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THE USE OF COMPETITION LAW POWERS FOR REGULATORY PURPOSES

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The purpose of this paper is to call attention to a problem which should be of some concern. There is now evidence that some authorities in Europe, both competition authorities and regulators with competition law powers, are inclined to use what they claim are competition law arguments for what are in reality, when correctly analysed, regulatory objectives. There are examples of this in a variety of industries, including transport, energy, telecommunications and others.[2]

The advantage, from the viewpoint of an authority, is that competition law is already in force, so that if it is applicable it can be applied retrospectively to past conduct. In contrast, a regulatory measure, being new, can be applied only prospectively, for the future, and usually after a procedure involving public discussion in which the authority has to explain what it wants to do, and why. Competition law, if it is thought to be available, is easier and more effective, and is not regarded as raising new policy issues that would need to be discussed. Fines can be imposed for past conduct under competition law.

The disadvantages, from the viewpoint of everyone else, are considerable. Competition law is made less clear, and is improperly extended to objectives and measures

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2 See generally Temple Lang, European competition policy and regulation: Differences, overlaps and constraints, in Lévêque and Shelanski, papers of the 2006 Ecole des Mines/Berkeley conference in Paris (due for publication in 2007); O'Donoghue & Padilla, The law and economics of Article 82 EC (2006, Hart) pp. 47-48; on consumer welfare, see Motta, Competition policy – Theory and practice (Cambridge U.P., 2004) 18-22; and see also Motta, Polo and Helder Vasconcelos, Merger remedies in the European Union: An overview, in Lévêque and Shelanski, Merger remedies in American and European Union competition law (2003) 106-128 at pp. 121-124.

which are not legitimately part of competition policy. Competition law is made unforeseeable. Legitimate procompetitive conduct is discouraged, and may be heavily penalised. Conduct that nobody would have thought was contrary to competition law is punished retroactively. Expensive litigation, the cost of which will not be fully recovered even if the authority ultimately loses, may be needed to get the authority's actions annulled. A potential liability, *ex post*, to pay compensation may be unjustifiably created. Precedents are created that may be used incorrectly in other industries to which no regulatory regime is applicable. A measure that might be a legitimate subject for democratic discussion and a policy debate is pushed through by unelected officials acting outside the scope of competition policy as correctly understood. Issues that might be clear if considered as regulatory policy questions are complicated and distorted by being forced into competition law categories. It may be procompetitive to guarantee immunity from regulation.[3]

The principal differences between competition law and policy, correctly understood, and regulation are as follows.

Competition law is only a set of prohibitions of certain kinds of private conduct that restrict competition in the market, or exploit dominant power. "Regulatory" legislation gives public authorities powers, after special procedures have been followed, to adopt measures designed to alter conditions in the market, to regulate or prohibit otherwise lawful conduct in order to increase competition, to control market power, cure market failures, or to promote some other objective or to achieve some other change. (It may also be needed to deal with technical issues such as interconnection). Competition is only about stopping illegal interference with the market. Regulation gives power to alter an existing, <u>legal</u>, situation.

Competition law, correctly understood, contains built-in limitations. Agreements, practices, unilateral conduct or proposed mergers can be identified, analysed, and if appropriate, prohibited. Exclusionary conduct raises the costs or lowers the return of competitors, or shuts them wholly or partially out of the market, without offsetting social benefit. Imposing a private penalty or handicap on a competitor, other than by offering a better bargain, is anticompetitive. Regulation does not require any conduct to be found illegal under existing, known, rules. It only requires that some kind of conduct should be

[3] Temple Lang, The proposed amendment of the German Telecommunications Act: Section 9a

considered undesirable for some reason. So regulatory powers, being much wider and greater than competition law powers, must be subject to additional constraints, both procedural and substantive.

Competition law may not be used to make an existing market more competitive, unless some element of the market is illegal. Competition law may be used only when some illegality has been identified, and then it can be used only for the purpose of putting an end to that illegality or, if the procedure allows, preventing the illegality from occurring.

