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## **What has Competition Done for Europe? An Inter-Disciplinary Answer\***

Robert D. Anderson and Alberto Heimler

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In recent policy debates in Europe, the question ‘what has competition done for Europe?’ has been posed at the highest levels. This question merits careful reflection. Competition as it is understood by mainstream economic and legal scholars refers not to an ideology but to inter-firm rivalry in markets. Such rivalry ensures that consumers enjoy choice, low prices, and good value for money. The authors consider the historical origins and development as well as the current role and effects of competition policy in Europe. The latter includes legal provisions that address anti-competitive practices by firms and activities aimed at promoting competition in respect of potentially anti-competitive government measures. They conclude that such policy has made essential contributions to the high standard of living enjoyed by European citizens, to the policy and institutional infrastructure of Europe, to related international initiatives and, indeed, to the creation of Europe itself.

*Keywords:* Competition, Wealth, Protectionism, Europe.  
*JEL Codes:* D40, D31, F10, F13, F15.

### **1 Introduction**

In recent European policy debates, the question ‘what has competition done for Europe?’ has been posed at the highest levels.<sup>1</sup> The question merits careful reflection. The role of competition in economic life and in contemporary economic policy is often misunderstood. For example, the term is sometimes used in a sense which connotes ultra-liberalism or laissez-faire. In fact, competition as it is understood by mainstream economic and legal scholars refers to something more banal – namely, inter-firm rivalry in markets. Such rivalry is vital to ensure that consumers enjoy freedom of choice, low prices, and good value for money, while also serving as an important driver of innovation and productivity improvement. The closely-related concept of “competition policy” refers to the set of laws, institutions, and pol-

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1 For example, at the EC Summit in June 2007, the newly elected President of France, NICHOLAS SARKOZY, reportedly asked “Competition as an ideology, as a dogma, what has it done for Europe?”. See FINANCIAL TIMES (2007).

icies through which governments maintain or promote competition. This essay will focus on the role and effects of competition policy, and on the ways in which European competition policy has evolved over time. Such policy, it will be argued, has made essential contributions to the high standard of living enjoyed by European citizens, to the policy and institutional infrastructure of Europe, to related international initiatives and, indeed, to the creation of Europe itself.

At the outset, it is important to make clear that neither competition nor competition policy necessarily implies either an absence of regulation or a ruthless commitment to market principles that overlooks the importance of altruism, social values, and appropriate forms of cooperation in society. Competition policy is, in fact, a (selective) form of government intervention that recognises – indeed, finds its essential justification in – the fact that markets are sometimes subject to failures (e.g., due to the existence of externalities, asymmetries of information, monopolies, cartels, and other restraints to competition).<sup>2</sup> Competition policy also seeks to promote reliance on market forces as a form of social organisation and engine of progress in circumstances where this is likely to be welfare-enhancing for citizens. It is, however, compatible with a wide range of other government interventions – i.e., social and economic policies – that may be deemed necessary to promote public welfare.<sup>3</sup>

Competition policy as it is practised in Europe is, moreover, a distinctly European creation, with deep roots in Continental economic and social thought. Its implementation via the Treaty establishing the European Community (i.e., the Treaty of Rome) has given rise to significant innovations in constitutional and institutional structures. For these reasons, in addition to its essential contributions to economic welfare, it forms a part of Europe's intellectual heritage and carries important lessons for the world.

In this essay, we have not sought to systematically review all aspects of European competition policy or to provide quantitative estimates of their welfare effects. Rather, we have tried to convey a sense of: (i) the historical origins of competition policy in Europe and its contribution to European development; (ii) the continuing (present-day) contribution of competition

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2 See, for elaboration, CARLTON and PERLOFF (1994).

3 For example, a vigorous competition policy in no way prevents the adoption of progressive taxation systems, universal health care or public welfare programs. It also does not prevent the adoption of diverse policies that governments may employ to promote industrial strength and competitiveness. See, in this regard, EVENETT (2003).

policy in Europe in addressing both business practices and government measures that could otherwise undermine the performance of Europe's economy; and (iii) the "external" contributions of EC competition policy to wider policy debates. Much emphasis is placed on the ways in which competition policy has evolved and adapted itself to changing circumstances, ensuring its continuing relevance. The essay takes an inter-disciplinary approach to the assessment of these matters, encompassing consideration of historical, economic, legal, institutional, and other dimensions. In the spirit of POPPER (2002), our analysis also recognises that some of the results achieved in implementing competition policy in Europe have been expected, but others were completely unexpected. Furthermore, success lies in the details and in having an institutional structure that meaningfully implements relevant rules.

Our analysis focuses on competition policy as it is practised in the European Community rather than in the European Economic Area (EEA) as such.<sup>4</sup> Nonetheless, the trends outlined in this essay are also broadly reflective of experience in the non-EC EEA states. This reflects both the direct impact of the EEA Agreement and the spread of common ideas and analytical approaches across Europe.<sup>5</sup>

The remainder of the essay is structured as follows. Part two provides a historical overview of the role of competition policy in post-war Europe. Part three looks at the contribution of competition policy to economic prosperity and the welfare of citizens in Europe today. This includes consideration of: (i) the role of competition (antitrust) law in safeguarding citizens from anti-competitive practices of firms; (ii) the benefits that have been achieved through competition-enhancing reforms in particular economic sectors; and (iii) the treatment of "state aid" (industrial subsidies). Part four considers the wider mark that European approaches to competition policy have made in international policy circles. Part five reflects on a question which we believe is closely related to the current debate – namely, will competition policy still be needed in a globalising economic environment? Part six provides concluding remarks.

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4 In addition to the EC and its Member States, the EEA includes Norway, Iceland and Liechtenstein.

5 An important sub-theme of our analysis concerns the role of ideas and institutional learning processes in the evolution of competition policy. See, in this regard, ΚΟΥΛΙΤΣ (2004), who provides an analysis of the evolution of US competition policy which, in some respects, parallels our analysis of European developments.

## 2 Historical Perspective: the Origins of European Competition Policy and its Contributions to Europe's Post-War Revival and Constitutional Structure

The intellectual roots of European competition policy can be traced back to eighteenth century German liberalism, with its emphasis on the role of law in creating the conditions for economic and political liberty; to *fin-de-siècle* Austria, where detailed proposals for the regulation of cartels were developed in response to the pressures of industrialisation and the felt need to protect citizens from the arbitrary power of industrial interests; and, importantly, to the German "ordo-liberal" school centred around the University of Freiburg (GERBER 1998 provides a penetrating analysis). The latter postulated that competition could provide the basis for a society in which economic progress, social development, and individual liberty would flower, but only where the proper functioning of markets was safeguarded through necessary laws and institutions. This is an important insight which clearly differentiates European competition policy from liberalism or *laissez-faire*. Of course, recognition of the role of markets as an underpinning of a prosperous, dynamic, and decent society also reflects the influence of European Enlightenment-era philosophers such as ADAM SMITH and IMMANUEL KANT (see ANDERSON and WAGER 2006).

Treaty-level provisions to safeguard competition were initially introduced in the European Coal and Steel Community in 1951. Building on the ideas of seminal European figures such as KONRAD ADENAUER, ALCIDE DE GASPERI, HANS KELSEN, JEAN MONNET and ROBERT SCHUMAN, the maintenance of undistorted competition was entrenched as a specific objective of the Treaty of Rome when it was adopted in 1957.<sup>6</sup> Specific provisions regarding the prevention of anti-competitive practices that could undermine this objective (i.e., cartels and abuse of a dominant position) were included among the substantive provisions of the Treaty.

It is important to note that the prominence given to competition and competition policy in the Treaty of Rome had as much to do with a desire to ensure peace through economic integration and intra-European trade as it had to do with the goals of economic efficiency and consumer welfare. After two world wars, both of them having originated in Europe, it was believed that economic integration was essential to avoid future conflicts. A mere free trade zone would not have been sufficient. Rather, the goal of the found-

<sup>6</sup> See Treaty of Rome ("EC Treaty"), Article 3(g). The Treaty came into force on 1 January 1958.

ing fathers of the European Communities was to create a set of rules that would constrain Member States from engaging in policies and conduct that could adversely affect other European Member States and would thereby ensure that the objectives of the Treaty were not undermined. It bears noting that this project – i.e., the taming of intra-European nationalism through economic integration based on the rule of law and the creation of necessary institutions – was one of the major achievements of humankind in the second half of the twentieth century, of huge importance for subsequent international peace and prosperity. Although this achievement obviously cannot be credited exclusively to the legal and institutional structures of European competition policy, it is noteworthy that the competition-related provisions of the Treaty were viewed by the founders as an essential element of the package of measures through which this result was achieved.

