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***André Schmidt***

***Non-Competition Factors in the  
European Competition Policy:  
The Necessity of Institutional Reforms***



**GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN**

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## **Non-Competition Factors in the European Competition Policy: The Necessity of Institutional Reforms\***

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### **Abstract**

The European competition policy can look back at a successful forty-year old practice of application by the European Commission. However, non-competition factors in the competition policy has become more and more relevant with the increasing importance of the so called positive integration. In a multitude of merger and state aid cases such influence of non-competition factors can be shown. To protect the European competition policy from political influence and therefore from the influence of non-competition factors a new institutional framework for the European competition policy should be set up. The decision-making process in the field of competition policy should be institutionalised with an independent European Antitrust Office and with an independent State Aid Commission.

**JEL: F02, L40**

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## **1 Introduction**

The European competition policy can look back at a successful forty-year application practice by the European Commission. It was dominated primarily by the political aim to realize the European integration. During the first years the European competition policy was understood as an instrument for setting up the common market. The emphasis has been on the integration of national markets by prevention of private and public restraints of trade. Hence, the European competition policy served exclusively the protection of effective competition.

After the Single European Act and the Maastricht Treaty the European competition policy was also treated as an instrument to reach industrial, environmental, technological and labor market goals. Hence, in the decisions of the European Commission these non-competition factors have gained more relevance. The political pressure the member states put on the European Commission increased, too. In a multitude of merger and state aid cases such political pressures can be shown. From the point of view of a market economy such a development is dangerous because the decision-making process becomes more and more political.

An independent European Antitrust Office should be institutionalized to protect the European competition policy from political influence. To realize a clear distinction between competition and non-competition factors in the decision-making process, a two stage process should be created - like the German or Swiss Antitrust Law. The decisions of the independent European Antitrust Office would purely refer to aspects of competition. In the case of possible conflicts between any decisions of the Antitrust Office and general aims of the EC-Treaty, the European Commission would get a veto right in a political process.

With institutional reforms there could be a better orientation on competition factors in the European State Aid Control as well. An independent State Aid Commission should focus purely on competition factors when deciding about aids from member states or the European Community. In the case of conflicts between effective competition and the political aims of the EC-Treaty a two-stage process could be institutionalized as well.

These institutional reforms shall serve to avoid political influence in European decisions concerning competition on the one hand and to cause more transparency in the decision-making process on the other hand.

## 2 Goals and developments of the European competition policy

### 2.1 Effective competition for establishing a common market

Right from the beginning European competition policy was primarily dominated by the political aim to realise the integration. In this sense competition didn't serve as an end in itself.<sup>1</sup> It was considered as a medium to achieve the common goals of Art. 2 EC-Treaty. Competition rules were meant to serve the integration of the national markets and the reduction in trade barriers which were set up by private agreements between undertakings, by the abuse of monopoly power or by state subsidies. In this context competition rules should guarantee a system ensuring that competition in the internal market is not distorted. Thereby it is linked to the four liberties of the common market - the free flow of persons, goods, services and capital. An extensive protection of these four liberties in the common market can be possible only when trade barriers set up by private agreements or state subsidies are forbidden. Accordingly, the central aim of the competition policy is to open the national markets by reducing trade barriers.<sup>2</sup> First of all, European competition policy is considered as an aid to integration and is therefore dominated by the paradigm of encouraging integration.<sup>3</sup> The European Treaty constitutes a complete Common Market Law of Competition, which prohibits private restrictions of competition (Art. 81 and 82 EC-Treaty) as well as public restrictions (Art. 86 and 87 EC-Treaty) by the member states. An important amendment of the competition rules was given in 1989 by the European Merger Control Regulation to ensure that the common market can't be restricted by concentration which couldn't be guaranteed effectively by Art. 81 and 82 (formerly Art. 85 and 86) of the EC-Treaty.

### 2.2 Effective competition to realize universal aims of the Community

European competition policy covers two dimensions. Beside the establishing of the common market, European competition policy should also contribute to universal aims of the European Union like industrial-, environmental-, social- and regional policies.<sup>4</sup> The performance of the European competition policy is judged by the achievement of the political aims of the European Union. With increasing importance of the so called positive integration<sup>5</sup> after completing

<sup>1</sup> Cf. Kerber, W. (1994), Die Europäische Fusionskontrollpraxis und die Wettbewerbskonzeption der EG: Zwei Analysen zur Entwicklung des europäischen Wettbewerbsrechts, Bayreuth, p. 185.

