European Competition Law Honours

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"The EC Treaty competition provisions are considered to be primarily economic instruments which are intended to implement more general economic policies. Two objectives may be identified. The first is the establishment of the single market. The second is the improvement of economic efficiency."

To what extent do the economic policy objectives of European competition law conflict with or preclude the consideration of broader policy objectives such as social policy or the protection of consumer's interests?

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Introduction

A classic expose of Competition theory would likely concentrate predominantly on market economics and their ability to allocate societies resources optimally. It is by definition intrinsically linked to economic theory and jurisdictions with competition provisions will invariably reflect this in the basis of their legal provisions. It is thus argued by some that economics alone should form the basis of assessment in determining the application of competition policies legal provisions.[1] Even if this supposition is accepted, the term "economic theory" is a generalisation, a label under which there are numerous theories and little agreement. Economic *efficiency* is championed by jurists, academics and businesspersons, especially in the United States, as being the rightful and only true realm for competition law, and achievable through the application of economic criteria only. This has led to criticisms of the European system where the achievement of economic efficiency appears subservient to the creation of a common market and regard is patently given to factors that are not, on a strict economic basis, related to achieving efficiency. It will be argued that assessing European policy requires consideration of the unique circumstances of the Union, the constitutional necessity of paying heed to non-efficiency criteria, and that apparent deviation from the classical ideals of competition policy do not conflict with economic theory to the extent argued by some critics.

The Market Theory

The view abounds that the competitive process maximises wealth by ensuring societies resources are used to optimal efficiency.[2] This involves two elements; allocative efficiency, whereby goods are produced in such quantities as fulfill demand precisely;[3] and productive efficiency, whereby firms produce in the most cost-effective manner so as to remain viable and competitive.[4] The classic view is that such efficiencies are achieved

[1] A view which the Chicago School would surely be at home with.
[2] Whish, *Competition Law*, 1993, Butterworths, Edinburgh. p.2.
[3] That is to say, there is no wastage through over-production but at the same time demand will be satisfied because a rational producer will increase production until the marginal cost is higher than the price the market will pay him for his goods. P.2, Whish.
[4] This becomes particularly necessary where allocative efficiency is achieved because if marginal cost equals revenue received, the best way to generate more profits for a business is to reduce the costs to the business. Stiff competition in the market will, in theory, ensure that striving for such cost effectiveness in production will be necessary simply to remain in the market. In the alternative, where there is a monopoly

through "perfect competition," a theory based on numerous assumptions,[5] and relying on the existence of numerous competitors.[6] Whether competition need be *actual* or merely *potential* stimulates much debate.[7] This theory is influential in European economics and justifies the regulation of both abuses of a dominant position and agreements between competitors.[8] It is also static and, as a general proposition, the Community prefers the "workable competition" model.[9] Less reliant on abstract theory, it promotes an

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or very limited competition, it is argued that a business will not require to maximise productive efficiency and will instead become "x-inefficient." See Liebenstein, *"Allocative Efficiency vs X-Efficiency"* (1966) Am Ec Rev 392.

[5] The following are the main assumptions of the perfect competition model; firstly, there are on any market a large number of both buyers and sellers; The different sellers within the market all produce homogenous goods; Consumers have perfect information about the market (One might ask whether this could be so in the EC, given that in a pan-European market for specific products the existence of may different currencies causes immediate problems for consumers wishing information on pricing differences); Resources may flow freely between different economic areas; There are no barriers to entry; There are no barriers to exit.

[6] This is emphasised by the fact that pure monopoly is often sited as the direct opposite of perfect competition, and is said to result in inefficient resource allocation. See p.6, Julian Lonbay (ed.), *Frontiers to Competition*, Wiley Chancery Law, 1994, where it is said that on a partial equilibrium analysis, the perfect competition price will equal marginal cost. But "under monopoly, price is above marginal cost; the monopoly restricts its output to a level below that which would obtain under competition. Moreover, the monopolist earns super-normal profits (which are not eliminated by competitive entry), and there is an overall loss of welfare to consumers (and society) due to prices exceeding marginal costs of production."

[7] A debate which has at its core questions about the role of barriers to entry. The rationale is that a firm which finds itself in a position of strength in a market may feel able to reduce its output and, due to a lack of competitors, this will have the perceptible effect of raising the market price of goods as fewer are available. Not only does this reduce allocative efficiency as there may be potential customers who could and would purchase goods at a price nearer to marginal cost but cannot afford to do so at this raised cost, it may also create the previously noted "x-efficiency." But regardless of how many actual competitors exist in a market, there may be numerous potential competitors who would enter the market if a dominant were to begin acting inefficiently. The ability of a firm to do so depends on the *extent* of barriers to entry i.e. the higher the barriers, the harder entry becomes. Bain, in *Barriers to New Competition*, (1956) Harvard University Press, Cambridge, Mass., listed absolute cost advantages, economies of scale and product differentiation of existing competitors as barriers. The Chicago school is critical of such broad interpretations, arguing artificial and contrived barriers must be distinguished from barriers arising from superior efficiency. See especially Bork, *The Antitrust Paradox* (1978) New York, Basic Books. They place much emphasis on Government regulation as a major barrier.