The model of competition policy that was incorporated in the Treaty of Rome and elaborated over the subsequent decades differed from other models (particularly North American models) in important respects. In addition to the core provisions on cartels and abuse of dominance (subsequently reinforced by the introduction of merger control provisions), it incorporated two elements not found in North American models, namely: (i) provisions to deal with the competition-distorting effects of state aid; and (ii) provisions to address barriers to competition that are introduced through government regulations and other measures. All these provisions were deemed necessary to address private and government restraints that segmented national markets, thus potentially undermining the common market. No other international organisation or country has a similar portfolio of instruments aimed at achieving an integrated market.

Notwithstanding the central place given to competition provisions in the Treaty of Rome, it must also be acknowledged that the full contribution of competition policy to the integration of the Community was not foreseen. In 1957, among the six original members of the Community, only Germany had a domestic competition law; it had adopted the law only a few months before the signing of the Treaty; and had no experience with enforcement. This lack of experience led Member States to underestimate the importance of competition and may well be the reason why they left responsibility for enforcement to the Commission, not the Council of Ministers. In fact, the Treaty insulated antitrust enforcement from political control by putting the decision making of the Commission under the jurisdictional control of the Court of Justice. As a consequence, the Court itself became a key player,

first in defining the application of the competition provisions in ways that would contribute to European integration and, later, in initiating adjustments in enforcement policies and approaches to place greater emphasis on economic analysis and efficiency.

A second result that was not widely expected when the Treaty was adopted was the influence that developments at the Community level had on the evolution of related laws, policies, and institutions at the Member State level. Today, fifty years after the signing of the Treaty, all Member States have a competition law and an enforcement structure capable of fulfilling their responsibilities within the European competition system. The major driving force behind this development was the example provided by the Community's rules and institutions. Their experience in enforcing similar laws in turn led Member States to play a more influential role in relevant consultative bodies at the Community level.

The importance given to the competition provisions in the Treaty of Rome and their role in shaping the economic and legal policies and structures of Member States have made competition policy part of the "economic constitution" of Europe (see PETERSMANN 1991 and 2004). Reinforced by the concept of "*effet utile*" (requiring that the Community's rules be interpreted in a way that ensures their effective functioning within the Member States), the creation of parallel enforcement institutions at the Member State level did not merely result in a transfer of enforcement activity from the Commission to Member States, but also in an enhanced overall level of such activity. To take one pertinent example, Italy, one of the founding members of the European Community, did not have a domestic competition law until 1990. The Italian case therefore provides a useful test of the effects of introducing a national competition law within the framework of the Community at large. From 1964 until 1990 the Commission opened up 25 formal proceedings relating to cases of restrictive practices (abuse of dominance and restrictive agreements) concerning the Italian market, an average of 0.8 cases per year. After the domestic Competition Act was introduced, the number of cases initiated by the Commission against Italian firms remained more or less constant. However, as shown in Table 1, many additional cases, practically all of them also falling under Community jurisdiction, were initiated by the Italian Authority (see also HEIMLER 1998).

Also manifesting this "constitutional" role, in recent years competition policy and related institutions and expertise have played an important role in the accession of central and east European states to the European Com-

munity. A key challenge in this process has been to ensure an integrated approach to the treatment of market structures and practices that could jeopardise the orderly and efficient integration of the new Member States into the expanded market. Reflecting this, prior to the conclusion of the accession negotiations, candidate countries had to demonstrate, among other obligations, that they had enacted competition laws embodying the *acquis communautaire* (i.e., the body of EC law accumulated thus far) with regard to competition policy and that competent enforcement authorities were in place (GERADIN and HENRY 2004). Particularly important in smoothing the transition have been the availability of abuse-of-dominance enforcement in regard to privatisation and restructuring and the role that competition agencies have played in addressing natural monopoly issues (see PITTMAN 2004).

The prominence of competition policy as an aspect of Europe's institutional infrastructure does not, of course, mean that such policy has always been perfectly balanced in all its applications, especially with regard to the narrow aspect of antitrust enforcement. As many commentators have pointed out, tensions have sometimes been evident between the various goals of such policy (especially those of market integration and economic efficiency). To eyes trained in North America (including, in varying degrees, our own), European competition policy has sometimes been overly interventionist and/or unduly protective of (possibly inefficient) individual competitors (see, for elaboration of this theme, McDONALD 2005). These criticisms, while worthy of consideration, cannot belie the immense achievements of competition policy in Europe. From our perspective, they are also subsumed by the observation that the emphasis on market integration was very likely the right approach for European competition policy in its early years (in view of the over-riding political objective of integrating post-war Europe and the risk that anti-competitive practices by firms at the national level would defeat this goal); while recent (and self-initiated) moves toward greater emphasis on economic efficiency are a more appropriate approach in the context of today's mature European economy. This ongoing re-orientation in addition to the substantive results of competition law enforcement in the European Community are discussed in the next section of the paper.



### **3 The Role of Competition Policy in Europe Today: Safeguarding the Market Economy from Business Practices and Government Measures that harm Competition and Consumer Welfare**

The continuing contribution of competition policy to economic welfare in Europe encompasses three main elements: (i) the role of competition (antitrust) law enforcement in deterring business practices that thwart competition and thereby harm consumers; (ii) the "legislative" role played by the Commission in addressing government measures that impede competition, thereby preventing realisation of the full benefits of market integration; and (iii) the treatment of state aid. As will be discussed, in each area, competition policy has evolved and adapted to changing circumstances to better protect the interests of citizens and ensure its continuing relevance.

#### **3.1 Competition Law Enforcement**

Today, the relevant part of the European Commission, the Directorate General for Competition (DG Competition), and the competition authorities of the EC Member States maintain sophisticated enforcement programmes addressing all major aspects of anti-competitive practices. These include price-fixing agreements and other cartels, anti-competitive mergers, abuses of a dominant position and vertical market restraints<sup>7</sup> (though the latter are addressed in a less rigid and sweeping way than was the case in the past). Through these programmes, the authorities are continuously addressing a wide range of business practices that, if left unchecked, would restrict consumers' choices, raise prices, and diminish the quality of products and services available (see, for details of the Commission's current enforcement programme, EC COMMISSION 2007a).

The current enforcement programmes of the Commission and the Member States' competition authorities reflect a far-reaching evolution in policy design and enforcement approaches. In order to appreciate the contribution that competition policy makes to the welfare of European citizens, it is helpful to review this evolution in some detail.

In its early stages, European competition policy was predominantly concerned with vertical market restraints on the basis that they constituted the

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7 Vertical market restraints are arrangements that limit competition within a particular brand or product line, for example, exclusive territories.

most obvious threat to the construction of a unified Europe. Such restraints were attacked through the application of Article 81 (then 85) of the Treaty, paragraph 3, to notified agreements and by developing form-based block exemption regulations. This approach was understandable as a political objective. However, over the years it was extensively criticised on the basis that most vertical agreements do not restrict competition and are instead pro-competitive. The introduction of the merger regulation in 1989,<sup>8</sup> and the emphasis on economic analysis that it brought with it, started to move the Commission away from form-based to effects-based enforcement (see, for useful background, NEVEN et al 1994). Important further steps in this regard were the notice on the relevant market which was issued in 1997<sup>9</sup> and the new block exemption on vertical restraints that was issued in 1999<sup>10</sup>.

An insistence on substantive analysis is now pervasive in most, if not all, aspects of the Commission's antitrust work. Moreover, the courts are moving away from formalistic applications even with respect to the market integration standard. In a recent judgment, the Court of First Instance partly annulled a Commission decision that forced parallel trade for GlaxoSmith Kline price-regulated drugs.<sup>11</sup> The judgment concluded that the Commission did not take proper account of the specific nature of the pharmaceutical sector where prices of medicines are not freely determined by supply and demand, but are set or controlled by the Member States through pervasive regulations.<sup>12</sup> For that reason, the Court ruled that it cannot be presumed that parallel trade would reduce prices – yet again enforcing an economics-based approach.

