

The future of EU competition policy

Edward Bannerman

Foreword

The Centre for European Reform has proven itself to be a significant contributor to the debate on how the European Union and its institutions should evolve. This contribution to the debate on the future of EU competition policy, particularly in merger control, is well timed, given the Commission's recent launch of its Green Paper on this economically important subject.

As a firm very actively involved in merger control and other competition proceedings before the European Commission, Freshfields Bruckhaus Deringer is very aware of the importance placed by our clients on the need for a professional, proportional, timely and impartial appraisal process. In this context, we welcome the launch of the Green Paper review in which the Commission has invited constructive comment on its current merger processes (which, notwithstanding their historical success, are capable of being further developed in the light of recent experiences).

Freshfields Bruckhaus Deringer has been pleased to support the CER's own contribution to the debate, at an important time in the development of European competition policy generally.

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Competition policy today is primarily about the application of law and economics to specific policy issues. In Europe, it is a major contributor to the development of the single market and to economic and monetary union.

Many views have been expressed recently, both from within the European Union and from outside, as to whether European competition policy, and its operation, is working well and what changes could usefully be made. The European Commission has recently published its own proposals so this initiative by the Centre for European Reform is very timely.

Most observers – including FIPRA – believe the current arrangements have largely worked well. However, this does not preclude the need for further development. Some changes suggested in this booklet, such as a faster appeal procedure, have widespread support. In contrast, the case for establishing a new European competition authority, independent of the Commission, will remain open to debate. The need is for the Commission to continue to take a balanced approach towards its assessment of particular cases in accordance with the principles of openness and even-handedness.

FIPRA very much welcomes the CER's contribution and is confident that these ideas will provide a constructive contribution to the discussion now taking place.

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DISCLAIMER

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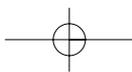
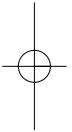
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1 Introduction

When anti-capitalist demonstrators have gathered at places such as Seattle, Stockholm and Genoa over the past few years, they have often argued that multinational companies have become more powerful than nation-states. Certainly the financial scale of these businesses, with their global reach and control of new technologies, gives them enormous clout. Politicians and businessmen in every developed country court multinational companies, anxious to secure their job-creating investment. Yet in only the last year, the European Commission has chosen to go head-to-head with two of the world's largest corporations in the name of competition policy. Officials from the Directorate General for Competition have confronted the American giants GE and Microsoft, using their wide-ranging powers to investigate and intervene in the marketplace.

Competition policy is a subject little understood outside legal circles or multinational boardrooms, but it is vital to Europe's economic prosperity and future political governance. In any market, buyers and sellers have different agendas, and the market cannot achieve the best outcome if any one party is dominant. This is as true for the EU's single market of 380 million consumers as it is for any other. There is no point in allowing free movement of goods and services if consumers cannot choose from a range of suppliers on the basis of cost or quality. Otherwise, public barriers to trade – tariffs or import regulations – would simply give way to private ones, such as a dominant monopoly that is free to fix prices or production quotas.

This is the main rationale for a powerful European competition policy, but there are others. A dynamic home market makes EU companies more likely to succeed overseas. *Competition* does not guarantee *competitiveness*, but open markets do put companies

under continual pressure to innovate, improve quality and keep prices low. A strong competition policy is therefore vital to ensuring that European firms remain among the world's best – a target the EU set itself in March 2000. At the pioneering Lisbon European Council meeting, governments signed up to a programme of economic reforms designed to make the EU “the world's most competitive and dynamic economy” by 2010.

The Lisbon summit highlighted another challenge for competition policy. Europe simply cannot compete in world markets if it relies on low-cost, low-skill production. EU leaders stressed that future prosperity depends on Europe making the leap to a knowledge-based economy, by developing and sharing new technologies. But companies will only invest in research and development (R&D) if the resulting intellectual property is protected by patents and trademarks. Such protection is deliberately anti-competitive, so the new economy represents a dilemma for competition policy, which EU policy-makers are only just starting to tackle.

Moreover, the need to invest in R&D and achieve economies of scale is pushing many companies into co-operative arrangements or full mergers with their rivals. There is rapid consolidation in the pharmaceutical sector, for example, where the research budget for a major new drug is now around €1 billion. But do such deals strengthen competitiveness, or weaken competition? The competition authorities use complex economic calculations to assess such deals, but in the end their verdict often comes down to a subjective judgement. And reaching that verdict is very time-consuming: the Commission receives notice of around 350 proposed mergers and takeovers every year, and it must give each one at least an initial review, to assess the impact of the deal on competition in the European economy.

The increasingly international dimension of competition policy is yet another new challenge to policy-makers. Because competition policy is crucial to the EU's internal market, the Commission's powers are

far-reaching. They allow it to investigate mergers that only affect one member-state, for example, as long as the deal is over a certain size. This has inevitably caused controversy, with critics arguing that the Commission fails to apply the principle of subsidiarity and tends to centralise power, rather than leave decisions to national authorities.

The Commission's defence is that, while companies have got bigger and more global, the EU is still constrained by the limits on both its resources and geographical jurisdiction. In both 1999 and 2000, the value of mergers worldwide was well over \$3 trillion, and around a third involved firms from more than one country.¹ Competition laws are usually national, but multinational companies – by definition – are not. Their greater size and reach give them enormous power to distort markets. In principle, the European Commission can monitor the activities of firms based both inside and outside the EU. But political realities can make this difficult if other states are unwilling to co-operate.

¹ *Goldman Sachs, Global Economics Paper 65, October 2001.*

This problem has already created tensions with the EU's trading partners. The outcry from the United States after the Commission blocked the merger of GE and Honeywell in July 2001 is only the most recent example. South Africa was also indignant about the Commission's intervention in 1996 to block the merger of Lonrho and Gencor's platinum interests. For their part, US competition authorities have blocked mergers between European companies, even when the Commission had approved the deal. This was the case with the aborted BOC-Air Liquide merger in 2000. New thinking is needed to manage and resolve these conflicts between different jurisdictions.

The existing system of co-operation between officials on both sides of the Atlantic is laying the foundations of a new system of global economic governance. This has evolved by agreements between regulators, but a political superstructure is still lacking. At the World Trade Organisation meeting in Doha in November 2001, world leaders finally agreed to the EU's suggestion that competition policy

should be integrated into the next round of trade talks. A formal WTO agreement on competition policy is still many years away, but a consensus could eventually emerge, with significant implications for companies. Closer to home, the EU will have to extend competition policy eastwards to new member-states which have only a short experience of competitive markets. This will mean yet more work for the already stretched competition authorities in Brussels and the candidate countries.

Despite all these challenges, the enforcement of competition policy has so far been one of the Commission's success stories. The Directorate General for Competition employs some of the best and brightest officials, and has been led by a succession of high-profile and effective commissioners. Mario Monti, the current commissioner, is widely respected even by those senior business leaders whose deals he has blocked. But to maintain this reputation, the Commission will have to face up to some complex and occasionally contradictory challenges:

- ★ to protect consumers from anti-competitive practices
- ★ to promote the working of the single market
- ★ to encourage competitiveness and innovation in EU companies
- ★ to integrate new EU members into the single market
- ★ to develop international rules to cope with the globalisation of business
- ★ to be accountable under due process of law.

Against this backdrop, the European Commission is proposing a major overhaul of competition policy. Business leaders, policy-makers and consumers across the EU need to understand these proposals, both for their own sake and for their relevance to the

broader question of the reform of European governance. Competition policy is at the cutting edge of the debate over how public institutions should respond to globalisation.

This paper examines the Commission's proposals and looks at what they mean for the private and public sector. It does not offer substantive guidance on any point of competition law, nor does it review the Commission's modernisation programme of anti-trust policy and recent Green Paper on merger control in detail. Instead, it looks from a longer-term perspective at how competition policy fits with the EU's main goals of boosting economic performance, strengthening democratic accountability and enhancing institutional effectiveness. And it suggests several reforms that would enable competition policy to play a more important role in shaping Europe's economic and political future.

2 EU competition law in practice

The EU has three broad branches of competition law:

- ★ Anti-trust/cartel policy
- ★ Merger control
- ★ State aid.

Each branch addresses an artificial distortion of the market that reduces efficiency and thereby harms consumers. The main principles behind this area of EU law date back to the Treaty of Rome of 1957, which founded the European Economic Community. At that stage, even the basic ideas guiding competition policy were still in dispute in many member-states. Since then, competition law has developed in parallel at national and at EU levels. The process has been remarkably rapid and mutually reinforcing through collaboration between regulators in Brussels and the member-states. Competition policy has gained in stature and profile, to the extent that even ardent free-marketeers now accept that government must play a role in its enforcement. This chapter looks at how each branch of EU competition law works in practice.

Anti-trust/cartel policy

Article 81 of the treaty establishing the European Community bans agreements between companies that harm consumer interests by distorting competition and trade between member-states. That ban covers horizontal agreements between firms in the same industry, and vertical agreements between companies along the supply chain. The Commission has extensive powers to investigate such

agreements, including the right to enter company premises unannounced to look at internal company documents. It can prosecute any firm that breaches the law and can levy fines of up to ten per cent of the company's global turnover. In the course of 2001, the Commission imposed fines for anti-competitive behaviour totalling almost €2 billion. And it is currently increasing the resources of DG Competition to respond to what it sees as a rapid rise in the number of international cartels.

In November 2001 for example, the Commission imposed record fines totalling €855 million on participants in a vitamin cartel, which included Roche and BASF. This came on top of a similar penalty levied on the same companies for the same offence by US regulators in 1999. The highest previous EU fine was €272 million for a shipping cartel in 1998. The Commission's fines take into account the seriousness of the offence, how big the companies involved in the cartel are, and how long the cartel lasts. The extent to which the companies co-operate with the Commission can also affect the final level of the fine.

Not all inter-company arrangements are illegal and the Commission can create block exemptions for some types of agreements. The best-known exemption regulates the exclusive relationship between car-makers and their official distributors. But even this is coming under scrutiny, thanks to consumer protests about differences between car prices across the EU. In October 2001, Daimler-Chrysler was fined over €70 million for illegal distribution arrangements that limited the ability of consumers to buy cars from other member-states. The arrival of the euro is making it easier to compare prices, and harder for manufacturers to control sales of their vehicles.

Increasingly, the Commission is moving away from a legalistic and towards an economic approach to competition policy. Instead of looking for illegal clauses in contracts, it now looks more at how corporate behaviour affects markets and consumers. As a result,

many more of the Commission's 150 competition policy staff now come from an economic rather than a legal background, but more such specialists are needed to meet growing demand.

