



CENTRE FOR EUROPEAN REFORM

policy brief

Consumers and EU competition policy

By Alasdair Murray

- ★ The European Commission has placed greater emphasis on the consumer benefits of competition policy in recent years. But it needs to take further steps to ensure that consumer issues – and consumer groups – are better integrated into competition policy.
- ★ The Commission's health and consumer affairs directorate-general (DG SANCO) needs to take competition issues much more seriously. SANCO should devote part of its research budget to investigating consumer-related competition issues, and also improve co-ordination with the competition and internal market DGs. In the longer term the Commission should consider stripping DG SANCO of its responsibility for health to create a department focused solely on consumer affairs.
- ★ The Commission also needs to help build up the capacity of consumer organisations to lodge complaints at the European level. And the Commission should develop a more comprehensive procedure for dealing with consumer complaints. This procedure should include the option of responding to a complaint by launching a market investigation.

AN EFFECTIVE COMPETITION POLICY IS vital to the long-term health of the European economy. Competition increases the incentives for firms to reduce costs, cut prices and improve the quality of their products. It encourages the reallocation of capital from less to more productive firms. It benefits businesses which gain from greater competition between suppliers. But above all, competition benefits consumers through lower prices and better products.

Competition policy is one of the European Union's greatest success stories. It is also one of the most integrated areas of EU policy-making. While the EU's Council of Ministers sets the broad parameters of competition policy, the European Commission has possessed sole responsibility for both investigating and ruling on individual cases since the creation of the European Economic Community (EEC) in 1958. Once the competition commissioner takes a decision, it normally sails through the rest of the Commission. Only the European Court of Justice (ECJ) can overturn a Commission decision on a competition case.

Thus the Commission possesses huge power both to determine the overall direction of EU competition policy and to investigate individual cases. However, the Commission has long faced criticism for failing to place consumers at the centre of its approach to competition. Critics claim that it pays too much attention to competitors and too little to the needs of consumers when reaching decisions in competition cases.¹ In contrast, the US Supreme Court has made clear that US competition policy is “for the protection of competition not competitors”.

Moreover, the Commission has only made patchy efforts to involve consumers – and their representative organisations – in the competition process.

The Commission has recently undertaken a number of reforms to integrate consumer concerns more closely into its policy-making. For example, the Commission has appointed a consumer liaison officer charged with canvassing consumer opinion on individual competition cases (see below). And it has for the first

¹ Alasdair Murray, 'A fair referee? The European Commission and EU competition policy', CER October 2004.

time explicitly stated that the overall goal of its competition policy is to benefit consumers. But the Commission now needs to build on these improvements to ensure that consumers are fully involved in the competition process.

Taking consumers seriously

Competition specialists complain that the Commission does not take consumer issues seriously enough. In its communications on its competition actions, the Commission usually produces only a cursory paragraph detailing the potential consumer benefits of individual competition decisions. The Commission's communications sometimes appear to be driven by a desire to generate instant headlines, and they usually fail to give any impression that its investigations include a thorough examination of the damage done to consumers in a particular case. Moreover, the Commission has only made patchy efforts to involve consumers – and their representative organisations – in the competition process.

To a certain extent, the Commission's neglect of consumers is understandable. As a supra-national organisation, the Commission is somewhat remote from the day-to-day concerns of European consumers. National competition authorities are often best placed to deal with consumer-related competition problems. Equally, consumer organisations have not always devoted sufficient resources to European issues.

EU competition policy has been primarily reactive: the Commission's main aim is to deal with individual cases of anti-competitive behaviour by firms (or in the case of cartels, groups of firms). Frequently such investigations have been in response to complaints from a competitor. The Commission has needed strong evidence of wrongdoing before it could take action. Senior competition officials privately admit that the Commission has focused too much on competitor complaints. The focus on complaint-led investigations has left the Commission vulnerable to criticism that it favours competitors not consumers in its decision-making. Furthermore, investigations which focus on the alleged anti-competitive activities of one company are unlikely to uncover wider market problems, especially regulatory barriers.

However, the Commission can no longer pay such scant regard to consumer issues. The creation of the euro and the steady evolution of the single market mean that a growing number of retail sectors are operating on a pan-European basis. Companies have integrated their supply chains across the EU in an effort to cut costs. Shopping centres are becoming increasingly homogenous, as major retailers consolidate and expand throughout Europe. The spread of new technology has also made it far easier for consumers to shop cross-border. Above all, the effective functioning of consumer markets is crucial to the good health of the European economy: according to Eurostat, consumer spending accounts for more than half of EU GDP.

The Commission has recently begun to give a greater voice to consumers in its competition deliberations. It repeatedly stressed the importance of consumers in its most recent statement of competition policy.² The Commission is committed to “the better integration of consumers' interest in its competition policies”. The competition directorate-general has sought to involve consumer groups directly in its competition investigations by appointing a consumer liaison officer. The officer's task is to increase contact with consumer groups and ensure that their views are heard during merger or anti-trust investigations. The liaison officer is also responsible for improving co-operation between the competition directorate-general and other DGs on consumer issues.

