

"The EC treaty competition provisions are considered to be primarily economic instruments which are intended to implement more general economic policies. Two objectives may be identified. The first is the establishment of the single market. The second is the improvement of economic efficiency." Francis Snyder, New Directions in European Community Law (1990, Weidenfield and Nicholson).

To what extent do the economic policy objectives of European competition law conflict with or preclude the consideration of broader policy objectives such as social policy or the protection of consumers' interests?

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Introduction

The Treaty of Amsterdam¹ is seen by many to have strengthened the areas of social policy, consumer protection and other areas in European Community law, yet in the European Community competition laws, a more economics based approach is still taken when examining the issues surrounding breaches of the Treaty provisions. The question begs, is this reliance on economic methods of examination to the detriment of such broader, non-economic issues, or are they compatible with Community competition law?

The EC treaty competition provisions

The role of the Commission through the acts of Directorate General IV (DGIV) is to act as a guardian of the Treaty, ensuring that the single market is established whilst at the same time creating harmony and compatibility between the various Treaty provisions. The EC Treaty provisions relating to competition are contained primarily in Article 3(g) and Articles 81-89 of the Treaty Establishing the European Community (the Treaty) which, along with the various Regulations and other subsidiary pieces of legislation² provide the framework for European competition law. Articles 81 to 86 can be seen to apply primarily to undertakings whereas Articles 87 to 89 apply to States. This essay will concentrate on those Treaty provisions relating to firms or undertakings rather than States.³

The primary goal of competition law is to ensure "*that competition in the internal market is not distorted*"⁴ and in doing so, the European Commission plays a leading role. In analysing whether or not the Articles have been breached, various tools of economics are used but at the same time, there is some provision made for the consideration of other issues. In Article 81(3), relating to exclusions from Article 81(1), it expressly provides that to be exempted, consumers must have "*a fair share of the resulting benefit*"⁵.

In later Regulations, notably Council Regulation 4064/89, Merger Regulation has become increasingly important in coping with different policy objectives. The issues of technical development⁶ and 'economic and social cohesion'⁷ may have to be considered before a Merger is allowed or rejected. What is apparent though from the reading of the Regulation is that these issues, along with consumer interests⁸ may have to play second place to competition policy.

¹OJ C340 10/11/97 p 145 - Amended and renumbered the Treaty Establishing the European Community.(TEC)

²enacted under Article 83

³For a more detailed discussion of the division, see Francis Snyder, New Directions in European Community Law.

⁴Article 3(g) of the Treaty

⁵Article 81(3)

⁶Article 2(1)(b) of the Regulation

⁷Recital 13 of the Regulation

⁸which now has greater prominence in the Treaty - a discussion will shortly follow.

The Treaty provisions relating directly to competition law are to be considered alongside the other aims of the Treaty.⁹ Articles 2 and 3 of the Treaty lay down the other areas¹⁰ central to Community law, which include among several others, "*strengthening of economic and social cohesion*"¹¹ and "*strengthening of consumer protection*"¹². Socio-political and consumer welfare considerations are very important in the Treaty and indeed fundamental in creating a single market in Europe. However, their treatment alongside competition law is not as significant as economic analysis and more business oriented considerations.

Consumer protection and other policy objectives

Consumer issues can range from the consideration of high prices to the exclusion of a product from a particular geographical market.¹³ The place of consumer protection in competition law can be illustrated by reference to Article 153(2) which states that "*Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*" This is a very unambiguous statement and is now enshrined in European Community law. However, it does lack any degree of weight for the phrase 'taken into account' lacks both necessity to regard it above other considerations and any guaranteed effects at all.

The provisions of Article 81(3)¹⁴ relating to consumers were first discussed in *Metro-SB-Grossmaerkte GmbH & Co. KG v Commission*¹⁵ where the Court held that, regular supplies presented a 'a fair share of the resulting benefit' under the Article. It is in the consideration of this Article that the most progress has been made in considering broader policy objectives. It is also in this area where the two seem more compatible for here, the provisions are contained in an Article within the competition law and so are extremely difficult to ignore. They are also most relevant since the aim of the section is to illustrate when an exemption might apply to an undertaking, a situation which will revolve as much around the facts of the individual case as it does on economic considerations. This situation is amplified by the wide degree of discretion the Commission has in relation to its decisions here. A strict interpretation of the Article 81(3) provisions could also lead to an imbalance in the provisions of the Treaty as a whole. A strict interpretation of one section, should not automatically lead to a strict interpretation of another, and so, in considering the aforementioned Article 153(2), its applicability here would conceivably remain unaltered.