[8] The agreements requiring regulation would likely on this analyses be horizontal because they would decrease the number of competitors in a market and, potentially, could help create a position of dominance for the firms which is in direct contravention of the aims of perfect competition. It will be seen later that the EC's regulation of vertical agreements, often a stimulus in strict economics to increased inter-brand competition, is criticised as taking account of non-economic goals.

[9] See Case 26/76 Metro v Commission [1977] ECR 1875. Paragraph 20 says workable competition is "the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement, the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors." See also Clark, *Toward a Concept of Workable Competition*, (1940) 30 Am Ec Rev 241; Easterbrook. F.H., *Workable antitrust policy*, (1986) 84 Michigan L Rev 1696; Sosnick, *A critique of Concepts of Workable Competition*, (1958) 72 Qu J Ec 380. P.523 of 2 part book on EC law.*****

appropriate and *adequate* level of competition.[10] The unfettered market indicates, through the price system, the most efficient allocation of resources.[11] It is argued that intervention will facilitate inefficiency by distorting these indicators, though such arguments may concentrate solely on static inefficiency to the detriment of broader considerations of competition.[12]

The Community takes a broader view of competition considerations than economic theory would allow. This is a necessary consequence of the Communities constitutional context which has broader goals than economic efficiency.

The Constitutional Context

As a preamble, the Union is constituted by fifteen States each with divergent legal systems,[13] economies, currencies, values, languages and cultures. European competition policy is but one instrument by which convergence is encouraged, and its development is clearly influenced by this background. Historically, industrial cartelisation was common, as were state monopolies and aid to troubled sectors or regions. Support for small and medium-sized enterprises was common,[14] being linked with ordoliberal notions of

[10] p.8, Rodger. B., *Competition Law and Policy in the European Community and United Kingdom*, 1999, Cavendish Publishing Ltd, London. One might ask what is def+ined as "appropriate" or "adequate". It suggests a very interventionist approach and at least one commentator has expressed grave concerns at such a proposition. See p.91, Korah, V., *EEC Competition Policy – Legal Form or Economic Efficiency*, (1986) 39 Current Legal Problems 85. However, the Commission have indicated support for this in annual reports.

[11] A point stressed as important in 1980's American Antitrust enforcement at p.71, Bodoff, J., *Competition Policies of the US and the EEC: an Overview*, [1984] ECLR 51. The basic premise is that long-term these indicators allow the best chance of efficient resource allocation and so interference by Government which alters the indications from the price system can lead to inefficient outcomes.

[12] Static inefficiency is where an undertaking abuses its position of dominance to keep production and consumption below the optimum level thereby maintaining higher prices. But there are other elements to efficiency, such as reduced technical efficiency when sheltered firms fail to optimise this and dynamic inefficiency whereby product innovation stalls. See Sauter., W., *Competition Law and Industrial Policy in the EU*, Clarendon Press, Oxford, 1997. p.117. Note Chicago concentrated mainly on static inefficiency.

[13] As an extension to this category, we might add that each Member State may affect their own economy through subsidies, taxes, state aid in both grants to businesses and specific area development and policies on Research & Design, among others. Of course the Union's purpose is to converge these, but the starting blocks will naturally affect the end result.

[14] p.56, Bodoff, J., *Competition Policies of the US and the EEC: an Overview*, [1984] ECLR 51. In the post-war era as economies began to converge, this concern was heightened as firms that had performed satisfactorily in protected national markets were exposed to greater competition as markets opened up.

competition as a means of controlling economic power.[15] Large, powerful economic institutions are considered a threat to individual freedom[16] and, perhaps, democracy.[17] Hence, Article 82 requires firms to act *as if* subject to competition.

Perusing the Treaty is informative in placing competition in a constitutional context. The Communities general aims, both economic and social, are set out in Article 2[18] with completion of the internal market being quintessential. One instrument provided to achieve this is "a system ensuring that competition in the internal market is not *distorted*."[19] A literal interpretation might suggest market forces are best placed to achieve this,[20] but there are many other instruments provided, including the four freedoms and provision of social and industrial policies.[21] The lack of hierarchy among these provisions, combined with the competition provisions being interpreted teleologically from Article 3, prevents competition being considered independently from this economic and social context. This partly explains the lack of an efficiency focus.

