



Competition Law in Times of Crisis

Case Studies of the European Passenger Airline Sector and the Irish Beef Industry

Conor Talbot

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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Summary

The objective of this thesis is to examine the role and utility of competition law within the EU's legislative and regulatory dialogue, using its response to crisis conditions as a test of its aims and abilities. As such, the main conclusion of this thesis is that competition policy acts as a forum for debate as to the direction of the European integration project, while competition law can serve as a tool for aiding in the implementation of broader policy objectives. The analysis in this thesis follows certain themes as they arose in the individual chapters, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the ability and role of National Competition Authorities (NCAs) in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law.

The decision to take an empirical approach to this research project stems from a conviction that an investigation into the real world situations faced by firms and consumers should underpin the evaluation of the applicable legal rules. Over the past number of years the European Commission has exerted more and more influence over the development of the regional and global airline industry, and Chapters 4 and 5 reflect the emergence of an apparent overarching aim on the part of the Commission to create a market with a handful of ultra-competitive airlines with international reach serviced by an array of smaller feeder airlines on a regional basis. The study of the Irish beef processing sector in Chapter 6 is interesting because of the high level of government involvement in providing the strategic thinking behind a crisis cartel scheme, and because the economic context appears to have exerted considerably more pressure on the government and the national court than on the competition authorities involved.

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CHAPTER 1: INTRODUCTION

Competition policy is a flexible part of the European Union's regulatory armoury but it is often misunderstood by the general public: a mainstay of the economic order, it has also been used towards social, industrial and political ends over the years. There is therefore a tendency for these disparate goals to clash at crucial times for the European economy, so this thesis asks the question of how such clashes come about, and how they are dealt with when they arise. The objective of this thesis is thus to examine the role and utility of competition policy as a forum for modern Europe's legislative and regulatory dialogue, using its response to crisis conditions in the European passenger airline sector and the Irish beef processing industry as litmus tests of its true aims and abilities.

In order to do so, the analysis in this thesis follows the certain themes explored in the individual chapters, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the role of National Competition Authorities (NCAs) in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law. This chapter introduces these themes in turn and outlines the issues arising under each heading.

1. Role of the General Economic Context

As regards the role of the general economic context in the application of competition law, the first task undertaken is to attempt to ascertain the individual goals pursued by the European competition policy-makers, in as much as they can be distinguished from one another. Alongside the courts, much of today's competition policy is written from a rhetorical standpoint in policy statements and reports by the European Commission and certain more active NCAs, so the analysis will begin by charting the evolution of its goals as set down in official sources, before moving on to studying the practical impacts of the cumulative decisions at the European level on some of the region's most important industries.

The aim of Chapter 3 of this thesis is to explore the constantly evolving objectives and practices of competition law and policy in the European Union in the hope of demonstrating how, and to what extent, competition rules interact with or learn from

general economic conditions. The focus on crises is intended to help pin-point areas where the goals of the Union visibly conflict in order to analyse the methods used to manage such a situation. Behind this approach is the conviction that it is only when forced to make a potentially painful decision between, for example, its rhetorical goals and a more politically amenable course of action, do the decision-makers' true colours shine through.

The incremental development of competition law comes about through policy making and the decisional practice of the EU Commission and Courts. Policy making in competition law is generally studied as a process that occurs through the medium of official public documents charting a dialogue between the main institutional actors of the EU.¹ Significant insight can be taken from the recorded exchanges between the Council, Commission, Parliament and Courts of the European Union; and the first section of this thesis draws heavily on such documents, as well as the reception they receive from the academic and general populations. However, such analysis is necessarily limited by being largely restricted to the publicised legal acts of the official institutions and thereby incapable of considering the contributions of other stakeholders – such as market participants, labour unions, trade associations and consumer representatives – who, despite advances in the transparency of decision-making processes, remain on the fringes of the debates.

In order to also capture the influence of such actors and the economic context on the decisions made, especially in controversial circumstances with the fate of entire industries on the line, it is proposed to conduct detailed case-studies of two important and embedded industries – one at a domestic level and one at a European level. The sectors chosen are the beef processing sector in Ireland and the European passenger airline industry. Both sectors have suffered severe crises in recent years and, due to strategies pursued by the market participants, they have

¹ See e.g. on the institutions of European competition governance and the official dialogue between them, Michelle Cini & Lee McGowan, *Competition Policy in the European Union* (Palgrave Macmillan 2008), chapter 3; on the ECJ's role in developing competition policy across the EU through the preliminary reference procedure, see Barry J. Rodger & Manuel Alba Fernández, *Article 234 and Competition Law: An Analysis* (Kluwer 2008); on EU merger control based on Commission documents, see Morten P. Broberg, *The European Commission's Jurisdiction to Scrutinise Mergers*, (4th ed, Kluwer 2006); on State aid and regional policy based on Commission official interventions and public rhetoric, see Fiona Wishlade, *Regional State Aid and Competition Policy* (Kluwer 2003); on competition policy in an international context by focussing on soft law instruments, Marco Botta, *Competition Policy: the EU and Global Networks*, in Gerda Falkner & Patrick Müller (eds), *EU Policies in a Global Perspective: Shaping Or Taking International Regimes?* (Routledge 2013).

both been the subject of attention of competition law authorities. Both case studies follow a similar pattern beginning with an introduction to the structure of the industry, an historical overview of the issues arising, and an outline of the approach of competition authorities to the sector. In the case of the airline industry, further insight on the influence of the general economic context on the application of competition law to the sector was obtained from questionnaires and interviews with lawyers who acted for some of the major airlines in their dealings with competition authorities; meanwhile, for the Irish beef industry, access to previously unpublished documents provides insight into the dynamic between the market players and government authorities in the formulation of a restructuring plan that was specifically tailored to meet the economic context of the day.

As part of this assessment of the implementation of the EU's competition rules, it becomes necessary to question the appropriateness of the use to which competition policy has been put, and whether better and more legitimate options could or should have been availed of by the Commission and the EU in general. This thesis will examine this point in the context of the European airline industry and the Irish beef processing industry, both of which have been heavily influenced by how competition law has interacted with the other political and legal elements at play in that sector. It will be queried whether competition law in the EU has indeed been applied in a normal and predictable manner in that sector, or whether the Commission and Courts – in an attempt to adapt competition law to the specificities of the industry – have ended up compromising the underlying principles of competition law and, therefore, some of the core goals of the European Union in general.

2. Existence of Identifiable Baselines

In this thesis, it is also explored whether EU competition policy is sufficiently robust and predictable to allow it to provide a comprehensive response to the challenges brought by economic crises. In the course of this discussion, the focus tends to revert to the role of the European Commission because, within the EU, the development and enforcement of competition law, and therefore of the development of the competition law enforcement tools and techniques, is largely entrusted to the

Commission.² For instance, in recognition of its role as the dominant driving force behind competition law and regulation, the Commission acknowledged that it had a responsibility to ensure an “effective and coherent public response to the [2007-2009 financial] crisis while at the same time minimizing the risks of distortions of competition”.³ In order to underpin the analysis and empirical research undertaken later in the study, Chapter 3 examines not only the changing goals and baselines of competition law and competition enforcement by the Commission, but also examines the factors that can cause a shift in objectives and the processes required for such changes to come about.

As is to be expected in a contentious area where decisions can have ripple effects on governments, firms and consumers in Europe and beyond, these changes in tack have been the source of considerable debate in academic, industrial and professional circles. Thus, we have a plethora of material from which to judge the acceptance of any such changes by the parties affected by them – and who most likely played an important role in pushing the changes through in the first place. Conducting an ex post study is one way to measure the effectiveness of the implementation of a rule change, but there is a trade-off between the degree of aggregation of subject matters and the clarity of the insights obtained.⁴ Hence, the case studies approach adopted here focusses on two individual industries where the relevant competition authorities has had to balance numerous political, economic and industrial factors in deciding upon and enacting a competition policy. While the decisions and approaches identified in the case studies are, to some extent, sector-specific, more general findings are presented using the themes outlined above. Therefore, in terms of the themes which shape the analysis presented within the

² See, e.g., on how the European Courts “take into account” competition law notices and guidelines issued by the European Commission, Oana Andreea Stefan, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, *European Law Journal*, Vol. 14, Issue 6, pp. 753-772; on the Commission’s historical practice of “regulation by publication”, see F Snyder ‘Soft Law and Institutional Practice in the European Community’, (1993) EUI Working Papers (Law) No. 93/5; on the Commission’s use of soft law instruments in State aid, see Michelle Cini, ‘From Soft Law to Hard Law?: Discretion and Rulemaking in the Commission’s State Aid Regime’, EUI Working Paper 2000/35.