<sup>2</sup> Cf. Everling, U. (1990), Zur Wettbewerbskonzeption in der neueren Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, Wirtschaft und Wettbewerb 40, p. 1000.

<sup>3</sup> Cf. Van Miert, K. (1995), Wettbewerbspolitik und die Zusammenarbeit zwischen den Kartellbehörden in der Europäischen Union, in: Gerken, L. (ed.), Europa zwischen Ordnungswettbewerb und Harmonisierung: Europäische Ordnungspolitik im Zeichen der Subsidiarität, Berlin, p. 219.

<sup>4</sup> Cf. Van Miert, K. (1995), Die Wettbewerbspolitik der neuen Kommission, Wirtschaft und Wettbewerb 45, p. 554.

<sup>5</sup> Cf. Tinbergen, J. (1954), International Economic Integration, Amsterdam.

the program for creation of the Single European Market in 1992 these performance orientation has become more and more important.<sup>6</sup> From the point of view of a market economy such a development is dangerous because the decision-making process becomes increasingly political.<sup>7</sup> With that, the probability of consideration of non-competition factors in the European competition policy increases.

In this sense the competition decisions are decisions under conflicting goals: On the one hand the goals of effective competition, and on the other hand the political aims of the European Union. Hence, the influence of particular interests in the competition policy has grown, because political decisions are always subject to the pressure of interest groups.<sup>8</sup> The priority of effective competition is now limited by the universal political aims of the European Union.<sup>9</sup>

### 3 Non-competition factors in the European Competition Policy: Case Studies

The consideration of non-competition factors, especially the influence of political pressure, can be shown in some cases of the European Merger Control and the European State Aid Control. A large part of the political pressure exerted on the European Commission comes from the governments of the member states. The following cases can show the links between universal political aims of the European Union and political pressure by the member states. Because of the increasing importance of the universal political aims in the decision-making-process in the European Commission, there is increasing space for pressure by the member states.

#### 3.1 Non-competition factors in the European Merger Control

The following cases are examples that the European competition policy is not only orientated on competition factors but also on non-competition factors.

##### a) *Alcatel/AEG-Cable*

In the case *Alcatel/AEG Cable*<sup>10</sup> in 1991, the French *Alcatel* cable intended to take over 96,8 percent of *AEG-Cable* Mönchengladbach from *AEG-Cable* Berlin. The takeover concerns es-

<sup>6</sup> Cf. *Ehlermann, C.-D.* (1992), Der Beitrag der Wettbewerbspolitik zum Europäischen Binnenmarkt, *Wirtschaft und Wettbewerb* 42, pp. 5.

<sup>7</sup> Cf. *Ehlermann, C.-D.* (1993), Wettbewerbspolitik im Binnenmarkt, *Recht der internationalen Wirtschaft* 39, p. 793.

<sup>8</sup> Cf. *Schmidt, A.* (1998), Ordnungspolitische Perspektiven der europäischen Integration im Spannungsfeld von Wettbewerbs- und Industriepolitik, Frankfurt am Main, pp. 162.

<sup>9</sup> Cf. *Schmidt, A.* (1999), Das Wettbewerbsprinzip im europäischen Integrationsprozeß: Ordnungspolitische Entwicklungslinien der europäischen Integration von Rom bis Amsterdam, *Hohenheimer Diskussionspapiere* Nr. 173.

<sup>10</sup> Cf. *Wagemann, M.* (1992), Erfahrungen mit der EG-Fusionskontrolle - der Fall "Alcatel/AEG Kabel, *Wirtschaft und Wettbewerb* 42, pp. 730.

essentially the markets of telecommunication and power cables in Germany. The Commission has approved the merger, because cable markets in the Community were at a transitional stage, shifting from national markets to one that is Community-wide, but the transition has not yet been completed and progress varies between product markets. The Commission concluded that the merger would not create or strengthen a dominant position for the parties in any of these markets. Although the German Cartel Authority made an objection against this takeover (the three leading enterprises would get a market share of over 50 percent), the European Commission declared it as compatible with the common market. The background for this decision was a solemn warning by the French President *Mitterand*. He urged the Commission to open the merger control procedure in this case, because the French government expected that the takeover would strengthen the competitiveness of *Alcatel* in the field of the market of telecommunication cables in the future. This case is the first example of the European Merger Control procedure in which a decision of the European Commission is influenced by a national government. Even the German Government renounced a complaint before the European Court of Justice due to the political intervention of the French government.

