and law from their beginnings to the present, all the wealth of case law and soft law, in order to predict how the EU institutions would decide in cases where it is not possible to satisfy the goals of market integration, fairness, and efficiency simultaneously.

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