Book Review

**Competition Law and Public Service in the European Union and the United States**

Tony Prosser

*The Limits of Competition Law: Markets and Public Services*

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Reviewed by Jim Rossi

When competition laws and other public service principles are in tension, can courts avoid a collision or will it be necessary to pick a winner? In *The Limits of Competition Law: Markets and Public Services*, Tony Prosser, a Professor of Public Law at the University of Bristol, England, sheds light on the debate. He pays particular attention to public service obligations and their implications for the regulation of state monopoly in the European Union, drawing interesting and important connections between antitrust principles in the UK and elsewhere in Europe, specifically France and Italy.

Although the notions of sovereignty that predominate in the EU differ fundamentally from those of federalism in the United States, Prosser’s discussion parallels familiar American debates about the scope of defenses for regulated industries under antitrust laws. By highlighting comparative differences between the UK and continental approaches to addressing potential conflicts between antitrust and public service law, Prosser emphasizes how a normative understanding of the nature of governmental intervention can contribute to a more robust assessment of the overlapping domains of competition law and public service obligations more generally. His analysis warns against an overly legal positivist understanding of antitrust defenses for regulated industries.

**Competition Law and Public Service in the EU**

Prosser begins his book by highlighting the tension between markets and competition law, on the one hand, and public service obligations, on the other. This tension is well known, paralleling the apparent divide between efficiency and fairness or equity as antitrust law’s goals. Whenever government has an active scheme of regulation for universal service in health care, compulsory access for telecommunications and broadcast providers, or energy service, the question about the scope of antitrust intervention is implicated.

As Prosser illustrates in his book, the UK has a long tradition of public service regulation, but recent legal decisions echo the *Report on Regulatory Reform* of the Organization for Economic Cooperation and Development (OECD) (published in 2002).Traditionally, UK notions of public service were largely “political and discretionary,” (p. 43) “part of an ill-defined concept of the public interest to be protected through nationalization rather than a set of specific norms susceptible

Jim Rossi is Harry M. Walborsky Professor and Associate Dean for Research, Florida State University College of Law. E-mail: jrossi@law.fsu.edu.

1 Page references to this book appear in the text throughout this review.
to legal enforcement” (p. 44). Nevertheless, for most of the 20th century, a broad “public interest” helped to create a safe harbor for public service regulation.

In contrast to this traditional approach, the OECD report suggests “a very strong preference for regulation only through competition law; any exceptions must be justified by ‘clear evidence’ and ‘compelling public interests’” (p. 4). Recent UK decisions appear to echo this approach. Industry privatization coupled with the recent UK approach to antitrust immunities—reflected in the Competition Act of 1998 and the Enterprise Act of 2002—disfavor public service obligations. Prosser observes that the new approach has practical implications for industries in the UK. One example is the Office of Fair Trading’s investigation of entry restrictions for retail pharmacy services, which “concluded that all control of entry regulations for retail pharmacies should be abolished because of the benefits of increased competition for prices and service quality . . .” (p. 51).2 Another example discussed is the UK agency’s BetterCare decision (2003), in which the new UK competition law was applied to an entity that exercised public functions, indicating that the scope of competition laws in the UK is broad and emphasizing the increasing significance of the definition of exceptions (pp. 56–57).3

With the emergence of this new approach in the UK, Prosser warns that “there appears to have been little development of principles relating to the special needs of public services” (p. 65). He finds this particularly worrisome given the “gradual development of social regulation based on public service concerns, notably in relation to protecting university service and the interest of consumers in newly competitive markets” (p. 93). Consumer protections in the UK are described by Prosser as “pragmatic” (p. 67), at best, and “uncoordinated and inconsistent” and leading to “inefficiencies and inequities,” (p. 94) at worse.

In contrast to the UK approach, what Prosser labels the “Continental tradition of public service” begins from first principles rather than politics. He uses the French law of le service public and the Italian law of servizio publico, much of which takes on constitutional status, as illustrations. As Prosser highlights, le service public operates at a high level of generality but is central to French administrative law and appears in several French legal sources. Italy’s servizio publico, which appears in its constitution, reflects “the inherent duties of the state to ensure its proper delivery, either through ownership or through effective private operators” (p. 119). What these approaches share is an emphasis on social solidarity over competition and markets—a topic Prosser explores in a conceptual chapter early in his book (Chapter 2, titled “Competition Law, Citizenship Rights, and Social Solidarity”).

