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INFORMATION COMPETITION

Competition policy in the Community 104/75

No area of Community policy has aroused so much interest in academic and business circles as competition policy. A vast array of material by journalists, students and learned writers deals both with its theoretical basis and with its economic and legal implications. Responsibility for the competition policy lies with the Commission of the European Communities. It works on proposals from its Directorate-General for Competition, and the authorities in the Member States are closely involved. The European Court of Justice, which has power to abrogate administrative acts of the Commission, and the national courts in the Member States, which deal with the implications in civil law of infringements of the Treaties, also play a major role. Indeed it can be said without exaggeration that competition policy has always been the keystone of the Community's economic policy. This is no mere coincidence, for the EEC Treaty lays considerable emphasis on competition. Innumerable independent decisions by business and consumer determine investment and market trends, and although the state can take direct economic action in individual industries, the economies of all the Member States work on competitive lines. The competition principle further underlies the whole process of integration - of merging the individual national economies into a single European economy. The free play of market forces rewards efficiency and penalizes inefficiency.

The EEC Treaty regards the institution and preservation of a system of undistorted competition as one of the pillars of European integration. It is surely no coincidence that competition policy has steadily grown in stature despite the crises and turmoils which have beset the Community. It is a political factor directly affecting everybody involved in business and commercial life.

If firms and individuals were not given the legally backed assurance that they could buy and sell goods and services in all the Member States without discrimination, there would be no common market. Restrictive agreements and

other practices would do the job hitherto done by all those national barriers to trade which we have worked so hard to dismantle. Imports of goods in key industries from other Member States would have been hindered by state-run monopolies. Uncontrolled government assistance would also have distorted the play of competition.

An economy can survive within open frontiers only if a vigorous and well-thought-out policy ensures that justice reigns in the marketplace and if there is a central agency to enforce the rules of the game. The Community competition policy provides the rules of the game and has two functions: first, it ensures that a genuine European market can come into existence and remain in existence; second, it ensures that the market process is fair to the consumer. Competition policy aims to ensure that supply and demand are evenly matched and forces firms to aim for that type of technical and economic progress without which the continuous improvement of the living and working conditions of Community citizens is unthinkable.

European competition policy does not just consist of a series of prohibitions. It actively promotes cooperation between firms as a means of bettering performance. Nor does it impose a blanket prohibition on state assistance. Assistance which is in line with Community interests and is necessary for structural purposes is perfectly compatible with the principle of fair competition in the common market; indeed, it is necessary means of promoting the harmonious development of economic life throughout the Community.

Industry as a whole is benefiting by the wider opportunities for buying and selling in the common market. As a result, the range of goods available has been broadened and the consumer is better supplied. Where price differences continue to exist, this is not always because the law on competition is being broken. Differences in value added tax, trade structures and Member States' price and counterinflation policies often account for price differences.

If Commission inquiries establish that price differences are the result of restrictive agreements or of continued endeavours by a dominant firm to preserve the artificial segregation of national markets for its own strategic ends, a decision is formally adopted and sent direct to the offending firms, requiring them to desist. Heavy fines can be imposed for intentional or negligent infringe-

ments of Community competition law. The fine can be a most impressive deterrent, for it can run to as much as 10 % of the culprit's annual sales. Fines have risen on occasion to more than a million dollars.

The Commission cracks down particularly hard on anticompetitive practices which are likely to impair the unity of the market. These practices are designed to give manufacturers territorial protection in their own domestic submarkets, and by splitting the common market up they can pursue sales and pricing policies which are shielded from competition from other manufacturers of the same goods. The consumer is harmed by this, as he is also by fixed supply quotas. When firms enter into agreements whereby they refrain from competing with each other, it is the consumer who has to pay the bill. The prohibition in Article 85 of of the EEC Treaty makes no distinction between restrictive agreements and concerted practices, but extends equally to any form of cooperation between firms which restrains the free play of competition or reduces uncertainty as to what competitors are doing. What matters is whether the effects are felt within the common market and whether the anticompetitive practices may affect trade between Member States.

It would be going too far to try and establish a watertight definition of the type of anticompetitive practice which may affect trade between states. A few examples must suffice. In the past there were a number of reciprocal collective exclusive dealing agreements in Belgium and the Netherlands. A group of manufacturers in a given country would agree with the most influential group of dealers in the same country on an exclusive dealing arrangement whereby dealers would handle only domestic goods. At the same time the manufacturers would agree not to supply outsiders. The effect of this was to segregate markets on national lines, for the trade in the relevant country could no longer handle products from other Member States and buyers from dealers could no longer choose from the full range of products available in the Common Market. The establishment of minimum purchasing quotas in favour of domestic goods is another means of providing a partial shield against the pressure of competition. Again, customers derive considerable benefit from the grant of aggregated rebates, where the amount allowed by the manufacturer depends on the customer's total turnover during the reference period, generally one year, on goods purchased from all the manufacturers who are party to the agreement. Since the rebate is aggregated, the customer has a strong incentive to push it up as high as possible by concentrating his sales business on goods produced by the relevant manufacturers.