On the basis of these and related developments, the European Community is moving closer to the substantive approaches to antitrust enforcement of the United States. To be sure, important differences remain between the two jurisdictions especially with respect to the treatment of abuses of a dominant position, restraints associated with the exercise of intellectual property rights and conglomerate mergers (see, for elaboration, the various essays in MARSDEN 2007). However, notwithstanding developments such as the recent controversy over the judgment of the Court of First Instance in

8 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *Official Journal L*, 395, 30 December 1989, pp. 1–12.

9 Commission notice on the definition of relevant market for the purposes of Community competition law, *Official Journal C* 372, 09 December 1997, pp.1–12.

10 Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, *Official Journal L*, 148, 15 June 1999, pp. 1–4.

11 Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, Decision of 27 September 2006.

12 *ibid.*, para. 147.

the Microsoft case (see below), the areas and degree of divergence are becoming smaller than they have been in the past. To a large extent, this reflects a process of learning based on enhanced economic understanding and on other jurisdictions' experience.<sup>13</sup> The "Chicago School of antitrust analysis" (a body of economic learning and doctrine associated with scholars at the University of Chicago in the 1970s through the 1990s) was an important source in this regard (POSNER 2001 provides a useful synthesis). The influence of the Chicago School has led both the United States' antitrust authorities and the European Commission to adopt stricter approaches to the repression of cartels and to devote more resources to this aspect of competition law enforcement while taking progressively more selective, economically nuanced approaches to practices such as abuse of dominance and vertical restraints.

The introduction in Europe of "leniency programmes" that provide incentives for participants in a cartel or similar arrangement to facilitate prosecutions by cooperating with enforcement authorities was an important step in strengthening competition law enforcement in this area.<sup>14</sup> Following the lead of the United States, the European Commission adopted such a programme in 1996.<sup>15</sup> The Commission's initial Leniency Notice, which was not as successful as expected, was replaced by a new one in 2002.<sup>16</sup> The main change was that, once a firm was admitted to the programme, immunity became automatic. Subsequently, the European Commission and all EC Member States adopted a model leniency programme developed within the European Competition Network (a network linking all competition authorities in the Community).<sup>17</sup> As a result, the Commission programme was again amended in 2006, mainly to clarify the type and quality of information to be provided by leniency applicants.<sup>18</sup>

The leniency programme of the Commission has been highly successful (see Table 2). As shown in the table, the number of cartels prosecuted in the last decade is substantially greater than what had been previously achieved. In

13 The role and importance of economic learning as a basis for evolution in competition law enforcement policies is stressed in KOVACIC (2004).

14 The basic principle of such programmes is that they offer immunity (whether total or partial) to cartel participants that inform on other members of the cartel.

15 Commission Notice on the non-imposition or reduction of fines in cartel cases, *Official Journal C* 207, 18 July 1996 pp. 4–6.

16 Commission notice on immunity from fines and reduction of fines in cartel cases, *Official Journal C* 45, 19 February 2002, pp. 3–5.

17 Internet: [http://ec.europa.eu/comm/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html). (as of 20 October 2007).

18 Commission notice on immunity from fines and reduction of fines in cartel cases, *Official Journal C* 298, 8 December 2006, pp. 17–22.

2006, the Commission issued seven final decisions in which 41 undertakings were fined a total of Euros 1.85 billion (EC COMMISSION 2007a). This activity has resulted in very substantial savings for EC consumers in that overcharges resulting from cartel activity are known to be typically on the order of 20–30% on average (CONNOR 2005). Given this and the scale of cartel activity uncovered by the Commission (which presumably is only a portion of the actual extent of such activity), it is not too much to say that the EC antitrust authorities' successes in the area of anti-cartel enforcement by themselves justify the investment in relevant institutions.

Also in furtherance of a more economics-based approach, in December 2005 the Commission issued a “discussion paper on the application of Article 82 of the Treaty to exclusionary abuses” (DG COMPETITION 2005). The discussion paper proposes the adoption of an “as efficient competitor test” which defines as exclusionary only those practices that exclude potential rivals that are at least equally efficient as the incumbent firm. This represents a change from the past when dominant companies were deemed to have a “special responsibility” to help ensure that competitors remain in the market even if they were not necessarily as efficient as the dominant firm – an approach that was clearly at odds with the standard of economic efficiency.

Although the recent judgment of the Court of First Instance in the Microsoft case<sup>19</sup> has been criticised as potentially “chilling innovation” (see US DEPARTMENT OF JUSTICE 2007), views have also been expressed that the judgment is solidly within the mainstream of past Community decisions (see DUVERNOY and VÖLCKER 2007) and that ‘there are many reasons to believe that [the remedies imposed] could have a positive effect on industry-wide innovation’ (GENAKOS, KUHN and VAN REENEN 2007; see also KUHN, STILLMAN and CAFFARRA 2004). The judgment of the Court upheld, in all substantive respects, a 2004 decision of the Commission which found that Microsoft had abused its dominant position by: (i) refusing to supply competitors with information that was essential to ensure the interoperability of competitive “group server operating system products”; and (ii) tying its Windows Media Player to the Windows operating system.<sup>20</sup>

Regarding the first aspect, GENAKOS, KUHN and VAN REENEN (2007) argue that, by blocking the development of the group server market, Microsoft

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19 Judgement of the Court of First Instance (Grand Chamber), 17 September 2007, Microsoft v. Commission, T-201/04. Internet: <http://curia.europa.eu/jurisp/> (as of 30 October 2007).

20 The Court ruled against the Commission on a potentially important procedural issue relating to delegation to a “monitoring trustee” of certain supervisory responsibilities.

was protecting its market power in the personal computer software market, ensuring that relatively few competitive applications would be feasible in related sectors where its market power was weak. From this perspective, requiring Microsoft to share information on the interface between the personal computer and group servers allows markets to be open and thereby promotes, rather than deters, innovation and growth.

The second part of the judgment requires Microsoft to “unbundle” the Windows Media Player from the operating system – i.e., to sell a version of Windows without Media Player. In general, the welfare effects of unbundling are ambiguous. A careful and complex analysis is needed to determine whether the effects on consumer welfare are positive or negative in any particular case (see, for a synthesis of relevant arguments, ANDERSON and HEIMLER 2007). The argument has, nonetheless, been made by KUHN, STILLMAN and CAFFARRA (2004) that the market context of the Microsoft case (particularly the presence of network effects and dynamic monopolisation) provides a stronger basis for intervention than in some other circumstances in which bundling has been the subject of antitrust investigation.

Contrary to the treatment of restrictive agreements and abuse of dominance which is based on specific articles of the Treaty, merger control in the Community was introduced through secondary legislation – i.e., the European Communities Merger Regulation (ECMR 1989).<sup>21</sup> The Regulation, which has been revised twice (first in 1997<sup>22</sup> and again in 2004<sup>23</sup>), empowers the Commission to scrutinise any merger with a Community dimension. This is defined sufficiently broadly to include most large scale mergers of firms making significant sales in at least two Member States. Related powers exist for the Commission to refer a merger back to a Member State for review if this is thought appropriate and also for Member States to refer to the Commission cases that might be of Community relevance even though they do not reach applicable notification thresholds.

Recently, the Commission has implemented its economics-based approach in three decisions, *Korsnas/AD Cartonboard*,<sup>24</sup> *Inco/Falconbridge*<sup>25</sup> and

21 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *Official Journal L* 395, 30 December 1989, pp. 1–12.

22 Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, *Official Journal L* 180, 9 July 1997, pp. 1–6.

23 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *Official Journal L* 24, 29.1.2004, pp. 1–22.