³ Note by the European Commission to OECD Roundtable 3 on Real Economy: The Challenges for Competition Policy in Periods of Retrenchment, DAF/COMP/WD(2009)12/ADD2

⁴ Fabienne Ilzkovitz and Adriaan Dierx, *Ex-post economic evaluation of competition policy enforcement: A review of the literature*, DG Competition (June 2015) available at: http://ec.europa.eu/competition/publications/reports/expost_evaluation_competition_policy_en.pdf.

thesis, some lessons and insights can be found which go beyond the sectors examined in the case studies.

3. Role of National Competition Authorities alongside Market Participants, the Commission & Courts

Another element under consideration here is the influence of the shifting balances of power between the relevant actors and how their concerns have shaped the content, interpretation and application of the rules. These different socioeconomic forces and their fluctuating relationships play a special role in the context of competition policy and particular consideration must be given to those who are directly subject to the rules in practice, most notably what are termed ‘capital actors’ in political science literature, i.e. those who represent corporate viewpoints and seek political alignment with regulators.⁵

The other most important players as regards competition rules have traditionally been the Member States, both individually and as represented by the Council, and the Commission. However, there is an ever-increasing emphasis on taking into account the views of previously marginal parties: national competition agencies, consumer groups as well as independent experts from the practice and academic worlds. Each of these parties has their own interpretation of the role competition should play in the European economy and society and their interests which translate into a multitude of objectives when it comes to setting and applying competition rules.

Understanding their viewpoints and desired outcomes will help put the stated policy objectives of this area of law into context, and an analysis of the changes in strength of their respective bargaining powers over time provides an insight into the thinking behind the rules eventually agreed upon. As one of its key exclusive competences, it could be said that the Commission needs to ensure the continuing legitimacy of the doctrine by responding to market developments, broader policy aims and perceived political preferences of other actors, most importantly member governments.⁶ The

⁵ R. S. Chari & S. Kritzinger, *Understanding EU Policy Making* (Pluto Press 2006), at 54-6. On the influence of transnational capital actors over national economic policies generally, see Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance* (CUP 2002).

⁶ Pinar Akman & Hussein Kassim, *Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy*, *JCMS* 2010 48(1) 111, at 119-120

working hypothesis in this regard is that it is the Commission's voice which has tended to dominate proceedings here.⁷ In particular, we shall see in the case studies that there is a clear perception of a division of competences between the Commission and the NCAs, with the Commission's leadership role emerging as very pronounced.

In the background, however, it is worth noting that nearly all Member State NCAs have the possibility to accept commitments analogous to those negotiated by the Commission under Article 9 of Regulation 1/2003.⁸ The procedural context of commitment decisions varies from one Member State to another, but the general proliferation of commitment decisions at the national level could lead to policy-driven NCAs using such procedures enter into negotiations with firm in which firms are in an unenviable bargaining position.⁹ Given the emphasis that has been placed on the coordination between the Commission and NCAs in official for a such as the European Competition Network (ECN),¹⁰ the case studies provided here present interesting insight into the other means at the Commission's disposal for providing guidance on the direction and enforcement of competition law at Member State level as well as at European level.

Although the procedures and channels exist for non-governmental and civil society bodies to have input into the development and enforcement of competition law, the case studies devote a certain amount of attention to focusing on the views of the firms to which competition rules have been applied in the first instance. The views of other interested parties certainly play some role in the law making and enforcement policies pursued by the Commission and NCAs, but the tactics and strategies

⁷ For an alternative view of the 'power politics' interpretation of the struggle for control between the European Commission and the member states, see: H. Kassim & K. Wright, Bringing regulatory processes back in: The reform of EU antitrust and merger control (2009) West European Politics 32(4): 738–755.

⁸ See further, Frederic Jenny, Worst Decision of the EU Court of Justice: the Alrosa Judgment in Context and the Future of Commitment Decisions, in Fordham Competition Law Institute, International Antitrust Law & Policy 2014 (Barry Hawk ed., 2015), available at: http://fordhamilj.org/files/2015/05/FILJ_Jenny_WorstDecisionoftheEUCourtOfJustice.pdf.

⁹ On the independence of competition authorities generally, see: William Kovacic, Competition Agencies, Independence, and the Political Process, DAF/COMP/WD(2014)86, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)86&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)86&doclanguage=en); Fabrizio Gilardi, The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors, (2005) Swiss Political Science Review 11(4): 139-167, available at: <http://fabriziogilardi.org/resources/papers/Gilardi-SPSR-2005.pdf>.

¹⁰ See also, Mattia Guidi, Explaining and Assessing Independence: National competition authorities in the EU member states (European University Institute PhD Thesis 2012), at: http://cadmus.eui.eu/bitstream/handle/1814/22688/2012_guidi_authorversion.pdf?sequence=1.

adopted by the firms involved contribute an added dimension which can be studied as part of their reaction to competition law. The incentives driving firms are usually easier to ascertain as well, meaning that there are fewer variables to consider when looking at their actions. Similarly, the public pronouncements of firms are usually followed by a strategic investment, or lack thereof, which allows us to assign a weight to the viewpoint taken by the firm. Lastly, from a practical point of view, the firms most directly involved were the most interested in participating in the empirical section of this thesis so the quality and quantity of the data far outstripped that which would have been forthcoming from an examination of trade unions or consumer bodies, for instance.

4. Influence of the Commission's Overarching Policy Goals

Important for this project is to consider European antitrust rules in their own context: not only of a centrally decided competition policy, but also that of an over-arching plan for the economic, social, environmental and cultural future of the continent. This requires, in turn, a discussion of the provenance of some of the most common justifications of competition policy, such as economic freedom and integration, as well as the newer concerns that appear to be behind the European Courts' and the Commission's thinking – namely consumer welfare, global competitiveness and some non-economic goals like social cohesion, cultural diversity and environmental issues. In this vein, the analysis in this thesis is heavily influenced by the historical and theoretical background to the development of the competition rules as we know them today. While there has been a sense of continuity in the language and terminology of the official policy pronouncements and judgments, this belies some considerable fluctuations and realignments that become clearer when the individual goals are teased out.

In order to derive the maximum potential value from the historical and theoretical analysis carried out in the opening chapter, the study will move on to examining the application of competition policy and the practices of the private actors concerned in two controversial industries. The choice of which industries to study was made in an attempt to find areas where the diverse goals of European competition policy and general economic policy clash. When forced to make decisions that have political, economic and social consequences the Commission is aware that its activities are

under public scrutiny, so such situations provide good insight into the robustness of the rules themselves as well as the ability of the Commission to withstand pressure from national, regional, industrial and populist groups.

The Commission, as the guardian of the Treaty, “has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency”.¹¹ Part of the thinking behind Regulation 1/2003 was to transform the existing star-like system under Regulation 17/62 into “two-way streets” whereby Member State authorities were in a position to inform the Commission about their cases and seek feedback draft decisions.¹² Notwithstanding its duty to fulfil its responsibilities with regard for the co-operative nature of the ECN, the framework of Regulation 1/2003 appears to have resulted in a situation where the Commission is empowered to act as *primus inter pares*.¹³

The aim behind using the case study approach is to bring an understanding of how and whether the Commission’s position of primacy allows or tempts it to apply competition rules in such a way as to pursue a predetermined policy objective. By adding accounts of actual experiences to what is already known through previous research, the case studies presented provide detailed contextual analysis of two particular examples where policy considerations appear to have played a role. As a research method, the empirical inquiry is designed to investigate the application of competition law and policy within a real-life context; when the boundaries between competition policy and other policy imperatives that form the context are not clearly evident.¹⁴

¹¹ Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Recital 9. See generally, Eleanor M Fox & Michael J Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2012).

¹² Philip Lowe, *Implications of the Recent Reforms in the Antitrust Enforcement in Europe for National Competition Authorities*, Italian Competition/Consumers Day (Rome, 9 December 2003), at: http://ec.europa.eu/competition/speeches/text/sp2003_067_en.pdf. On the significance of the prior procedural framework for the enforcement of competition policy from a practitioner’s perspective, see Frank Montag, *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner’s Point of View*, (1998) *Fordham International Law Journal* 22(3) 819.

¹³ Pieter van Cleynebreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context* (Brill 2014), Chapter 2; Mary Catherine Lucey, *Unforeseen Unintended Consequences of Article 3 of EU Regulation 1/2003*, *European Competition Law Review*, 27 (10) 2006-10, pp.558-563.

¹⁴ For an alternative approach in the form of an empirical study of 75 domestic merger regimes designed to find whether and how states incorporate policy criteria and the socio-economic factors that influence how this is done, see David Reader, *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights*, CCP Working Paper 16-3.

