The Boundaries of EC Competition Law: The Scope of Article 81

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THE BOUNDARIES OF EC COMPETITION LAW: THE SCOPE OF ARTICLE 81

Okeoghene Odudu

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Mr. Odudu has written an interesting book. While readers may disagree with his conclusions, it is well written, provocative, and presents a blueprint for the further development of European Community (Community) competition law. Some years ago this reviewer’s class at Harvard Law School was enlivened by Mr. Odudu’s presence and participation. It is heartening to see that he continues to spark controversy, generate debate, and contribute ideas.

1. A SUMMARY OF MR. ODUDU’S THESIS

The success of the Community’s competition mission is in doubt. This failure is broadly ascribed to the Community’s failure to define its competition policy objectives. Indeed, a myriad of differing objectives historically have driven the Community’s competition enforcement agenda. There are other problems as well. Focusing more narrowly on Article 81, Odudu finds the relationship between Article 81(1) and 81(9) to be confused. Furthermore, the duality requirement of Article 81(1) is shrouded in mystery.1

1 Okeoghene Odudu, Ph.D., is Herchel Smith Lecturer Law & Fellow at Emmanuel College, Cambridge, where he teaches and writes on competition law. Previously he taught competition law at King’s College, London.

2 Each year budding competition lawyers struggle with the duality requirement whether they labor over section 1 of the Sherman Act or Article 81 of the Treaty. Like meat inspection regimes, both the American and the

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Despite its historical shortcomings, European competition policy—like St. Paul on the road to Tarsus—has experienced an epiphany. It is, in Odudu’s view, an epiphany of great importance and one that defines the raison d’être of EU competition policy. After “in barely . . . fifty years of application and reflection, it is now possible to understand Article 81 EC and what it seeks to achieve.” As a result, “we are now at the end of a beginning of a great leap forward.”

Focusing on the objectives of competition policy, Mr. Odudu places himself in the Chicago school. Although sharing the stage with market integration and antidilberal notions of economic freedom, efficiency concerns are paramount. More precisely, Article 81(3), as explained by Mr. Odudu, ensures that the sum of allocative and productive efficiency is maximized. Using a Williamsonian trade-off, the author would have competition policy seek to maximize total welfare.

Like St. Paul’s conversion, Mr. Odudu’s thesis requires faith. Mr. Odudu describes the “efficiencies” foundation of Community competition policy as one of fact and relies on Regulation 2790/1999, the Guidelines on Vertical Restraints, the White Paper on Modernisation, and—importantly—Regulation 1/2003 to support his view. Furthermore, he cites cases from the Community courts where efficiency concerns have trumped others. He also argues that while the Commission, during its European differentiate between concerted and single-firm behavior. And, like most competition regimes, both struggle over the contours of the duality requirement. But Mr. Odudu cites several important commentators for the proposition that the European law in this regard is so unclear that it is impossible to differentiate between unilateral and concerted conduct. See Ouorou, supra note 2, at 5.


tenure as the sole arbiter of Article 81(3), could play the philosopher king, the decentralization of competence to the national courts and national competition agencies requires a more focused objective.

1 share Mr. Odudu’s conclusion that efficiency concerns should trump those of ordoliberal and more populist ideals. But I am more skeptical that the Community has embraced the faith. While efficiency-oriented competition policy is gaining converts throughout Europe, there are still grand soul in Brussels and within the Member States who do not share this view. Nevertheless, armed with a policy objective, Mr. Odudu rallies forth to address the substance of Article 81.

II. A FUNCTIONAL DEFINITION OF “UNDERTAKING”

American lawyers find the concept of an “undertaking” baffling. Whereas American courts spend almost no time analyzing whether an actor is subject to the antitrust laws, almost every analysis within Europe begins with a determination of whether the actors are “undertakings” or “an association of undertakings.” Unlike some Member States, the Treaty does not define the terms.

Although the determination of whether an entity is an undertaking has broader application, Mr. Odudu believes that the principal purpose of the analysis is to separate sovereign from market activity. Given cultural and ideological differences, this inquiry can be difficult. For example, health care can be provided by the state through taxation or via the market. Escewing an institutional analysis, Mr.