After tracing the Continental tradition of public service, Prosser discusses its fit with European Community law. As is discussed in the book, this is a complex issue, in part because of the decentralized approach of the EU and the radically different notions of public service, law, and politics among its 25 Member States. It is also complex because EU laws themselves pull in differing directions, presenting a difficulty in “reconciling liberalized markets and competition on the one hand and protection of public service goals on the other” (p. 124). Prosser’s examination of the relevant articles and rules of competition law illustrates this potential tension. EU competition law contains strong protections for competitive markets. For instance, Article 31, as amended by the Treaty of Amsterdam, prohibits discrimination in commercial dealings between Member States. In a manner similar to the Sherman Act, Articles 81 and 82 present general rules of competition law,

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2 Office of Fair Trading, The Control of Entry Regulations and Retail Pharmacy Services in the UK, OFT 609 (Jan. 2003).
3 Office of Fair Trading, BetterCare Group Ltd/North & West Belfast Health and Social Services Trust (Remitted Case), Decision 98/09/2003.
prohibiting agreements between undertakings and concerted practice (akin to Sherman Section 1 violations) and abuse of a dominant position (akin to Sherman Section 2 claims). Enforcement can be carried out by the European Commission or by enforcement authorities in any of the 25 Member States.

However, Prosser notes that EU law also creates some safe harbors for public service regulation. Article 86(1) carves out an exception from the general rules of competition for “public undertakings and undertakings to which Member States grant special or exclusive rights.” Article 86(2) provides an exception for undertakings “entrusted with the operation of services of general economic interest or having the character of revenue producing monopoly . . . .” As Prosser highlights, a real tension exists between Article 82 and Article 86’s exceptions, but courts recognize broad exceptions for universal service purposes. He discusses some of the leading cases. For instance, a challenge to the Belgian postal service’s exclusive right to collect, transport and deliver mail to sustain universal service led to the celebrated Corbeau case.4 There it was recognized that the exclusion of competition for special services is permissible if competition in them would compromise the economic equilibrium of service of general economic interest.

In another case, German restrictions on commercial entry to provide ambulance services intended to protect emergency ambulance services was upheld on the ground that the restrictions were necessary to maintain the quality and reliability of service.5 Prosser’s analysis also highlights such cases as the European Court of Justice’s Altmark decision, which addresses the scope of permissible state aid for monopolies that provide public services.6

These cases appear to interpret the exceptions to competition law broadly, even where there are less restrictive alternatives for competition that Member States could have used. For example, the Court may permit companies to enter into exclusive purchase and sale agreements for electricity to ensure uninterrupted service to meet a state-imposed requirement, even if the agreements have the effect of precluding imports from Member States and even if other means of providing uninterrupted service (such as competitive bidding) were less restrictive of competition. The Court has recognized that restrictions on competition must be permitted to allow an undertaking “entrusted with such a task of general interest to perform it.” It also has recognized that “it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.”7

Further bolstering EU law’s strong tendency toward public service values is Article 16 of the Treaty of Amsterdam, which provides that Member States shall take care that services operate on the basis of principles and conditions that enable them to fulfill their missions. Some legal commentators have argued that this creates a positive legal obligation for Member States to provide public service.8 Prosser does not adopt this ambitious view of Article 16, but does urge a much more expansive understanding of public service obligations than the recent UK approach. In discussing the application of public service obligations to telecommunications, energy, postal services, and transportation, Prosser argues that EU law gives a “clearer, more coherent, and more

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legally enforceable basis for the implementation of public service than had been the case in the UK . . .” (p. 205). He addresses the expansion of public service values by statute, as has been done in UK broadcast regulation, but favors a judicial over a statutory approach to the problem.

**General Lessons for Regulated Industry Defenses in Antitrust Law**

Prosser takes as his point of departure the obvious tension between competition, reflected in the ideal of common markets supported by EU competition law, and public service values, reflected in the positive consumer protection laws of the individual Member States. Perhaps these values are incommensurable, highlighting the limits of any effort to develop common markets through an interstate legal system. The looser the notion of federalism, the more intractable the problem is likely to be. Indeed, one latent message of Prosser’s is that competitive markets and public service reflect a clash of fundamental values—a subtheme that reverberates throughout the book but which Prosser concedes to be largely beyond its scope. To the extent these values are incommensurable, this may limit any lessons that can be drawn from a comparative survey.