5. Case Studies

a) Passenger Airline Sector

The passenger airline industry has been one of the single most influential elements in the process of European integration and globalisation generally, but its development from a largely state-controlled sector to a privatised and increasingly global industry continues to fascinate and frustrate in equal measures. The structure of the airline industry in the past was characterised by a number of national flag carriers, extensively protected by their governments, operating international networks without necessarily having a sufficient domestic market to do so profitably. A trend of regional liberalisation saw the adoption of the EU Common Aviation Policy in 1987 which opened market access and relaxed price controls to encourage start-ups to challenge the hegemony of the old flag carriers.¹⁵ This has led to a situation where there is intense competition and rivalry between airlines serving short-haul routes within geographic regions. The international long-haul routes are seen as a different market because of the resources and expertise required to operate them. They have tended to be dominated by a small number of large airlines who have traditionally been largely protected from the perils of open market competition.

Mergers and alliances also play an important role in this market because, as competition opens up, industry consolidation is necessary in order to create a smaller number of strong international airlines. Over the past number of years the European Commission has exerted more and more influence over the development of the regional and global airline industry, and Chapters 4 and 5 reflect the emergence of an apparent overarching aim on the part of the Commission to create a market with a handful of ultra-competitive airlines with international reach serviced by an array of smaller feeder airlines on a regional basis.

While the airline industry continues to be subject to standard competition rules in general, the Commission has arguably developed some innovative approaches in applying its rules to the dynamics of the airline market in light of the significant political and economic arguments in favour of increased consolidation in the sector.¹⁶

¹⁵ D Mernagh & B Quain, *The Changing Nature of the Airline Industry*, *Foresight Business Journal* (2003) 6.

¹⁶ Trevor Soames, Geert Goeteyn, Peter D. Camesasca and Kristian Hugmark, "EC Competition Law and Aviation: Cautious Optimism Spreading its Wings", 20. *E.C.L.R.* 2006, 27(11), 599-615

In this regard former Commissioner Neelie Kroes¹⁷ was consistent in deeming it essential that the economic benefits of any policy are passed on to passengers, and in recent years the Commission has shown itself to be particularly assertive in intervening to impose specifically tailored rigorous conditions on the parties to various types of transactions within the sector.

The airline sector is also interesting in that it presents certain characteristics of a network industry. Network industries require a complex system of governance involving regulators operating at various levels, themselves networked at European and sometimes global levels.¹⁸ Therefore, studying the relationship between the different regulators that oversee the airline sector also provides ample opportunity to investigate the application of competition policy in an area where there are as many conflicting goals as interested parties: individual Member States often attempting subtly to support their declining flag-carriers, consumer organisations trying to secure cheap and efficient air travel, and the Commission and other regulators with various policy aims. This is the case in many network industries and fields of EU activity, and other academics have examined this inter-relationship question from the perspective of what tasks EU legislation can require such agencies to perform.¹⁹ The role of EU competition policy in the context of network industries was initially that of a crowbar as part of a push towards liberalisation while latterly it has come to be focused on the pursuit of competitive network markets on a case-by-case basis.²⁰ In particular, it becomes clear from the analysis of the airline sector that once the

¹⁷ Speech of Neelie Kroes, "Competition in the aviation sector: the European Commission's approach", Leiden University, Leiden, 24 April 2006

¹⁸ Jacques Pelkmans and Giacomo Luchetta, *Enjoying A Single Market For Network Industries?*, Notre Europe – Jacques Delors Institute (February 2013) available at: <http://www.institutdelors.eu/media/singlemarketnetworkindustries-pelkmansluchetta-ne-jdi-feb13.pdf?pdf=ok>.

¹⁹ See, e.g. the "Meroni doctrine" whereby the ECJ prohibited the delegation of powers by an EU institution where that delegation involves "a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy, Case 9/56, *Meroni v. High Authority* [1957 & 1958] ECR 133. For commentary, see S. Griller & A. Oratorn, 'Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni doctrine', (2010) *European Law Review*, Vol. 35, No. 1, p. 5; E. Chiti, 'An important part of the EU's institutional machinery: features, problems and perspective of European Agencies', (2009) *Common Market Law Review*, Vol. 46, pp. 1395-1442; and M. Chamon, 'EU, Agencies between Meroni and Romano or the devil and the deep blue sea', (2011) *Common Market Law Review*, Vol. 47, pp. 1065-1075.

²⁰ See, e.g., Commission Vestager, *Competition in telecom markets*, 42nd Annual Conference on International Antitrust Law and Policy Fordham University, 2 October 2015, at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en.

market conditions are such that competition policy has to work hand-in-glove with other types of regulation, regulators find it more difficult to make markets competitive.

b) Irish Beef

The Irish Competition Authority's long-running case against the Beef Industry Development Society (BIDS) concluded in 2011 with a clear message that any plan to restructure an industry by agreement between competitors is likely to restrict competition and therefore breach national and European competition law. This case is interesting because of the high level of government involvement, in the sense that the Irish Government, through the Ministry for Agriculture and Food, was a strong and active supporter of the BIDS scheme. Interestingly, the strategic thinking behind the BIDS scheme came from the highest levels of the Irish Government, and the economic context appears to have exerted considerably more pressure on the Government and the national court than on the competition authorities involved.²¹

The Irish Beef chapter examines the developments that set the scene for the case study by describing the background to the measures proposed in the beef processing sector around the turn of the century. It then sets out the rules which the actors in the beef sector would appear to have deemed to be applicable to them. As we shall see, this particular area of the law had been characterised by a certain amount of flexibility being afforded to actors in previous economic crises encountered by various industries in the EU. However, as Chapter 6 examines, this sense of flexibility gradually dissipated and the final pronouncements on the beef industry litigation and subsequent clarifications are such that a predictable baseline approach is now arguably in place.

While it showed commendable determination to pursue its case, especially following the glowing terms with which the BIDS restructuring scheme was received in the domestic court of first instance, the chapter questions the role – or lack thereof – played by the Irish NCA in the period leading up to the establishment of BIDS in the

²¹ On the level independence enjoyed by the Irish NCA relative to the independence of other EU Member State NCAs, see Mattia Guidi, *Delegation and varieties of capitalism: Explaining the independence of national competition agencies in the European Union*, *Comparative European Politics* (2014) 12, 343–365, at 347 where Ireland ranks as the 13th most independent of the 27 NCAs studied.

first place.²² As regards the evolution of the ability of parties to identify where the baseline for permissible conduct lies, *Irish Beef* represents an important point. Some interesting developments since then are also mentioned, specifically dealing with how the CJEU has distanced itself from the Commission's interpretation of the role of a contextual assessment under Article 101(1).

It is clear from the vigorous application of the competition rules in *Irish Beef* that times of economic recession or declining demand do not grant immunity from the application of competition law.²³ In terms of identifying a baseline for commercial undertakings to understand the practical application of the competition rules, this case shows that national competition agencies are not in a position – especially given the oversight of the European Commission – to follow a flexible approach even in state-endorsed schemes. The *Irish Beef* case also confirms that even extensive government involvement does not legitimise the approach taken to restructuring nor does it in any way preclude the application of the object restriction contained in Article 101(1) or even significantly influence the interpretation of Article 101(3).

6. Overall Objectives of the Thesis

Overall, as described above, the objective of this thesis is to examine the role and utility of competition policy within modern Europe's legislative and regulatory dialogue. The different goals pursued, and capable of being pursued, by competition law has been the subject of many fine academic contributions surveyed in Chapter 3. However, as competition law and policy evolves, so do its goals. This thesis will assess some of the objectives which previously have been recognised as driving competition law in Europe by the Commission, the Luxembourg courts and some important commentators. In light of this discussion of the goals of competition law in the EU over the years, there will be an attempt to analyse how competition law has been applied in practice to two strategic industries.

Feeding into this discussion is an exploration of the relationship between different enforcement agencies, especially when it comes to deciding how best to deal with

²² On recent reforms to the Irish NCA, see: Mary Catherine Lucey, *The New Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?* (2015) 6(3) JECLAP 185.

²³ Andreas Stephan, 'Will the Recession Make Cartels More Likely and Cartel Enforcement More Difficult?' (2009) 19 CCP Newsletter 5.

aggressive or defensive consolidation or cooperation during a period of crisis in a given industry. This question is all the more interesting because there is a certain degree of tension in the background: a tension which emerges, for example, in the submissions to an OECD Roundtable on the issue in the airline sector in particular,²⁴ stemming perhaps from the different strategies being pursued by the favoured national players of the States in question. As the integrated economy sees more and more deals take on a global significance, the need for cooperation between policy enforcers becomes more acute and the studies undertaken indicate that market participants will not hesitate to tailor their arrangements to find the most sympathetic institutional audience. By focussing on the effects of competition rules on different arrangements from an industry point of view, this research aims to be of interest not only to industry players but also to government officers, competition authorities and academics involved in the drafting or enforcing of competition rules.