The second key anti-trust provision is Article 82, which prevents any company from abusing its dominant position in the market. It is not illegal to be dominant *per se* – indeed, it is usually a sign of success. But it is illegal to abuse that position by, for example, conspiring to keep competitors out of the market. Dominant companies often employ tactics such as predatory pricing to weaken their rivals, or exclusive distribution and supply arrangements that shut them out of a market. Increasingly, technological innovation can also create anti-trust problems – for instance, when the systems developed by the market leader become the industry standard, this can block competitors out of the market. The abuse of a dominant market position is much harder to prove in such technical cases, and the Commission has generally been wary of launching investigations. The Commission's tough approach to merger control could in part be explained by concern over the limited remedies available to control competition *after* a merger has been approved.

The highest profile example of a 'dominance' case is the ongoing investigation into the software giant Microsoft. US regulators first launched an investigation in 1998, and in 2001 American courts found that Microsoft had abused its position: as the dominant provider of personal computer operating systems, it had excluded rival internet browsers to promote its own software products. In early 2002, Microsoft was close to reaching a deal with the US federal anti-trust investigators, although some US states are still challenging the proposals.

The European Commission launched separate but parallel investigations into different parts of the software market in 2000 and 2001, and is continuing to collect evidence. Like its American counterparts, the Commission can choose from several remedies if it decides that Microsoft has indeed abused its dominant position. It

could impose fines, force Microsoft to change its behaviour (for example, by licensing technology to other firms), or even order the break-up of the business – forcing Microsoft to sell off certain assets or divisions. This would be a dramatic and highly controversial step and would take the EU into unprecedented legal territory. Even Deutsche Post nominally ‘offered’ to split its operations in March 2001. It is hard to see Microsoft making an equivalent proposition to the Commission.

Merger control

One of the simplest ways for firms to reach a dominant position is by merging with or acquiring a competitor. Mergers themselves can be good news for consumers. They can make the companies involved more efficient, resulting in cost-savings that are passed on to consumers. Or if two medium-sized firms merge, they may be able to compete better with a dominant rival, again to the benefit of consumers. But the Commission is rightly determined to block those mergers that, by creating or strengthening a dominant position, impede effective competition.

That is why, in 1990, the EU passed a regulation that large firms must get Commission approval before they can merge. This regulation applies to transactions with ‘a Community dimension’, which in practice typically means those where the combined turnover of the companies exceeds €5 billion. There are several clearly defined stages to each merger review, and informal consultations often take place between the merging parties and the Commission prior to formal notification. The first stage takes a month, during which experts decide if the merger has competition implications. For the ten per cent or so of cases that raise serious concerns, the Commission starts a four month investigation based on a formal ‘statement of objections’ that it presents to the companies concerned. Officials then look in detail at the potential impact on particular markets and discuss possible solutions with the parties. These remedies could include an agreement to sell off certain subsidiaries to rival firms, for example.

The number of deals that are reviewed has risen rapidly in the past few years: from only 95 in 1994, to 172 in 1997, and to 345 in 2000. Most of these are eventually approved – the Commission has officially blocked only 18 proposed mergers out of almost 2000 notifications since the regulation came into force. But eight of these barring orders have come in just the last two years and, in other recent cases, companies have withdrawn their merger plans once the Commission made its disapproval clear. To some extent, this increase reflects the rapid rise in worldwide takeover activity that occurred in the late 1990s.

The merger process works well, although there are fears that the Commission's workload may be getting unmanageable. The rapid rise in notifications has inevitably strained the scarce resources of the Commission's Merger Task Force. It is not unknown for companies to submit over a million pages of documentation in support of a proposed deal. The recent dramatic downturn in merger activity, resulting from the global economic slowdown, may ease the pressure somewhat in the short term. The Commission has also launched a debate on whether to charge for merger notifications in order to cover some of the costs it incurs. A baseline fee of around €30,000, which could be adjusted to reflect the size and complexity of the merger, seems reasonable compared to the other corporate legal expenses involved in a merger. The Commission could use the revenue received to increase the resources available to DG Competition.

The process of reviewing mergers requires considerable expertise and time, and it is important to get the process right if DG Competition is to aid, not hinder, competition. The officials involved use complex economic models to predict consumer and firm behaviour, but even so, their assessment is inevitably speculative because it has to predict the future evolution of the market, and can therefore be contentious. This is why negotiations of remedies can prove so difficult, as the companies concerned may take a very different view from the Commission on how the market will evolve.

In its December 2001 Green Paper on merger control, the Commission proposed a ‘stop-the-clock’ clause, so that companies could ask for a pause if they felt they needed more time to negotiate remedies that would allay the Commission’s concerns.

The recent dispute over the proposed GE-Honeywell merger highlighted the difficulties of judging how any merged company will behave in the future. Officials in the US were notified in October 2000 that the American industrial conglomerate GE wanted to buy the aerospace and electronics firm Honeywell for \$45 billion. A similar notification reached EU officials in February 2001. But the competition authorities on either side of the Atlantic reached different conclusions regarding the likely impact on the aerospace market. This was not just because they were looking at their different geographical markets. The two authorities also made different assumptions about how the merged enterprise would behave in a global industry such as aerospace. The Commission assumed the merged company would bundle its services in such a way as to keep out competitors and therefore ultimately hurt consumers; US officials predicted that consumers would not suffer from the merger and could even benefit (see Chapter 4 for fuller discussion).

Very few industries are as global as aerospace however. Despite the EU’s formal establishment of a single market, many sectors remain more national than European. And because it reviews mergers on the basis of their size, the Commission’s decisions can lead to political conflict. This was shown very clearly in the recent debates over ‘national champions’, after member-state governments had encouraged firms in some sectors to merge into a single enterprise so they could compete more effectively in international markets. Such mergers rarely win the approval of the Commission, which has no brief to protect national champions and in many cases sees them as a barrier to effective competition.

In 2000, for example, Swedish auto-manufacturers Volvo and Scania announced plans to merge their truck divisions. The Swedish

government backed the plans, but the Commission blocked them because the merger would have resulted in excessive concentration in some of the smaller national markets. In 2001, two Swedish banks withdrew their plan to merge, fearing the Commission would also block the deal on similar grounds. This prompted complaints that EU competition policy inevitably discriminates against smaller countries.

Yet larger countries have been caught by the same rules. Take the Commission's recent decision to reverse the merger of French electrical equipment manufacturers, Schneider and Legrand. The Commission argued that the merger would lead to excessive dominance in the French and Italian markets. But it had to overcome some high-level political opposition within France, where President Jacques Chirac and Finance Minister Laurent Fabius had personally intervened to support the deal.

The fact that the markets in each case were national and not EU-wide shows that the single market is still not a full reality. Indeed, the Commission's merger policy is intended to support the EU's economic integration, as the European Court of Justice has noted on several occasions. And the Commission's approach appears to be having an effect. Volvo, for example, responded to the ban on its Scania merger by buying the truck-making arm of France's Renault, and is probably better-placed to compete in both EU and world markets as a result. That shows how companies, consumers and the single market can benefit from an effective merger policy. Little wonder that the EU merger regime, with its strict timetables and transparent procedures, is widely seen as one of the Commission's greatest successes.

The state-aid regime

Most competition policy tools are targeted at private sector firms. Yet a large part of DG Competition's work involves the regulation of government hand-outs to companies. Such state aid has been declining in recent years across most EU member-states, but it still

totals almost €80 billion, or around one per cent of the EU's gross domestic product (GDP). State aid can take the form of grants, soft loans or tax benefits, provided either by national or local governments. It can potentially distort the level playing-field between firms, which is an essential part of the single market. That is why the Commission has the power to force the repayment of illegal state aid, even though fiscal policy is normally a matter for individual member-states,

The framework for controlling state aid to private enterprises is set out in Articles 87 and 88 of the Treaty. It does not ban government support per se, but rather targets those measures that give an unfair advantage to some firms and so distort competition in the EU. State aid that is designed to support certain specified public policy objectives may be allowed. The Commission can, for example, approve aid to companies in Europe's poorest regions in order to support industrial regeneration. Support for small and medium-sized businesses and for research and development may also be permissible. The Commission can – in some circumstances – approve state aid to support inward investment that would otherwise go outside the EU. But these exemptions are rigidly policed by DG Competition, and the member-states can only overturn the Commission's decisions through a unanimous vote in the Council of Ministers. So far, this has happened only once, in the area of agricultural subsidies.

When a Commission decision on state aid goes against a member-state, protests almost invariably follow. If a ban on aid to a particular firm causes job losses, then there is a strong temptation to blame 'interfering Brussels'. Take the airline industry, where several smaller airlines, such as the national carriers of Greece, Spain, Portugal or Belgium, have been forced to restructure because the Commission has banned further subsidies from their governments.

The terrorist attacks of September 11th, which greatly damaged the global aviation sector, have further exacerbated the controversy over

state support for the airline industry. The Commission has restricted aid to cover only the 'exceptional losses' incurred when transatlantic routes were shut down immediately after the atrocities. Several governments want to inject money into their national airlines, or to underwrite insurance cover that would otherwise be withdrawn. The US, they point out, has offered its carriers up to \$15 billion in support, which European airlines claim will allow the Americans to undercut them.

However, low-cost airlines such as Ryanair and EasyJet have continued to prosper without any state aid. If their rivals are propped up with government handouts, then there is less incentive for these low-cost airlines to enter new markets with cut-price ticket offers. No-one will benefit from a return to spiralling subsidies, which damage the industry by encouraging inefficiency. Both consumers and taxpayers would suffer as a result. As for the national carriers, they would probably benefit from some market consolidation, creating fewer, leaner, pan-European airlines – although this process would need monitoring for its competitive effects on key routes.

If the airline industry can use the crisis to create more efficient carriers, it will probably be the better for it. But this long-term view cuts little ice with workers who stand to lose their jobs, or with some politicians, for whom a flag-carrier is a symbol of national pride. Unfortunately, the benefits of controlling state-aids occur mainly in lower fares and taxes, and are therefore widely diffused among the population. The costs, on the other hand, take the form of job losses, which hurt a small but vocal constituency.

One reason why aid for airline companies has become such a contentious political issue is that European airlines are still, at least in part, publicly-owned, with strong connections to member-state governments. This is also the case for many other transport and utility sectors across the EU. The Lisbon European Council meeting in March 2000 gave a new impetus to the process of liberalisation

and called on member-states to increase competition in these sectors. Even when public monopolies have been privatised, they often still dominate their national markets and receive favourable treatment from their governments.

That is why DG Competition has to monitor public enterprises and companies with 'exclusive rights' to operate in some markets very closely, in order to ensure that they are regulated in a transparent fashion. Postal services are a good example. The rules for such firms are set out in Article 86 of the Treaty. This specifies that EU competition rules also apply to these companies insofar as the application of those rules does not obstruct their obligation to provide public services. For example, most member-state postal companies are required to provide a universal delivery service at standard rates across their whole country. The Commission has come into regular conflict with member-states, which want to protect their domestic providers from increased competition. 'State aid' in these sectors is often based on opaque agreements, or takes the form of weak regulation that allows these companies to exploit their privileged position.