In general competition law cannot be used to regulate or fix prices, or break up legal monopolies. In some situations a competition authority may have a duty to say that a given price is discriminatory, predatory, or excessive. But it has no power to say (except perhaps indirectly and by implication) what a non-discriminatory price should be, or what the lowest lawful price would be, or what the highest legitimate price would be. A competition authority has no power to regulate the conduct of companies even for the purpose of promoting competition, encouraging market entry, preventing excessive profits, subsidising investment, or any other presumably desirable economic objective.

Similarly, if the issue is whether terms offered by a dominant company are lawful, the task of a competition authority is to say whether they are lawful or not, but not to specify what they should be, except indirectly.

Nor can competition law be used to make structural changes in a market, even to encourage or promote competition, unless that is an appropriate remedy to end some identified unlawful conduct. The fact, if it is a fact, that there would be more competition in a downstream market if the owner of important and necessary infrastructure gave access to it on non-discriminatory terms to additional companies does not entitle a competition authority to order access to be given. That can be done only if refusal of access is illegal, and if an order for compulsory access is the appropriate remedy for the illegal conduct.

It is, of course, well known and widely accepted, at least in theory, that competition law is for the protection of competition and consumers (including intermediate consumers of

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– "New Markets", 1 Competition and Regulation in Network Industries (2006) 417-435.

industrial and commercial services, as well as final consumers). Accordingly a measure the principal purpose or effect is to protect competitors from competition, whatever its other merits may be, is anticompetitive and not a competition law measure. It may be a legitimate regulatory measure if market entry would otherwise be difficult or impossible, but it is not a competition law measure. Regulation is designed to cure defects in markets. Competition law is to prevent interference with markets.

For various reasons, competition law is most likely to be misused in this way in cases involving unilateral conduct. However, as the examples given below demonstrate, the problem is not confined to those cases. It may arise in any situation, at least in the sense that a competition authority, having identified what it says is a competition law problem, may try to impose a remedy that is, in fact, a regulatory measure and not a remedy for a competition law infringement (even assuming that there has been one).

All this is, or ought to be, well known and clearly accepted by both competition authorities and regulators, at least in theory. It seems that it may not be understood so clearly in practice.[4]

At this point, readers may react by saying that the Commission is quite entitled to try to negotiate with companies, and that if a competition authority exceeds its powers, companies must defend themselves, if necessary by having the authority's measures annulled. That may however be too simple, for several kinds of reasons:

- The company in the case in question may have an interest in reaching an agreement with the competition authority, to obtain approval for a merger, to avoid a fine or bad publicity, or simply to put an end to the cost, uncertainty, and inconvenience of a continuing investigation. The company may therefore have an interest in reaching an agreement even if it knows that what the authority is demanding is unjustified and anticompetitive.

[4] Incardona, Modernization of Article 82 EC and refusal to supply: Any real change in sight? 2 European Competition Journal (2006) 337-369 at p. 367 says it is " … disturbing that the terms (*e.g.*, dynamic competition, consumer, welfare, efficiency, allocative efficiency) used frequently in EC competition law are not better delineated … "

- The company may have a general long-term interest in remaining on reasonably good terms with the authority. This may be so in particular if the authority is a regulatory authority with which the company has frequent routine contacts, or if the company expects to have regular contacts with the authority in the future, whether as a complainant or as a defendant.
- The company may, in some circumstances, have genuinely broken competition law, and the unjustified request of the competition authority may concern the remedy, not the infringement. Since remedies often are pragmatic and practical solutions to particular problems, and the company may know that some remedy is anyway going to be imposed, it may not have strong reasons for resisting a remedy on the grounds that only some other remedy could legally be justified.
- Cases involving unjustified attempts to use competition law powers are likely to be complicated, and the law may be unclear (especially if Article 82 EC is said to be applicable). So the company's lawyers may genuinely fail to realise that what the authority is trying to do cannot be justified under competition law.
- The company may be trying to negotiate a commitment under Article 9 of Regulation 1/2003, or the national equivalent, and may be willing to make unnecessary concessions in order to have its commitment accepted.

