



The Economics of EC Competition Law: Concepts, Application and Measurement

UNIVERSITY EDITION

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SWEET & MAXWELL

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★ The views expressed in this book are those of the authors and not of their respective organisations.

Foreword

As I remarked in the Foreword to the second edition of *Bishop and Walker*, this is a book that all practitioners of competition law—competition authorities, legal advisers, judges, policy makers and students—should read. Competition law is about economics, and anyone involved in the subject should endeavour to understand its underlying principles and policy objectives; furthermore it is important to be familiar with the various methodologies used by economists when they work on particular cases. The third edition of *Bishop and Walker* is extremely welcome, as much has happened in the seven years since the second edition was published. What is sometimes referred to as the “more economics” approach has taken deep root in recent times. This can be seen in individual cases, particularly under the EC Merger Regulation, where increasingly sophisticated methodologies are deployed and decisions are adopted containing much more economic analysis than was historically the case. The importance of economics is also evident in the Commission’s guidelines, for example on horizontal and on non-horizontal mergers, and in its *Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings*. It is not surprising that the growing influence of economics is reflected in the growth of *Bishop and Walker* itself—the third edition is considerably longer than the second, with much new material that is very welcome.

The structure of the book remains the same as in previous editions. In Part I the reader is introduced to the underlying concepts of the subject—effective competition, the assessment of market power and the relevant market. In the discussion of market power there is new text on countervailing buyer power, the Lerner Index and—a topic that has become very important in recent years—on two-sided markets. In the chapter on market definition the authors provide guidance on a number of errors that are sometimes made in practice (the “*Cellophane* fallacy” being just one of these).

Part II of the book looks at each of Article 81, Article 82 and the EC Merger Regulation. Much has changed in these chapters to reflect developments over the last seven years. The Commission’s determination to

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eradicate cartels has become even stronger over this period: the level of fines is now enormous, and many of the Commission's decisions lead to follow-on actions for damages. At one time economics did not have a large role in cartel cases. However this has certainly changed in recent years, and economists are increasingly involved in the substantive analysis of cases—for example could an agreement for the exchange of information actually have an impact on prices? If not, should that agreement be regarded as restrictive of competition by object (rather than effect)? Economists are also increasingly called upon for assistance in thinking about the correct level of fines in cases, and in the extremely difficult task of working out what level of damages should be awarded in follow-on actions in domestic courts. The new edition of *Bishop and Walker* contains very helpful discussion of these important topics. It also expands the treatment of Article 82 in the wake of DG COMP's *Discussion Paper* of 2005 and the Commission's more recent *Guidance on Enforcement Priorities*. There are now two chapters on merger control rather than just one, reflecting the Commission's adoption of separate guidelines for horizontal and non-horizontal mergers.

It is important to understand the techniques that economists use when working on actual cases as well as the underlying economic concepts. Part III of the book contains an extremely useful discussion of these techniques, including, for example, the use of elasticities; bidding studies; shock analysis; price concentration studies; merger simulation; shipment and transport cost tests; and the calculation of damages.

I have highlighted some of the important changes that have been made to the third edition; there are, of course, many other additions, too numerous to refer to here. Readers who are eager to understand the contribution that economics makes to competition law and policy will find this book to be invaluable: the authors are to be congratulated for producing a new edition of their very fine text.

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Preface

The first edition of this book, written primarily during 1998, stated that economic reasoning and analysis was assuming greater prominence in EC competition law. That trend has not only continued but accelerated since writing the second edition in 2002. Obvious indicators of this trend are the number and type of cases in which economists are engaged as well as the growing number of economists working at the various competition authorities across Europe. Further confirmation of the importance of economic analysis is provided by the creation in 2003 of the post of the Chief Economist within DG COMP of the European Commission and a specialist team of economists to support that position.¹ Since then that team has grown rapidly in size. But the most important indicator continues to be, in our view, the increasingly economic approach that DG COMP and certain national competition authorities are taking to policy and to policy guidelines. Within the context of EC competition policy, examples of this include the notice on the definition of the relevant market, the vertical restraints guidelines, the horizontal merger guidelines, the non-horizontal merger guidelines and the guidance on the Commission's enforcement priorities in applying Article 82 to exclusionary abuses.² All of these documents adopt an explicit economic approach to the relevant policy areas.