The competition provisions in Chapter V give regard to factors not traditionally associated with competition analyses, although the interpretation is perhaps more market orientated.[22] Regarding the behaviour of undertakings, Article 81(1)[23] is *capable* of an

[15] The Ordoliberal School was German and clearly had a strong influence on EC law. See 2 Part EC book, p.531. This is perhaps the one instance in which competition may be seen as a value in itself.
[16] Gerber, D., *Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe,* (1994) 42 American Journal of Comparative Law 25.
[17] Karl Van Miert, one time Competition Commissioner, is attributed with saying that as well as the general goals embodied in the treaty, both economic and social, competition must also have regard to safeguarding "a pluralistic democracy, which could not survive a strong concentration of economic power." Frontier Free-Europe (May 5,1993). Then again on the 11th of May, "We can have no meaningful democracy if economic power is concentrated in the hands of a few powerful individuals or corporations." Quoted in Sauter, W., *Competition Law and Industrial Policy in the EU*, Clarendon Press, Oxford, 1997. p.121.
[18] The community, by establishing a common market, aims to promote harmonious and balanced development, increasing living standards, and bringing about closer relations of Member States. The Treaty on European Union added some new rhetoric to this list, but the above give a relevant flavour of the aims.
[19] Article 3(g)
[20] p.99, Synder, F., *New Directions in European Community Law*, 1990, Weidenfield and Nicolson. It is suggested that not only would such an interpretation be based on an over-simplified view of language, it also suggests that free market forces would produce only beneficial results.
[21] See Article 3 in general.
[22] p.447, Jebsen, P., & Stevens, R., *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*,
[23] It states that "….all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect

efficiency-based analyses similar to that employed in the US with which it shares strong resemblance.[24] However, 81(3) diverges from this approach by granting exemption to restrictive practices when they achieve other desirable goals. These include the improved distribution of goods or promoting technical or economic progress, which might be considered to promote efficiency in a broader sense.[25] The requirement that consumers gain a fair share of the benefit suggests broader considerations than mere efficiency, in that there must be clear gains to this class,[26] though in practice this is relatively easy to satisfy. However, as "improvement" and "progress" are objective values, the exemption tool cannot sustain decisions over the long-term that clearly conflict with the basic prohibition in the name of some other policy.[27] Nevertheless, wider policy issues are clearly accounted for in Article 81(3).

Article 82 emphasises the protection of competitors rather than competition, by giving examples of abuses with reference to notions of "fairness,"[28] prejudice to consumers[29]

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the prevention, restriction or distortion of competition within the common market……." It then gives specific, though not exhaustive, examples of such behaviour i.e. fixing of purchase or sale prices, limiting or controlling production, sharing of markets, placing other trading parties at a disadvantage by applying dissimilar conditions and forcing parties to accept supplementary obligations in contracts unrelated to the main subject of the contract.

[24] p.67, Bodoff, J., *Competition Policies of the US and the EEC: an Overview*, [1984] ECLR 51. She suggests that there are strong parallels with section 1 of the Sherman Act, as well as sections 2 and 3 of the Clayton Act and of the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act. The fact Art.81 gives examples of such prohibited behaviour is similar to some of the above American provisions, and similar restraints of trade are outlawed on both sides of the Atlantic.

[25] An examination of the block exemptions that were implemented on the basis of this amply highlights the kind of benefits considered desirable, such as Specialisation , Franchise and Research & Development.

[26] Exemptions have been used to allow horizontal agreements, such as crisis cartels and agreements between SME's. Certain agreements that further environmental considerations have also been permitted. though often the benefit to consumer's test will be satisfied relatively easily if production efficiencies arise etc.

[27] p.82, Van Der Esch, B., *EEC Competition Rules: Basic Principles and Policy Aims*, (1980) Legal Issues of European Integration 75. Thus she argues that while Art.81(3) is a policy instrument of the first order, the objective nature and scope of this provision means a justifiable economic basis for decisions taken under it must be sustained. It is not possible to disassociate it from the basic prohibition found in Art.81(1).

[28] Art.82(a) says abuses consist in "directly or indirectly imposing *unfair* purchase or selling prices or other *unfair* trading conditions." Standards such as fairness do not truly have a place in economic theory – they are value judgements.

[29] Art.82(b) says abuses consist in "limiting production, markets or technical development to the prejudice of consumers." It does seem likely that such actions would nevertheless be to the detriment of consumer welfare under a strict economic analyses, so specifying consumers interest may be less influential on interpretation than standards such as fairness.

and the placing of certain trading partners at a competitive disadvantage.[30] This has seen "exploitive" abuses such as excessive prices condemned[31] and duties to supply have been imposed on dominant firms.[32] The EC thus looks beyond efficiency and is, on occasion, inclined to intervene rather than allow market self-regulation; a fact emphasised by the inclusion of state aid provisions. These serve a dual purpose. They acknowledge the distortive effect on competition of State Aids and provide powers to regulate this,[33] while recognising that other economic and social goals may legitimately be served through state aids and therefore deems some compatible with competition law.[34] Finally, State's cannot breach competition law through the grant of special or exclusive rights, nor through use of public sector undertakings.[35] This does not suggest an intention to organise society purely in line with competition theory, as evidenced by the derogation's contained in Article 90[36] which look to wider social goals. The fact that interpretation of "distortion of competition" varies between these provisions emphasises the broader focus.[37]

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[30] Art. 82(c) say's abuses consist in "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

[31] United Brands v Commission [1978] ECR 207.

[32] As an example, ICI & Commercial Solvents v Commission [1974] ECR 233.