These difficulties for companies are increased where, as in the case of the European Commission and a few national authorities, essentially the same individual officials draft both the Statement of Objections or equivalent document and the final decision. This means that there is no complete objective re-assessment, and so no effective safeguard against over-enthusiastic insistence on results outside the proper scope of competition law.[5]

[5] See House of Lords Select Committee on the EU, Strengthening the Role of the Hearing Officer in EC Competition Cases (2000, Session 1999-2000, 19th Report).

One basic difficulty – the failure to adopt a clear definition of exclusionary abuse under Article 82

The examples of misuse of competition law arguments given below are not limited to cases under Article 82. But one of the reasons why competition law can be misused is because the Community institutions have not yet adopted a clear definition of exclusionary abuse. The Court of Justice notably failed to do this in *British Airways*.[6] This is clearly unfortunate. It is also unnecessary. Article 82(b) provides a definition: exclusionary conduct is conduct which limits the marketing, production or technical development *of competitors of the dominant company* (the last words result from the case law of the Court), provided that harm is caused to consumers.[7] So foreclosure is conduct which creates obstacles or handicaps for competitors or limits the possibilities that would otherwise be open to competitors, in ways in which they would not otherwise have been limited. If this definition was clearly understood and adhered to, it would be more difficult to misuse competition law on unilateral conduct.

European Commission cases

Several examples of situations where the Commission inappropriately used competition law (whether Article 81 or Article 82) for what were really regulatory objectives, to increase competition or facilitate market entry, may be useful.[8]

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6 Case C-95/04P, *British Airways*, March 15, 2007, "the list of abusive practices contained in Article 86 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses …" (para. 57).

7 Temple Lang, Anticompetitive non-pricing abuses under European and national antitrust law, in Hawk (ed.), 2003 Fordham Corporate Law Institute (2004, New York) 235-340; Temple Lang, Abuse under Article 82 EC: Fundamental issues and standard cases, in Baudenbacher (ed.), Neueste Entwicklungen im europäischen und internationalen Kartellrecht, 13. St. Galler Internationales Kartellrechtsforum 2006 (Helbing Lichtenhahn, Basel, 2007) 95-168; O'Donoghue & Padilla, The law and economics of Article 82 EC (Hart, 2006); Gilbert, Holding innovation to an antitrust standard, 3 Competition Policy International 47-78 at pp. 57-62.

Even in the USA, the law under S.2 of the Sherman Act is not clear: see *e.g.*, Lande, Should predatory pricing rules immunize exclusionary discounts? 2006 Utah Law Review 879-899; Elhauge, Defining better monopolization standards, 56 Stanford Law Review (2003) 253-344.

8 The examples of misuse given here are distinct from the important question whether it is helpful to use competition law concepts of dominance, in a modified form, under Telecommunications Directives: Temple Lang, Current problems of dominance in changing markets, in Baudenbacher (ed.), 12. St.

In the *Ford Werke* case,[9] the agreements for distribution of Ford cars in Germany, where prices were lower, enabled Ford to refuse to supply German dealers with right-hand drive cars for export to the UK, where car prices were higher. The Commission finally[10] declared that as a result the German agreements did not fulfil the requirements of Article 81(3). But first the Commission ordered Ford to supply right-hand drive cars in Germany. As Ford was not in a dominant position, the Commission had no power to do this, and the decision was annulled. This illustrates how the Commission, even in a formal procedure, may try to achieve a result which it has no power to achieve under Community competition law.

