Part IV The single European market: policy integration

13 Competition policy
14 Industrial and competitiveness policy: the Lisbon Strategy
15 Tax harmonization
16 Transport policy
17 Energy policy and energy markets
18 Environmental policy

Part IV of the book covers areas that constitute the very foundations needed to facilitate a properly operating Single European Market (SEM). Hence it tackles in six chapters: competition rules; industrial and competitiveness policy; tax harmonization; transport policy; energy policy; and environmental policy. Industrial policy is included because variations in it would be tantamount to affording differing protection to national domestic industry. The absence of tax harmonization would have consequences equivalent to those of disparate industrial policies. Similar considerations apply to transport, energy and the environment. Of course, transport and energy are also dealt with as industries in their own right, as well as providers of social services, and the environment is treated in terms of tackling pollution and the consequent health benefits.

13 Competition policy

WOLF SAUTER

13.1 Introduction

The main purpose of competition policy is generally seen as protecting the market mechanism from breaking down. It does so by promoting competitive market structures and policing anti-competitive behaviour, thereby enhancing both the efficiency of the economy as a whole and consumer welfare in particular. In the EU this objective is pursued by means of enforcing prohibitions against (1) anti-competitive agreements between different companies, as well as against (2) anti-competitive behaviour by companies that are large enough – either individually or jointly – to harm competition by means of independent behaviour, and (3) by vetting mergers between previously independent companies to verify whether these are likely to result in non-competitive market structures.

EU competition policy has three important characteristics that are not commonly found elsewhere. First, it not only aims to protect the competitive process as such, but also to promote and protect market integration between EU member states (MSs). Second, apart from addressing private distortions of competition, it also curbs distortions of the market process by its MSs, notably as a result of state aid. Both result from the third distinguishing feature of EU competition policy: it is implemented in a multi-level political system, that of the EU and its MSs. In this context, it is worth noting that although until recently the application of EU competition rules was highly centralized in the hands of the European Commission (Commission), due to its exemption monopoly for agreements infringing the cartel prohibition, this changed fundamentally in May 2004. A decentralized system based on enforcement by (and coordination between) the twenty-seven national competition authorities (NCAs) was moved into place. All these aspects are examined further below.

This chapter first discusses in greater detail the rationale for competition policy generally, and for EU competition policy in particular. Next, it sets out the basic instruments of EU competition policy, its rules and procedures, and the manner in which they are implemented. Finally, three important developments in EU competition policy are addressed: the focus on public intervention, its shift to a more economic approach and, most recently, a move towards decentralization.

13.2 The rationale for EU competition policy

The reasons for introducing competition rules have varied, both between different jurisdictions and over time. The first set of modern competition rules is contained in the USA's Sherman Act (1890). They were adopted as the result of political concern over the railroad, oil and financial 'trusts' emerging in the USA at the end of the nineteenth century, generating an economic concentration of power that threatened to upset the popular consensus underpinning the economic as well as the political system of that country. In various European states from the early twentieth century onwards, national competition rules typically sought to provide protection against the socially and therefore politically undesirable results of 'unfair' competition (Gerber 2001). In some cases, the legislation concerned even enabled public authorities to impose the terms of existing private cartel agreements on entire economic sectors, as an alternative to state-designed market regulation – for example, in order to control prices.

American ideas about competition policy that were more critical of restraints were exported to both Germany and Japan after the Second World War, when the Allied occupation forces imposed new anti-monopoly legislation to curb the influence of the financial–industrial combines that were widely seen as having powered

the war effort of these two countries. For similar reasons, coal and steel being the essential components of the war industry of the time, anti-trust provisions were introduced into the 1951 Paris Treaty creating the European Coal and Steel Community (ECSC; see Chapter 2), which, unlike the EEC Treaty, included the control of concentrations from the outset. This check on concentrations of economic power was therefore in line with the objective of the ECSC of eliminating the threat of future wars between its participant MSs.

For the EC beyond coal and steel, competition rules were likewise introduced in the 1957 EEC Treaty, albeit for a different reason. In this case, the competition rules served primarily to ensure that restrictions on trade between MSs – tariff and non-tariff barriers – that the MSs' governments agreed to remove under this treaty would not be replaced by cartels between undertakings following national lines (Goyder and Albors-Llorens 2009). This is why competition rules addressed to undertakings were introduced into what at the outset was still regarded as an international treaty between independent states.

Initially, therefore, EU competition rules essentially served to complement an inter-state trade policy of reducing trade barriers and promoting market integration. From this starting point, promoting market integration has developed into an overriding rationale of EU competition policy, alongside that of maintaining 'effective competition' (Bishop and Walker 2002) and, more recently, promoting the consumer interest. The integration rationale has had a profound impact on the orientation of EU competition policy that has at times led it into conflict with the emerging economic consensus favouring efficiency considerations.

For example, the integration rationale has long tended to lead to a negative view of vertical agreements with territorial effects. This conflict is clearly seen in the groundbreaking ruling by the European Court of Justice (ECJ) *Consten & Grundig* of 1966.[1] Consten was the exclusive distributor in France for Grundig, a German producer of consumer electronics. Consten agreed not to market products competing with those of Grundig in exchange for an exclusive licence to use Grundig's trademark in France. Thereby, in practice, Consten enjoyed absolute territorial protection. In economic terms, such territorial protection may have been required, for example, to recover Consten's investments in setting up a sales network and an aftersales service in France. However, the ECJ ruled that this contract infringed the cartel prohibition of the Treaty as it had a market partitioning effect. Agreements that reinforce national divisions in trade frustrate the EC objective to abolish the barriers between MSs and therefore could not be allowed. Although economic theory shows that restrictions of intra-brand competition (between different suppliers of Grundig products) are unlikely to have harmful effects on competition, so long as there is sufficient competition between brands (that is, between suppliers of Grundig products and suppliers of comparable products), the ECJ considered the protection of both forms of competition equally important here. This view has evolved over time: the current competition rules on vertical restrictions recognize that vertical agreements generally produce efficiencies and should be treated more leniently. However, absolute territorial protection is still prohibited.

13.3 The role of economics

While it is difficult to find an example where pure economic reasoning motivated the introduction of competition rules, the rationale of EU competition policy is increasingly defined in economic terms. Evidently, the relevant economic theory has evolved over time as well (Motta 2004).