[33] It is a fairly crass observation, but aid to particular undertakings or sectors alters the cost structures of the recipient and would therefore allow such undertakings a competitive advantage to the detriment of competitors. Perhaps of most concern to economists versed in the efficiency ideal, such aid could support and protect firms that are inefficient and who would perhaps benefit from change spurred on by the unfettered forces of the market.

[34] As a flavour of what such goals consist of, Art.87(2) deems aid of a *social* character granted to individuals as compatible with the market. Similarly, Art.87(3) allows that certain aid may be compatible with the market, such as that given to promote economic development within regions of high unemployment and low standards of living, aid given to promote projects of common European interest or remedy serious economic disturbances, and that given to develop certain economic activities. Perhaps the principle conclusion from this is that there is no outright belief in the self-correcting nature of the market, with greater emphasis placed on intervention where deemed necessary. It also supports aid of a social character, suggesting a readiness to ignore efficiency considerations.

[35] Article 86. That is not to say that the Treaty aims to remove a Member States rights to set up and run public undertakings. The treaty is completely neutral on the matter of property ownership. It simply demands that in a mixed economy there is no abuses by public bodies, or those given special right through public sanction, of this position. See Hancher, L., *Community, State, and Market*, in Craig. P. and de Burca, G., *The Evolution of EU Law*, 1999, Oxford University Press, New York.

[36] Art.86(2) states that "undertakings entrusted with the operation of services of *general economic interest* or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, *in so far as* the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them……"

[37] A fact enunciated by Synder., F., *New Directions in European Community Law*, 1990, Weidenfield and Nicolson. at p.97. Art.81(1) has prevention and restriction interpreted almost interchangeably with distortion. See *Consten & Grundig v Commission [1966] ECR 299*. In Article 87, it often presumed any aid granted to an undertaking will distort competition *unless* exceptional circumstances are present.

Competition exists alongside other ideals, lacking a clear focus in part because of the existence of these externalities. The hierarchy of objectives and rights within which competition takes its place is hard to delineate. Frazer[38] addressed this, asking whether competition was subject to constitutional norms or was, indeed, one itself. He concluded, by asking whether a clear constitutional norm such as the right to property might limit the scope of acts taken in pursuing a competition policy,[39] that general economic rights do not limit competition policy. But neither is competition a constitutional norm, being one instrument (among many) for the achievement of policies far wider than creating a competitive market. These were extended by the Maastricht Treaty with new innovations such as industrial,[40] environmental,[41] and cultural[42] policies. The complex relationship of competition with such factors is demonstrated by litigation. *Huiles usagees*,[43] for example, held that the principle of free and fair competition was a general one to be upheld. In the instant case, however, restrictions imposed by French law implementing a directive on environmental protection were lawful in light of the community's environmental policy objectives.[44] That is not to say that environmental policy is superior to that of competition – there were restrictions set down by the Court[45] – but fulfillment of one policy could restrict the operation of another. Furthermore, the Treaty anticipates that competition policies impact and scope will vary depending on the sector in question.[46] Indeed consideration of the interplay of different community policies against a

[38] Frazer., T., *Competition Policy after 1992: The Next Step*, (1990) MLR 609.
[39] p.613, Frazer., T., *Competition Policy after 1992: The Next Step*, (1990) MLR 609. Most especially he discusses the case of *Hauer* (Case 44/79 Hauer v Land Rheinland-Pfalz [1980] 3 CMLR 42) where pursuant to competition policy the Council had passed a regulation prohibiting the planting of new vines in certain areas. It was argued that this infringed the constitutional right to peaceful enjoyment of property and as such the regulation was illegal. The ECJ did not accept this, partly on the basis of a "general interest" loophole in the first protocol to the ECHR, whereby they held restrictions imposed by competition law justified restricted use of property. It was said that the claimants were not *deprived* of a property right.
[40] Article 130.
[41] Article 130r.
[42] Article 128.
[43] Case 240/83 Procureur de la Republique v Association de defense des bruleurs des huiles usagees [1985] ECR 531.
[44] The case facts are handily summarised by Synder., F., *New Directions in European Community Law*, 1990, Weidenfield and Nicolson, at p.94.
[45] The Court said that such requirements that are restrictive of competition "must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection which is in the general interest. [1985] ECR 531 at 549.
[46] A view expressed by Van Der Esch., B., EEC Competition Rules: Basic Principles and Policy Aims. pp.81-82. He suggests this may be seen by considering Article 83, especially 2(c), and is in line with the ECJ's application of workable competition. .See also Case 26/76 Metro v Commission [1977] ECR 1875.

sectoral context may help explain decisions such as *Huiles usagees.*[47] But whatever the relationship of these factors, being enshrined in the Treaty means they cannot be ignored should enforcement philosophy change. They are unlikely to either, whilst enforcement remains with a central body having vast influence in the creation of *all* Community policies. This institutional context is important.

The Institutional Context

The Commission plays a central role in the proposal, implementation and administration of all spheres of community policy, making the potential for and occurrence of cross-fertilisation of traditional competition policy with other considerations obvious.[48] The power of the Commission accentuated this, the bifurcation of Article 81 combined with their very wide interpretation of 81(1)[49] allowing them to shift analyses on to 81(3) where they have *exclusive* competence and must be notified.[50] Hence other judicial and administrative bodies within the Community have a limited role, especially compared

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Paragraph 20 says workable competition is "the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement, the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors."