24 Case COMP/M.4057 *Korsnäs/Assidomän Cartonboard*, Commission decision, 12.5.2006.

25 Case COMP/M.4000 *Inco/Falconbridge*, Commission decision, 4.7.2006.

Metso/Aker Kvaerner.<sup>26</sup> In these decisions, the Commission explicitly took into consideration possible efficiencies as well as other competitive effects of the transactions in question, in line with the approach set out in the horizontal merger guidelines.<sup>27</sup>

The adoption of an economics or effects-based approach in regard to merger analysis has been reinforced by relevant judicial decisions. In *Airtours/First Choice*<sup>28</sup> the Court of First Instance annulled a decision of the Commission<sup>29</sup> because of the lack of a sufficiently rigorous economic analysis of the incentives for, and ability to coordinate behaviour as a direct consequence, of the proposed merger. In the judgment, the Court articulated a new standard for the identification of a collective dominant position. In *Schneider/Legrand*<sup>30</sup> the same Court annulled the Commission's decision<sup>31</sup> on the basis that the Commission had failed to take account of the different degrees of competition in each of the national markets it identified and did not provide Schneider with enough information to offer an appropriate remedy. In *Tetra Laval/Sidel*,<sup>32</sup> the Court of First Instance annulled the Commission's decision on the basis that leveraging market power between two otherwise separate markets, the reason for the Commission prohibition, could have been blocked by ex-post article 82 interventions, a possibility that the Commission did not consider. This decision was subsequently upheld by the European Court of Justice.<sup>33</sup> Finally in *Impala*<sup>34</sup> the Court of First Instance for the first time annulled an authorisation decision (concerning the Sony/BMG merger), suggesting that the same standard of proof should be applied by the Commission for prohibition and for clearance. In the judgement, the Court further clarified the conditions for establishing a collective dominant position, indicating that the Commission failed to carry out a genuinely forward looking analysis, being too much influenced by current market conditions and behaviour.

26 Case COMP/M.4187 Metso/Aker Kvaerner, Commission decision, 12 December 2006.

27 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraphs 76–88 (*Official Journal C 31*, 5.2.2004, p. 5). See also Commission Report on Competition Policy 2006{SEC(2007)0860}, (COM/2007/358 final), Brussels, 25 June 2007, available at [http://ec.europa.eu/comm/competition/annual\\_reports/2006/en.pdf](http://ec.europa.eu/comm/competition/annual_reports/2006/en.pdf)

28 Case T-342/99 *Airtours plc v. Commission*, Decision of 6 June 2002.

29 Case IV/M.1524 – *Airtours/First Choice*, Commission decision, 22 September 1999.

30 Case T-77/02, *Schneider Electric SA v. Commission*, Commission decision, 22 October 2002.

31 Case COMP/M.2283 – *Schneider-Legrand*, Commission decision, 30 January 2002.

32 Cases T-5/02 and T-80/02, *Tetra Laval BV v. Commission*, Decision of 25 October 2002.

33 Case C-12/03 P, *Commission v. Tetra Laval BV*, Decision of 15 February 2005.

34 Case T 464/04, *Independent Music Publishers and Labels Association (Impala, international association) v. Commission*, Decision of 13 July 2006.

As a result of these judgments, the Directorate-General for Competition has implemented a number of organisational changes, including the creation of the post of chief economist and the setting up a “devil’s advocate panel” providing an internal critique of arguments provided by case teams (see also RÖLLER and BUIGUES 2005). Furthermore, a Commission proposal to change the substantive test of merger control has been approved by the Council. The new approach prohibits all mergers that lead to a ‘significant impediment of effective competition, in particular as a result of the creation or strengthening of a dominant position’. The introduction of a wider test than that of simple dominance was considered appropriate because of the possibility that a merger in differentiated oligopoly markets would lead to a significant increase of market power without necessarily creating a dominant position.<sup>35</sup>

Recent Commission decisions are much more based on factual analysis, including econometric evidence, than in the past. For example, in the recent prohibition of the merger between Air Lingus and Ryanair, the Commission employed a number of different techniques (e.g., interviews with dozens of airlines, consumer surveys, and quantitative analysis) that showed, contrary to what the parties were claiming, that Air Lingus was a direct competitor of Ryanair on 35 routes to and from Ireland and exercised a significant constraining influence on the exercise of market power. The Commission therefore prohibited the merger.<sup>36</sup> Its timely intervention in this case, preventing a merger that would have resulted in a substantial increase of air transport fares on these routes, illustrates the importance of effective merger enforcement for the well-being of European consumers.

In sum, the European Commission, together with the competition authorities of the EC Member States, maintains sophisticated enforcement programmes addressing all major aspects of anti-competitive practices including price-fixing agreements and other cartels, anti-competitive mergers, abuses of a dominant position, and (but in a less rigid and sweeping way than was the case in the past) vertical market restraints. The contribution of these programmes to the welfare of European citizens is clear: without them, citizens would pay higher prices and suffer reduced choice in the goods and services that are available to them. The enforcement policies and approaches of these agencies have not remained static; on the contrary, they

35 In practice, at least until now, the change of the test, which initially stirred a heated debate, seems to have had little or no impact.

36 Case M.4439 Ryanair/Air Lingus, Commission decision, 20.12.2006. See also Press Release IP/07/893, Brussels, 27 June 2007.

have undergone a far-reaching evolution which has drawn effectively on both the insights of economics and the experience of other jurisdictions.

### 3.2 Addressing State Measures that Restrict Competition

Apart from the contribution of competition policy in terms of competition law enforcement vis-à-vis anti-competitive business practices, competition agencies can play an important role in regard to the reform of government measures affecting competition. This is recognised in many jurisdictions, where competition agencies engage in “advocacy” activities (e.g., research, analysis, submissions to parliamentary bodies, etc.) aimed at influencing the evolution of government policies and raising awareness of restraints on competition. There is, in fact, a growing recognition that such work is of critical importance, co-equal with enforcement function (see, e.g., KOVACIC 2004; ANDERSON and JENNY 2005). In the European Community, the addressing of state measures affecting competition includes, but goes well beyond, mere advocacy. It encompasses, in addition, both “legislative” functions relating to the reform of government measures affecting competition and “executive” functions under which the Commission (or the Court of Justice) can declare a law or a regulation of a single Member State to be contrary to the Treaty because it allows companies to violate the competition rules. Through such measures, the Commission has dealt with a large number of practical challenges to efficient economic development and/or the welfare of consumers. The following considers both aspects.

#### 3.2.1 *Scope of the Commission's Role*

With respect to “legislative” functions in regard to state measures affecting competition, the instruments available to the Commission include the following:

- *Competition-driven directives.* These directives, which have been particularly significant in telecommunications, are based on article 86 of the Treaty and other competition provisions and are adopted directly by the Commission, without involvement from the Council of Ministers.
- *Harmonisation directives.* These Directives, which lead to the harmonisation of national legislation, are issued by the Council of Ministers. While often related to competition policy objectives, their legal basis is



typically found in the various articles in the Treaty aiming at the creation of a unified market.

- *Communications.* These instruments, which have been issued by the Commission regarding specific matters such as universal service obligations, complement and facilitate the application of relevant directives.

The use of the foregoing instruments is subject to important checks and balances based on the Treaty. Both competition and harmonisation directives are initiated by means of a Commission proposal. Member States' governments are directly involved in the decision making process, even though only as advisors for article 86 directives. In regard to competition driven directives, Member States maintain the possibility to appeal the Commission directive before the Courts and have done so in several cases (even though without much success).

### 3.2.2 *The Impact of "Legislative" Actions by the Commission Based on Competition Policy Considerations*

The EC Commission's powers to adopt competition-oriented directives and related measures have been used extensively to encourage necessary reforms in disparate economic sectors. This constitutes an essential aspect of the contribution of competition policy to Europe. In most cases, these efforts are not a *fait accompli* but a work-in-progress that will require continuing input and policy adaptation. Nonetheless, substantial benefits for European citizens in the form of price reductions and service improvements/product innovation are already evident. The following highlights both key developments and challenges remaining in several specific sectors, in particular telecommunications, electricity, rail transport, and banking, chosen as examples of the important role the Commission has played in addressing state barriers to competition.

#### *a) Telecommunications*

The legislative powers of the Commission to promote competition-related objectives have been instrumental in profound changes that have taken place in the telecommunications sector since the 1980s, generating immense benefits for European citizens. In the late 1980s, this sector was characterised by legal monopolies in most Member States. A directive issued in 1988 on the basis of Article 86 of the Treaty introduced competition in the market of telecommunications terminal equipment. An interesting phenomenon, which shows the type of pressures that originate from pro-competitive re-

forms and the ways in which the Commission's powers and related institutional machinery have helped to address these powers, is that Member States participated fully in the discussion that led to the directive. However, when the directive entered into force, five Member States (France, Italy, Belgium, Germany, and Greece) challenged it before the Court of Justice. The Court ruled conclusively in favour of the Commission's interpretation of article 86. After this decision, the liberalisation process gathered steam. In 1990, the Commission issued directive No. 388 which liberalised value-added services and data transmission.<sup>37</sup> Only voice telephony was left as a monopoly. After France and Germany offered support for full liberalisation, all Member States finally agreed on a timetable for the comprehensive liberalisation of telecommunications infrastructure (Council resolution of 22 December 1994).<sup>38</sup> Starting on 1 January 1998, the telecommunications sector was opened up to full competition.

