

St.Gallen ICF 2016

The future of competition law – is politics taking over?

PETER FREEMAN
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The 2016 St.Gallen International Competition Law Forum ICF will serve as the backdrop for discussions on a variety of current competition law, economics and policy topics. One of the panels is going to focus on the future of competition law. Namely, it will try to evaluate whether politics is going to take over. Who is going to be the driving factor in the advancement of the field? Are we going to see a shift towards more political decision? Has competition law always been driven by political decisions? Is there a difference between the different areas of competition law? Is there maybe even a need for enforcement to be influenced by policy?

The following interview between PETER FREEMAN (a Chairman, Competition Appeal Tribunal; Former Chairman, UK Competition Commission) and ULRICH SOLTÉSZ (Partner and Attorney-at-Law, Gleiss Lutz) offers you some food for thought and a starting point for our panel discussion. During the St.Gallen ICF itself, additional input and foreign perspectives will be offered by PROF. THOMAS CHENG (Professor, University of Hong Kong) and PROF. DR. ALEXEI ISPOLINOV (Professor and Head of International Law Department, Moscow State University).

Join us in St.Gallen on May 19th and 20th for the “THE FUTURE OF COMPETITION LAW – IS POLITICS TAKING OVER?” panel. More information about the conference and a list of the remaining panels and speakers is available on www.sg-icf.ch.

PETER FREEMAN: Given that EU competition law is applied in an economic policy context, is it really surprising that politics are involved? Do you think the political aspect of EU competition law has increased in recent years, and, if so, why should this be?

ULRICH SOLTÉSZ: The influence of politics in competition law is not really surprising; basically all EU Commissioners and of course

also the current Commissioner for competition, Ms. Vestager, can look back at a successful career as political leaders in their home country. Therefore, they might see competition law from a politician’s point of view rather than only from a strictly legal perspective.

This is also the main reason why I do not believe that the political influence in the

enforcement of European competition law has increased over the last years. There have always been high profile cases which drew the attention of the public. In such circumstances the parties involved have often claimed that decisions have been based on political considerations. Such general criticism has often, but not always, been unjustified.

PETER FREEMAN: When we ask “*Is politics taking over?*” do we mean politics in the sense of political moves within the EU Commission (that is to say one Commissioner trying to do better than the others) or do we mean that the Commission as a whole may have a political agenda, either vis-a-vis the Member States, or internationally?

ULRICH SOLTÉSZ: I think it would be the latter point. It is probably fair to say that the Commission as a whole does have a political agenda, published notably in the annual work program. Since the 1990s, the Commission has pushed the liberalization of many different markets, for example the energy and telecommunications markets, later also the markets for finance and media. This has also been done by the means of competition law. The Commission also uses the instrument of sector inquiries to focus on restrictions on competition in specific markets, the most recent example of which being the sector inquiry into e-commerce. This is also a way to achieve specific political goals. And, as a side-effect, such steps are well very popular with the general public.

PETER FREEMAN: In what ways can political influence show itself? Is this in the choice of undertakings against which the Commission takes action (for example US rather than EU based); or is it in the choice of industrial sector (for example on-line retailing, financial

services or information technology); or in any other way?

ULRICH SOLTÉSZ: Like you say, there are many ways how political influence can show itself. However, the popular view that the Commission prosecutes US- rather than EU-based companies as a sort of pseudo-trade policy is unfounded. I do not believe that US companies are being discriminated against. Between 2010 and 2015 the Commission adopted 34 cartel decisions, imposing fines of € 9.2 billion on 208 companies. Almost 60% of these fines were imposed on European companies and only 5% on US-based companies. On the other hand, the US Department of Justice (DOJ) imposed fines totalling \$ 4.1 billion during the same period, only 6% of which were fines to US companies. These numbers should speak for themselves.

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The focus on specific industrial sectors is certainly a way to wield political influence. Commissioner Vestager has set her particular interest in certain industrial sectors, such as telecommunications, online-retailing and energy.

This political aspect of competition law is even more emphasized in the current Juncker-Commission, as he sees the Commission very much as a political body. In the understanding of Ms. Vestager, this political understanding of the work of the Commission demands competition policy to use all the available tools to support economic growth. On the other hand she also emphasized that competition rules must be met regardless of such political objectives. Thus, in its enforcement part of competition law there is “no room to spare for political interference”, according to Ms. Vestager.