The Commission's recent initiatives are welcome. But the Commission's desire to place greater emphasis on consumer interests continues to be hampered by the failure of its health and consumer protection directorate-general to address competition concerns. DG SANCO's latest action plan for consumer policy does stress the need to integrate consumers into all aspects of EU policy-making.³ But the plan fails to make any mention of the role competition can play in promoting better consumer policies.

Another problem is the dearth of consumer organisations at a European level. The few active pan-European consumer organisations are short of funds and experience, in comparison with their national counterparts. Thus the Commission should help stimulate the growth of more professional consumer organisations in a number of ways. First, the Commission should encourage national consumer groups to devote more resources to European issues. Most consumer organisations are still geared to looking at domestic issues, even though many key rules and regulations now originate at EU level. Second, the Commission should make some funds available for consumer research from the fines it collects from anti-trust offences. At present money from the fines is simply absorbed into the general EU budget.

A consumer commissioner

The EU treaties specify that consumer interests should be integrated into all relevant aspects of EU policy. However, the implementation of this ideal has so far been piecemeal. The Commission should review its approach to consumer issues, and improve co-operation between those directorates-general most responsible for consumer issues: particularly the SANCO, competition and internal market DGs. The Commission should establish a ‘consumers group’, chaired by the health and consumer affairs commissioner, which would meet regularly to debate the Commission's approach to consumer policies. The

² *European Commission, 'A pro-active competition policy for a competitive Europe', April 2004.*

³ *European Commission, 'Healthier, safer, more confident citizens: a health and consumer protection strategy', April 6th 2005.*

group should revise the Commission's consumer policy strategy to ensure it places greater emphasis on the importance of competition.

SANCO focuses on protecting the consumer through rules and regulations, such as those for food production. Regrettably, SANCO has shown little interest in promoting competition as an important element of consumer welfare. For example, it has clashed with DG Competition over the latter's investigation into restrictive practices in the liberal professions, which includes lawyers, engineers, accountants and pharmacists. SANCO has argued that existing restrictive practices, ranging from high levels of qualification to bans on advertising, are necessary to protect the consumer from rogue practitioners. The Competition DG, however, has concluded the opposite – that many of the rules and regulations are harming consumers by preserving the power of

⁴ *European Commission, 'Report on competition in professional services', February 9th 2004.*

incumbents. In particular, DG Competition has highlighted restrictions on pricing and advertising as unnecessary impediments to competition.⁴

In some countries – most notably the US – governments have sought to balance consumer protection and competition by handing responsibility for both to one body. In the US for example, the Federal Trade Commission has responsibility for competition and consumer protection.

The Commission does not need to precisely replicate this model by folding SANCO into DG Competition. But the Commission could better ensure a 'consumers first' approach by stripping the existing DG of its responsibility for health (which requires a different very legislative approach). A revamped 'consumer affairs' DG should focus on promoting consumer welfare, including greater competition, rather than simply 'protecting' the consumer. An independent consumer affairs department – led by an able commissioner – should act as a powerful advocate for Europe's consumers in all Commission policies, including for example environmental or single market issues.

A new consumer affairs DG should also devote part of its research budget to competition issues, something that SANCO has failed to do. In particular, some of this funding should go to European consumer groups to help build up their competition policy capacity.

Market investigations

The institutional reforms outlined above would help the Commission place greater emphasis on consumer-related competition issues. However, that will not suffice to ensure that the Commission's consumer policies become more competition focused. The Commission also needs to involve consumer groups more closely in the competition process.

As part of its new competition strategy, DG Competition intends to make greater use of sectoral investigations. These involve looking into the workings of a whole market rather than the actions of individual firms, and exploring whether rules and regulations are unnecessarily impeding competition. Excessive or poorly designed regulation – whether private or public – tends to bolster the market power of incumbent companies by making it difficult and costly for new players to enter the market. Article 17 of the EU's new competition regulation grants the Commission broad powers to investigate sectors of the economy where it suspects that competition may be restricted.

In some member-states, including France, Germany and the UK, such market investigations are common. In the UK, for example, the Office of Fair Trading has recently conducted investigations into high street pharmacies and private dentistry, and made recommendations to liberalise these markets.

Businesses often prefer this approach to competition enforcement, in part because the investigations are less aggressive – the competition authority does not need to employ 'dawn raids' to gather its information. When the Commission takes this approach it builds up a broad picture of how individual sectors work, through a dialogue with firms operating in the sector. Firms are also reassured by the fact that market investigations will not directly lead to the Commission bringing competition cases against them.