[47] I do not state this as a general proposition of fact, but you might argue that in certain industries there is a more pressing need of justification for, say, policies protecting the environment to stand even though they create a restriction to competition. I have in mind situations where a by-product of the industry might be to cause damage to the environment. Similarly within the competition provisions the interplay of prohibitions on distortion of competition with the state aid rules might be said to allow economic distortion when there are more pressing social matters, such as assisting companies who are a major employer and therefore of major importance to the economy of a particular area

[48] See p.58, Hawk., B., *The American (Anti-trust) Revolution: Lessons for the EEC?*, [1988] ECLR 53. He succinctly puts it thus: "….centralisation in a single institution…….of the formulation and execution of different Community policies permits an easier integration of narrower microeconomic competitive concerns like allocative efficiency with broader economic, social and political concerns such as industrial policy and foreign economic policy."

[49] The early decision in *Consten & Grundig v Commission* [1966] ECR 429 adopted an approach whereby restriction is defined as interference or limitation of the freedom of either of the parties to the agreement. It was noted earlier that this provision might have been interpreted in a way more closely related to American antitrust analyses. A narrower interpretation would not make Art.81(3) with its additional non-efficiency (allocative efficiency, at any rate) criteria redundant, it would simply have reduced the number of cases notified to and dealt with by the Commission. Perhaps it might have deprived them of a major policy instrument.

[50] Apart from making the satisfaction of criteria in Art.81(3) necessary, this reduces the capacity of the Courts of the Member States to deal with disputes as they have no authority to give exemptions. It partly explains the lack of private litigation in the EC, which contrasts starkly with the US.

with the US where private litigation abounds.[51] Although they initially required time to gain experience of the markets,[52] the eventual block exemptions were limited in scope.[53] This led to suggestions that their reluctance to develop a rule of reason analyses under 81(1) reflects their desire to maintain a key policy instrument.[54] Reform of the block exemptions,[55] with wider catchment and more economic analyses, reflects the Commission's desire to concentrate their efforts on areas requiring policy development.[56] Given the omnipotence of the Commission with regard all the Competition provisions, consideration must turn to the influence of other policy and its interaction.

Considerations in Competition Enforcement

It is not possible to enunciate a clear dichotomy of the goals or policies of competition law in terms of integration, efficiency and *other* non-competition considerations. Integration, aimed at completing the single market (herein referred to as "SEM"), is arguably a long-term efficiency plan yet decisions to promote this may conflict with traditional efficiency-based decisions. It was noted previously that non-economic criteria, such as fairness, are accounted for in the competition provisions. However, such policies that appear to be more social or consumer orientated than are often said to directly relate to the creation of an efficient and competitive community, especially those promoting the restructuring made necessary by completion of the SEM. The Community system does not submit easily to the drawing of arbitrary lines between its policies.

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[51] Note that in the US private enforcement is encouraged by contingency fees, treble damages and class actions. The nature of judicial enforcement perhaps explains the use of economic analyses more prominently, as it is a simpler formula to apply, and more predictable for businesses.

[52] Indeed recital 4 of Reg. 19/65, the enabling regulation for block exemptions, demanded that the Commission gained such experience first by the issuing of decisions.

[53] The main feature being the limitation of application to agreements between two undertakings and involving only goods for resale. Another important consequence was that they are shaped by historical experience and this made them ill-equipped to anticipate future developments, such as the impact of technology, creating "regulatory drag." See p.605, Maher, I., Competition Law & Intellectual Property Rights, in Craig. P. and de Burca, G., *The Evolution of EU Law*, 1999, Oxford University Press, New York.

[54] One that might be used for the implementation of both economic and other policies. It is worth considering that, especially in the early years of the community, a rule of reason analyses might have granted far more discretion to the judiciary of the Member States to apply competition rules at a time when they did not have the experience necessary to do this. This may have led to differing interpretations and enforcement of competition across the Community.

[55] "Green Paper on Vertical Restraints in Competition Policy" COM (96) 721 final, 22 Jan 1997;

The Commission clearly regards the concept of efficiency, discussed previously, as a policy goal in itself.[57] But the necessity of merging national markets into one has required deviance from traditional economic analyses. Nevertheless, the SEM *program* is seen as stimulating efficiency by reducing costs and promoting cross-border competition through mutual recognition of products, encouraging firms in national markets to reorganise and hopefully gain economies of scale by exposing them to new competition, and through the foregoing thereby increase innovation and investment.[58] In many ways traditional efficiency and SEM efficiency analyses are concomitant, but in breaking down non-tariff trade barriers erected along national lines the Commission often adopts a more interventionist role than normal economic theory might justify. With regard non-price vertical restraints, such as exclusive distribution agreements, many economists' view the loss of intra-brand competition as justified by gains in inter-brand competitiveness.[59] Yet *Consten & Grundig* applied Article 81 to vertical restraints.[60] Rejecting the forgoing argument, they placed market integration before economic analyses, aiming at creating toe SEM.[61] The grant of Intellectual Property Rights are similarly divisive, the Court distinguishing between the existence and *exercise* of such rights and applying Article 81

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[56] Commission of the EEC, 28th Report on Competition Policy: 1998, (Brussels, 1999) at p.14.