However, despite the apparent tension between these values, Prosser highlights some important lessons for federalism-based defenses to competition law in both the U.S. and the EU. In the context of EU law, Prosser usefully separates the negative public service restrictions, reflected in Article 86, from the positive public service obligations that appear in Article 16. In so doing, he highlights the legal sources for many European Community decisions that embrace public service values over competitive markets. For instance, a 2003 Green Paper on Services of General Interest recognized a Community conception of general economic interest, which includes universal service, continuity, quality of service, affordability, and user and consumer protections. Prosser makes a strong case for viewing these obligations as more than mere abstractions in the EU context.

Moreover, Prosser provides a sketch for the implementation of public service goals in liberalized markets. Drawing on the *Altmark* decision, which envisioned a reconciliation of competitive markets and public service through the substantive evaluation of competitive tendering, he elaborates on the importance of choosing a public service provider and supervisory institutions in liberalized markets. The primary substantive condition for approving competitive tendering for public service is that “either the compensation was awarded through a public procurement procedure based on the lowest cost, or that the compensation was no greater than that which a notionally efficient undertaking would require” (p. 241).

Prosser argues, however, that while competitive tendering may be necessary, it is not sufficient to resolving the tension between competitive markets and public service in politically accountable ways. His book suggests a broader analysis that is attentive to institutions. Using the example of the British public service broadcasting system, he argues that “there may be situations in which it will simply be impossible to create proper competitive tendering because there are overwhelming reasons to favour a particular incumbent because of its critical mass of skills and established expertise” (p. 242). In the case of the BBC, Prosser observes that regulators “concentrated on the institutional arrangement to secure transparency in the relationship between publicly funded and commercial services.” (p. 243)

Ultimately, Prosser argues, “proceduralization” or “appropriate institutional arrangements, including independent regulation” (p. 244) will be necessary to simultaneously balance competitive markets and public service without sacrificing accountability. Common markets are critical of state-sanctioned regulatory barriers, while public service regulation may embrace such barriers. The institutional arrangements surrounding a state-sanctioned barrier, including transparency
and independent decision making (presumably to avoid corruption), as well as competitive tendering, thus take on a fundamental role in evaluating the legitimacy of the barrier.

Prosser leans strongly toward general expansion of public service values in competition law. However, the analytical and legal framework of competition law would not necessarily lead to this result in every instance. Attention to procedural and institutional features can give courts a reason to question exceptions to competition laws as well as to embrace them. Prosser’s analysis reminds us why a firm’s claim of public service values like consumer protection should not give rise to automatic exceptions from antitrust enforcement. His attention to institutional arrangements suggests that, in deciding when state “public service” regulation provides a legitimate defense to antitrust enforcement, attention to political accountability must serve as a safeguard against abuse of the antitrust laws by dominant firms. Careful assessment of procedure, along with transparency of regulatory processes, should be required before extending antitrust immunities to regulated industries.

This observation has application to discussions of antitrust immunities involving regulated industries in the United States, a topic the Antitrust Modernization Commission currently has placed on its agenda for discussion. In the United States, the problem Prosser discusses takes on the greatest significance in state action defenses to antitrust law, which carve out a safe harbor from antitrust enforcement where state and/or local regulators engage in regulation that reflects a clearly articulated state policy to displace antitrust law and where there is active supervision by regulatory officials of the conduct at issue.

One of the issues courts in the United States are struggling with is how to reconcile competitively restructured markets with partial schemes of regulation at the state and local level. Much state and local regulation is directed to furthering public service related values, including universal service and equal access. As a number of antitrust scholars in the United States have recognized, where a regulator is not acting in transparent ways to enforce standards, the extension of an exemption from antitrust principles seems questionable. Antitrust law can play a role in ensuring a baseline of competitive markets where firms might otherwise attempt to abuse the governmental process for private gain. Courts and regulators in the United States thus might take a lesson from Prosser’s comparative study of the conflict between competition law and public service. As Prosser illustrates, a legal positivist approach to state regulation cannot, by itself, reconcile competition laws with public service values. If the mere fact of a law supporting state or local public service precludes antitrust enforcement, this could encourage dominant firms to engage in more strategic lobbying than is socially optimal. State-sponsored public service laws can serve important goals, as Prosser recognizes, but his framework may also give courts grounds to recognize that sometimes state or industry claims of public service goals values are unjustified.

Prosser’s study carefully surveys the issue in the UK and EU, raising many interesting questions for competition law. Common markets may seem idealistic, especially in complex multistate settings with loose federalism. Prosser’s book will certainly be of great interest to comparative law scholars and to EU and Member State regulators and courts. A glance at EU law can prove instructive to both regulators and courts in the United States as well.

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