In July 2001, DG Competition launched a state-aid 'scoreboard', which will display on-line how much each member-state is subsidising its companies. This will bring some much-needed transparency to the debate, allowing other member-states and rival businesses – as well as the Commission – to challenge excessive handouts that they believe impede competition. The results should benefit consumers, and eventually the industries themselves. As most member-state governments are beginning to recognise, they should not intervene to prop up decaying industries. Such aid is expensive, stifles effective competition from innovators and merely postpones inevitable economic restructuring. As recognition of this argument spreads, the Commission should eventually find it easier to control excessive state aids.

3 Implications for European businesses

Competition and competitiveness

Business analysts and chief executives argue that the competitive pressures on companies have never been greater. Globalisation has heightened competition, and increased the sheer complexity of most industries. More trade and investment is now flowing across international borders as companies seek to exploit new opportunities in overseas markets. And business is getting more international all the time, thanks to new communication technologies and a reduction in border controls on goods, services, people and capital.

All this should work to the benefit of consumers. According to conventional economics, increasing competition keeps prices low and encourages innovation. Discerning consumers are using the power of the internet to sniff out bargains and play off one company against another. The result is more and better choice. And the implication is that firms have less need of competition authorities to keep them in check when the market can do this perfectly well. Yet some aspects of the new economy could in fact reduce competition, by increasing the market power of some dominant producers.

In particular, the new technologies driving globalisation may not necessarily promote increased competition. In many new sectors, there are high fixed costs that have to be invested up-front. These might include the development of operating systems software, for example, or the construction of mobile phone masts. The pioneer companies in these sectors face heavy, 'sunk' costs. But once they have established the basic network infrastructures, these often

become an industry standard that can make it harder for other companies to enter the market. This is part of the case against Microsoft, but similar accusations have been levelled against telephone monopolies, particularly in the US.

What is more, the falling cost of sharing information also makes it easier for firms to collude, even if only tacitly. If Firm A can use the internet to track and match every price-cut that Firm B offers, there is much less incentive for Firm B to cut prices in the first place. New technology also allows companies to track and segment their customers in a much more discriminating – and possibly discriminatory – manner. Companies can therefore gain the advantage of better information over their customers and potential rivals, which could distort the market.

All these characteristics of the new economy can create problems for competition policy. And given that the EU is keen to promote information and communication technologies, the balance is a tricky one to strike. It is worth recalling that neither perfect competition nor absolute monopoly is conducive to high levels of innovation. A company with a monopoly has no incentive to invest in new products and services because it is already enjoying excess profits. But if markets work too perfectly, then there is little incentive for firms to invest heavily in research and development, because the benefits will be quickly copied and shared by rival firms.

The EU needs to strike the right balance between encouraging innovation and allowing technologies to spread. That is why intellectual property rights are needed, to reward innovative firms by giving them limited monopoly rights on their creations. Such rights are deliberately anti-competitive, but they are one reason why EU firms are among the world's most innovative. And they will become ever more necessary as the EU moves away from mass-manufacturing and towards the knowledge-based economy promised at the Lisbon summit.

At the same time, intellectual property rights must not be allowed to stultify competition and stop technologies spreading. The EU will have to strike a delicate balance. This trade-off was at the core of the recent decision by the European Court in the IMS Health case. The Court found in this case that the Commission had not given appropriate weight to intellectual property rights of IMS in its desire to promote competition in the market for medical sales data.

These trade-offs are especially acute when two rival firms collaborate over research and development. In the short term, that means less competition. But in the longer term, consumers will benefit from the results of research that produces better products. Furthermore, if the EU's competition authorities stop producers from collaborating over research, then overseas competitors could eventually steal a lead on European businesses. As with intellectual property rights, the Commission has to compromise in its pursuit of more competition in order to fulfil its other goal of promoting innovation and competitiveness. As a result, competition policy can easily stray into the territory of industrial policy.

The protection of sunset industries such as steel, shipbuilding or mining is another sensitive area in competition policy. These are sectors where companies are struggling with the effects of globalisation, either because it has resulted in more foreign competition (as for steel producers) or because of a shift to new technologies (as for coal mining). Without intervention, companies could disappear fast, resulting in mass lay-offs that would be politically difficult for governments to accept. So public policy must balance the benefits of cheaper steel or clean new energy sources against the costs of retraining thousands of workers to work in other sectors.

Subsidies to ailing companies are the usual way to ease the pain of this transition, but some governments use trade restrictions, too. Both approaches can distort the market and are expensive for governments and consumers. Furthermore, such protection often

simply postpones industrial restructuring rather than making it easier. The Commission can help EU member-states to face up to this economic reality, since it is not under the same domestic political pressures. The Commission's 'one-time, last-time' policy on state aid to help restructure ailing firms has been in force since the beginning of 2000. It is designed to prevent firms being artificially kept alive by continuous restructuring. The Commission will only approve government handouts where there is a viable recovery plan, competition is not unduly distorted, and the aid is proportional to the needs of the firm.

There are other European trends that dictate how competition policy affects EU businesses. The introduction of the euro, for example, is expected to lead to greater competition in the single market by enabling consumers to compare prices across the eurozone. Prices are already starting to converge in some industrial sectors. But the process is very slow, suggesting that many EU markets are far from perfectly competitive and are still far more national than European. At the same time, economic and monetary union should encourage more cross-border mergers and acquisitions in the eurozone. This could strengthen many EU companies, but it could also be bad news for consumers, unless the competition implications are carefully monitored.

Equally important is the expansion of Europe's stock markets – essential if EU firms are to stay competitive. In developed capital markets, firms must compete for the money they need to expand, and investors can take over failing businesses. European leaders laid great stress on fostering closer integration of EU capital markets at the Lisbon Summit in March 2000 and recognised that new regulatory procedures would be required.³

³ Alasdair Murray, "The future of European stock markets", CER, March 2001.

But the development of free and open capital markets is far from complete, as the recent arguments over the takeover directive show. The proposed directive, which was 12 years in the making, would

have made taking control of an ailing company easier. But it was defeated in the European Parliament in July 2001, when MEPs – encouraged by the German government – voted to protect the existing, national corporate governance rules which can block ‘Anglo-Saxon’ style hostile takeovers.

Despite this setback, the EU and its member-states generally recognise that more competition, at every level, is vital to increase the competitiveness of EU firms. Some non-EU businesses and politicians, notably in the US Congress, claim that the Commission often uses competition policy to support wider EU industrial policy goals. As a result, they say, the Commission often favours European companies at the expense of foreign competitors.

⁴ *Goldman Sachs, Global Economics Paper 65, October 2001.*

The Commission and other independent observers deny this accusation, pointing out that there is no evidence to support it.⁴ Foreign investors in the EU are not discriminated against, as leading officials in the US administration have acknowledged.⁵ Indeed, the competition authorities recognise that foreign firms often turn out to be more innovative and efficient than the local ones, helping to reinvigorate markets for the benefit of consumers. Japanese investment in European car-making is a good example of this.

⁵ *Remarks of Timothy Muris, Chairman of the US Federal Trade Commission, 21 December 2001.*

In any case, the idea of discriminating between EU and foreign firms is becoming increasingly nonsensical, as the GE-Honeywell affair shows. GE employs 85,000 people in Europe, yet much of opposition to the deal came from companies based in the US. Perhaps the greatest beneficiary of the Commission’s ban on the merger was United Technologies Corp, an American firm and former suitor of Honeywell. Similarly, the Commission’s aggressive pursuit of an anti-trust case against Deutsche Post was largely prompted by complaints from the American courier firm, UPS.

Competition policy and the firm

Individual companies often experience competition as a double-edged sword. Very few modern industries conform to the economist's ideal of an open and free market. Most sectors are dominated by a handful of large players, which employ strategies that deliberately marginalise or weaken their competitors. In general, this is done openly and legally, as firms try to maximise returns for their shareholders. And rivals usually accept the rules of the game, though they may complain if it leads to their key suppliers upping prices.

But globalisation is leading to consolidation in many sectors, as firms respond by merging, or by establishing joint ventures, strategic alliances or distribution agreements. Most forms of consolidation will have an impact on competition and will come to the attention of the authorities. The companies involved, and their rivals, need to know that their plans will be judged fairly. It is therefore important, as European business leaders regularly tell the Commission, that competition policy should be as predictable as possible. Businesses also want decision-makers to be accountable for their decisions, and to allow all parties a fair hearing, including rival firms. And they want the competition authorities to take a long-term view of competition problems because markets are evolving fast.

Regulators want companies to take more responsibility for their actions. In part, this is to avoid red tape and lighten the officials' workload. But it is also a way of encouraging companies to police their own managers, or even their rivals and suppliers, in order to ensure fair competition in the market. The result of all these pressures is that competition policy in Europe is moving slowly towards more self-regulation for companies, subject to stringent checks by the authorities. But it is a tricky balance to strike, for both the regulators and the companies involved.

Competition policy can only be predictable if it involves straightforward procedures applied with speed, transparency and

consistency. So far, the Commission has an admirable record in this respect, especially given the increasing number and complexity of corporate tie-ups. As a result, the European business community seems quite content that, for example, the assessment of large mergers should be centralised in Brussels. Most companies have access to legal advisers who can guide them through the EU regulations, while the Commission offers a 'one-stop-shop' for most issues. This is much easier for companies than having to deal separately with 15 different authorities in each of the member-states.

But for the Commission, there is a trade-off between making procedures predictable, and getting bogged down in routine bureaucracy. The Commission's anti-trust enforcement arrangements are a good example of where the 'one-stop shop' has been less successful. DG Competition reviews agreements between companies for their anti-trust implications under the terms of Regulation 17, drawn up in 1962. The rules allow – but do not force – companies to submit draft agreements for assessment. Once DG Competition has reviewed a company's plans, it sends them a letter saying it does not object on competition grounds. This letter is no guarantee against any future investigation or prosecution, but companies do view it as a 'comfort letter', enabling them to proceed with their plans.

From the Commission's point of view, though, the existing arrangement is cumbersome. It takes hours of administrative time to review all the harmless arrangements that are notified. Indeed, the procedure may be one reason why the Commission's anti-trust operations are seen as more laborious and less effective than other parts of competition policy. Meanwhile, the process is highly unlikely to catch any of the more pernicious cartels that really affect competition in the market.

That is why the Commission is proposing to modernise Regulation 17, by removing this bureaucratic process and asking companies to review the competition effects of their plans themselves. Normally,

companies would welcome any reduction in red tape. But some business leaders have protested that getting rid of the comfort letter would make anti-trust regulation less predictable. And that, they argue, could deter firms from making investment decisions for fear of falling foul of the Commission.