Of course, liberalisation did not create competitive markets overnight. It takes time for new entry to become established. As had already happened in the past, some Member State governments were reluctant to introduce a pro-competitive regulatory structure in a timely way. Further action by the Commission was therefore necessary. In 2002, a package of six directives was approved: the common regulatory framework directive;<sup>39</sup> the universal service directive;<sup>40</sup> the data protection and privacy directive;<sup>41</sup> the directive on access and interconnection;<sup>42</sup> and the authorisation directive for electronic communications.<sup>43</sup> The main thrust of these instruments was to promote the use of competition-based regulatory concepts. As a result, regulatory obligations now apply only to undertakings that are dominant within the meaning of article 82 of the EC Treaty. This facilitated efficient business reorganisation by eliminating reliance on arbitrary market share thresholds which had previously been in place. Furthermore, the regulatory framework

37 Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, *Official Journal L* 192, 24 July 1990, pp. 10–16.

38 Council Resolution 94/C 379/03 of 22 December 1994 on the principles and timetable for the liberalisation of telecommunications infrastructures, *Official Journal C* 379, 31 December 94, pp. 4–5.

39 Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *Official Journal L* 108, 24 April 2002, pp. 33–50.

40 Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), *Official Journal L* 108, 24 April 2002, pp. 51–77.

41 Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *Official Journal L* 201, 31 July 2002, pp. 37–47.

42 Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *Official Journal L* 108, 24 April 2002, pp. 7–20.

43 Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *Official Journal L* 108, 24 April 2002, pp. 21–32.

directive gave the Commission powers to oversee national regulatory measures. These powers have been used effectively to encourage national regulatory authorities to implement competition-based regulatory approaches, going a long way to create a level playing field in the European telecom sector.

The 2002 process is still underway. In most Member States, incumbent operators are still the dominant players in fixed-line telecommunications. Nonetheless, in all countries, consumers have the possibility of choosing among alternative service providers, especially in mobile services. As a result, prices have declined significantly everywhere and service quality, including the treatment of consumers by telecom operators, has greatly improved. Possibly the greatest impact of competition-based liberalisation has been in the introduction of new products and services, including internet-based services and mobile services.

In addition to the removal of policy restraints on supply-side competition, important measures have been taken to enhance demand-side flexibility. Mandating number portability has reduced the cost of switching between service providers which in turn, has reduced the market power of incumbent firms. Carrier selection, whereby consumers maintain their contract with the incumbent operator but may select an alternative carrier, has made entry easier by reducing the need for an upfront commitment by consumers. Where consumers are satisfied with the alternative provider, carrier pre-selection makes it possible to fully substitute for the services of the incumbent operator. In both cases, regulation has been essential for ensuring access to the unbundled elements of the network (see ENNIS and HEIMLER 2004).

Implementing competition oriented reforms reduces, but does not eliminate, the necessity of regulation. In sectors such as telecommunications, antitrust enforcement, and regulatory interventions can serve complementary roles. In this regard, the EC Roaming directive<sup>44</sup> has resulted in a substantial reduction of roaming charges, benefiting consumers but potentially introducing some rigidities with respect to long run market developments.<sup>45</sup>

44 Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC.

45 As of summer 2007, European consumers benefit from a "Eurotariff" that sets a maximum limit for calls made (EUR 0.49 excl. VAT) and received (EUR 0.24 excl. VAT) when abroad. The price caps will be further reduced in 2008 and 2009.

b) *Electricity*

The degree of opposition to reform of the electricity sector exceeded that which occurred in relation to telecommunications reforms. From December 1990 to June 1996, the initial Commission position to allow direct transactions between as many producers and consumers as possible was blocked by the opposition of Member States believing that a vertically integrated structure for the industry with no possibility for direct transactions by consumers with generators was preferable. In June 1996, after a long debate, the Council of Ministers agreed on a directive concerning common rules for the industry.<sup>46</sup>

The 1996 directive began the process of introducing competition while leaving important choices to the discretion of individual Member States. For instance, the directive allowed Member States either to provide for free entry in electricity generation or to introduce a tendering procedure in order to identify the actual generator that entered the market, maintaining central control on the technology to be used and the timing of entry. Furthermore, either a grid operator could be made responsible for power transmission and for guaranteeing the physical equilibrium of the system, or Member States could designate a single buyer with responsibility for a centralised system of buying and selling. Nonetheless, over time, an increasing proportion of consumers became eligible for purchasing electricity supplied by independent producers.

To create a level playing field among suppliers, further important measures were introduced by Directive 2003/54/EC<sup>47</sup> and Regulation (EC) No 1228/2003 on "Cross border Electricity Trading".<sup>48</sup> Directive 2003/54/EC aimed at complete market opening, requiring that all non-household electricity customers become eligible by 1 July 2004 and all household customers by 1 July 2007. However, in sectors such as electricity where entry requires substantial investments and involves a lengthy authorisation process, simple market opening does not automatically lead to the introduction of vigorous competition. Structural measures such as divestiture may be necessary. The directive was silent on this issue, reflecting different perceptions among Member States on the benefits of stronger competition. On their own ini-

46 Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, *Official Journal L 027*, 30 January 1997 pp. 20–29.

47 Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC – Statements made with regard to decommissioning and waste management activities, *Official Journal L 176*, 15 July 2003, pp. 37–56.

48 Regulation (EC) No 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, *Official Journal L 176*, 15 July 2003, pp. 1–10.

tiative, some Member States imposed capacity divestitures on the former legal monopolist sometimes coupled with temporary measures to increase competition such as market share caps.<sup>49</sup>

Directive 2003/54/EC also obliged Member States to introduce a regulated third party access regime, removing the possibility of negotiated third party access which had been permitted under the 1996 directive. Furthermore, the directive mandated the appointment of an independent national regulator. As for transmission and distribution, the directive required legal unbundling – stopping short of proprietary unbundling that had been proposed in the OECD as the most effective solution for aligning the incentives of the infrastructure owner with the general interests of society (OECD 2001 and 2006).

As the foregoing account implies, pro-competitive reform in the electricity sector has not gone as far as it has in telecommunications. In many cases, markets remain concentrated and national in character. Acknowledging this, in 2005, the Commission opened a sector inquiry into the functioning of the European gas and electricity markets.<sup>50</sup> The results of the sector enquiry were published in January 2007 (see EC COMMISSION 2007b). The main finding was that in almost all Member States, the incumbent operator is vertically integrated and the degree of cross-border competition is weak, due in part to a lack of inter-connection capacities. Nonetheless, other evidence indicates that, where effective competition has been introduced, important benefits have been generated for consumers. As the INTERNATIONAL ENERGY AGENCY (2005) reports, there is a clear falling trend in the price of electricity in the United Kingdom which is attributable to increased competition promoted by vertical separation. In Portugal, vertical unbundling of electricity markets resulted in a 45–80% decline in access prices and a tripling of real investments in transmission facilities in the period 1999–2006 (GERALDES 2007).

### *c) Rail Transport*

Introducing competition in the rail transport sector is challenging, due to intrinsic problems in ensuring competitive access by alternative rail carriers to the same rail infrastructure. Recent developments in many European countries show that European policy has been particularly effective with

49 In the UK and in Italy, the existing state owned monopolists were split up into competing undertakings in order to create competitive markets, a move which in Italy has nonetheless maintained an incumbent operator with a significant market power.

