COMPETITION LAW AND POLICY

IN THE EUROPEAN UNION

-- 2005 --

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FOREWORD

This report, prepared by the Secretariat of the OECD[*], was the basis for a peer review examination of the European Commission in the OECD Competition Committee on 19 October 2005. Competition policy played a central role in the development of the European Union and its institutions. It has achieved a quasi-constitutional status, distinctively based on the direct application of law to economic actors rather than on administrative exercise of policy discretion or on political or interest-group bargaining. Competition law in the European Union is in transition, as policies about antitrust, mergers and State aids are increasingly based on market-centred economic considerations. Modernisation of concepts sets out basic analysis in an administrable format while making its economic underpinnings more explicit. By eliminating notification and prior approval while sharing enforcement responsibility with national agencies, the European Commission seeks to redirect resources so that DG Comp can concentrate on complex, Community-wide issues. A high priority is to clarify the relationships among the leniency programmes of the Community and the national agencies. In adopting an economic approach to dominance, liability should depend upon effects that harm competition; in appropriate cases, assessing the scope for recoupment should be an integral part of such an approach. DG Comp has added economic expertise and strengthened quality controls; nonetheless, a further increase in economic analysis capacity is called for. With projects to liberalise industries regulated by Member states well under way, the Commission's new program for impact analysis of EU legislative proposals is turning attention to avoiding unnecessary and disproportionate restrictions on competition in the legislation of the EU.

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EXECUTIVE SUMMARY

The European Commission, supported by the European courts, developed the framework for competition policy in Europe, building on a conceptual and legal foundation of promoting market opening and strengthening community institutions. The competition law of the European Union is now in transition toward policy based on market-centred economic considerations, relying more on application by the now-extensive network of national-level authorities applying broadly consistent substantive rules. Substantive doctrines are adapted to administrative methods of application, as regulations and guidelines increasingly follow an analytic format based on an economic perspective.

Anticompetitive agreements are prohibited and void, and something close to a *per se* rule can be used against hard-core conduct, though economic benefits can lead to exemption from the prohibition. Enforcement against cartels would be strengthened further if sanctions applied to individuals as well as firms; if that is not feasible under Community law, the Commission could promote and support the imposition of individual sanctions under the national laws of Member States. Most restraints in agreements about supply and distribution are permitted, unless there is market power.

Curbing abuses by firms that dominate markets and suppress competitors or harm consumers is the other main subject of Community "antitrust" law. This area of law is due for modernisation to adapt it to the Commission's more economics-centred approach, to focus on likely or actual market foreclosure effects more than on formally defined prohibited behaviours. In adopting an economic approach to dominance, liability should depend upon effects that harm competition; in appropriate cases, assessing the scope for recoupment should be an integral part of such an approach.

The inclusive legal standard for merger control can deal with all kinds of competitive effects. The Commission's 2004 guidelines about horizontal mergers imply strong harmonisation in approach across the Atlantic, at least for horizontal combinations. But the courts' critical response to several Commission merger control actions revealed weaknesses in its decision process, which the Commission has moved to correct by increasing its capacity for economic analysis and strengthening its internal quality controls. These checks, with which the Commission is still experimenting, improve quality but can increase costs. Nonetheless, a further increase in economic analysis capacity is called for.

SUMMARY (contd.)

The administrative process for applying the law is adapting in order to strengthen investigative powers and better incorporate economic evidence in decision-making, and thus convince the courts while maintaining policy consistency in a system of decentralised enforcement. Member State competition agencies and courts can apply Community substantive law, and the informal "European Competition Network" (ECN) is the medium for facilitating inter-agency co-ordination. Modernisation of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with national agencies, is designed, among other things, to redirect resources so that DG Comp can concentrate on complex, Community-wide issues and investigations. A high priority here is to clarify the relationships among the leniency programmes of the Community and the national enforcement agencies.

Coverage of Community competition law is broad and generally consistent, with no sectoral exclusions and few provisions for special enforcement processes. Treaty provisions that prohibit Member State measures contrary to Treaty rules about public undertakings and undertakings with special or exclusive rights have been the foundation for the long-term liberalisation program to reform traditional infrastructure monopolies. Treaty principles about controlling State aid try to prevent competition-distorting actions by national public authorities. The Commission's new program for impact analysis of EU legislative proposals that might affect competition in the internal market is turning attention to avoiding unnecessary and disproportionate restrictions on competition in the legislation of the EU.

1. Foundations

The competition law of the EU responded to Europe's mid-century economic conditions. Its development, driven by the imperative of market integration, profited from the symbiosis between the protection of competition and the promotion of open trade. Decisions of the European Court of Justice (ECJ), pursuing the goals of strengthening the community and eliminating trade barriers, established the legal framework underpinning an ambitious Community competition policy. The European Commission's Competition Directorate (DG Comp, formerly DGIV) is in a nearly unique position in the European Community system, because in the area of competition policy the Commission can apply direct enforcement power that is not dependent on national governments. Community competition law is undergoing a profound transition, after moving beyond the initial goals of opening markets and establishing a competition culture to become a mature, comprehensive enforcement structure centred on the European Commission. The substantive principles that the Community institutions developed have now become a common legal framework shared with the national laws of the Member States. In the future, the law will evolve within the network of national and Community agencies that share

responsibility for applying it. The principal focus of this study is the European Commission, as the administrative organ of the 25-country European Union. Most of the discussion would also apply in the context of the EEA, with its 3 additional countries and closely co-ordinated competition policy and enforcement.[1]

1.1 Context and history

In post-war Europe, administered economies faced development needs and state monopolies. The institutions of the European Union were created in a context of state intervention through ownership and control over trade and prices, as Europe was rebuilding after depression and war. The designers of the new post-war political economy framework, seeking to expand and integrate markets and sustain development, concluded that competition policy would be a necessary element of the new structure, principally to curb abuses of national monopolies.

The framework developed as a treaty group of states. Characterising the legal status of the European Union and comparing it to other institutions have become complex tasks as functions have evolved.[2] In those aspects of its operation that are dependent on consensus, it resembles an international organisation of states coming together to promote co-operation. In other aspects it resembles a federal government, capable of applying powers directly. The development of competition policy and the direct application of that policy by the Commission represent such federal tendencies. Those tendencies also appear in rulings of the ECJ that establish the supremacy of Community law and require national courts to apply Community law as their own. (Hartley, 1994)

The concepts and institutions of EU competition law appeared first in the European Coal and Steel Community (ECSC). The need to stabilise Germany's post-war economy and integrate it into western Europe, while preventing German firms from dominating markets, was most evident in the key coal and steel sectors. A new legal entity, the ECSC, was created by the 1951 Treaty of Paris to administer these sectors. The ECSC included most of the elements that were later incorporated into EU competition policy.[3] The terms of its rule prohibiting restrictive agreements while permitting exemptions pioneered the now-familiar language. It also set the benchmark for sanctions that is still the norm, of an administrative fine up to 10% of annual turnover. The ECSC prohibition against restrictive agreements, to be applied directly by the ECSC administrative body, appeared unusually sweeping. It was a clear departure from the consensus approach that had emerged from pre-war discussion and experience about competition policy, to register cartels in order to control abuses rather than prohibit them outright. By contrast, the ECSC treatment of dominant firm conduct more closely resembled the pre-war consensus, of correcting abuses by controlling future practices and prices (after consultation with

the Member government concerned). ECSC provisions about "interference with conditions of competition" regulated government subsidies and assistance, foreshadowing the Common Market's rules about state aids. The ECSC competition law system also required prior approval of mergers; however, the merger rules, the only part of the ECSC system that reflected US experience, had little influence on later developments.[4] The ECSC became effective in 1953. Its competition provisions were not actually applied very much during the 4 years before the Treaty of Rome established the broader Common Market in 1957.

The Common Market used the ECSC as a model for basic policies and rules. The discussions preparing the European common market recognised that controlling anticompetitive practices was a critical prerequisite. The preparatory documents described the problems of monopoly and the need for rules against discrimination, market division and suppression of output or technology. The fundamental goals that the Treaty of Rome set for the Common Market include preventing national discrimination and establishing a system to ensure that competition is not distorted. The competition rules in the Treaty of Rome build on those of the ECSC about agreements, dominance and subsidies, though not the ones about merger control. The rules for the Common Market add some precision to the prohibition of restrictive agreements, while strengthening rule against abuse of dominance into a prohibition. These basic articles were conceived as constitution-like, anticipating that their content would be determined in practice. Generality was also prudent, as the Treaty necessarily bridged or avoided some differences among the Members' views. Some favoured a strict competition law and envisioned the Treaty rules as legal norms to be applied in judgments by courts. Others saw the Treaty provisions as programmatic statements about policy intentions to guide administrative discretion. (Gerber, 1998)

The Council gave the Commission broad powers to develop and apply the law. The Member States did not focus on competition policy very much during the 4 years it took to prepare the regulation to implement the Treaty rules, and thus the Commission ended up with more autonomy in this area than it might have otherwise. (Goyder, 1998) The 1962 enforcement regulation centralised responsibility in the Commission. Its approach to cartels emphasised the Treaty's prohibition, because obtaining an exemption required a decision from the enforcer. It carried over from the ECSC process the possibility of obtaining a negative clearance decision, but it did not provide for an "opposition" procedure (under which inaction by a deadline would constitute approval or exemption). Between 1957 and 1962, some national agencies had begun to apply the Treaty provisions.[5] But the Council enforcement regulation marginalised the national agencies and courts by giving the Commission priority in investigations under Community law and exclusive competence over the key subject of exemptions. The Commission had to consult

about enforcement actions with a committee of representatives from the Member States, but the committee's views were advisory, not binding. The Council rejected a proposal to give this committee veto power. When the system was implemented in 1962, the Commission received over 35,000 notifications requesting exemption or negative clearance. Case-by-case response proved impossible; general rules were obviously needed instead. The block exemption regulation of 1965 responded to the overload, while underscoring the Commission's autonomy in competition policy. The Council delegated authority to the Commission to issue regulations setting generally applicable objective standards for exemption from the cartel prohibition. The Council has not delegated such authority to issue regulations to the Commission for any other substantive field.

With encouragement from the judiciary, competition law framed an economic constitution. In the process of decision and appeal during the first decades of Community competition law enforcement, the dialogue between the Commission and the ECJ set the direction and scope of competition policy. ECJ support for broad interpretation and wide application of the Treaty competition provisions has been fundamentally important. The Commission did not face the narrow, technical limitations on jurisdiction or power that some national courts have imposed on new competition agencies. Instead, the ECJ supported expansive claims of competition policy jurisdiction, because they implemented the Court's goals of promoting market integration and strengthening the institutions of the common market. The Court's encouragement of the Commission in setting the terms of market integration gave the Treaty rules about competition a quasi-constitutional status.

The Commission moved carefully at first. Decisions might expand jurisdiction because of potential effects on trade, then balance that expansion by some narrowing of the basic prohibition. The Commission concentrated on jurisdictional and procedural questions, avoiding heavy fines and aiming enforcement toward private firms more than state-owned companies. The 1964 *Convention Faïence* case illustrates the commercial context that the Commission faced: a complex of obligations and constraints upon members of a trade association effectively cut off a national market from significant imports. The case was resolved in characteristic fashion, with a negotiated undertaking to transform the cartel into an open-entry venture. Distribution agreements dominated enforcement attention, while recurrent controversies about parallel imports also highlighted the importance of the market-integration goal. That goal explains and probably justifies the priority given to vertical matters; however, as a consequence of that choice, "not until some years later did the Commission get to grips with some of the major horizontal cartels that had operated with impunity." (Goyder, 1998, p. 70)

Increasing confidence in EU competition policy culminated in the 1989 merger regulation, completing the European competition-policy "toolkit". After 20 years of laying the foundation, by the 1980s the Commission was taking stronger enforcement actions. The single-market program and the Single European Act of 1986 reinforced the market-integration objective and thus provided additional momentum for active competition policy. Merger control, which the drafters deliberately omitted from the 1957 Treaty, was finally adopted by a Council regulation after 17 years of effort. Business supported this move to establish a single point in Europe for regulation of large-scale mergers. Implementation involved a process of adjustment. The first time the Commission prohibited a merger, in 1991, governments where the firms were located protested. It took some time to overcome the early impression that political factors could play a role in Commission merger actions. (Gerber, 1998) Wielding this significant power to affect key business decisions bolstered the visibility and prestige of Commission competition enforcement generally.

State interventions and monopolies drew increasing attention. A line of cases dating from 1985 invoked basic Treaty obligations against national legislation that interfered with the effective operation of the Community's competition law. The Commission's program to encourage reform of monopolies in infrastructure service sectors began with telecommunications. Here again, the courts supported the Commission's initiative. The ECJ's 1986 *Telecommunications Terminals* decision distinguished between inherently governmental and essentially commercial functions, narrowing the exemption for public services and permitting a Commission action for abuse of dominance against British Telecom. A directive to eliminate monopoly rights that harmed competition followed in 1988, expanding on previous directives that had required more transparency about state owned enterprises. Other decisions in the Commission's liberalisation program since then have addressed postal services, mobile telecommunications, airports, ports and maritime transport, insurance and broadcasting, while the Council has issued legislation in the form of directives calling for reforms in telecommunications, energy and postal services.

Community competition policy is now being reshaped in terms of economic principle. In this project, which has been underway since the mid-1990s, the Commission is building on the increasing reliance on economic reasoning and analysis demanded by merger control and the liberalisation program.[6] With the market integration goal largely accomplished concerning industry and trade, attention shifted both to the constraints on trade in services and to the standard competition policy fare of cartels and monopolies. The shift in enforcement focus entailed a shift in analysis away from formal categorisation. The foundation for the economic reconstruction was laid in the 1997 guideline about the definition of a

relevant market. The first major substantive projects were the complete revisions of the rules about vertical and horizontal restraints, replacing long listings of specific requirements and prohibitions with general principles and market-share tests. The Commission is reformulating regulations and revising guidance to modernise Community competition law along these lines.

Closer judicial oversight led the Commission to improve its internal procedures. Addition of the new Court of First Instance (CFI) in 1989, which doubled the capacity of the Community's judiciary, provided a more practical avenue for parties to appeal Commission decisions. The Community courts remain supportive of the Commission's competition policy initiatives. But the CFI has rejected Commission actions for procedural errors and for defects in the quality of its reasoning and its treatment of evidence. When the CFI adopted rules permitting "fast track" review, it became practical for parties to seek judicial review of merger decisions too. About 20 merger cases are in some stage of appeal to the Community courts now. (Vesterdorf, 2005) In 2002, the CFI rejected three Commission merger decisions within 4 months, in opinions that sharply criticised the Commission's economic analysis and its treatment of evidence. Partly in response to problems that these decisions revealed, DG Comp created a new special economic unit and accelerated the recruitment of industrial economists generally in order to increase its capacity for economic analysis, and it introduced additional quality-control checks into its processes of investigation and case evaluation.

After 40 years of experience, in 2004 the Community implemented a "modernised" enforcement process.[7] By removing the Commission's monopoly on deciding about exemptions, the new system makes it much more practical to apply the law through national institutions and processes. The founding treaty envisioned enforcement co-operation between the Commission and Member State national authorities, at least as a transition measure. But of the original six, only Germany had a similarly ambitious competition law system at that time.[8] Now, all of the Member States have competition laws and enforcement agencies, and their national substantive laws have generally converged on the Community standards. Some areas of divergence remain, and the new enforcement regulation deals with the questions of co-existence and supremacy. National law can be applied to conduct that meets the jurisdictional test concerning effect on trade between Member States, but the national authorities must also apply Community law at the same time, and national law cannot prohibit restrictive agreements that would not violate the Treaty. But national law can be stricter than Community law concerning unilateral behaviour.[9]

1.2 Policy goals

The Treaty makes competition a principal goal, but it does not elaborate what the concept means. The activities prescribed for the Community institutions include several that directly implicate competition policy: to provide "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital," and "a system ensuring that competition in the internal market is not distorted." (Article 3) The Community and its Member States are to adopt a co-ordinated economic policy based on "an open market economy with free competition." (Article 4) These parts of the Treaty thus set out the goal of free and undistorted competition for the Community's internal market. The basic rules of Articles 81-87 do not limit the choice of policy goals. They do make clear that the competition rules address government measures as well as private conduct. The Treaty's opening statement implies that the most fundamental objective of the Community can be understood as promotion of economic welfare and progress,[10] with competition policy being one of several instruments for that purpose. Thus the Treaty text also includes policy goals that might be construed as inconsistent with promoting competition–although they are typically phrased in a way that implies there will be no need to choose. For example, Community institutions are to support industry competitiveness, in part by "encouraging an environment favourable to cooperation"; however, this provision is not to be taken as a basis for any Community measure "that could lead to a distortion of competition". (Article 157) Even the complementary fundamental free trade goal of the common market, embodied in the prohibition against controls on imports and exports, is not unqualified. Other policies that can justify national limits on trade are "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property". (Article 30)

The goal of promoting market integration was important when the common market was still being established. Where industries were traditionally established within national markets, the challenge was to get them to transcend those boundaries. The market integration goal explains the emphasis on vertical relationships and intellectual property rights, which were seen as obstacles to cross-border trade. That goal was the link in the Commission's partnership with the ECJ. Policy developed with an emphasis on legal form, more than economic content, in part because of this partnership with the courts and in part because of the influence of concepts from German competition law. One commentator concluded from these dynamics that the policy goals of Community competition law were not efficiency or equity, but legality in the service of market integration. (Wilks & McGowan,

1996) With progress toward realisation of the internal market, the relative importance of the market integration goal has declined.

Policy statements now stress efficiency, consumer welfare and competitiveness. The mission statement of DG Competition sets out a number of possible goals, including in the same sentence both the welfare of consumers and the competitiveness of the European economy. Covering all bases, it contends that "[o]pen and competitive markets are an important means to increase the competitiveness of industry, stimulate technological development and innovation, and to provide consumers with lower prices, larger choice and better quality goods." The 2000 Guidelines on Vertical Restraints declares that "the protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market … Market integration is an additional goal of EC competition policy. Market integration enhances competition …". The Commission's guidelines about horizontal mergers detail the benefits to consumers, of low prices, high quality products, a wide selection of goods and services and innovation. These guidelines do not mention improving competitiveness. But the Commission's 2004 annual report on competition policy, while mentioning the general notion of improving efficiency, highlights the Lisbon agenda to promote European competitiveness, being careful to note that "competition policy is not an end in itself, but one essential tool to achieve efficient market outcomes."

2. Substantive issues: content of the competition law

Substantive doctrines are adapted to administrative methods of application. Regulations and guidelines now follow an analytic format based on an economic perspective.

2.1 Framework

The basic norms and rules are the text of the Treaty and actions taken by the Council. They thus represent political-level enactments taken by agreement among the Member States. The general rules about antitrust and state aid issues are in the Treaty text. Merger control rules are in a Council regulation. Directives adopted by the Council, which require implementation through the laws of the Member States, have been particularly important about liberalisation.[11]

Regulations issued by the Commission, the administrative body of the Community, are important tools for implementing competition policy. The block exemption about vertical agreements in distribution, adopted in 1999, and its

accompanying guidelines introduced the now-standard format of an explanation of analytical method and a compact set of clear standards or prohibitions, coupled with thresholds or safe-harbours based on size or market share. This approach considers implicitly the likely costs and benefits of the practices at issue, by including a proxy for the likelihood of market power or significant market impact. It also takes account of benefits for compliance and enforcement of making rules clear and concise. This new format is replacing regulations that had been criticised as excessively legalistic, typically comprising detailed "black lists" of terms that were forbidden and "white lists" of ones that were required or permitted. The Commission has issued revised regulations following this format about horizontal agreements, insurance, motor vehicle distribution and servicing and technology transfer agreements.