From a methodological point of view, as set out in more detail in the next chapter, this approach allows us to study the relevant competition rules themselves, to gauge the reaction of the interested parties to the policymakers' initiatives and also to get an insight into the effectiveness of the rules on the ground. By building on an examination of the aims, methods and outcomes of competition policy, the thesis aims to contribute to the understanding of the hierarchy of the EU's economic and social norms. The next chapter introduces the approach taken in the rest of the work, and highlights the value of focussing on specific crises and individual industries as analytical tools capable of granting fresh insight into the field of competition law today.

²⁴ OECD, *Airline Mergers and Alliances*, (2006), available at: <http://www.oecd.org/dataoecd/1/15/2379233.pdf>.

CHAPTER 2: METHODOLOGY – CASE STUDIES & RESEARCH THEMES

1. Using Case Studies to Explore the Research Questions

The analysis in the case studies of this thesis explores the following questions in order to pursue the overall research question of asking what is the role and utility of competition law during times of economic distress: (i) what is the role played by the general economic context in the application of competition law, (ii) are guiding baselines identifiable in crisis conditions, (iii) whether and how the role of National Competition Authorities (NCAs) in applying competition law changes depending on the sector and the economic context, and (iv) do the Commission's overarching policy goals influence the application of competition law.

The decision to take an empirical approach to this research project stems from a conviction that an investigation into the real world situations faced by firms and consumers should underpin the evaluation of the applicable legal rules. For the purposes of this work, the type of empirical research attempted involves “the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have”.¹ Rather than completely focussing on the postulations of academics and the rhetoric of governing authorities, this work is designed in light of the vital importance of the effectiveness of any given element of law – and one way of measuring this is to examine how the parties concerned respond to various legal rules and standards.² Overall, thus, this style of approach was chosen due to its potential to shed light on the inner workings of the system of competition law rules, to reveal their shortcomings and successes, and to highlight some unintended consequences of the law or ways in which the legal processes are affected by external factors such as the economic climate or by other social pressures.³

¹ John Baldwin & Gwynn Davis, ‘Empirical Research in Law’, in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, 2003, pp880-881. On researching and writing a thesis generally, guidance for this work was taken from: Caroline Morris & Cian C Murphy, *Getting a PhD in Law* (Bloomsbury 2011); Don Davis, Ph.D. Thesis Research: Where do I Start? (Columbia University 2001), at: <http://www.columbia.edu/~drd28/Thesis%20Research.pdf>; Umberto Eco, *How to Write a Thesis* (tr. Caterina Mongiat Farina & Geoff Farina), (MIT Press 2015); Paul Oliver, *Writing Your Thesis* (Sage 2013).

² Thomas S. Ulen, A Nobel Prize In Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law, Illinois Law and Economics Working Papers Series No LE03-008, available at http://papers.ssrn.com/pape.tar?abstract_id=419823.

³ Julius G. Getman, Contributions of Empirical Data to Legal Research, 35 J. Legal Educ. 489 (1985).

Due to the array of dynamics and counter-veiling factors at play in the two industries selected for closer examination here, a socio-legal method will be followed in order to encompass a wide range of theoretical perspectives. The choice of socio-legal methodology embraces the discipline of competition law as a social institution, and aims to shed more light on the effect of law, the law- and decision-making processes, as well as the institutions behind them. This path was also chosen in order to reflect the influence of social, political and economic factors on competition law and institutions. Furthermore, the qualitative research undertaken as part of this examination forms part of an inductive approach to the relationship between competition, economic theory and the real world conditions faced by the market players. One interesting work which inspired the research undertaken in this thesis looked at the effect that announcements of strategic partnerships had on the stock price of the airlines involved and found that shareholders reacted much more strongly to deals that increased cooperation in key areas rather than pure equity arrangements.⁴ From this we can see that investors are very interested in the potential practical efficiencies to be gained from alignment with former rivals, and in light of the clear competition-related problems such moves cause to arise, this serves as an interesting starting point for the analysis of the dynamics at play in the firms' decision-making processes.

a) Using Empirics in Competition Law Research

Part of this thesis is based on empirical research – that is, research that aims to learn about the world using quantitative data or qualitative information.⁵ The choice of an empirical methodology to undertake part of the research in this thesis was made in order to ensure that this work challenges some of the major implicit beliefs and assumptions present in modern day competition law scholarship and to avoid that the analysis would overly rely on the traditional – official – sources. The need for a balance between the use of empirical and theoretical studies to inform legal analyses is supported by Roger Brownsword, who maintains that any “theoretical

⁴ TH Oum, JH Park & A Zhang, *Globalization and Strategic Alliances: The Case of the Airline Industry* (Elsevier, 2000).

⁵ See, for example, Michael Heise, The Importance of Being Empirical, 26 *Pepperdine L Rev* 807, 810 (1999); Craig A. Nard, Empirical Legal Scholarship: Reestablishing a Dialogue between the Academy and the Profession, 30 *Wake Forest L Rev* 347, 349 (1995) (“[Empirical] scholarship [is] based on a detailed statistical study and analysis from which one could draw conclusions and formulate or reformulate policy”).

work without any empirical content is hollow and that empirical work without supporting theory is shallow”.⁶ Thus, this work aims to look beyond the legislation, precedents and official statements to consider real-world instances of the law’s impact on firms and their corporate strategies, especially for obtaining growth. One of the key advantages of empirical studies identified by Brownsword is the potential for highlighting situations where the law-in-action deviates from the law-in-the-books. For example, these ‘gaps’ can be found to exist due to the particular enforcement practices of regulators or, as Ellickson’s famous investigation into Californian ranchers found, the law being under-used by the groups that it was designed to help.⁷ Without carrying out a wider project, however, this project is not in a position to conclude whether the findings of the empirical research undertaken here apply across the board, or whether it just happens to be the case for the chosen case studies. This is a noted limitation of these types of research projects, but should not prevent the emergence of interesting findings which contribute to the debate.⁸

The interesting added-value supplied by empirical work is that it has the potential to reveal the legal phenomena or particular circumstances involved which have impeded the law’s functioning or made it more costly to achieve.⁹ Although empirical studies can be highly specific and for a limited audience, the choice of two controversial industries and the presentation of the results using more universal themes should render the findings of more general application, and of interest beyond the chosen sectors. Put very simply, this study will provide a practical model for competition policy makers and enforcers by showing, in a defined context, what kind of intervention or framework has led to what kinds of outcomes and why. By

⁶ R. Brownsword, An Introduction to Legal Research, available at: http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf, p. 19; see also: Rob van Gestel, Hans-W. Micklitz & Miguel Poiars Maduro, Methodology in the New Legal World, EUI Working Papers LAW 2012/13, at: http://cadmus.eui.eu/bitstream/handle/1814/22016/LAW_2012_13_VanGestelMicklitzMaduro.pdf?sequence=1; Rob Van Gestel & Hans-Wolfgang Micklitz, Revitalizing Doctrinal Legal Research in Europe: What About Methodology? EUI Working Papers LAW2011/05, at: <http://hdl.handle.net/1814/16825>.

⁷ Robert Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 Stan. L. Rev. 623 (1986).

⁸ Amelia Fletcher and Bruce Lyons, Geographic Market Definition in European Commission Merger Control A Study for DG Competition (January 2016), at: http://ec.europa.eu/competition/publications/reports/study_gmd.pdf.

⁹ Thomas S. Ulen, A Nobel Prize In Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law, Illinois Law and Economics Working Papers Series Working Paper No. LE03-008, http://papers.ssrn.com/pape.tar?abstract_id=419823

understanding more about the effect of particular rules in practice, lawmakers can avoid unintended consequences and keep better control of volatile sectors where necessary.

As detailed below, the transatlantic market for airline services, in particular, has come to be dominated by what have been termed ‘virtual mergers’ in the form of ‘metal neutral’ joint ventures created on the basis of the three well-known global alliances. Under such arrangements, the performance of the joint ventures for consumers and markets in general are largely kept from public view as the terms deals themselves demand utmost commercial secrecy. Thus, any quantification of the overall benefits – both to the companies and their customers – can only really be based upon the opinions and insight of management figures.

Many scholars divide empirical research into two types or styles: *quantitative*, which uses numbers and statistical methods, and *qualitative*, which does not rely on numbers but on historical materials and intensive interviews.¹⁰ Each approach poses its own challenges, however.¹¹ Given the difficulties encountered in obtaining responses industry actors, it was important for this project to combine the two in order to preserve the representativeness of the sample and guard against the potential for response biases. Similarly, surveys and even in-depth interviews can suffer because of the time that has elapsed since the event being recalled by the expert. To some extent, these problems can be addressed through careful survey design and analysis, but any evidence obtained in this way still needs to be approached with the appropriate caveats.¹² Furthermore, the research undertaken generated a large amount of data from multiple sources. By establishing clear protocols and procedures in advance of the field work, it was possible to losing sight of the original research purpose and questions.