In order to resolve this problem of uncertainty, most firms consult specialist lawyers, who can draw on a substantial body of case law on anti-trust arrangements. The Commission has also agreed to provide more guidance on what kinds of corporate agreements it would consider acceptable. All investments carry risks of some sort but, overall, the removal of the filing requirement should help companies to move faster when striking agreements.

The debate over reform of anti-trust rules forms part of the larger shift towards self-regulation in competition policy. The same shift is also apparent in the Commission's attitude to mergers. In June 2001, the Commission decided to leave it up to merging companies to decide whether their so-called ancillary agreements comply with EU law. These are agreements concluded at the time of a merger between the parties, for example where the seller of a company agrees not to enter again into the market where the business that was sold operated. Previously, these agreements would have been vetted as part of the overall merger review. But with the new freedom comes extra responsibility: if the firm makes the wrong decision in the Commission's eyes, then it could be challenged. No business would risk Commission intervention lightly.

Neither this reform nor the recent Green Paper on merger control address the major grievance of companies when it comes to merger reviews: the Commission's lack of accountability. At the moment, if the Commission's specialist merger task force is concerned about a particular deal, it has to submit a written statement of its objections to the companies involved. Then it must allow them to respond before it finishes its assessment. But many companies would like a greater opportunity to challenge the Commission's thinking, either

during the review process, or afterwards in the courts before the merger lapses.

The question of judicial oversight is considered in the next chapter. But during the review process it is the job of the Hearing Officer to ensure that company rights are respected. The Hearing Officer is a senior official appointed by the Commission. Supported by a deputy, he or she is responsible for ensuring that the review process for both anti-trust and merger cases follows the proper procedure. This is vital, because the review often causes heated arguments between the companies involved and the Commission.

In May 2000, the Commission tried to respond to continuing criticism about its procedures by raising the Hearing Officer's profile and appointing John Temple-Lang to the post. But Temple-Lang resigned just four months later, reportedly because he did not believe the Commission was serious about increasing his role. The Commission is still highly sensitive to criticism on this point. But it fought back in May 2001, with an official Decision to "...further strengthen the role of the Hearing Officer".

Under the new arrangement, once DG Competition has completed its assessment of a merger or an anti-competitive practice, the Hearing Officer files a separate report to the full Commission and to the member-state representatives, describing how the hearing was conducted. This report is also published in the Official Journal, leaving out any commercially sensitive information. In practice, though, this often amounts to little more than a few sentences confirming that the appropriate procedures were followed.

Whether these reforms will convince companies that the Commission's procedures have become fairer remains to be seen. After all, the Hearing Officer is still part of the Commission, which will make some critics question his or her independence. But the reforms have raised the profile of the role, and any further success will probably depend on the stature of the person appointed to the

job. The most recent appointees are highly regarded officials drawn from within DG Competition. But in future, they should probably be recruited from the member-states, or the judiciary. And to encourage transparency and to draw out wider lessons from individual cases, the Hearing Officer should submit an annual report to the European Parliament. That would allow the Commission's procedures to be scrutinised and debated more widely.

The need for transparency has to be balanced against the protection of commercially sensitive information, which is often used in merger cases. Companies involved in the deal normally submit such information voluntarily to the regulators as part of the review process. But the Commission's Green Paper has proposed increased powers to mount 'dawn raids' on companies to gather evidence that might otherwise be withheld. Currently these powers are restricted to anti-trust cases.

But the Commission will have to tread carefully if it is to investigate a case in a thorough and balanced way in order to gain a long-term view of any competition problems. In any specific case, a number of third parties could have a direct interest in blocking or promoting a merger. These could include competitors, suppliers or customers of the firms under investigation. In addition, the wider business and legal community as a whole has indirect interest in understanding the thinking inside the Commission on competition issues.

Opinions differ over how far the regulators should take into account the views of third parties when applying competition law. Since the 1970s, the free-market philosophy of the Chicago School has shaped US thinking on anti-trust arrangements. This school holds that, if a merger did not strengthen the companies involved and by implication weaken their competitors, it would be pointless. So, if the combined company can cut prices for consumers that must be a good thing, even if competitors complain.

The Commission argues that consumer interests are the over-riding motive of EU competition policy too. But it also believes that the views of suppliers and competitors should not be dismissed out of hand. Competitors have a good knowledge of the sector involved and its history, which can help the authorities assess the likely effects of a merger. Many mergers are intended to produce cost savings, which may lead to immediate price cuts for consumers. But in the long run, these price cuts may force competitors out of the market, leaving the merged firm free to raise prices again. So the Commission has to come to a balanced decision, treating competitors' views with some scepticism, but also recognising when they have legitimate concerns.

All these issues came to the fore in the GE-Honeywell case, when critics argued that the Commission took excessive heed of competitors' views. The Commission objected to the merger because it was concerned about 'bundling' by the combined divisions of GE and Honeywell. In other words, the Commission argued that the merged firm could offer a whole range of its aerospace products as a single package, supported by GE's own finance arm. Competitors would not be able to match this offer and would be squeezed out of the market. Yet when the US competition authorities reviewed the proposed deal they focused exclusively on the consumer. And they concluded that the merged firm would be more efficient, enabling it to cut prices for its customers.

But the differences in the approach of the two competition authorities are not entirely clear-cut. The US authorities also considered the danger of 'bundling' and discussed it at length with Commission staff. A different form of 'bundling' even formed part of the original US case against Microsoft. For its part, the Commission has been known to dismiss complaints from competitors, as when it approved the AOL-Time Warner merger. But the EU is clearly right to consider the impact of mergers on other companies, whether they are suppliers or competitors. It is other firms – not consumers or regulators – that make competition a reality in the marketplace.

Corporate responsibility

The trend towards greater self-regulation in industry is apparent in many other aspects of corporate behaviour, such as social and environmental policy. It is broadly to be welcomed. Business should be free to maximise profits within a framework set by publicly accountable institutions. This framework should include a robust and active competition policy, in which firms should help to enforce the rules as well as abide by them. Companies, like citizens, should help to police their own community.

But altruism is not the only benefit of integrating competition policy considerations into corporate behaviour. For its leading role in the vitamin cartel, Roche will have to pay fines to regulators in excess of €1 billion. It is also faced with potentially massive private lawsuits from consumers who claim to have been over-charged by the company. A number of its senior executives have even gone to jail in the US for their role in the conspiracy. They will soon be joined by the chairman of Sotheby's, Alfred Taubman, who was convicted in December 2001 of fixing commission charges in auction sales with his counterpart at Christie's. In both cases, internal audit controls were shown to be very weak, which allowed such practices to go on undetected. Roche has now sent 7,500 senior executives on competition law training courses.

Self-regulation should also encourage companies to police their own sectors, identifying anti-competitive practices by their rivals or suppliers. But if a company becomes aware that a supplier or distributor is behaving anti-competitively, it may be reluctant to report it, for fear of disrupting an established commercial relationship. This is particularly true if the company has to denounce its commercial partner publicly in court. But companies can and should bring their concerns to the attention of the regulators.

One weakness of the American merger review system is that a public testimony from regulators or third parties is usually needed to block a deal. This may help explain why US regulators came to a different

conclusion in the GE-Honeywell case: the companies' key customers in the airline industry, even if they had significant concerns, may not have been prepared to testify openly against the deal. The EU, on the other hand, can hold more informal hearings with industry sources. This evidence must of course be open to review and challenge, as discussed in the next chapter.

The companies involved in a merger also need to be more pro-active in the review process. Some firms planning a merger are badly prepared (or unwilling) to offer constructive remedies within the strict timetables. In some cases, this is negotiating brinkmanship but in others it reflects a lack of understanding of competition issues raised by the Commission. The recent Green Paper's proposal to allow a 'stopping of the clock' in merger reviews, in order to negotiate further on remedies could offer a clear choice to companies: they can benefit from one of the core strengths of the current EU system, which is its time-limited nature, or they can ask for more time to negotiate remedies.

Globalisation is bringing companies not only increased opportunities, but also new rights and responsibilities. Good practice in corporate governance should take into account a firm's responsibilities not only to its shareholders, but also to its wider stakeholder community. Companies have already started to accept their responsibility to the environment and their workers. Now they should start to extend this attitude to their markets, and work harder to identify anti-competitive practices both inside and outside the company. An appropriate mixture of legal carrots and sticks could help to underpin this attitude.

The sticks – punishments for breaking competition laws – get the most attention. But the carrots are equally important, especially when it comes to encouraging companies to report anti-competitive practices to the authorities. Under the US system, companies can come forward and admit their participation in such practices to the American anti-trust authorities. If they provide evidence against

their former co-conspirators, they are offered immunity against future lawsuits from the regulators. This system results in one or two companies coming forward each month. But more importantly, it makes any anti-competitive deal inherently unstable because of the 'prisoner's dilemma' effect: if conspirator A confesses first, it will suffer less than conspirator B.

The EU is moving in this direction, but the leniency schemes used by some member-states are not yet fully harmonised, and information-sharing between national competition authorities is still in its infancy. The Commission will play a central role in generating and distributing this market intelligence, and it will also need to administer the immunity programme to ensure consistency. Some business leaders will flinch at these increased powers for the regulators. But they should bear in mind that companies, as well as consumers, are the biggest victims of anti-competitive practices. If competition policy is laxly enforced, then only uncompetitive firms will benefit.

4 Implications for European institutions

Subsidiarity and the member-states

The relationship between the EU and its member-states is particularly sensitive in the area of competition policy. This is because the Commission has arguably more powers of enforcement in competition matters than in any other policy area. This section examines why member-states have granted the Commission a pivotal role to protect the integrity of the single market. But the section also considers some of the problems inherent in the existing distribution of competition powers, such as the inconsistent use of criminal sanctions. The final part of this section explores how the relationship between member-states and the Commission may evolve in the future.

In search of the level playing-field

Completing the single market remains one of the EU's big unfinished tasks, and competition policy is an essential weapon in this battle. In fact, the single market will never be fully 'complete': the task of ensuring that anti-competitive practices do not undermine its integrity is never finished. The tendency of individual member-states to protect national champions or apply competition law inconsistently could threaten the functioning of the single market. Fortunately, member-states recognise this, and are generally happy to let Brussels enforce competition policy where cross-border trade is involved, in the interests of both fairness and efficiency.

