COMPETITION LAW AT THE CROSSROADS

Despite calls for its overhaul, competition is where it should be – swinging the pendulum too far in any direction would be a mistake, and it would hit back

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Competition law is now at the centre of political and economic debates, with implications that extend well beyond the discipline itself. What was traditionally a niche area of the law has now become a subject of interest for those concerned about some of the major challenges of our time, including industrial policy and economic protectionism, growing inequality, labour and wages and the perceived challenges posed by digital markets and platforms.

A considerable number of institutions, well-regarded newspapers, economists and politicians from all sides are calling for a fundamental overhaul of the competition rules to ensure that competition law can address all these challenges.

The outcome of this process should concern us all, not only as consumers and citizens, but also as lawyers. The current debates relate not only to the moral underpinnings and ultimate justifications of competition law, but also to wider questions that cut across other areas of law. These have to do with legal certainty, objectivity, the role of expertise in decision-making, the virtues of rule-based systems and non-negotiable legal principles.

Consensus versus hype

As a dynamic discipline, built on remarkably broad legal concepts, competition law has been able to evolve incrementally, incorporating the lessons of mainstream economics, and to apply to all sorts of markets across all jurisdictions. Few areas of law have achieved a similar level of international convergence, thanks largely to the work of specialised courts and agencies. Over the years, competition law has been corrected, overcorrected and corrected again in a quest to devise practicable and economically sound legal rules. This state of permanent evolution driven by reasoned critique, by a rule of reason, is one factor that makes competition law fascinating and unique.

At present, however, there are calls to think competition law anew, take it away from experts and courts, replace incremental consensus with hype and radical proposals, because "we need to get it right, and get it right now". But what if we don't? Can competition law meet those expectations? Do consensus views suggest there is a problem to begin with? In any event, aren't some issues too important to be left to competition lawyers and agencies?

The intimate ties between competition law, economics and regulation may have obscured the fact that competition law is law, not just economic policy.

Prudency, not urgency

Some critics advocate for more aggressive competition law, some for laxer enforcement and political vetoes; sometimes the same actors want both more and less enforcement, depending on the identity of the target. In a way, everyone wants to change the rules when they are not applied the way they like. But this is the very reason why we have rules in the first place.

Those rules are certainly often criticised for being too complex or technical. But this only shows that, at a time when simplicity often trumps complexity, competition law has not resorted to simple solutions to avoid difficulties. On the contrary, it engages in a permanent effort to face complexity, to reason through it, and to distil it into a set of workable rules.

In law, unlike perhaps in politics, the technically right thing to do is the right thing to do. This means that decisions should not be driven by political expedience, but by consistent and rigorous analysis grounded on consensus positions, on precedent and on facts. It means that rules must apply in the same way to all, and not to favour or challenge specific entities, nor to address our concerns and anxieties on a case-by-case basis. It means objectively seeking the truth that the facts bear out, not imposing a given view. It means not compromising on the question of who bears the burden of proof. It means that the law should not rush to condemn practices that are ambiguous or that it does not yet understand. In short, this means prudency, not urgency.

For all its flaws, criticisms and the incremental adaptations that are arguably needed, competition law is probably where it should be. Swinging the pendulum too far in any direction would likely be a mistake, and it would hit back.

Competition law ain't broke, but it risks being broken. We should not let that happen.

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