[57] Commission of the EEC, 1st Report on Competition Policy (Brussels, 1972), p.11. "An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralised decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the *sin qua non* for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society."

[58] p.12. Johnson, D., *The Single Market: Competition in Context*, in Davidson, L., Fitzpatrick, E., & Johnson, D., *The European Competitive Environment Text & Cases*, 1995, MacMillan, London.

[59] The Chicago school would certainly support such an analyses. For a good summary, see Korah, V., *EEC Competition Policy – Legal Form or Economic Efficiency*, (1986) 39 Current Legal Problems 85. Note especially the "free-rider" arguments etc.

[60] Case 58/64 *Consten and Grundig v Commission* [1966] ECR 299. At p.340 they stated that any such agreement between producer and distributor "…which might tend to restore the national divisions in trade between the Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their appearance, could not allow undertakings to reconstruct such barriers. Article 85(1) is designed to pursue this aim, even in the case of agreements of undertakings placed at different levels in the economic process."

[61] One of the problems with vertical restraints, such as exclusive distribution agreements, that is not self-evident is that, especially in the early days of the community, they were often organised along national lines. Products would be distributed by different distributors depending on the State in question. The major problem arose when an exclusive distribution agreement between the supplier and a distributor for one state

to the latter,[62] where absolute territorial protection is granted.[63] Article 82 reflects the integration goal, with price discrimination potentially being an abuse if it results in unjustified price disparity between Member States.[64] Finally, the requirement that States open up all markets, including those where state monopolies traditionally pertain, to competition save where the "collective goods" rule applies is a logical extension of the integration principle.[65]

Although it can be argued that the economic objectives of efficiency and integration are consistent a long-term view,[66] there are certain policies of apparently social character which appear to conflict with economic policy. An example is the "crisis cartel," a price altering horizontal agreement which has been exempted so as to deal with industrial excess capacity.[67] Market forces, while capable of regulating a reduction,[68] would not necessarily eradicate the *in*efficient firms, especially those gaining subsidies. These cartels allow negotiated *restructuring* for "sick" industries, a position cloaked as much in

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imposed obligations on the supplier to ensure that distributors of the same product in other states did not trade or sell to parties from the first distributors territory.

[62] Need a page ref. It in conclusion of piece starting around p.602 of that bloody book.******

[63] The distinction made is between "open" and "closed" licenses. There is a fundamental conflict between notions of free competition and the granting of a legally sanctioned monopoly to a producer. The reason for granting such a right would of course be similar to the "free rider" arguments regarding exclusive distribution, namely it encourages parties to take the financial risk of developing new products in the knowledge that their potentially risky investment is protected. Their investments are protected by exclusive rights, meaning other parties who have not taken such a risk cannot "free ride."

[64] United Brands v Commission 1978 ECR 207.

[65] See Hancher, L., *Community, State, and Market*, in Craig. P. and de Burca, G., *The Evolution of EU Law*, 1999, Oxford University Press, New York. The "collective goods" rules are those detailed above under Article 86.

[66] Johnson, D., *The Single Market: Competition in Context*, in Davidson, L., Fitzpatrick, E., & Johnson, D., *The European Competitive Environment Text & Cases*, 1995, MacMillan, London. p.24. "In fact, it is accurate to describe the single market programme as an extension of traditional competition policy and therefore as part of competition policy itself."

[67] There are conditions which must be fulfilled in order to grant an exemption. Clearly improvement of distribution and production is satisfied if the inefficient firms are the ones removed. Proportionality and the ensuring that competition was not eliminated will depend on the individual case. Similarly, the condition that benefits must outweigh the disadvantages is likely to be satisfied in such a case. However, one might ask how consumers are to receive a fair share of the benefit. See p.92 Hornsby., S., *Competition Policy in the `80's: More Policy Less Competition?* [1987] ELR 79. He notes the ECJ try to justify this with a bit of fudge, saying benefit arises where the agreement provides "competitive and economically healthy supply structures…..without being deprived of the benefits of competition during the currency of the agreement." Further benefits arise where undertakings become more cost effective.

[68] p.74, Bodoff. J., *Competition Policies of the US and the EEC: an Overview*, [1984] ECLR 51. She suggests that any other means of restructuring will merely make an inevitably painful process more drawn out and inefficient than a sharp shock. Such faith in the market forces may not be wholly justified and seems at odds with community ideals.

social as economic justification.[69] State Aids form another example, having obvious distortive effects yet being authorised in certain circumstances.[70] Their general purpose is to preserve current market structures or to facilitate change in the present market and industrial structures.[71] But regional and sectoral aid clearly recognises the social problems caused by struggling industries or sectors, and may help alleviate employment problems etc.[72] However, to claim policies which look to social considerations might conflict with economic policy strictly construed would overlook restructuring of industry, a common rationale for crisis cartels and state aids, as being necessary to the integration process. Sauter[73] noted the exceptional importance of wider public policy goals to the community because they further market integration. The SEM anticipates long-term *efficiency*, but it cannot be completed without *reconstruction*. Thus policies promoting reconstruction may conflict less with economic policy than at first appears, even where they apparently promote non-economic policy too.