The admission of the candidate countries of Central and Eastern Europe to the Union could further complicate the enforcement of competition law. Businesses that operate across all of the EU will

soon need to meet the requirements of a further 10 different sets of competition laws. The candidates are moving to adopt the *acquis communautaire*, the existing body of EU laws, which contains detailed provisions on competition policy. But even if they have the laws in place, few of them have the legal and economic expertise necessary to enforce competition laws rigorously. For example, the Commission has noted that while some progress has been made in anti-trust enforcement, state aid controls in the accession countries are “in general, far from satisfactory”.⁶

⁶ *European Commission, “European Community competition policy”, 2000.*

Candidate countries will need to address these problems urgently to ensure that their accession to the EU is not delayed. But they also face a political dilemma in their dealings with the Commission. On the one hand, they want to convince DG Competition of their readiness to join the EU; on the other, they must be open about their shortcomings in order to receive technical assistance where it is most urgently needed.

Among current member-states, the Commission’s application of competition policy has led to few serious disputes. That is remarkable, given the scope for conflict whenever the EU intervenes in any member-state’s affairs. Most of the disputes that have occurred have been settled by negotiation, and litigation has been rare.

One of the most contentious decisions was the De Havilland case of 1992, when French and Italian state-owned companies tried to buy a small Canadian aircraft manufacturer. The Commission blocked the deal, arguing that it would result in excessive concentration in the global market for certain types of small aircraft. The governments in Paris and Rome were extremely critical of what they saw as unwarranted intervention, but they could not reverse the Commission’s decision.

There have been similar disputes at regional level. In 2001, the Commission successfully challenged the bank guarantees provided

by German *Länder*, or regions. These guarantees allow the regional banks, or *Landesbanken*, to give discounted finance to local industry – in effect, a form of state aid. Germany’s constitution jealously guards the autonomy of the *Länder* and the federal chancellor, Gerhard Schröder, criticised the intervention of the Commission. Similarly, when Gordon Brown, the UK’s finance minister, wanted to set up a regional network of venture capital funds, he had to satisfy an initially sceptical Commission that it did not equate to an illegal subsidy.

Such disputes are likely to become more common in future, as competition rules are increasingly applied to industries that used to be protected by national governments. This includes sectors such as telecoms, post, energy and transport, which were – and in some cases still are – dominated by state-owned companies. Many of the companies operating in these sectors have now been privatised, and their markets are slowly opening up to new entrants. The EU’s liberalisation of these markets began in the 1980s, and was given new urgency at the Lisbon summit in March 2000.

The problem is that liberalisation is taking place at an uneven pace across the EU, leading to accusations that some governments are still protecting their firms. Electricité de France has been buying up other utility companies across Europe, for example, even though its home market is largely closed to competition. In an extraordinary (and potentially illegal) move, the Spanish and Italian governments threatened in the spring of 2001 to suspend the voting rights of French investors in these companies, until the Paris government allowed better access to its own energy market.

Cool heads were clearly needed, and the Commission rightly decided to intervene. In response to the Spanish and Italian threats, Single Market Commissioner Frits Bolkestein warned against the discriminatory suspension of voting rights, while Competition Commissioner Mario Monti promised to investigate Electricité de France’s allegedly anti-competitive practices. The Commission is

therefore playing a vital role in the struggle for liberalisation in these sectors. Its long-established executive powers to open markets could prove far more effective than either the legislative approach in the Council of Ministers, or the new open method of co-ordination, which relies on peer pressure between governments. In both cases, the intransigence of one or two member-states can and has blocked progress. Even though energy policy is subject to qualified majority voting, the Council of Ministers has made only limited progress on this issue.

For DG Competition, liberalising these highly regulated utility sectors is “an essential objective of community competition policy”.⁷ It should therefore continue to use the same kind of aggressive market-opening initiatives that it has used so successfully on previous occasions. In the early 1990s, for example, the then Competition Commissioner Sir Leon Brittan used the anti-monopoly provisions of Article 86 to force through telecoms liberalisation. His successor, Karel Van Miert, threatened to do the same for the electricity and gas sectors, and Commissioner Monti should continue to keep up the pressure for liberalisation. The European Court has already backed the Commission’s right to use the regulations in this way, which means the Commission does not need the approval of either the Council or the European Parliament. This is a great opportunity for the Commission to use its supranational powers to challenge the vested interests in member-states, and to ensure that the Lisbon agenda moves forward.

So there are several good reasons why key aspects of competition policy should remain centralised in Brussels. And though some member-states grumble about the Commission’s powers, few really want to re-nationalise competition policy. Countries often use the tactic of ‘blaming Brussels’ to push through unpopular but necessary decisions, such as cutting state aid to decaying industries. Although this is politically expedient in the short term, such an approach does little to support the EU’s legitimacy in the eyes of the general public.

⁷ *European Commission, “European Community competition policy”, 2000.*

The Commission recognises the problem, and has launched a public relations campaign to highlight the benefits of effective competition policy to European voters.

Even so, it seems unlikely that trust-busting will ever be as popular in Europe as in the US. For the past century, many Americans have built their political careers on 'standing up for the little guy' against the interests of big business. This was as true for the breaking up of Standard Oil in the 1920s as for the dismantling of AT&T's telephone monopoly in the 1980s. In contrast, EU politicians have received little credit for the single market or even the introduction of the euro. In March 2002, the EU will launch a convention to consider, *inter alia*, why the EU remains unloved and mistrusted by so many of its citizens. These fundamental problems of legitimacy – the so-called democratic deficit – are far beyond the scope of DG Competition officials. But the role and powers of the Commission, which are extensive in competition policy, are central to this institutional debate.

The strong arm of the law

Member-states are likely to remain at the core of the EU's future governance and they still have an important role to play in competition policy. For example, they alone have the power to apply criminal sanctions so that individual directors can face imprisonment for competition-related crimes. Austria, France, Germany and Ireland already employ criminal sanctions for some violations, and Sweden is considering introducing them. British Chancellor Gordon Brown also believes that punishing managers is a far greater deterrent than fining their companies, and the UK government has included such powers in its forthcoming Enterprise Bill.

The US has long used criminal sanctions in its competition law and regards anti-trust violations as tantamount to corporate fraud against the consumer. By contrast, the Commission can only impose fines and administrative penalties on companies, not individuals, and EU institutions have no criminal powers. Where competition policy

is concerned, this can lead to anomalies: the Commission investigates the big, pan-European competition cases but without any criminal powers, while member-states with the power to throw managers into jail are limited to smaller, local cases.

This difference could clearly result in some unfairness. Furthermore, not all countries impose criminal sanctions for competition violations. So in a single case involving a pan-European, anti-competitive practice, equally guilty managers from different countries could face very different punishments. Company executives who feel they are vulnerable to such allegations could shop around for the most lenient regime. Alternatively, and equally unfairly, they could be subject to multiple prosecutions in two or more jurisdictions. Some member-states offer immunity to those involved in anti-competitive practices who are first to admit their wrong-doing, but greater clarity over how these leniency schemes relate to one another and to the Commission is needed.

The EU's role in the judicial sphere has been greatly strengthened since the terrorist attacks of September 11th. But the Commission is unlikely to gain criminal powers such as arrest, trial and imprisonment in the near future. So these contradictions raise the question of whether criminal sanctions are suitable for punishing violations of competition law. In the most serious cases, these are distortions to the single market – normally resolved through civil proceedings.

Moreover, once a criminal investigation starts at the national level, national competition authorities and the Commission face additional procedural burdens on their co-operation. These restrictions on, for example the handling of evidence, are to ensure the defendants receive a fair trial. But the experience of the UK Serious Fraud Office shows how difficult it is to get a conviction in complex financial crime cases. Juries must assess technical points of corporate practice, which are normally reserved for specially trained judges.

The Commission's plans to modernise anti-trust enforcement (see below) propose a network of member-state competition agencies. But this would still not solve the problem. According to the current draft, the information exchanged through the network will only be used to support financial penalties. This will make it far harder for national authorities to secure individual convictions. Paradoxically, therefore, the introduction of criminal penalties into competition law could make it even more difficult for the various authorities to collaborate. It could even reduce the chances of securing a conviction, if evidence is needed from other member-states.

There may be other ways of punishing anti-competitive behaviour by individual executives. After thirty years of debate, the passing of the European Company Statute in 2001 could, in time, point the way towards a new canon of EU company law. From 2004, companies can register as a *Societas Europaea* and operate across the EU as a single corporate entity under a single set of rules.

But this increased freedom of operation for businesses should be balanced by extra accountability for their executives. The EU should develop laws, for example, that would allow company directors to be disqualified at a European level if they are found to be acting anti-competitively. This would stop short of criminal sanctions, but would still target individuals for their wrong-doing. Such a measure would require close co-operation between the various parts of the Commission (including DG Internal Market) and their counterparts in national industry ministries. Its enforcement would have to be subject to the due process of law, with an appropriate right of appeal.

⁸ *Proposal for Council Regulation implementing Articles 81 and 82 of the Treaty, European Commission, 27 September 2000.*

Towards a new partnership?

The relationship between the EU and the member-states is central to the Commission's planned modernisation of anti-trust law.⁸ The proposed regulation (which will replace regulation 17 of 1962) would create a formal network to improve co-operation over the management of specific cases. The network would consist of DG Competition and national

competition authorities in each member-state. It would improve the procedures for joint investigations of anti-competitive practices and for handling confidential information.

The Commission is also proposing to share at least some of its exclusive powers over EU anti-trust law with individual member-states. In return, the Commission argues that national competition authorities should apply EU law to the exclusion of their own national codes, if trade between member-states is involved. This fairly transparent exchange is set out in Article 3 of the Commission's proposed modernisation regulation. But several countries have severe reservations, with France and Germany in particular reluctant to give up their own law in return for a greater role in enforcement. The UK seems less worried because its 1998 law expressly adopted EU case law, and so it has much less to lose.

The proposed regulation also confirms the Commission's power to intervene if a member-state is not applying EU law effectively. Some member-state officials fear that the Commission is making yet another attempt at empire-building. Far from devolving power, they think the Commission may be taking power from national competition authorities, which would be reduced to semi-autonomous vassals of DG Competition. These fears verge on paranoia. But sceptical member-states are clearly reluctant to pass the new regulation until they are satisfied about how the network of national competition agencies will work in practice.

At the time of writing (January 2002), the draft regulation is unlikely to become law in its present form. National experts, keen to protect their established jurisprudence, tend to dominate discussions in the Council of Ministers, where the final decision will be taken. Some form of parallel application of EU and member-state law seems a more likely outcome. However, failure to accept the principles of Article 3 of the draft regulation could undermine the integrity of EU competition law. Businesses could soon face 25 different legal jurisdictions, with all the attendant confusion and cost that would bring.

Enlargement of the EU will certainly have an impact on the common competition culture that has developed in most of the current member-states. Even without the proposed formal network, informal arrangements enable most EU national authorities to co-operate well with each other and with DG Competition. Officials exchange best practice and occasionally personnel, contribute to journals and meet regularly at conferences to discuss new developments in competition policy. In this respect, competition policy is very similar to central banking. Expert officials in different countries are often more at ease with each other than with their fellow countrymen in other parts of government. And like central bankers, competition policy officials are often sceptical of politicians. They would prefer more independence to pursue their own very specific goals.

