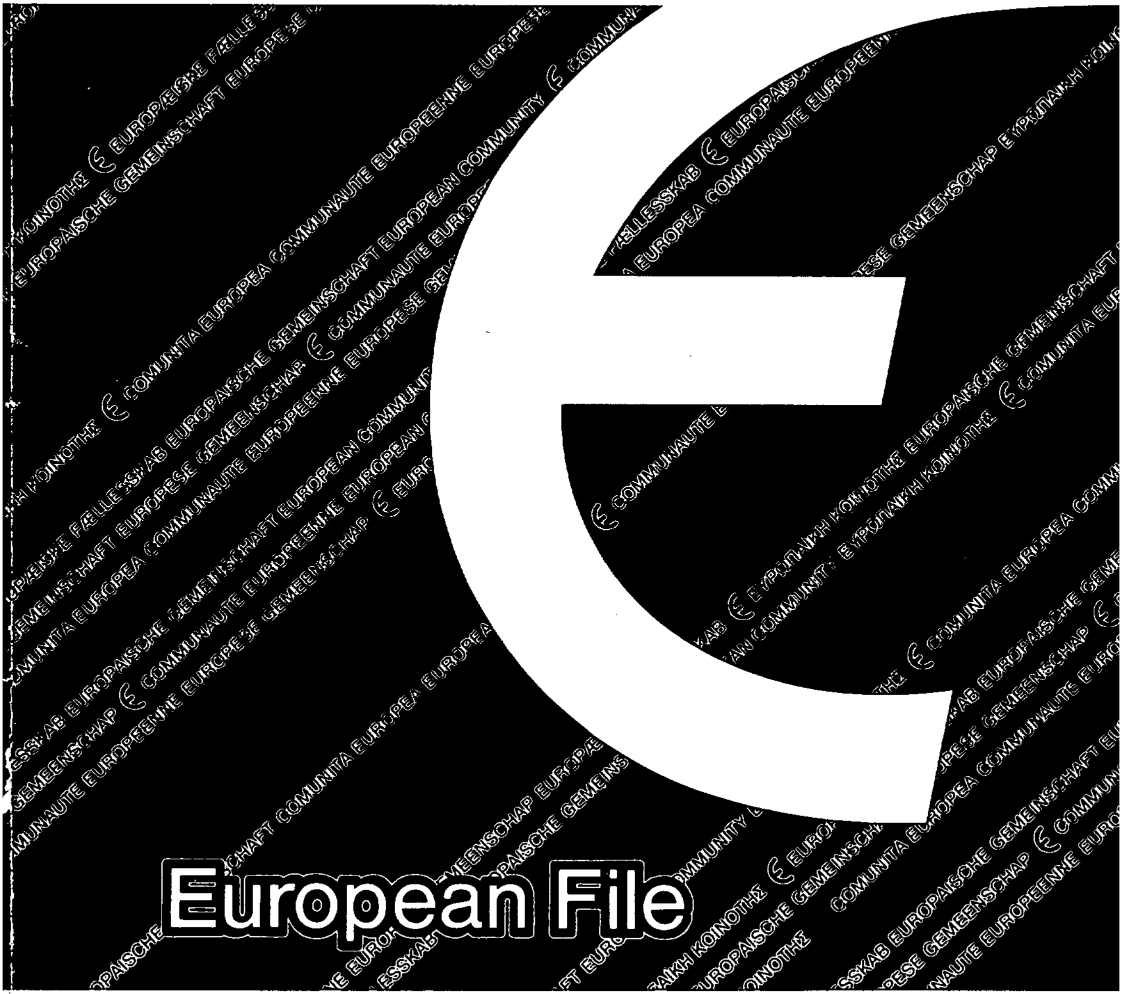
European competition policy



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Free competition between companies in providing goods and services, whether in the public or private sector, guarantees a wide choice for consumers and helps to keep prices down and quality standards high. It also provides a powerful stimulus to technological and economic progress, since competing companies are constantly forced to innovate.[1] But free competition is not incompatible with a degree of public control, for a number of reasons:

- ☐ Left entirely to the free play of market forces, competition can degenerate. Companies may try to cheat by entering into risk-sharing agreements. Competition can destroy itself if economic concentration leads to the creation of monopolies. To counter these dangers, many countries have passed laws enabling them to intervene where faire and effective competition is threatened.

