Social rights and economic objectives: The importance of competition at supra national level

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ABSTRACT

The need for a supra national model which embraces and provides for social rights of individual Member States is becoming more apparent amidst the ever intensifying integration process within the EU and its involvement in areas which have been undermined by an economic model. This paper considers why, despite such a need for a supra national model, the "ordo liberal European polity" is favoured. It partly does so, by way of reference to two judgements from the European Court of Justice (ECJ) – namely, *Laval un Partneri Ltd* , and the *Viking* Cases.

Can competition rules (during and beyond periods of financial crises) be designed and implemented in such a way whereby the facilitation of the aims and objectives of the EU Internal Market are optimally realised? To what extent can such rules be reconciled with the all paramount and more highly prioritised goal of sustaining economic and financial stability? Further, to what extent should competition rules be given due prominence – particularly during chronic periods of financial crises? To what extent should competition be encouraged (where it would result in downward spiral and generate unproductive and detrimental results) : to what extent, therefore, should competition rules (within such a context) be respected? These also constitute further questions which this paper seeks to address.

Key Words: European Court of Justice (ECJ); integration; competition; regulation; ordo-liberalism; economic objectives; social rights; internal market; bank rescues

Social Rights and Economic Objectives: The Importance of Competition at Supra National Level

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I. Introduction

Competition and Economic Regulation

Competition it has been argued, is so important that it should be elevated from its status as a principle of financial regulation to a statutory objective of financial regulation. This is the view shared by some regarding the statutory objectives and principles of financial regulation in the United Kingdom. The rise of conglomeration over the past two decades, as well as globalisation has resulted in changes to the structure of regulation in countries such as Germany, the UK, and Scandinavian countries such as Denmark, Norway and Sweden. With transnationalisation of standard setting processes and increased harmonisation between countries such as the US, the UK and Germany, in these standard setting processes, this has resulted in less role for the State and a greater role for supra national bodies. The traditional tool of deregulation as a means of fostering competition has therefore become inconceivable. As a result, there is even greater need to promote measures which would facilitate competition.

However the priority accorded to the objective of ensuring financial stability – over that of fostering competition (as well as the extent to which authorities, such as the European Commission, are prepared to facilitate measures aimed at fostering financial stability – even where these may still distort competition),[2] highlights the prominence accorded to financial stability as an economic objective. During the recent global financial crisis, it was widely accepted that "a serious disturbance in the economy of Member States had occurred and that measures supporting banks are appropriate to remedy this disturbance".[3]

„In order to assist Member States to take urgent and effective measures to preserve stability and to provide legal certainty, between October 2008 and July 2009, the Commission adopted four Communications which provided direction on how State aid rules are to be applied to government measures to support the financial sector within the context of the Financial

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[2]As evidenced by many rescue and State aid cases during the recent Financial Crisis.

[3] "This having been confirmed in various Commission communications such as the *Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis(hereinafter "the Banking Communication"), its Communication on the re capitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (hereinafter "the Re capitalisation Communication"), and its Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (hereinafter "the Restructuring Communication").*"In order to address continued uncertainty about the value and location of impaired assets held by banks, the Commission also adopted the Communication on the treatment of impaired assets on February 25 2009." See also N Kroes, „Competition Policy and the Crisis – the Commission's Approach to Banking and Beyond" February 2010 at page 4 of 7
<http://ec.europa.eu/competition/publications/cpn/2010_1_1.pdf>

Crisis.[4] Various rescue cases - such as those of Bradford and Bingley[5] and Hypo Real Estate[6] have confirmed how far the European Commission is willing to go in order to facilitate financial stability – even where competition may be distorted as a result.[7]

The Commission's resort to the „rarely used and more lenient provision of Article 87 (3)(b) EC Treaty, during the recent Financial Crisis, to authorise national recovery plans and individual rescue measures"[8] is an explicit illustration of its committment to goals aimed at facilitating economic stability through the aversion of „a serious disturbance in the economy of Member States." Its realisation of the need to implement this provision occurred after Lehman Brothers filed for bankruptcy[9] – the first case to be decided under Article 87(3)(b) EC Treaty, being Bradford and Bingley.[10]

