THE ANTITRUST REVOLUTION IN EUROPE

EXPLORING THE EUROPEAN COMMISSION'S CARTEL POLICY

Lee McGowan

The Antitrust Revolution in Europe

Exploring the European Commission's Cartel Policy

Lee McGowan

Senior Lecturer in European Studies, Queen's University Belfast, UK

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2009942053

ISBN 978 1 84720 146 1

Printed and bound by MPG Books Group, UK

The Antitrust Revolution in Europe

Preface

Interest in European competition policy has never been higher and the literature has never been richer. In the last decade the European Commission has initiated a thorough review of all areas of its activities stretching from cartels and mergers to state aids and abusive monopolies. Competition policy can certainly be said to have 'come of age', and its recognition in the Lisbon Treaty as one of the few exclusive EU competences has enhanced its prestige and significance for students and researchers outside the two disciplines that have overwhelmingly dominated this policy area, namely economics and law. Yet beyond these disciplines, competition policy is little understood or often appreciated. Political scientists rarely study this area; even those working in the field of European Studies have also tended to underplay or overlook its importance as a European policy in the integration process. The absence of politics has long represented a major gap in the competition literature, and especially when the evolution of competition policy provides us with a great example of the European integration process. Over the last fifteen years, however, a small but growing band of historians and political scientists have finally begun to explore competition policy, stress its significance in the European integration process and shed new light onto the origins and actors as well as analysing the impact of competing economic philosophies and the appropriateness of rival theoretical approaches to understanding developments in this field.

This particular work comes at competition policy from a politics/public policy perspective and its focus on actors, ideas and policy developments aims both to complement and add to the existing economics and legal based literatures. This book explores the European Commission's cartel policy. Cartels have very rarely attracted the attention of political science, and yet cartel-busting has always been one of the foremost activities of the Commission and one that has consumed much of this regulator's time and resources. Cartel policy provides for a truly fascinating account of supranational governance in action as the Commission looks for ever more imaginative means to detect, unearth and penalise cartel offenders. The recent reform of the Commission's anti-trust provisions (through Regulation 1/2003) forms part of this modernisation agenda. It was a significant move and marked the first major overhaul of the Commission's cartel-busting activities since its inception nearly fifty years ago.

Some commentators claim the recent reform package constitutes a 'revolution' (Wilks, 2005), while others have opted to regard it instead as the latest development in a regime that has been continually marked by the neo-liberal turn of the 1980s (Wigger, 2008). Whichever reflects better the recent transformation of the policy, there is no doubt that for those of us interested in the area of competition policy (and cartel policy) we are living in interesting times and especially as we wait to see how the credit crunch and worst recession since the 1930s impacts on the competition arena.

Before commencing, however, there are a few stylistic points that need to be addressed at the outset. First, with regard to the numbering of treaty articles, this book uses the post-Amsterdam (post-1999) numbering only. Thus, Article 81 is referred to when cartel/restrictive practices policy is discussed (rather than its former incarnation as Article 85). This book avoids using both to prevent any unnecessary confusion although technically it should refer to Article 85 from 1958–1999. Another word of caution is needed on the numbering of treaty articles: at the time of writing the Treaty of Lisbon had still not been ratified by all 27 EU member states, with the Czech Republic, Germany and Poland still to approve the document. The treaty was ratified by Ireland at the second referendum attempt in October 2009 and approval came shortly thereafter from both Poland and the Czech Republic. The treaty finally came into force on 1 December 2009 and renumbered the treaty provisions. Under the Lisbon Treaty the competition articles now run from Articles 101–110.

The Lisbon Treaty will also adopt the term European Union throughout the entire treaty base. This book uses EU when referring to competition policy although it is currently technically correct to speak of European Community (EC) competition law. On a similar point it should be noted that in 1999, DGIV (Directorate-General Four) of the European Commission became DG Competition (or DG COMP). DGIV may be mentioned in Chapters 4 and 5 as the historical evolution of the policy is explored, but otherwise, DG Competition is used throughout.

Finally, I would like thank friends and colleagues for their support as this work was completed. I would like to express my gratitude to all the relevant staff at Edward Elgar for their patience and assistance, to all those people who kindly expressed their views on the draft chapters and the final text and those officials who provided insights into the workings and evolution of EU cartel policy. And finally, I wish to thank my immediate family for their support.