b) *Nestlé/Perrier*

In the second case *Nestlé/Perrier*<sup>11</sup> in 1992, political influence on the Commission's decision can be verified as well. Although the acquisition of *Perrier* by *Nestlé* raised serious doubts whether it would create or strengthen a dominant position on the French bottled water market, the Commission has declared the merger as compatible with the Common Market under conditions and obligations. By facing the near referendum about the treaty of Maastricht the controversial decision based on the apprehension, that a ban of the merger would push the political atmosphere in France against the European integration. Decisions like this one undermine the system institutionalized ensure that competition in the internal market can't be distorted.

c) *Mannesmann/Vallourec/Ilva*

On August 18<sup>th</sup>, 1993, *Mannesmannröhrenwerke AG*, *Valtubes SA* and *Dalmine Spa*<sup>12</sup> notified the Commission of the proposal to create a concentrative joint venture (*DMV*) for production and sale of seamless stainless steel tubes. After the initial one month assessment provided for under the Merger Regulation, the Commission considered that the proposed operation raised serious doubts as to its compatibility with the common market. Following an in-depth second phase enquiry, the Commission has decided to authorise the proposed merger. In taking its decision the Commission didn't follow the opinion of the Advisory Committee on mergers. The majority opinion of the Advisory Committee considered that the creation of the new entity would give rise to market conditions which would place the new entity, *DMV*, and the come second producer the, Swedish *Sandvik*, in a collectively dominant position on the

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<sup>11</sup> Cf. *Nestlé/Perrier*, Official Journal 1992 No. L 356, pp. 1.

<sup>12</sup> Cf. *Mannesmann/Vallourec/Ilva*, Official Journal 1994 No. L 192, pp. 15.

Western European market for seamless stainless steel tubes, as a result of which effective competition would be significantly impeded in the common market. The majority opinion therefore concluded, that the proposed operation was incompatible with the common market and should therefore be prohibited. In the Commission itself, the authorisation was controversial. The commissioner for competition, *Karel Van Miert*, was outvoted by a 8:8:1 result. The decision was justified by the statement, that there would be a “real” possibility of competition from Japanese and Eastern Europe producers on the relevant Western European market.

The case *Mannesmann/Vallourec/Ilva* shows impressively, that European merger control procedure needs an improvement in its institutional conditions. That can be demonstrated by the result of the voting procedure by the commissioners. Primary non-competition factors in form of industrial goals were in the background of this decision. The joint venture was meant to strengthen the competitiveness of the European steel-industry against Japanese and East-european producers. Under aspects of an effective competition this decision was doubtful.<sup>13</sup> In former decisions potential competition would have been considered only, if strong evidence of high probability of a strong and quick market entry existed.<sup>14</sup> However, the case *Mannesmann/Vallourec/Ilva* doesn't fulfil this essential assumption.

#### d) *Kali&Salz/Mdk/Treuhand*

In the case *Kali&Salz/Mdk/Treuhand*<sup>15</sup> in 1994, the German government exerted political pressure on the decision by the Commission. In this case the Commission permitted the joint venture by K&S – a subsidiary of *BASF* – and *MdK*, a hundred per cent subsidiary of *Treuhand*, subject to conditions. The procedure was characterised by considerable political interventions, in the context of the German reunion. Under these circumstances the Commission had to consider non-competition aspects like regional or employment conditions. The given severe structural weakness of the regions in East Germany was concerned by the proposed concentration. Under the aspects of failing company defence the Commission declared the joint venture as compatible with the common market under obligations.

#### e) *Mercedes-Benz/Kässbohrer*

The acquisition of *Kässbohrer* by *Mercedes-Benz*<sup>16</sup> in 1995, in the bus market, caused suspicions, too. It was presumed that the Commission has decided not only under competition aspects but also under non-competition aspects. Although the acquisition has led to a combined

<sup>13</sup> Cf. *Ebenroth, C. Th.*, and *K. W. Lange* (1994), EG-Fusionskontrolle nach Abschluß der Uruguay-Runde im Rahmen des GATT: Zugleich Besprechung der Entscheidung der EG-Kommission *Mannesmann/Vallourec/Ilva*, *Wirtschaft und Wettbewerb* 44, p. 614.