The treatment of Small and Medium-Sized Enterprises (SME's) amply demonstrates the interplay of policies. Pure competition emphasises the advantage of many competitors and prevention of horizontal agreements. Yet they gain special privileges, partly because encouraging them to compete across national boundaries furthers the integration goal,[74]

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[69] Hornsby, S., *Competition Policy in the `80's: More Policy Less Competition*, [1987] ELR 79. In a particularly useful article he discusses how the difficulty in justifying such cartels has led the Commission to rely on ECJ statements more related to the maintenance of employment, such as the decision in Case 27/76 *Metro* [1977] ECR 1875.

[70] Of course the basic principle is that they are incompatible with the common market, but derogation's are allowed therefrom.

[71] Situations where State Aid may be justified is where a state must provide goods or services which are desirable but which are not available privately as people wait for someone else to provide them, so they can "free ride." Other examples are where industries produce products with externalities (such as pollution, where aid helps in providing solutions), where the size or risk of projects is too great for the private sector, where a market is not contestable without state help, or where industry must attain new technology so as to be competitive or produce economies of scale. See p.28 Barnes. I., & Barnes, P., *The Distortion of Competitive Forces: State Aids*, in Davidson, L., Fitzpatrick, E., & Johnson, D., *The European Competitive Environment Text & Cases*, 1995, MacMillan, London.

[72] ECOSOC did suggest in their Economic and Social Consultative Assembly paper of 1992 that the process by which such aid is allowed to be granted might require more stern procedures to ensure there are clear principles and that it is granted uniformly and on same basis across the community. It would be unfair were one state's industry to gain an advantage because of a looser approach to aid than is seen in other states.

[73] p.118, Sauter, W., *Competition Law and Industrial Policy in the EU*, Clarendon Press, Oxford, 1997.

[74] p.15 Rodger. B., *Competition Law and Policy in the European Community and United Kingdom*, 1999, Cavendish Publishing Ltd, London.

and may include exempting horizontal collaboration which improves research and design or technology. There are two justifications; firstly, such collaboration results in integration between firms, often in different markets, and thus furthers integration;[75] and secondly, exposure to an enlarged market provides many opportunities and threats, though often competitiveness requires a certain scale, thus collaboration between two SME's may ensure more effective competition to large market participants than if they act separately.[76] This furthers the restructuring required by the SEM and the technological progress required improving Europe's competitive position with third parties. It reflects notions of fairness, the desire to limit economic power and the importance of such firms to community employment.

Completion of the SEM[77] gave new impetus to the restructuring requirement. The Commission believed this would open and amalgamate previously isolated markets to competition and thereby squeeze profit margins, forcing firms to efficient and improve innovation or risk having to leave the market.[78] Changes in market structure and size necessarily require restructuring of industries to take advantage of economies of scale. Increased merger activity is predicted.[79] It may also herald a change in emphasis from market integration to a looser market regulation. Reform of the block exemptions for vertical restraints demonstrate this, placing greater emphasis on economic analyses[80] and recognising the changes in market structures as necessary for industries to remain

[75] They are most keen on such arrangements when the firms are located in different Member States. As an example, Sopelem/Vickers, OJ L70/47 (13 March, 1978)

[76] Thus the interrelation of the integration goal and efficiency might clearly be seen. It could certainly be argued that the position regarding SME's is in no way related to "efficiency" considerations, given that protecting potentially less efficient firms at the expense of larger more efficient ones may happen – but seen as a long-term move and basing analyses more on the market structure one might argue efficiency is still a major goal. It also demonstrates the more regulatory approach of EC Competition policy.

[77] Supposedly by 1992.

[78] See Frazer, *Competition Policy after 1992: The Next Step*, (1990) MLR 609. pp.609-611.

[79] Commission of the EEC, *28th Report on Competition Policy: 1998* (Brussels, 1999). p.17 Note this was stated in relation to the Euro but on the basis of reinforcing the positive effects of the SEM. They also state, interestingly, that they see no problem in a resultant decrease in the number of market participants (subject to market entry remaining easy) as the inefficient exit and the efficient expand. This is partly because the widening markets mean that while the number of domestic suppliers might be reduced by the competition a far wider market means there are more actual and potential competitors available.