In the *ENI* case, a competition law investigation, the Commission required ENI to offer significant gas volumes to customers located outside Italy over a period of five years (using auctions where ENI failed to meet agreed targets), to increase the capacity in its pipelines used to transport Russian gas destined for the Italian market, and to offer an improved third party access regime facilitating the use of the transit pipeline. This requirement to improve the market structure was something which the Commission could not have done under Articles 81-82.

In a third case, involving several joint ventures in the gas industry, the Commission tried to break up the joint ventures, and to order the parent companies to sell to some new entrants a proportion of the output which they would then be selling separately. The Commission was finally convinced that the joint ventures were legal. But there was no legal basis in competition law for ordering non-dominant companies to sell a specified proportion of their output to specific buyers.

In a case involving a telecommunications standards body, the question arose whether a licence of a certain patent was needed to comply with a specified standard. The Commission believed, no doubt correctly, that the market would be more competitive if no licence of that patent was needed. The Commission instructed the standard setting body to make a declaration, which neither the Commission nor the body had any legal power to

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Galler Internationales Kartellrechtsforum 2005 (2006, Helbing and Lichtenhahn, Basel) 181-232 at pp. 211-217.

9 Cases 228-229/82, *Ford Werke* [1984] ECR 1129.

10 Cases 25 and 26/84, *Ford* [1985] ECR 2725.

make, that no licence of the patent was needed. The Commission even threatened the standard setting body under Article 81 if it did not carry out the order. This was unjustified. The rules of a standard setting organisation are not contrary to Article 81 merely because they fail to ensure that no unjustified claims that patents are essential can ever be made. There was no connection between Article 81 and the patent law issue.

The *IMS Health* decision[11] was an Article 82 case in which, although no abuse of a dominant position had been committed, the Commission tried to order compulsory access in order to create new competition. This was, in reality, a regulatory measure, not a competition

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[11] OJ No. L-59/18, Feb. 28, 2002; withdrawn OJ No. L-268/69, 2003; Case T-184/01R, [2001] ECR II-2349 and 3193; Case C-418/01, judgment dated April 29, 2004.

The *IMS Health* case gave rise to a great deal of comment and criticism. See Schwarze, Der Schutz des geistigen Eigentums im europäischen Wettbewerbsrecht, Europäische Zeitschrift für Wirtschaftsrecht 3/2002, 75-81; Pitovsky *et al*., The essential facilities doctrine under US Antitrust Law, 70 Antitrust Law Journal 443 (2002); Marquardt & Leddy, The essential facilities doctrine and intellectual property rights: a response to Pitovsky, Patterson & Hooks, in 70 Antitrust Law Journal (2002) 847-873; Derclaye, Abus de position dominante et droits de propriété intellectuelle dans la jurisprudence de la Communauté européenne: IMS survivra-t-elle au monstre du Dr. Frankenstein? 15 Les Cahiers de Propriété Intellectuelle (2002) 21-55; Koenig, Bartosch & Braun, EC Competition and Telecommunications Law (Kluwer, 2002) 133-134, 151-157; Baches Opi, The application of the essential facilities doctrine to intellectual property licensing in the European Union and the United States: Are intellectual property rights still sacrosanct? 11 Fordham Intellectual Property, Media and Entertainment Law Journal (2001) 409-506; Hull, Atwood & Perrine, Compulsory Licensing, European Antitrust Review (2002) 36-39. Casper, Die wettbewerbsrechtliche Begründung von Zwangslizenzen, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, 166. Band, Dezember 2002, 685-707; Gitter, The conflict in the European Community between competition law and intellectual property rights: a call for legislative clarification of the essential facility doctrine, 40 American Business Law Journal (2003) 217-300; Dolmans & Ilan, A health warning for IP owners: the Advocate General's opinion in IMS and its implications for compulsory licensing, 11 Competition Law Insight (2003) 12-16; Narciso, IMS Health or the question whether Intellectual Property still deserves a specific approach in a free market economy, [2003] Intellectual Property Quarterly 445-468; Derclaye, Abuses of dominant position and intellectual property rights: a suggestion to reconcile the Community Courts case law, 26 World Competition (2003) 685-705; Lebrun, *IMS v. NDC*: Advocate General Tizzano's Opinion, [2004] European Intellectual Property Review 84-87; Aitman & Jones, Competition law and copyright: Has the copyright owner lost the ability to control his copyright? [2004] European Intellectual Property Review 137-147; Conde and Riziotis, Comment, International review of intellectual property and competition law No. 5 (2004) pp. 564-573. Temple Lang, European competition law and compulsory licensing of intellectual property rights, 4 Europarättslig Tidskrift (2004) 558-588, 580-587; Eilmansberger, How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses, 42 Common Market Law Review (2005) 129-177, at pp. 155-166; No need to rule on validity of an ineffective interim decision, 4 Competition Law Insight (No. 7), 2005 p. 15; Temple Lang, Mandating access: The principles and the problems in intellectual property and competition policy, 15 European Business Law Review (2004) 1087-1114; Temple Lang, The application of the essential facility doctrine to intellectual property rights under European competition law, in Lévêque and Shelanski, Antitrust, patents and copyright: EU and US perspectives (Elgar, 2005) 56-84; Temple Lang, Anticompetitive abuses under Article 82 involving Intellectual Property rights, in Ehlermann and Atanasiu (eds.), European Competition Law Annual 2003: What is an abuse of a dominant position (Hart 2006) pp. 589-658.