50 See press release at <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html> (as of 1 November 2007).

respect to freight services. Efforts to introduce competition in passenger services have been less effective. Council Directive No. 440 of 1991 on the development of Community railways<sup>51</sup> and two complementary Directives (95/18 and 95/19) adopted in 1995<sup>52</sup> had the objective of creating a unified market of railways services throughout the Union. The system of regulation was to be based on common accounting rules and in particular on a common approach to separation between infrastructure and services as well as on the creation of access rights to rail infrastructure for international services. In 1998, the Commission presented further legislative proposals for what was eventually to become the first package of railway directives (Directives 2001/12, 2001/13, 2001/14).<sup>53</sup> The package takes the accounting separation provisions of Directive 91/440 further by requiring that certain essential functions for non-discriminatory network access are carried out independently of the provision of rail transport services.

In practice, entry by new providers was delayed by difficulties associated with logistics and with the need to enter with a full network of coordinated routes so as to ensure a high degree of capacity utilisation. Furthermore, passenger train services in Europe have been subject to pervasive financial problems. According to National Economic Research Associates (NERA) (2004), in 2001 operating revenues were around 30% of operating costs in Italy, 50% in Germany and Spain, 58% in France, and 68% in the UK. The cause of such difficulties was not unrelated to the ownership structure of most rail companies and to the objectives pursued by public policy. Being state owned, rail companies were obliged in many countries to maintain the level of service irrespective of demand and keep prices low (OECD 2005).

Currently, the Commission is proposing a third package of railway directives to open up the market for international passenger services by 2010.<sup>54</sup>

51 Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways. *Official Journal L* 237, 24 August 1991, pp. 25–28.

52 Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings. *Official Journal L* 143, 27 June 1995, pp. 70–74 and Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees. *Official Journal L* 143, 27 June 1995, pp. 75–78.

53 Directive 2001/12/EC of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways. *Official Journal L* 75, 15 March 2001, pp. 1–25; Directive 2001/13/EC of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings. *Official Journal L* 75, 15 March 2001, pp. 26–28; Directive 2001/14/EC of 26 February 2001 on the allocation of capacity and the levying of charges for the use of railway infrastructure and safety certification. *Official Journal L* 75, 15 March 2001, pp. 29–46.

54 Proposal for a Directive of the European Parliament and of the Council on the certification of train crews operating locomotives and trains on the Community's rail network (COM/2004/0142 final – COD 2004/0048); Proposal for a Regulation of the European Parliament and of the Council on International Rail Passengers' Rights and Obligations (COM/2004/0143 final – COD 2004/0049); Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/440/EEC on the development of the Community's railways [SEC(2004) 236](COM/2004/0139 final – COD 2004/0047).

Some technical convergence will be required. To facilitate this, a European certification for locomotive drivers will be introduced by 2010 which will require a standardisation of national rules (and signals) by that time. On the other hand, there is no project underway for achieving convergence on locomotive technical standards which differ substantially across Member States and which impede entry by competitors into neighbouring markets. These technical difficulties need to be solved if entry in transborder domestic passenger service markets is actually to take place. Still, there are some indications of increasing competition in freight. In Germany, for example, competitors of RAILION GERMANY AG (the successor of DB Cargo) achieved a market share of almost 7% in 2003. Similar results have occurred in many other European countries (OECD 2005).

*d) Banking*

In banking, progressive rounds of Council directives have led to a widespread opening of national markets based on the principles of home country control, efficiency-oriented regulation, and mutual recognition. Liberalisation efforts have been directed mainly towards making the entry of new competitors into national markets easier. The system of regulation, although increasingly harmonised across Member States, has evolved towards a relaxation of controls as in the rest of the world.

The first EC banking directive (Directive No. 77/780)<sup>55</sup> reformed entry regulation, eliminating discretionary powers associated with it. The second banking directive of 1989<sup>56</sup> set out a number of important principles such as home country control (meaning that the responsibility for authorisation and financial supervision of credit institutions remains with the supervising authority of the "home" country); the principle of single banking license, which implies that a bank that is authorised to carry out business in one Member State can do so throughout the Union; and the principle of mutual recognition, leading to recognition by all Member States of each others banking laws and regulations. Some related but more technical directives have also been adopted, setting common standards on prudential regulation such as the Own Funds Directive, the Solvency Ratio Directive, the Large Exposure Directive, and the Deposit Guarantee Schemes Directive. These measures have substantially strengthened competition while ensur-

55 Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations, and administrative provisions relating to the taking up and pursuit of the business of credit institutions, *Official Journal L 322*, 17 December 1977 pp. 30–37.

56 Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations, and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, *Official Journal L 386*, 30 December 1989 pp. 1–13.

ing appropriate prudential regulation (International Competition Network [ICN] 2005).

Efficient, competition-supporting regulation in the banking sector has been reinforced by a modification of the Basel Accord in 2004 which facilitated more sophisticated approaches to capital requirements and risk-management in banks (BANK FOR INTERNATIONAL SETTLEMENTS 2006). The so called Basel II regulation, whose implementation began in 2006, encourages banks to develop their own systems to compute minimum capital requirements while maintaining supervisory oversight. Basel II also assigns a greater role to market oversight in reducing excessive risks in banking activities. A key aspect of the new framework is its flexibility. This provides institutions with the opportunity to adopt the approaches most appropriate to their situation and to the sophistication of their risk management.

Notwithstanding these initiatives, the retail banking industry continues to be segmented along national boundaries at least in the original fifteen members of the Community. Mere liberalisation has not yet created an integrated, competitive European market. Partly to address this, the Commission launched a sector enquiry on retail banking which was completed in January 2007 (see EC COMMISSION 2007c). The inquiry, which also addressed payment systems, found that retail banking is characterised by limited competition which reduces the elasticity of demand each bank faces, resulting in extensive market power. This finding underscores the continuing need for effective competition policy oversight in this sector and for the adoption of regulations, for example, account number portability, that facilitate greater competition by increasing flexibility on the demand side.

*e) Other uses of the Commission's powers*

The Commission's powers have also been used in individual cases to remove unjustified restrictions in a number of sectors, for example, in postal, in harbour, and airport services. If a regulation requires or favours an abusive behaviour on the part of a state owned company or a firm that has been granted special and exclusive rights, the Commission can initiate proceedings before the Court of Justice in order to remove the restrictive regulation. Analogously, the Commission can initiate proceedings on the basis of articles 3 and 10, in order to remove a regulation that requires or favours a violation of articles 81 and 82. Through these powers, the Court has ensured the removal of rules deemed to violate the Treaty in a large number of cases (see Table 3).



A less definitive result can be achieved by the dis-application on the part of national judges or of public administrations of national rules that require or favour the adoption of practices contrary to articles 81 or 82. In these cases, which are not very frequent, national judges or administrative authorities are obliged to dis-apply the anti-competitive rules and, as a consequence, firms can no longer claim that they are obliged by that law to act in breach of the Community competition rules.<sup>57</sup> Unjustified regulatory restrictions to competition can also be removed by applying the Treaty rules that establish the "fundamental freedoms" (free movement of goods, services, capital, and people in addition to freedom of establishment). In interpreting these provisions, the Court of Justice has gradually moved away from an early emphasis on non-discrimination, adopting an approach whereby any impediment is prohibited unless justified on narrowly defined objective grounds (see, for related discussion, AMATO and LAUDATI 2002, and HEIMLER 2006).

In sum, the EC Commission's powers to adopt competition-oriented directives and related "legislative" measures have served as a principal tool for the encouragement of reforms that have advanced the interests of European consumers and provided enhanced flexibility for suppliers in key economic sectors. Moreover, since many of the sectors involved are infrastructure sectors, price reductions and improvements in service quality can yield major advantages for European business users. The benefits of these reforms are particularly evident in the telecom sector and are becoming more so in the electricity and other sectors. It is also evident that, in important respects, the process of competition-oriented reforms is not yet complete; continuing efforts and policy adaptation will be needed to increase the degree of competition in these markets and realise the full benefits for European citizens.

### 3.3 State Aid Enforcement

The state aid provisions of the Treaty were meant to ensure that competition is not distorted in the common market. Contrary to antitrust where the legal and economic communities are all very active in the discussion of standards to be applied, on state aid the Commission was and continues to be substantially alone. Economic research, which could contribute usefully to defining what should be treated as a competition restrictive subsidy, has,

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57 See Case C-198/01, *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato*, Decision of 9 September 2003.

until recently, been scarce (see BESLEY and SEABRIGHT 1999). Nonetheless, a good argument can be made that the contribution of state aid enforcement to European welfare has been enhanced by recent reforms.