⁹Case 85/76 *Hoffman-La Roche & Co. v EC Commission* [1979] 3 CMLR 211

¹⁰see also Halsbury's Laws of England Vol. 19 at 1.03

¹¹Article 3(k)

¹²Article 3(t)

¹³Case 48/69 *Imperial Chemical Industries Ltd v EC Commission* [1972] CMLR

¹⁴see above

¹⁵Case 26/76 [1978] 2 CMLR 1

In considering the Merger Regulation in *Comite Central d'Enterprise de la Societe Anonyme Vittel v European Commission*¹⁶, the Court of First Instance (CFI) said that

*"although [Regulation 4064/89] was primarily concerned with the establishment of free competition, it might in some cases take into consideration the social effects of a particular concentration if they were likely to adversely affect the objectives of Article 2 of the Treaty."*¹⁷

This though appears to have been a freak occurrence of other considerations for, as the cases of *Aerospatiale/Alenia/de Havilland*¹⁸ and *Mannesmann/Vallourec/Ilva*¹⁹ indicate, the Commission has gone to great lengths to both place great emphasis on competition matters in considering mergers and also to stress the role of competition considerations to the exclusion of others where it appears that other considerations had been used.²⁰ As David Banks concludes,

*"there is a strong likelihood [...] that merger control will continue on the basis that competition is the dominant criterion, with other Treaty objectives being taken into account on a subsidiary basis."*²¹

This is a rather pessimistic view and whether it is a realistic one or not remains to be seen in practice. However, the use of the Merger Regulation here, although not contained within the Treaty illustrates the lengths the Commission will go to in order to ensure that competition is the predominant area of consideration.

It is interesting to note that the Office of Fair Trading in implementing the Competition Act 1998 has indicated that it is extremely conscious of consumer concerns in identifying the relevant product market and other issues and in its guidelines states that it intends to consult consumers as a means of identifying whether or not a breach of competition law has occurred.²²

The relevance of social policy in the Community competition law is illustrated more commonly in relation to the aims of competition policy itself. For competition policy is seen as a tool which

*"creates an environment in which European industry can grow and develop in the most efficient manner and at the same time take account of social goals."*²³

¹⁶Case T-12/93 [1995] 2 ECR 1247

¹⁷Altered quote, taken from *Non-Competition Factors and their Future Relevance under European Merger Law* - David Banks 1997 3 ECLR 182 at p184

¹⁸[1992] 4 CMLR M2

¹⁹Case IV/M.315 [1994] OJ L102

²⁰both cases relate to Industrial Policy, political and public interest ideas clashing with competition policy. Neither case was decided with reference to external factors.

²¹ibid. at page 186

²²OFT Guidelines on Market Definition (OFT 403)

²³15th Report on Competition Policy p11

As such, social policy is seen more as a result of competition policy than as a method to use in achieving competition goals. The acceptance of social policy remains in a similar state to that of consumer interests and is considered throughout the rest of this essay although these are simply two of the many criteria, which must be considered alongside more general competition policies.

The possible effects of a dominant firm abusing its position are perhaps too great to ignore regardless of the potential benefit to consumers. At the same time, though an agreement which would not ordinarily have been struck at on closer examination, but turns out to present significant consumer concerns may indeed be struck at under Article 81(3) and vice versa. This will, of course be after considering the economic effects of both options which may be of more importance.

Objectives of EC Competition Policy

The general aim of the Treaty is that of "*economic and social cohesion and solidarity among Member States.*"²⁴ The identification of the policy objectives of Community competition is a more complex issue. As already mentioned, it seeks to ensure that no distortion of competition within the single market occurs. However, there is no clear statement of what objectives are desired to be achieved through the use of competition law. The legislation is silent on the issue, leaving the European Court of Justice and the Commission to devise their own interpretations. The main problem with this is that in an area of law as sensitive as competition, a high degree of certainty is required by businesses so that they may be able to confidently protect their interests and avoid falling foul of the Treaty.