Decisions in individual cases demonstrate concretely what the general rules imply. Decisions are not generally treated as a source of substantive rules, although judicial opinions have created some widely used doctrines of Community law that are not found in the texts of the treaties or legislation. In competition law, ECJ judgments created the important doctrine that Community jurisdiction does not apply to practices whose effect on trade or on competition is not appreciable. More specific rules derived from the Court's judgments could be somewhat unstable, for the ECJ does not consider its past judgments to be binding precedents (although it usually follows them).

Notices and guidelines follow the courts' cases and indicate the Commission's policy direction. As the courts stepped back from shaping substantive doctrines, the initiative shifted to the Commission, which has relied often on the "soft law" of guidelines and notices. (Gerber, 1998) The Commission has issued such pronouncements about the interpretation of fundamental issues such as effect on trade and *de minimis* coverage, market definition, policies about setting fines and promising leniency, horizontal mergers, vertical restraints (elaborating on the regulation), technology transfer agreements, horizontal restraints and co-operation with national courts. Projects for similar restatements of principles and guidance are underway about other kinds of mergers, abuse of dominance and state aids.

Community competition law applies only if there is sufficient Community impact. This concept, which defines the limits of the Community's legal competence and its boundary with the laws of the Member States, is interpreted expansively. The Treaty's competition rules address conduct that "may affect trade between the Member States".[12] The Commission's Guidelines on the effect on trade concept, issued in April 2004 as part of the modernisation package, collect doctrines from court judgments to define the cases that national agencies can handle without also applying Community law. If an agreement as a whole is capable of affecting trade, Community law applies to all of it, including parts that individually do not affect

trade, and to all of the parties, including ones whose individual contribution to that effect would be insignificant. The jurisdictional test can be met based on the expected effects of potential competition and on positive as well as negative changes in patterns of trade. The further requirement that the effect be appreciable limits this broad scope, though. The Guidelines define what is not considered "appreciable" based on cumulative thresholds of market share (5%) and aggregate turnover (EUR 40 million). In general, these levels define a rebuttable negative presumption. Below those levels, the enforcer has the burden of showing that there is nonetheless an appreciable effect on trade in order to establish Community law jurisdiction over an agreement or practice. For agreements that "by their very nature" would affect trade, though, each threshold establishes a positive rebuttable presumption: above those levels, parties to such agreements have the burden of showing that there is nonetheless no appreciable effect on trade in order to avoid Community law jurisdiction. Virtually any agreement that controls imports or exports or that is implemented in more than one Member State would be covered by the positive presumption. There is also a clear presumption that an agreement or practice that covers all of a Member State meets the "affecting trade" requirement, because a cartel or abusive practice of such wide scope would necessarily affect the competitive prospects of potential competitors from outside. More judgment is called for in dealing with agreements or practices that apply only in a part of a single Member State. The Guidelines follow case law in denying that markets must be defined first before identifying jurisdictional effects, but they also refer to the Commission's general Notice about market definition for the purpose of identifying these thresholds. Because one of the thresholds is based on market share, it may be necessary to define markets.

Community law applies to entities that are "undertakings", determined by function. This defined term is interpreted broadly, based on the nature of activities rather than formal structure. It excludes the sovereign functions of a state, but it includes the state's commercial activities. It thus includes state bodies engaged in commerce, nationalised industries, municipalities, trade associations, private individuals, co-operatives and associations. Economic activity, not profit, is the important element. Some close cases have involved social insurance funds. Factors that may lead to finding that such a fund is not an undertaking include whether it is compulsory and motivated by solidarity or redistribution. On the other hand, it is more likely to be considered an undertaking if it is potentially in competition with similar private-business entities.

A standard analysis for defining markets is used for the tests based on market power. The Commission's 1997 Notice on the definition of the relevant market for the purposes of Community competition law lays out systematically the considerations used to identify product and geographic markets. Legal criteria come

from the enforcement and merger regulations. A relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. The method relies principally on demand substitutability, which is described as "the most immediate and effective disciplinary force on the suppliers of a given product." This is tested by examining the market's likely reaction to a 5-10% permanent relative price increase. Supply substitutability may also be taken into account where its effects are equivalent to those of demand substitution. Potential competition is not taken into account when defining markets, but may be considered in the competitive assessment. The guidance recognises that the market definition analysis might depend on the nature of the competition issue under examination. The focus in merger cases is prospective, anticipating market conditions in the future. By contrast, in dealing with restraints or abuse of dominance, the focus could be on present or past conditions, and it could include an examination of whether the conduct has affected conditions in the market and thus the evidence used to define it.

Anticompetitive agreements are prohibited and void, unless exempted. Article 81(1) prohibits agreements that have the object or effect of preventing, restricting, or distorting competition. The prohibition extends to decisions by trade associations and to "concerted practices". These terms are interpreted broadly, to include arrangements that are not legally enforceable contracts. The alternative characterisations, about the nature of the object or of the effect, also invite broad interpretation. But there are limits: for example, a supplier's arrangements with its customers may not be treated as a set of agreements if the customers had not acquiesced in the supplier's program.[13]

Small-scale agreements are not usually considered to be likely to affect competition. In a series of Notices issued since 1970, the Commission has limited the scope of the Article 81 prohibition by describing transactions that are likely to be too small to have appreciable effects.[14] The latest such *de minimis* Notice sets thresholds based on market share at 10% for agreements between competitors and 15% for agreements between non-competitors. Where there are parallel networks of similar agreements in a market, the threshold is lower, at 5%. The Notice also implies a collective threshold for that situation, stating that cumulative foreclosure is unlikely if less than 30% of the market is tied up in such parallel networks. Regardless of market share, hard-core agreements cannot benefit from *de minimis* treatment. The Notice's definitions of such hard-core agreements are the same ones

used in the block exemption regulations and guidelines about vertical and horizontal agreements. The rationale for *de minimis* treatment is that competition concerns are unlikely if companies do not have a minimum degree of market power.[15]

Economic benefits from an agreement can lead to exemption from the prohibition. Under Article 81(3), an agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Improvements in productive efficiency obviously can be considered. Promoting progress could also include prospects for innovation that may be less immediately tangible. Neither "efficiency" nor "progress" implies a broad social balancing of economic advantages and disadvantages. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3). Guidelines from the Commission acknowledge that applying the 2 parts of Article 81 is a balancing process, seeking to identify the net economic effect of the restriction and the efficiencies. An increase in market power increases firms' ability and incentive to raise price, but cost efficiencies may permit them to reduce price. In balancing these potentially opposite effects, the requirement that benefits be passed on to consumers results in a sliding scale.

2.2 Horizontal agreements

The Treaty specifies some of the horizontal agreements it prohibits. The listing, which is not exclusive, includes direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment or technical development and sharing of markets or suppliers. Decisions have clarified what else Article 81 prohibits. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are prohibited. Exclusionary devices such as aggregate rebate cartels are prohibited even if they make some allowance for dealings with third parties. Joint purchasing and selling are permitted in some market conditions. Exchange of price information is permitted only after enough time has passed, and only if the exchange does not permit identification of particular enterprises.

Something close to a *per se* rule can be used against hard-core conduct. It is not necessary to prove that price fixing, market division or output limits or quotas actually raised prices or reduced output. Decisions have made clear that those effects are presumed, and parties to the agreements cannot overcome the presumption by claiming they had no intention or capacity to achieve an anti-competitive effect. The

decision to fix prices is enough to establish the infringement. To set the fine, though, factors in addition to the nature of the infringement could also be relevant to showing the gravity of the offence. These factors could include the cartel's geographic scope and its impact, if that can be measured. Showing implementation of the cartel agreement would not require evidence of marketplace effect; for example, it would be enough to show that the colluders announced agreed price increases or met to monitor compliance. For hard-core infringements, the ECJ has agreed that factors related to intent may be treated as more significant than those related to effects.

Agreements that are tacit or undocumented may be prohibited as anticompetitive "concerted practices". This term covers co-operative activity short of explicit agreement, which the ECJ has described as "co-ordination between enterprises, that had not yet reached the point of true contract relationship but which had in practice substituted co-operation for the risks of competition." The term can include hard-core restraints. Cases about concerted practices typically look for evidence of arrangements for reaching and enforcing compliance with implied agreements to limit competition. The Commission has applied the concept to conduct that some other enforcers would treat as ordinary agreements, such as formal industry-wide market-sharing arrangements set up by trade associations. In this role, the term fills a conceptual gap in a legal tradition that privileges documentary formalism. But pure oligopoly interdependence would not be a prohibited "concerted practice".[16] Intentional communication and awareness are needed, not just mutual awareness of the benefit of restraint.

Because Article 81 explicitly applies to "decisions" of trade associations, Community law can deal with this common setting for cartel agreements in a straightforward way. There is no need to infer constructive agreements or resort to theories of collective dominance. The decisions that Article 81 prohibits can include an association's formal rules or its more informal actions or recommendations. Where the infringement is attributed to the association, the Commission may nevertheless take into account the sum of the members' turnovers in calculating the association's fine. Under some conditions, the members may be liable for the payment of the fine by the association. The Commission will obviously go after the members for their own behaviour.[17]

In its application to non-hard core agreements, Article 81 resembles a rule of reason.[18] The Article 81(1) prohibition and the Article 81(3) exemption criteria require market analysis and balancing of positive and negative effects in cases of horizontal co-operation that does not amount to a hard-core cartel. The Commission has issued block exemption regulations about agreements for production specialisation and for research and development, accompanied by guidelines to show

how Community law can allow competitor collaboration where it contributes to economic welfare without creating a risk for competition. The case law is not entirely consistent about whether the assessment of market conditions and consideration of potentially competing policies and effects are part of determining whether Article 81(1) prohibits an agreement or of determining whether Article 81(3) exempts it.[19] For non-hard core agreements, the ECJ has said that market conditions, market structure and the economic context determine whether Article 81(1) prohibits it. For a hard-core agreement, those considerations might come up, if at all, only to determine whether efficiency claims under Article 81(3) exempts it. Yet the ECJ's *Wouters* judgment found that not every agreement which clearly restricts competition necessarily infringes Article 81(1). The judgment took particular account of the context and objectives of the agreement. In the *Wouters* case, the court found that the objective included a public interest purpose, to ensure the integrity and experience of the providers of professional services, that was in the interest of consumers and the sound administration of justice. Where the effects restricting competition are inherent in the pursuit of such objectives and can be reasonably held to be necessary in order to ensure the proper practice of the profession, as it was organised in the Member State, the court found that the agreement was not covered by the Article 81(1) prohibition at all. The public interest criteria that the court invoked would also appear relevant to the issue of exemption under Article 81(3). The Commission's Guidelines state that the four conditions for exemption are exhaustive, so no other grounds can be invoked. (Guidelines on the application of Article 81(3), para. 42). Nonetheless, the courts have made clear that the goals set out under other provisions of the Treaty can be taken into account where they can be subsumed under the conditions of Article 81(3). Conflation of the two aspects of Article 81 may spread, now that other agencies and courts can apply both of them. (Goyder, 2003)

Assessment considers factors such as market power and market structure under both aspects of Article 81. The Commission's guidelines on the applicability of Article 81 to horizontal cooperation agreements explain the standard analysis of horizontal agreements in general and apply it to several common types. Determining under Article 81(1) whether the agreement could restrict competition involves determination of the nature of the agreement, definition of markets, and evaluation of market structure and market power, including considerations such as the nature of the products, market concentration, barriers to entry, stability of shares and the countervailing power of buyers or suppliers. The horizontal guidelines presume that if parties have a low combined market share, co-operation is not likely to restrict competition. The guidelines do not prescribe a single rule, because conditions and effects can vary significantly, but they do suggest particular levels for some kinds of agreement. For agreements about joint purchasing and commercialisation (that is,

selling, distribution and promotion), the guidelines set a safe harbour at a combined market share of 15%. High market shares will not necessarily be a concern for standardisation agreements, and the assessment focuses more on whether the standards could raise barriers to entry. No market share test is needed for agreements that, because of their very nature, are unlikely to reduce competition. This could be the case, for example, if the parties could not carry out a project independently at all, or if their agreement is about an activity that does not affect any relevant parameter of competition. At the other extreme, no market share threshold applies to the hard-core restrictions of price-fixing, output limitation and allocation of markets or customers, which are generally prohibited irrespective of the parties' market shares. The guidelines then explain the application of the cumulative Article 81(3) criteria about economic benefits and its caveats about sharing the benefit with consumers, indispensability of the restraint to achieving the benefit and not eliminating competition by dominating the market.

The block exemption regulation about specialisation treats production rationalisation in the same way that the guidelines treat similar practices which are not covered by the exemption. For agreements between competitors to specialise production, the regulation sets a market share threshold for exemption at 20% (for all parties combined, and subject to certain conditions, including the absence of hard-core restraints). The guidelines describe how the law would apply to analogous agreements for joint production (which are also covered by the regulation) and for subcontracting agreements between competitors. The guidelines refer to the same 20% combined market share threshold in explaining both the Article 81(1) test of effect on competition and the Article 81(3) test of whether economic benefits outweigh the effect on competition.

The block exemption regulation for research and development is generous, particularly to innovation that promises to create new markets. Agreements between competitors about research and development are exempt up to a combined market share of 25% (of the market for the product that is the subject of the joint research), subject to certain conditions and the absence of hard-core restraints. Here too, the guidelines about the application of the block exemption regulation use the same level to presume the lack of effect on competition and to explain why benefits would be presumed to outweigh harm to competition. If the collaboration is developing something for which there is not yet any market, the guidelines recognise that a successful first-mover effort should not necessarily be seen as an elimination of competition, even though it could lead to huge initial market shares once the product is developed. Thus, the block exemption permits such agreements to continue regardless of market share for the first 7 years after the product comes to market. At that point, the safe harbour of 25% applies.

Enforcement of Article 81 developed in an environment that had tolerated formal industry co-operation, sometimes amounting to self-regulation. Early cartel cases targeted national-scale industry associations and substantial international agreements about quinine, dyes, aluminium and chemicals. Some cartels had formal committees that kept minutes of their agreements. For other cases, obviously co-ordinated market actions could support an inference of agreement. Collection and exchange of information about price and output through trade associations has been a concern, as a means of tacit or even explicit co-ordination to confirm and police agreements. By the early 1990s, some cartel cases had resulted in total fines of over EUR 100 million. As the fines for price fixing mounted, Commission enforcement strategy began relying increasingly on insider evidence supplied by firms seeking clemency. This was formalised in the Commission's 1996 leniency notice, publicly announcing what had been an unofficial practice.

The level of enforcement against horizontal cartels has sharply increased since 2001. The Commission has issued an average of about 8 decisions per year, compared to fewer than 2 per year over the previous decades. The Commission's notice about setting fines treats hard-core cartels as "very serious infringements," for which the fine, determined by gravity, would normally be at least EUR 20 million (before considering other factors). The fines imposed in these recent cases confirm that treatment. In 31 Commission cartel decisions since 2001, the fines totalled EUR 4 billion. The peak was in 2001, with EUR 1 836 million. The level then dipped, and in 2004 the total was about EUR 390 million. Despite the increased activity, the fines being imposed may not yet be enough to deter hard-core infringements.[20]

2.3 Vertical agreements

Most restraints in agreements about supply and distribution are permitted, unless there is market power. The 1999 block exemption regulation for vertical co-operation agreements restated the Commission's analysis of these restraints. Recognising that parties typically enter agreements to manage the distribution chain in order to improve efficiency and that smaller-scale agreements are unlikely to affect competition either upstream or downstream, the regulation applies a market share screen. It exempts most agreements involving a supplier or buyer with a market share under 30%, considering that to be a level at below which vertical agreements would be expected to lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits (as long as they do not include certain particularly harmful restraints). The buyer's share of its downstream market is considered where the contract requires the supplier to sell exclusively to that buyer. Vertical agreements involving associations of retailers are also exempted, as long as the turnover of each is below EUR 50 million. Where

parallel, similar networks of agreements account for more than 50% of a market, the Commission reserves the power to disapply the exemption, on 6 months notice; it has not yet done so, though. There is no presumption of violation where an agreement involves a supplier with a share over 30%. But with increasing market power come increasing concerns that agreements might impair competition, by foreclosing other suppliers, raising barriers to entry or reducing interbrand competition and facilitating collusion. The regulation also notes possible concerns about reducing intrabrand competition and about creating obstacles to market integration. The regulation applies to many types of agreements, replacing previous notices and regulations about topics such as exclusive distribution and franchising. Unlike previous regulations of similar topics, it does not contain a list of permitted clauses, an approach which had tended toward uniformity of practice out of a fear that whatever was not permitted would be prohibited. The vertical block exemption regulation takes the opposite position: below the 30% threshold, whatever is not prohibited is permitted.

Fixing minimum resale prices and excessive territorial protection remain black-listed, regardless of low market share. Resale price maintenance has always been treated as a *per se* infringement, at least with respect to minimum prices; however, recommending a resale price or requiring resellers to respect a maximum resale price are exempted, up to the 30% market share threshold, provided that the result is not a fixed or minimum sale price due to pressure from, or incentives offered by, the supplier. Territorial resale constraints are suspect, but some are permitted, to protect systems of exclusive dealership, preserve functional distinctions between wholesalers and retailers or prevent resale of components leading to competition with the supplier.

Provisos in the general rules address issues that arise in selective distribution systems and franchising. The regulation and accompanying guidelines do not dwell on the nature of the product for which suppliers may select and limit distributors. They do make a distinction between qualitative and quantitative criteria for selection. Qualitative criteria support selecting distributors on the basis of objective criteria determined by the nature of the product, which justify requiring distributors to demonstrate technical competence and provide suitable facilities. Quantitative criteria limit the potential number of dealers, for example by requiring minimum or maximum sales or even fixing the number of dealers. The regulation does not try to distinguish between claims for special treatment about technically complex or dangerous products and those about luxury or image goods. Systems that apply objective, qualitative, non-discriminatory criteria for selecting distributors do not infringe generally Article 81(1). Selective distribution may be combined with exclusive territories and location clauses, but only if the buyers are permitted to market to consumers outside their territory. Thus the guidelines treat a ban on

internet sales as a forbidden hard-core restraint. The guidelines underline the connection between the economic approach to vertical restraints and an economic appreciation of consumer information needs. Restraints may be more acceptable when applied to new or complex products whose qualities are difficult for consumers to judge before purchase and consumption (and for "credence" goods, whose quality consumers may not be able to judge well even after consumption). Most distribution and service franchises are evidently included in the block exemption regulation. How much the exemption applies to franchising is somewhat uncertain, though, because it does not cover agreements that are primarily concerned with intellectual property rights.

