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# European competition policy

European File

Free competition between companies in providing goods and services, whether in the public or private sector, guarantees a wider choice for consumers and helps to keep prices down. 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 fair and effective competition is threatened.
- ☐ the free play of market forces does not always respect key economic objectives, 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 often 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 270 million

[1] This text updates and replaces our No 14/79.

Commission of the European Communities
Directorate-General for Information,
Rue de la Loi 200 — B-1049 Brussels

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consumers where 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:

- ☐ to prevent companies from re-establishing frontiers abolished 25 years ago through the less visible but equally effective means of market-sharing agreements and export bans. Both consumers and traders benefit from this policy: consumers because they can enjoy the lowest prices available in any of the member countries; traders, because they have 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.

The economic crisis has not caused the Ten to question their fundamental objectives. But the social implications of the recession 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 would 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 Ten. An impartial body 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 or by following up complaints from Member States, companies or individuals. The cases dealt with run into their thousands. In many instances they are resolved by voluntary policy changes by the companies concerned. Sometimes the Commission finds are in the company's favour. In other cases, the Commission orders a change of policy or imposes fines, sometimes amounting to millions of ECU.[2] Each year the Commission reports on its work to the European Parliament. Companies have a right of appeal against Commission decisions to the European Court of Justice, which rules on points of European law. A considerable body of case law has already been established.

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[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] 1 ECU (European Currency Unit) = about £ 0.59, Ir. £ 0.69 or US $ 0.96 (at exchange rates current on 7 December 1982).

## 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 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 one Member State. Among the numerous cases of 'everyone to his own backyard' dealt with and banned by the Commission were the quinine cartel, which led the Commission to impose its first fine in 1969 and the sugar cartel (1973). In this case the Commission imposed a heavy fine of 9 million ECU, subsequently reduced to 1.6 million ECU by the European Court of Justice.

☐ *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 in Community territory.

☐ *exclusive purchase agreements* to buy from specified manufacturers or importers or exclusive supply agreements to sell to certain buyers. Such agreements, which have cropped up 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 and works of art is not necessarily excluded 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 had banned UK traders from re-exporting its products. Selective distribution arrangements are sometimes permitted if they improve the quality of the service provided. But discrimination against retailers for their pricing policies can be severely punished, as in the 1982 case of AEG-Telefunken.

The European competition policy must not, however, be seen as a purely negative one. 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'.

For this reason 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. In addition, the Commission is expected shortly to approve exemptions which will guarantee the legal standing of certain patent licensing contracts.

The Commission is particularly interested in cooperation between small and medium-sized companies, which can frequently have a progressive influence. It has therefore identified a number of forms of agreement which it feels should escape the general ban.

- ☐ Exclusive representation contracts with trade representatives.
- ☐ Small-scale agreements, taking account of turnover and market share (which must not exceed 5%).
- ☐. Sub-contracting agreements.
- ☐ Information exchanges between companies, joint studies and joint use of equipment.

In addition to these rulings, some of which have been made recently, the European Commission gives careful consideration to the economic climate facing companies seeking individual exemptions from the agreements ban. 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.

## Mergers and abuse of dominant positions

The current restructuring of the crisis-hit steel industry is a perfect illustration of the way the Commission takes account of economic facts of life in applying 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 developments and coordinate industrial and commercial policy. 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 competitivity 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 again in modified form in 1981, that the largest mergers should be made subject to Commission scrutiny. The Commission also asked for the power to ban mergers which, in its view, pose a threat to effective competition in the Community.

While waiting for a Council decision on this point, 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 a company of its market position. 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 resell 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 judgment against Nederlands Banden-Industrie Michelin for offering discounts to discourage tyre retailers from buying other makes.

## State ownership

European competition policy also guards the Community interest in the public sector 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 frequently achieved the objective laid down by the European Treaties, namely the abolition of discrimination between nationals of the Member States in the procurement and marketing of goods. Despite recent advances, minor problems still exist, notably in the marketing of tobacco in Italy and France. In Greece, which joined the Community in 1981, the dismantling of State monopolies has yet to commence.

☐ 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. The aim is to prevent governments from giving unfair advantages to these companies, such as unremunerated holdings of the companies' stock. These can amount to disguised subsidies which are incompatible with the common market.

## 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 the Ten or damage competing firms. But certain forms of social aid are permitted. Allowances are also made for clearly defined and limited aids to the regions or industrial sectors which aim to correct regional imbalances or permit struggling industries to readapt:

☐ regional aid aims to improve the pattern of economic development in the Community. To prevent distortions of competition and check damaging excesses in inducements to invest, the European Commission laid down common guidelines in 1975 (strengthened in 1979) which establish ceilings for aid in the Community.

☐ environmental aid is regulated by European guidelines which ensure that it does not stray too far from the principle of 'polluter pays'.

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

- shipbuilding aids are controlled by a fifth directive, agreed in 1981;
- textiles are subject to a framework of aids, first drawn up in 1971 and elaborated in 1976;
- man-made fibres;
- steel, which is the object of a 1981 agreement, allowing limited aids up to 1985.

General aids, introduced to meet a number of different objectives, also tend to multiply in times 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. Far-reaching programmes must be submitted to the Commission for prior approval.[1]

△

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 ■

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[1] See *European File* No 9/82: 'The European Community and State aids to industry'.

The contents of this publication do not necessarily reflect the official views of the institutions of the Community.

**Commission of the European Communities**

Information offices (countries fully or partially English speaking*)

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