Discretion and prioritisation in public antitrust enforcement

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All views expressed are strictly personal
Overview

- notion of discretion
- antitrust enforcement by the European Commission
- antitrust enforcement by national competition authorities
- prioritisation:
  - arguments in favour
  - risks
Discretion

with regard to a certain matter
(e.g. whether to investigate and prosecute a suspected infringement; whether a certain practice constitutes an infringement; whether to impose a fine; what the amount of the fine should be; ...)

= whenever the law leaves the competition authority a certain freedom to choose among different possible courses of action according to the authority’s own judgment
Discretion ↔ margin of appreciation

three primary elements in each decision:

1) finding facts
2) settling the standards or criteria on which the decision should be based
3) applying the standards to the facts

- **discretion** relates to 2) i.e. a certain freedom of choice as to the standards or criteria which govern the decision

- ≠ **margin of appreciation** when assessing facts (in the light of the rule or standard) under 3)
Antitrust enforcement by the European Commission

a) investigation, prosecution and settlement
   → wide discretion

b) content of the antitrust prohibitions
   → no discretion

c) fines
   → discretion but unlimited jurisdiction General Court
Investigation, prosecution and settlement: discretion to set priorities

- positive priorities
  - C-344/98 Masterfoods: task of orienting EU competition policy → broad discretion to select cases
  - Article 11(6) Reg 1/2003
  - C-375/09 Tele2 Polska
  - limit: misuse of powers (evident, on the basis of objective, relevant and consistent evidence, that it was taken with the exclusive or main purpose of achieving an end other than the enforcement of Articles 101 and 102 TFEU)
Investigation, prosecution and settlement: discretion to set priorities

- negative priorities
  - businesses cannot force the Commission to take a position on the legality of their agreements or practices
  - Commission can give differing degrees of priority to complaints, and reject for lack of sufficient EU interest but
    - obligation careful examination complaint + reasoned decision, possible judicial review
Investigation, prosecution and settlement: discretion to set priorities

C-119/97 P Ufex §§ 92-93:
« when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty »
→ individual assessment in each case

Guidance on enforcement priorities
Investigation, prosecution and settlement

- discretion how to conduct investigations

- discretion to limit the investigation or the finding of infringement to only part of a case

- discretion to settle
Content of the antitrust prohibitions

- Art. 101 & 102 TFEU = directly applicable
- Article 19 TEU: Court of Justice ultimately responsible for interpreting EU law

- « even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by the Treaties as interpreted by the Court of Justice » (AG Kokott, C-109/10 P Solvay)

- « an abuse of a dominant position is what the Court says it is » (Judge Meij)
Content of the antitrust prohibitions

- Commission decisions / Commission observations in preliminary reference proceedings
- Discretion on the interpretation of the prohibitions ↔ margin of appreciation on complex economic assessments
- Exemption regulations
- Guidelines, notices and other interpretative communications
Fines

- Commission discretion:
  - fine or no fine
  - factors taken into account for amount
  - raise general level

- Guidelines on the method of setting fines, Leniency Notice, Settlements Notice

- General Court’s unlimited jurisdiction
Antitrust enforcement by national competition authorities

- national law, but principles equivalence & effectiveness
- mostly similar
- differences as to discretion to set negative priorities (rights of complainants):
  - France
  - Germany
  - UK
Arguments in favour of prioritisation

1) over-unclusiveness of the antitrust prohibitions
2) enforcement costs exceeding enforcement benefits
3) limited enforcement resources
4) unrepresentativeness of complaints and leniency applications
5) discretion through infrequently imposed high penalties
6) other enforcers better placed
Prioritisation risks

- arbitrariness or discrimination risk
- short-sightedness risks
- predictability risk
- prioritisation process risks
paper

« Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust enforcement »

http://ssrn.com/paper=1759207