The economic reasoning concerning the goals and limits of competition policy has been developed in particular in the USA, where an early willingness of courts to entertain economic arguments was subsequently stimulated by the appointment of law and economics scholars to the bench and to influential regulatory positions. Over the past century, the resulting debate has had a profound impact on the way competition policy is applied both in the USA and beyond. Originally, competition policy focused on the results of market structure and the behaviour of market participants associated with the Harvard School. Increasingly, the so-called Chicago School of anti-trust economics, focusing on efficiency, price effects and the self-policing nature of the market (Posner 1976), has become the new mainstream of industrial organization, and hence of much analysis underlying competition policy (Scherer and Ross 1990). In addition, game theoretic approaches are used increasingly – for example, to deal with problems of collusion and joint dominance in oligopolistic markets (Phlips 1995). EU competition policy has followed these trends to varying degrees, modified in particular by the intervening variable of its overriding integration objective (Peeperkorn and Verouden 2007). It is now thought to be guided by insights of the post-Chicago School of competition policy (Langer 2007). A home-grown economic influence has been that of the Freiburg School or *Ordo*liberalism (Gerber 2001). The proponents of this school accepted the main ideas of classical liberalism, but they also extended the classical views by arguing that individual freedom should be protected not only against governmental interference, but also against private economic power.

Today, the market mechanism is broadly seen as the most efficient instrument to set prices and thereby allocate resources. To a large extent, the success of markets at doing this is determined by the degree of competition in the market involved. However, perfect competition, which presupposes homogeneous products and full transparency of prices and costs, as well as the absence of entry barriers, economies of scale and scope, and learning effects, is not a real-world phenomenon. Instead, market imperfections, or market failures, are likely to lead to restrictions of competition that produce sub-optimal results. Firms also have economic incentives to collude and to exclude competitors. Consequently, the role of competition policy is to substitute for competitive pressure by ensuring that restrictions on competition between undertakings that are harmful to the competitive process (rather than to individual competitors) are prevented or removed. Because pure market outcomes are likely to be theoretically sub-optimal in many cases, this leaves ample room for disagreement on what amounts to a restriction of competition that merits policy intervention.

In the context of EU competition policy, the key concept in this regard is that of maintaining 'effective competition' or 'workable competition'. In the *Metro* v. *Commission* case of 1977, the ECJ appealed to the concept of workable competition as the effective type of competition to realize the economic objectives of the EC Treaty. The court stated that: '[t]he requirement contained in Articles 3 and [101, TFEU] that competition shall not be distorted implies the existence on the market of workable competition, that is to say 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'.

There is debate about whether effective competition concerns the process of competition as such, or the outcome that markets produce in terms of improving consumer welfare – generally equated with efficiency. In any event, it is by now well established that effective competition is seen in terms of preventing harm to competition as such, not to particular competitors (Bishop and Walker 2002).

This was highlighted by Advocate General Jacobs in the *Oscar Bronner* v. *Mediaprint* case of 1998, when he reminded the court that 'the primary purpose . . . is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors'. Especially since the start of the tenure of Mario Monti (an academic economist, succeeded by Neelie Kroes, and recently Joaquín Almunia) as commissioner responsible for competition policy in 1999, the promotion of efficiency has been declared to be the core value under competition law alongside promoting consumer welfare. For example, in a speech in July 2001, Monti said that 'the goal of competition, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market' (Monti 2001). During his tenure, he emphasized the importance of sound economic analysis (creating, inter alia, the office of chief economist).

In practice, whether there is effective competition has to be determined in relation to a specific 'relevant market' that is defined both in terms of the product concerned and geographically. Factors taken into account, such as the existence of market power, the number of competitors, relative market share and degree of concentration, demand and supply substitution, the existence of barriers to market entry and exit, and potential competition, affect both the evaluation of the degree of effective competition in the relevant market and market definition itself (CEU 1997e). Increasingly refined economic analysis is used to define relevant markets.

13.4 General overview of the legal framework

Although EU competition policy is increasingly driven by economic considerations, its origins are found in

European law, and it must evidently operate within the constraints of its legal framework. This legal framework consists of the substantive, procedural and institutional rules that govern EU competition policy (see Chapters 3 and 4). It is important to understand that the framework only applies to 'undertakings' (Wils 2000).

The notion of undertaking is defined in the *Höfner & Elser* v. *Macrotron* case of 1991 as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. The notion of undertaking was further defined in three other cases:

- In the *Poucet & Pistre* v. *Cancava* case of 1993, the ECJ held that an agency charged with managing a social security scheme was not an undertaking within the scope of competition, as the scheme fulfilled an exclusively social function that was based on the principle of national solidarity and was entirely non-profit-making.
- In the *Diego Cali & Figli* v. *Servizi Ecologici del Porto di Genova* case of 1997, the ECJ did not consider a private organization entrusted by the public authorities with anti-pollution surveillance duties in an oil port to constitute an undertaking under the competition rules as it executed a public function.
- More recently, in the *FENIN* case of 2006, concerning the public authorities running the Spanish national health system, which purchased medical goods from an association of undertakings marketing these goods, the ECJ decided that where a public body purchases goods or services that will subsequently be used for social purposes it will not be engaged in economic activity, even in the purchasing market, and consequently will not be an undertaking for the purposes of the competition rules.

The legal basis of EU competition policy is found, first of all, in the TFEU (Treaty of the Functioning of the European Union) itself (101–6 and 107–9). Second, it is found in implementing legislation adopted by the Council and Commission in the form of regulations and directives (see Chapters 3 and 4), which develop in particular the wide-ranging powers of the Commission in this field, notably Council Regulation 1 of 2003 (reforming Council Regulation 17 of 1962 concerning the application of the cartel and dominance abuse prohibitions). Council Regulation 139 of 2004 (reforming Council Regulation 4064 of 1989) provides the framework for merger control by the Commission. In addition, an increasing number of notices and guidelines that are not formally binding provide essential information on the manner in which the Commission intends to apply EU competition policy. An example is the Commission's notice on the definition of the relevant market referred to above (CEU 1997e). By issuing such guidance, the Commission increases the predictability of its policy – allowing undertakings and their legal advisers to take EU competition law constraints into account, while at the same time facilitating the enforcement of EU competition law between private parties and at a national level.

The ultimate arbiter of the various rules, and on whether Commission policy remains within the bounds of its powers, is the ECJ. It decides only on points of law. The ECJ becomes involved either directly, on a 'pre-judicial' reference by a national court, or in judicial review proceedings following a first appeal against Commission decisions to the EU's General Court,[2] which establishes the facts. In principle, the standards applied are those of administrative review of policy – that is, they focus on formal competence to act, on respect for the rights of the defence and enforcing minimum standards of reasoned rationality. The ECJ and General Court have nevertheless on a number of occasions led the way in demanding higher standards of economic argument, rather than more formal reasoning, from the Commission (Korah 2004).

Particularly with regard to merger control, EU courts have scrutinized the Commission's economic reasoning. For example, the General Court concluded in the *Airtours* v. *Commission* case of 2002 that the decision to block the proposed merger, 'far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created'. This indicated that the court requires better economic evidence when reviewing the Commission's decisions, and also addressed the burden of proof, arguing that it was the Commission that had to produce convincing economic evidence of the anti-competitive effects of the proposed merger. Another example in this context is the ruling by the ECJ in the *Tetra Laval* v. *Sidel* case of 2005. The ECJ stressed the importance of 'reviewing the Commission's interpretation of information of an economic nature, especially in the context of a prospective analysis'.