Two fundamental aims are apparent from the discussions surrounding the Treaty competition provisions: market integration and market efficiency for, competition policy is

*"one of the instruments towards the fundamental goals laid out in the Treaty - namely the establishment of a common market, the approximation of economic policy...."*²⁵

The belief is commonly held that the primary purpose of competition law is to seek the establishment of the single, common market within the European Community²⁶. This notion stems firstly from the ECJ in *Metro-SB-Grossmaerkte GmbH & Co. KG v Commission*²⁷ where it stated that Articles 3 and 81 aim to "ensure the observance of the basic requirements and attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."

²⁴Article 2

²⁵Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR I paras 4-5

²⁶see also *Joined Cases 56 and 58/64 Consten and Grundig v Commission* [1966] ECR 299 where Article *5(1) was stated to be designed to pursue the aim of abolishing barriers between States.

²⁷Case 26/76 [1978] 2 CMLR 1 at 2

and secondly, from the Commission itself, "The first fundamental objective is to keep the common market open and unified."²⁸

The pursuit of market efficiency is a secondary goal since "competition enables enterprises continuously to improve their efficiency"²⁹ which is believed leads to improvements in society as a whole. The concept of market efficiency stems from the belief that a market economy such as exists in the Community, requires competition to result in better allocation of resources, cheaper products, greater variety of products,. This was highlighted in the Twenty First Report on Competition Policy which stated that it believed competition to be a vital tool it ensuring producers remain dynamic and innovative and respond to changes in the attitudes of the market, thereby promoting growth and stability in the marketplace. Indeed, in *Europemballage and Continental Can v Commisison*³⁰, the ECJ stated "that without [effective competition] numerous provisions of the Treaty would be pointless."³¹

Valentine Korah has pointed out that if reading Article 2,

*"one might think that the common market was the mechanism whereby efficiency goals are to be achieved, but it has been promoted into a goal in itself."*³²

In separating the two, it becomes easier to see where non-competition issues may arise. While market efficiency will utilise automatically, economic analysis for assistance, the common market aim requires considering all relevant aspects of Article 3. For example, consumer interests in the efficiency goal are more likely to be economic considerations and a dividing line between the two may be hard to draw. Yet in aiming for a single European market, non-competition factors of a non-economic nature are required in order to further the aim of unity in the Community.

The purpose of Competition law is considered to be primarily to implement more general economic policies and as such, the provisions in the Treaty are often seen as economic instruments providing the means with which to do so, yet this has been criticised for ignoring the broader policy objectives of the Treaty as a whole. As a consequence, the two main objectives identified above are not the only ones, which have been mentioned, indeed the list itself could comprise a separate, extensive discussion³³. The goals of market integration and market efficiency are though, the main policy objectives. These require to be compatible

²⁸see 9th Report on Competition Policy (1980) pp 9-11

²⁹1st Report on Competition Policy p11

³⁰Case 6/72 [1973]ECR 215

³¹ibid.

³²EEC Competition Law and Practice at p 6

³³other policies include fairness in competition, innovation, lower prices, the interests of the small and medium sized firms - a more extensive list is available in 52 Halsbury's Laws of England 19.03 at page 858

with other policy objectives and to a large extent are. The Commission has a wide degree of discretion at its disposal and a wide range of issues, which must be considered in each case.

Economic Analysis

The fundamental goal of every company is to maximise profits and in doing so, consumer and social interests are automatically assisted to a certain extent since a blatant disregard for these aspects would damage a company's corporate personality and result in fewer profits. This could possibly be an argument against competition law, in that, left to its own devices, a market will compensate for inequalities between consumers and large undertakings however, it is also clear that consumers will often tolerate a high degree of unfair conditions and sometimes may lack the option of an alternative product to choose from. By attacking such situations before they are allowed to escalate and harm the economy of the single market, competition law allows effective competition to take place within the Community.