As part of their co-operation with the Commission, national authorities have always had a consultative role in the merger review procedures. Through the Advisory Committee on Concentrations, member-state experts monitor the Merger Task Force's activities, and give non-binding opinions on draft decisions before the full Commission ratifies them. A similar regime operates for anti-trust, and the expert group on state aids might eventually become a full Advisory Committee, too. Sometimes these committees have simply rubber-stamped Commission decisions in 15-minute meetings. But it was striking that the Advisory Committee debated the GE-Honeywell case for a full day, before reaching an agreement to support the Commission's decision blocking the merger.

In future, these advisory committees must play a more meaningful role in managing the network, and in setting policy on broader competition issues, not just individual decisions. In effect, they should become a single council of EU competition agencies, publishing reports of meetings and debating in more detail how the Commission should apply the law. This would give member-states a greater stake in the management of EU competition policy, which in turn should encourage them to support the Commission's proposals to strengthen the law. The enforcement of subsidiarity and greater

accountability of the Commission are both important, if competition policy is to remain effective and legitimate in the eyes of member-states.

Accountability and the EU

Companies often complain that the Commission acts as investigator, prosecutor, judge, jury and executioner in making competition decisions. Small wonder, perhaps, that business is increasingly calling for the Commission to become more accountable in the exercising of such quasi-judicial powers. The argument for separating out some of its powers, in order to increase transparency, is strong. This would certainly increase the number of checks and balances in the system.

The role of the courts

At present, the main check on the Commission's powers is the courts. Companies that disagree with its decisions have the right to take their case to the European Court in Luxembourg. But companies know that launching an appeal is a slow, uncertain and expensive process. And because of the time it takes, it is likely to be of little or no immediate benefit to their planned merger, which cannot sit on ice for a couple of years while the cogs of justice turn. In 1999, for example, the Commission blocked the planned merger of travel companies Air Tours and First Choice. The companies appealed, but, two years later, the case is still grinding its way through the courts.

Companies compare this unfavourably to the US system, where regulators need court approval before they can block a merger. While ECJ decisions usually come too late for individual mergers to be revived, the role of the court does ensure that the Commission is subject to judicial oversight and that its procedures are robustly scrutinised. Companies sometimes appeal in order to challenge a particular finding of fact that might block future merger plans, for example a ruling that their market share is already dominant. But they can only challenge this indirectly as the courts have – so far –

tended to limit their reviews to the procedures of the Commission and do not generally comment on matters of substance.

⁹ *CER Bulletin, Issue 19, Aug/Sep 2001.* Under new rules agreed in December 2000, the Court of First Instance, which hears most competition cases, has established a fast-track procedure.⁹ This is aimed at time-sensitive cases such as those in competition policy, where commercial pressures require rapid decision-making. The new procedures should reduce the duration of hearings to around eight months. However, until they are put to the test, many practitioners will remain sceptical. Even this shortened legal process may still be too long for many companies. The real need is to introduce specialist judicial oversight into the operation of EU merger policy, in a way that preserves the separation of powers for all the institutions, and protects the rights of the parties.

Under the proposed modernisation of EU anti-trust policy, the national courts in each member-state will also play a more important role in enforcement. Over time, national courts will have to deal with many more lawsuits from companies which claim to have suffered from the anti-competitive practices of other businesses. And the Commission is keen to encourage this growth of a private enforcement culture. These lawsuits will complement the Commission's established role as the public enforcer. Injured parties could seek damages for breaches of EU competition law in their own national courts.

To fulfil this important and expanded role, the national courts will need quick access to information and legal guidance from the Commission. DG Competition has promised to provide this, but the procedures remain unclear. Many national courts are still largely paper-based, making it hard for the Commission to track relevant cases in all member-state courts. In an enlarged EU, this may be almost impossible, increasing the risk of inconsistencies in the application of competition law.

Although effective judicial review is essential, an appeal to the courts should remain a last resort. US competition law is enforced through the courts, but this can create its own problems. The eccentric behaviour of the judge in the Microsoft anti-trust trial, which led to delays and a partial reversal in the upper courts, is one example. A system of checks and balances within the investigative process is surely preferable, so that all parties can make their case and the law is applied consistently and transparently. Unless the Commission can demonstrate that the Hearing Officer fulfils this role, it may have to consider a more radical institutional alternative.

If the Commission cannot allay concerns about the fairness of its procedures, it could face the 'nuclear option': a challenge through the European Court of Human Rights (ECHR). This Strasbourg-based court is not an EU institution and has no jurisdiction over the Commission. But its decisions do bind EU member-states, which have all signed up to its jurisdiction. EU citizens under investigation by the Commission could therefore argue that the lack of 'due process' in the Commission's investigations denies them their human rights. The Commission has the right to enter company premises, to seal off offices, and to examine and copy records. It can also demand answers to specific questions from company personnel and record their answers. The additional proposal in the planned modernisation of anti-trust law, that DG Competition officials should be allowed to search private homes, is particularly sensitive in this respect. This is the only power which the Commission has proposed be subject to prior authorisation by a judge.

A challenge in the ECHR remains a hypothetical scenario. But the chance of competition policy being unravelled under human rights legislation has been increased by the EU's adoption of the Charter of Fundamental Rights, which strengthens the rights of the individual with respect to public institutions. The Charter is likely to become binding under EU law in the near future, and the Commission's recent decision to expand the role of the Hearing Officer explicitly acknowledges its relevance to competition policy.

Until the legitimacy of its current procedures is clarified, the Commission will struggle to get support for its modernisation plans. The Commission's proposals confirm the existing right of DG Competition to impose on a firm violating competition law "any obligations necessary, including remedies of a structural nature". So the Commission could order the break-up of a major company, with enormous implications for jobs and profits. In the US, as shown by the Microsoft case, only the courts can take such a drastic step. The reforms would also allow the Commission to take unspecified interim measures on the basis of *prima facie* evidence alone, if it believed there could be irreparable damage to competition without prompt action.

Undue influences?

It is not always easy for the Commission to separate competition policy from other public policy goals. As part of the Lisbon agenda, the EU wishes to increase access to the internet, for example. A reduction in telephone charges would clearly help and this was one reason why the EU agreed to open up local telephone exchanges to competition. As the EU increasingly turns its attention to environmental matters, many proposals – such as taxes on emissions for example – are likely to have competition implications, in which the Commission will rightly take a keen interest.

There is still a debate over how far other EU objectives should shape decisions on competition policy issues. For example, the Commission allowed Ford and Volkswagen to set up a joint venture in 1993, in order to create jobs in some of Portugal's poorer regions, even though some saw it as an anti-competitive arrangement. Likewise, a consortium of washing machine manufacturers collaborated in 2000, with Commission approval, because their joint development of new technologies would help the environment. These may be worthy objectives, but how far should competition policy be compromised to support them?

Most people would accept that competition policy should not override all other objectives. But does the EU have the right

institutional balance to make such trade-offs in a transparent and measured way? Here, the Commission's collegial nature risks compromising – or appearing to compromise – its decision-making on competition matters. This is because the Commission exercises its powers collectively and will vote on issues, if necessary, by simple majority. This means that Commissioners with different portfolios could have the final say over complex and politically sensitive competition cases.

For example, the Commission was split down the middle over whether or not to support the then competition commissioner Sir Leon Brittan's decision to block the De Havilland deal. In particular, the French and Italian governments put strong pressure on their Commission representatives to let the deal go through. The Commission was also divided over whether to allow the merger of Boeing and McDonnell Douglas in 1997. During heated discussions in the college, Leon Brittan's successor, Karel Van Miert, threatened to resign before the deal was eventually allowed through with additional commitments from the companies. Because the commissioners are politically appointed, there is always the danger that their home governments will try to interfere in key decisions. The risk of opaque and dubious political trade-offs within the college of Commissioners is therefore inherent in the current system.

One solution to all these problems of accountability would be to establish an independent European competition agency, with a defined mandate and powers to undertake some of the work currently done by the Commission. There are parallels with the implementation of monetary policy. The Frankfurt-based European Central Bank (ECB) is the central bank for the eurozone and is charged with maintaining price stability. To achieve this, the ECB has the specific power to set interest rates. This technocratic approach guarantees the political independence that is vital for market credibility. While the European Central Bank makes all the key decisions itself, it also works closely with the central banks in each member-state, whose representatives sit on the ECB's governing

council. This gives them a stake in the operation of the monetary system and could serve as a useful example to the planned network of competition authorities.

The ECB has had teething problems since its 1999 launch, and there may at some stage be pressure among member-states to change its operational mandate. However, the principle that giving operational independence to a central bank is the best long-term guarantor of price stability is now widely accepted. Indeed, before any country can participate in the eurozone, it must give independence to its own central bank. If the EU created an independent agency to enforce competition policy — as many of its member-states have done — it would enhance the credibility and legitimacy of the EU's interventions in the marketplace.

In Germany, many in government and industry want to set up an EU competition authority modelled on their own *Bundeskartellamt*, which is widely regarded as the best system outside the US.¹⁰ The aim would be to depoliticise the enforcement of anti-trust policy, just as the European Central Bank has depoliticised monetary policy. A number of senior German officials within both the *Bundeskartellamt* and DG Competition have supported this idea, notably during the EU's 1996-97 inter-governmental conference.

¹⁰ DTI
Benchmarking
Study by
Pricewaterhouse
Coopers.

There are also clear precedents for allocating EU-wide functions to outside agencies. The European Medicines Evaluation Agency (EMA) in London is a good example. Charged with regulating the supply of pharmaceuticals in Europe, EMA is a decentralised EU body, similar to the European Trade Marks Office in Alicante. A management board drawn from the member-states, the Commission and the Parliament, oversees its work. There are also observers from the European Economic Area, which includes countries such as Norway and Iceland. EMA decides about specific products on purely scientific criteria, but its opinions do not become formal EU decisions until the Commission ratifies them.

It is easy to see how an equivalent agency would work for competition policy. Focusing purely on competition issues, it could become a powerful advocate for reinvigorating European markets. To emphasise its independence, it should not be based in Brussels and its staff should come from a variety of backgrounds. Exempt from the Commission's staffing procedures, the agency would find it easier to recruit badly needed specialists from the private sector. The EU could meet much of the additional cost of establishing the agency from filing fees or, potentially, from fines levied on transgressors. These should however be paid into general revenues to prevent distortion of the agency's priorities. Under a new mandate, the European competition agency would look solely at the competition implications of mergers and anti-trust issues, but the Commission would review its findings and could decide if other factors, such as environmental and employment concerns, should be decisive. But the Commission would have to explain its reasoning in public and this would increase transparency, by spelling out the criteria behind each decision.