The Commission is the institution that is responsible at EU level for the implementation of EU competition law and policy. It takes most formal decisions by simple majority, as a collegiate body. These decisions are prepared by the Directorate General for Competition, DG COMP, which reports to the commissioner responsible for competition policy; since January 2010 this has been Joaquín Almunia (formerly the commissioner for monetary and economic affairs). Following the abolition of the system requiring notification to the Commission of potentially anti-competitive agreements by the parties to these agreements, the Commission can be apprised of a competition problem by a complaint by an undertaking or an MS, a leniency application by an undertaking trying to come clean, or it can act on its own initiative (*ex officio*) to investigate either specific cases or entire economic sectors (sector inquiries). It has considerable powers to require undertakings to collaborate in its investigations, backed by fines, including the right to obtain evidence by unannounced inspections of company offices (dawn raids). In addition, the Commission can penalize all infringements of the competition rules with significant financial penalties, including fines of up to 10 per cent of the global group turnover of the companies involved, without any absolute upper limit. Fines of well over a hundred million euros have already been imposed in a number of cases.

For example, in 2002 the Commission imposed a total fine of 168 million euros on Japanese video games maker Nintendo and seven of its official distributors in Europe, for colluding to prevent exports from low-priced to high-priced countries – another illustration of its focus on territorial restrictions with their effect on inter-state trade. In 2004, it fined Microsoft over 497 million euros for refusing to supply information necessary for interoperability and for bundling the Windows operating system with Windows Media Player. In 2006 it found that eight suppliers and six purchasers of road bitumen in the Netherlands had participated in a cartel from 1994 to 2002 to fix prices in violation of Article 101. These fourteen companies have been fined a total of 266 million euros and one of the participants was fined more than 100 million euros. In 2009 computer chip manufacturer Intel was fined over one billion euros for various exclusionary practices vis-à-vis its competitors.

Because the treaty prohibitions on restriction of competition (that is, the cartel prohibition of Article 101.1) and on abuse of a dominant position are directly effective, parties may choose to invoke these rules in procedures before national courts of all levels in EU MSs (Komninos 2002).

The *Courage* case of 2001 is interesting in this context. Inntrepreneur Estates Ltd administrated the leased pubs of both Courage and Grand Metropolitan in the UK. The standard form of lease agreement contained the obligation that tenants must order their beer exclusively from Courage. Crehan, one of the tenants, failed to pay for supplied beer. When Courage started proceedings, Crehan claimed that the exclusive purchase obligation infringed the cartel prohibition of the EC Treaty. However, under English law, a claimant cannot rely on his own wrong. The EU's General Court found that the English rule was inconsistent with the long-established direct effect of the treaty prohibitions. The full application of the national rule made it too difficult for the plaintiff to enforce his rights to compensation under Community law, and hence the national rule should not be applied.

Finally, as a result of the modernization exercise (see Section 13.9, page 209), from 1 May 2004 all national competition authorities and national judges in MSs now have explicit powers (and the obligation) to apply the exemption provision of the cartel prohibition as provided for in Article 101.3 of the EC Treaty. Under the old Regulation 17 of 1962, parties could obtain such an individual exemption exclusively from the Commission. Article 9.1 of Regulation 17 conferred 'sole power' on the Commission 'to declare Article [101.1] inapplicable pursuant to Article [101.3] of the Treaty'. Following modernization, Article 101.3 is now directly applicable. This may give rise to increased requests by national courts for the pre-judicial rulings on points of law by the ECJ that are an important mechanism to ensure the coherent application of EU competition law and policy.

13.5 The substantive norms

There are three core substantive norms of EU competition law that are addressed to undertakings:

1. the prohibition of agreements and concerted practices between firms restricting competition;
2. the prohibition of abuse of (single firm or joint) dominance;

3. the obligation to submit mergers and acquisitions for prior clearance under the merger control rules.

In addition, there are specific competition rules that apply to aid by MSs, and to companies privileged in their relation to public authority. These are each discussed in turn.

13.5.1 The cartel prohibition

The prohibition of collusion restricting competition (cartels) is found in Article 101.1 of the TFEU. Prohibited cartel agreements cover, for example, price fixing, market sharing, tying and discrimination.

As far as collusive behaviour is concerned, for example, the ECJ has made clear in the *Sugar Cartel* case of 1975 that undertakings may not knowingly substitute the risk of competition for practical coordination between them that results in conditions of competition that do not correspond to normal market conditions. The court explained that the requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their rivals, as long as there is no direct or indirect contact between the undertakings that influences the conduct on the market of an actual or potential competitor, or discloses to such a competitor the course of conduct that they themselves have decided to adopt on the market.

By force of Article 101.2, infringement of the prohibition of Article 101.1 triggers the nullity of the restrictive clauses of the agreements involved – that is, they become void, non-existent – which can lead to civil law liability and thereby to claims for damages under national law.

The ECJ addressed the scope of the nullity of an agreement that infringed Article 101 in its abovementioned *Consten & Grundig* case, as well as in the *Société La Technique Minière* v. *Maschinenbau Ulm* case of 1966, where the court explained that Article 101.2 only applies to 'those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself', and that 'any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law'. This determination is made by the national courts.

As mentioned above, in addition, the Commission can penalize infringements by means of substantial fines. Certain national systems also provide for penal sanctions, and there is an ongoing debate as to whether further criminalization of competition law is desirable.

Whether directed at private undertakings or MSs, EU competition norms are triggered only if constraints on competition are both appreciable and have the effect of distorting trade between MSs (CEU 1997f). This is consistent with the integration rationale of EU competition policy: unless they distort trade flows, restrictions of competition do not hamper integration, and consequently do not concern the EU. However, the integration rationale also means that certain types of territorial protection are prohibited that might not otherwise be particularly objectionable from an economic perspective. This still leaves EU competition policy a broad scope, which has often made it difficult to enforce effectively.

For example, in the *Distillers* case of 1978, the Commission condemned the export deterrent created by Distillers' dual pricing system for the UK and the rest of the EU. In the *Zanussi* case of 1979, the Commission objected to a system of aftersales guarantees that did not apply to washing machines used in a different MS from the one in which they had been bought. In 1998 the Commission fined Volkswagen heavily for setting up a system with its Italian dealers whereby final consumers in MSs other than Italy were unable to order VW cars from Italian dealers.