Lee McGowan, May 2009

Abbreviations

ABA	American Bar Association
AMCHAM-EU	American Chamber of Commerce – EU Division
BDI	Bundesverband deutscher Industrie (Confederation of German Industry)
BEUC	European Bureau of Consumers' Unions
BKartA	German Cartel Office
CBI	Confederation of British Industry
CDU	Christian Democratic Union (of Germany)
CEECs	Central and East European Countries
CET	Common External Tariff
CFI	Court of First Instance
CLP	Competition Law and Policy Committee
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
CSU	Christian Social Union (Germany)
DG	Directorate-General (of the Commission)
DG Competition	Directorate-General for Competition (European Commission)
DGIV	Directorate-General for Competition (prior to 1999)
DTI	Department of Trade and Industry
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECN	European Competition Network
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECSC6	Original six founding members of the ECSC
EEA	European Economic Area
EEC	European Economic Community
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
EP	European Parliament
ERT	European Roundtable of Industrialists
EU	European Union
EUMR	European Union Merger Regulation

EURATOM	European Atomic Energy Community
FDP	The Free Democratic Party (Germany)
FTC	Federal Trade Commission (US)
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Product
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Law against Restraints on Competition)
G8	Group of Eight (industrialised countries)
ICI	Imperial Chemical Industries
ICN	International Competition Network
IT	Information Technology
ITO	International Trade Organization
MEP	Member of the European Parliament
MTF	Merger Task Force
NAFTA	North Atlantic Free Trade Association
NCAs	National Competition Authorities
NTBs	Non-Tariff Barriers
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Co-operation
OFT	Office of Fair Trading
OJ	Official Journal (of the European Union)
R&D	Research and Development
SEA	Single European Act 1986
SEM	Single European Market
SME	Small and Medium-sized Enterprises
SPD	Social Democratic Party of Germany
TEC	Treaty Establishing the European Community
TENs	Trans-European Networks
TEU	Treaty on European Union (Maastricht Treaty) 1992
TFEU	Treaty on the Functioning of the European Union 2009
ToA	Treaty of Amsterdam 1997
ToN	Treaty of Nice 2001
UNCTAD	United Nations Conference on Trade and Development
UNICE	European Employers' Association (now Business Europe)
WTO	World Trade Organisation

Contents

1. The origins and scope of European competition policy: themes and purpose

Some 53 years after the signing of the Treaty of Rome there is ample scope to debate the achievements, near misses and failures of the European Union (EU). One aspect of European governance, however, is undeniable, namely the priority and centrality of the competition principle throughout the history of the European integration process. As an issue of low politics, and one that is particularly complex, competition policy was arguably an ideal sector for initial functionalist co-operation towards the creation of a common (and later) single market. Even so it must be stressed that competition policy as an idea and logic was controversial in its own right among the states of Western Europe. It was a new departure and consequently, any plans to delegate powers to the supranational level not only were problematic but raised controversies about at which level power should be exerted, how it should be exercised and who should enforce it.

Nevertheless and with hindsight it is clear that these problems were overcome and that the development of competition policy within the EU represents one of the success stories of the entire European integration process and offers one of the first and best examples of supranational governance in action. Indeed, the EU competition policy regime gradually stamped its influence on the perceptions, structures and approaches of the national competition regimes within the EU as the latter have either opted to converge voluntarily with many aspects of the EU competition model or have been coerced into doing so as a necessary part of the accession criteria for the states of Central and Eastern Europe after 2004. This 'ever closer' interaction between the European and national competition authorities has been further boosted through the creation of the European Competition Network, which enables the agencies to share and swap information, and more importantly to develop their own set of norms and values. How did this all happen? Why did competition policy emerge as a suitable policy area for European integration and who are the drivers and actors within the EU regime? This book is very much concerned with unpacking the competition policy regime to provide answers to these

questions and explores the actors, their powers and strategies at establishing European competition governance. Rather than providing a general overview of the full remit of EU competition policy this book focuses its attention primarily on the EU cartel regime and aims to illustrate how the European Commission has pursued cartels and to what extent its battles to uncover, dissolve and penalise cartellisation has been effective.