- ☐ The free play of market forces does not always further key economic policies, such as the rapid development of new technologies and the rationalization of struggling industries. It can also disrupt social policies, such as efforts to solve the problems caused by rationalization and the reduction of regional imbalances. In these cases, public aid is justified, at least for a limited period.

Why a European policy?

Alongside these national policies, there is scope for a European competition policy. The creation of the European Community has opened up a vast market of more than 270 million consumers within which goods and services are supposed to circulate freely. New barriers must not be allowed to spring up to threaten the unity of this market. The objectives of European competition policy are therefore:

- ☐ To prevent companies from re-establishing, by means of market-sharing agreements and export bans, less visible but equally effective barriers to trade to replace the customs frontiers abolished by the Community. Both consumers and traders benefit from this policy: consumers because they can take advantage of the lowest prices available in any of the member countries; traders because they are given access to a market on a European scale.

- ☐ To prevent excessive concentrations of economic power from damaging the interests of consumers, competitors or subsidiaries. Fair competition and free movement of goods are protected by preventing companies from abusing dominant market positions and preventing the concentration of economic decision-making in too few hands, especially in the coal and steel sector.

- ☐ To prevent national aids from giving unfair advantages or distorting competition in such a way that economic forces are disturbed and the very existence of the common market is threatened.

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[1] This file updates and replaces our No 2/83.

The recession has not caused Community countries to question these fundamental objectives. But the social implications of the economic crisis have forced governments to re-examine carefully the advantages and disadvantages of restrictions on free competition. Care is needed.

Each country realizes the dangers to its own exporting industries if its neighbours increase government aids or companies erect new barriers to trade. For each job saved in one place in the short term, how many more will be placed at risk elsewhere in the long term in a world where trade is geared to the laws of the free market?

European competition policy is set out in broad terms in the Treaties governing the Community.[1] Equality of economic opportunity is guaranteed to all companies in the Community by an impartial body which monitors the market and, occasionally, punishes offenders:

- ☐ This central role in the enforcement of Community competition law is played by the European Commission, acting either on its own initiative of following up complaints from Member States, companies or individuals. The cases dealt with run into thousands. In many instances they are resolved by voluntary policy changes by the countries or companies concerned (a celebrated example is the IBM case, where the company was accused in 1980 of abusing a dominant position and finally reached a voluntary agreement with the Commission in 1984). In other cases, the Commission finds in favour of the accused or it finds the case proved, and orders policy changes or imposes fines, sometimes running to millions of ECU.[2] Companies have a right of appeal against Commission decisions to the European Court of Justice and a considerable body of case-law has been established.

- ☐ Businesses and individuals who believe themselves to be victims of infringements of Community competition rules can also bring direct actions before national courts.

Company agreements

The European Treaties ban as incompatible with the common market 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.'

This blanket ban on agreements applies to European and non-European companies, private and public enterprises alike. Since 1962, agreements likely to fall

[1] With some exceptions, this text omits specific, but broadly equivalent, measures for the coal and steel industry covered by the Treaty of Paris.

[2] One ECU (European currency unit) = about £ 0.62, Ir. £ 0.72 or US $ 0.69 (at exchange rates current on 8 February 1985).

under the ban must be notified in advance to the European Commission. Companies can apply for 'negative clearance', which means that free competition is not threatened, or an 'exemption', sparing a restrictive agreement from the overall ban because of the benefits it brings.