13.5.2 The prohibition of abuse of dominant position

The prohibition of abuses of dominant position (monopolies and oligopolies) in Article 102 of the TFEU focuses on 'abusive' (that is, anti-competitive) behaviour associated with market power, rather than on securing of high market shares as such. Although it is not illegal to be dominant, provided dominance achieved is based on legitimate commercial advantage won in the market, there are no exemptions for abuse. Like the restrictions of competition covered by the cartel prohibition, possible abuses of dominance include unfair – for example, excessive or predatory – pricing, discrimination and tying. The key difference is that abuse of dominance is typically carried out by a single company, whereas cartels involve explicit coordination between competitors. Abuses are often qualified as either exploitative (of consumers and customers), exclusionary (foreclosing competition from the market) or discriminatory (between consumers, competitors or downstream operations and competitors) in nature. Unlike the cartel prohibition, which in principle applies to all undertakings, the prohibition of abuse of dominance is asymmetrical in nature: it only applies to those firms that can afford to behave independently.

The definition of a dominant position was established in the *Hoffmann-La Roche* case of 1979. The court stated the following: 'The dominant position thus referred to in [Article 102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.'

The prohibition of abuse of dominance is intended to force such firms to behave as if they were subject to effective competition by abstaining from anticompetitive behaviour. In order to establish a breach of Article 102, the relevant market must first be established. The relevant market has a product and a geographic dimension. The product market consists of all products or services that are interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The geographic market for the stated product is the area in which the conditions of competition are sufficiently homogeneous. Next, the existence of dominance in that relevant market should be established, and finally, the existence of an abuse must be shown, as well as an effect on trade between MSs. If markets are defined narrowly, the chances of finding dominance increase – and if they are defined broadly, the reverse holds. Hence market definition is strongly contested in most dominance cases.

The legal test for abuse was also set out in the *Hoffmann-La Roche* case and later restated in the *Michelin* case (2002). The court defined abuse as follows:

> In prohibiting any abuse of a dominant position on the market in so far as it may affect trade between MSs, Article [102] covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has been weakened and which, through recourse different from those governing normal competition in products or services based on trader's performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.

This indicates that residual competition is valued highly.

13.5.3 Merger control

Unlike the prohibitions on cartels and abuse of dominance, which are normally enforced after the alleged infringement occurs (or *ex post*), EU merger control is based on a system of pre-notification (or *ex ante* control) that is elaborated in the Merger Control Regulation. This system is intended to provide legal certainty to firms before they implement their transaction, and to allow the Commission to vet all such transactions of a certain size (or Community dimension), based on a complex system of multiple turnover thresholds. Merger control aims at preserving 'effective' or workable competition, based on an assessment of the structural characteristics of the relevant product and geographic markets. As elsewhere in EU competition policy, market definitions are essential here: if wide product and geographic market definitions are used, mergers are evidently less likely to be considered problematic than if narrower markets are concerned. In principle, mergers are considered useful to allow undertakings to realize potential efficiencies of scale and scope in contestable markets. They can also promote economic integration. However, above a certain size mergers cannot normally be executed until they have been formally approved. Such approval may be given subject to structural remedies – for example, divestiture of assets such as brands and intellectual property rights, as well as production facilities – and frequently is. An early example is the *Nestlé/Perrier* case (1992), which, according to the Commission, could have led to single firm dominance in the French bottled water market (and duopolistic dominance if only one brand, Volvic, had been spun off to the next biggest operator who already owned Evian). In this case, Nestlé eventually offered commitments to sell to a credible competitor not one but four of its established water brands, as well as the relevant water sources, and

to provide a minimum water capacity for them. Nor would it be allowed for a period of five years to acquire other bottled water producers in France accounting for more than 5 per cent of the market. On these conditions, the Commission declared the merger compatible with the common market.

In addition, behavioural remedies such as non-discrimination obligations are sometimes considered (Jones and Gonzalez-Diaz 1992), although they are difficult to monitor and enforce effectively. An example of a failed structural remedy is *Vodafone/Mannesmann* (2000), where the resulting mobile phone giant was not allowed to offer its business users seamless use of their telephones abroad (roaming) for a single pan-European tariff unless it gave its competitors access at the same rates. This was intended to give competitors a chance to catch up, but rather than promoting competition it caused Vodafone to postpone its product innovations and encouraged all other operators to lean back and price-gouge their roaming customers instead. This situation was only (so far partially) resolved based on specific, EU-level roaming legislation in 2007 (Council and Parliament Regulation 2007,[3] the legality of which was confirmed by the ECJ in 2010).

The EU was long denied merger policy powers, because its MSs preferred to vet themselves, or indeed to supervise, the creation of national 'industrial champions', in a wide and often ill-defined set of industries (ranging from aerospace to yoghurt making) considered to be of strategic or political importance (see Chapter 14). The failure of such mutually exclusive national strategies, the increasing desire of businesses to merge across national borders without engaging in multiple notifications subject to different rules, and the merger boom triggered by the 1985 internal market initiative, were all instrumental in finally convincing the MSs to adopt the Merger Control Regulation in 1989 (Neven *et al.* 1993a, b). Since then, merger control has become widely acclaimed as a model for EU competition policy generally. The main reasons for this success are strict rules and deadlines that force the Commission to produce binding decisions within a limited timeframe (if they fail, the merger is cleared automatically), and undertakings to collaborate fully in the process of preparing these decisions. The scope of Community competence in this area – determined by the above-mentioned turnover thresholds – remains politically sensitive.

The reform of the Merger Control Regulation by Council Regulation 139 of 2004 has improved the system of referrals between the EU and national jurisdictions, and introduced a number of procedural changes. More importantly, the reform clarified the concept of dominance – that is, the substantive test applied – as including collective dominance in tight oligopoly situations (Stroux 2004). The Commission had earlier tried to pursue such a case (albeit unsuccessfully) in *Airtours* (2002; mentioned above, page 200). The ECJ set out the three-pronged test that would have to be met: first, the members of the oligopoly must be able to observe and monitor each other's behaviour; second, coordination must be sustainable over time, based on the possibility of retaliation against deviation from the common course; and third, the actions of consumers or competitors cannot successfully challenge this behaviour.

The regulation now applies a so-called SIEC test, meaning that a merger that 'significantly impedes effective competition' should be blocked or only be cleared after the acceptance of remedies. The SIEC test is codified in Article 2.3 of the Merger Regulation. This provision reads as follows: 'a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market'.

13.5.4 Public undertakings

In addition to the rules that apply to undertakings in general, the TFEU includes specific provisions governing the application of competition rules for undertakings that are controlled, favoured or charged with executing key economic tasks by public authorities. Article 106 of the TFEU provides rules concerning state-owned undertakings, undertakings that benefit from certain legal advantages and undertakings charged with tasks in the general economic interest, such as utilities – for example, in the energy, transport and communications sectors. Article 106.1 is addressed to MSs, not to undertakings. It prohibits MSs from enacting or maintaining in force any measures in relation to public undertakings and undertakings to which they have granted special or exclusive rights that are contrary to the rules of the treaty. Conversely, Article 106.2 is addressed to undertakings themselves. It states that the competition rules apply to public undertakings charged with services in the general economic interest without limitation, unless this makes it impossible for such companies to carry out their duties.