<sup>14</sup> Cf. *European Commission* (1992), XXI th Report on Competition Policy 1991, Brussels - Luxembourg, pp. 406.

<sup>15</sup> Cf. *Kali&Salz/MdK/Treuhand*, Official Journal 1994 No. L 186, pp. 38.

<sup>16</sup> Cf. *Mercedes-Benz/Kässbohrer*, Official Journal 1995 No. L 211, pp. 1.

market share of 74 % in the intercity bus market in Germany (41 per cent in EAA), the Commission declared the proposal as compatible with the common market. The German minister for economic affairs, *Rexrodt*, had intervened successfully in Brussels. He had stressed emphatically the social and regional dimension of the proposed merger. The commissioner of competition, *Karel Van Miert*, commented after the decision: “ However, I am glad that this decision removes the uncertainty surrounding the fate of the Kässbohrer company currently threatened by bankruptcy and therefore also removes the threat to 5000 employees within and outside Germany”<sup>17</sup>.

### 3.2 Non-competition factors in the European state aid control

In comparison to the merger control procedure the state aid control procedure is characterised by more political interventions. At first glance this remark is not surprising, because state aid decisions are always political decisions at first.

Although the European state aid control is a central column of the European competition policy, the Commission’s approach can be characterised by the absence of a framework of competitive impact analysis.<sup>18</sup> As a result, there is a high possibility of political intervention. The decision-making process is dominated by political aspects and not by competition aspects.

Therefore the analysis of the decision-making process has to be seen within the context of the theory of public choice. In this context two factors have to be distinguished. First the individual Commissioner’s come from certain member states. So it’s possible that the Commissioners take decisions under the political pressure from their own countries. Second the Commission spurs its own goals in its role as the engine of the integration, for instance as supplier of actions in the field of industrial-, social- and regional policies.<sup>19</sup> In this context the European Union itself offers community aids. Moreover the Commission can use its competence of state aid control as an instrument for its own goals.<sup>20</sup> Article 92 (3) EC-Treaty regulates, that the Commission has extensive latitude to decide whether a state aid is compatible with the common market or not. The Commission has a discretion about whether higher-ranking interests exists which legitimate a limitation of the principle that competition in the internal market shouldn’t be distorted. The following cases of state-aid-control will show that the decisions by

<sup>17</sup> *Van Miert, K.*, Frankfurter Allgemeine Zeitung from 15 th February 1995, p. 17.

<sup>18</sup> Cf. *Bishop, S.* (1997), The European Commission’s Policy Towards State Aid: A Role for Rigorous Competitive Analysis, *European Competition Law Review* 18, p. 84.

<sup>19</sup> Cf. *Freytag, A.* (1993), Zur Rolle der EG-Kommission in der Europäischen Industriepolitik, *Zeitschrift für Wirtschaftspolitik* 42, pp. 297.

<sup>20</sup> Cf. *Schütterle, P.* (1994), Kontrolle staatlicher Beihilfen nach Art. 92 ff EGV - Wettbewerbsschutz oder EG-Sachpolitik? Ein praktischer Problemauflöß, in: *Referate des XXVII. FIW-Symposiums, Marktwirtschaft und Wettbewerb im sich erweiternden europäischen Raum*, Köln, p. 18, and *Färber, G.* (1995), Binnenmarktgerechte Subventionspolitik in der Europäischen Union: Strukturen, Normen und Defizite, Frankfurt am Main - New York, p. 389.

the commissioners are often dominated by political interventions so that non-competition aspects are predominant in the end.