Sector-specific regulation governs vertical relationships in motor vehicle distribution and servicing. Lobbying and then recalcitrance led to a separate regulation for this problematic sector. The 2002 regulation is the Commission's third effort to break down constraints that have tended to prevent parallel imports, limit consumer choice for cars and service and dampen price competition within and between national markets. The latest regulation followed a series of infringement actions that imposed fines totalling EUR 276 million. At the time (1998), the EUR 102 million fine against Volkswagen was the largest fine the Commission had ever imposed against an anticompetitive restraint. (The CFI later reduced this fine to EUR 90 million.) The experience persuaded the Commission to take a tougher line in this sector than the general vertical restraints regulation.[21] The "black list" of forbidden clauses is unusually long and detailed. Manufacturers do not benefit from the block exemption if they do not allow their authorised dealers to sell competing brands or if they limit the dealers' ability to open secondary outlets in other territories. The regulation applies the same market-share safe-harbour, of 30% (and 40% for a selective distribution system with a limited number of distributors), and it permits suppliers to use an exclusive system, but only if the system imposes no constraints on making passive sales to customers in other areas.

2.4 Abuse of dominance

Curbing abuses by firms that dominate markets and suppress competitors or harm consumers is the other main subject of Community "antitrust" law. Article 82 prohibits the abuse of a dominant position. Some acts that the Treaty lists as abuse are imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage and imposing non-germane contract conditions. Other kinds of conduct by a dominant firm that disadvantage other parties in the market could also be abuses.[22] Practices such as loyalty rebates that would not be objectionable when done by a firm without market power could be considered abuses when done by a

firm in a dominant position. To find infringement it is not necessary to show that an abusive practice produced an actual anticompetitive effect; it is enough that the conduct, when undertaken by a dominant firm, tends to restrict competition or is capable of having or likely to have that effect. There is no provision for exemption, although the case law has developed a doctrine that otherwise abusive conduct is not prohibited under Article 82 if it is "objectively justified".

Dominance is a broader concept than economic market power over price. It is not the same as economic monopoly, although a monopoly would clearly be dominant. Dominance is often presumed at market shares over 50%, and it may be found at lower levels depending on other factors. The ECJ's *Hoffman-LaRoche* (1979) and *United Brands* (1978) judgments explained the meaning of dominance under the Treaty, describing it as a "position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers." These still-authoritative judgments found dominance based on features such as vertical integration, because that enabled a firm to act independently of its suppliers of intermediate services, and at market shares of 40-45%. In current practice, there appears to be a safe harbour at a market share of about 25%[23] and a rebuttable presumption of dominance at about 40-50%. Dominance depends on factors other than market share, such as the number and relative size of other firms and the conditions of entry. A finding of dominance is more likely if entry is difficult or if there are no other firms of comparable size or with the capacity to counter the leader's strategies. Some recent actions imply that especially close attention will be paid to the conduct of "super-dominant" firms with shares over 90%. That treatment would confirm that dominance is subject to a sliding scale. (Goyder, 2003)

Article 82 is not limited to single-firm misconduct. Under the theory of collective or joint dominance, several firms can share and abuse a dominant position. When the Commission first tried to apply Article 82 to oligopoly, the Court of First instance rejected the argument (although the court upheld the finding of infringement under Article 81 as a restrictive agreement). To find that several firms together hold a dominant position, the court demanded that the firms be "united" by "economic links", such as a network of interdependent intellectual property licenses. A formal cartel could possess collective dominance. Judgments applying the analogous language about dominance in the Merger Regulation, which have been cited as authority for the application of Article 82, imply that oligopoly interdependence might amount to collective dominance if the members could monitor each other effectively, if retaliation against defectors was credible enough to provide each member with an incentive to maintain co-ordination and if customer and consumer responses would not undermine co-ordination.

Exploitation of market power by charging high prices could be an abuse, although no final decision has actually condemned it. In the 1970s, reviewing Courts annulled 2 Commission decisions that had challenged high prices as abuses. The early Court judgments about abuse of dominance agreed with the principle, though, that "unfair" pricing could include setting prices to take advantage of market or monopoly power. Prices would be too high if they bore no reasonable relation to the economic value of the product. The ECJ has also endorsed the concept that Article 82 could prohibit prices for licensing intellectual property rights that are "particularly high" and "not justified by the facts".[24] Despite the theoretical support for the sweeping principle, in the end the decisions have declined to find infringements based upon the evidence in the cases.

For predation, anticompetitive intent can be inferred from prices too low to recover costs; the strength of the inference depends on the cost reference. Prices below average variable cost are presumed to be predatory, that is, intended to eliminate competitors. Prices above that level that do not recover total costs may also be treated as predatory, but that conclusion may depend on further evidence of the intent to eliminate or prevent competition. "Super-dominance," that is, extremely high market shares, may also be a relevant circumstance. Thus, the Commission has applied Article 82 against the collective "fighting ship" tactics of members of an ocean shipping conference, even though the prices were not demonstrably below costs. There is no recoupment requirement. The ECJ has endorsed the Commission's view that it need not demonstrate that the dominant firm will succeed in raising its prices after its predatory tactics have weakened or eliminated its competition. The Commission recognises that recoupment could be relevant, though. For example, a recent decision about ADSL pricing pointed out that entry barriers would enable the predatory firm to recoup its losses. Cross-subsidy can support predatory tactics, and thus the Commission has addressed the asymmetric financial advantages of one-time public monopolies. The Commission accepted a commitment from *Deutsche Post* to effect a corporate reorganisation in order to make financing transparent. It implies a general principle under Article 82, that a statutory monopoly setting up a new business must cover the entire incremental cost from the revenues of that new business.

Discrimination is included among the abuses listed in the Treaty text, which prohibits putting other parties at a competitive disadvantage through the application of dissimilar conditions to equivalent transactions. This language implies some common principles of competition laws about discrimination, notably that the discrimination must be between transactions involving the same product or service and that it must actually cause competitive harm. The harm could be to an individual competitor, though, and not necessarily to competitive conditions in the market. Price variations that correspond to different national markets have been treated as

prohibited discriminations, in the absence of objective justification in terms of differences in costs or in the extent of the seller's exposure to different risks in different markets. Decisions have prohibited discriminations about inputs that impose a "price squeeze" on non-integrated competitors or that unfairly favour national-champion incumbents.

Putting pressure on customers to enter into requirements contracts can be an abuse. Many cases have dealt with the foreclosure effects of loyalty rebates. Loyalty programs may be permitted if they are based on cost efficiencies. Only cost savings to the supplier can justify quantity-based rebates. Indeed, recent decisions imply that the only way to avoid liability is to base the loyalty scheme strictly on cost differences. Refusal to supply a customer can be an abuse, particularly if the customer is a long-time regular trading partner, but a reasonable justification, such as the customer's poor credit, can overcome the prohibition.

The prohibition of tying is implied in the Treaty text, which prohibits imposing non-germane conditions in contracts. The elements of tying, or refusing to supply a product unless the customer also takes another, allegedly unnecessary one, are dominance in the tying product, a separate tied product, coercion to take them together, an anti-competitive effect in the market for the tied product and the absence of an objective, proportionate justification for the tie. Bundling, which can make the price of the tied product effectively 0, can be construed as coercion. The most prominent application of Article 82 to tying tactics is the Commission's 2004 action against Microsoft.

Refusal to licence intellectual property, under some circumstances, can violate Article 82. The leading case reaching this result emphasised that the refusal prevented the production and marketing of a new product for which there was a potential consumer demand. The ECJ later refined the conditions for finding liability. The firm seeking the license must not be intending essentially to duplicate what the owner of the right already offers, there must be a potential consumer demand for the firm's product, the refusal to license must not be justified by objective considerations; and the refusal must prevent, to the detriment of consumers, the development of a market in which the licence is an indispensable input.

The doctrine of "essential facilities" combines discrimination, tying and refusal to deal. The suggestive label points to common application in sectors dominated by historic infrastructure monopolies, controlling facilities such as ports, wires, pipelines and airports. The logic – denying access to something that competitors need to provide their own product or service – invites a broader application. The courts have resisted invitations to extend the doctrine, though. The ECJ refused to

find that newspaper distribution is an essential facility, reasoning that a competing newspaper could use the post or rely on newsstand sales.

Problems in network industries about access and strategic exclusion remain prominent in the Commission's Article 82 caseload. The program for liberalisation of these sectors relies largely on indirect application, through sector-specific directives. Improvements in national regulation and market opening have not eliminated the need for direct enforcement actions, though. In 2003, the Commission fined Deutsche Telekom EUR 12.6 million for exclusionary pricing of local loop access, and it fined Wanadoo EUR 10.4 million for an exclusionary strategy in pricing ADSL. In these actions, the Commission pointed the way for further sector reform and presented a standard for cost assessment. (EC DG Comp 2004)

Original case law doctrines about abuse of dominance rested on the concept of "distortion" of competition, from Article 3(g) of the Treaty. Thus the acquisition of a competitor could be a prohibited abuse because the dominant position distorted the market structure. A refusal to supply a competitor might be treated as adversely affecting the structure of the market by destroying the competitor's capacity to compete effectively. The seminal *United Brands* decision focuses on how the dominant firm's strategies limited the independence of smaller business, implying that coercion could demonstrate dominance regardless of actual effect on the competitive process. It also decried restraints that "limit markets to the prejudice of consumers", implying appeal to a consumer-welfare standard as well. The early *Hoffman-LaRoche* and *Michelin* cases barred fidelity devices that pressured firms to deal with a dominant firm unless there was "economic equivalency" in the transactions and there was no significant effect on the structure of competition. The approach implied by these judicial authorities, concerned about preserving the positions of individual firms and competitors, no longer reflects the Commission's own policy view.

A wide range of remedies is available to correct and deter abuse of dominance. The new enforcement regulation has authorised the Commission to order structural relief, which could include divestiture but might also include other dispositions of property rights. These measures must be proportionate. The Commission may only use structural measures to correct abuse of dominance where there is no equally effective behavioural remedy, or any behavioural remedy would be more burdensome to the entity that will be the object of the structural remedy. The new enforcement regulation also confirmed that the Commission can order interim relief, which is particularly significant in cases about access. Behavioural orders and financial sanctions remain the principal tools. Substantial recent fines include EUR 13 million for exclusionary pricing in telecoms and EUR 24 million for loyalty rebates. The fine against Microsoft shows that Community sanctions against abuse

of dominance can be vigorous; at EUR 497 million, it exceeds the total fines the Commission imposed against horizontal cartels in 2004.

Article 82 is one of the next subjects due for modernisation. The Commission plans to issue a discussion paper soon, which may be a prelude to proposed enforcement guidelines. The result will probably follow the pattern of other new guidelines, focusing on aspects of conduct that are related to competitive effects and economic principles more than on formal distinctions and classifications. A contribution to the discussion from the Economic Advisory Group for Competition Policy, posted on the DG Comp website in July 2005, advocates an economic approach based on the market effect of a practice, rather than its form or classification.

2.5 Mergers

The inclusive legal standard for merger control can deal with all kinds of competitive effects. The Commission may prevent or correct a merger that would "significantly impede effective competition … in particular as a result of the creation or strengthening of a dominant position." This substantive standard is subsidiary to the Regulation's fundamental criterion, whether the transaction is "compatible with the common market."[25] The 2004 revision of the Merger Regulation revised the original 1989 standard. The principal issue motivating the change was non-coordinated effects in oligopoly markets, where the merged firm might have market power without necessarily having an appreciably larger market share than the next competitor.

The Commission's 2004 guidelines about horizontal mergers imply strong harmonisation in approach across the Atlantic, at least for horizontal combinations. The guidelines' structural safe-harbours and presumptions are based on market shares and HHI. The guidelines presume that a merger does not impede effective competition if the new entity's market share would not exceed 25%; however, this presumption does not apply to coordinated effects, where the merged entity would be collectively dominant along with other third parties. The guidelines rely on HHI levels not as firm cut-offs, but as points beyond which it is more, or less, likely that detailed analysis will be needed or that a competition issue will arise. With that general caveat, the guidelines draw the bottom line at post-merger HHI of 1000. The line of greater scrutiny is drawn at post-merger HHI up to 2000, changing by less than 250 points, or over 2000, changing by less than 150 points. Regardless of these levels, though, the guidelines warn that special attention will be paid if any party has a pre-merger share over 50%, or if there are obvious issues of potential or toe-hold entry, innovation, cross-shareholding, "maverick" market behaviour or indications of oligopoly behaviour in the industry. The guidelines discuss in detail the theories

of non-coordinated and co-ordinated anti-competitive effect. Where non-coordinated effects are the concern, an important indicator where products are differentiated can be the closeness of substitution between the merging firms' products, for homogeneous products, an important factor is the relative capacities of the merging firms and their rivals. A market share over 50% and a significant market share advantage over any rival may be a strong indication that the merger would create or strengthen a dominant position. Where co-ordinated effects are the concern, the guidelines describe the conditions for finding that a merger will create or strengthen a position of collective dominance.

Countervailing factors include buyer power and entry. Whether significant entry is likely is determined by inquiring whether an entrant would find it profitable to do so in post-acquisition market conditions. Entry must not only be likely but also sufficient and timely. The measure of timeliness could vary in different product markets, but the normal test is 2 years.

Efficiencies can also be a mitigating factor, if they are merger specific, timely, verifiable, and benefit consumers. Reductions in variable or marginal costs are more likely to lead to lower prices, and hence they would get more weight than savings in fixed costs. The guidelines disavow an efficiency "offence", that is, that increases in productive efficiency, giving the merged firm a cost advantage over rivals, will be a reason to reject a merger.

If one of the parties is financially failing, the guidelines would permit an otherwise anti-competitive merger. The rationale is that the competitive structure would deteriorate equally absent the merger. The parties must show that the allegedly failing firm would in the near future be forced out of the market by financial difficulties if not taken over by another firm, that there is no less anti-competitive alternative acquirer, and that in the absence of a merger the assets of the failing firm would inevitably exit the market.

The merger regulation and the guidelines do not call for considering policies other than effects on competition. Efficiencies are taken into account as part of the competitive assessment. Although the Commission does not consider other policies explicitly, the merger regulation recognises that Member States may do so in defined circumstances. They may take "appropriate measures" to protect public security, media plurality and prudential financial rules, as long as those measures are compatible with Community law, concerning mergers that have a Community dimension. Member States could invoke these principles to block or regulate transactions that do not impede competition; however, they could not invoke them to authorise a transaction that the Commission has blocked.[26]

A concentration cannot be put into effect before it is notified to the Commission and the Commission has cleared it. This merger control power applies only to transactions that are large enough to have a Community dimension. That status and the associated obligation to notify the Commission in advance are defined in terms of turnover, in total and within the Community. A transaction has a Community dimension when the combined aggregate worldwide annual turnover of all of the firms involved is more than EUR 5 billion, and the aggregate turnover within the EEA of each of (at least two) of them is more than EUR 250 million. An alternative definition captures certain transactions that have significant effects in several Member States. If the merging firms concentrate their Community business in a single Member State (with each of them having more than two-thirds of its Community turnover there), then the merger does not have Community dimension and the national competition authorities are responsible for it. There is also now a discretionary process for avoiding multiple national filings and reviews. If a merger may have to be reviewed in 3 or more Member States, the merging firms can request that the Commission examine the merger, which it will do if none of the Member States objects. Merger control is more like a formal approval than a simple notification. The merger regulation, the Commission's implementing regulation and its "best practice guidelines" set out the process. It begins with informal contacts with DG Comp staff, including submission of a briefing memorandum and draft notification documents, before any formal filing is made. The formal process begins with submission of a detailed notification describing the transaction, its motivations, markets affected, market shares, and conditions of supply, entry and exit, and considerable other documentation. The Commission may use all of its other powers to get further information from the merging parties and from others. The Commission's decision process for mergers is similar to the process for other competition matters, except that merger decisions are subject to strict deadlines. The deadlines are now set in terms of working days. In the "first phase," the issue is whether to clear the transaction or to open a second phase investigation; the deadline to finish the first phase is 25 days; if the matter continues to the "second phase" investigation and decision, the deadline is 90 days from the beginning of the second phase; if the parties offer modifications to deal with competition concerns, the first phase can be extended to 35 days, and the second phase, to 105 days.

Guidelines about the treatment of non-horizontal mergers, particularly vertical ones, may be issued in the future, once Court judgments have been taken in some important pending cases. The most prominent of these is the appeal of the Commission's decision against the conglomerate GE-Honeywell merger. The Commission is also engaged in a study of the effectiveness of merger remedies.

2.6 State aid

Basic principles for the control of state subsidies and other aids in order to prevent distortion of competition are contained in Articles 87-89 of the Treaty. The Commission determines whether aid violates the Treaty standard, and it can order the Member State to end it and order the recipient of illegal aid to return it. The Council can override the Commission's actions about state aid, in exceptional circumstances, but it must do so by unanimous vote. The policy motivation for state aid control in the original treaties was to prevent national favouritism and thus promote opportunities for trade and competition among the Member States. DG Competition administers the system for notification and approval and deals with state aid policy and decisions about most sectors. Other directorates-general apply the rules in transport, coal, agriculture and fisheries.

The substantive criterion is whether the aid distorts or threatens to distort competition by favouring some products or enterprises (and affects trade between Member States). Drawing on this text, the elements that define state aid are state resources, advantage to firms or industries, selectivity, distortion of competition and effect on trade. Correct classification has practical consequences. A measure that falls within the formal category "state aid" must be notified and approved by the Commission in advance. Thus the first issue to determine is whether a program or action constitutes aid. To then assess whether aid is compatible with the common market, the Treaty describes permissible purposes for aid. Aid is permitted for redressing underdevelopment and unemployment and for dealing with serious economic disturbances and important projects of common European interest. Aid for other regional development and for promoting culture and preserving heritage is permitted only where it does not adversely affect trading conditions to an extent contrary to the common interest. The Council may define other categories of aid that are compatible with the common market. Aid issues are classified into "horizontal," regional, fiscal and sectoral, as well as the special provisions about coal, transport, agriculture and fisheries. Recent cases have involved shipbuilding, motor vehicles, steel, telecoms and broadcasting. The Commission has issued several notices and guidelines clarifying its policies about aid for regional development, employment, research and development, environmental protection and corporate rescue and restructuring. Block exemption regulations define permissible aids for small and medium sized enterprises, training and employment. The process of applying the legal standards and regulations depends more on categorisation than on direct evaluation of actual or threatened distortions of competition in particular markets.

Aid that pays for provision of public services might conflict with the principle that state aid should not distort competition. The state aid rules permit compensation for the performance of functions that the market could not be expected to provide,

such as geographic coverage or universal access, but they do not permit over-compensation. The ECJ resolved a long-running controversy over how to balance these considerations in its 2003 *Altmark* judgment. The judgment announced criteria for determining that support does not confer a competitive advantage, and hence does not constitute aid that must be notified and approved in advance. These are: clear definition of the public service obligations in national law; objective and transparent parameters for compensation determined in advance; and compensation no greater than costs (including a reasonable profit). Most imaginatively, the court decided that the provider would have no competitive advantage, and therefore the compensation would not be aid, if it had been selected through open bidding or a public procurement process. If there is no competitive bidding process, the reference for costs will not be the actual cost of the provider, but those of a hypothetical, normally efficient and economically viable company.

In July 2005, the Commission issued a package of measures clarifying treatment of compensation for public services, building on the direction of the case law. One element of the package is a Commission decision that specifies conditions under which compensation for public services does not have to be notified in advance. The decision includes a quantitative threshold, being applicable to compensation of less than EUR 30 million per year provided the beneficiaries have annual turnover of less than EUR 100 million. Compensation to hospitals and social housing for services of general economic interest benefits from the decision irrespective of the amounts involved. Compensation for air and sea transport to islands and for airports and ports is covered by the decision below thresholds that are defined in terms of passenger volumes. Another element of the package is a framework document explaining the conditions under which compensation that does not meet the criteria of the decision, and hence must be notified and approved, would nonetheless be compatible with the state aid rules. In particular, compensation that exceeds the costs of the public service or that is used by the recipients in other markets that are open to competition would be incompatible. The package also includes an amendment to the directive about transparency, clarifying the obligation to maintain separate accounts to facilitate checking for over-compensation.