Competition authorities and litigants worldwide have increased the use of economic quantitative methods and economic expert witnesses as a means to produce and

¹⁰ See, for example, Earl Babbie, *The Basics of Social Research* 258 (Nelson Thomas Learning 1999); William J. Dixon, *Research on Research Revisited: Another Half Decade of Quantitative and Field Research on International Organizations*, 31 *Intl Org* 65, 79 (1977).

¹¹ Hervé Dumez, *What Is a Case, and What Is a Case Study?*, *Bulletin of Sociological Methodology/Bulletin de Methodologie Sociologique* July 2015 vol. 127 no. 1 43-57

¹² Carmen Suarez, *Evaluation of Competition Advocacy to Government Assessing the Impact of Influencing Policy-Makers*, *Competit Law Int* 7 no1 Apr 2011 p. 56-61.

support evidence in merger and antitrust cases.¹³ Quantitative techniques are those designed to test a hypothesis formulated based on economic theory. These techniques can range from simple statistical tests to complex structural econometric estimation models of demand and supply (e.g. demand system estimation). Quantitative analyses can complement the conclusions from qualitative or theory-based analyses, and provide an empirical basis to choose between competing conceptual or theoretical conclusions.¹⁴ However, these techniques are never definitive since the weighting and sifting of evidence will always involve expert judgment on the part of the competition authorities and a policy-driven choice as regards where, when and what type of data is sought out.

b) “New and Important”: Lessons That Can Be Learned Using the Chosen Approach

The in-depth studies of two controversial sectors provide insight into the Commission’s approach to industries undergoing rapid change and can, in turn, help clarify the role which competition law and policy has developed for itself in the overall governance of the region’s economy. Competition policy’s constant interaction with the rest of the bloc’s industrial policy was clear when, at the height of the 2009 financial crisis, Commissioner Kroes publicly stated that the Commission as a body needed to learn the lessons of the 1970s ‘disaster’ – meaning that Brussels’ responses needed to be better tailored to the surrounding economic conditions than the crisis cartel approach adopted during the oil crises which appeared to act as a drag on the region’s overall economic recovery.¹⁵ Building on the historical account and background provided by Chapter 3, the case studies provide insight into whether and how EU competition law’s application to industries faced with crises has changed since the 1970s, the clarity with which the baselines are perceived by

¹³ For a description of the main aspects of the most commonly used quantitative techniques in antitrust analysis, see: Ioannis Lianos & Christos Genakos, *Econometric Evidence in EU competition law: an empirical and theoretical analysis*, CLES Working Paper Series 6/2012 (October 2012). See also: Peter Davis & Eliana Garcés, *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton University Press 2009); Daniel L. Rubinfeld, *Quantitative Methods in Antitrust*, 1 *Issues In Competition Law and Policy* 723 (ABA Section of Antitrust Law 2008); Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 *Am. L. & Econ. Rev.* 386 (1999).

¹⁴ Kostis Hatzitaskos, David Card & Vandy Howell, *Guidelines on Quantitative Techniques for Competition Analysis*, Regional Competition Center for Latin America (2012), at: http://www.crcal.org/guias-y-estudios/guias/transversales/doc_download/18-guidelines-on-quantitative-techniques-for-competition-analysis.

¹⁵ Neelie Kroes, *Tackling cartels – a never-ending task*, Speech/09/454, Brasilia, 8th October 2009

market participants and how the modern-day approach has been received by the parties involved.

The relevance of this study may also go beyond the realm of competition law and policy, as its findings go to the heart of how the European integration project defines itself and the role which it can legitimately play in the restoration of the regional economy and beyond.¹⁶ The two industries chosen for the bulk of this research have both been subject to some of the most controversial European-level policy agendas, and by looking at them in-depth we can chart, for example, the escalation in tensions between those decision-makers in favour of nurturing Euro-champions and those promoting free trade where the market forces reign supreme.

In a similar vein, the practical approach taken by this study aims to highlight the influence of some of the less visible forces at play in the European competition policy-making and enforcement processes. While the input of lobbies has long been recognised as a factor, especially since the emergence of the European Roundtable of Industrialists as a highly organised and driven group in the early 1980s,¹⁷ this work will seek to explore and examine that impact on a sector-specific basis. Both sectors studied are exposed to global market forces and, thus, the EU's overall trade and development policy impacts upon them. Chapter 3 examines the development of competition law and policy within the overall context of the European integration project, and the case studies build on this by highlighting how competition law operates within a system of many other policies – in recognition of how the EU is, after all, a “a construct of intertwined polities”.¹⁸ As such, the use of the two case studies allows us to examine how factors such as the EU's declining economic dynamism and the EU's ability to leverage its bargaining power vis-à-vis third party countries impacts on the role for competition law and the scope for discretion for

¹⁶ On the role of the EU in the globalised economy, see Nicole Gnesotto, Europe and Globalisation: the dangers and the assets, Fondation Robert Schuman, European issues n°296, 3 December 2013, at: <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-296-en.pdf>.

¹⁷ See generally, Justin Greenwood, Interest Representation in the European Union (Palgrave Macmillan 2011); Gert Tinggaard Svendsen, The Political Economy of the European Union: Institutions, Policy and Economic Growth (Edward Elgar 2003).

¹⁸ EU External action Service, The European Union in a changing global environment, at: http://eeas.europa.eu/docs/strategic_review/eu-strategic-review_strategic_review_en.pdf.

European and national authorities in enforcing competition rules in globally exposed industries.¹⁹

There is also an opportunity here to examine the approach of regulators, especially competition enforcers, when the nature of a given industry is rapidly changing.²⁰ Such conditions arguably pose fresh questions for competition authorities, due to the presence of factors such as industrial policy issues bound up in dictating the overall structure of the industry and the risk of certain market participants being too embedded to be allowed to fail. These sectors are interesting because Member States' eagerness to see their producers survive in some form means that authorities could find themselves under significant pressure to help avoid politically explosive rationalisations, closures and redundancies.²¹ As a result, the role of competition law in ensuring any such deals are 'pro-competitive' in the EU context may be in direct tension with a desire by governments to create champions.²² All of these aspects provide a rich pool of issues capable of gleaning insight into the practical experiences of how the authorities deal the vested interests at play.

During the design phase of the case study research, it was deemed optimum to examine two controversial and politically exposed sectors in depth, with each case treated as a single case. Each case's conclusions are then be used as information

¹⁹ On the transnational aspects of competition law enforcement in the airline sector, see: European Commission and the United States Department of Transportation, Joint Report on Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches (2010), at: http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf; on the impact of international trade agreements on the competitiveness of the Irish beef sector, see: Irish Department of Agriculture, Food and the Marine, Background Paper: "Meat", at: <https://www.agriculture.gov.ie/media/migration/agri-foodindustry/2025agri-foodstrategy/Meat2025backgroundpaper.doc>.

²⁰ On the relationship between competition authorities and sectoral regulators, see generally: Nicolas Petit, The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion, GCLC Working Paper 02/04. For an interesting account of how the Canadian competition authority and Canadian competition law has adapted to globalisation and dynamic market changes, see: Canadian Competition Bureau, Competition Law in a Global and Innovative Economy — A Canadian Perspective, 3rd BRICS International Competition Conference, (New Delhi, India, 21 November 2013), at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>.

²¹ On the effectiveness of political pressure to intervene in a sector without the impediments of cross-border competition concerns such as those found in the EU, see: John Rolfe & Russ Reynolds, Competition and Exit in Meat Processing: A Queensland Case Study, 42nd annual conference of the Australian Agricultural and Resource Economics Association, Christchurch, January 20-22, 1999.

²² On the background to European champions or industry champions, see: Emmanuelle Maincent & Lluís Navarro, A Policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms, European Commission, DG Enterprise and Industry, Industrial Policy and Economic Reforms Papers No. 2, (April 2006).

contributing to the whole study, but each sector is dealt with individually. The sectors chosen were selected to represent the national and EU-level aspects, as well as the network and traditional market structures, while still retaining sufficient common factors – specifically the political exposure and a tendency to suffer from downturns in the overall economy - to increase the validity of the study.²³ The process of fixing the sectors at the point of selection also helps erect boundaries around each case and makes the research and output manageable.

c) Choosing a Methodology for Evaluating Competition Authorities & Competition Policy

Bound up in the task of examining the practices of a competition authority in any given sector is the question of choosing the criteria by which to assess its actions.²⁴ Developing and exploring methods of evaluating competition policies has been very topical of late, especially with governmental agencies finding themselves on the defensive and faced with threats to their resources.²⁵ Some approaches proposed have included the reliance on proxies such as price levels and profitability as a measurement of changes in product-market behaviour in the aftermath of an antitrust procedure, with varying degrees of success.²⁶ Similarly, studies have also been based on changes to the market value of a firm – using share prices as an indicator – following the instigation or conclusion of an antitrust prosecution.²⁷ All such economic approaches suffer from severe methodological problems in that they do not offer easy routes to deriving counterfactuals and do not allow for consideration of the more far-reaching political repercussions of enforcement strategies. Hüschelrath

²³ KM Eisenhardt, Building theories from case study research, *Academy of Management Review*, (1989) 14(4), 352-550; Hamel, J. (with Dufour, S., & Fortin, D.). (1993). *Case study methods*. Newbury Park, CA: Sage; Stake, R. E. (1995). *The art of case study research*. Thousand Oaks, CA: Sage; Yin, R. K. (1984). *Case study research: Design and methods*. Newbury Park, CA: Sage; Emory, C. W., & Cooper, D. R. (1991). *Business research methods*. (4th ed.). Boston, MA: Irwin.