These developments have naturally led to more interest in the subject on the part of competition lawyers and officials. But while several excellent textbooks on economics exist at varying levels of complexity, their focus is

¹ See Röller and Buigues (2005) for an insider's overview of the role of the Chief Economist's Team in particular and the role of economists inside DG Competition more generally.

² European Commission (1997) "Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law" OJ C372/5; European Commission (2000) "Commission Notice: Guidelines on Vertical Restraints" (2000/C29/01); European Commission (2004) "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004/C 31/04); European Commission (2008) "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2008/C 265/07); and European Commission (2008) "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings".

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with the techniques of economic analysis, *per se*, and much less with the policy issues to which such analysis is or might be applied in practice. As such, few books have been directly concerned with the practical application of economics and in particular, even fewer seek to address the needs of competition lawyers and other non-economists.³ For this reason, the treatment of economic principles in this book focuses squarely on policy issues, how economic reasoning relates to the practical application of the law and the implications the legal approach has for commercial and business practices. The aim of this book is to provide an introduction to the key economic issues that arise in EC competition law cases and to provide examples of practical relevance.

While the book is specifically about the economic issues raised in EC competition law, it should be noted that with the increasing adoption of EC competition law into the domestic law of the Member States, this makes it increasingly relevant for domestic competition law as well.⁴ In addition, the techniques of economic analysis described in the book are frequently applicable even in jurisdictions that have not explicitly modelled their competition law on EC competition law.

The book is aimed at competition lawyers, competition authority officials and economists working in the area (both as academics and consultants). Part I of the book will be of interest to all three groups. In this Part we discuss, in an explicitly practical manner, the nature of “effective competition”, market power and issues relating to market definition: these are three key concepts of competition policy analysis. Part II is primarily aimed at lawyers and competition authority officials, although doubtless economists may also find the discussion of the practical application of economic principles of interest. It discusses the economic theory lying behind Articles 81 and 82 and the Merger Regulation. The discussion of the economic issues arising in each of these areas has been greatly expanded since the second edition, reflecting the general growth in the number of cases in which economics has featured heavily, as well as the introduction of the two sets of guidelines on mergers and the guidance on Article 82 issued by DG COMP. The discussion of the economic concepts relevant to assessing mergers has been split into two chapters; the first addressing horizontal mergers and the second non-horizontal mergers. Part III is again aimed at all three groups. It discusses various empirical techniques that can be used to distinguish between competing hypothesis in competition inquiries. This Part is more technical than Parts I and II. We appreciate that some of this material will be difficult for non-economists (this is particularly true of parts of chapters 10 and 15). However, it is hoped that Part III will provide the underlying intuition of the various

³ Notable exceptions to this include Mehta and Peeperkorn (2007), Motto (2004) and Lyons (2009).

⁴ All Member States have merger control and, apart from Germany, all have national laws modelled on Articles 81 and 82.

empirical techniques and thereby allow for a more refined assessment of any empirical analyses that might be encountered.

The list of people who have contributed to the book, either directly or indirectly, is a long one. It includes the many competition lawyers we have worked with and against over the last eighteen or so years. They have forced us on many occasions to re-examine and refine our understanding of applying economic principles to real world markets and of what economics can usefully say about policy issues. This is an ongoing process. Similar comments apply to officials working in DG COMP and various national competition authorities, in particular the Office of Fair Trading, the UK Competition Commission, the South African Competition Commission and Tribunal, the Australian Competition and Consumer Commission and the German Federal Cartel Office. We would also like to acknowledge the contribution of our respective economic colleagues to our continued economic education. Thank you all.

We would like to express our immense gratitude to those individuals who were coerced into reading and commenting, sometimes at length, on earlier drafts of the book. In addition to those who helped on the first and second editions of this book, we would like to thank the following for their help on this edition: Luisa Affuso, Markus Baldauf, Paul Dobson, Pablo Florian, Bojana Ignjatovic, Miguel de la Mano, Richard Murgatroyd, Daria Prigioni, Vitaly Pruzhansky, Francesco Rosati, Tania van den Brande, Matthijs Visser, Chris Walters, Greg Werden, and Richard Whish. Richard Whish deserves special mention for agreeing to write, once again, the Foreword.

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