The Commission is focusing its attention on the kinds of aid that are most likely to distort competition. These are restructuring aid, regional aid targeted to large firms, fiscal aid to attract investment and aid sectors that are key to competitiveness such as newly liberalised services and network industries. In the traditional network industries, aid is often connected to controversies over responsibility for stranded costs. The Commission has undertaken an inquiry about new guidelines for state aid, following the Council's March 2005 direction to Member States to work towards reducing the level of state aid while making allowance for market failures. The Council called for redeploying aid towards

research and innovation and the optimisation of human capital, while reforming regional aid to encourage investment and reduce disparities. General rules will try to identify better the classes of likely market failure that can be traced to subsidy distortions. Application will examine whether the aid corrects the failure and whether it is done in a way that minimises distortions of competition. The system of notification and approval is likely to be retained, but the Commission's consultation notice also suggests that some oversight and enforcement responsibility could be shared with independent authorities in Member States.

2.7 Unfair competition and consumer protection

Claims about unfair competition between firms are matter of Member State national law. By contrast, consumer protection is recognised in the Treaty as a Community responsibility. Treaty Article 153 provides that "the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests." Community regulation about consumer protection is authorised to some extent, but principal reliance is placed on Member State laws. The Treaty permits Member States to adopt consumer protections that are more stringent than Community regulations in the area. The Treaty language implies a focus on product standards, including environmental and safety concerns.

Community consumer protection policy now also addresses market issues such as information asymmetry and bargaining fairness. A directive to harmonise Member States' rules on unfair commercial practices was signed in May 2005 and is expected to become effective in 2007. It clarifies consumers' rights by establishing common rules against aggressive or misleading marketing to consumers. It defines a limited range of "sharp practices" that are to be prohibited EU-wide. These include so-called "pressure selling", such as implying that a consumer cannot leave the shop without signing a contract, conducting personal visits to the consumer's home and ignoring the consumer's request to leave or not to return, and misleading marketing, such as bait-and-switch tactics, falsely claiming to adhere to a code of conduct or describing a product as "gratis", "free" or "without charge" if the consumer has to pay anything other than unavoidable delivery or collection costs. The directive also establishes general principles that can be used to assess whether other types of practices should be prohibited as unfair. The key test in most cases is whether the practice would unfairly distort the behaviour of an "average" consumer, although there are also provisions aimed at preventing exploitation of particularly vulnerable consumers. These norms will be enforced at the national level. The lack of Community-wide consumer protection enforcement contrasts with the Commission's powers to apply competition policy directly.

To make the connection between competition and consumer interests more visible, DG Comp has designated a Consumer Liaison Officer to develop contacts with consumer NGOs, soliciting complaints about infringements and comments on policy proposals. The post will also improve communications with other Commission Directorates General, especially Health and Consumer Protection.

Norms about fair dealing and relative bargaining power between businesses, such as rules against sales below cost and abuse of economic dependence, are not part of Community law. They are, however, included in the laws in several Member countries, and sometimes in their competition laws. These laws related to unfair competition can be inconsistent with a consumer-welfare conception of competition policy. Under the Community enforcement regulation, Member State laws about the unilateral conduct of dominant firms can be stricter than Community law. This concession to local variation permits these national regimes to control abuses of economic dependence in conditions where dominance of an economic market is not an issue.

3. Institutional issues: enforcement structure and practices

The administrative process for applying the law is adapting to strengthen investigative powers and better incorporate economic concepts and evidence in decision-making, in order to convince the courts while maintaining policy consistency in a system of decentralised enforcement.

3.1 Competition policy institutions

The European Commission, as the Community's executive body, implements its competition policy. By Treaty, the Commissioners shall, "in the general interest of the Community, be completely independent in the performance of their duties," neither seeking nor taking instructions from a government or anyone else, and refraining from any action incompatible with their duties. Member governments undertake to respect the principle and not to seek to influence members. The Commissioners have protected tenure during their 5 year terms. Only an order from the ECJ can remove a Commissioner. Still, the Commission's structure and appointment process embody indirect links to the Member governments and to the Community's political institutions. There are 25 Commissioners, one from each Member State. When a Commission is created, the Member State governments first agree on a nominee for Commission President. Once approved by Parliament, the president-elect then nominates the other Members of the Commission, in accordance with proposals made by each Member State. The president-elect's nominees are then appointed by the Council, after approval by Parliament. The nominees tend to be politically experienced, often with previous service as government ministers.

Decisions about policy initiatives and cases are taken by the Commission as a body, which meets weekly (but which can also act by written procedure or delegated authority). As a practical matter, competition policy is dominated by the Commissioner holding the competition portfolio. The Commission has not disagreed with the Competition Commissioner's recommendation on a major enforcement matter since some merger decisions in the early 1990s. More recently, deliberation among the Commissioners did lead to adjustments in some state aid matters and the motor vehicle block exemption regulation. But on balance, the *de facto* prerogative of the Commissioner for Competition has increased. With that increased prerogative has come increased confidence that Commission decisions about important competition cases are made independently of other policy considerations and influences.[27]

In the Commission staff, the Directorate-General for Competition is principally responsible for competition policy and enforcement. Headed by a Director General who is a career Community manager, DG Comp is organised into 10 directorates, for management, antitrust and merger policy, cartel enforcement, sectoral expertise (4 directorates) and state aid (3 directorates, including one for policy). DG Comp's complement has been stable for several years at just over 600 permanent staff. In addition, DG Comp relies on contract and auxiliary personnel and experts seconded from Member State competition agencies.

3.2 Enforcement processes and powers

The Commission uses broadly similar basic procedures and investigative tools for dealing *ex post* with infringements[28] of Articles 81 and 82 and for decisions about notified mergers. A complaint or merger notification, or a decision to start a procedure at the Commission's own initiative, is followed by an investigation by DG Comp, managed by a case handler. The evidence and proposed remedy are presented to the respondent in a "statement of objections". The respondent has a right of access to the investigative file and an opportunity to reply, in writing and at an oral hearing. The decision is taken by the Commission, on a recommendation of the Competition Commissioner. The Commission no longer processes applications for individual exemption or negative clearance, because it no longer has the power to issue them. The enforcement regulation provides for the possibility of a "guidance letter", but it sets conditions to discourage routine requests. Now that the historically important system of notification and exemption has been eliminated, the legal criteria describing what is prohibited and what qualifies for exemption apply directly. In effect, this approach puts a burden on companies to evaluate their agreements accurately, as they are at risk for making a mistake.[29]

A complaint is submitted on a prescribed form. Comprehensive background information and documentation are required. The complainant is asked to detail the factual basis of the claim, supply information about markets and market shares, submit documents and statistics relating to the complaint, give names of persons who could testify about it, explain the complainant's legitimate interest in the matter and specify the relief sought.

Investigative tools and powers deal principally with documentary information, since Commission procedures rely heavily on documentary evidence. A request for information may be a "simple" request or a "request by decision." Each will state the basis and purpose of the request, specify the information requested and the deadline, and indicate the consequences of incorrect or misleading response. There is no penalty for failing to respond to a simple request, although a company can be fined if its responses are false or misleading; by contrast, a company risks substantial fines for failure to respond to a request by decision. It is no longer necessary for the Commission to send a simple request before sending a request by decision.

To get information that companies are likely to want to conceal, the Commission can launch a "dawn raid." It has the power to enter business premises (and vehicles), to examine physical records and take copies and extracts. It can seal the premises during the search and ask representatives for explanations of what it is finding. The Commission can require responses about factual matters, but not statements that admit an infringement. The company can have its lawyer present, but cannot delay the process too long in order to summon counsel. In antitrust matters, but not merger investigations, the "dawn raid" power extends to homes of individual directors, managers and staff, on reasonable suspicion that books and records about the business and the subject of the investigation are there. If a firm resists co-operating, the use of force to obtain entry requires an order from a national court. The Commission must describe the nature of the suspected infringement and the target's involvement in it and explain the need for the particular search. The national court can verify that coercive measures are not arbitrary or disproportionate; however, the court may not demand to see the evidence in the Commission's file. The power to search residences has not yet been used as of mid-2005.

Testimony has been relatively unimportant. In the past, it has usually been confined to answers to factual questions about documents asked during a dawn raid and statements made at an oral hearing after the Commission has issued a statement of objections. The Commission now has a limited additional power to interview persons during investigations. But the individuals must consent to the process, and they face no penalty if the information they provide is false or misleading. Leniency applicants, who are under a duty of co-operation, are more constrained to tell the

truth than the subjects of these interviews will be. As of mid-2005, the new interview power had only been used in cartel investigations.

Providing false or misleading information in an investigation, or failing to provide complete and accurate responses within the time set by a request by decision, may result in fines of to 1% of turnover. Daily periodic penalties of up to 5% of average daily turnover may also be imposed to compel complete and accurate responses to a request by decision. Usually, those penalties would accrue only if the recipient fails to respond on time. In a merger proceeding, recalcitrance that requires the Commission to resort to a request by decision can toll the decision deadline.

The Competition Commissioner decides about whether to send a statement of objections, after consultation with the Commission's Legal Service, an external unit that reports to the President of the Commission. The parties have a right to access the Commission's file after the Commission has issued the statement of objections. The statement of objections is not usually the first contact between the Commission staff and the respondent about the theory of the possible case, though. A pattern of "best practices" about the exchange of views and evidence has developed over the years. For merger matters, DG Comp has set out these "best practices" in a publication, in which DG Comp commits to make its best efforts to provide notifying parties with access to key documents such as third-party submissions once the second phase begins. They also provide for "clear the air" meetings between merging parties and third parties and regular "state of play" meetings between merging parties, senior DG Comp officials and the investigating team.

The oral hearing is conducted by a Hearing Officer. Most parties now take advantage of this opportunity.[30] There are now 2 Hearing Officers, who report to the Competition Commissioner but are not part of the Competition Directorate. In addition to ensuring the parties' right to be heard, they rule about confidentiality and other process issues. Their role and status was strengthened by a 2001 Commission Regulation stressing the need for independent oversight of competition proceedings. Their independence is ensured mostly by transparency about their appointment and termination, rather than by protected tenure. The hearing is not before the Commission or the Competition Commissioner. Those in attendance are usually the respondents, investigating staff, staff from other directorates of DG Comp, and staff from other Commission services and from Member State enforcement agencies.

"Scrutiny" or "peer review" panels are an important innovation in the internal process at DG Comp. These *ad hoc* committees are assigned to review a matter and report about it directly to the Director-General. This process for internal quality control was set up in 2003, but it is not entirely new. Similar reviews had been done on a few occasions since the early 1990s. Panels are used about 10-12 times per year

for cases that raise complex or novel issues. About 60% of the reviews to date have dealt with second-phase merger investigations, and about 30% with antitrust cases. The Director General designates each panel, which normally includes one head of unit, one senior case handler and one junior case handler. The review is organised by an official from the DG Comp policy directorate, who serves as "scrutiny officer" and writes the report for the Director General. The session at which the case team makes its presentation to the panel may last a full day. The Commission Legal Service, the Hearing Officer and other interested services may attend. Panels have suggested changes in more than half of the cases they have reviewed, mostly about remedies. In at least one case, a review of a merger resulted in dropping the case completely. Most peer reviews are held after the parties have replied to the statement of objections, so the panel can consider both the staff's case and the strength of the parties' response to it. A review may be held at an earlier stage, before the statement of objections is sent, to try out a potentially innovative theory.

Advisory Committees composed of officials from Member State competition agencies play a role in both antitrust and merger matters. These committees meet regularly and submit opinions about proposed decisions. Their opinions about mergers are appended to the decision and published. Their opinions about other cases are appended to the decisions and may be published if the Committee recommends it. Advisory Committee views do not control DG Comp's recommendation to the Commission. But the consultation process is a valuable avenue for achieving general consensus, and DG Comp takes the views seriously.

The draft decision is prepared by the DG Comp case-handler (or team of case-handlers) and reviewed by DG Comp management. It is also reviewed by the decision scrutiny unit. The Competition Commissioner consults with the Legal Service and the Advisory Committee from the Member States before proposing a decision to the Commission. There are several other means for providing a measure of quality control over the staff's recommendation, in addition to the possibility of an internal scrutiny panel. The Hearing Officer prepares a report about procedural issues, which goes to the Advisory Committee, and a separate report to the Director General assessing the response to the staff's case. Although the Hearing Officer's principal role is about issues of process, the reports may include insights about the evidence and the substantive issues. The Chief Competition Economist reports independently to the Director General and the Competition Commissioner. With the agreement of the Director General, the Chief Competition Economist could submit his advice to the Commission itself in a separate opinion. The proposed decision is adopted by majority vote of the Commission members, although non-controversial matters can be decided without formal deliberation.[31]

The principal sanction for substantive infringements, set out in the Council regulation on enforcement, is an administrative fine against the infringing undertaking. This fine can be as high as 10% of the undertaking's global annual turnover. The regulation does not authorise fines against individuals. A Commission guideline explains the considerations applied in setting fines for infringements of Article 81 and Article 82. The process begins with a basic amount, which is then adjusted upwards for aggravating circumstances and downwards for attenuating circumstances.[32] The basic amount depends on the gravity of the infringement (which includes its nature and impact (if measurable) and the size of the market) and its duration. The guideline recognises three classifications in terms of the gravity of the infringement: minor, calling for a fine between EUR 1 000 and EUR 1 million; serious, up to EUR 20 million; and very serious, over EUR 20 million. These approximate levels are not fixed. That amount can then be increased to account for duration, up to 50% for medium duration infringements and up to 10% per year for longer ones. The aggravating circumstances could include repeat offences, refusal to co-operate, leadership in the violation, retaliation against other firms and the need to set the penalty greater than the gain. The attenuating circumstances could include with a passive role in the violation, non-implementation, termination upon Commission intervention, reasonable doubt about whether the conduct was an infringement, negligence and co-operation with the Commission (outside of the leniency programme). The enforcement regulation now makes clear that the Commission can accept binding commitments to correct infringements and that the Commission can impose a fine for failure to comply with these commitments; however, commitments are not to be accepted in cases where the Commission intended to impose a fine in the first place.

The power of the courts to review the amount and appropriateness of a fine is unlimited. The courts do not require the Commission to follow a prescribed formula, recognising that an element of discretion is needed to tune sanctions to effective deterrence. But in law, the courts can reach their own decisions about the reasonableness of fines. Because of how fines are determined, this means the courts could effectively substitute their own opinions for the Commission's about the gravity and duration of the infringement. Decisions have paid close attention to how the Commission's computation conforms to the relevant criteria of aggravation and attenuation, if not to the choice of the starting point. (Joshua, 2004)

The Commission has had a formal leniency program since 1996. After revisions to the program's terms in 2002, which replaced the "decisive evidence" requirement and the "ringleader" proviso, the process is more certain and transparent. The first undertaking that comes forward can receive full immunity from fines. The evidence it supplies should be enough for the Commission to order an inspection. The application may be hypothetical; actual evidence can be supplied

in a second stage. Conditional immunity can be granted within weeks, providing applicants with some legal certainty at an early stage. Even after the Commission has launched an inspection, immunity may still be possible if immunity has not already been granted to another. If immunity has already been granted, or if the Commission already has enough evidence to find an infringement, reductions of fines remain possible for companies that provide significant added value to the Commission's case. For the second firm to come in, the fine could be reduced by 30-50%[33]; for the third, 20-30%; for others, no more than 20%. There are conditions: the applicant must co-operate throughout the Commission's proceeding and end its involvement in the cartel, and it may not have coerced others to participate in the violation. Applications continue to increase. There were 16 in 2003 and 29 in 2004[34].

There have been controversies about whether corporate statements that leniency applicants provide to the Commission are discoverable in private civil suits. This concern has been raised in particular with respect to US treble damage civil suits. The Commission considers that a corporate statement, in which the company describes its participation in a cartel with effects in the EU, and which has been produced for the sole purpose of applying for immunity or a reduction of fines under the Commission's leniency programme, should not be discoverable for use in other legal proceedings. While the Commission does not want to hinder civil litigation, it does not believe that plaintiffs in civil litigation should benefit from the unrelated and autonomous procedure of the Commission's leniency programme, undermining that programme in the process. Against this background and to reduce the risk that confidentiality of such statements will be compromised, the Commission will depart from standard Commission practice, which depends strongly on written evidence. The Commission has already processed a large number of leniency applications on the basis of oral statements rather than written corporate statements. The Commission investigators record the applicant's oral statement on a tape and will use the tape as evidence in its decisions and in proceedings before the EC Courts. The tape is treated as non-discoverable.

3.3 Judicial review

Commission decisions are subject to oversight by the two European courts. The ECJ, which was established in the original ECSC, ensures enforcement against Member States, decides disputes between the Community and Member States (and between Community institutions) and ensures uniform interpretation of Community law by deciding questions referred to it by national courts. The CFI was created to reduce the ECJ workload and backlog by dealing with the cases with no political or constitutional importance and those involving complex facts. The ECJ can review CFI judgments, but only on matters of law. The possibility of a substantive appeal to

the courts brings the Community's competition enforcement system into compliance with the European Convention on Human Rights. The ECJ held in 1980 that the Commission process did not provide the "independent and impartial tribunal" that the Convention requires.

The decision of the Commission in an infringement matter, to terminate the violation or pay a fine, is binding. The parties can bring an action in the CFI to annul it, on grounds of fact or law. Filing the court action does not itself suspend the application of the decision. The parties can request that the CFI suspend application pending the appeal. For fines, the Commission's practice is to agree to suspend pending appeal, on condition of providing a bank guarantee for the fine plus interest. If the courts annul a merger decision, that action does not amount to clearance; rather, the matter is sent back to the Commission to re-examine the notification, potentially repeating the two-phase merger review process. The judicial process has normally taken 2-3 years to complete. The CFI adopted an expedited process, providing for written procedures and a full hearing, through which it can complete a matter within 8-10 months after a Commission decision. Thus there is now a realistic prospect of judicial oversight of time-sensitive matters such as mergers. Rules about standing are generous, so complainants are regarded as individually concerned and hence can challenge the Commission's action or inaction.

The scope of review under the general Treaty provision looks limited and supervisory, not involving re-examination on the merits. (Article 230) The grounds for judicial review are lack of competence, infringement of an essential procedural requirement, the Treaty itself or a rule of law related to its application and misuse of power. Despite this apparently narrow scope, the CFI and the ECJ have also overturned Commission decisions for inadequacy of evidence or error of fact. The courts have devised a category of "comprehensive review," and when applying it the CFI will control the accuracy and quality of the Commission's reasoning about economic and market analysis. The court rules provide for commissioning independent expert reports. In its 1985 *Wood Pulp* judgment, the ECJ relied on reports of its appointed experts to overturn the Commission's findings and conclusions.[35] The CFI at first rejected about half of the Commission's decisions imposing substantial fines; however, those actions may have represented an effort to set ground rules about procedures, since several of the rejected fines were later upheld after the Commission revisited the matters to correct the procedural flaws. (Wils, 2004)

3.4 Other means of applying EU competition law

Private parties can sue in national courts, under national procedures, for relief from infringements of Community competition law. Such actions in national courts

could have attractions, such as co-ordination with related claims about breach of contract or unfair competition. In general, remedies for infringement of obligations under Community law are determined by national legal systems and procedures, subject to a requirement of non-discrimination and efficacy. The claimant under Community law must not be worse off than a claimant under national law. Sometimes the Community law claimant can even do better, as the ECJ requires national courts to make remedies available in some situations even where national law does not. (Hartley, 1994) State aid principles are also enforceable by private parties in national courts, that is, the disadvantaged competitor can obtain a judicial declaration and order that non-notified aid is illegal and thus must be repaid.