In 2005, the Commission launched its State Aid Action plan,<sup>58</sup> with economic analysis being explicitly identified as the tool of the reform. Such analysis is meant to be used for identifying both the necessity and the proportionality of the aid, with an emphasis on the effect of the aid on market conditions. This is a big change over past practices according to which the Commissions considered state aid to be illegitimate only if it created distortions within a particular country, not considering that markets may be larger.

A further important tool is the “market economy investor test”. The test has been used to facilitate better-informed application of state aid policy to distressed flag carriers; to loss making state owned German local banks; and to state owned conglomerates such as IRI in Italy and Alstom in France.<sup>59</sup> In a number of cases, the prohibition of state financing has led governments to privatise distressed companies, leading to efficiency improvements.

Recently, the market economy investor test has been fine tuned to accommodate for special circumstances, enhancing the flexibility of state aid policy. In the case of public services, the 2003 Altmark judgement<sup>60</sup> made it clear that in the case of services of general economic interest, a subsidy has to be justified in terms of universal service considerations, where the cost of such obligations be clearly identified. In the context of liberalised industries, the 2005 Combust case<sup>61</sup> has made it clear that the financing of cost inefficiencies that originate from labour legislation valid at the time does not constitute state aid. State aid policy has also played an important role in facilitating the integration of the new EC Member States into the Community, by helping to ensure that their producers are not unfairly subsidised, especially as a result of incentives provided at the time of privatisation (see relevant chapters of GERADIN ed. 2004).

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58 State Aid Action Plan. *Less and better targeted state aid: a roadmap for state aid reform 2005–2009*, COM(2005) 107 final, Brussels, 7 June 2005.

59 See MONTI (2007) for an assessment of the role of competition policy, including state aid policy, in recent years.

60 Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, Decision of 24 July 2003.

61 Case C 10/2005, Restructuring aid to COMBUS A/S, Commission decision of 2 March 2005.

#### 4 “External” Contributions of EC Competition Policy

The significance of EC competition policy and the intensity and originality of the thinking underlying such policy have ensured that it has had an impact that goes well beyond the “direct” contributions to economic welfare and development noted in the preceding sections of this essay. These “external” contributions of European competition policy comprise:

- Encouragement to the adoption of competition rules in other jurisdictions, often based on EC approaches. A major vehicle for this work has been the partnership and free trade agreements that the EC has entered into with many developing and transition economies. An OECD survey of 86 regional agreements incorporating provisions on competition policy identified two broad “families” of such agreements, one associated with the EC and one with North American (NAFTA-style) approaches (see SOLANO and SENNEKAMP 2006). While ANDERSON and EVENETT (2006) suggest that this characterisation is overly simplistic, it is nonetheless clear that the EC has used its partnership and other agreements effectively as a vehicle to promote the adoption of EC-style rules internationally. As a result, the rules encountered by EC businesses operating abroad are more likely to be similar to those with which they are already familiar – an important benefit for European citizens in a globalising economy.
- In addition to EC-style substantive competition rules, the institutional configuration of EC competition policy has helped to inspire the adoption of similar institutional arrangements such as the West African Monetary Union and (in some respects) CARICOM.
- The Commission, along with the Member States’ competition authorities, has made extensive contributions to international policy debates and initiatives on related topics. For example, the EC has contributed extensively to policy debates in the OECD and co-founded the so-called International Competition Network – an informal network of national competition agencies throughout the world.<sup>62</sup>
- The EC was the principal sponsor of a proposal a few years ago to establish a “multilateral framework on competition policy” in the WTO. While any possibility of developing such a framework in the WTO was placed on hold in the General Council “July package” of 2004, the debate that occurred in the WTO was acknowledged even by sceptics of the pro-

62 For a description of the ICN see Internet: <http://www.internationalcompetitionnetwork.org> (as of 25 October 2007).

posal for a multilateral framework to have contributed to enhanced understanding of competition policy principles worldwide (see, e.g., INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE 2000). The decision taken by the WTO General Council in the 2004 July package leaves open the possibility of resuming work in this area in the WTO following conclusion of the Doha Round (ANDERSON and JENNY 2005, ANDERSON and EVENETT 2006).

- The EC experience has helped to generate interest in the idea of replacing anti-dumping with competition law disciplines in appropriate circumstances – an idea which has been picked up in subsequent WTO and other debates (WORLD TRADE ORGANIZATION 1998).
- More broadly, the role and institutional configuration of EC competition policy have helped to stimulate theoretical work on international governance which transcends the domain of competition policy as such. An example is Professor ERNST-ULRICH PETERSMANN's work on multi-level judicial governance and the protection of human rights in international markets (see PETERSMANN 2004 and 2007).

As already acknowledged, the impact of the foregoing wider contributions of European competition policy on the welfare of citizens is less direct than the contributions surveyed in earlier sections of this paper. Nonetheless, contributions of this nature have both: (i) facilitated the foreign operations of EC businesses; and (ii) maintained a high profile for Europe in international policy, legal, and academic circles. As such, they deserve to be counted in any full rendering of the contributions of competition policy in Europe.

## **5 Is Competition Policy Still Needed in a Globalising Economic Environment?**

An important issue underlying current debates on the role of competition policy in Europe is whether competition policy will still be needed in a globalising economic environment. Some would contend that the elimination of trade barriers is all that is needed to adequately protect competition (see, e.g., BLACKHURST 1991). There are, however, reasons for believing that state measures to protect and promote competition are still important even in the context of globalisation and continuing trade liberalisation (see also ANDERSON and JENNY 2005):

- First, depending on the natural configuration of industries as well as a variety of policy-related factors, markets for many goods and services

(particularly the latter) may be largely insulated from external sources of competition.

- Second, experience shows clearly that certain manifestly harmful anti-competitive practices (e.g., international cartels) cannot be remedied by external (or internal) liberalisation alone, where the relevant arrangements cover the main foreign firms in addition to any domestic firms operating in the relevant market(s). In other words, exposure to potential competition from abroad may not help if the key firms in the (international) market are allowed to form a cartel (see, for a useful compilation of evidence in this area, EVENETT 2003).

Even in the absence of barriers to external trade, competition law and policy can be important for other reasons, as well. For example, in many cases, the potential benefits of trade liberalisation will not be realised unless countries simultaneously take steps to address anti-competitive practices and structural barriers to development such as private and public monopolies in infrastructure sectors, domestic and international cartels that raise business input costs and reduce the welfare of consumers, and restrictions on entry, exit and pricing in manufacturing and other industries (OSAKWE 2001, ANDERSON and JENNY 2005). Furthermore, in many jurisdictions it is recognised that competition law has a role to play in preventing abusive practices relating to intellectual property rights in the domestic economy. It is unlikely that the mere absence of tariffs, quotas, or other traditional trade barriers can suffice to prevent such practices – particularly since patents or copyrights can themselves affect the ability to supply domestic markets through imports. These and other considerations imply that globalisation and trade liberalisation do not allay the need for effective state measures to protect competition, though they can certainly bear on the optimal application of such measures.<sup>63</sup>

## 6 Concluding Remarks

In recent policy debates, the question ‘what has competition done for Europe?’ has been posed at the highest levels. In this paper, we have sought to provide at least a provisional answer to this question. We have focused, in particular, on the contribution to European prosperity and the well-being of European citizens of “competition policy” – the set of laws, institutions

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63 For example, in markets characterised by an absence of import barriers, the effects of mergers are often assessed by reference to an international rather than a domestic market.

and policies through which governments maintain or promote competition. Our analysis has shown that the contribution of competition policy to European prosperity and the welfare of citizens have multiple dimensions. To begin with, from a historical perspective, rules to promote competition were deliberately given a prominent place by the fathers of the European Economic Community in the 1957 Treaty of Rome. This reflected their view that such provisions were needed to facilitate efficient market integration and break down barriers to internal trade. From this perspective, competition policy has made an important contribution to the success of the overall project of European integration, which has brought unprecedented peace and prosperity to millions. More recently, competition policy and related institutions and expertise have played an important role in the accession of central and east European states to the European Community. In these respects, competition policy has performed an important constitutional function in Europe.