a) *Renault*

On 15 November 1989, the Commission decided that its decision of March 1988 against the aid granted to *Renault*<sup>21</sup> had not been implemented correctly. The French Government had failed to comply with two essential conditions imposed by the Commission. In its decision, the Commission had authorized the award by the French Government of FF 20 000 million to *Renault*, of which FF 8 000 million had already been granted as capital contributions in 1985 and 1986, and FF 12 000 million in the form of a debt write-off. The award of FF 12 000 million was approved on condition that the French Government implemented its plan to change the status of *Renault* from a “regie” to a legal entity subject to normal commercial law before the end of 1988. A further condition was that *Renault* carries out its restructuring plan. The Commission found that the modification of *Renault’s* status by means of regulation was not sufficient to place legally on completely the same terms as its competitors subject to all the obligations of national commercial law, and *Renault* had abandoned its plan to reduce vehicle production capacity through closure or gradual reductions in assembly plants, contrary to the undertakings given by French Government. Therefore the French Government will be required to recover FF 12 000 million from *Renault*. However one year later the French Government paid FF 8000 million to *Renault* masked as inflow of capital in the frame of the privatisation. Although the behaviour of the French Government is an offence against the conditions of the decision by the Commission for strengthening the competitiveness for its motor vehicle industry, the Commission is still inactive.

b) *Bull*

The case *Bull*<sup>22</sup> was motivated by industrial policy goals, too. In 1993 the Commission instituted Art. 88 (2) [formerly Article 93 (2)] EC-Treaty proceedings in respect of an advance on a future capital injection amounting to FF 11,1 billion which the French State and *France Télécom* had granted to *Bull*. The commission believed that given the past losses incurred by *Bull* and the fact that most major operators have seen turnover decline in recent years, the capital injection represented an aid. Moreover, as *Bull* exports its products within the Community, such an aid could affect trade between member states. Against the background that the aid did not have a regional orientation and that no restructuring plan was presented to the Commission, it was not possible to declare the aid to be compatible without extending the Article 88 (2) proceedings. Unfortunately, in the further course of the proceeding the Commission gave up these competition orientation. Surprisingly, in October 1994 the Commission

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<sup>21</sup> Cf. *European Commission* (1991), XX th Report on Competition Policy 1990, Brussels - Luxembourg, p. 186.

<sup>22</sup> Cf. *European Commission* (1995), XXIV th Report on Competition Policy 1994, Brussels - Luxembourg, pp. 493.

declared the aid as compatible with the common market. In its decision, it took into account that it would be in the Community's interest to maintain and develop the information sector in Europe, that the aid would enable *Bull* to return to viability within two years, that the aid was limited to what was strictly necessary and that the company in return would be obliged to reduce its production capacity.

c) *Aids in air transport*<sup>23</sup>

On January of 1996, the Commission raised no objections in respect of the plan of the Spanish state-owned holding company *Teneo* to invest PTA 87 billion in the national airline *Iberia*. The Commission considered this investment as a normal commercial transaction which satisfies the market economy investor principle. At the end of 1994 Spain had lodged a state aid application to the Commission for PTA 130 billion, aimed at financing a restructuring plan. In early 1995, the Commission took the decision that, because *Iberia* had already received state aid of PTA 120 billion in 1992, further state aid could be authorized only under very strict conditions. *Iberia*, therefore, decided to find alternative financial arrangements for its problems and to modify the restructuring programme. The new financial strategy adopted by the management enabled the Commission to consider the capital injection as a normal commercial transaction. However, this decision was not convincing, because *Iberia* has given its consent to divest a substantial part of its Southern American holdings to a newly created company, with the option to repurchase the Latin American Holdings two years later. It's still very doubtful, whether these conditions are a normal commercial transaction which satisfies the market economy investor principle. Rather, it seems that the Commission offended with its decision against its own principle of state aid control: "one time – last time".

In July of 1996 the Commission raised no objections to the payment of the third and last instalment, amounting to FF 5 billion, of the FF 20 billion state aid to *Air France*. Although the airline didn't fulfil some of the conditions and obligations, the Commission decided - under the pressure of the French government - that the aid could be seen as compatible with the common market. Objections raised by the competitors were not considered. In June of 1998 the European Court of Justice has sustained the objection of six competitors grounded on formal defects of the decision. At the result the Commission has to revise the decision fundamentally.

These cases can show, that the state aid procedure in the Community is not only dominated by aspects of competition but also by aspects of political influence. The political pressure on decisions by the Commission can also be proved in the cases of *Volkswagen*<sup>24</sup> or *Credit Lyon-*

<sup>23</sup> Cf. *European Commission* (1997), XXVI th .Report on Competition Policy 1996, Brussels - Luxembourg, pp. 227.

<sup>24</sup> Cf. *Waniek, R. W.* (1996), Die Beihilfenaufsicht der EU im Lichte des Falls Volkswagen Sachsen, *Wirtschaftsdienst* 76, pp. 464.