case – there had been no abuse (mere refusal to licence an intellectual property right is not an abuse), but the Commission wanted to create competition.

One of the odd features of the *IMS Health* decision was that it treated customers' preferences as creating an essential facility, instead of merely being a reaction to competition. Unfortunately the Commission does not yet seem to have abandoned the view that the duties of dominant companies should be adjusted to make life easier for competitors with less attractive products – at best, a regulatory objective, at worst, an anticompetitive measure. Attractive products are evidence of legitimate efficiency. Competitive disadvantages can be cured, under competition law, only insofar as they have been illegally created.

Another odd feature of the *IMS Health* decision was that it involved using competition law to counteract or reverse a result of intellectual property law, without any abuse of a dominant position being shown (because a mere refusal to licence an intellectual property right is not, by itself, an abuse).

In 2006, in the *Gaz de France/Suez* merger case, the Commission insisted on two divestitures by Gaz de France, and on Suez giving up control of the Belgian network operator. A series of investments are to be made to increase infrastructure capacities to facilitate entry of new competitors into the market. The Commission described these remedies as "far-reaching" and said they were to ensure effective competition in the newly-liberalised energy markets. These structural changes were designed to create more competitive conditions, but could hardly have been necessary as merger remedies.

In the *Alrosa* case, now before the Community Courts,[12] the Commission obtained a commitment from De Beers that it would not buy any rough diamonds from Alrosa after 2008. The aim was to ensure that Alrosa's diamonds would come on the market in competition with De Beers. It seems unprecedented to deprive a non-dominant seller of the right to sell to a major buyer, and indeed to prevent a dominant company from trading in the normal course of its business. (The Commission's objections to long-term contracts are more understandable).

[12] Case T-170/06, *Alrosa Co v. Commission*.

The Commission's Policy Statements

In its Discussion Paper on exclusionary abuses under Article 82, in late 2005, the Commission proposed that the "commercially viable share" of the market that an efficient competitor or entrant can be expected to supply should be calculated. This would then be compared with the "required share", which would be the share of customers' requirements that an entrant should capture so that the effective price resulting from the dominant company's rebate would equal the average total cost of the dominant company.[13]

This was pure regulation, not competition law.

The Commission also said[14] that "it may sometimes be necessary in the consumers' interest to also protect competitors that are not (yet) as efficient as the dominant company". This again, is pure regulation, in the interests of competitors, not competition.