As well as the attention drawn (by key findings published by the OECD) to the controversy generated by some who argue that competition rules should be suspended for the duration of financial crises - thus allowing regulators to focus only on the objective of safeguarding the stability of the financial system, these findings also conclude that, whether competition is desirable at all when there is a systemic crisis, is a matter which generally, is in need of clarification.[11]

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[4]N Kroes, „Competition Policy and the Crisis – the Commission's Approach to Banking and Beyond" February 2010 at page 3 of 7
<http://ec.europa.eu/competition/publications/cpn/2010_1_1.pdf>

[5]European Commission, "State aid N 194/2009 –United Kingdom: Liquidation Aid to Bradford and Bingley Plc section 4 paragraph 44

[6]European Commission, „State aids n° C 15/2009 (ex N 196/2009), N 333/2009 & N 557/2009 - Germany Hypo Real Estate – Extension of formal investigation procedure, and temporary find capital injections compatible"

[7]However emphasis is still directed at the need to minimise or avoid distortions of competition.

[8]See D Gerard, „Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem" at page 6 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330326

[9]„With respect to State aid law enforcement, the Commission also consistently refused to authorise measures pursuant to Article 87(3)(b) EC Treaty during the period prior to mid September 2008." The period from mid September 2008 being a point where it was realised that „the systemic turn was beginning to affect even fundamentally sound financial institutions." See ibid

[10]In respect of Northern Rock, and with respect to the legal basis of the Commission's decisions, „the rescue decision and the decision of 2 April 2008 to open the formal investigation procedure, were taken on the basis of Article 87(3)(c) of the Treaty and the Rescue and Restructuring Guidelines. The reason for this being that the Commission considered the difficulties faced by Northern Rock to be linked specifically to Northern Rock – therefore not justifying the application of Article 87(3)(b) of the Treaty. As the severity of the Financial Crisis affected more and more banks, in September 2008, the Commission considered the application of Article 87 (3) (b) EC Treaty, to banks that were in receipt of State aid, to be necessary thereafter. „

„Therefore the decision extending the formal investigation procedure and (ii) the final decision were taken on the basis of Article 87 (3)(b) EC Treaty." See Z Didziokaite and M Gort, „Restructuring in the Banking Sector During the Financial Crisis: The Northern Rock Case" at pages 3 and 4 of 6 http://ec.europa.eu/competition/publications/cpn/2010_1_18.pdf

[11]"Others have instead emphasised the importance of applying strict competition rules in the recent crisis as a means of ensuring a level playing field and a coordinated reaction to the crisis – as well as avoiding a futile race for subsidies between countries to attract depositors and investors. Moreover, the long-term effects of relaxing competition policy can be serious. Mergers that lead to very concentrated markets in particular are almost impossible to reverse."; See Organisation for Economic Cooperation and Development, "Competition and the Financial Crisis" at page 12

II. Addressing the Lack of a Socio-Economic Model at Supra National Level in the EU.

Social Rights and Economic Objectives

The facilitation of competition can be said to constitute one of the primary economic aims of the EU. According to Article 2 of the Treaty Establishing the European Community, the establishment of a common market should facilitate a high degree of competitiveness and convergence of economic performance. Article 3(g) of the EC Treaty lists activities of the Community which include *inter alia* a system ensuring that competition in the internal market is not distorted.

"The theory of ordo-liberalism, which influences politics to a great extent in Germany, bases the European model on a dual polity which did not require democratic legitimacy: At supra national level, it aims to ensure a process of undistorted competition whilst sustaining economic rationality.[12] At national level, endeavours are to be made to further the development of social policies."