²⁴ See generally on using performance measures and conducting ex post evaluations of the work of competition authorities, William E Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, *Journal of Corporation Law*, Vol. 31, No. 2, p. 503, 2006;

²⁵ OFT, *Positive Impact 09/10 - Consumer benefits from the OFT's work*, available at: http://www.oft.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1251.pdf, p.11; Jarig van Sinderen & Ron Kemp, *The Economic Effect Of Competition Law Enforcement: The Case of the Netherlands*, *De Economist* (2008) 156:365–385, at 367

²⁶ See e.g., R. M Feinberg, *Antitrust Enforcement and Subsequent Price Behaviour*, *Review of Economics and Statistics*, 62(4), 609–612; M. K. Block, F. C. Nold & J. G. Sidak, *The Deterrent Effect of Antitrust Enforcement*, *Journal of Political Economy*, 89, 429–445

²⁷ M.R. Burns, *The Competitive Effects of Trust-Busting: A Portfolio Analysis*, *Journal of Political Economy*, Vol. 85 (1977), pp. 717-739. See generally, Tomaso Duso & Peter Ormosi, *Capacity Building Workshop on the Ex-Post Evaluation of Competition Authorities' Enforcement Decisions: A Critical Discussion*, OECD DAF/COMP/WP2 (2015)8 (October 2015).

and Leheyda note that the main focus when evaluating the application of an entire competition policy in practice should be on measuring how the enforcers have been able to meet the obligations set down by its own supervising institutions.²⁸ This becomes especially difficult at the European level because the internal aims of the Commission, not to mention those of its supervising institutions, can and do change – as explored in greater detail in Chapter 3.

Thus, it can safely be remarked that assessing how well competition authorities accomplish their objectives is a difficult question, and Werden adds that the identification and quantification of any unintended consequences is even more difficult still.²⁹ Thus this thesis aims to unearth empirical evidence on the application of European competition policy to particular sectors. A key element of the case studies is the inclusion in the overall assessment of interests of stakeholders beyond the enforcers and the main beneficiaries. The views of stakeholders, and especially the regulated firms, are taken on board in order to frame the examination, and to frame the discussion of whether the policy and enforcement strategies manage to balance the competing interests.

Any such analysis must be reliable for it to carry weight, meaning that it is critical for the purported results to be based on data that is statistically meaningful. In this light, the analysis in this thesis is based on relevant and high quality sources - namely surveys and interviews conducted with primary actors (airline sector) and unpublished documents which were subsequently relied upon by the parties concerned (Irish beef sector). The analysis departs from the underlying assumptions and benchmarks used by the authorities and highlights mismatches in the perceptions of the authorities and the market participants. From a research perspective, even though many types of data are potentially available, it is often very challenging to collect useful and reliable data for analysis of a competition or antitrust matter.³⁰ Part of the added value of this thesis comes from the fact that firm-specific or sector-specific data or views are rarely publicly available, and many firms may not

²⁸ Kai Hüscherlath & Nina Leheyda, A Methodology for the Evaluation of Competition Policy, *European Competition Journal* 6 (2), 397-425, at 414

²⁹ Gregory J. Werden, Assessing the Effects of Antitrust Enforcement in the United States, *De Economist* (2008) 156:433–451

³⁰ Kostis Hatzitaskos, David Card & Vandy Howell, Guidelines on Quantitative Techniques for Competition Analysis, Regional Competition Center for Latin America (2012), at: http://www.crcal.org/guias-y-estudios/guias/transversales/doc_download/18-guidelines-on-quantitative-techniques-for-competition-analysis.

necessarily contemplate or communicate their views on an issue such as competition policy unless specifically asked. Obtaining the data or views constituted the first task, which was followed by a preliminary analysis in order to understand the results in their context. In analysing the initial data, certain limitations became evident, specifically in the airline sector where the number of responses raised doubts as to the weight that could be attached to any findings. Similarly, in the Irish beef sector, further in depth research was required in order to obtain documents which built on and spoke to the initial consultants' report which came to be widely cited as the basis for the action taken by the parties. As such, in both case studies, it was necessary to analyse the data as it became available and this led to further attempts to gather more and alternative data. In the airline sector, this led to the circulation of a revised supplementary questionnaire and the use of trade publications and other secondary sources as the basis for further inquiries to lend greater depth to the overall analysis; in the Irish beef sector, the research trail led to further State agency documents which interpreted the underlying consultants' report prepared for the parties. As such, the early phases of investigations in both sectors served to better inform the further steps that were made in the time available.

A practice used in each of the case study chapters is to present a “baseline” model that captures the main features of the applicable competition law rules as the basis for the main presentation of the research. Indeed, one of the main themes of the thesis is whether and how market participants are able themselves to identify such baselines. For the purposes of the research project, the sketching of baselines early on informed the research questions chosen as the main focus or themes of the thesis, but also served in the development of the model of the investigation and ensured the robustness of the resulting analysis.

2. Using Crises as a Mechanism to Study Competition Law

a) The Role of Crises in the Thesis Research

The term ‘crisis’ is employed in its general sense this thesis and it involves a deterioration in competitive conditions and an attendant shift in political priorities.³¹

³¹ As opposed to a crisis in the technical sense that provokes major policy change and re-evaluation of prevailing settlements such that entirely new models are created, to wit see: A Boin, P ‘t Hart & A McConnell, Crisis exploitation: political and policy impacts of framing contests, *Journal of European Public Policy*, 16(1), 81-106 (2009). On the European Commission’s use of the term crisis, see

The term generally encompasses both a long-term and a short-term sense and, as such, it is often used to describe situations where extreme difficulties are faced by particular companies, sectors or, indeed, countries. However, an attempt is made here to differentiate between the different meanings of the term along the lines of the origins of the difficulties being faced. While long-term crises tend to be related to the emergence of new products or suppliers which render a certain type of product or producer less attractive or sustainable,³² the short-term sense of the modern usage of the term ‘crisis’ usually refers to situation of extreme demand shocks or drop-offs in profitability brought on by external causes – such as a spike in the cost of an input (oil or credit, for example).³³ Short-term periodic downturns are often little more than a pitfall of operating in an open and globalised economy, even if the consequences can be devastating for the short-run health of an industry where it finds itself particularly exposed to the fluctuation which has occurred. As such, for the purposes of this work, the analytical value of a short-term crises is limited so this thesis will deal primarily with industries facing long term issues. Thus, while the events discussed in the case studies may be somewhat attributable to precise periods of economic hardship, the overall emphasis will be on how competition rules deal with firms and industries which suffer from long-term imbalances in their business model or are faced with trading conditions in inevitable decline.

From a competition law perspective, this element of the analysis in the thesis was inspired by the detailed accounts that emerged around the time of the 2007-2009 global financial crisis, such as the academic works of Kokkoris and Olivares-Caminal from 2010 and Heyer and Kimmel from 2009,³⁴ as well as the publications of international organisations such as the OECD. Further inspiration was taken from

Stephen Wilks, Competition Policy in the Recession: industrial crisis and implications for the economic constitution, Paper for EUSA, Los Angeles, April 2009.

³² On the economics and politics of industries in long term decline, see: William Scheuerman, *Steel Crisis: The Economics and Politics of a Declining Industry*, (Praeger 1986); Albert N. Greco, *The Economics of the Publishing and Information Industries* (Routledge 2014); Richard A. Bitzinger, *The Modern Defense Industry: Political, Economic, and Technological Issues* (ABC-CLIO 2009)

³³ See, e.g., on the short-term and long-term crises faced by the automotive industry, see Ian Graham, *Automotive Industry: Trends and reflections*, (ILO Research Roundtable 2010). See also, Carl Shapiro, Competition Policy in Distressed Industries, May 13, 2009, <http://www.justice.gov/atr/public/speeches/245857.htm>.