The Commission is empowered to declare illegal and order the termination of an agreement or other unacceptable practices at any time. For more than 20 years, the Commission has been called upon to deal with many forms of agreements and concerted practices:

- *Market sharing agreements,* which create protected markets, often in a single Member State. Among the numerous cases of 'each to his own' dealt with and banned by the Commission were the quinine cartel, which led the Commission to impose its first fines in 1969, the sugar producers cartel (1973) and more recently, in 1984, the cartels of zinc and flat glass manufacturers, who were fined a total of 4 million ECU.

- *Price-fixing agreements* such as the dye-stuffs cartel (1969), which controlled 80% of the European market. The manufacturers had agreed to raise their prices by the same amount at virtually the same time. This was the first case in which firms with head offices outside the Community were fined because they were operating within the Community in a damaging way.

- *Exclusive purchase agreements* involving arrangements to buy only from specified manufacturers or importers or exclusive supply agreements to sell only to certain buyers. Such agreements, which have occurred in markets ranging from gramophone records to heating equipment, are outlawed by the European Commission. They carve up the market and give unfair advantages which distort free trade.

- *Agreements on industrial and commercial property rights:* the exclusive use of patents, trade marks or works of art is not necessarily exempted from competition rules. In one case in 1982, involving maize seed, the Court of Justice ruled against the total territorial protection granted by a patent licensing contract.

- *Exclusive or selective distribution agreements:* in 1964 the European Commission ruled against an agreement which granted the distributor Consten exclusive rights to handle Grundig products in France. The Commission's opposition to any form of restriction of parallel imports has been demonstrated in a number of rulings. In 1981, for instance, the Commission imposed a heavy fine on the Moet-Hennessy champagne group because its British subsidiary banned UK traders from re-exporting its products. Selective distribution arrangements are sometimes permitted if they improve the quality of the service provided (see for instance the 'IBM-personal computer' ruling of 1984). But discrimination against retailers, especially for their pricing policies, can be severely punished, as in the 1982 case of AEG-Telefunken.

European competition policy must not, however, be seen as purely negative. It also encourages positive developments. Economic and social progress often comes about through various forms of cooperation between companies. The Commission attempts to promote these through its powers to authorize agreements which, in the words of the Treaties, 'contribute to improving the production or distribution of goods or promoting technical or economic progress . . . without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives (and without) affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

On this basis the European Commission has taken a number of decisions of principle to waive the requirement to notify company agreements. It has also given bloc authorization to certain agreements, provided that a number of conditions are fulfilled. These include distribution and purchasing agreements as well as specialized manufacturing agreements up to a fixed level of turnover and market share. Another exemption guarantees the legal standing of certain kinds of patent licensing contracts. Research and development agreements will from now on be given a similar dispensation, along with motor vehicle distribution and before and after-sales servicing agreements.

The Commission is particularly interested in cooperation between small and medium-sized enterprises, which often further economic progress. It has therefore identified a number of types of agreement which it feels should escape the general ban:

☐ Exclusive representations contracts given to trade representatives;

☐ Small-scale agreements, based on turnover (not more than 50 million ECU) and market share (not more than 5%);

☐ Subcontracting agreements;

☐ Information exchanges between companies, joint studies and joint use of plant.