However, the need for a supra national model which embraces and provides for social rights of individual Member States is becoming more apparent amidst the ever intensifying integration process within the EU and its involvement in areas which have been undermined by an economic model – namely, those involving social policies. The need for unity amidst increasing intensification of integration within the EU is also vital to ensure the administrative workability of functions within the EU. How is one to reconcile the aims of fostering competition and those social rights such as those aimed at ensuring minimum wage requirements? The issue regarding whether an introduction of minimum wages fosters or hinders competition could be complex and different results emanate according to whether it is viewed from a supra national level or from a national level. As regards social rights, these also depend on whose social rights are in question. To illustrate using Laval[13], whose rights carry more weight - those of the posted workers or those workers of the host state?

In Laval, the Court presented as a social right (of the posted workers), the universally guaranteed higher minimum wage in the host state. That unless, employers who are not threatened by collective actions agree voluntarily to pay more than the local minimum wage, then no action may be taken by a union of the host state in order to extract higher compensation from employers.[14] However, the Posted Workers Directive states in its preamble that where a conflict with established industrial relations occurs, the Directive must assume a subordinate position.[15]

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[12] C Jörges and F Rödl, ' On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project, Reflections after the Judgments of the ECJ in Viking and Laval' at page 5 <http://www.hanselawreview.org/pdf6/Vol4No1Art01.pdf>

[13] Case C-341/05, Laval un Partneri Ltd, of 18 December 2007 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0341:EN:HTML>

[14] In effect, established systems of industrial relations where trade unions are able to demand concessions that are more favourable for workers than that stipulated under statutory minimal standards are deemed, in principle, to be incompatible with EU Law. For more on this see A Somek, Idealisation, De-politicisation and Economic Due Process: System Transition In The European Union **)** in "The Law/Politics Distinction in Contemporary Public Law Adjudication." Edited by B Iancu, March 2009.

[15] ibid

Should values of these social rights be weighed against the values of free market access at supranational level? What authority/ies should determine those social rights which do and do not conflict with European economic objectives?

In the Viking Case[16], the ECJ realigned the balance between economic freedoms at European level and social rights at national level with the pre-requisite that Member States comply with community law when exercising their authority in the field of labour law.[17]

The problem however, is that the Community is not authorised to regulate national industrial relations.[18] The basic rights involved are not within the jurisdiction of the Community since Article 137 (5) EC expressly provides that "pay, the right of association, the right to strike or the right to impose lock-outs" are matters to be regulated by the Member States.[19] "Not only did the Court accord an extremely extensive interpretation of European primary law (Article 137 (5) EC in Viking, it also did likewise in interpreting European secondary law (Directive 96/71/EC) in Laval.[20] Furthermore its interpretation of the Directive 96/71/EC in Laval, did not take into consideration vital elements of the Swedish social model."[21]

III. Conclusion

The role assumed by the Commission in the recent Financial Crisis – particularly with regards to bank rescues, illustrates the extent to which economic and competition policies are now being managed at supranational level.

Social rights which exist at national level should be incorporated at EU level in so far as these do not severely impede or hinder competition. Those (social) rights which conflict with economic objectives of European economic integration should be determined according to the national laws of the Member State/s involved. EU legislation should stipulate (where possible) those rights which do and do not conflict with European economic objectives – hence matters to be decided upon by national courts and the ECJ respectively. This is however, a complicated task.

The ordo liberal European polity is therefore favoured in the sense that social rights which do not conflict with economic rationales and the aim of facilitating a system of undistorted competition should be recognised at supranational level. Furthermore it is administratively

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[16] Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML>

[17] ibid

[18] ibid

[19] ibid

[20] See C Jörges and F Rödl, ' On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the "Social Deficit" of the European Integration Project, Reflections after the Judgments of the ECJ in Viking and Laval' at page 5
<http://www.hanselawreview.org/pdf6/Vol4No1Art01.pdf>

[21] ibid

unworkable for the ECJ alone to take into account all vital elements of every Member State's social model.

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