*naise*<sup>25</sup>. In consideration of such political interests both by the member states and the Community itself, the system ensuring competition in the internal market is put at risk.

## 4 Proposals for institutional reforms

### 4.1 The necessity of institutional reforms

To protect the European competition policy from political influence and therefore from the influence of non-competition factors a new institutional framework for the European competition policy should be set up. The case-studies have shown, that political influence and non-competition factors exist in the decision-making process always and everywhere. The list of such cases can be extended without any problem, to mention only the case of *Deutsche Telekom/Bertelsmann/Kirch*, in which the German government tried to exercise political influence on the Commission.

Based on the theory of Public Choice, a competition policy which is orientated towards effective competition has not much chance of realisation.<sup>26</sup> This is because voters are usually not sufficiently informed about the value of competition policy. They can't perceive the positive effects of competition policy directly. On the contrary, the public can easily see the benefits of employment programs or regional development. So it will rather refuse a competition policy which is orientated towards effective competition above all when such a policy would mean that employment or regional development strategies can't be reached in the first place. Therefore, politicians have no incentives to a rational competition policy under the presumption of maximising votes or satisfying behaviour. However, an incentive exists to pursue a competition policy, which is orientated to the desires of interest groups.

These arguments can be transferred to the situation of the European Commission. The European Commission is involved in various fields of politics. Competition policy is only one part of them. Therefore the commissioners have incentives to subordinate the competition policy to the fields, which are more likely to gain publicity like employment or regional policy. Furthermore, the commissioners are always under the influence of the interests of their native countries and their respective interest groups.

Therefore, the competition control procedure should be institutionalised with independent authorities. The advantage of such a solution would be that an independent authority could exclusively consider competition factors. Independent servants would maximise their utilities by increasing the reputation of the authority. Therefore effective incentives exist to realise the

<sup>25</sup> Cf. *European Commission* (1997), XXVI th Report on Competition Policy 1996, Brussels - Luxembourg , pp. 226 .

<sup>26</sup> Cf. *Baum, Th.* (1982), Per se Rule versus Rule of Reason und Kartellrechtsautonomie: Eine Hypothese auf der Basis der Public Choice Theorie, *Wirtschaft und Wettbewerb* 32, p. 915.

aims of such an authority successfully. Especially with regard to the structure of the decision-making process in the European Commission this seems to be important. The commissioner of competition needs the majority of the other commissioners, remember the case *Mannesmann/Vallourec/Ilva*. Because the commissioners are not independent in their decisions, the creation of independent competition authorities could effectively protect the competition factors in the European competition policy. The creation of an independent Antitrust Office for decisions against cartels, vertical restraints and mergers should be discussed as well as the creation for an independent State Aid Commission for the state aid procedure.

## 4.2 Independent Antitrust Office

To protect the European competition policy from political influence, an independent European Antitrust Office should be institutionalized.<sup>27</sup> The creation of the European Antitrust office could take the independent European Central Bank as an example.<sup>28</sup>

To realize a clear distinction between competition and non-competition factors in the decision-making process, a two stage process should be created - like the German or Swiss Antitrust Law. The decisions of the independent European Antitrust Office would purely refer to aspects of competition. In the case of possible conflicts between any decisions of the Antitrust Office and general aims of the EC-Treaty, the European Commission would get a veto right in a political process. The advantage of such an institutional solution would be that the European Antitrust Office could be purely consider competition aspects without problems of political acceptance.

One could be afraid that the European Commission uses its veto right extensively and that thereby the decision-making process will get more and more political.<sup>29</sup> Such a fear is unfounded, because if the Commission uses its veto right it will have to reveal the reasons for its decision. So the decision-making process gains more transparency. Politically motivated decisions could never hide behind doubtful competition aspects like separation of markets or vague considerations of potential competition.

However, such institutional changes are not to be expected in the near future. Therefore, current system should be improved through the following steps:<sup>30</sup>

<sup>27</sup> Cf. *Bartodziej, P.* (1994), *Reform der EG-Wettbewerbsaufsicht und Gemeinschaftsrecht: Eine Studie zu Vorbildern, Möglichkeiten und primärrechtlichen Gestaltungsgrenzen für ein Europäisches Kartellamt*, Baden-Baden, pp. 94., and *Janicki, Th., and B. Molitor* (1995), *Wettbewerbssicherung durch Schaffung eines Europäischen Kartellamtes*, *Wirtschaftsdienst* 75, pp. 36.