Some examples of legitimate cases

In several air transport cases the Commission said that it could not authorise a joint arrangement between two State-owned airlines which provided the only commercial service between two cities, as there would then be no competition between them. The Commission however said that if the two States in question authorised other airlines to fly on the same route, the arrangement would no longer eliminate all competition. The Commission applied no pressure, but the States chose to licence new entrants, in the interests of their airlines, and the joint arrangements were then approved under Article 81(3).

When companies with sufficient market power agree to set up a patent pool or a standard, or in some cases a joint venture, in order to comply with Article 81(3)(b) they are usually obliged to give non-parties access on non-discriminatory and reasonable economic terms. If one company fails to do this, it may be required to do so. In most cases access on reasonable terms will already have been given, so there is a convenient standard of comparison. This is not regulation, but enforcement of an obligation to avoid creating a privileged position

13 Para. 155.

14 Para. 67.

for parties and a handicap or boycott of non-parties.[15] The terms are in the first instance decided by the companies, not the competition authority.

When negotiating structural remedies in cases under the Merger Regulation, remedies in theory should go no further than is necessary to offset the effects of the merger on competition. Remedies are supposed to be suggested by the parties rather than the Commission, and they cannot be imposed by the Commission. Divestiture, the usual remedy, is usually intended to compensate for or counteract the effects of the merger. However, remedies other than divestiture[16] may be structural, such as giving access to a technology or infrastructure, supplying third parties or purchasing from third parties, terminating exclusive arrangements or cooperation with competitors, to facilitate market entry. If they go further than providing an effective remedy or offsetting the effects of the merger, these are regulatory in nature.[17]

A dominant company may discriminate, on its own initiative, in favour of new entrants into the market for its goods or services, if the aim is *e.g.*, to increase the total demand for them. This is procompetitive (it increases welfare) and is legitimate. A competition authority should accept this, if the question arises. However, if an authority were to impose on a dominant enterprise the duty to discriminate in favour of new entrants (or *e.g.* in favour of companies investing in infrastructure), that would be a regulatory obligation, not justified under competition law.

Several Italian cases

In a case brought by the Italian competition authority in 2005 against ENI, the Autorità argued that ENI was using the only LNG re-gasification infrastructure in Italy at less than full capacity, and was refusing to let other companies use the spare capacity. ENI finally gave commitments to release a specified quantity of gas at a prescribed price in 50 lots, 38 lots to

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15 See *e.g.*, *IGR Stereo Television Salora*, Eleventh Competition Policy Report (1981) pages 63-64; *British Interactive Broadcasting-Open*, OJ No. L-312/1, Dec. 6 1999; Temple Lang, International Joint Ventures under Community Law, in Hawk (ed.), 1999 Fordham Corporate Law Institute (2000) 381-464, at 447-450. If the companies in question are dominant, there may be corresponding duties under Article 82.

16 See Levy, European Merger Control Law: A Guide to the Merger Regulation (Lexis, 2005) ch. 18.

17 Temple Lang, Commitment decisions and settlements with antitrust authorities and private parties under European antitrust law, in Hawk (ed.), 2005 Fordham Corporate Law Institute (2006).

agents of final buyers and 12 to agents of resellers, on two-year contracts. These rather elaborate and prescriptive commitments seem regulatory in nature.

In 2005 the Italian competition authority opened proceedings against ENEL for using its near-monopoly position in certain regions to control flows of electricity to and from the neighbouring regions to keep prices up. The authority finally accepted commitments by which ENEL agreed to provide capacity in the southern region equivalent to some 3% of national demand for electricity, on specified conditions. This quantity was considered enough to reduce significantly ENEL's pivotal role in the markets. The authority wanted to prevent ENEL from taking advantage of the shortcomings of the regulatory framework to lessen competition, and to ensure as far as possible that the price paid by operators throughout Italy is the same. These seem to be regulatory objectives.