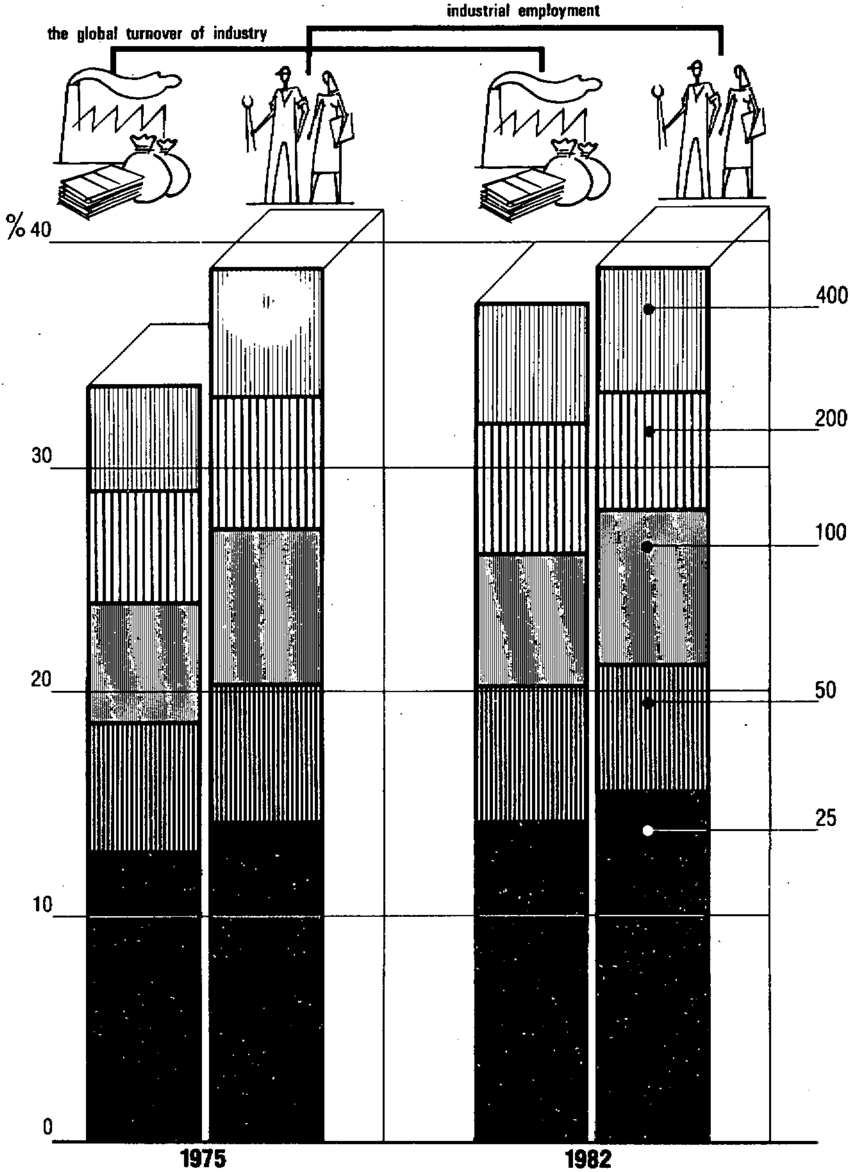
In addition to these rulings, some of which have been brought up to date recently, the European Commission gives careful consideration to the economic climate facing companies seeking individual exemptions from the ban on agreements. If, for example, there is a long-term downturn in demand for a product, the Commission can, under certain circumstances, authorize firms to coordinate a rundown in overcapacity. A recent example was the synthetic fibres sector in 1984.

Mergers and abuse of dominant positions

The current restructuring of the crisis-hit steel industry is a useful illustration of the way the Commission takes account of economic facts of life in applying

The concentration of Community manufacturing industry, 1975-1982

Percentage share of the 25, 50, 100, 200 and 400 largest companies in:



Source: European Commission, 14th report on competition policy, using statistics from Eurostat and the 'Nouvel Économiste'.

competition law. In this sector, as with the coal industry, mergers and takeovers must receive prior authorization from the Commission. To protect the independence of the different groups, the Commission seeks to prevent individuals from taking up seats in a number of boardrooms where they might be in a position to monitor the policies of competing groupes and coordinate supposedly independent commercial and industrial decisions. Recent large-scale mergers authorized by the Commission are consistent with the anti-crisis and restructuring policy agreed by the Community. They are expected to lead to increased competitiveness and a better balance of supply and demand on the steel market.

The European Treaties make no provision for control of mergers in sectors other than coal and steel. The Commission did however propose to the Council of Ministers in 1973, and in modified form in 1981 and again in 1984, that the largest mergers should be made subject to Commission scrutiny. The Commission also sought the power to ban mergers which, in its view, pose a threat to effective competition in the Community.