[80] "Green Paper on Vertical Restraints in Competition Policy" COM (96) 721 final, 22 Jan 1997;

efficient. These include technological changes,[81] which encourage *vertical integration* as necessary to competition.[82]

Completion of the SEM coincided with the policy innovations of Maastricht, including the new industrial policy.[83] Such innovations might be viewed as externalities conflicting with competition analyses. Yet the Commission saw industrial policy as an effective and coherent measure with which to implement the structural adjustment necessary to promote *competitiveness*, providing a *horizontal* framework to remedy structural deficiencies where the market fails to do so.[84] This reflects an interventionist approach, but they maintain it promotes the same goals as competition.[85] Any measure adopted must, after all, be in "accordance with a system of open and competitive markets."[86] It complements the four freedoms, helping the integration process whilst simultaneously allowing account to be taken of the co-ordination of economic and social policy.[87]

Competition, viewed in the wider sense of market integration, might justifiably account for other externalities such as social and environmental policies. Economic theory tends to concentrate on the parties to a transaction, whose actions "can have consequences for other parties of which an unregulated market would not take account."[88] Separate regulatory provisions usually govern such matters with competition analyses as an instrument confined to achieving only traditional competition goals. The EC has such provisions, but the constitutional placement of competition as one instrument among many to achieve a single market and thereby economic and social goals means external

[81] As an example, the paper suggested that one of the biggest impacts on retail distribution is the automation of stock inventories, especially Just In Time. Such methods make strong relationships between parties at different levels of the distributive chain a necessity.
[82] The competitive advantages of closer vertical integration has to some extent altered the market so that instead of having, for example, retailers competing against each other you effectively have vertical chains competing.
[83] Art.130(f).
[84] See Commission of the EEC, *21st Report on Competition Policy*, 1991 (Brussels, 1992), p.42.
[85] p.42, ibid. They state the three goals of competition policy and industrial policy to be synonymous, namely an open trade policy, completion of the internal market and an active competition policy. This will all, in theory, be to the benefit of consumers. It's just that in strict economic theory such measures, especially horizontal ones, are not beneficial.
[86] Art.130(1) EC.
[87] Sauter, W., *Competition Law and Industrial Policy in the EU*, Clarendon Press, Oxford, 1997. pp.113-114.

factors are more influential. National environmental policies have the potential to divide markets[89] and, whilst the four freedoms may deal with trade barriers created thereby, a common environmental policy was adopted.[90] In addition, the Commission has used competition law to promote this environmental policy by exempting agreements, potentially anti-competitive, between firms which have an environmental goal.[91] Similarly, creating a purely single market requires that social policy be reformed, as economic distortions can occur through "social dumping."[92] The extent that such considerations can and should be considered in competition analyses is unclear. The allowance of state aids has aspects of social policy behind it and the ECJ have stated, albeit in the context of the merger regulation,[93] that in considering whether to permit concentrations (often part of the restructuring necessary for integration) regard may be necessary to any adverse effect on social policy. It is impossible to divorce social consequences from such economic decisions, and patently taking account of these perhaps conflicts less with competition than at first appears.

Conclusion

The European Community has a complex mix of economic, social and political goals aimed at creating a true *community* of peoples. It is clear that notions of fairness and social justice have a clear influence in policy formulation, the extent to which such ideals are consistent with economic policy being unclear. The certainty of their influence cannot be reconciled easily with economic theories which aim to promote static efficiency as the

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[88] p.533, 2 Part Book.****

[89] A more stringent national environmental policy in one state creates non-tariff barriers to the free movement of goods.

[90] Article 130(f), introduced at the TEU, allows Member States to adopt more stringent measures even than the Community but only so far as this does not conflict with other treaty provisions, such as free market competition.

[91] See p.34 of Book A.*****

[92] If different states have different standards, such as in employment conditions etc, then countries with a lower standard might gain a competitive advantage.

[93] Case T-96/92 Comite d'Entreprise de la Societe Generale des Grandes Sources & Others v Commission [1995] ECR II-1213. See paragraph 28 and 29. The merger regulation does state in the thirteenth recital in the preamble that "the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a."

sole goal and, in this respect, they might be said to conflict with economic policy even if not precluded by it.

The extent of such conflict becomes less pronounced when one considers that the Treaty has creation of the SEM as the cornerstone for achieving both its economic and social goals. Moreover, it is clear that creating the SEM naturally requires a degree of social policy integration to counteract such policies distortive effects. The Treaty provides both economic and social instruments to achieve integration but, due to there being no hierarchy between them, the institutions may adopt competition decisions that are influenced by such externalities. Clearly this would conflict with traditional efficiency maximisation theories, but competition policy does not contain such focussed, self-evident, goals.

If it is accepted that the SEM program has within itself the aim of producing a free, competitive and highly efficient market then it may be possible to view such externalities as far more compatible with economic policies than at first appears. This is especially so where apparently social or political goals, such as the favourable treatment of SME's and the granting of aid to troubled industries, might be viewed as facilitating the structural changes required to make the newly created SEM competitive and efficient. Clearly such a view requires a greater belief in the positive effects of market intervention to achieve efficient outcomes, but the consumer should ultimately benefit from the increased competitiveness of industry through lowered costs and better products which an integrated market should produce. That is not to say that every act of the Community, based on the premise of competition policy yet subject to other influences, can be explained in this way. Undoubtedly some decisions do conflict with economic policy. But the lack of a clear dichotomy between the various policies means there is less conflict than might at first appear.

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