1. WRITING ABOUT COMPETITION POLICY

Although fewer areas of European public policy may seem to have been as widely researched, debated and analysed than European Union (EU) competition policy, a degree of caution is immediately required, for a closer inspection reveals that interest in this particular policy area has stemmed mainly from the disciplines of economics (including Bishop, 1993; Clarke and Morgan, 2006; Estrin and Holmes, 1998; Motta, 2004) and law (including Goyder, 2003; Jones and Sufrin, 2008; Whish, 2009). In stark contrast, few political scientists have opted to explore competition policy in terms of both research and teaching. Indeed, even most EU scholars (albeit with a handful of exceptions such as Cini and McGowan, 2009; Eyre and Lodge, 2000; McGowan and Wilks, 1995; Doern and Wilks, 1996; Wilks, 2007) have tended to overlook this field of enquiry, simply just acknowledge its significance on passing or dismiss its relevance altogether. This reality holds true for studies of the EU regime as well as studies of the individual national competition regimes. Few undergraduate modules on the EU include competition policy. The complexity and seemingly impenetrable labyrinth of the legal case law and the economic analyses of competition regulation may in part explain this seeming reticence to explore competition, and there can also be a tendency among economists, legal scholars and practitioners to reject a political dimension in the making of competition policy. Mario Monti, a former EU Competition Commissioner, provided an apt illustration when he declared that EC competition policy 'is a matter of law and economics, not politics' (Levy, 2005). Politics certainly plays a role in the regulation of competition and its exclusion (whether self-imposed or not) is simply no longer defensible.

EU competition policy has long represented one of the few areas where the Commission not only is responsible for direct policy implementation but also possesses wide discretionary powers as both a regulator and an enforcer of policy. Fortunately there are now strong signs that these knowledge barriers are finally being broken down as a new generation of political science/public policy researchers (Buch-Hansen, 2008; Büthe and Swank, 2007; Damro, 2006; Doleys, 2007; Lehmkuhl, 2008; Leucht, 2008;

Seidel, 2007; Warzoulet, 2007; Uydin, 2009; Wigger, 2008) shed greater and welcome light on the origins, institutions and workings of EU competition policy.

Politics matters in competition regulation and surfaces in relation to institutional design and powers, issues of transparency, degrees of politicisation, discretionary abilities and questions of legitimacy in the decision making process. Those regulators engaged in cartel enforcement may be surprised to find political scientists mulling over competition policy, but a closer examination of the intense debates surrounding the inclusion of competition in the ECSC Treaty and the shaping of the anti-cartel drive in the EEC Treaty clearly reveal examples of the political sensitivities at play. There can of course be little doubt that competition policy is a matter of economics, just as it is a matter of the law. As Cini and McGowan (2009) state:

> What is often forgotten, however, is that the reasons for having a competition policy, the form that policy takes – both substantively and procedurally – and how the policy is implemented and enforced are all at the core questions of politics. A political dimension demands that we stand back from the micro- and meso-analyses of the competition economists and lawyers to address broader questions of state, economy and indeed society.

Competition policy may not immediately catch the imagination of many political science students. At first glance it seems too arcane and complex, but its less than apt coverage is not so unremarkable. Indeed, let us go further and argue that the paucity of material from political science is part of a wider malaise in EU studies. There is an imbalance, and many of the main economic policy areas (with the exception of the euro) have been overshadowed by a huge interest in the 'high politics' arenas of security and immigration, the politics of enlargement and treaty reform. Although both topical and significant these areas should not be allowed to overlook the core areas where integration has proceeded the furthest. This imbalance has arisen owing to the unwillingness or degrees of uncomfortability for many about engaging with other disciplines, but in part it also occurs because such policy studies do not lend themselves easily to the leading debates within International Relations and Comparative Politics theories and approaches.

It is important for students of politics to engage with competition policy. It is one of only six exclusive core competences of the EU (Treaty of Lisbon), and students should recognise its significance in the creation of supranational governance, and need to question the politics behind its operationalisation and appreciate the growing relevance it will have for a new phase of government/industry relations in face of the current economic crisis.

This book has been written with the politics and public policy reader in mind, and aims to complement the numerous existing materials on this subject area from the disciplines of economics and law. As such it should be stressed from the outset that this work is primarily concerned neither with analysing the economic theories of competition behind cartel formation and practices (Bishop and Walker, 2002; Morgan, 2009) nor with the legal analysis of collusive agreements and a substantial case law that already exists (Korah, 2007; Sufrin and Jones, 2008; Whish, 2003). Its attention concentrates rather on the institutional structures and decision-making processes of the EU supranational cartel regime, and specifically the role and activities of the European Commission and the evolution of cartel policy. In adopting this approach it recognises the contributions from both economics and law. Indeed, this book should prove invaluable and informative for students of both law and economics as each discipline brings its own distinct slant and focus.

Still, from a political science perspective, if there has been little work done on EU competition policy as a whole there has been substantially nothing that has been done on the two core aspects of anti-trust, namely cartels and monopolies. This book begins to redress this omission by examining cartel policy. It focuses on the one aspect of its competition brief which has occupied much of the European Commission's limited resources from the very outset, namely restrictive practices (under Article 81), which includes the pursuit, identification and termination of cartel arrangements. The European Commission takes the lead in shaping and setting the policy, and in establishing the parameters within which it is applied in practice. Even though certain aspects of policy enforcement have been decentralised since regulation changes in 2004, and despite the fact that the Commission now works within a network of competition actors and institutions to which it has delegated some of its earlier responsibilities, it remains the dominant player in the European competition policy game.