Turning to the continuing (present-day) contribution of competition policy to European welfare, this has three main dimensions: (i) the role of competition (antitrust) law enforcement in deterring business practices that thwart competition and harm consumers; (ii) the role of the Commission in addressing government measures that can impede competition, thereby preventing realisation of the full potential benefits of market integration; and (iii) the treatment of state aid to industry (i.e., industrial subsidies). Our analysis has shown that, in each of these areas, competition makes important, ongoing contributions to the welfare of citizens. In regard to the first aspect, it deters cartels, anti-competitive mergers, and other practices that are manifestly harmful to consumer welfare, promoting the adoption of effective antitrust enforcement also by domestic authorities. Regarding the second aspect, it has encouraged reforms that have advanced the interests of consumers and also provided enhanced flexibility for suppliers in key infrastructure sectors. To be sure, the process of competition-oriented reforms is not yet complete; continuing efforts and policy adaptation will be needed to realise the full potential benefits for European citizens. In regard to the third area, it ensures that the use of subsidies does not distort competition in the unified market.

This essay has also shown that the contribution of competition policy transcends the realm of the purely economic. Competition policy as it is practised in Europe is, very much, a European creation, with deep roots in Continental economic and social thought. It serves important constitutional functions. It has undergone far-reaching evolution, taking account of ex-

perience within the Community, the insights and lessons of modern economic analysis, and experience abroad. Initiatives derived from the principles of European competition policy have generated interest in diverse international fora and debates, and thereby contributed to policy formulation beyond Europe. Taking account of all these dimensions, it is not too much to say that competition policy forms part of Europe's intellectual heritage and carries important lessons for the world.

Finally, the experience with liberalisation (in Europe and elsewhere) has shown that restrictions of competition are never advocated on the basis that "monopoly is good"; rather, they tend to be justified, often instrumentally, on the basis of general interest objectives such as security of supply, universal service, environmental sustainability, or competitiveness. In such circumstances, recognition that competition itself is also an objective can be an important source of leverage for competition advocates and guidance for relevant policy-making bodies.

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**Table 1:** Proceedings opened by the European Commission and by the Italian Antitrust Authority affecting the Italian market, 1964–96 (number of cases, averages per year and %)

Formal proceedings opened by the Commission according to Sections 85 and/or 86 of the Treaty				
Years	Number of cases involving the Italian market	Average number of cases involving the Italian market each year	Total number of cases	Percentage of cases involving the Italian market
1964–1980	7	0,4	162	4%
1981–1990	12	1,2	171	7%
1964–1990	19	0,7	333	6%
1991–1996	6	1	113	5%
<b>1964–1996</b>	<b>25</b>	<b>0,8</b>	<b>446</b>	<b>6%</b>
Formal proceedings opened by the Italian Competition Authority according to Sections 2 or 3 of Law no. 287/90				
<b>1991–1996</b>	<b>114</b>	<b>19</b>	<b>114</b>	<b>100%</b>

Source: HEIMLER (1998).

**Table 2:** Cartel prosecutions by the EC Commission, 1995–2006

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Number of cartels discovered without leniency	1	2	0	4	1	1	2	0	0	0	1	1
Sanctions on cartels without leniency (million EUR)	12	1	0	179	99	3	103	0	0	0	44	10
Number of cartels discovered with leniency	0	0	0	0	0	1	6	8	4	4	4	5
Sanctions on cartels with leniency (million EUR)	0	0	0	0	0	110	1581	821	388	368	639	1833

Source: DG COMPETITION, Annual Reports, various years.

**Table 3:** Application of Article 86 of the Treaty or State responsibility under articles 3 and 10 of the Treaty\*

Sectors	Commission	Court of Justice
<b>Agricultural and Food Products</b>	- Pabst & Richarz/BNIA (1976)	- Banchemo (1995) - Crespelle (1994) - BNIC/Aubert (1987) - GB-INNO v. ATAB (1977)
<b>Used Oils</b>		- Inter-Huiles (1983)
<b>Electricity, Gas and Water</b>	- Jisselcentrale (1993) - Naweva Anseau (1981)	- Commission v. France (1997) - Almelo v. Ysselmij (1994)
<b>Transports</b>	- Canary Islands (1987)	- Ahmed Zaeed v. Zentrale (1989) - Nouvelles Frontières (1986)
<b>Ports and Airports</b>	-Brussels Airport (1995) -Roedby (1993)	- GT link A/S (1997) - Corsica ferries (1994) - Merci v. Siderurgica (1991) - Mueller (1971)
<b>Travel Agencies</b>		- Vlaamse Reisbureaus (1987)
<b>Telecommunications</b>	- Irish telecommunications (1997) - Italian GSM (1995) - British telecommunications (1982) - Directives on TLC	- Spain v. Commission (1992) - RTT v. GB-Inno (1991) - France v. Commission (1991)
<b>Postal Services</b>	- Dutch Express delivery (1990) - Spanish courier services (1990)	- Corbeau (1993) - Netherlands v. Commission (1992)
<b>Television</b>	- UER (1993)	- Commission v. Netherlands (1991) - ERT v. DEP (1991) - Sacchi (1974)
<b>Banks and Insurance</b>	- Greek insurance (1985)	- FFSA and others v. Commission (1997) - Greece v. Commission (1988) - Zucher v. Bayerische Vereinsbank (1981) - Van Aymede UCI (1977)
<b>Employment Agencies</b>		- Job Centre Coop a.r.l. (1997) - Hoffner v. Macrotron (1991)
<b>Accountants</b>		- German accountants (1997)
<b>Customs Forwarding Agents</b>		- Commission v. Italy (1998)
<b>Horse Racing</b>		- Commission and France v. Ladbroke (1997)
<b>Funeral Homes</b>		- Bodson v. Pompes Funebres (1988)
<b>Intellectual Property Rights</b>	- GLV (1981)	- BRT v. SBAM (1974)
<b>Public Enterprises Accounting Transparency</b>		- France v. Commission (1993) - Italy v. Commission (1987) - France v. Commission (1982)
<b>Others</b>		Consorzio Industrie Fiammiferi v. Autorità garante della concorrenza e del mercato (2003)

\* Only cases where a violation was ascertained are mentioned; cases on State responsibility under articles 3 and 10 of the Treaty for facilitating or encouraging behaviour contrary to Articles 81 and 82 are in italics.

## Artikel – Articles

### What has Competition Done for Europe? An Inter-Disciplinary Answer

*Robert D. Anderson and Alberto Heimler*

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In recent policy debates in Europe, the question 'what has competition done for Europe?' has been posed at the highest levels. This question merits careful reflection. Competition as it is understood by mainstream economic and legal scholars refers not to an ideology but to inter-firm rivalry in markets. Such rivalry ensures that consumers enjoy choice, low prices, and good value for money. The authors consider the historical origins and development as well as the current role and effects of competition policy in Europe. The latter includes legal provisions that address anti-competitive practices by firms and activities aimed at promoting competition in respect of potentially anti-competitive government measures. They conclude that such policy has made essential contributions to the high standard of living enjoyed by European citizens, to the policy and institutional infrastructure of Europe, to related international initiatives and, indeed, to the creation of Europe itself.

Die Frage «Was hat Wettbewerb Europa gebracht?» wurde während den jüngsten Politikdebatten in Europa auf höchster Ebene gestellt. Diese Frage verdient eine sorgfältige Reflektion. Wettbewerb wird von den meisten ökonomischen und rechtlichen Schulen nicht als Ideologie, sondern als die Rivalität zwischen Firmen in einem Markt verstanden. Diese Rivalität sorgt dafür, dass Konsumenten eine Auswahl geboten wird, die Preise niedrig gehalten werden und ein gutes Preis-Leistungs-Verhältnis besteht. Die Autoren betrachten die geschichtlichen Ursprünge und Entwicklungen sowie die aktuelle Rolle und die Auswirkungen der Wettbewerbspolitik in Europa. Letztere beinhalten rechtliche Massnahmen, welche auf die wettbewerbswidrigen Praktiken von Firmen abzielen sowie Aktivitäten, welche den Wettbewerb im Hinblick auf mögliche wettbewerbsverzerrenden staatlichen Massnahmen fördern. Sie kommen zum Schluss, dass diese Politik einen wesentlichen Beitrag zum hohen Lebensstandard in Europa, zur politischen und institutionellen Infrastruktur und zu ähnlichen internationalen Initiativen, ja sogar zur Gründung von Europa selbst geleistet hat.