The practical incentive to file a private action was dampened by the available alternative of a cost-free complaint to the Commission, which for years acted as though it were under an obligation to give complaints priority treatment. The usual Commission infringement proceeding has elements of privately-initiated litigation. An advantage of taking the trouble to meet the demands of a formal complaint at the Commission is that complainant gains party standing, including the right to participate to some extent in the proceedings at the Commission and to seek judicial review if the action is unfavourable.

The Commission has long tried to encourage resort to private suits in national courts. In 1992, the CFI freed the Commission of the obligation to give complaints priority treatment, permitting it to defer to a national court to deal with a matter that did not have enough Community interest. Taking immediate advantage of the CFI's endorsement of its right to set enforcement priorities, the Commission issued a notice on co-operation with national courts to call attention to the option and provide guidance. Notably, national judiciaries must make available to claimants under Community competition law all remedies and procedures, such as injunctions and compensation, that are available to claimants under analogous or related national laws. But the Commission's monopoly on granting exemptions under Article 81(3) remained a disincentive until 2004. DG Comp is again trying to promote more private enforcement, to empower those who are the object of infringements of the law. Stronger private relief, providing complainants with a credible alternative avenue, is conceptually a correlate, or even a precondition, for the Commission's greater discretion over its own priorities and case selection. Procedures and powers of Member State legal systems must be taken into account, and judges need to be knowledgeable about competition issues. To meet this challenge of decentralised enforcement generally, the Commission and others are supporting efforts by associations of national judges to organise seminars and programs about competition law and enforcement.

National courts are making more use of provisions permitting them to ask the Commission for information and opinions. The Commission has promised to respond quickly, within 1 month for information and 4 months for an opinion. The Commission's ultimate recourse if national courts appear to be taking inconsistent positions about a practice in an industry would be to take a decision itself. DG Comp has not usually made *amicus* appearances in national matters, but that is also an option that might be considered.

Member State competition agencies and courts can apply Community substantive law.[36] All Member States have taken the necessary national legislative steps to be sure that national institutions have the power to apply Community law. Indeed, national authorities now have an obligation to apply Community law if the jurisdictional requirement of Community effect is met. National authorities can, under Community law, order cessation of an infringement, order interim measures, accept commitments, impose fines and make negative determinations that there are no grounds for action. In a few countries, such as Ireland, the "national authorities" designated under the Community enforcement co-operation system include courts. Co-operation is encouraged and to some extent required. National authorities must notify the Commission 30 days before adopting an infringement decision, accepting a commitment or withdrawing the benefit of a block exemption regulation. The Commission can take over a case if, after consultation, it appears that the national authority might produce a result in conflict with established principles of Community law or that this is necessary in order to ensure efficient enforcement or to develop Community competition policy. Confidential information can be exchanged for purposes of Community law enforcement or simultaneous Community-national law action; however, confidential information from Community cases cannot be used directly in national law cases that threaten individual penal sanctions, except in the so-far unusual situation where the source and recipient countries have similar sanctions. A national authority can suspend or decline to pursue its own action if another authority is already dealing with the same conduct. This is optional, not mandatory. National authorities must assist the Commission's investigations, obtaining court orders if needed for dawn raids. National authorities may now carry out investigations in aid of the Community-law actions of other national authorities.

The informal "European Competition Network" (ECN) is the medium for facilitating inter-agency co-ordination. The ECN is conceptually and functionally distinct from the Advisory Committee that must be consulted about Commission enforcement proposals. It is also distinct from the association of European national competition agencies, which has been in existence for several years (and which includes agencies in countries that are not Member States of the EU). The basis for the ECN is in the enforcement regulation requirements for consultation and

provisions about information exchange and case allocation. The network is mentioned in the recitals of the enforcement regulation, but the ECN has no legal status. The notice on co-operation explains how it will work, to allocate cases, handle information and ensure consistency. A joint declaration in the modernisation package describes the agencies' non-binding expectations about co-operation. Normally, a case would be handled by the authority of the Member State that is most affected, and others would stay their own proceedings. The Commission would normally deal with matters that substantially affect more than 3 Members or where its intervention is appropriate in order to ensure efficient enforcement or to set policy. Where a national authority is already acting on a case, the Commission would only exercise its power to take over if it looks like it will be in conflict with others or with established Community case law, if it is taking too long, or if similar problems are appearing widely and a Community decision is needed to clarify Community policy. The Commission would not normally adopt a decision in conflict with a national authority's decision if it has been kept fully informed about the case. The ECN is also a forum for informal co-operation. The members hold occasional plenary meetings at the policy level. There are also working groups on topics such as leniency, transitional issues, sanctions and procedures, and Article 82, and sector subgroups about railways, electricity and insurance.

As agencies across the Community share enforcement responsibilities, complications will arise about parallel investigations and leniency applications in several jurisdictions. Exchange of experiences has led to the introduction of generally consistent leniency programs in the Member States. Programs are in place in 17 Members now, and programs are planned in several more. Enforcement could suffer it multiplicity and inconsistency deter firms from coming forward. Differences among the programs are few, mostly about the obligation to stop the infringing conduct. Some permit continuation to avoid tipping off other conspirators so they will destroy evidence. Although the absence of programs in a few Members may cause firms some anxiety about the risk of exposure, the network notice requirement provides some safeguard. Information given by a leniency applicant can only be exchanged with other enforcement bodies with the applicant's consent, except if it has also applied with the receiving authority or if the receiving authority promises in writing not to use it or any information collected after the date of transmission to impose a sanction on the applicant. This permits *de facto* export of leniency to countries without programs. Multiple filing is consistent with parallel competences, but demanding complete applications everywhere imposes some practical burden. To ease the burden, a few national authorities are accepting "short form" leniency applications. One potential complication arises from the fact that several Member States provide for criminal penalties. In Ireland and the UK, the national leniency programs deal with the eligibility of individuals. This is less clear

in other Member States that provide for criminal liability, at least for some anticompetitive conduct. These include Austria, Belgium, France, Germany, Greece and Spain.

The merger regulation also provides for co-ordination among the agencies. The system of allocating jurisdiction provides the possibility that, with the agreement of the Member State agencies, the Commission can review mergers that do not have a community dimension but that would need to be notified in a large number of Member States. The system provides for consultation about such transactions before they are notified. In the first year, there were 30 requests for clearance to DG Comp because of multiple coverage, obviating 214 national-level multiple notifications. This amounted to about 10% of the cases under the new regulation. On a few occasions, company requests to have their mergers reviewed by the Commission were vetoed by Member States that wanted to review the mergers themselves.

3.5 International issues

Community institutions have not usually claimed jurisdiction on the grounds that conduct outside the Community has had an effect within it. Instead, other legal constructions are applied so that conduct outside the Community that is a matter of concern to Community enforcement can be characterised as having taken place within the Community. One such device is the group economic unit. If a parent outside the Community could control an affiliate or subsidiary within it, that power will support an imputation that the foreign parent has acted within the Community. This imputation does not require proof that the parent has actually done so. Another tool is the conception of the implementation of a practice. If a cartel sells something to a customer in the Community, the agreement is said to be implemented there even if the sale is direct and no member or affiliate is actually found within the Community territory. ECJ judgments supporting these legal constructions have declined to apply the arguments of the Commission and the Advocates General of the ECJ in favour of the simpler, more direct doctrine of jurisdiction based on effect in the Community. But at least for mergers, cases such as *Gencor* and statements in speeches by enforcement officials imply acceptance of the emerging international law norm of an effects-based approach, at least where effects are immediate, substantial and foreseeable. (Goyder, 2003)

The Commission has formal co-operation agreements in competition matters with the Canada, Japan and the United States. The agreement with the United States provides for notification of cases that concern the important interests of the other party, exchange of information on general matters, co-operation and co-ordination, traditional comity and positive comity, that is, providing for a request that the other party take action under its legislation concerning behaviour affecting the important

interests of the requesting party.[37] These arrangements have fostered a near-continuous co-ordination in merger and cartel cases, notably to deal with simultaneous leniency applications. Formal notifications from one to the other occur nearly once a week in each direction. The Commission cooperates on a bilateral basis with numerous other competition authorities. Relationships have been particularly continuous with Australia, China, Korea, Mexico, Brazil and EFTA countries. Cooperation with OECD Members is carried out on the basis of the 1995 OECD recommendation. With Korea, the Commission has established a permanent forum of consultation, transparency and cooperation on competition. The Commission has also initiated with China structured dialogue to exchange experiences and views on competition matters. With certain Latin American and Mediterranean area countries, the EU has free trade agreements, which usually contain basic provisions concerning cooperation in competition matters. The Commission has particularly close cooperation, including exchange of confidential information, with the EFTA Surveillance Authority in enforcing the competition provisions in the Agreement on the European Economic Area (EEA Agreement). Information exchanged between the Commission and the EFTA Surveillance Authority may be forwarded to the competition authorities in the Member States and the EFTA countries. Recognising the importance and opportunity for close co-ordination of large-scale cartel investigations, the Commissioner has supported moving toward a "second generation" agreement allowing the exchange of legally protected information with the US enforcers. (Kroes, 2005)

3.6 Resources and priorities

DG Competition is one of the largest competition agencies in the world, with about 615 permanent staff.[38] About a quarter of them deal with state aid (167 work years in 2005), and about half with antitrust, mergers and liberalisation (375). In addition to the permanent staff positions, the competition mission relies on about 67 auxiliary and contract agents, many of them in support positions, and about 41 experts seconded from national enforcement agencies. The competition directorate has long been considered understaffed. One reason given for shifting more cases to national agencies was the fear that resources in DG Comp were "clearly inadequate" for law enforcement in the Community (Goyder, 2003, p. 531) Staff levels have increased since the 1990s. In 1999, the total complement of permanent staff was 486. In the context of decentralisation, the resources available now for Community law enforcement are substantial. Taken together, the competition agencies in the EEA area have nearly 3300 staff.

DG Comp is organised into directorates that specialise by enforcement function and some that concentrate on sectors. Creation of sectoral directorates and units is intended to improve the capacity to respond to matters that arise under different

legal theories, by reducing the need to re-establish basic factual foundations. The special merger task force has been disbanded. Its capacity is now distributed among the mergers units in each of the 4 sectoral directorates. In June 2005 a new directorate specialising in cartels was established. After the dismantling of the merger taskforce, this is the only directorate in DG COMP devoted to a particular enforcement function. Specialisation on this subject is motivated by the importance in these cases of investigative methods and legal issues such as the rights of defence. Thus, this directorate's staff of about 40-50 is dominated by lawyers and other experts, such as accountants, who work regularly with legal issues. It does not have a monopoly on cartel cases, though. The sectoral enforcement divisions may have a comparative advantage in detecting cartel behaviour, because of their continuing contacts within industries. State aid occupies 3 directorates, one of them for policy and co-ordination, one for network industries and liberalised sectors and one for regional, restructuring, research and development and environment and energy aids.

As economics is playing a larger role in Community competition policy, the proportion of economists on the DG Comp staff has increased. The number of permanent DG Comp staff whose training is in economics (173) is still somewhat lower than the number whose training is in law (202). But ten years ago, lawyers reportedly outnumbered economists 7 to 1. (Wilks & McGowan, 1996) To raise the profile of economic analysis, a separate economic unit was created in 2003. The new Chief Competition Economist reports directly to the Director General. He is supported by about 10 experts, all with doctorates in industrial organisation economics, who work with the staff of the enforcement and policy directorates. The Chief Competition Economist and half of the members of this unit come from outside the Commission. They are serving in DG Comp on temporary contracts. Case support occupies about 7 members of the unit. The unit is called on for most Article 82 cases and second-phase merger investigations, and occasionally for Article 81 cases. The unit also contributes to policy studies. The Economic Advisory Group for Competition Policy (EAGCP), composed of academic economists nominated by the Chief Competition Economist and appointed by the Commissioner, is another source of expertise and advice about policy for DG Comp and the Commissioner. EAGCP sub-groups about antitrust, mergers and state-aid may present an opinion at the request of the Chief Competition Economist, the Director General or the Commissioner, and its members may also be asked for advice on an ad-hoc basis.

The Commission has adopted as one of its primary objectives to re-invigorate the 2000 Lisbon agenda, to improve European innovation and competitiveness. Highlighting this commitment, the Competition Commissioner launched a series of inquiries into competition problems in some critical sectors that should be counted on to make contributions to European competitiveness. These inquiries will examine

conditions and recommend measures for enforcement or regulatory reform in financial services (retail banking and business insurance), electricity and gas. About 8-9 professionals are assigned to work on each inquiry, along with their other duties. The first reports from these inquiries are expected in late 2005, and steps toward implementation will follow in 2006. The 2005 Annual Management Plan for DG Comp, implementing its part of the Commission's overall program, focuses on cartel enforcement, key sectors such as those subject to recent liberalisation and advocacy. To address these priorities, some staff have been shifted to the sector inquiries and the cartel division.

Changes in methods and adoption of different priorities have changed the nature of the caseload. With the end of the notification system, the number of individual cases has declined sharply. Indeed, even the number of matters initiated by complaint or by the Commission itself has declined. In 2004, the Commission reports that it opened 52 antitrust matters on its own initiative, compared to an annual average of about 85 over the previous 5 years. Another 85 antitrust matters were opened based on complaints; this compares to a previous average of 120. The number of formal Commission antitrust decisions is also declining, from 68 in 1999 to 24 in 2004. (European Commission, 2005, pp. 56-57) This general decline in the number of competition law proceedings may be the result of choosing not to pursue minor cases. The Commission tries to concentrate on cartels and foreclosure. There are few infringement matters involving vertical agreements, except for clear territorial restrictions or cumulative foreclosures. The merger caseload in 2004, which saw 242 decisions, was down from the peak of 345 in 2000, but up slightly from 231 in 2003. (European Commission 2005, p. 96)

The Annual Management Plan lists DG Comp's current plans and priorities. Of particular note are planned investigations into abuses of dominance in information industries and the pharmaceutical and chemical sectors, and investigations of other anti-competitive behaviour in pharmaceuticals, mobile telecommunications, media markets, copyright licensing societies, rough diamonds and automobile distribution and repair. Other sectors or industries mentioned for attention, many of them under the liberalisation agenda, include natural gas, electric power, high-speed internet access, postal service operators in non-reserved markets, air transport alliances, possible cartels in banking and barriers to cross-border competition in securities trading.

4. Limits of competition policy: exclusions and sectoral regimes

There is no general principle in the Treaties or in Community jurisprudence about how to deal with a conflict between the demands of competition law and those of other Community-level laws or official actions. Many passages in the Treaty that

promote other policies and goals include provisos to ensure consistency with the goals of open markets and free competition. If a conflict arose, the legal argument could be over whether the conflicting decision or regulation was illegal because its derogation of competition was not supported by Treaty authorisation to do so. The omission of such a proviso in other passages might imply greater leeway about those topics in the event of conflict.

Conflicts with Member States laws and official actions have been a much more important topic. The Member States' capacity to use national law to prevent or restrain competition is limited. A Member State may constrain the freedom to set prices, if this is manifestly an exercise of government authority and not rubber-stamping of a private agreement and if the power has not been removed by Community legislation. But business firms cannot usually defend their infringements of Article 81 or Article 82 by claiming that national regulation eliminated their freedom of competitive action. This argument only succeeded once, in the *Sugar Cartel* case in 1975. Many cases in the 1980s confronted such purported defences in the context of government-tolerated cartels arranged through traditional trade-associations, where the government order obviously followed the industry's own initiative. Some cases from the 1990s appear to have tolerated pricing agreements, though, where the bodies that reached them, before seeking government imprimatur, comprised mostly non-industry, public members and were required by statute to act in the interests of all market participants, and the state retained the power to reject the proposal. The CFI's 2003 *Greek Ferries* judgment confirms that public authority recommendations may not insulate firms from liability for price fixing, at least as long at the public authorities' pressure was not binding or irresistible.

Member States may adopt rules that constrain competition in order to promote some sectoral or other policy, as long as there was no contrary Community policy on the issue and other Treaty obligations are respected. Since those other Treaty obligations include market openness and non-discrimination, national measures that might affect trade would not be permitted. But the Treaty texts combine to disfavour a broad "state-action" exemption. Article 10 of the Treaty obliges Member States to take all appropriate measures to fulfil their obligations and to facilitate the Commission's task, and it requires that they abstain from any measures that could jeopardise attainment of Treaty objectives. One of those objectives is "a system ensuring that competition in the internal market is not distorted". (Article 3(1)(g)) Thus the Members are obliged to support, and not to undermine, Community competition policy goals. Member State institutions are under a Treaty obligation not to apply such national laws, and hence private undertakings cannot use national legislation that fails this standard to protect themselves from liability under Community law. The Member States themselves might be held liable for breaching

Article 10 if national legislative or administrative measures render ineffective the Community competition rules applied to undertakings.

Close questions about conflicting claims have arisen concerning culture and professional services. The ECJ has rejected the claim that resale price maintenance for books was necessary to protect specialist book shops and the printed media against reduction in variety and availability. The court emphasised that curbing competition about imports would violate the Treaty's market-opening obligation. But the ECJ's 2002 *Wouters* judgment defers to other policy claims, holding that an agreement to limit competition among professionals was actually, when taken in context, an agreement to assure integrity and experience to consumers and to the administration of justice. As such, the agreement was not even covered by the prohibition of Article 81(1). The court ignored the suggestion of the advocate general that the policy conflict should be resolved by treating the legal profession as providers of services of general interest under Article 86.

Article 86 is, along with the rules on state aid, the principal Treaty tool for control of government measures that restrict competition. It is also a key instrument for opening up previously monopolised markets to competition. It deals specifically with public firms, firms with special and exclusive rights services of general interest and revenue-producing monopolies authorised by law. In general, Member States may not enact or maintain any measure contrary to the Treaty rules about competition and trade concerning public undertakings and those that have been granted special and exclusive rights. Article 86 mentions specifically the competition rules of Articles 81-89 and Article 12, forbidding discriminations based on national origin. There is an exception from the Article 86 prohibition. Measures that would otherwise be in violation of Treaty rules are permitted if applying the Treaty rules would obstruct performance of the particular service of general economic interest that has been assigned to an undertaking, and entrusting the undertaking with that task does not affect the development of trade "contrary to the interests of the Community." The exemption has been construed narrowly, to cover only activities with a direct relationship to the entity's main, permitted statutory function, and only where there is a prospect of inherent conflict between that entrusted task and the Treaty rules at issue. It is not enough that the function is economically important. Government measures must have actively and deliberately entrusted the function to the entity.