4 Except for a very limited set of exceptions, every person—whether natural or legal—is subject to the federal antitrust laws.

5 See, e.g., Competition Act 2001 (Ir.), § 3(1), which defines an “undertaking” as “a person being, an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.”

Odudu favors a functional approach. The focus should be on the activity rather than the institutional actor. For an activity to render the actor an “undertaking,” it must “offer goods or services to the market; bear the economic or financial risk of the enterprise; and have the potential to make profits from the activity.”

Mr. Odudu candidly admits that his test awaits “synthesis and articulation” by the Community courts, but does an admirable job in finding support for his three-pronged inquiry in the case law.

Conversely, he would exclude labor, consumption by end-users and regulation. The author’s discussion of each is intentionally brief and it is perhaps unfair to fault him for failing to provide a more detailed analysis. Nonetheless, the exclusion of labor is a good example of a complicated issue that merits more analysis. As presented, it poses as many questions as it answers. For example, when is a person a wage earner for hire and when is he or she an independent contractor offering goods or services on the marketplace? This is a difficult, but important, practical issue. Similarly the definition of “regulation” and the contours of exempted activity are not easy. Although Mr. Odudu discusses the Wouters case, one is left with many unanswered questions.

III. DUALITY UNDER THE TREATY

Odudu introduces his consideration of the topic by stressing the confusion that characterizes the subject in both Europe and the United States. Odudu’s comments about the American treatment of the

11 ODUDU, supra note 2, at 26.

12 This very issue was at the heart of a recent decision of the Irish Competition Authority. Agreements Between Irish Actors: Equity SIPUT & the last of Advertising Practitioners in Ireland concerning the terms & conditions under which advertising agencies sell hire actors, No. 13/04/02 (2004), presented the issue of whether actors were laborers or independent contractors: the Authority concluded that they were independent contractors and therefore “undertakings” subject to the Act.


14 In support of this confused state, he cites Hans Henrik Lidgard, Unilateral Refusal to Supply: An Agreement in Disguise, 18 E.C.L.R. 325 (1997) among others.
subject are a bit misleading. The concept of duality, which undergirds section 1 of the Sherman Act, is generally well understood and not controversial. Simply put, there must be an agreement between or among the parties. The issue becomes difficult when one seeks to establish duality using circumstantial evidence. But resolution of fact issues is not often easy when circumstantial evidence is paramount.

Odudu focuses his analysis on whether the “concerted practice” language of Article 81(1) means something different from “agreement,” and posits two approaches to this issue. The first requires common intention, but relies on different evidence than that used to show agreement. What then is the relationship between “agreement” and “concerted practice”? Odudu poses the question and posits an answer as follows:

Since concerted practice is included to capture conduct not already caught by “agreement,” and since common intention is caught by agreement, there must be something distinctive about common intention in concerted practice. An idea underlying some cases and commentary is that common intention in agreement is expressed in a manner that gives rise to (legal) obligation, where common intention in concerted practice is not so expressed. The Daestuffs case is instructive in this regard. There the European Court of Justice characterizes “concerted action” to be a “form of coordination” that does not rise to the level of an “agreement properly so-called.” Or, in the words of Advocate General Mayraz, the “author[s] of the Treaty intended to avoid the possibility of... evading Article 81... by so conducting their affairs as to not leave any written document which might be called an agreement.”

Not surprisingly, both public enforcement authorities and private plaintiffs prefer to focus on cases where the evidence of an agreement is clear. This is particularly true with reference to criminal prosecutions in the United States, where the case must be proved beyond a reasonable doubt.

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14 O'Keefe, supra note 2, at 2.

15 Id. at 72.


17 Id. ¶ 64.

18 Imperial Chem. Indus., AC Opinion at 679.
ing this view, the “inclusion of the concept of concerted practice..." enables the authorities to intervene when there is no direct evidence of an agreement, but where circumstances permit to presume its existence with certainty.”