The *Höfner & Elser* v. *Macrotron* case of 1991 provides an example of the anti-competitive exclusive rights scenario. In Germany, a public agency called *Bundesanstalt für Arbeit* had the exclusive right of employment procurement – that is, headhunting. Höfner and Elser were recruitment consultants who contracted with Macrotron to find the latter a sales director. When Macrotron did not approve their candidate and refused to pay, Höfner and Elser started proceedings. In its defence, Macrotron claimed the recruitment contract was void as it breached the agency's exclusive right of employment procurement. The German court dealing with the case turned to the ECJ, which ruled that an MS is in breach of the prohibitions of Articles 106 in combination with Article 102, if an undertaking with a certain legal advantage, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position. According to the court, there was an infringement in this case as the agency was manifestly incapable of satisfying demand. An example of services of general economic interest is found in the *Corbeau* case of 1993. Here a local competitor to the Belgian postal monopoly was charged with having infringed the latter's exclusive rights. The Court found that the operation of a universal postal service throughout the national territory could be covered by a service of general economic interest, and in fact it might cover such cross-subsidies as necessary for the financial balance of the service. It left it to the national court to decide whether these criteria were met.

Article 106.3 concerns the policing and legislative powers of the Commission. First, it provides that the Commission may address decisions to MSs to ensure the observance of Article 106. Second, it gives the Commission power to issue directives to the MSs to ensure the application of this Article. Exceptionally for legislation, such rules do not require approval by the European Parliament and Council. The importance of Article 106.3, long a dormant provision of the TFEU, has increased markedly since 1988, when it was used to abolish exclusive rights in the telecommunications equipment sector. This is because 'natural monopoly' arguments that were long held to apply to public utilities have become contested, and public ownership is increasingly seen as inefficient. The TFEU itself, however, remains formally neutral concerning public and private ownership, by force of its Article 345.

13.5.5 State aid

Finally, in its Articles 107–9, the TFEU contains rules on restrictions of effective competition that result from MSs' authorities at any level favouring some companies over others by means of subsidies – that is, state aid (Quigley and Collins 2004; see also Chapter 14). Illegal state aid covers subsidies in any form, including outright financial subsidies as well as tax advantages or exceptions, favourable loan terms, credit guarantees, the sale or lease of goods and real estate below market prices, and many other forms of discrimination by public authorities between undertakings. Some types of state aid, however, are acceptable. Hence state aid is governed by a rule in Article 107.1 prohibiting aid that distorts competition, and two possible exceptions to this rule: first, aid that is by definition considered compatible with the internal market (see Chapter 7), as listed in Article 107.2 – for example, social aid to consumers and disaster relief; and second, aid that the Commission may clear by decision, following mandatory notification, as listed in Article 107.3 – for example, certain regional and sectoral aid. In this area, then competition Commissioner Kroes announced in 2005 that more weight should be given to market failures. Only when market failures exist is there a potential argument for intervention by means of state aid.

13.6 Enforcement

The Commission's relatively limited human resources have long focused on the enforcement of the prohibition of anti-competitive agreements contained in Article 101 of the TFEU (although, gradually, the relative weight of state aid policy did increase). This is the result of interrelated, systemic, political and practical constraints.

In spite of a recent spate of court decisions supporting the Commission's findings concerning *Deutsche Telecom* (2008), *France Telecom* (2009) and the celebrated *Microsoft* judgment (2007), Article 102 decisions remain relatively rare. This is in large part due to

the high burden of proof that the European courts have imposed on the Commission, which is explained by the inherently intrusive nature of this prohibition: based on their size, it bars individual behaviour by companies that would otherwise be acceptable business practice. A clear indication of the difficulties involved is that over the period of almost forty years during which the Commission has actively applied the competition rules, it has adopted only forty-odd decisions: evidently, it is likely that in reality significantly higher numbers of grave abuses of dominance occurred over this period. Since 1989, however, effective EU merger control may also have played a role in preventing dominant positions from emerging in the first place. Meanwhile, the Commission is trying to revive and rationalize its approach to dominance abuse. In December 2008 the Commission (CEU 2008e) published guidance on its enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings (officially recorded in CEU 2009j). This guidance focuses on conduct that risks weakening competition in a market by various means of foreclosure, such as rebates, refusal to supply and tying.

The manner in which the system of Article 101 was implemented until the 2004 modernization effort, on the other hand, was clearly biased in favour of attracting cases to the Commission. Article 101.1 of the TFEU prohibits agreements and parallel behaviour that restrict or distort competition within the common market. However, it is not always clear whether restrictions capable of affecting trade are involved, and in any event the benefits of such restrictions may be more significant than their negative effects (Odudu 2006). In practice, there are therefore many agreements, which are at face value restrictive, but that ought not to be prohibited. Because under Article 101.2 agreements that infringe the prohibition of Article 101.1 are automatically void, it was long held that undertakings require prior assurances that their prospective agreements are not caught by this prohibition. Under the key implementing Regulation 17/62 (Council 1962), only the Commission could provide exemptions to the prohibition on policy grounds, because notification to the Commission of the agreements involved was a precondition for obtaining an exemption. However, this resulted in a flood of notifications which the Commission has never managed to handle in a timely manner, due to capacity constraints. Moreover, the effectiveness of this system was low: harmful cartels are unlikely to be caught in this manner, as they are carefully kept secrets. In over thirty-five years of the application of the notification system, the Commission adopted only nine decisions prohibiting agreements based on notifications, without a complaint having been lodged against them in addition (CEU 1999f).

The most important instrument providing a collective negative clearance was the *de minimis* (see page 220) notice, concerning agreements of minor importance – that is, with negligible effects on trade between MSs or on competition (CEU 2001k). Aside from agreements covered by the *de minimis* notice, few agreements benefited from a negative clearance, largely because the Commission traditionally preferred to perform its anti-trust analysis under Article 101.3 (EC) – and it appears to continue to do so following modernization. This approach has long been criticized by advocates of a 'rule of reason' approach under Article 101.1 (Wesseling 2005). Under Article 101.3, an agreement that is in principle prohibited under Article 101.1 may, if its effects are on balance considered beneficial to competition, obtain a waiver, or 'exemption' from this prohibition, potentially subject to structural and behavioural conditions, and limited in time. This process was streamlined by means of collective, or 'block' exemptions (see Section 13.8, page 208).

Its monopoly on exemptions from the prohibition on restrictive agreements set out in Article 101.1 gave the Commission sole control of key levers of competition policy. The resulting centralization of EU competition law enforcement in the hands of the Commission had considerable benefits in terms of consistency and credibility, and was probably indispensable in order to allow a fully-fledged EU competition policy to develop. In fact, with few exceptions (notably Germany), in the EU a true competition policy was long pursued only at Community level.