The Commission's 2001 Communication on Services of General Economic Interest provides some guidance about its intended interpretation of Article 86. States are free to define what counts as a service of general economic interest. The Commission does demand, though, that the public service mission be clearly defined and explicitly entrusted through an act of public authority. This could be a contract,

rather than legislation. A designation of an ostensibly general interest service could be rejected on grounds of manifest error. Community law is neutral with respect to public or private ownership of the undertakings providing them. The Commission will oversee to ensure proportionality, that is, that any restrictions on competition are no greater than is necessary to guarantee effective fulfilment of the mission. Principles for defining and providing services include clear definition of basic obligations about quality, health and safety, transparency about tariffs and providers, choice of service (and, where available, of provider) and regulatory oversight that is independent of the operator and provides for complaint handling and redress. Article 16 of the Treaty admonishes Community institutions and Members to take care to operate services of general economic interest on the basis of principles and conditions which enable them to fulfil their missions. This language was added by the Treaty of Amsterdam. Its precise content is not entirely clear, since it includes a proviso that this is to be without prejudice to Articles 86 and 87. The addition was probably intended as a signal to the Commission to be more cautious in dealing with public service sectors. (Goyder, 2003) In any event, recent liberalisation directives in sectors such as electric power and gas have come from the Council.

The Commission has the power to issue decisions and directives to Member States implementing Article 86. The first broad sector reform directive, concerning telecommunications equipment, was such a Commission initiative, responding to evidence of widespread abuses. The ECJ upheld the Commission's use of this power rather than seeking Council legislation or bringing a particular enforcement action against the Member States. The amended Commission directive set out key elements of permissible special rights, notably that the criteria for granting limited rights or conferring advantages must be objective, proportional and non-discriminatory. The latest generation of the regulatory framework for electronic communications, which applies from July 2003, builds on principles of EU competition law. It imposes ex-ante regulation only on undertakings with significant market power in markets not subject to effective competition, and it foresees progressive withdrawal of regulation as markets become competitive.

Labour is not subject to Community competition law. The Treaty covers labour separately, in Article 39. Employees are not undertakings; rather, they work for undertakings. Trade unions would be considered undertakings to the extent that they enter into commercial activities, but not when they are dealing with labour market issues. In general, agreements concluded in good faith on core subjects of collective bargaining, such as wages and working conditions, which do not directly affect third markets and third parties are beyond the scope of Community competition law.

Intellectual property rights receive special attention in the context of the internal market. Article 30 permits constraints on imports and exports, which are

otherwise strictly prohibited, if they are justified to protect industrial and commercial property. These parts of the Treaty are directed to Member States. They are invoked in controversies about the permissible extent of control over parallel importation of trademarked and patented products. The outcome of these controversies has important implications for the state of competition in European markets, but the issues do not arise under the competition law and are not under the jurisdiction of DG Competition.

There are no sectoral exclusions from Community competition law. Where the Treaty structure appears to create exclusions for particular sectors, notably agriculture and transport, the result has been a tailored enforcement regime applying essentially the same principles. The block exemption power has rarely been used to exclude firms in a sector from the application of the competition rules. The Treaty's use of the term "exemption" is a confusing usage. Non-specialist observers sometimes understand it to mean that a block exemption regulation for a sector frees it from the obligation to comply with Community competition law. "The Commission on principle dislikes sectoral block exemptions unless the characteristics of the sector are so special, and the lobbying power of its members so great, that a tailor-made block exemption is inevitable." (Goyder, 2003, p. 527) The principal example was the motor vehicle block exemption regulation, whose original motivation and effect was more like an exclusion, explained not so much by a cost-benefit balance of market effects as by the political influence of the national-champion auto industries. The regulation was recently revised to make it more restrictive in this industry than the general vertical restraints exemption. It will be coming up for review again within the next 5 years. The Commission has made it a priority to concentrate on continuing problems in that sector.

Agriculture: Agreements that form an integral part of a national market organisation or that are necessary to attain the objectives of the Community's Common Agricultural Policy (CAP) are exempt from the prohibition of Article 81, but not from Article 82 or merger control. The exemptions follow from Article 36 of the Treaty, which authorised the Council to determine to what extent the Treaty's competition rules apply to production and trade of agricultural products, and the regulations that the Council has issued detailing the scope of the exemption. The exemption only applies to certain products (specified in Annex I to the Treaty). National market organisations are not exempted if there is a corresponding Community-wide organisation. Now that most commodities are covered by Community-wide organisations, the first part of the regulation's exemption is less important. Agreements concerning co-operatives can only include farmers and their associations. Including a processor, such as a slaughterhouse, removes the protection of the exemption. They should be limited to a single Member State, and they may not impose an obligation to charge identical prices, exclude competition or

jeopardise the CAP objectives. The exemption related to the CAP is subject to conditions related to the CAP's purposes. Several of these purposes, such as increasing incomes, stabilising market and ensuring supplies, imply protecting the agriculture sector against market forces. Others, such as improving productivity and ensuring supplies to consumers at reasonable prices, could be conceived as not inconsistent with competition policy goals. The Commission and the courts typically presume that the CAP's objectives are fulfilled by the establishment of common market organisations, and thus are more sceptical of agreements outside and beyond that framework. Regulations setting up Common Market Organisations may introduce some variations and cover additional products, but they typically follow the same pattern and may also explicitly deny the exemption to hard-core price-fixing. Community competition policy in this sector is administered by DG Comp, although state aid cases are dealt with by the Agriculture Directorate-General.

Ocean shipping: Council block exemption regulations govern the application of Community competition law to ocean shipping conferences and to intra-Community maritime freight transport. The justifications offered for this special treatment include price stability, service reliability and efficiency. The basic regulation covering liner conferences dates from 1986, permitting coordination of timetables and agreements about frequency of sailing and calls, allocation of sailing and calls among members, regulation of capacity and allocation of cargo or revenue. Agreements between conferences and shippers are permitted but regulated to prevent harm from discriminations that are not economically justified. Another series of exemptions, the latest issued in 2005, has permitted agreements about "technical" matters but not price fixing. Like other recent block exemption regulations and guidelines, it provides a market-share safe-harbour, of 30%. The regulations do not provide a blanket exemption, and the Commission has pursued several infringement actions against conferences, notably for agreements about services beyond what the exemption permits, such as agreements outside the range of the conference or concerning inland legs of multi-modal service. A Commission white paper in 2004 has considered a proposal to withdraw the current block exemption schemes for liner conferences and enforcing general competition rules, even to cabotage and tramp vessels.

Aviation: The original enforcement regulation exempted air transport from competition law oversight. That was changed in 1987, when the Council gave the Commission some powers to regulate and grant block exemptions concerning air transport within the Community. A new Council regulation in 2004 expanded that power, so the Commission can now apply competition law concerning transport with third countries as well. An exemption regulation dating from 1993 that permitted IATA interlining agreements was due to expire in 2005. DG Comp has been considering whether to recommend retaining it with changes, or simply allowing it

to expire, since the post-liberalisation industry has evolved in ways that make the historic agreements no longer important enough to justify special treatment.

5. Competition advocacy and policy studies

DG Comp is putting a higher priority now on promoting and protecting competition through screening proposals from other quarters of the Commission and on analysing market problems and advocating reforms in Commission and Member State laws and regulations. According to the latest mission statement, "a key aspect of DG Comp's future mission is to contribute to the shaping of other EU policies and national regulatory frameworks in order to promote a regime favourable to competition (competition advocacy)." In the past, screening of proposals from other Directorates and developments in Member State legislation has often been defensive. DG Comp would like to move to a more pro-active advocacy role in the development of Commission legislation and policy guidance.

Commission guidelines about impact analysis for proposals, issued in June 2005 after a long process of consultation, highlight competition issues. A formal impact analysis is required for items on the Commission's Work Programme, such as regulatory proposals, White Papers, expenditure programmes and negotiating guidelines for international agreements, and the Commission may decide to require impact analysis for other items too. Impact analysis is not required for Green Papers launching consultation processes, regular decisions and reports, proposals following international obligations or decisions implementing the Commission's powers to implement Community law. The prescribed process contemplates that other directorates will be alerted early on, and normally an inter-service steering group will be established to follow the course of the proposal and the analysis. Where the process leads to a proposal for action, the required impact analysis report is subject to formal inter-service consultation before the proposal and the impact analysis are presented to the college of Commissioners. The 2005 Guidelines for doing impact analysis uses a hypothetical reform of regulations that prevent competition and entry in Europe's sugar market to illustrate the steps and considerations. The annexes to the Guidelines include an outline of the kinds of problems that might call for solution. A principal heading, after the listing of the Community's explicit treaty goals themselves, is "market failures," including externalities, undersupply of public goods, missing markets, imperfect information and insufficient competition. The explanation of "missing or weak competition" cautions against over-reliance on market structure as evidence of weak competition, and it points out the need to consider actual market performance and the likelihood of entry, as well as the problem of regulating natural monopoly.

It remains to be seen how impact assessment will work in practice. Only a few items on the roster of proposals and impact assessments that have been posted to date might have had a significant competitive impact. Some that appear more likely to have a market impact are listed as "restricted," evidently because they deal with positions the Community may take in trade negotiations. Each Directorate is responsible for impact analysis of its own projects, including the assessment of their impact on competition. In some areas, regulations prepared about other topics have been designed well to take advantage of competition and market incentives, without substantial intervention or advice from DG Comp. For example, the carbon dioxide trading regime developed by the Environment Directorate is an economically sophisticated regulatory tool. Nonetheless, to help the other Directorates-General, DG Comp has prepared a concise guide to competition screening. This guide is posted on its website under the heading "advocacy". The guide instructs that the kinds of proposals most likely to have a competition impact are those dealing with liberalisation, industrial policy and the internal market, followed closely by ones granting exclusive commercial rights or exempting activities from competition rules. Sectoral rules about environmental, industrial or regional policy that affect economic activity and general rules that affect commercial behaviour also may deserve attention. It emphasises that screening to identify restrictions on competition and less restrictive alternatives could help achieve desired goals without disproportionate constraints on competition. The guide then illustrates possible applications with examples: exemptions from competition rules for agriculture, preventing competition for waste management and accreditation, mandating product characteristics, setting maximum prices or minimum standards, restricting advertising, limiting distribution, eliminating uncertainties and promoting excessive transparency in procurement, restricting access to resources or requiring licensing or testing new products in concentrated markets, and designing rules in ways that *de facto* favour incumbents.

DG Comp does not have a separate unit responsible for advocacy and screening. Rather, projects are assigned according to expertise in the sector or issue. The current management plan sets out the expected outputs for 2005: a Commission working paper on the water sector, a proposal to abolish the Council block exemption regulation for maritime conference price fixing, an amended block exemption regulation about liner shipping consortia, a report on progress in reforming professional services regulation, rules incorporating competition principles in agricultural Common Market Organisations and a contribution to the crop protection directive. In addition, the sector inquiries in financial services and energy may lead to proposals to reform regulation. One of the announced motivations for these inquiries was that regulations in place had not succeeded in

displacing national incumbents from their protected positions and establishing an integrated common market.

Enforcement experience backs up advocacy advice and the liberalisation agenda. A chief example is the long-running reform of telecommunications, from its beginnings 20 years ago with an infringement action. This has continued in energy and transport, where Commission decisions about mergers and infringements complement the development of directives for reform. Where application of Community policies depends on action by Member State governments, oversight is more difficult and more delicate. Member States may introduce elements that affect market competition, perhaps unwittingly. For example, some Members states implemented the Community directive about petroleum security stocks in a way that effectively prevented new entry into retailing.

The most prominent recent reform project is about professional services, concentrating on lawyers, notaries, accountants, architects, engineers and pharmacists. The Commission released an extensive report in 2004 about competition in professional services. Problems it identified included fixed and recommended prices and regulations restricting advertising, entry and business structure. Acknowledging that some regulation is justified to protect consumers in these areas, nonetheless the report called for using more pro-competitive mechanisms. The Commission points out that restraints imposed by private bodies such as professional associations could violate Article 81 (unless they are objectively necessary to guarantee the proper practice of the profession as it is organised in a Member State). State regulation that impairs competition violates treaty obligations, and if a Member State delegates power to a private entity without sufficient safeguards, the Member State could also be liable for a resulting infringement. But after thus reserving the possibility of enforcement action, the Commission invited the Member States and the professions to review and reform unjustified regulations. It has promoted a series of bilateral meetings to give the professions and national regulatory authorities an opportunity to explain their positions, recognising that the project will necessarily involve national professional bodies and regulatory authorities and competition agencies, as well as consumer groups. Member States have also been encouraged to compare experiences. A follow-up report, “Professional Services – Scope for more reform”, was published on 5 September 2005. This gives an overview of progress made by Member States in the review and removal of unjustified regulatory restrictions. It welcomes progress made in some Member States but finds that regulations that seriously restrict competition are still too common in many countries. Progress is hampered by a lack of national political support for reform and little appetite for reform from the professions themselves. The Commission calls on Member States to take decisive action and suggests that the issue of modernising the rules affecting the

professions should be built into the national reform programmes for implementing the Lisbon Strategy. It concludes by reiterating its commitment to wide-scale reform and leaves open the possibility of further enforcement action.

6. Conclusions and policy options

Competition policy played a central role in the development of the EU and its institutions. It has achieved a quasi-constitutional status, distinctively based on the direct application of law to economic actors rather than on administrative exercise of policy discretion or on political or interest-group bargaining. With broad jurisdiction and what some observers described as an evangelical, even moral commitment to free market ideas and their constitutional role, DG Comp was recognised by the 1990s as a particularly effective agency in the EU system. (Wilks & McGowan, 1996) (Goyder, 2003) Competitiveness is replacing market integration as a driver of policy, but it appears unlikely that competition policy will have to make a political compromise with industrial policy. Historically, the Commission has shown a pragmatic appreciation of Europe's need to be competitive and realistic tolerance of national interests. Productive efficiency and consumer welfare appear to have equal priority as goals of the restated competition policy based more explicitly on economic concepts.

The strong relationship between the Commission and the courts remains fundamentally important. Early support from the ECJ, which was interested in the market integration theme and in strengthening EU institutions, encouraged a conception of competition policy in terms of legal categories. As the Commission now moves toward a more explicitly economic point of view, a new understanding with the courts will have to be worked out, about how the courts will deal with economics and the Commission's claim to economic expertise. Convincingly and consistently presented, economic analysis could substitute for legal soundness as an anchor against politically-driven manipulation of policy outcomes.

Completion of the policy framework and ambitious application of it revealed some problems, which the Commission has moved to address. Important reforms and achievements since the mid-1990 included turning attention away from vertical agreements, using a leniency program to bring more effective challenges to clandestine horizontal collusion and replacing the notification system and the "comfort letter" paste-over. The liberalisation program, which had begun in the 1980s with telecommunications, has extended competition to network sectors. But implementation of the merger regulation, buoyed by overconfidence, foundered over defects in analysis, evidence and procedure. The CFI's chastisement of the Commission in 2002, in effect doubting that the Commission was any more expert than the court about economic matters, has led to welcome improvements in

economic resources and important reforms in the Commission's internal quality control process. The most important reforms, though, are the long-term projects to modernise the content of EC competition policy, by revealing its economic motivation, and to modernise the means for applying it, by ending the system of bureaucratic approvals and extending enforcement responsibility through the entire network of national competition authorities in Europe.

Modernisation of concepts sets out basic analysis in an administrable format while making its economic underpinnings more explicit. In the new approach to guidelines and block exemption regulations, issues such as hard-core misconduct are clearly distinguished from others, and the classifications and presumptions are typically subject to thresholds based on market share or absolute size. There is a single guideline about how to define markets, rather than one for every possible application; however, the guideline is flexible, permitting adjustments to take account of the possibility that a market is, or is not, already operating competitively. Consistency in such matters as the description of "hard core" restrictive agreements also supports increased coherence. The new approach combines recognition of legal distinctions in theory with practical common-sense simplicity in application. The guidelines about horizontal co-operation, for example, parse the logical distinctions and statutory categories but then apply the same market-share thresholds to all, thus warning parties not to bother crafting clever claims about categorisation. The market share thresholds mostly imply negative presumptions, not positive ones; they are plausibly conservative for defining safe harbours to clear the docket and provide some security to business. This now-standard model is well designed for application in a bureaucratic-administrative process, in which precision and nuance in particular cases could not be achieved at acceptable cost with a manageable set of formal rules. Rather, they support clarity and consistency in a comprehensible framework that is accessible and persuasive to the businesses that are subject to it and that is administrable without constant recourse to graduate-level economic theorising. This is not to say that every bright line is drawn in exactly the right place; rather, there may still be room for debate about whether all of the practices characterised conclusively as hard-core restraints deserve that treatment.

The modernised framework replaces legalism with economic concerns about market power and anti-competitive co-ordination. But it does not eliminate all vestiges of formal analysis. Applying it may still require categorisation, for tasks such as identifying "hard-core" conduct whose treatment does not depend on a market share screen. Nor will its application always be straightforward. Treatment of non-hard core matters will depend on market definition, an exercise that can be uncertain as well as disproportionately resource intensive. Market definition is a matter of both fact and judgment, liable to outcome-driven bootstrapping or simple naiveté. Businesses engaged in self-assessment are at some risk to define their

markets correctly, although the guidelines typically assure that the Commission will only take prospective action where a company has mistaken a market definition in good faith. Many aspects of the notices and guidelines are explicitly traced to judicial authorities, but others may be explained by administrative plausibility or perhaps by the direction that the Commission would like to take in the future. To the extent the schema takes the form of "soft law" notices and guidelines, it depends on persuasiveness. Their ultimate authority will depend on how the European and national courts treat notices and guidelines that do more than restate the holdings in judicial rulings.

Modernisation of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with national agencies, is designed, among other things, to redirect resources so that DG Comp can concentrate on complex, Community-wide issues and investigations. Modernisation shares competence with national institutions in a different way than the Community usually does. It does not follow the paradigm of a directive from Brussels to be implemented through national laws. There are no EU-level directives requiring national governments to adopt a particular substantive competition law, and modernisation does not require substantive harmonisation. Rather, it builds on the fact that the national competition law systems have co-evolved along with the Community system, so that over the years most national governments (and all of the pre-accession Members) have adopted substantive rules that are generally consistent with those of the EU without being required to do so.

The net effect of decentralisation remains to be seen. The regulation establishing the modernised system for co-operative application sacrifices some of the Commission's monopoly while confirming and expanding the remedies and investigative powers available for Community competition law enforcement. The system is founded on the expectation that coherence will be achieved through common legal principles subject to supervision by the ECJ. So far, the ECN operates by consensus. Depending on developments, though, pressures could lead to demands for greater transparency and accountability, more centralising formality in the network, or devolution of powers to national authorities. (Wilks, 2005) The European competition agencies differ in their capacities and perhaps in their priorities. Some NCAs may defer to DG Comp, and others may take more initiative. Inevitably, the agencies will vary in their technical economic and legal resources and in their degree of effective independence from other policy interests. Strategic reactions from complainants and respondents can be expected. Of course, the process of shopping for the most promising forum is itself a kind of "market test" of the quality of enforcement. The regulation's provision for the Commission to take over an action should be a sufficient check against weaknesses in the network—unless the Commission is the weak link.