This book addresses a paradox. Although the anti-cartel drive represents the oldest aspect of the EU competition regime and has been the one which has consumed most of the European Commission's Competition Directorate General's (DG Competition) human resources and time, the area of cartels has been under-researched in favour of the other aspects such as merger control and more politically sensitive areas such as the liberalisation of the public utilities (especially in the energy sector) and state aid (Doleys, 2007; Thomas and Wishlade, 2009). The paucity of political science literature in this area is unfortunate, for the pursuit of cartels opens up a truly fascinating world of 'dawn raids' and intrigue where secretive agreements are concocted in smoke filled rooms, in luxury holiday resorts

and have even been subject to covert taping (see Connor, 2001) by the FBI in the USA.[1]

In the first half of 2008 alone the European Commission raided the offices of a very prestigious list of companies (such as Unilever, Procter and Gamble, Lufthansa, and Lloyd's Register, to name but a few) in their search for cartels (*Financial Times*, 30 June 2008; *Irish Times*, 21 June 2008). The study of cartels has, according to two competition law specialists (Harding and Joshua, 2003), received little distinct exploration even in the legal literature, and the highly probable explanation for this situation rests with competition law's focus on market structures rather than investigating the moral and ethical issues of anti-competitive activities. Cartels are a reality of modern business life, but just how problematic are they and what exactly is competition policy?

2. UNDERSTANDING THE COMPETITION PRINCIPLE AND THE ENFORCEMENT OF COMPETITION POLICY

It is an undisputed fact among neo-classical economists that competition is a necessary prerequisite for a free market economy, although there may indeed be a variety of different approaches to defining what competition actually entails and means (Scherer and Ross, 1990). Being anchored in the principles of free-market capitalism the origins and development of competition policy across Europe after 1945 have always retained a degree of controversy and policy evolution must be set against trends in wider economic models and varieties of capitalism (Buch-Hansen, 2008; Wigger, 2008). A competition policy strives to secure the creation and maintenance of genuinely competitive markets. As one commentator has described it, 'central to the classical definition is the notion of perfect competition which provided a benchmark against which all other forms of competition should be judged' (Gavin, 2001: 108). Thus, the commitment to competitive markets is rarely questioned. Cini and McGowan (2009) note that 'Competition' has been defined as the 'struggle or contention for superiority, [which] in the commercial world . . . means a striving for the custom and business of people in the market place' (see also Bishop and Walker, 2002; van den Bergh and Camasasca, 2006). Wilks identifies the reality that 'there are both economic and political rationales for competition policy' (Wilks, 2005: 115). The political aspect centres on the readiness of individual governments to allow business actors the freedom to compete in the market in order to protect the consumer from any potential exploitation from the power of big business. Although the economic rationale

raises more points of controversy it is very much steeped in 'neo-classical' economic approaches which highlight the advantages and desirability of both productive and allocative efficiencies. Ultimately, efficiencies will be greater where the health of the economy is subject to strong competition rules and they are very much linked to the competitiveness agenda which arose in the mid-1990s and continued as a central aspect of the Lisbon Agreement. A sizeable literature on the economic theory of competition policy has developed from Smith and Mill to the Chicago and Austrian Schools. It is not the intention to deal with this here and readers are strongly encouraged to consult the above-referenced works.

The pursuit of perfect competition has long been a cherished concept of neo-classical economics and the market has been regarded as the most effective instrument to allocate resources and determine prices. Accordingly, competition between firms is to be welcomed as it unleashes dynamic effects which can be transformed into greater efficiencies, innovation and, ultimately, lower prices for the consumer. Economic theory illustrates the argument through two ideal types. The first type refers to a world of perfect competition where the existence of numerous suppliers prevented any likelihood or possibility of collusive agreements to control price. This ideal model remains largely utopian in nature as the realities of many actual markets are typified more by models of imperfect competition (type 2), where considerably fewer players exist and can (determine price) and do deliberately set out to thwart competition through the pursuit of anti-competitive agreements. Even Adam Smith, with his talk of the 'invisible hand' of the market, recognised that competition was an abstract notion which could not exist in its purest form in the real world.

Instead of pursuing some abstract notion of perfect competition, competition authorities have preferred to opt for the looser concept of 'workable competition' (Clark, 1940; Sosnick, 1958). On the one hand such an approach is, in terms of theory, a much vaguer concept, but on the other hand it reflects developments on the ground. Either way a state of actual competition cannot simply be taken for granted even if there are be ethical and social objections to the absence of competition. Markets can be manipulated by firms deliberately to distort the benefits and efficiencies of competition. Some firms strongly resist any such calls for competition and seek to undermine such objectives by engaging in a number of anti-competitive practices which include dividing up markets and fixing prices in order to increase or maintain their profit margins.