In recent years, however, this situation has changed fundamentally. All MSs now accept, at least in principle, that state intervention and tolerance or promotion of private cartel arrangements are poor substitutes for the market allocation of resources. Hence, in a process of 'spontaneous harmonization', most MSs have adopted national competition rules based on the EU model, and have moved towards effective enforcement of these rules. At the same time, it became clear that in order to further advance competition policy, the Commission would have to focus on new problems, such as those that arise in recently liberalized markets, in oligopolistic markets and in markets that extend beyond the EU. Likewise, to ensure proactive enforcement, it would have to focus more on complaints, and on labour-intensive, own-initiative actions to pursue the gravest cartel and dominance abuses. Meanwhile the adoption of a 'leniency notice' (CEU 2002l) led to a steep increase in the number of applications for a reduction of fines in cartel cases by undertakings 'coming clean' about cartel abuses in which they were involved, and providing the necessary evidence against their co-conspirators. Following up these cases in a timely and effective manner now requires increased resources. Together, these constituted compelling reasons to decentralize and modernize the system of enforcement.

Even prior to the adoption of the key modernization Regulation 1 of 2003, the Commission started rationalizing its existing Article 101.3 practice by streamlining and consolidating its block exemptions, and by moving towards an approach that relies more on economic analysis, in particular in the area of vertical restraints. Likewise, at an earlier stage, following the momentum generated by the 1992 internal market programme (see Chapter 7), the Commission had started focusing its competition policy more on public undertakings and state intervention. These three developments are each discussed below.

13.7 The public turn

During the first three decades of its competition policy, the Commission focused on the basic task of enforcing the Article 101 (EC) and Article 102 (EC) prohibitions against private undertakings. This required it to elaborate implementing rules (the procedural regulations and block exemption regulations mentioned above) and to develop its practice concerning a range of standard competition policy problems in this area. After consolidating this part of its competencies, the Commission started expanding the scope of its enforcement efforts, to cover the politically more delicate areas of the public sector and state aid, over the course of the 1980s and 1990s. This trend has been defined as the 'public turn' of EU competition law (Gerber 2001).

In the first place, the Commission began more active enforcement of the competition rules against public undertakings, and undertakings that enjoy special and exclusive rights, such as legal monopolies, as well as licences or concessions limited in number and awarded on discretionary grounds – for example, the early licenses to operate mobile telephony or port landing rights.

Second, the Commission's policy on state aid has matured, in particular following the completion of the internal market programme. This policy has included: targeting aid to public enterprises; the elaboration of the 'market investor test', which means aid is not acceptable unless private investors might have taken similar investment decisions; and enforcing the repayment of illegal aid (see Chapter 14).

The market investor test emerged from the case law. In the *Spain* v. *Commission* case of 1994, Advocate General Jacobs regarded aid as being granted whenever a state made funds available to an undertaking, which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding considerations of a social, political or philanthropic nature. This approach was adopted by the Court itself in the *SFEI* v. *La Poste* case of 1996, where it held that, in order to determine whether a state measure constitutes aid for the purposes of Article 107, it is necessary to establish whether the recipient receives an economic advantage that it would not have obtained under normal market conditions.

At the same time, the belief that state control over the economy is inversely related to its performance became widely shared by policy-makers at national level. This realization was reinforced by the move to economic and monetary union (EMU), which imposes budgetary constraints that make MSs reluctant to expose themselves to the significant potential liabilities represented by public investment that is not guided by efficiency considerations, and indeed by public ownership as such (Devroe 1997; see also Chapters 11 and 12). The degree to which the system of state aid checks has become engrained in the policy process is illustrated by the fact that when the financial crisis caused numerous MSs to rescue ailing financial institutions, EU state aid control over this process continued unabated.

An important new category of state aid cases concerns services of general economic interest (Sauter 2008). The *Altmark* case of 2003 states the main

principles for financing services of general economic interest. In that case, the court concluded that payments made by governments to companies providing essential services – for example, public transportation – should not be classed as state aid as long as the following criteria are satisfied. First, the recipient must actually perform a predefined public service obligation. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred for supplying the public service. Fourth, where the undertaking that performs the public service obligation is not chosen on the basis of a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical well-run undertaking in the same market would have incurred. Taken jointly, this means that the undertaking would have provided a public service in proportionate exchange for consideration, and hence was not conferred an unfair advantage, so no aid was given.

Although the developments that constitute the 'public turn' of EU competition policy can certainly also be seen as a form of modernization and rationalization, they still remain distinct from these changes to its traditional core anti-trust enforcement. In the utilities sectors, where traditional monopoly markets must be opened up to competitive entry, sector-specific competition rules enforced by independent sector regulators will continue to play an important role at least in the medium term, until competition becomes sufficiently effective for application of the general (or horizontal) competition rules to suffice. Meanwhile, the existence of such sector-specific national regulators helps to relieve the burden on the competition services of the Commission, and to spread an understanding of how the process of competition may be protected in often technically complex (and politically sensitive) fields, such as electronic communications, energy and transport. The rules on state aid will of course not be phased out, as the need to distinguish legitimate public measures from illegal aid will persist as long as public authorities are tempted to interfere in markets. Moreover, unlike the antitrust provisions, the state aid rules are, by definition, not suited to decentralized application, and no such rules exist at national level (although EU rules can be invoked in some cases by complainants before national courts). Therefore, they must be enforced in a centralized manner.

In sum, there is a clear case for Commission services to focus on state aid, mergers and other cases with a significant Community interest due to the size and transnational nature or precedent value of the problems involved, while leaving the great majority of competition cases to national competition authorities and sector-specific regulators. A significant Community interest or dimension was arguably not involved in the bulk of competition cases so far examined under Article 101. Accordingly, Regulation 1 of 2003 empowered national authorities to deal with such cases. In addition, limiting the scope of the prohibitions to cases where economically significant effects and market power are concerned would help to allow a clearer focus on more serious competition problems at both the national and EU levels. The developments in the area of vertical restraints and modernization indicate a clear policy trend in this direction.

13.8 Rationalization

Many commentators have criticized EU competition policy for its lack of economic analysis, in particular in relation to restraints on competition under Article 101 (Hildebrand 2002; Korah 1998). In part, the Commission's approach, with its focus on formal and territorial restraints, was a logical consequence of the integration objective. Yet even when it tried to accommodate economically advantageous vertical agreements, the system of parallel block exemption regulations adopted for similar types of agreement led to inconsistencies and, in combination with the practice of identifying exempted restrictions, rather than just those restrictions held to be illegal, to 'straitjacket' effects. Moves towards consolidation and reform started in 1996, when the Commission adopted a single block exemption for technology transfer agreements, replacing previously separate regulations concerning patent and know-how licences. Since then, EU competition policy has shifted away from an approach based on legal form towards one based on market power and economic effects: it is this process that can be described as rationalization.