Sharing responsibilities will add perspectives as well as resources. Substantive harmonisation across Europe makes it less critical in most cases to identify an effect on trade sufficient to support Community law jurisdiction. The same principles will be applied, especially concerning restrictive agreements and mergers, whether a matter is handled by DG Comp or by a national agency and whether it is assessed under Community law or national law. The regulation anticipates some variation in how national laws treat unilateral practices by dominant firms, and some differences remain in procedures and resources. There may also be differences among agencies in their capacity and willingness to act, particularly concerning sensitive sectors. The liberalisation projects have demonstrated the importance of a "federal"-level enforcer that can confront entrenched national monopolies. The opposite scenario is also conceivable. Policy disputes among the Commissioners might prevent them from reaching a clear decision whether to take enforcement action about a matter or a sector. An interested national agency might then step up, applying Community law. The Commission could take over the matter in order to preserve its prerogatives, but at least the national agency's initiative will have overcome the decision deadlock.[39]

The Commission's integrated enforcement process, though efficient, has inherent weaknesses. Combining the functions of investigation and decision in a single institution can save costs but can also dampen internal critique. Risk of unchecked discretion may make courts sceptical of the Commission's decisions. The reversals at the CFI in 2002 made it obvious that changes were needed, and the Commission has taken many steps to address long-recognised concerns about its internal quality controls. More "state of play" meetings and opportunities to expose the staff's thinking to the parties and to critical peer review are sound. The expectation of close CFI oversight represents a culture change at DG Comp. The net result of the reactions to the setbacks, as well as to the creation of the Chief Economist position and the expansion of the role of the hearing officers, is that case teams understand that they need to put together more and better evidence.

These changes had just been put in place at the time of the OECD's 2003 *Annual Survey*, which included a special chapter on product market competition. (OECD, 2003) That survey noted the concern about the absence of checks and balances where the powers of initiation and decision are combined, and it called for an assessment of whether the review panels and other measures made the decision process more effective. The most relevant measure of increased effectiveness will be whether the Commission's decisions are better able to survive judicial scepticism. Few cases reviewed with the new internal processes have completed their way through the courts, so it may be too early to tell. But some cases that have gone through the internal process were dropped or revised as a result, and thus they never

got to court. To that extent, the internal checks are doing what they are designed to do.

Checks improve quality but can increase costs. The Commission is still experimenting, to find the appropriate balance between the time and resources needed to put a case together and the time and resources devoted to explaining and defending it internally. Such flexibility can be an inherent advantage of an integrated system. Aspects of the quality control system remain *ad hoc*. Not every case is subject to a peer review panel or the attention of the Chief Competition Economist. For now, it is appropriate to make those decisions case by case, in part because there are not nearly enough resources available to give that attention to everything. But as the allocation of cases among agencies evolves, most of the docket at DG Comp may be the more complex and controversial matters for which in-depth analysis and critical scrutiny are most necessary. If so, then *de facto* these internal steps may become expected rather than extraordinary.

Some explicit separation between the investigative and decision-making functions may be inevitable, to secure judicial confidence in the quality of the Commission's decisions. One option for more transparent separation within the Commission process could be creating a more formal evaluative role for the hearing officers. These officials now deal primarily with ensuring process fairness, more than with assessing the substantive merits. Nonetheless, if they have views about the merits, the process already provides some opportunity to convey them. It would a challenge, though, to create such a role that stops short of a full internal administrative trial and initial decision, a process that could just add a layer of delay.

The Commission-level decision process is another quality check, but it is not without problems. The Commission has a key independent role in the Community governing structure, as an institution that is charged with acting in the interests of the Community as a whole. By contrast, the Council and the Parliament are political bodies that must be responsive to national and other interests. The Commission's historic strength has been its appearance of impartiality with respect to national rivalries. Even so, observers in the mid-1990s noted concerns that Commissioners might tend to favour their policies and interests, subliminally if not overtly. (Wilks & McGowan, 1996) No other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission. With 25 members, the Commission is too large to effectively deliberate and decide fact-intensive matters.[40] Realistically, the Commission defers increasingly to the Competition Commissioner, providing some high-level policy control over the Competition Commissioner's initiatives. The Competition Commissioner may have consulted with the Legal Service, Hearing Officer, peer review panel and Chief Economist, and the Commission may have before it opinions from the Advisory

Committee or other Commission services. But when the Commission decides a matter, it has typically not heard directly the case against the proposed decision. No Commissioner, including even the Competition Commissioner, will have attended the hearing. All depend on briefings from staff, and there is no *ex parte* rule or other control on contacts between investigating staff and the Commissioners who decide the matter. There is no initial adjudicator that is fully independent of the investigative function.

It is thus not surprising that courts are moving into what looks like a first-instance role. At least, since the CFI was created the courts have not given the Commission much leeway about evidentiary matters. The potential for judicial review and annulment shores up deficiencies of the Commission decision process under principles of European human rights law about impartiality and independence. But the current court system would be taxed to the limit by a true first-instance decision responsibility. To be sure, the courts have risen to the occasion when called: in the 1975 *Sugar Cartel* case, the ECJ produced a 200 page judgment (nearly 500 pages, in CMLR) to examine claims about individual markets and the interaction of competition and agricultural policies, and the full judgment of the CFI in the 2000 *Cement Cartel* cases runs to nearly 1 200 pages. And the CFI was created to increase the judiciary's capacity to handle fact-intensive review. The "fast track" procedure there has made this a realistic possibility even for time-sensitive cases such as mergers.[41] The scope of review and thus the role of the courts are evolving. Recurring issues in competition cases, such as market definition and assessing net effects of agreements and transactions, show that it is not always clear where to draw the line between matters of fact and evidence that are subject to judicial review and matters of complex economic analysis that in principle should be entrusted to the Commission's expertise.

If a separate court took on more responsibility for making records and deciding cases, it would likely play a larger role in determining policy too. As Community competition policy moves beyond law-driven market integration toward a more economic approach, courts may need to articulate a more coherent conception of competition and policy goals. (Gerber, 1998) Perhaps a specialist competition court could fill that role. Changes to the CFI's status due to the Treaty of Nice prepared the way by giving the CFI its own basis for jurisdiction and authorising it to annex panels to hear matters in the first instance, with an appeal to the CFI. Though this was conceived as an outlet for staff cases, it might foreshadow the creation of a separate competition court as a first-instance decision-maker.[42] (Goyder, 2003) But creation of a new "cartel court" at this time would be premature. It would undermine the role of the Commission and the Council in setting policy direction, and it would encourage DG Comp to act more like a prosecutor than a decision-maker. Short of changing the courts' basic function in the process, they might be given more

comprehensive powers to consider Commission decisions on the basis of appeal rather than judicial review. The European courts now review Commission decisions for legal and procedural deficiencies, exercising full control only over the sanctions imposed. If the court rejects the Commission's finding of infringement, it can only annul the decision and send it back to the Commission for further proceedings. An alternative would be to authorise a full appeal, leading to entry of final judgment by the court.

Resources appear sufficient for DG Comp to deal with Community-wide cases and policy development and co-ordination. Inadequacies noted in the 1990s have evidently been overcome. (Wilks & McGowan, 1996) Indeed, now that the national competition agencies apply Community law, public resources committed to competition enforcement in the EEA are substantially greater than in the United States. To be sure, Europe does not yet have such a large contingent of non-government lawyers and economists engaged in supporting and defending private antitrust enforcement.

The 2003 *Annual Survey* called on the Commission to consider economy-wide welfare losses in setting priorities. The Commission has long set its overall priorities based on an understanding of the likely net economic effects of enforcement intervention. For example, a judgment about the net economic impact motivated the shift of resources and attention over the last ten years from vertical restraints to horizontal cartels. At the smaller scale of choosing individual cases, though, it is not often feasible to rely on suppositions about large-scale welfare losses. The high priority given to hard-core cases is based on considerations of general deterrence rather predicting the effect of stopping any individual cartel. For non-hard core cases, the net effect might not be very clear at the outset. Nevertheless, DG Comp is trying to improve is methods for setting enforcement priorities DG Comp's 2004 annual report calls for enhancing the pro-active nature of policy-making, to remedy market failures in support of the competitiveness agenda, while providing for enforcement action at the most appropriate level in the enlarged EU. (EC DG Comp, 2004) The comparative advantage of the 26 different authorities is now highly relevant. The Commission obviously ought to take the lead on matters with international or Community dimension, or where the key factor is a Community based regulatory program, such as network infrastructure. Allocation of resources is shifting already in response to these priorities. DG Comp has doubled its resources for cartel enforcement over the last year, resulting in a doubling of enforcement activity too (measured by statements of objections issued).

Creation of a special cartel directorate was announced as an innovation; however, in 1998 and again in 2002, DG Comp had previously announced the creation of special new cartel units. Whether or not the directorate is particularly

new, it is necessary and welcome. The special merger directorate was disbanded because mergers no longer present procedural and legal novelties; a special cartel directorate is needed because the new enforcement structure presents novel and sensitive legal and practical problems, concerning jurisdiction, leniency and investigative powers. Cases are multiplying and respondents are likely to put up sharper defences. The cartel directorate's special expertise is about issues that are likely to be of particular sensitivity in the courts, about investigative process and the quality of evidence. As fines increase to levels that persuade companies to contest liability as well as the size of fines, the quality of proof will become even more important. The confessions and insider evidence produced by the leniency programme have been invaluable. But DG Comp does not want to rely too much on leniency, perhaps concerned about litigation over tangential issues or judicial rejection of leniency-prompted evidence. DG Comp is thus looking for economic indicators of horizontal collusion that would identify targets for further investigation. It remains to be seen whether economic data and analysis alone will persuade courts to authorise coercive investigative techniques. So far, it does not appear that DG Comp expects to rely on such an analysis, in the absence of more direct evidence, to persuade courts about the substantive merits or appropriate sanctions.

A new notice and guidelines about sanctions and remedies is in preparation. The principal topics are likely to be cartel fines and the leniency program. The 2003 *Annual Survey* recommended assessing the deterrent effect of sanctions, implying that the fines being imposed were not large enough. Sanctions being imposed against horizontal cartels in the Community generally match the levels being imposed elsewhere, and sanctions against abuse of dominance appear even stronger. But recent research shows that cartel overcharges have historically been even greater than enforcers had believed, averaging over 30% in EU cases and well over 40% for international cartels. (Connor, 2004) Sanctions everywhere may still be too low to deter effectively. The process of preparing a new notice is an occasion for assessment of whether the Community's sanction level is effective. The notice may also lay a foundation for the use of new powers of structural relief and divestiture. Other improvements in remedies include clear authority for interim measures and binding commitments and power to withdraw the benefit of block exemptions. The provision for enforceable commitments is valuable, although the recital that they will not be accepted in a case where the Commission began by seeking financial sanctions is curious. It implies that, once the Commission demands a fine, the respondent must either pay it or take the Commission to court, with no possibility of reaching a compromise resolution about commitments before the court rules. This limitation on the Commission's negotiating flexibility may have been unintended.

The informal network of enforcement authorities is off to a promising start. Deliberately setting up a new non-institution in the ECN, rather than building on the already-established Advisory Committee, sends an interesting message. The distinction appears intended to keep the ECN informal and to avoid, or at least postpone, a legalistic process of binding expectations and commitments. The fact that the ECN has no legal status raises questions about accountability, and its process has raised concerns about transparency. (Wilks, 2005) Experience will show whether it is necessary or prudent to make the system more formal. For now, consensus-driven informality is a good setting to learn about the different capacities of the 26 agencies.

Guidelines are under consideration about abuse of dominance under Article 82, seeking to develop an approach that is coherent with the modernised conception of Article 81. Thus, the guidelines might examine factors analogous to efficiency claims under Article 81(3). Since Article 82 does not provide for balancing other considerations against the prohibited conduct, apart from the doctrine of "objective justification", the argument would have to be that in the presence of a demonstrated efficiency conduct does not amount to abuse. Practice under Article 81 provides an analogy, as court judgments sometimes disregard subtleties that distinguish whether a factor is relevant to the Article 81(3) exemption or to the Article 81(1) prohibition. The principal topic of the possible guidelines will probably be the treatment of exclusionary abuses. Clarification of policy about exploitative abuse would be welcome. The absence of cases challenging exploitative abuse implies that the Commission is reluctant to police price levels like a utility regulator; on the other hand, the Commission has not foresworn the power, which the courts have recognised even though they have never authorised the Commission to use it. Relying on soft-law guidelines to persuade the courts to modernise the approach to Article 82 presents a challenge. Much of the lack of clarity about whether the basis of the law is preserving market relationships or improving economic performance can be traced to still-authoritative early ECJ judgments.

Clear process and deadlines have been a strength of the EC merger control system, and the recent changes in those dimensions are incremental improvements. The most important changes are the possibility of extending deadlines in order to discuss remedies and the provision for notifying a non-binding agreement. The changes also seek to reduce procedural complication and uncertainty in the allocation of jurisdiction among the Commission and national agencies. A national agency no longer must demonstrate dominance in its market before getting a referral from the Commission, and the merging undertakings can take the initiative to suggest the appropriate venue. After fifteen years of experience with Community merger control, experiments and habits have evolved into efficient "best practices", which are now the subject of extensive soft-law guidance. Notably, informal pre-

notification contacts with DG Comp are strongly encouraged. In some other jurisdictions, over-reliance on pre-notification contacts and negotiations outside the formal merger control requirements have been criticised for non-transparency. In the EU context, though, where there is a realistic opportunity for timely judicial review to correct abuse of the enforcer's discretion, this is unlikely to be a problem.

State aid regulations are another topic for recasting into the modernised format. The 2003 *Annual Survey* called for reducing state aid generally. The *Annual Survey* acknowledged that the European Council in 2002 had already adopted a policy of "less aid, but better", targeted to remedy real market failures. The Commission is moving to implement that approach, and the review of the state aid rules launched in 2005 is a step toward that goal. The Competition Commissioner has recognised that state aid control is critical to improving competitiveness, because improper aid anaesthetises the market and prevents it from achieving efficiencies. (Kroes, 2005) The subject is too technical and wide-ranging for detailed treatment in this report. The opportunities for controversy are obvious, as competition principles confront industrial and other policies. Concerning the important general issue of how state aid rules relate to Treaty rules about public services, the ECJ's recent *Altmark* ruling established a useful practical framework, which the Commission has embraced. Some questions remain to be answered. The ruling leaves open whether cost coverage that is not treated as aid includes provision for any benefits received from performing the public service function. Nor does it indicate the level of profit that would be considered reasonable or how to find a benchmark where there is no typical comparable private firm. (Louis, 2004)

The liberalisation program that has been central to the DG Comp mission since 1986 is not completed, but the course is laid out. The principles of separation between monopoly and competitive functions and encouragement of trans-national markets have long been well understood, at least at the Community level. The 2003 *Annual Survey* demanded accelerated liberalisation of network industries, especially those that were lagging. But for the sectors where changes have been most difficult, notably rail and postal services, further reform depends on the Community's political decision-making process to overcome protections of national incumbents. The *Annual Survey* also recommended clarifying and limiting the jurisdictions and powers of sector regulators that overlap competition policy, to be sure they are not protecting their national markets too much. It is not evident what more needs to be done, though, to ensure that Community competition policy would override inconsistent national regulation, subject to the general principles of Article 86 and relevant Community directives.

No sector is completely excluded from Community competition law, although special treatment applies to aspects of agriculture and transport, particularly ocean

shipping. These are sectors that commonly get special treatment elsewhere. Careful attention is called for to ensure consistency in sector-specific application of state aid and other general competition rules here. DG Comp has been vigilant, promoting reform and repeal of some of the block exemption regulations. More generally, the Commission has adopted a new procedure for reviewing the impact of proposed regulations, and DG Comp has made it a priority to become more active in this "screening", to head off or correct regulatory initiatives at the Community level that hamper competition. The extent to which other the parts of the Commission are committed to pro-competitive reform of their regulatory programs remains to be seen.

National-level regulation of professional services is a key object of advocacy and reform. The Commission's nuanced approach to this subject has been realistic and comprehensive. DG Comp sponsored a thorough study and report as a foundation for further action. That has been followed by a combination of admonition and encouragement, seeking to form a consensus about change but reserving the potential for enforcement action. The 2003 *Annual Survey* recommended stronger action toward a single market in services. The project about professional services shows how DG Comp is contributing to that goal, whose success depends ultimately on action at the national level.

In 2005, DG Comp launched sector inquiries in finance and energy to determine whether private constraints or public regulations were impairing competition. These projects follow through on the Commissioner's determination to use competition policy to improve competitiveness. (They also show how DG Comp is promoting a stronger role for competition authorities in development of common financial services, as the 2003 *Annual Survey* recommended.) The inquiries are a welcome application of the Commission's previously underused power to investigate in sectors where competition looks problematic even though no particular infringement is suspected.[43] Financial services and energy were chosen because making the supply of these inputs more efficient would have multiplier effects on competitiveness. But they also present opportunities to demonstrate how competition could encourage innovation and reduce prices for services provided directly to consumers.

6.1 Policy options for consideration

6.1.1 Clarify the relationships among the leniency programmes of the Community and the national enforcement agencies.

Companies that are exposed to investigation and potential liability in several jurisdictions have raised a number of concerns, unsure about how a leniency offer or

commitment in one jurisdiction affects their rights and risks in others. There is no single point of contact, so companies must make multiple applications. There are no programs in 8 Member States (although 4 are considering them), so companies might be exposed there despite receiving leniency elsewhere. And the terms of the programs differ. Some programs cover vertical agreements, others do not. The Commission's program now permits leniency to instigators, but others still follow the earlier approach. Parties after the first one get different deals in different countries. Some permit the applicant to remain in the cartel if obvious abandonment would tip off the others, but the Commission frowns on this. Some demand more evidence than others in order to claim first place in line, thus forcing a choice between speed and completeness. Some will accept oral statements, which companies prefer in order to avoid exposure in the US, but others do not. Despite these variations, though, no case of serious disagreement has been reported yet.

The risk that a leniency applicant would be exposed to criminal liability in other jurisdictions is probably not significant, although it is often raised. The text of the Treaty supports a legal argument that national bodies could not bring criminal actions following Community enforcement and grant of leniency. (Levy, 2004) The Commission's upcoming notice about remedies might make that even clearer. The same result could be accomplished through commitments from the national agencies not to pursue criminal prosecutions in those circumstances.

The 2003 *Annual Survey* called for exploring options for making leniency more attractive, particularly concerning co-operation with Member States. DG Comp recognises that addressing this issue is a top priority. But it need not result in a single, integrated system, at least not yet. There is still room for experiment to improve the tools. The goal is to maintain the incentive to confess that result from the crucial features of transparency, certainty and asymmetry. The only aspect of the programmes that appears to present a risk of actual conflicting demands now concerns whether the leniency applicant must cease participation, as some agencies might not want an abrupt change to tip off others prematurely. That risk is reduced, however, by an agreement reached within the ECN that an agency with discretion will exercise it to avoid that conflict. Reducing other administrative complications and unnecessary variations is unlikely to present serious difficulties. Short-form applications in some jurisdictions already simplify the process, for example. Co-ordination and functional equivalence of conditions and procedures among the jurisdictions' programmes could lead to the same efficient outcome as a "one-stop shop". It may be prudent to get more experience with the courts, to see how they treat fines that result from leniency offers, before going too far into detail.

6.1.2 In adopting an economic approach to dominance, make liability depend upon effects that harm competition; in appropriate cases, assessing the scope for recoupment should be an integral part of such an approach.

A thorough-going economic approach to dominant firm conduct requires some methodologically clear means of identifying claims about exclusionary conduct that present threats to sound competition and distinguishing them from demands by competitors for help in keeping prices up. This implies a finding that the market is likely to suffer the effects of monopoly exploitation as a consequence of the abusive conduct. For example, where the allegedly exclusionary conduct entails a short-term sacrifice of the dominant firm's profit, to impose liability where those losses could never be recouped could discourage vigorous competition. Requiring a separate showing about this could be a matter of form, though, more than substance. The conclusion is implicit in a conception of dominance that includes the presence of entry barriers sufficient to protect against erosion of monopoly gains. In developing the new Article 82 guidelines, there are a number of other sensitive issues for which the correct approach may be less clear. These include the treatment of intellectual property rights and claims about network effects and essential facilities, as well as whether to include or ignore concepts of "economic dependence" that cannot be tied to coherent theories of economic effect on market competition.