He will prefer not to buy from other sources for this would cut his aggregate rabate. This can still be an attractive proposition even when outsider supplies are taken into account.

Some collective exclusive dealing arrangements are in practice highly developed cartels which can have a direct effect on prices. A typical example is the cartel prohibited by the Commission in 1973 which organized sales of 22 LR calibre sporting ammunition and cartridges in the Netherlands. The manufacturers' side comprised all the world's major ammunition manufacturers and the export agencies of the Eastern European countries, while 90 % of the Dutch arms dealers were included on the dealers' side.

A classic restrictive practice is the price-fixing agreement, and the Commission has frequently imposed heavy fines on offending firms here. Noteworthy cases have involved quinine, dyestuffs and sugar manufacturers. Agreements on participation at fairs and exhibitions can also have protectionist effects. For instance, the Commission has taken action on an agreement whereby 'national' exhibitions were open only to such firms as were headquartered in the organizing country or at least had some kind of permanent establishment or sales agency there. A particularly effective means of eliminating competition consists of working through a joint sales agency. A whole series of such agencies have already been prohibited by the Commission, notably for cement and fertilizers.

But the prohibition in Article 85/1 does not only catch horizontal agreements between competitors: vertical agreements between manufacturers and dealers which restrict the business freedom of one side or the other can also be damaging to competition. A case here would be the obligation for a manufacturer to supply only a single dealer in a given part of the common market, or an obligation on a dealer to obtain goods of a given type from a single manufacturer. Article 85/1 can also extend to agreements on terms of sale, such as resale price maintenance and other restrictions on the seller's freedom. Unless restrictions of this kind are in the interests of the consumer, they are prohibited, but practices which benefit the consumer can satisfy the tests of Article 85/3 of the Treaty for exemption from the prohibition in Article 85/1.

Right from the start, the Commission's competition policy had to deal with the problem of exclusive dealing agreements. The agreement between Grundig and its

French sole distributor Consten infringed Article 85/1 and did not qualify for exemption since the parties gave each other absolute territorial protection. Grundig equipment could be sold in France only by Consten; no other Grundig dealer could export to France. The Court of Justice of the European Communities upheld the Commission's decision prohibiting this arrangement, and since then the consumer in the common market had had the fundamental right to obtain goods from whatever part of the common market suits him best without let or hindrance. Dealers, too, have the fundamental freedom to sell their goods anywhere in the common market. All they can be forced to do is to concentrate their sales efforts primarily on that area of the common market which is their allottel territory. By forcing a partial dismantling of the exclusive dealing system, the Commission has broken down some of the barriers to trade between Member States. As soon as prices for a given product vary substantially from one Member State to another, there is automatically an incentive for buyers in high-price areas to obtain goods from low-price areas. This leads to parallel imports, in other words imports through channels other than the manufacturer's official network. Parallel imports are an everyday phenomenon in a number of instances, such as motor cars and gramophone records. It is interesting to note that the German market, where prices are currently most stable, is not necessarily the market on which prices for all goods are the lowest. Thousands of articles can still be bought more cheaply in other Member States. Since there are estimated fifty thousand or more exclusive dealing agreements operating in the common market, it is clear that by easing the strictures of the exclusive dealing system we can help to put downward pressure on prices.

It goes without saying that export bans in conditions of sale are incompatible with the rules of competition. Selective distribution system - where the number of dealers is artificially kept down - are acceptable only if it is in the consumer's interests that the number of suppliers should be restricted, as has been found to be the case in the motor trade, for instance.

Firms regularly use patent and other industrial property rights as a means of preserving the segregation of national markets. With the support of the European Court of Justice, the Commission has taken firm action on practices whose aim is not to protect the essence of the property right but rather to exploit the fact that it is still a 'national' right in order to set up artificial barriers within the common market. When taking a decision on restraints of competition

in licensing agreements, the Commission has to make sure that the parties are subjected to a minimum of restrictions on their freedom while at the same time ensuring that patentholders still have incentive enough to make technological advances available to other firms under under licence. In other words, the Commission must take especial care that the sources of licences do not dry up.