One of the reasons for this cultural change may have been the integration of economists at DG COMP. There has been a large increase in the number of economists working at DG COMP: around 200 out of over 700 officials have an economics or business background. About twenty of them have a PhD in economics, ten of whom are currently working in the Office of the Chief Economist. The Office of the Chief Economist was created in 2003 as a separate and independent division of DG COMP that mainly consists of economists (presently chaired by Professor Damian Neven). The Office's members work closely with the case teams, getting involved early on in the investigation and providing economic guidance and methodological assistance.

The most important examples so far concern the Commission's approach to vertical and horizontal restraints. In 1999 it adopted a single block exemption regulation for vertical restraints, replacing the formerly separate legal instruments concerning exclusive distribution, exclusive purchasing and franchising agreements. In addition, the new block exemption covers selective distribution agreements, which were previously dealt with under individual decisions (CEU 1999e). In 2000 the Commission adopted 'horizontal' block exemption regulations for specialization agreements and for research and development agreements (CEU 2000g, h), followed by a notice on horizontal cooperation agreements (CEU 2001l). With regard to both vertical and horizontal agreements, the emphasis is now on undertakings with some significant measure of market power. Only the vertical block exemption is discussed in more detail here.

Vertical agreements are entered into between undertakings operating at different levels of the production or distribution chain that relate to the purchase, sale or resale of certain goods and services. The restraints involved in such agreements typically cover various forms of exclusivity and non-competition clauses, as well as branding and pricing constraints that may foreclose market entry, reduce intra-brand competition especially, and obstruct market integration. Especially for the latter reason, vertical restraints have traditionally been frowned on in EU competition law, and a systematic policy recognizing the potential benefits of vertical agreements has been slow to develop. However, as the various specific block exemptions testified, these potential benefits can be significant: vertical agreements can improve economic efficiency by reducing the transaction and distribution costs of the parties involved, and can lead to an optimization of their respective sales and investment levels, in particular where there is effective competition between different brands. Most important from an integration perspective, vertical agreements also offer particularly effective ways of opening up or entering new markets. The objective of the vertical block exemption is to secure these positive effects, turning away from the earlier focus of EU competition law on integration through protecting inter-brand competition (Peeperkorn 1998).

The block exemption for vertical restraints is based on a general exemption, subject only to a prohibition of a limited number of blacklisted clauses (such as resale price maintenance and most territorial constraints), leaving broader freedom for commercial contracts (Korah and Sullivan 2002). Unless the undertakings involved enjoy market power (or where there are networks of similar agreements stifling the market), the block exemption creates a presumption of legality for vertical agreements concerning the sale of goods and services that are concluded by companies with less than 30 per cent of market share. Only cases involving undertakings that are above this threshold require separate analysis. In a move towards decentralization, national authorities are empowered to withdraw the benefits of the block exemption if vertical agreements have effects incompatible with Article 101.3 on a geographically distinct market within their jurisdiction. The vertical block exemption is now under review, especially its prohibition of retail price maintenance.

13.9 Modernization

For more than thirty-five years, following the Council's adoption of the key procedural Regulation 17 in 1962, the Commission was responsible for the administration of a highly centralized authorization system for exemptions to the cartel prohibition of Article 101.1. This system rested on the notification requirement and exemption monopoly introduced by Regulation 17. It has facilitated the uniform application of EU competition law, which in turn fostered a 'culture of competition', now shared with national competition authorities in all twenty-seven MSs, a majority of which

obtained authority to apply national competition laws inspired by Community law even prior to modernization (Temple Lang 1998). However, this success came at significant cost to effective enforcement: mass notifications overburdened Commission services, leading to administrative solutions that did not provide adequate legal certainty for undertakings, but which nevertheless used to trump national courts and competition authorities in their own enforcement of the directly effective cartel prohibition (Wils 2003).

Over time, the Commission came to share many elements of the widespread criticism of this system. In addition, it identified the impending further EU enlargement (see Chapters 2 and 19), the effects of economic restructuring following EMU, and the need to reallocate resources to respond adequately to the broadening geographic scope of various anti-competitive practices as the result of economic globalization, as reasons to adopt a programme of far-reaching modernization and reform of the manner in which Article 101 is applied. In its modernization White Paper of 1999 (CEU 1999f), the Commission set three objectives for this exercise: ensuring effective supervision; simplifying administration; and easing the constraints on undertakings while providing them with a sufficient degree of legal certainty (Wesseling 2000). Subsequently, the Commission's proposals resulted in the adoption of the new Council regulation on the implementation of Articles 101 and 102, which came into force on 1 May 2004, coinciding with EU enlargement.

The key element of this modernization exercise is that it replaces the mandatory notification and authorization system with a directly applicable legal exception system. This constitutes a shift from a system of *ex ante* control to a system of *ex post* supervision that relies more on direct effect, and hence on enforcement by national authorities and in private court actions by interested parties. Undertakings are now required to assess for themselves whether their contemplated agreements are likely to infringe the prohibition of Article 101.1, and, if they do, whether they remain within the scope of the legal exception of Article 101.3, because the restrictions involved are limited to the minimum that is necessary to realize legitimate economic benefits shared with consumers, consistent with established EU competition policy practice.

It is important to note that this self-assessment remains subject to challenge before national courts and by the competition authorities both at national and at Community level. The enforcement at national level is facilitated by Commission guidance. In its own handling of such cases, the Commission has announced that it will limit the scope of its review to undertakings with market power. Hence, as with the approach concerning vertical restraints, market shares will come to play a key role. Under the modernized system, all national competition authorities are not only to be empowered but also obligated to apply Articles 101 and 102 in cases where there is an appreciable effect on trade between MSs. This considerably reinforces the decentralized application of EU competition law.

National competition authorities have to keep the Commission informed of their intentions in such cases, and must submit substantive decisions to prior Commission scrutiny. Since the Commission retains the right to take over cases where this is deemed to be in the Community interest, there will also be an increase in coordination at Community level. The ambition is that DG COMP will become the linchpin of a system based on a seamless network of closely cooperating competition authorities at national and EU level (Ehlermann 2003; Temple Lang 2004).

The role of national authorities was at issue in the *Consorzio Industrie Fiammiferi* (CIF) case of 2003. CIF was an Italian consortium of domestic manufacturers of matches. The CIF had been established by royal decree in 1923, and enjoyed a commercial and fiscal monopoly that ended in 1994. Subsequently, the Italian state undertook to prohibit the distribution of matches that had been produced by non-CIF members. In return, CIF promised to ensure that its members paid the excise duty on matches. The Italian competition authority declared the relevant national legislation to be contrary to the good faith clause and Article 101 of the TFEU, as it required the CIF to engage in anti-competitive conduct. Remarkably, the EU General Court agreed with the competition authority and held that the duty to disapply national legislation that contravenes Community law applies not only to national courts, but also to 'all organs of the state', including both national competition authorities and sector-specific regulators.