PETER FREEMAN: If political influence is increasing, is this to be explained by the personalities and ambitions of individual Commissioners, or by wider considerations perhaps linked to the difficulties increasingly faced by the EU itself (for example resurgent populism, pressure on the Euro from weaker economies, or the effect of refugees and economic migrants)?

ULRICH SOLTÉSZ: I think both explanations hold true to a certain extent.

As Commissioners often have to find a job “back home” after their term within the European Commission, there is a certain danger that Commissioners will use their influence to boost their personal careers.

One example during the term of Mr. Almunia as Commissioner for Competition highlights how strong the personal bonds of Commissioners with their home country are: When some smaller football clubs in the Netherlands received very small amounts of State aid, the Commission started State aid proceedings almost immediately. However, some big Spanish football clubs, such as e.g. Real Madrid, FC Barcelona and Atletico Bilbao, obtained state support worth hundreds of millions, but it took the Commission more than four years and a complaint to the European ombudsman to start proceedings against Spain. With Mr. Almunia being said to be a supporter of Bilbao, this example may give an impression on possible political or individual influence to the enforcement of competition law.

PETER FREEMAN: If political influence is having some effect, does this differ as between the three main areas of EU competition law, namely antitrust, mergers and State aids? Isn't it in any event inevitable that EU control of

State aids will be subject to political interference from Member States?

ULRICH SOLTÉSZ: Yes, the political influence between these three areas differs indeed. Whereas this influence in antitrust and merger is rather small, the political influence in the area of State aids is more visible. As State aid per definition requires the participation of a Member state, it is nearly impossible to prevent an influence of the Member state concerned. In addition to that, the Commission has a wide margin of appreciation when approving State aid, so that decisions on political grounds seem more likely.

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PETER FREEMAN: Do you think politics should play any role at all in EU competition law? If yes, then what should that role be and how should it be kept within proper limits? If no, then is there not a danger of competition law becoming increasingly divorced from political reality and open to the charge that it is more concerned with pursuing its own technical perfection than the interests of EU citizens?

ULRICH SOLTÉSZ: First of all, I do not think that some influence of politics in competition law is per se negative.

However, this influence should not interfere with the enforcement of competition law in specific cases, where it concerns for example the amount of fines. Equally the question of whether or not proceedings are started by the Commission should not be influenced by

political considerations. Any political influence on individual cases proceedings would constitute a breach of due process.

On the other hand, I think what you are implying with the second part of your question is right: the Commission is also a political body and should not see itself as a detached, purely administrative authority. As long as the political influence stays within the area of policy decisions, i.e. abstract legislative measures, “political influence” is basically a good thing because here it means that the Commission can be held politically accountable.

PETER FREEMAN: How do you see these trends developing in the future? Will there be more politics or less? Will this make EU competition law easier or more difficult to apply?

ULRICH SOLTÉSZ: The development of the political influence in European competition law is hard to predict. Most probably, some tension between politics and the legal enforcement of competition law will always exist.

By the way, political influence in competition law also exists on a national level. As you might know, the German Federal Competition Authority recently prohibited a merger between two big food retailers. However, the German Minister for Economic Affairs and Energy, Sigmar Gabriel, granted a so called “Ministerial Permission” that allowed the merger to go through under certain conditions. This Ministerial Permission exists in German law to allow mergers, after having been prohibited by the Competition authority, if the negative effect on the market and the competition is outweighed by the advantage for the economy as whole. One of the conditions in the recent case was the requirement to keep all the 16,000 jobs. Here, one can see the political influence on competition law quite clear, as the saving of jobs is not part of the legal criteria provided by German antitrust law but is rather a political reason.



Peter Freeman has spent more than 40 years in the competition law field, as a practitioner and commentator, as an authority head, and as a specialised judge. He has had ample opportunity to observe the various ways in which political factors can influence competition law and policy at national and EU level.

Ulrich Soltész is a partner at the Brussels office of Gleiss Lutz. Since 1997 he advises companies and public bodies in the field of EU competition law, representing them before the European Commission, national competition authorities as well as the European Courts. He has published numerous articles on the subject, contributed to many books and is a regular speaker at conferences.