Effective competition has been referred to as an absence of market power, in that no one firm can adversely affect competition in the market. This seems plausible although slightly simplistic and in fact there are several possible alternatives which economists debate over. It is clear though that to examine the workings of a company and indeed the markets in which they operate that at times a more economic examination is required. The method of economics to apply has once more led to controversy. In a 'perfect competition' system, the market will produce an efficient result and it is through the examination of this theory that the economic analysis of competition cases is concerned. The controversy for a while concerned the two competing schools of thought emanating from Harvard and from Chicago. The theories and histories of the two schools are not at present of great significance since a ne industrial economics theory is closer to that of the Community.³⁴ At one point, the Chicago school advocated that

“the only concern of competition policy should be the attainment of efficiency, and that ancillary ‘non-economic’ goals ... should not be part of any competition policy.”

As already mentioned, the Community has two main aims in competition policy and as a result differs from the USA which has only one, that of market efficiency. In practice in the Community, the courts tend to prefer to avoid the more rigorous economic models of economic analysis allowing for the consideration of broader policy objectives in order to maintain the common market.

Broader considerations in competition law

The market efficiency aim of competition law ideally, if achieved would result in benefits to consumers, to living and working conditions, wages, and so on. As a consequence, by neglecting to examine other issues as thoroughly, the Commission ensures that efficient competition is allowed to breed by itself. Only those

³⁴ See in particular, Mark Furse, Ch 1 p11

cases with large-scale public concerns would be barred for public policy reasons and benefits to consumers and the like would naturally flow from an efficient economy. Yet at the same time, there is a problem in a unified Europe based upon economic and social cohesion, of ignoring the wishes of the general populous. By taking broader policy considerations into account as a rule in the Commission stage and making those deliberations publicly available, the Treaty provisions are better fulfilled and a greater certainty arises for business in Europe. At present, references to external sources are vague and unclear and a more pronounced set of rules or indication of the procedure followed is called for. Furthermore, the Commission fails to provide clear and detailed reasoning behind many of its decisions which leaves a large gap in the development of Community law.³⁵

It cannot be ignored though that the predominant aim of the Community is the establishment and maintenance of a single market, an aim which is directed towards business and the economies of international markets. Economic and business considerations play a significant part in this process, particularly if 'European Champions' are to be created with sufficient economic weight to tackle large multinational companies in other areas of the world. This latter issue is also a politically motivated one and it is more likely in the future that political considerations will be more successful than social or environmental ones. With the alteration of the Treaty recently and the move to European Monetary Union, economic policies are more likely to remain predominant in the analysis of business in the common market. Third parties, for instance, consumer groups and environmental groups may still take part in proceedings. In the UK also, under the new Competition Act, it seems likely that such groups could initiate proceedings themselves in domestic courts. Indeed this approach is welcomed by the Commission, which cannot cope with the existing burden of notifications, which it receives. The decentralisation of the Commission's workload is a future probability and broader policy considerations may arise in domestic investigations although, the harmonisation of Community laws will remain a priority.

Conclusion

The economic policy objectives of European competition law should not conflict with the consideration of broader policy objectives. Firstly, the creation of the single market is a pointless venture if it is not at the same time combined with the aim of unifying social policy, environmental policy, and other such harmonisation efforts. The aim of 'economic and social cohesion' must ultimately lead to an absence of barriers between States, which without broader policy considerations, would be difficult to achieve. Secondly, market efficiency as a concept ideally leads to greater savings for companies, improvement of living and working conditions and consumer benefits. Indeed, many of the consumer concerns are by and large economic in nature and so an economic competition policy should aim also to serve the economic

³⁵ See in particular, the discussion of this by V. Korah in EC Competition Law and Practice 5th Edn

interests of its consumers. In practice, the prevalence of economic considerations is apparent but as Europe moves further towards a 'Citizen's Europe', and the other aspects of the Treaty are strengthened, notably in social policy, consideration of broader objectives will remain important in considering competition issues which arise. The future remains uncertain but it is clear that,

*"Competition, as a means to securing economic and political goals, must coexist with various industrial, agricultural and social policies which seek to achieve similar goals through different methods."*³⁶

³⁶Competition Policy after 1992 - Tim Frazer 53 MLR at p 615

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