Even under this scenario, much of the work of DG Competition would remain inside the Commission. The control of state aid, for example, should remain within its current institutional framework, as this often requires tough negotiations with member-states and the Commission's established supranational authority is useful. DG Competition would also have to liaise with and oversee the work of the new agency. With its experience and in-house expertise, the Commission could offer an effective fast-track appeal process for parties who feel they have been treated unjustly by the new agency. It would be better able than the courts to do this in a timeframe that could allow mergers to proceed if the appeal were upheld. Finally, DG Competition could continue to undertake broader studies on general competition issues (such as the relationship with intellectual property, for example) and advise other parts of the Commission as appropriate.

Such an agency would also make it easier to deal with competition issues that affect the EU's near neighbours. Some countries

neighbouring the EU would find it politically easier to affiliate with an institution that was outside the Commission and removed from Brussels. Switzerland and Norway, for example, have powerful multinational companies based in their jurisdictions that possess strong commercial links with EU markets. Candidate countries could also ask the new agency for assistance in enforcement, leaving the Commission free to assess their readiness for accession. A truly pan-European competition authority, that had the active support of these countries, could better defend consumer interests by challenging corporate practices that do not fall exclusively within the EU's borders.

An independent European competition agency, focusing on anti-trust and merger control, would have other wider benefits, too. By making these functions independent of the Commission and its political influence, the EU would give its competition policy decisions more international credibility. It would be much harder for critics to portray DG Competition as an arm of EU industrial policy, whose sole aim is to protect uncompetitive European companies. There is little evidence to support these charges, but perceptions matter.

By giving these important powers to a separate agency, the Commission would also allay concerns among some member-states that it is empire-building. Prompted by its *Länder*, Germany has called for greater clarity in the division of responsibilities between the regional, national and EU authorities. Opinion polls suggest widespread unease among many EU citizens about the legitimacy of the Commission's powers. Some have suggested that the President of the Commission should be an elected office, either directly chosen by EU citizens or by a vote in the European Parliament. The constitutional convention, announced at Laeken in December 2001, will discuss all these ideas. But if the Commission President ever became an elected office, an independent agency would be even more essential. With an electoral mandate to the Commission, there would be a heightened danger of political interference in the enforcement of competition policy.

No-one is suggesting that the Commission's regulatory functions be dismantled. Its historical record in enforcing competition law is strong. But monopolies in regulation are perhaps no more desirable than monopolies in the marketplace. DG Competition should welcome an ally in its vital work of injecting competition into EU markets.

Efficiency and transatlantic co-operation

Those who dislike the idea of splitting the Commission's powers over competition policy and creating two separate bodies should consider the experience of the US. Together, the Federal Trade Commission and the Department of Justice Anti-trust Division are seen as highly effective enforcers of US competition policy.¹¹ Their roles may nevertheless occasionally overlap and are different from those proposed for the EU in the preceding section, reflecting the different legal traditions of the US. American anti-trust law dates back to the 19th century, and American influence was one reason why Europe included competition policy in its founding Treaty of Rome in 1957.

¹¹ *DTI Benchmarking Study by Pricewaterhouse Coopers.*

The competition authorities in the US and EU already co-operate to a remarkable extent. This process has been helped by an increased willingness among companies to waive their rights to confidentiality and allow regulators on both sides of the Atlantic to exchange information. For their part, the EU and US competition authorities have signed two bilateral agreements, in 1991 and in 1998, which have led to almost daily liaison between DG Competition and its two American counterparts. Commissioner Mario Monti describes their relations as "something of a model for transatlantic co-operation." Because both the EU and US institutions are rooted in a common competition culture, most transatlantic competition cases are resolved amicably and effectively. In both the Boeing-Hughes merger of 2000 and the Novartis-AstraZeneca deal of the same year, officials from the EU and US worked closely together to develop their analysis and to formulate appropriate settlements with

the companies. In the former case, the Federal Trade Commission and the European Commission were able to announce their compatible decisions on the same day.

In the past few years, DG Competition has stepped up this co-operation as it tries to respond to the globalisation of business. Many of the most powerful multinational companies operate in both the US and European markets. And because of their size, the activities of these firms are more likely to raise significant competition concerns. Over the past five years, around 30 per cent of all cross-border mergers and acquisitions have involved a transatlantic dimension.¹² The growth in transatlantic mergers has resulted in both the EU and US authorities reviewing more cases. So it is perhaps not surprising that occasionally they disagree on how best to respond.

¹² *Goldman Sachs, Global Economics Paper 65, October 2001.*

In most instances, these transatlantic disputes happen either because one side accuses the other of political interference, or because of methodological differences, or because the two sides disagree on the proposed remedies. Take the dispute over the Boeing and McDonnell Douglas merger in 1997. When the Commission initially tried to block the merger, which had been approved by the US authorities, many Americans thought the EU was trying to protect the European aircraft-maker Airbus from the might of the merged US firm. The resulting transatlantic row helped spark the 1998 co-operation agreement.

The 1998 agreement committed both the US and EU to the principle of 'positive comity' on anti-trust issues. This means that each side must address competition problems in its own jurisdiction which affect the other party. In practice, this has meant exchanging confidential information and allowing each other's representatives to sit in on key meetings, if the companies concerned agree. The first example of positive comity at work was an 'abuse of dominance' investigation launched by the Commission at the behest of US authorities. EU officials looked into the alleged discrimination by Air

France against Sabre, an American computerised reservation system. The case was satisfactorily resolved in July 2000, when the airline agreed to a code of conduct, allowing other reservation systems equivalent access to its own partly-owned system.

In the GE-Honeywell case however, US and EU regulators made different assumptions about how the merged conglomerate would behave, and therefore about what effect its merger would have on competition. To some extent, these differing assumptions reflected differing traditions of corporate governance on either side of the Atlantic. In the US, conglomerates such as GE expect their subsidiaries to operate quite independently and perhaps even to compete against each other. In the EU, a conglomerate would probably try to find synergies between divisions, and might well 'bundle' its different products and services together.

This latest transatlantic argument has raised plenty of questions about how to manage divergences in competition policy, and may spur further improvements. In 1999, the EU and US set up joint working groups to consider ways of co-operating further. These have led to some discussions on suitable remedies to the competition problems raised by mergers. These remedies can be structural, selling off certain assets or subsidiaries, or behavioural, such as a commitment to supply potential rivals with certain products or to license certain technologies. At present, merging parties negotiate separate remedies with each jurisdiction. This can cause problems, particularly if the investigations are not carried out in parallel. For example, an agreement to sell off a company in order to satisfy regulators in one jurisdiction may not address competition issues in the other jurisdiction, and could even create new problems or worsen existing ones. Greater transatlantic discussion on the principles and procedures of negotiating remedies is therefore very welcome.

The US and EU are also swapping ideas on the methodologies they use to assess competition in certain industries, such as the notion of 'collective dominance' of a group of firms. This is the idea that

although one firm may not be dominant in any given industry, a group of companies might be, even if they operate independently. Under EU merger rules, which focus on the dominance test, this principle allows the possibility of blocking mergers that would otherwise not be caught by a test that required a single company to be ‘dominant’.

In effect, the Commission has moved EU merger law very close to the US test which outlaws deals which are likely “substantially to lessen competition or to tend to create a monopoly”.¹³ When one considers that the EU merger regulation prohibits mergers that “create or strengthen a position of dominance, as a result of which competition would be significantly impeded”,¹⁴ it becomes clear the difference in law between the two jurisdictions is not that great. Both jurisdictions are essentially focusing on whether the combined entity would have excessive power in the marketplace. In other words, the key test is economic rather than legal.

¹³ Section 7 of the Clayton Act.

¹⁴ Council Regulation (EEC) No 4064/89 as amended.

¹⁵ Remarks of Timothy Muris, Chairman of Federal Trade Commission at Brookings seminar, Washington DC, 21 December 2001.

Nevertheless, many commentators have highlighted the Commission’s recent offer in its Green Paper to consider moving to the US test of ‘substantial lessening of competition’ in its merger control. But even if the Commission made this change, it would be unlikely to result in much practical difference as to whether or not the EU approved individual deals in the future. And even such a convergence of law is unlikely to prevent transatlantic rows over the application of these principles, as senior US administration officials have recently noted.¹⁵

The EU and the US still need to resolve important methodological differences. These include the questions about conglomerates raised by the GE-Honeywell case, such as the ‘bundling’ theory discussed earlier. And how should competition authorities treat the linked question of efficiencies resulting from a merger? The US authorities see them as a good thing, while the EU is at best neutral, particularly if they strengthen a dominant position. The issue will now be

debated as part of the Green Paper review process. Commissioner Monti has noted that while there is no efficiency *defence* available to merging companies in the EU, neither is there an efficiency *offence*. In other words, the Commission will not approve an anti-competitive merger because it creates efficiencies. But neither will the Commission block a merger because of such efficiencies. By contrast, US regulators would allow such a deal if they believe the benefits of such efficiencies will be passed on to consumers.

The US and EU also need to develop joint filing procedures for merger notifications. In addition to cutting down on the wasteful duplication of paperwork, such procedures would enable greater synchronisation in the review process and ensure that both jurisdictions were working from the same factual basis. They would then be better able to share and debate their analysis of the market and particularly to co-ordinate their proposals for remedies that are satisfactory to all sides. The agencies on both sides of the Atlantic also need to do more to co-ordinate their investigations against global cartels, which again will require the secure exchange of information and even joint collaboration in the analysis undertaken by both sides.

In the meantime, the US administration under President Bush is adopting a more *laissez-faire* approach towards competition policy. This is shown most clearly in its response to the Microsoft case, where it is accepting softer remedies than once seemed probable. Perhaps paradoxically, the less interventionist approach in the US could strengthen the power of the EU, because DG Competition is now seen as the most demanding authority in terms of competition policy enforcement. Companies planning a merger will now concentrate on satisfying the authorities in Brussels rather than the US.

Effectiveness and a World Competition Organisation

In addition to developing a close relationship with the US, the EU has also signed a competition policy co-operation agreement with Canada in 1999, and reached agreement in principle to do the same

with Japan. But globalisation and the need for more consistency limit the effectiveness of such bilateral deals, and co-operation should be extended to other parts of the world. After all, Europe and the US may currently account for about half the world's GDP, but their share will decline as powerful emerging markets such as China, India and Brazil grow wealthier. Competition policy needs to respond to the realities of the global marketplace.

There are already some precedents for global economic regulation. The World Trade Organisation was set up in 1995 because of a general recognition that an international body was needed to regulate rapidly growing world trade. Six years later, it has proven its ability to resolve international trade disputes. But the growth of foreign direct investment – driven by multinationals expanding overseas – has long outstripped that of trade. And, as companies have grown bigger and more multinational, so their scope for anti-competitive behaviour has increased. All this points to the need for a World Competition Organisation.

