

Introduction

Reform of EC Competition Policy: Decentralisation and Effective Enforcement in an Enlarged European Union

The papers published in this special issue of *Intereconomics* were presented at a workshop on reform of EC competition policy that took place on 10-11 December 2001 in Maastricht. The workshop was jointly organised by the Hamburg Institute of International Economics (HWWA) and the European Institute of Public Administration (EIPA). The workshop focused exclusively on changes to the enforcement of Articles 81 & 82 of the EC Treaty. Other changes in competition policy with respect to mergers and state aid were not examined by the workshop.

Competition policy is one of the oldest policies of the European Community. The first implementing regulation of Articles 81 & 82 was adopted in 1962 (Regulation 17/1962). Since then, the principal rules on the application of those two Articles have been left virtually intact. Yet, despite its successes, competition policy has been criticised for being too formalistic and too centralised. The Commission has responded to these criticisms with a number of reform initiatives. Reform measures fall into two main categories: modernisation measures and decentralisation measures.

Competition policy is being modernised by incorporating current thinking and accumulated experience on vertical agreements and horizontal agreements. Vertical agreements are no longer perceived to constitute a major problem to competition. The new block exemption regulation (Regulation 2790/99) is accordingly more tolerant and allows undertakings more freedom to structure their agreements in ways that suit their needs. The same applies to horizontal agreements and the recent block exemption regulation (Regulations 2658/2000 and 2659/2000).

The changes that have been proposed concerning the decentralisation of enforcement of competition law are thought to be more crucial to the effectiveness of the Community system for preventing distortions to competition. The reason is that the Community system allows for exemptions to be granted. So far, exemptions have been granted exclusively by the European Commission. The new regulation proposed by the Commission will abolish exemptions on request and, perhaps surprisingly, the Commission's exclusive right to grant such exemptions: national competition authorities and national courts will have the right to consider whether an agreement merits exemption.

This has aroused considerable opposition by business associations and the legal profession. They fear that decentralisation of enforcement which also includes the possibility of granting exemptions will result in uneven enforcement of competition law across the Community. They believe that this will be even more so in an enlarged European Union of 27 or more members. The workshop examined the aspects of both modernisation and decentralisation of EC competition policy.

Valentine Korah explains in her paper how the old block exemptions on vertical agreements (exclusive distribution, exclusive purchasing and franchising) were drawn narrowly and formalistically. She welcomes the new block exemption which replaced them (Regulation 2790/99). She finds that in general the new regulation is an improvement because it does not stipulate contractual clauses to be included in contracts, contains only a list of prohibited practices and applies to both goods and services at both final and intermediate levels of trade among firms with a market share that falls below 30%.

Simon Bishop examines EC practice on vertical agreements from an economic perspective. He explains the reasons why economic theory takes a more benign view of vertical agreements than horizontal agreements. Theory suggests that vertical agreements restrict competition only where firms possess market power either upstream or downstream in the distribution chain. He, in turn, welcomes the use of the 30% threshold in the new regulation, although he would prefer it to be set at a higher level. Nonetheless, not only does reliance on market thresholds make more economic sense, it also makes the application of the regulation more coherent. But he is also critical of the regulation for the fact that it maintains the well-known position of the Commission against practices that appear to re-segment the common market. As Bishop points out, under certain conditions, agreements that protect distributors from free-riders may in the end strengthen market integration rather than weaken it. He also criticises the new regulation for its overly static approach which does not give due weight to dynamic issues relating to product differentiation and branding.

Floris Vogelaar examines the two new horizontal block exemptions concerning specialisation agreements (Regulation 2658/2000) and R&D agreements (Regulation 2659/2000). He, along with the other authors, also expresses his approval for what he terms the "economisation" of competition policy: i.e. the use of explicit market-share thresholds. His assessment of the two new regulations is favourable because they are clearer as to the obligations they impose on cooperating firms. He then proceeds to consider how the block exemptions may be enforced by national courts as competition policy is decentralised. Here he is less sanguine about the prospects of coherent enforcement across the EU. He identifies a number of potential problems such as the exemption of cooperation agreements for unlimited periods of time, the non-imposition of obligations and conditions on cooperating parties and the inability of third parties to make their views known.

Hans Maks carries out an economic assessment of the two horizontal block exemptions. He first defines the various senses in which the term "economic" may be understood. He favours a broad definition which also takes into account other things to which consumers may attach value and which are not normally traded on the market, such as a clean environment. Yet he concludes that competition policy becomes ineffective as it widens its scope to accommodate possibly conflicting policy goals. He finds evidence to support this conclusion in the vagueness of the analysis in the Commission Guidelines on the interpretation of the horizontal block exemptions.

A. Kist and Phedon Nicolaidis turn their attention to the methods of cooperation that will be necessary among competition authorities in order to achieve uniform and effective enforcement of competition policy. Kist believes that it will be necessary to establish a network of competition authorities in which all members, including the Commission, will be equal. He argues that if that network is to function properly it should develop rules on case allocation and exchange of information. He also warns that the EU would need to establish rules on the handling of confidential information.

Nicolaidis looks at the issue of cooperation from a different perspective. He begins by considering the costs and benefits of independent decision-making, on the one hand, and collective decision-making, on the other. Given that there are costs associated with either option, he proposes that national authorities should maintain decision-making discretion but at the same time they should be made more accountable by having the obligation to take into account the comments and concerns of their counterparts in other EU member states. In order to strengthen cooperation without incurring excessive costs, he argues in favour of an enhanced "peer review" process.

Lastly, Anna Fornalczyk reviews the progress of the candidate countries, and especially Poland, in enforcing competition policies. One of the main reasons for decentralisation of the Community competition policy is that the Commission will not be able to cope with the increased workload as a result of enlargement. It is therefore important for the success of decentralisation that the new members have the capacity to enforce competition rules as effectively as existing members of the EU. She is optimistic about the ability of the candidates to apply the rules properly. However, she also identifies a number of problems such as the political pressure under which competition authorities find themselves when they pursue firms with market, and apparently political, power.

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Guest editor