³⁴ Ioannis Kokkoris & Rodrigo Olivares-Caminal, *Antitrust Law Amidst Financial Crises* (Cambridge University Press 2010); K. Heyer and S. Kimmel, ‘Merger Review of Firms in Financial Distress’ (2009), available at: www.usdoj.gov/atr/public/eag/244098.htm; OECD Competition Committee, *Competition and the Financial Crisis* (February 2010). On the 2008 crisis more generally, see Richard A. Posner, *A Failure Of Capitalism: The Crisis Of '08 And The Descent Into Depression* (Harvard Univ. Press 2009).

works that focus on the competition policy responses to past crises such as the Great Depression in the United States.³⁵ The line generally taken by the Commission when faced with a sector or economy in severe difficulty is that the market economy, with its emphasis on competition, has brought immense benefits to consumers and economic participants alike and should therefore be maintained.³⁶ Some academics, however, argue that there is also room for the development by competition authorities of a 'balanced flexibility' approach.³⁷ This would require preserving core goals of antitrust and not fundamentally relaxing key enforcement parameters, but allowing a limited degree of flexibility that does not lead to long term harm.

It is observed in Chapter 3 that the Commission's stance and role in the development of competition policy and enforcement has, by necessity, allowed the resulting competition rules of the EU to take into account other overriding public policy imperatives. In light of its position as a constituent element of overall EU economic policy, the core principles of competition assessments have adapted to the demands of 'problematic' firms in their economic context. As such, calls for competition policy and enforcement to adapt to the economy are somewhat redundant as the competition policy of the day is heavily influenced by the exigencies of the overall economic context as reflected in the EU economic policy direction changes from time to time.³⁸

As a mechanism to chart the advances in the role and aims of European competition policy, times of economic and financial stress, both at the sectoral and economy level, are very interesting and continue to attract the attention of researchers and commentators.³⁹ Changing economic circumstances can have several, sometimes

³⁵ See, e.g., Alan Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*,

23 *Cornell Journal of Law and Public Policy* 255-336 (2013). On the policy lessons from the Great Depression generally, see K. Brunner (ed), *The Great Depression Revisited* (Springer 2012). On the specificity of the 2008 crisis in contrast with other recent crises, see Carmen M. Reinhart & Kenneth S. Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (Princeton University Press, 2011).

³⁶ Heitzer B., "Times of crisis: Competition policy helps reduce long term damage", *Concurrences* N° 2-2009

³⁷ Luís Silva Morais, Editorial - Competition Law and Policy in Times of Crisis and Economic Change, (2013) 9(2) *CompLRev*

³⁸ European Parliament's Committee on Economic and Monetary Affairs, *The Contribution of Competition Policy to Growth and the EU 2020 Strategy*, IP/A/ECON/ST/2012-25 July 2013

³⁹ See, e.g. XXth CLaSF Workshop on 'Competition Law and the Economic Crisis', Edinburgh Law School, 13 September 2012; Peter Freeman, "Competition Night?", Foreword, in *Concurrences*, N.1-2009; Kokkoris I., *The crisis is finally biting! The response of the EU Merger Control Regime to the need for corporate restructuring*, *International Corporate Rescue* vol. 11 issue 2, 2014.

contradictory, effects on the public perception of competition policy. In order to better understand the political and industrial reactions to times of crisis, some of the most important phenomena bound up within a crisis will be outlined in the following section, and their influence over competition policymakers distilled.

Industries which face long-term structural problems are of particular interest in this project as their fundamental weakness, usually the result of high levels of over-capacity or declining demand, should see them gradually wind down and their assets put to use elsewhere in the economy.⁴⁰ However, when a sector faced with an unviable long-term outlook also comprises of some other important elements, such as being a large source of employment, innovation or national prestige, their survival can take on a strategic value that causes normal economic reasoning to seemingly be put to one side. Often, these industries would have been propped up by national governments which were loath to face the consequences of their disappearance.⁴¹ However, with the advent of stricter state aid controls supervised by the European authorities that are less sympathetic to national concerns, the possibilities for receiving direct governmental support were radically reduced – albeit not completely eradicated.⁴² So, while State aid law is not actively considered in this thesis, the sectors used as case studies were specifically chosen because of the presence of national interests that may work against common interests and distort competition.⁴³ Overall, the case studies aim to explore the importance of States as actors and the influence of national interests in the application of competition policy.

⁴⁰ On different ways to define and distinguish between different types of industries in decline, see European Commission. Directorate-General for Competition, London Economics Study on a Methodology for Identifying Sectors with Serious Structural Problems (2002), at; http://ec.europa.eu/competition/state_aid/studies_reports/report_en.pdf.

⁴¹ On the EU law of State aid generally, see: Leigh Hancher, Tom Ottervanger & Piet Jan Slot, EU State Aids (Sweet & Maxwell 2012); Conor Quigley & Anthony Collins, EC State Aid Law and Policy (Hart 2003). For a sector-by-sector analysis, including aids to aviation and shipbuilding sectors and aid in the fields of agriculture and fisheries, see Michael Sánchez Rydelski, The EC State Aid Regime: Distortive Effects of State Aid on Competition Trade (Cameron May 2006). For a comprehensive analysis of a politically exposed industry from a State aid perspective, see: Paul C. Murschetz, State Aid for Newspapers: Theories, Cases, Actions (Springer 2014).

⁴² Szymon Gebiski, The legal framework of EU state aid in light of the more economic approach: protecting competition or promoting a European industrial policy? (EUI PhD Thesis 2013).

⁴³ On the issue of national interests interfering with EU-wide policies, see: Mario Monti, A New Strategy for the Single Market. At the Service of Europe's Economy and Society (2010), p. 86. As noted by the European Parliament's Committee on Economic and Monetary Affairs, the role of national interests – as encapsulated in the State aid afforded to the sectors – has been evident in the energy supply and broadband sectors.

Regulators typically come under more pressure to demonstrate the benefits of competition policy for a good functioning of the economy and for the welfare of citizens when faced with an industry in crisis.⁴⁴ Therefore, examining the regulatory pronouncements and responses to industries struggling with a long term crisis can also deepen our analysis because of the presence of additional elements in the decision-making – particularly the political factors of the fear of large scale redundancies or the loss of strategic economic advantages on the international level – which do not always play a role in an authority's typical competition assessment. Even when there is a sector in clear decline, that entire sector will not be homogeneous and the financial distress will not be evenly distributed.⁴⁵ Therefore, competition law becomes relevant when, for example, the strongest remaining businesses seek to survive by means of consolidation and/or rationalisation. These operations will typically not be directly concerned with the overall recovery of the sector because the individual parties' strategy is more likely to revolve around their own expansion in terms of market share and the expulsion of competitors.⁴⁶ In that light, the case studies below deal with two sectors which have long-since been labelled as declining due to factors beyond the parties' immediate control, but where significant political pressure has been brought to bear to create attempt to create a regulatory environment in which the industries can survive and become more efficient – almost in spite of competition policy.

A general objective of this work is to try to chart the utility of competition rules in dealing with crises. Times of uncertainty in the economy as a whole often equate with periods of rapid business re-structuring in the form of defensive contraction or even aggressive expansion.⁴⁷ If we begin from the assumption that all merger and acquisition transactions can be read as the consequence of differences in the values placed on an asset by the buyer and the seller, we can expect an increase in

⁴⁴ See generally, Fabienne Ilzkovitz & Adriaan Dierx, Ex-post economic evaluation of competition policy enforcement: A review of the literature (DG Competition, June 2015); more broadly, on the rhetoric used by officials during the financial crisis, see Paul 't Hart & Karen Tindall Framing the Global Economic Downturn: Crisis Rhetoric and the Politics of Recessions, (ANU E Press, 2009).

⁴⁵ Comparing conglomerates and single segment firms in conditions of economic distress, R. Gopalan & K Xie, Conglomerates and Industry Distress. (2011) Review of Financial Studies, 24(11), 3642–3687.

⁴⁶ R. Paraboni, Aspetti Congiunturali e Strutturali della Crisi Internazionale, in R. Paraboni (ed.), L'Europa nella Crisi Economica Mondiale, Franco Angeli Editore, Milano, Italy (1984).

⁴⁷ Ralph L. Nelson Merger Movements in American Industry, 1895-1956, Princeton: Princeton University Press, 1959.

strategic outlays in times of economic uncertainty as the expectations and predictions of different market players tend to diverge more than usual.⁴⁸ On the other hand, merger waves have many other causes as well, and the economist Gort also notes that mergers can also be read as a function of the growth of an industry.⁴⁹ As time is of the essence for firms that want to expand into new market opportunities, it is often more attractive for them to acquire production facilities or assets that already exist rather than developing their own. Thus, as more companies seek to add capacity at the same time, we can expect to see the valuation differences referred to above being discovered and acted upon more regularly. The rate at which competition amongst the market players is increased due to an expansion in capacity depends on the industry's growth levels: in a rapidly expanding sector, large increases in capacity can often be undertaken by firms without significantly increasing competition. However, when firms expand capacity in industries where demand is flat or contracting, competition will normally be increased and a downward pressure should be exerted on prices leading to consumer benefits outweighing the potential loss of competitors.