Essentially this is the U.S. approach. In this regard, it is interesting to compare the language of Article 81(1) with that of section 1 of the Sherman Act. U.S. case law holds that the disjunctive language in “contract, combination... or conspiracy” is unnecessary; the terms do not have distinct legal meanings. On the other hand, the use of the term “concerted practice” within Article 81(1) has meaning independent of the agreement language within the same section. At first blush, it might appear that the American and European views diverge. Many, including this reviewer, reject that view. Rather, the Americans simply define agreement very broadly, so that special provision for “concerted practice” is unnecessary, whereas the Europeans define “agreement” somewhat legallyistically.

But Odudu goes on to suggest another broader reading of “concerted practices.” In doing so, he examines cases, like Suiker Unie, which Odudu reads as rejecting a requirement of a common intention. Going beyond the case law, Odudu argues that the Treaty language “concerted practice” adds nothing if it is simply “agreement” liberally defined. One wishes that Odudu had developed his argument more fully. As presented, it is less than persuasive. First, the case law on which he relies is not unambiguous. The Court of Justice’s rejection


22 Odudu cites Bellamy & Child in support of this construction:

[If the parties combine informally to restrict competition, even if the arrangements are binding neither legally nor morally, they may give rise to a ‘concerted practice’. On this view: ‘the only difference between concerted practice and agreements lies in the impossibility of enforcing a concerted practice in court’.


that the defendants must have “implemented an actual plan” in *Suiter Union* may mean nothing more than it says. Second, if one accepts that Article 81 does not reach unilateral behavior in conscious parallelism (and the Community case law seems clear) and that “agreement” may be liberally defined, what field could “concerted practice” occupy? Lastly, it is probably inappropriate to assume that the drafters of the Treaty language must have meant the language to have independent meaning above and beyond a more liberal interpretation of agreement. More probably the drafters wanted to insure against a legalistic interpretation of agreement and used “concerted practice” to accomplish that result.

Odudu does not give up the point and seemingly suggests that there may be conduct that goes beyond conscious parallelism that does not involve agreement. Noting that some commentators have suggested that any contact among parties designed to reduce uncertainty about their future conduct can be characterized as “concerted action,” Odudu suggests communication among sellers may suffice. Where a competitor has communicated (perhaps via a price announcement), and it is followed by competitor conduct, is it permissible to infer duality? At the end of the day, it seems we are really asking nothing more than whether the trier of fact can permissibly infer the existence of an agreement based on circumstantial evidence.

The section on duality concludes with a discussion of section 1 of the Sherman Act and Article 81(1) of the Treaty and their relationship

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28 Id. at 85.
29 Second, and more troubling, is whether there is any other plausible explanation for the conduct that followed. Odudu cites Community cases for the proposition that “conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.” Id. at 77, quoting A Ahituv v. Oskerythri v. Comm’n, 1993 E.C.R. I-1307 ¶ 71.
to conscious parallelism. While an able discussion of the issues, it does not add to the analysis.

IV. THE MEANING OF RESTRICTED COMPETITION

This issue goes to the heart of the relationship between Article 81(1) and 81(3). Does Article 81(1) simply confer jurisdiction while Article 81(3) assesses the impact? Or, does Article 81(1) "serve a substantive function"? In perhaps the most interesting chapter of the book, Osdou describes the respective roles of the two sections. Article 81(1) focuses on whether the conduct at issue reduces allocative efficiency, while Article 81(3) focuses on production efficiency. Thus he rises to the defense of the bifurcation that has been the subject of much criticism.28

Osdou recognizes that Article 81(1) proscribes conduct when either its "object" or "effect" is anticompetitive. Therefore the efficiency losses may be ex post or ex ante. Osdou then discusses the presumptions involving "hard core" conduct is both U.S. and EU competition law. While Article 81(3) precludes the existence of per se offenses in Europe, the Commission has made it clear that certain "hard core" offenses are presumed illegal. After the BMW26 and NCAA27 cases in the United States, it is probably fair to say that the American per se rule is really a presumption, which while very strong, is not irrefutable.28 Thus United States and Community law are increasingly similar in this regard.