There are so many types of case where the Commission has promoted positive forms of cooperation between firms by giving exemption from the prohibitions that a few examples will again have to suffice. Specialization agreements and joint R & D agreements spring immediately to mind. Although exemptions in respect of cooperation agreements are primarily designed to assist small and medium businesses, agreements between large firms may also qualify for exemption under Article 85/3. By way of example, a joint R & D agreement between Henkel and Colgate was allowed.

A typical example of encouraged cooperation was the Transocean Marine Paint Association case. The Association combines a number of medium-sized firms which have built up a joint worldwide network for the sale of marine paints. As far as the buyer is concerned, the result is that marine paints of similar qualities are available in a large number of countries; the arrangements have proved highly satisfactory.

Since the prohibition in Article 85/1 applies to anticompetitive agreements whose effects are felt within the common market, it extends even to firms whose headquarters are outside the Community.

For some years now, the Commission has been applying Article 86 of the EEC-Treaty, which prohibits the abuse of dominant positions, alongside Article 85. All abuses are prohibited without exception; instances of abusive conduct include imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, sales or technical developments to the prejudice of consumers, and discriminatory treatment.

One important Article 86 decision was issued against GEMA, a performing rights society applying unfair terms to composers, while another concerned an American firm which refused to supply a European customer.

The Commission's view - upheld by the Court of Justice in Continental Can - is that in certain circumstances corporate mergers, which involve changes in market

structure, can also constitute abuse for purposes of Article 86. The Commission considers that it is under an obligation to use Article 86 to curb unhealthy changes in the structure of business. The need for this arises from the fact that, once they exceed a certain degree of market power, firms are no longer subject to control by market forces and can thus set their prices and terms of sale in a more or less arbitrary fashion. The question to be asked in each case is whether the merger is in the interests only of the parties to it or is beneficial to the economy as a whole. It is often beyond the powers of judgment of the authorities to take a decision on this, since even those directly concerned, with the best will in the world, cannot always tell in advance whether a merger will have beneficial effects. The Commission prohibits corporate mergers that will have demonstrably harmful effects on the economy. An example would be where, as a result of the merger, the consumer no longer has any real scope for choice.

By prohibiting restrictive and abusive practices, Articles 85 and 86 can make a modest but nevertheless effective contribution to the fight against inflation. It is very difficult to quantify its share of the praise, but it is beyond dispute that consumer interests are constantly safeguarded by the competition policy applied by the European Community.

Competition policy does not deal exclusively with competition between firms but also extens to rules on state aids and the reorganization of state-run monopolies. Although there is no basic contradiction between competition policy and industrial or regional structural policy, conflicts can arise where individual Member States provide unreasonable assistance to individual industries or firms or improperly attract investment to individual regions through excessive regional aids. The Commission's power to control such measures bites deep into the internal affairs of the Member States. In several cases the Member States are glad to have the Commission on their side when trying to resist demands for assistance in its own regions. However, there is frequently a head-on clash between national governments and the Commission, so that the Court of Justice has to be the final arbiter.

Using its powers to control regional aid schemes, the Commission has successfully taken action against the excessive assistance given at a particular time in several countries. It has worked with the Member States on establishing maximum rates of investment aid for the central regions of the Community, and the Member States have so far been ready to comply with this.

Specific aid arrangements have been developed for the shipbuilding industry in Europe. The Commission has established a Community approach to aids to the textile industry, and the admissibility of national measures of aid is tested against the criteria of this approach.

Considerable progress has already been made in the reorganization of state-run commercial monopolies. At the Commission's instigation, most of these monopolies have been wound up, while those that remain in business are there only for a limited duration. The tobacco monopolies in France and Italy are shortly to be dismantled; they have already been altered to such an extent that manufacturers from other Member States can now enter the French or Italian market on the same terms as the national manufacturer.

One question of European competition policy which remains to be solved is the relationship between state authorities and public enterprise. The Member States have an extensive range of possibilities for distorting competition between public and private enterprise. No one will wish to deny the state's right to own and operate businesses - on the contrary, government involvement is an indispensable facet of our mixed economy. But for efficiency's sake, it must be ensured that public enterprise is not given excessive advantages over its private sector competitors. Putting this principle of equal treatment into practice is a thorny problem; the Member States will have to exercise good judgment, while the Community must know what it is doing and must act with authority.

To sum up it can be said that the Community competition policy has been through its baptism by fire. This is the first time in all economic history that a major area of economic policy - backed up by the existence of penalties - has been administered on a transnational basis and has been enforced against industry and government. The further development, the ambition, the quality and the viability of this policy will play a key role in consolidating the Community's achievements and in helping it to prosper.