In two cases involving Merck and Glaxo, the Italian competition authority obtained commitments to grant patent licences for production in Italy of active ingredients of medicines, for export of generic drugs to countries in which the companies had no corresponding patents. The Autorità said in the *Merck* case that its decision needs to be seen in the context of its efforts to obtain commitments to improve market conditions. The Autorità said that its interim measure in the *Merck* case was justified because the regime of "voluntary" licences during an extended patent period (through "protection certificates") made a refusal to licence contrary to competition law, and the order to licence was to correct the effect of the "particularly long and anomalous" period of protection given by certificates. Merck's refusal to licence the active ingredient allowed it to prolong its monopoly in Member States where the patent protection had already expired. This use of Merck's rights was regarded as exceeding the proper scope of the Italian rights.

The point being made here is not that the actions of the Italian competition were unjustified under competition law. In each case, the companies concerned finally chose or felt obliged to give commitments. The point being made is that in each case either the objective or the means used, or both, were primarily regulatory, and probably went beyond what could have been imposed as a remedy in a formal competition decision not involving commitments.

Other national cases

Examples could also be given of similar misuse of competition law concepts by both national competition authorities and national regulatory authorities with competition law powers. Pijnacker Hordijk[18] has written that the Dutch competition authority has used competition law to act as a "quasi price-regulator" in a way that he says is "audacious" and "revolutionary".

National regulatory authorities that also have competition law powers seem particularly likely to try to use those powers for regulatory purposes, since they often appear easier to use procedurally than regulatory powers.

However, national authorities do not necessarily regard each other's decisions as precedents. But the Commission expects national competition authorities to regard its decisions as precedents.[19]

Comment on procedures and substantive issues

The distinction between competition law measures and regulatory measures is not merely a question of clear thinking or academic pedantry. The practices prohibited by competition law, properly understood, have harmful economic consequences for society. But when a competition authority is tempted to adopt measures which are not needed to stop illegal conduct (or to end its ill-effects) but are thought useful to change or "improve" the market, the effect often is to protect competitors against competition. If this is justified for regulatory reasons, as it may be in the case of temporary protection for new entrants which could not otherwise establish themselves, a procedure appropriate to the imposition of new policy objectives and new obligations should be followed, the reasons should be clearly identified and explained, and the need for them balanced against their probable long-term

[18] Pijnacker Hordijk, Excessive pricing under EC competition law: an update in the light of "Dutch developments", in Hawk (ed.), 2001 Fordham Corporate Law Institute (2002) 463-495, at 489 et seq.

[19] Regulation 1/2003, Article 16. This Regulation however does not apply to national regulatory authorities even when they are applying EC competition law.

anticompetitive effects. Ill-considered regulatory measures by competition authorities are often likely to protect competitors, not competition, and protectionism is addictive.

However, it is probably inevitable that where solutions are being negotiated in merger cases, or when commitments are being negotiated under either Community law or national law, authorities will be inclined to seek changes of a more or less "structural" nature to make the market more competitive. There would be no objection to this if companies agreed to it freely and without pressure. But that condition is not always fulfilled, and even if it was fulfilled in the case of one company, it might not be fulfilled in the case of other companies similarly affected.

The key issue is almost always whether the result that the competition authority tries to insist on is one which it could have imposed as a remedy under competition law.[20] If so, even if the result is complicated, it is legitimate.

It will be seen that the cases described here fall broadly into two categories: those in which the authority in question sought a procedural solution that it had no power to impose, and those in which it tried to obtain a structural change or an adjustment in market conditions which it could not legitimately order under competition law. The temptation to seek structural change is particularly great in markets that are recently liberalised, oligopolistic, or inadequately integrated, in which regulatory measures, if correctly adopted, might be justified. It is not suggested here that the measures criticised could never have been justified if they had been properly considered and adopted under regulatory powers. But they were not, and it is unsatisfactory that attempts were made to adopt them using competition law.