<sup>28</sup> Cf. *Duijm, B.* (1997), *Das Europäische System der Zentralbanken: Ein Modell für ein europäisches Kartellamt?*, *Tübinger Diskussionsbeiträge* Nr. 90.

<sup>29</sup> Cf. *Banks, D.* (1997), *Non-Competition Factors and their Future Relevance under European Merger Law*, *European Competition Law Review* 18, p. 186.

<sup>30</sup> Cf. *Schmidt, I.* (1996), *The Suitability of the European Merger Control System: An Analysis of Five Years of Application*, *Jahrbücher für Nationalökonomie und Statistik* 215, p. 304.

- Publication of the draft of the decision prepared by the Merger Task Force and of the statement of the Advisory Committee. The draft and the statement should also deal with possible conflicts between maintaining effective competition and economies of scale, technological progress or the ability to compete internationally.
- Simultaneously, the creation of a European Monopoly Commission<sup>31</sup> whose vote has to be published before the decision of the Commission is taken.

All these considerations have in common that they can overcome the institutional weakness of the European competition policy and with that they create a system which guarantees an objective proceeding.

### 4.3 Independent State Aid Commission (SAC)

There are no doubts, with the European State Aid Control there was created a very successful instrument for a system which guarantees effective competition in the European Union. But with institutional reforms there could be a better orientation on competition factors in the European State Aid control as well. The necessity of institutional reforms concerns primary the so-called ex ante-control. The State Aid Commission should focus purely on competition factors when deciding about aids from member states or the European Community.<sup>32</sup>

The procedure of the State Aid Control could be orientated to the current procedure. All member states and the EU were committed to announce all aids which meets certain thresholds to the SAC. The realisation of the aid-prohibition, the declaration of compatibility and the ongoing observation are incumbent upon the SAC. Within two months, the SAC must initiate a proceeding. The SAC declares the aid as compatible with the common market when serious doubts don't exist. The SAC opens the main proceeding if the aid raises serious doubts with regard to the common market. Member states and third parties, like competitors or commercial associations, have a right of hearing during the main proceeding. After six months, the SAC makes a decision. All decisions should be subject to the commitment of publication to gain more transparency in the procedure.

In case of conflicts between effective competition and the political aims of the EC-Treaty a two stages procedure could be institutionalised as well. Analogous to the Merger Control Procedure the State Aid Commission would decide, whether the aid can be seen as compatible with the common market and could fix conditions and obligations in doubtful cases. To guar-

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<sup>31</sup> Cf. *Ehlermann, C.-D.* (1995), Zukünftige Entwicklungen des europäischen Wettbewerbsrechts, in: Monopolkommission (eds.) Wettbewerbspolitik im Wandel: Colloquium anlässlich des 20jährigen Bestehens der Monopolkommission am 23. Juni 1994 im Wissenschaftszentrum Bonn, Baden-Baden, p. 50.

<sup>32</sup> Cf. *Möschel, W.* (1995), Den Staat an die Kette legen: Gegen die Aushöhlung des Wettbewerbs durch den Staat, Bad Homburg, p. 88.

antee a democratic solution at possible cases of conflicts between competition aims and political aims of the EC-Treaty, the European Parliament could get a veto right in a political process. Alternatively the European Commission could get a veto-right – analogous to the Merger Control Procedure. To avoid overloading in the control procedure, the procedure should only concern cases which have a community wide dimension.

## **5 Summary**

There is no doubt, the European competition policy can look back at a successful forty-year-old practice of application by the European Commission. However, with increasing importance of the so called positive integration the political influence in competition policy has become more and more important. In a multitude of merger and state aid cases such political influence can be shown. From the point of view of a market economy such a development is dangerous because the decision-making process is dominated by general political goals of the Community and competition factors get a lower significance. Competition loses its constitutional function of the system. Such a development couldn't be desirable with regard to the future challenges – deepening and enlargement of the Community.

With the proposed institutional reforms – creation of an independent Antitrust Office and State Aid Commission – an important progress could be obtained with regard to gaining more competition orientation in the European competition policy. It's time to think about institutional reforms in the Community.

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