The complexity of the role of the national courts was brought out in the *Masterfoods* v. *HB Ice Cream* case of 2000. HB had supplied retailers in Ireland with freezer cabinets for no direct charge, provided that the cabinets were exclusively used for stocking and displaying HB ice-cream products. In 1989 Masterfoods, a subsidiary of Mars, Inc., entered the Irish market, and some retailers started stocking Masterfoods products in their HB freezer cabinets. When HB strongly objected to this practice by enforcing the exclusivity provision of its distribution agreements, Masterfoods brought an action before the Irish High Court, as well as a parallel complaint with the Commission, claiming that the HB exclusivity clause infringed Articles 101 and 102. The Commission found that the exclusivity clause did infringe Community rules on competition and HB appealed to the EU General Court. In the parallel national proceedings the Irish High Court held the reverse and Masterfoods appealed to the Irish Supreme Court, which addressed the ECJ. The ECJ held that where a national court is considering issues that are already subject to a Commission decision, the court may not reach a judgment conflicting with the decision of the Commission, irrespective of the fact that the Commission decision in question had been appealed to the General Court. The court further stressed that it is for the national court to decide whether to stay proceedings pending final judgment or in order to address a preliminary reference to the ECJ.

It is clear that new dynamics involving national regulators and courts are evolving. Because ending formal centralization gives rise to an increased need for coordination, it is by no means certain that the Commission's ambitions to refocus its own enforcement activities on intensified *ex post* control – including that against the gravest cartels – can be realized without additional resources. Whether sharing responsibility for competition law enforcement more broadly will create momentum in favour of providing the necessary means remains an open question. At a minimum, however, it will provide the Commission with increased flexibility in reordering its priorities.

13.10 Conclusion

Following its initial system-building efforts, EU competition policy became increasingly hampered by a mismatch between the formal scope of the Commission's powers and its actual capacity for effective enforcement. To some extent the Commission fell victim to its own success at centralizing its competence in order to secure its key mission of promoting market integration. Nevertheless, its efforts eventually spawned both the spontaneous harmonization of competition policy and an increasingly effective enforcement culture at national level, which are now considered key to modernization.

EU competition policy is in a process of rationalization and modernization that involves imposing increasingly stringent curbs on public intervention, and it is moving away from its former primary focus on the integration objective towards increasing reliance on economic logic and on enforcement at national level.

Although significant advances have already been made concerning previously privileged economic sectors, state aid and revising the block exemptions, the ongoing review of EU competition policy instruments is not complete: a full review of policy on market power and dominance, including approaches to dominance and collusion in oligopolistic markets, remains to be worked out. The process of decentralizing the enforcement of the principles established so far forms a precondition for such further modernization, which has only recently begun. Methods and principles for case allocation and cooperation within the network of European competition authorities are being tested in practice. The state aid machinery is likely to be reformed further. Finally, setting priorities may be necessary to manage a growing flow of cartels subject to leniency applications. Nevertheless, the outline of a fully-fledged market power and effects-based 'second-generation' system of EU competition law is now clear.

Summary

- EU competition law is one of the key instruments of the SEM and thereby of European integration. Although it is based on common concepts of antitrust and law and economics first developed in the USA, it has a typically European dimension. Historically this can be traced back to German *Ordo*liberalism in the 1940s and 1950s, but even more important is the aspect of promoting integration that can be found, for instance, in the

approach to parallel trade and vertical restraints (long regarded with scepticism).

- The three main dimensions normally associated with EU competition policy (CP) are the prohibitions on cartels and dominance abuse, and merger control. In addition, there are policies on public undertakings and on state aid, which do not concern the relationships between undertakings as such, but between undertakings and the MSs – for example, exclusive rights or subsidies. These rules are complementary and aim at achieving effective (not perfect) competition in the SEM. The comparatively more recent attention for the role of the state in this context has been called the 'public turn' of CP.
- Finally, the rationalization and modernization of EU CP policy are discussed:
  1. Rationalization largely equates integrating the use of more (up-to-date) economic analysis in CP. A notable example has been the revised policy towards vertical restraints.
  2. Modernization is the most recent trend and revolves around the decentralization of CP to the network of competition authorities in the MSs, coordinated by the Commission, and replacing the centralized exemption procedure with a legal exception based on self-assessment.

     At the same time, hard-core restrictions are combated more vigorously.

Questions and essay topics

1. Why is there an EU CP?
2. What is effective competition and how does it differ from perfect competition?
3. What is the relevant market and why is it important in EU CP?
4. Define an agreement/concerted practice between firms that restricts competition.
5. What are vertical restraints and why are they considered differently from horizontal restraints?
6. What is a block exemption?
7. Under what circumstances would a company be in a dominant position in the EU?
8. Why is it abuse, not dominance, that is a problem under EU CP?
9. What determines whether a merger comes under EU jurisdiction?
10. Under what circumstances will a merger be banned by the EU?
11. What is state aid?
12. Why is EU control of state aid necessary?
13. Explain the position of public enterprises under EU CP.
14. Discuss the goals of EU CP and how they differ from those of another jurisdiction, such as the USA.
15. Why was it necessary to extend EU CP to mergers?
16. What is meant by the modernization of EU antitrust policy? In this context, explain the importance of the legal exception and the exemption system.
17. Why has EU CP taken a public turn? Consider the form this change has taken.
18. Discuss the relevance of economics to anti-trust in the EU.
19. It has been necessary to modernize EU CP. Consider the forms this modernization has taken.

FURTHER READING

Cini, M. and McGowan, L. (2008) *The Competition Policy in the European Union*, Palgrave Macmillan, Basingstoke.

Elhauge, E. and Geradin, D. (2007) *Global Competition Law and Economics*, Hart Publishing, Oxford.

Faull, J. and Nikpay, A. (eds.) (2007) *The EC Law on Competition*, 2nd edn, Oxford University Press.

Geradin, D., Layne-Farrar, A. and Petit, N. (2010) *EC Competition Law and Economics*, Oxford University Press.

Gerber, D. J. (2001) *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press.

Monti, G. (2007) *EC Competition Law*, Cambridge University Press.

Motta, M. (2004) *Competition Policy: Theory and Practice*, Cambridge University Press.

van Bael & Bellis (2009) *Competition Law of the European Community*, 5th edn, Kluwer Law International, Deventer.

van den Berg, R. J. and Camesasca, P. D. (2001) *European Competition Law and Economics: A Comparative Perspective*, Intersententia Publishing, Mortsel, Belgium.

NOTES

1. Cases from 17 June 1997 are available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en; earlier cases are available on the subscription service EUR-Lex.
2. Until 2009 this was known as the Court of First Instance.
3. Regulation (EC) No. 717/2007 of the European Parliament and the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ 2007 L171/32.