While waiting for Council decisions on these points, the Commission is not entirely powerless. The Treaties state that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'. The application of these Treaty provisions to industrial mergers began in 1971-73 with the Continental Can case. In this instance, the European Court of Justice acquitted the giant American packaging company but ruled that certain mergers could of themselves constitute an abuse of dominant position.

Unfair pricing, curbs on production or marketing and discrimination between traders are other examples of punishable abuse by companies of market positions. Two instances can be quoted. The first is the 1978 ruling against the United Brands Company, confirmed by the European Court. This company was judged to have interfered with the market by ordering its distributors not to re-sell bananas while still in their green phase. It was also found to have blacklisted a customer who took part in an advertising campaign for a competing product. A second example is the 1981 judgement agains Nederlandse Banden-Industrie Michelin for offering discounts to discourage tyre retailers from buying other makes.

State ownership

European competition policy also safeguards Community rules by watching over the activities of State-owned enterprises:

- In 1962 there were 18 national trading monopolies in the Community, covering goods ranging from potassium, gunpowder and explosives to alcohol and tobacco. Partly by negotiation and partly by taking recalcitrant offenders to the European Court, the Commission has often managed to enforce the objectives of the Treaty, namely the abolition of discrimination between nationals of the Member States in the procurement and marketing of goods. Despite recent advances, minor problems remain, notably in the marketing of tobacco in France and Italy. In Greece, which joined the Community in 1981, the dismantling of State monopolies has yet to be completed.

☐ As far as public or private ownership is concerned, the European Treaties are completely neutral. State-owned concerns must respect Community law, particularly competition law, in the same way as any privately-owned company. Consequently, the Commission drew up a directive in 1980 to ensure the financial 'transparency' of dealings between Member States and State-owned concerns. In the first place, this measure will apply to the car industry, synthetic fibres, textile machinery, shipyards and tobacco manufacturing.

State aid

A further problem is State aid, whether to private or public enterprises. The European Treaties declare such aids incompatible with the common market in so far as they distort trade between Member States or damage competing firms. But certain forms of social aid are permitted. Exemptions are also made for clearly-defined and limited aids to the regions or industrial sectors which aim to correct regional imbalances or permit struggling sectors to readapt:

☐ Regional aid aims to improve the balance of economic development throughout the Community. To prevent distortions of competition and check damaging competition in the level of investment aid, the European Commission laid down common guidelines in 1975 (strengthened in 1979) which establish, amongst other things, ceilings for aid within the Community.

☐ Environmental aid is regulated by Community guidelines which ensure that national policy does not stray far from the principle of the 'polluter pays'.

☐ Aids to struggling industrial sectors have mushroomed. The Commission takes account of the economic crisis in laying down guidelines. It insists that such aids must be exceptional, limited in duration and geared directly to the objective of restoring long-term viability by reducing capacity in struggling sectors. More detailed guidelines exist for four sectors:

- Shipbuilding aids are controlled by a fifth directive, agreed in 1981 and recently extended to 1986;

- Textiles are subject to a framework for aids, first drawn up in 1971 and made more specific in 1976;

- Synthetic fibres;

- Steel, which is the subject of a 1981 agreement allowing limited aids up to the end of 1985.

General aids, introduced to meet a variety of objectives, also tend to multiply in time of crisis. They can create numerous distortions. Investors can, for instance, be attracted to settle in one member country rather than another. General aid must be submitted for Commission approval. The Commission attempts to weed out elements likely to cause too marked a distortion in competition. Certain forms of aid can, however, be acceptable, if they pursue objectives of common interest, such as research, energy-saving or job-creation. They are also expected to form part of an industrial or regional aid programme with distinct objectives, conforming to Community priorities. The most far-reaching plans must be submitted to the Commission for prior approval.[1]

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European competition policy has a dual objective: to prevent Member States from distorting competition by giving favoured treatment to certain enterprises; to prevent firms from carving up markets by erecting new barriers to trade. The policy aims to defend the interests of the consumer and, in the long run, to guarantee dynamism in the European economy ■

[1] For more details, see *European File*, No 9/82: 'The Community and State aids to industry'.

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