[20] Case 228-229/82, *Ford Werke* [1984] ECR 1129.

Article 10 EC Treaty[21]

Article 10 EC imposes a wide variety of legally binding duties on national authorities and national courts to help and not to hinder Community objectives. One of these objectives is, of course, competition. Therefore, if a national authority's decision unduly restricts competition, it may be contrary to Article 10 even if it is valid under the authority's regulatory powers under national law. Any decision the principal purpose and effect of which was to protect competitors from competition, rather than to protect consumers and competition, might be open to challenge on this ground. This might be important in the case of an anticompetitive regulatory measure, or a decision under a national competition law on unilateral conduct which was stricter, as Article 3 of Reg. 1/2003 unfortunately allows, than Article 82.

Proportionality

Under Community law (and indeed under most national laws) all measures based on Community law, including decisions of the Commission and of national competition authorities when applying Community law, must comply with the principle of proportionality. This principle, in brief, says that measures must be appropriate and no more

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21 On Article 10 generally, see General Report, The duties of cooperation of national authorities and courts and the Community institutions under Article 10 EC, XIX FIDE Congress, (Helsinki 2000), (ed. Sundström) Vol. I 373-426 and Vol. IV, 65-72; Durand, in *Commentaire Mégret: Le Droit de la CEE* (2nd edition, Brussels, 1992) Vol. 1, 25-43; Temple Lang, Article 5 of the EEC Treaty: the emergence of constitutional principles in the case law of the Court of Justice, 10 Fordham International Law Journal (1987) 503-537; Schermers & Waelbroeck, Judicial protection in the European Union (6th ed., 2001) pp. 112-115 and 330; Blanquet, L'article 5 du traité CEE – Recherche sur les obligations de fidélité des Etats Membres de la Communauté (Paris, 1994); Due, Article 5 du traité CEE – une disposition de caractère fédérale?, Schumann lecture (Florence, 1991); Temple Lang, Community constitutional law: Article 5 EEC Treaty, 27 Common Market Law Review (1990) 645-682; Lenaerts, Le devoir de loyauté communautaire, in Verhoeven (ed.), La loyauté - mélange offert à Etienne Cerexhe (1997) 229-247; Temple Lang, The core of the constitutional law of the Community – Article 5 EC, in Gormley (ed.), Current and future perspectives on EC competition law (1997, Kluwer) 41-72; Van Raepenbusch, Le devoir de loyauté dans l'ordre juridique communautaire, Droit social, No. 11, November 1999, 908-915; Gormley, The development of general principles of law within Article 10 (ex Article 5) EC, in Bernitz (ed.), General principles of European Community Law (Kluwer, 2000) 113-118; Temple Lang, The duties of national courts under Community constitutional law, 22 European Law Review (1997) 3-18; Temple Lang, The duties of national authorities under Community constitutional law, 23 European Law Review (1998) 109-131; Temple Lang, The duties of cooperation on national authorities and courts under Article 10 EC, two more reflections, European Law Review (2001) 84-93; Temple Lang, Developments, issues and new remedies – the duties of national authorities and courts under Article 10 of the EC Treaty, 27 Fordham International Law Journal (2004) 1904-1939.

onerous than is necessary to achieve a legitimate objective.[22] This principle therefore limits both the remedies that may be required to end genuine violations of Community competition law and the measures that may be taken for genuine regulatory purposes if the regulatory legislation is based on Community law. If the authority claims to be acting under Community competition law powers, only competition law objectives, and not regulatory objectives, are legitimate, and the appropriateness of the measures must be assessed in the light of those objectives, and not on broader regulatory or public interest grounds.

[22] Tridimas, The General Principles of EC Law (Oxford U.P., 1999); Emiliou, The Principle of Proportionality in European Law (1996 Kluwer); Groussot, Creation, Development and Impact of the General Principles of Community Law (Lund, 2005) 209-249.