A state of firm to firm competition is often resisted and fought because it generates uncertainty. In contrast engagement in anti-competitive practices is deemed to provide greater predictability. By acting collusively or by abusing a dominant market position, cartel members may be able to

charge higher prices and reap substantial gains. Given this context competition policies are designed and drafted to prevent, deter or threaten firms from acting in such a fashion. In the lack of strict competition application and enforcement such incentives are easily lost, and without it, as the former command-led economies of the former communist states in Eastern Europe readily illustrated, prosperity and growth suffer.

Competition requires regulation because, as Doern and Wilks (1996: 1) have affirmed, '[n]either competition nor the market is inevitable or natural. Markets have to be created through processes of social change and public regulation . . .', and while there is indeed some consensus that competition is a good thing, there is little agreement about what 'workable competition' implies in concrete policy terms. In other words, and in order to safeguard and ensure the benefits arising from the competitive process, the market has to be 'policed', and this in turn requires the establishment of a regulatory framework which requires strict enforcement. In practice, competition policy needs to strike a balance between the imposition, by legislation, of necessary restrictions upon unbridled economic competition and the elimination of harmful restrictive practices which prevent a coherent integration of markets. Competition policies are constructed around what practices are not allowed, and in this sense are negative policies as they seek to prevent rather than to promote certain activities. However, caution should be applied because competition policy may not always be driven by the desire to promote competition and thus enhance consumer welfare (in terms of both prices and protection). There can be other factors at play which can centre on the distribution of wealth and concerns about economic power residing in the hands of the few. There has always been a concern about the extent of economic power and the degree to which cartels and monopolies are undemocratic. Competition policy can also be advanced to defend the position of small and medium-sized enterprises, which provide both potential competitors to their larger neighbours and supply most jobs in the economy. Competitiveness is another objective of competition policy. In the EU context competition policy has been advanced as a means of furthering economic and political integration by breaking down privately constructed barriers to trade between the EU member states, thus realising a fully functioning Single European Market (SEM).

EU competition policy constitutes one of the largest, if often unheralded, success stories of European integration and has two main objectives: firstly, to create and sustain a single market that fosters intra-EU trade and competitiveness; secondly, to promote economic and political integration. It has achieved both. The most distinguishing feature of EU competition policy is that it represents a clear example of European governance in action, but what issues does it deal with, who are the principal

actors behind competition policy and to what extent has the policy become Europeanised?

3. INTRODUCING THE EUROPEAN UNION COMPETITION REGIME

From a European perspective the development of a competition policy framework has been a gradual process which commenced after 1945. The first steps towards the first coherent regimes occurred in the United Kingdom (from 1948) and West Germany (from 1957).[2] From the outset the adoption of these domestic policies reflected new thoughts on industrial structures and competitiveness and were influenced indirectly and directly by the well-established US competition model (initiated under the Sherman and Clayton Acts in 1890 and 1914 respectively which sought to ensure that economic power (in the shape of banks, oil, and railroad companies) was not concentrated in the hands of a few powerful trusts). At its core competition law essentially was seeking to balance the perceived benefits of economic collaboration against the potential economic and political problems that could ensue. Although the UK, West German and the later domestic competition regimes in Europe all differed slightly in terms of structure, institutional design and decision-making processes, they all shared the same objective of promoting competitive market structures and breaking up anti-competitive behaviour such as market-rigging, price-fixing cartels and abusive monopolies, which had been an endemic feature of the European business environment for the first half of the twentieth century.[3] These anti-competitive pursuits still remain very much a threat in the early twenty-first century. The realities that many of these acts occurred on a cross-border scale effectively left the national authorities ill-equipped to tackle and investigate them, and consequently led to greater pressure for both greater inter-regime co-operation and new modes of international competition governance. Competition policy, for example, therefore assumed central importance in the European regional integration process, and found reflection in the objectives of both the European Coal and Steel Community of 1951 and the European Economic Community Treaty of 1957 (Cini and McGowan, 2009; Leucht, 2008), and both are discussed in greater detail in subsequent chapters. Article 3(g) TEC explicitly declared that competition should not be distorted in the common market while the substantive law is spelt out in Articles 81–90 (TEU).[4]

However, the treaty articles simply outlined the objectives and did not spell out how such objectives were to be realised. A state of competition between companies could not be taken for granted or assumed to occur