However, critics argue that market investigations are often 'fishing' expeditions that usually prove a waste of time and effort. The Commission's few previous attempts at market investigations have proven very time-consuming. For example, the Commission launched an inquiry into airport landing fees in 1995, but only completed the case in 2001. Critics of the market investigation approach argue that, in contrast, the complainant in an anti-trust investigation has an incentive to supply information which can reduce costs and times.

The Commission is trying to reduce the risk that market investigations drag on needlessly by introducing specific timelines. But the EU lacks a clear framework for deciding when to begin a new investigation. The Commission's recent communication on 'proactive competition policy' sets out which tools the Commission intended to use to analyse competition problems, such as measures of market concentration. But critics argue that the Commission places too much emphasis on traditional industrial economic analysis. They argue that the Commission needs to make greater use of other relevant analytical tools such as behavioural economics.

Moreover, the document said little about how the Commission would choose its targets for investigation – beyond a vague commitment to focus on the most economically sensitive sectors. Neelie Kroes, the competition commissioner, has promised to develop

more specific tools for choosing which sectors to investigate. These tools should focus on identifying and assessing harm caused to the consumer, drawing on all available analytical tools (including industrial, regulatory and behavioural economics). The Commission should use this broad approach to assess the impact of all competition cases and draft legislation. Like this, it would apply in practice the principle that consumer interests should be integrated into all relevant aspects of policy.

Involving consumer organisations

DG Competition could increase the effectiveness of its market investigations by permitting consumer organisations to make formal complaints about competition problems in particular sectors of the economy. At present, consumer groups can only bring problems to the Commission's attention by filling in a 'Form C', a formal complaint notice. Consumer groups complain that the form is too narrowly defined – it can only be used to suggest evidence of a breach of EU anti-trust or merger rules, rather than report more widespread competition concerns. Moreover, the Commission expects such complaints to include a high level of proof, effectively asking consumer groups to provide information that it has failed to uncover, despite its wide-ranging powers of investigation. Consumer groups point out that they have only limited access to the documents the Commission uses in its investigations.

The Commission should thus develop new procedures for dealing with consumer group complaints. These should leave open the possibility that the Commission will respond to a consumer group complaint by launching a market investigation, or by passing on the complaint to another DG for regulatory action. Furthermore, the Commission should increase the access of consumer groups to its investigation documents by establishing clear criteria for deciding what information is withheld on the ground of commercial confidentiality.

Such a reform would achieve two key aims. First, it would give consumer groups a much greater stake in EU competition policy. Second, it would provide a practical means of directly connecting Brussels bureaucrats with consumers. The Commission would be seen to be intervening on the side of consumers and not that of powerful vested interests. It would thus ensure that DG Competition acts as an advocate for

⁵ David Byrne, 'EU consumer policy – making it work', speech to Dutch presidency conference on EU consumer policy, October 21st 2004.

consumer interests. As former commissioner David Byrne has said: "Competition policy is simply too important to leave to major law firms and competition law experts."⁵

However, the Commission has so far rejected calls for it to follow the practice of some member-states and make consumer-inspired market investigations a formal part of the competition process. Officials

privately argue that the data provided by consumer groups are often of insufficient quality to justify inclusion. But without the incentive of guaranteed participation, European consumer organisations will struggle to raise the funding they need to produce good quality reports. Moreover, the experience of bringing well-researched complaints to the Commission would have an educative effect on consumer groups across the EU.

Clearly, the Commission could face resource difficulties if consumer organisations suddenly brought a flood of complaints. So the Commission should establish clear guidelines about what forms of complaint it most wants to encourage. It should also be able to dismiss time-wasting complaints swiftly. For example, the Commission could set aside a month to undertake an initial review of a complaint. At the end of this period, it could then launch a full-scale investigation, request further information from the complainant or dismiss the complaint out of hand. The publication of the Commission's decision would act as a powerful deterrent to ill-considered complaints. In reality, encouraging consumer complaints should help the Commission to police the market.

Conclusion

Until recently, the Commission predominately acted as a competition 'policeman', following up complaints about the behaviour of individual companies, or reacting to a merger deal. However, the Commission is now seeking to raise the overall level of competition within the EU's single market. As the Commission explained in its most recent competition policy statement, it wants to "actively remove barriers to entry and impediments to effective competition that most seriously harm competition in the internal market and imperil the competitiveness of European enterprises".

Above all, the Commission is now seeking to become an advocate of the benefits of competition, both inside its own bureaucracy and in the wider EU. This means the Commission should place a greater focus on market investigations: it should actively seek out barriers to competition in the most important parts of the EU economy. And it must place much more emphasis on consumer interests when taking competition decisions. Thus the Commission should do more to encourage consumer organisations to become involved in the competition process and enable them to bring their own complaints on markets that do not work well. This is the best way for the Commission to guarantee the continuing success of EU competition policy, and to ensure that it effectively promotes the long-term competitiveness of the EU economy.

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