27 Osdou quotes Professor Barry Hawk's statement that "the bifurcation of what ideally should be a single anti-trust analysis into the double tests of [Art. 81(1) and 81(3)] results in 'near starkness': "Barry Hawk, The Americans (Anti-trust) Revolution: Lessons for the EEC?, 9 E.C.L.R. 53, 60 (1988). He also notes Professor Richard Whish's query of whether the bifurcation is the original sin of European competition law. Osdou, supra note 2, at 151.
30 For a recent exposition of the movement toward a structured approach to rule of reason analysis, see In re Polygram Holdings, Inc., 5 Trade...
The Commission’s monopoly jurisdiction over Article 81(3) prior to Modernisation28 presents an obvious difficulty with Oduodu’s allocation of efficiencies between the sections. He addresses this issue noting supportive Community case law,29 but essentially recognizing this to be a long-standing problem now solved by Regulation 1/2003. While Modernisation may have cured this problem, it does pose the question of whether the national courts will be able to undertake the production efficiency analysis. Oduodu is optimistic, noting that they already apply similar provisions under national law.30

While the national courts may be able to do as well as those of the Community, there is still the larger issue of how well any court will be able to measure and compare allocative and production efficiencies and insure that consumer receive the legally required fair share of the efficiency gains.31 In one of the book’s most interesting discussions, Oduodu discusses the myriad of issues that surround these questions. Having said that, the discussion is more of an itinerary than a travelogue. For example, it is one thing to say that the transmission of benefits to consumers must be “reasonably proximate” to the allocative losses and another to define “proximate” in a pending case.32 For another, what is a “fair” share of the gains? Even more difficult is the ex ante application of the calculus in “object” cases where one seeks to predict future consequences. Oduodu recognizes and analyzes these issues, but—not surprisingly given the difficulty of the issues—much of the discussion remains open-ended.

36 It is to be noted that Oduodu concludes that the “consumers” are European consumers as opposed to consumers generally. For a brief, but interesting, comparative discussion of this issue see Oduodu, supra note 2, at 152 n.171.
37 See id. at 153.
V. NONEFFICIENCY GOALS

Having squarely put efficiency considerations at center stage in the introduction of the book, Odudu concludes the volume by addressing the role of nonefficiency goals in more detail. Here Odudu notes that a myriad of goals have been pursued in the past and concedes that within recent memory some European policy makers have admitted as much and acknowledged the propriety of doing so. He then makes the "efficiency argument," using the points made by others before but in the context of the evolution of the Community. For this reviewer, it was an "easy sell." Whether he makes converts of previous nonbelievers remains to be seen.

VI. CONCLUSION

Odudu undertook a very large subject and has made a significant contribution to the literature. Given the size of the undertaking, this one volume cannot be encyclopedic. Nevertheless, the author covers a broad waterfront. The author's discussion throughout is interesting, but it is his defense of the substantive bifurcation of Article 81 that is most provocative. It is a "must read" for anyone seriously interested in European competition law.

Precisely where Okeoghere Odudu goes from here remains to be seen, but doubtless it will be interesting and add value to the analysis and development of competition law.

\* Id. at 10. For example, Director-General Ehlermann is quoted saying: It would probably be an exaggeration to assume that . . . non-economic considerations are to be totally excluded from the balancing test required by Article 81(3). Such an interpretation would hardly be compatible with the Treaty, the Court of Justice’s case law, and the Commission’s own practice. Claus-Dieter Ehlermann, The Modernisation of EC Antitrust Policy: A Legal & Cultural Revolution, 37 CML Rev. 537, 549 (2000).

Community competition law’s goals are rarely discussed, but many of the Commission’s policy statements now assert that the objective of Article 81 EC is to protect competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. There is no room in the Commission’s new world for public policy goals. See, eg: Odudu, O, The Boundaries of EC Competition Law: the scope of Article 81 (Oxford, Oxford University Press, 2006) ch 7; and Ehlermann, CD and Laudati, L (eds), European Competition Law Annual 1997: The Objectives of Competition Policy (Oxford, Hart, 1998).