6.1.3 Increase further DG Comp's capacity for economic analysis.

Correcting a long-recognised resource limitation, the office of the Chief Competition Economist now makes sophisticated analytical resources available in-house. Already, as Community competition analysis has increasingly relied on economic reasoning, DG Comp had greatly increased the proportion of staff with economic training. The new office represents quantum increase in the level of economic expertise, but the office is small and it is stretched thin. The *ad hoc* method of allocating its limited resources is not necessarily a problem. Not every case needs its attention, and trying to specify a protocol in advance for identifying those that do may be more costly than just leaving it up to case handlers to request and the DG to decide case by case. But more will be needed, particularly if more complex and difficult matters come to dominate the DG Comp caseload. Staffing this office with a combination of permanent employees and academics rotating through on temporary contracts is a sound approach, bringing new ideas into the enforcement bureaucracy and practical insights into academia. The advisory group, institutionalising DG Comp's relationship with Europe's academic community, is another valuable step. These are the experts who are likely to occupy the position of Chief Competition Economist in the future.

6.1.4 Consider means for extending sanctions to individuals as well as firms, such as co-ordination with application of Member State laws that provide for individual sanctions.

The prospect that individuals involved in infringements would be exposed to sanctions could improve the effectiveness of cartel enforcement. The terms of the Treaty could support administrative fines against individuals for conduct that was part of an infringement, although there is no jurisprudential or constitutional basis for Community criminal liability. But fines might not be as effective as other sanctions against individuals, though. Extending the process of investigation and enforcement to individuals would raise a number of difficult and complex legal issues and additional costs, and it would strengthen the case for making the courts the principal decision-makers. (Wils, 2004) If an effective individual sanction at the Community level is deemed impossible or imprudent, the obvious alternative is for the Commission to promote and support the imposition of individual sanctions under the national laws of Member States.

The 2003 *Annual Survey* recommended another means of expanding the reach of enforcement, by encouraging the use of private suits. The Commission has been doing so since at least the early 1990s. This is primarily a matter for national law, though. Informal efforts to encourage private actions continue, and more resort to private litigation in national courts is expected to be a by-product of modernisation. Richer articulation between Community-level principles and national competences concerning private remedies and criminal sanctions could extend the base of support for competition policy.

Commissioner Monti, in his final annual report, called for better definition of the role of consumers. Designation of a contact point high on the DG Comp organisation chart is a modest step in that direction, to co-ordinate better with the parts of the Commission that are handling consumer protection and product safety issues and perhaps with consumer NGOs. More important, though, is effective, persuasive communication of the value of sound competitive markets, not just to policy officials and advocates nor even to the businesses in Europe that are affected directly, but to the citizens of Europe who benefit.

NOTES

1. The Maastricht treaty renamed the European Economic Community as the European Community (referred to below as the “Community”), while creating a new construct, the European Union “founded on the European Communities”. The competition rules appear now in the Treaty Establishing the European Community, referred to below as the “Treaty”.

2. The constitutional treaty that has been submitted for ratification would make it explicit that the European Union has legal personality.

3. Competition law ideas in Europe had a trans-national dimension since the 1920s. The image and model of appropriate competition laws were formed at the League of Nations’ World Economic Conference and the Interparliamentary Union’s London Conference. (Gerber, 1998) By contrast, in the first new pan-European institution set up after the war, the Organisation for European Economic Co-operation, there were discussions of a customs union but no particular attention to other ideas about competition. (Goyder, 1998)

4. Although a US antitrust lawyer and law professor, Robert Bowie, is often credited with drafting the competition articles of the Treaty of Paris, they contain no concepts or terms from US antitrust law. The debate over the need for competition rules may have been informed by US experience, but the legislation is European. A member of France’s Conseil d’État, Maurice Lagrange, cast the language into European legal style. (Goyder, 2003) (Gerber, 1998).

5. In the absence of an implementing regulation, the Treaty authorised national authorities to apply the Treaty rules, while limiting the power of the Commission over infringements to investigation and authorisation to the national authority to take appropriate action to ensure that they are corrected. (Treaty, Articles 83, 84)

6. The Commission’s website and reports classify its substantive programs into 4 categories: antitrust (business practices that impair competition, under Treaty Articles 81 and 82), mergers (under the Merger Regulation), liberalisation (under Article 86), and state aid (under Article 87).

7. Council Regulation 1/2003, which became effective 1 May 2004. A similar approach, of according direct effect to the exemption criteria, was considered during the deliberations about the original enforcement regulation, but it was rejected as premature at that stage.

8. Germany's cartel law became effective the same day as the Treaty of Rome. The also-new Dutch competition law system was built on registering cartels, not prohibiting them. The drafters of Regulation 17 rejected the Dutch approach, of mandatory notification conferring a presumption of validity, placing the burden on the enforcer to prove abuse and limiting remedies to prospective orders. France had had an *ordonnance* about competition for several years, but it dealt mostly with price control. The other active European competition law systems at that time were outside the EC.

9. In addition, a national law that predominantly pursues a different objective than Community competition law can be applied, as long as that law is not itself in breach of general principles of community law.

10. Article 2 states that the purposes of establishing a common market, economic and monetary union and other common polices are "to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

11. In the terminology of Community law, regulations are norms that apply generally both at the national and Community level, to Member States and potentially to firms. By contrast, directives are addressed to Member States, binding them only as to the result to be achieved. In implementing the directives in national rules and legislation, Member States can choose the form and method for achieving the required result. The Commission also has power to issue directives under Article 86(3), and Commission directives launched telecoms reforms in the 1990s; since then, though, most liberalisation directives have been issued at the Council level.

12. This phrase appears in both Article 81 and Article 82, describing conduct that is "incompatible with the common market". Analogous phrases about the Community dimension apply to the other principal subjects of Community competition law. In the Merger Regulation, it is whether the transaction is "compatible with the common market" (Article 2). For state aid, it is whether the support "affects trade between Member States" and is "incompatible with the common market" (Article 87). For services of general economic interest or authorised monopolies, it is that "development of trade must not be affected to such an extent as would be contrary to the interests of the Community" (Article 86).

13. The Commission's Guidelines on the application of Article 81(3), issued with the modernisation package, set out the principles for applying Article 81(1) and Article 81(3) and collect the relevant case-law.

14. The latest notice, issued in 2001, deals only with whether the effect on competition is appreciable. A separate notice sets out slightly different criteria for identifying an appreciable effect on trade.

15. Changes in the Notice show how the Commission's appreciation of the risk of market power has changed. The previous Notice had set the thresholds at 5% and 10% and had denied any protection if there were parallel networks of similar agreements.

16. Nevertheless, the competition policy community's preoccupation in the mid-20th century with the problem of oligopoly co-ordination might explain why the concept was included in the original 1951 ESCS rules.

17. Another problem often encountered in dealing with quasi-collective action is characterising accurately the relationship among affiliated companies. At one time, Community law treated companies in a corporate group as separate undertakings, so agreements among them would be subject to Article 81 unless there was no possibility that the entities could act independently. This "group" construct was sometimes used to extend Article 81 enforcement to parent firms located outside the Community. (Goyder, 2003) It is no longer Commission policy to apply Article 81 to intra-group agreements.

18. Although the effect of combining the two elements of Article 81 resembles the application of a "rule of reason" to determine net competitive effect, that label is resisted. To some observers, the reason to avoid the term is that the rule of reason would consider a wider range of non-economic considerations than Article 81. (Goyder 2003, p. 127) Yet the criteria of Article 81(3), notably the notion of economic "progress," appear to be broader than the issues about market definition and market power that are typically considered in applying a rule of reason to determine net effect on competition.

19. Historically, the interpretation of restriction of competition under Article 81(1) tended to be both broad and formal compared to the application of the criteria of Article 81(3), which only the Commission had the power to construe before 2004.

20. Examination of case practice shows that in particular cases Community competition law has the capacity to set fines that approach the level of economic deterrence, that is, that exceed the violator's gain from the infringement, as adjusted for the likelihood of detection and sanction. In the *Lysine* cartel, the Commission's fine against one participant exceeded the company's total annual turnover for the product affected. (Joshua 2003) The total base fines against all

participants, before adjusting for aggravating and mitigating factors and leniency (EUR 142.5 million), were nearly equal to the participants' total annual turnover in the product affected (EUR 164 million). Whether these fines reached the optimal deterrent level would depend on how long the participants exercised market power and how much their collusion raised prices, of course. It is conceivable that the cartel lasted long enough, and raised prices high enough, that even confiscating a full year's turnover would not capture all of the gains, adjusted for the likelihood of detection.

21. The original regulation 20 years ago had treated the sector more generously than others, leading some observers to consider it a partial exclusion from Article 81. Now, "being regarded as a 'special case' has become a burden rather than a privilege". (Goyder 2003, p. 207).

22. Characterisations of abuse in the judicial authorities are too amorphous to guide policy. For example, the seminal *Hoffman-La Roche* ruling of the ECJ describes it as "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as the result of the very presence of the undertaking in question, the degree of competition is weakened and which, though recourse to methods different from those which conditions normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

23. The recital to the Merger Regulation indicates that below a market share of 25% there is no likelihood of creating or strengthening a dominant position.

24. Case 40/70, *Sirena Srl v. Eda GmbH* [1971] ECR 69, 84.

25. Use of this criterion is explained in part by the fact that the legal foundation for the merger regulation is not Article 81 and Article 82. In an early test case, the ECJ confirmed that an acquisition which strengthens a dominant position infringes Article 82, and a later decision implied that Article 81 could also be applied against merger agreements. But rather than build a merger regulation on those decisions, the Council relied on the implementing article in the Treaty's competition section, Article 83, and more importantly on the clause of the Treaty that authorises the Council to fill gaps. Article 308 provides that the Council, after consultations, may take "appropriate measures" where action by the Community is necessary to attain a Community objective but the treaty has not provided the necessary powers. Thus, a premise for the merger regulation is that the system of ensuring that competition in the common market is not distorted, which is a Community goal set by Article 3(g) of the Treaty, requires a merger control system that the Treaty has not provided, indeed that was deliberately not included in the competition law system in 1957.

26. The Treaty does not preclude a Member State from taking such measures as it considers necessary for the protection of the essential interests of its security which are concerned with the production of or trade in arms, munitions or war material. Such measures must not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes. (Article 296)

27. Insiders reported there had been some vote-trading in the early era of the merger regulation, concerning matters arising under the portfolios of other Commissioners. (Wilks & McGowan, 1996, p. 234)

28. In the Community's legal vocabulary, an "enforcement" matter is one that the Commission brings against a Member State for non-compliance with Treaty obligations or Community directives or other legislation.

29. This is the system that has long been used to apply French competition law. France had advocated it for the original Regulation.

30. The right to a hearing, to know and respond to the basis for an adverse decision or action, is recognised as a general principle of law in Community jurisprudence. It was the first such concept that the ECJ took from English law (where it is an element of "natural justice"), in a 1974 competition case. (Hartley, 1994)

31. Each Commissioner's *cabinet* includes a competition policy specialist. These specialists meet weekly. If a matter raises issues that they cannot resolve satisfactorily, it is discussed at the regular Monday meeting of the Commissioners' *chefs du cabinet*. If there is still no agreement, the matter would be put on the agenda of the Commission meeting on Wednesday.

32. At one time, the starting point was based on turnover, but the Commission no longer applies that approach, in part because of concern that using turnover explicitly would compromise business confidentiality of that data. (Joshua, 2003)

33. In the 1996 program, this was 50-75%. The 2002 version makes the promise more asymmetric and thus increases the incentive to be first in line.

34. Full leniency was granted under the 1996 program only 11 times. (EC DG Comp, 2004, p. 19)

35. The ECJ may have been nonplussed by the absence of documentary evidence proving agreement and reluctant to trust the Commission's sole judgment in this area. (Bailey, 2004)

36. Decentralised competition law enforcement is not an example of the Community law principle of subsidiarity. The term is not used in the enforcement regulation. This principle, which is recognised in the Maastricht agreement, only applies

where the Community lacks exclusive jurisdiction. Competition policy is one of the few areas where the Commission has always had direct enforcement power, and it has not been considered an area of shared jurisdiction under the Treaty.

37. The Commission entered a "passive comity" co-operation agreement with the US enforcement agencies in 1991; after a challenge by France to the form and authority of this agreement, it was ratified by the Council in 1995.

38. This is the level budgeted in the 2005 Annual Management Plan. The Antitrust Division of the US Department of Justice is larger, with about 775 staff. Japan's Fair Trade Commission is roughly the same size, with about 640. The JFTC's jurisdiction includes unfair marketing practices and deceptive advertising in addition to competition law.

39. A somewhat similar dynamic has appeared in the US, when state-level officials or private plaintiffs have taken up issues and cases that the federal enforcers have not pursued. In the US system, though, the federal authorities have no power to intervene and take over state or private actions.

40. The closest analogy is the Competition Commission in Denmark, which has 17 members plus a chair. Unlike the European Commission, it is not composed of officials with policy portfolios, although more than half of its members are designated by associations and interest groups.

41. The 2003 *Annual Survey* raised some questions about the CFI's fast-track process, fearing that it was ineffective since parties who succeeded in their appeals did not necessarily succeed in closing their deals, and recommended an assessment of its effectiveness. The criticism misconceived the purpose of fast-track treatment. The proven benefits of the fast-track option, in providing effective judicial discipline over important but time-sensitive Commission decisions, far outweigh any concerns about whether resource constraints might limit how much fast-track treatment is available.

42. Assigning decision-making jurisdiction to the Community courts might require Treaty changes, at least for merger control decisions. The regulations to enforce and impose fines for violations of Articles 81 and 82 are authorised under Article 83, which gives the Council broad and flexible authority to design the enforcement system. Court jurisdiction under Article 229 is based on reviewing penalties. The legal basis for the merger regulation, though, is Article 308, and the merger control system is not based on imposing penalties. (Wils, 2004).

43. The new enforcement regulation adds authority to do this with respect to types of agreement across sectors.

BIBLIOGRAPHY

ABA Section of Antitrust Law (2005), "The European Competition Network: What it is and where it's going", *The Antitrust Source*, July 2005, available at www.antitrustsource.com.

Bailey, David (2004), "Scope of Judicial Review under Article 81 EC," *Common Market Law Review*, vol. 41, no. 5, Kluwer, Netherlands, pp. 1327-60.

Bustin, George L. et al. (2004), "2003 Annual Review of European Union Legal Developments", *International Lawyer*, vol. 38, no. 3, American Bar Association Section of International Law, Chicago, pp. 629-664.

Connor, John M. (2004), "Price-fixing Overcharges: Legal and Economic Evidence", American Antitrust Institute Working Paper No. 04-05.

González Díaz, Francisco Enrique (2004), "The Reform of European Merger Control: *Quid Novi Sub Sole?*", *World Competition Law & Economics Review*, vol. 27 no. 2, Kluwer, Netherlands, pp. 177-99.

Dolmans, Maurits and Thomas Graf (2004), "Analysis of Tying under Article 82 EC: The European Commission's Microsoft Decision in Perspective," *World Competition Law and Economics Review*, vol. 27 no. 2, pp. 225-244.

Ehlermann, Claus-Dieter and John Ratliff (2005), "Mario Monti's Legacy for Competition Policy in Article 82," *Competition Policy International*, vol. 1 no. 1, spring 2005, p. 79.

European Commission (2005), *Report on Competition Policy 2004*, 17 June 2005, SEC(2005) 805 final, Brussels, *available at* http://europa.eu.int/comm/competition/annual_reports/2004/en.pdf.

European Commission, Directorate-General for Competition (2004), *European Union Competition Policy: 23d Report on Competition Policy 2003*, Luxembourg.

Garzaniti, Laurent, Jason Gudofsky and Jane Moffat (2004), "Dawn of a new era? Powers of investigation and enforcement under Regulation 1/2003", *Antitrust Law Journal*, vol. 72 no. 1, p. 159.

Gerardin, Damien and David Henry (2005), "The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments", conference on *Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States*, University of Amsterdam, 17-18 February 2005.

Gerber, David (1998), *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, Oxford.

Goyder, D. G. (1998), *EC Competition Law*, 3d ed., Oxford.

Goyder, D. G. (2003), *EC Competition Law*, 4th ed., Oxford.

Hartley, Trevor C. (1994), *The Foundations of European Community Law*, 3d ed., Oxford.

Hildebrand, Doris (2002), *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, The Hague.

Huser, Henry and Frederic Depoortere (2002), "Substantive Enforcement Standards in Horizontal Mergers under the EC Merger Regulation," *Antitrust*, vol. 17, no. 1, p. 44.

Joshua, Julian and Peter D. Camesasca (2003), "EC fining policy against cartels after the *Lysine* rulings: the subtle secrets of x," *European Antitrust Review 2004*, Global Competition Review, London, p. 5.

Kroes, N. (2005), "The First Hundred Days," speech to International Forum on Competition Law, 7 April 2005, *available at* http://europa.eu.int/comm/commission_barroso/kroes/speeches/speeches_en.html.

Levy, Nicholas and Robert O'Donoghue (2004), "The EU Leniency Programme Comes of Age," *World Competition Law & Economics Review*, vol. 27 no. 1, Kluwer, Netherlands, pp. 75-99.

Louis, Frédéric and Anne Vallery (2004), "*Ferring* Revisited: the *Altmark* Case and State Financing of Public Service Obligations," *World Competition Law & Economics Review*, vol. 27 no. 1, Kluwer, Netherlands, pp. 53-74.

Nebbia, Paolisa (2004) [case note on ECJ Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)* v. *Autorita Garante della Concorrenze e del Mercato*] *Common Market Law Review*, vol. 41, p. 839.

Nicolaides (2002), "Distortive effects of compensatory aid measures: a note on the economics of the *Ferring* judgement", *European Community Law Review*, p, 313.

OECD (2003), *Economic Survey: Euro Area*, Paris.

Ross, George (1995), *Jacques Delors and European Integration*, Cambridge.

Townley, Chris (2004), "The Liner Shipping Block Exemption in European Law: Has the Tide Turned?", *World Competition Law & Economics Review*, vol. 27 no. 1, Kluwer, Netherlands, pp. 107-53.

Vervaele, John A. E. [case note on ECJ cases [2003] ECR I-5689], *Common Market Law Review*, vol. 41, p. 795 (2004).

Vesterdorf, Bo (2005), "Standard of proof in merger cases: Reflections in the light of recent case law of the Community courts", *European Competition Journal*, vol. 1, no. 1, p. 3.

Wilks, Stephen & Lee McGowan (1996), "Competition Policy in the European Union: Creating a Federal Agency?", in G. Bruce Doern & Stephen Wilks, eds., *Comparative Competition Policy: National Institutions in a Global Market*, Oxford.

Wils, W. (2003), "The principle of 'ne bis in idem' in EC antitrust enforcement: a legal and economic analysis," *World Competition*, vol. 26.

Wils, Wouter P. J. (2004), "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis," *World Competition Law & Economics Review*, vol. 27 no. 2, Kluwer, Netherlands, pp. 201-224.