The WTO is widely, if mistakenly, seen as an instrument of multinational enterprises. A World Competition Organisation would go some way to demonstrating that companies, as well as countries, can be called to account for their activities. Admittedly, the stone-throwers of Genoa and Seattle are unlikely to be mollified by such an avowedly pro-market institution. But the protesters' militancy reflects a wider unease that there are no constraints over multinationals. By addressing these concerns through a World Competition Organisation, public authorities – including the EU – would not only buttress the case for capitalism, but also underline their own vital role as the regulators of globalisation. Commission President Romano Prodi has referred to this as a key function of the EU in the twenty-first century in many of his recent speeches.

The opposition to such an organisation would be quite strong, notably in the US Congress, which is generally hostile to global institutions that constrain America's freedom of action. A 'WCO'

will not be created soon. But a binding dispute settlement system for international trade looked equally unlikely ten years ago. The inclusion of competition policy in the WTO round launched at Doha in November 2001 represents the first tentative step towards a World Competition Organisation.

India and a number of developing countries strongly opposed its inclusion in the agenda, fearing a loss of control over their home market. For this reason, the commitment in the Doha Declaration has been heavily qualified by the need for an “explicit consensus” on the form of the negotiation, before talks can start. Nevertheless, the Doha declaration says that setting up a multilateral framework for competition policy is now a WTO objective for the next round, and that formal negotiations will begin after the next ministerial meeting in 2003. This statement implicitly recognises that many competition issues cannot be effectively addressed at national, regional or even transatlantic level.

The US and the EU must take the lead, as they did with the establishment of the WTO. The world’s two largest economies have the most mature competition regimes and the biggest stake in strengthening rules-based governance of the world economy. Their leadership is all the more important because of the resistance among several developing countries. Yet these poorer countries have much to gain from open and competitive global markets. Their own companies would be better placed to compete in world markets and their consumers would benefit from greater choice and lower prices.

The EU still needs to persuade many developing countries of the merits of international co-operation. The challenge is to overcome not only their instinctive scepticism, but also their fundamental lack of technical know-how on competition issues. The WTO, supported by UNCTAD, must make technical assistance and capacity-building in these countries a priority, so that they can effectively participate in the negotiations. The EU can also offer substantial assistance in helping to embed a culture of competition policy in their domestic

economies. The results could promote economic growth and benefit the poorer citizens of these countries. Just as the World Trade Organisation already advises developing countries on trade policy, a future World Competition Organisation could provide independent technical assistance.

Many of the principles and precedents established by the WTO would be helpful for a 'WCO', which would use methodologies and procedures based on internationally-recognised best practice. For example, existing trade rules already allow governments to challenge some anti-competitive practices, where they are imposed by other states. Examples include violations of investors' rights as well as cartel-like measures such as Voluntary Export Restraints and Orderly Marketing Agreements, which impose quotas on some trade flows.

But the World Trade Organisation has no mandate to challenge private companies as opposed to countries. A World Competition Organisation would be unlikely to have such powers itself, at least initially. It would therefore be up to national competition authorities, and the European competition authorities, to enforce their own laws. In the short term at least, the 'WCO' would essentially act as a clearing-house for the exchange of information and best practice. Its major role would be advocacy: encouraging countries to set up competition regimes based on recognised principles and then ensuring that they enforce these laws in a non-discriminatory way. Where disputes and conflicts arose between jurisdictions, the 'WCO' would mediate rather than arbitrate.

More than 80 states already have some form of competition law. Three-quarters of them have merger control procedures and the number is rising. Many of the largest and most sensitive corporate tie-ups now require multiple approvals in more places than just Washington and Brussels. MCI WorldCom and Sprint notified their planned merger in 37 different jurisdictions before they abandoned the deal during the course of 2000, when both the EU and US authorities expressed their opposition. The large number of

notifications was intended to pre-empt any government subsequently blocking or disrupting the deal because of a technical failure to comply with often primitive and opaque competition regimes.

The substantial filing fees that some governments demand are little more than state-sanctioned extortion. Croatia tops the list with a maximum filing fee of \$140,000. Russia has a bizarre requirement for merging parties to notify the authorities if their combined worldwide assets exceed 100,000 times the local minimum wage, a far from transparent calculation. Such onerous requirements could lead to even the most desirable deals collapsing.

From this perspective, a World Competition Organisation could help companies that are seeking to merge across borders. The 'WCO' would set minimum standards for national competition authorities and provide technical assistance where needed. These measures would reassure responsible multinationals that their activities would not be unreasonably constrained and thus encourage more international trade and investment. In time, the 'WCO' could help countries to develop standard filing and reporting procedures and agree common methodologies for assessing company behaviour, making it easier for companies to plan for international expansion, and thus promoting global economic integration.

As a result, global capitalism, played by the pro-market rules of a World Competition Organisation, would become a better and fairer game. To make progress, countries must agree in broad terms over what constitutes good practice and there must be demonstrable benefits from international co-operation. At present, the main areas of competition policy that meet these requirements are clear-cut: cartels, merger activity and discrimination against investors. The new round of World Trade Organisation negotiations should discuss these issues as soon as possible.

The Organisation for Economic Co-operation and Development (OECD) has done much of the groundwork on the convergence of

legal principles in competition policy. This Paris-based body works effectively behind the scenes to develop thinking and build consensus on these issues among leading industrialised governments. The newly established International Competition Network (ICN), which informally links the leading regulators, can also do further work on the procedural aspects of convergence. This would help produce greater consistency in the application of competition law. Participants talk of keeping the ICN as a loose informal structure, to encourage the exchange of best practice through peer-pressure rather than developing it so that it issues formal edicts. This 'soft convergence' has its limits, as the EU is finding out with its own economic reform programme. But there is nevertheless much that can be done through this sort of harmonisation, not least in helping to promote both a competition culture and practical know-how in developing countries.

Many anti-capitalist demonstrators argue that the globalisation of business requires the globalisation of governance. There is a wider unease about multinationals' apparent lack of accountability. Public institutions such as the EU need to show that they still have a meaningful role to play. But they can and should do so with the market-friendly instruments of competition policy. A World Competition Organisation need not alarm either international businesses or the protesters, but will instead promote both greater efficiency and prosperity worldwide.

5 Policy conclusions

- ★ Competition policy is clearly a single market issue. So a uniform EU law instead of disparate national codes would be beneficial in terms of greater clarity and efficiency. This is a key part of the Commission's proposed modernisation of anti-trust enforcement. Member-states should rethink their hostility to these reforms, and instead welcome shared responsibility for enforcing EU law, as the Commission proposes.
- ★ Once the member-states agree to a single competition law, they will need to make their operational procedures more consistent. This would improve clarity and reduce business compliance costs, as well as facilitating information-sharing between the regulators. Soft convergence through benchmarking and the sharing of best practice is welcome, but some legislation is also likely to be necessary in the future.
- ★ The proposed network of EU competition authorities must be a true partnership between the Commission and the member-states. The Advisory Committees of member-state representatives, which the Commission consults over decisions on individual mergers and anti-trust cases, should become more involved in setting broad policy guidelines. This would give member-states a greater stake in the enforcement of EU competition policy.
- ★ The Commission should build on its successful experience of telecoms liberalisation by using its anti-monopoly powers on other sectors such as energy. DG Competition has a vital role to play in ensuring the Lisbon economic reform targets are met. As well as ensuring fair access to highly regulated sectors, it should continue to push for further cuts in state aid across the EU.

- ★ The Commission is charged with investigating the largest cartels but has no criminal powers. Meanwhile, the patchwork application of criminal sanctions against violations of competition law by some member-states and not others is arbitrary and unfair. Furthermore, member-states cannot easily use information from other competition authorities in criminal investigations against the biggest, pan-European cartels. Until EU practice becomes more consistent, criminal sanctions will hinder rather than help the enforcement of competition law.
- ★ The recently agreed European Company Statute could pave the way for a single legal framework to govern companies operating across the EU. This could allow individual executives to be held to account for their behaviour by EU authorities, but would not require criminal powers. Civil law in some countries already allows managers violating competition law to be disqualified. These disqualifications should be harmonised and recognised across the EU.
- ★ The Hearing Officer is responsible for ensuring that the Commission's investigations into competition issues are conducted fairly. This individual is an integral part of the Commission's system of internal checks and balances and must be seen by all parties as truly impartial. The Hearing Officer should present an annual report to the European Parliament (alongside DG Competition's own separate report) to encourage debate of the Commission's procedures and policies.
- ★ Companies cannot wait years for judicial decisions on competition issues. As yet, the new fast track appeal procedures in the European Court have not been tested. But officials and the judiciary across the EU need more training and resources so that they can apply the law effectively, as they will be required to do under the Commission's plans to modernise its enforcement of anti-trust law. This is especially true for the accession countries of central and eastern Europe.

- ★ There should be transparent procedures to encourage the business community to police itself. Consistent and appropriate leniency for companies that report anti-competitive practices would help. Companies should also include a commitment to competitive markets in their corporate governance procedures, alongside their social and environmental commitments. The regulators need to highlight the cost to consumers of anti-competitive practices whenever they discover them. The threat of bad publicity would also help deter anti-competitive behaviour by firms. In addition to raising the profile of competition policy, this would demonstrate that multinationals are not above the law.
- ★ In the longer term, an independent EU competition authority could help to strengthen enforcement. Located outside Brussels, such an agency should have a clear and narrow brief to promote competition in the single market, focusing on anti-trust and merger control. The Commission should oversee the new agency, and could offer an effective fast-track appeal process. Where non-competition concerns had influenced its final decision, the Commission should make these explicit. This move would mirror the trend in member-states towards taking the politics out of competition analysis, while still allowing the Commission to take other factors into account in their final decision.
- ★ Regulators have responded well to the challenge of globalisation, and there has been some very effective transatlantic co-operation over competition policy. The EU and the US now agree on many – but not all – of the principles of competition policy. Different wording in their respective legal tests for merger control has not prevented this convergence. But they need to do more to minimise duplication and inefficiencies in their operational procedures for mergers (such as their different filing requirements and divergent timetables), and to build collaboration in the anti-trust area.

- ★ Competition policy should become an integral part of World Trade Organisation negotiations, even though progress is likely to be slow. The International Competition Network should be given more resources so that it can promote shared thinking on the application of core principles and agree a framework in which national competition authorities can co-operate more closely. This would act as a forerunner to a World Competition Organisation (WCO).
- ★ A 'WCO' would ensure that competition laws are applied in a non-discriminatory way and mediate in disputes between competition agencies. The WCO would also help build and share best practice in competition policy enforcement among developing countries. This would promote greater economic development and ensure that multinationals could expand and develop their operations within a framework set by publicly accountable institutions.