Thus, for industries where the health of the market players is closely linked to global economic output, the overall economic situation can have a dramatic impact on the light in which a proposed deal or arrangement is presented to competition authorities. For the sectors chosen for the case studies in this work, market conditions are greatly influenced by macro-economic forces because any growth in demand is generally proportional to GDP growth. Indeed, as we shall see, this vulnerability to changes in the economy was one of the factors pushing market players in each industry into cooperative arrangements in the hope that they can help temper the effects of turbulent periods, for example, by moderating any single member's dependency on one particular market or source of funding.⁵⁰

⁴⁸ Michael Gort, An Economic Disturbance Theory of Mergers, *The Quarterly Journal of Economics*, Vol. 83, No. 4 (Nov., 1969), pp. 624-642.

⁴⁹ Michael Gort, An Economic Disturbance Theory of Mergers, *The Quarterly Journal of Economics*, Vol. 83, No. 4 (Nov., 1969), pp. 624-642.

⁵⁰ On the airline industry internationally, see Buyung Agusdinata & Wouter de Klein, The dynamics of airline alliances, *Journal of Air Transport Management* 8 (2002) 201–211, p.203; on the Irish beef sector, see Irish Competition and Consumer Protection Commission, *Agreements to Reduce Capacity in the Irish Beef Processing Industry are Prohibited*, available at: <http://www.ccpc.ie/enforcement-mergers-civil-competition-enforcement-cases/agreements-reduce-capacity-irish-beef>.

The primary concern in this regard is that the stability of an already crisis-stricken market may be further undermined by intense competition. These kinds of sentiments are not unique to any particular sector, but have been especially encountered regarding the financial and banking sector where the view was that competition worsens stability as intense competition favours excessive risk taking leading to a higher likelihood of bank failure.⁵¹ There are a number of reasons why a softening of competition policy can appear attractive in periods of crisis, and this section will explore the most salient as well as some situations where they have led to a change in policy application and the resulting dangers.⁵²

In simple terms, the relaxation of individual elements of competition policy enforcement can appear, at least superficially, to be a relatively 'cheap' option in that they will not require the spending of taxpayers' money. A recession also increases public pressure on politicians to intervene in this way as a means of counteracting the risks of large scale exits from an industry, resulting unemployment and consumer vulnerability.⁵³ This would arguably be a perilous and democratically suspect route to embark on, and the risks encountered have been outlined by authors from both within and without competition authorities.⁵⁴ Authorities generally are faced with difficult choices during such periods and will not be allowed to lose sight of the broader impacts of competition enforcement.⁵⁵

In order to inform the analysis of competition authorities faced with crisis conditions later in the thesis, the next section sets out some of the effects that a crisis can have

⁵¹ See generally, OECD Roundtable discussion, Competition, Concentration and Stability in the Banking Sector (2010). On the question of whether competition among banks caused the 2008 financial crisis in Ireland, see Cathal Hanley and Andrew Rae, Stability and Competition in Irish Banking; Friends or Foes? (2011), available at: <http://www.ccpc.ie/sites/default/files/2011-10-14%20Competition%20Policy%20%26%20Financial%20Stability%20-%20Friends%20or%20Foes%20PAPER.pdf>.

⁵² Describing antitrust enforcement as a political luxury good consumed during times of relative peace and prosperity, see D Crane, Antitrust Enforcement During National Crises: An Unhappy History" Antitrust Chronicle 12, no. 1 (2008). See also, D Crane, Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-09 Financial Crisis? (2010) Law & Economics Working Papers. Paper 3, at: http://repository.law.umich.edu/law_econ_current/art3.

⁵³ Thomas K. Fisher, Antitrust During National Emergencies, 40 Mich. L. Rev. 969, 996 (1942).

⁵⁴ John Fingleton, Competition Policy in Troubled Times, Speech given on 3 December 2008 at the Annual Charles River Associates Conference in Brussels. For submissions from various perspectives, see: House of Commons Regulatory Reform Committee, Themes and Trends in Regulatory Reform - Written Evidence (July 2009), at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmdereg/329/329we01.htm>.

⁵⁵ For a US perspective, see: Christine A. Varney, Vigorous Antitrust Enforcement in this Challenging Era, May 11, 2009, available at <http://www.justice.gov/atr/public/speeches/245711.htm>.

on policymakers and regulators generally. As such, the next section demonstrates how difficult it can be to devise a policy approach to a sector or an economy in crisis generally, and from a competition policy perspective in particular.

b) Regulators and Policymakers During Crises

A first danger is the spectre of protectionism which looms on the horizon whenever governments trust their own judgement ahead of that of the market.⁵⁶ Governments globally have been known to move with some speed to support ‘at risk’ industries, most noticeably banks and financial services providers, but other industries have made calls for help over the years.⁵⁷ The real danger, at least in terms of a negative impact on today’s market-driven economic models combined with the expanding internationalisation of business and commerce, lies where governments, by supporting domestic firms and industries, undo the access to markets and free trade built up over past decades. National and international competition authorities thus have an important role in pointing out the dangers of protectionism⁵⁸ – namely that it distorts competition in the short run and is usually unsuccessful in the long run; that it keeps inefficient firms in business, holds back innovation so that consumers may pay higher prices and taxpayers may be left to foot the overall bill.

Another danger that arises is the politicisation of decisions related to competition enforcement and policy.⁵⁹ Such “interference” could take the form of calls for more direct intervention bringing instant results instead of trusting to the more long-term benefits of competition. The application of competition policy by independent

⁵⁶ Robert Z. Lawrence & Robert E. Litan, *The Protectionist Prescription: Errors in Diagnosis and Cure*, Brookings Papers on Economic Activity, 1:1987.

⁵⁷ Peter Freeman, *Competition Advocacy in Time of Recession: the UK Competition Commission’s Approach*, International Competition Forum, Warsaw 15 April 2009, available at: http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_warsaw_150409.pdf; John Fingleton, *The case for competition policy in difficult economic times (2009-10-09)*, ICN Steering Group, at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc818.pdf>; Hassan Qaqaya, *Competition Policy during economic crisis*, UNCTAD High level meeting on trade capacity building and competition policy (Lusaka, 10-12 May 2010), at: http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_qaqaya_en.pdf; Paul K. Gorecki, *Competition Policy in Ireland’s Recession*, *The Economic and Social Review*, Vol. 43, No. 4, Winter, 2012, pp. 597–629, at: <https://www.esri.ie/pubs/JACB201260.pdf>; Philip Lowe, *Competition Policy and the Global Economic Crisis*, *Competition Policy International*, Autumn 2009, Vol. 5, No. 2, at: http://ec.europa.eu/competition/speeches/text/cpi_5_2_2009_en.pdf.

⁵⁸ Exploring whether there is a rational foundation for pursuing international competition rules, and what form these laws should take, see: Brendan J. Sweeney, *The Internationalisation of Competition Rules* (Routledge 2009).

⁵⁹ William Baer, *The Politicization of Competition Policy: Myth or Reality?*, Remarks at the Chatham House Annual Antitrust Conference (June 2015), at: <http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust>.

agencies free of government interference is in most countries a comparatively recent and possibly rather fragile creation, and should not be taken for granted. A related danger is the threat to the stable long-sighted competition policy developed through the consistent practices of the Commission and NCAs over recent times. European competition policy is based on a particular variant of economics which incorporates preferences for free competition and a faith in market outcomes.⁶⁰ In its most general sense this danger flows from the populist pressure to sacrifice the longer term benefits of strong competition, i.e. low prices and greater innovation, in favour of securing short term successes, such as retaining employment and creating 'big players' to survive the recession.⁶¹ Thus there thus are many reasons for policymakers to be wary of calls to relax competition policy enforcement in a recession or vis-a-vis a struggling industry. As witnessed by the historical experiences outlined below, relaxing competition policy can be an ineffective, and even counterproductive, means to boost the economy and encourage recovery.

By way of illustration of the potential dangers highlighted above, this section briefly outlines the US and EU reactions to two crises encountered during the last century. From an EU perspective, Chapter 3 deals with these issues in greater detail while each of the case studies revisit similar topics in the context of their respective sectors.

c) Great Depression in United States

The narrative below focuses on the Great Depression and, though by no means exhaustive, it serves to highlight the difficulties faced by antitrust policymakers when the struggling overall economy led to a surge in economic nationalism that coloured antitrust enforcement in an almost un-patriotic light. A symbolic starting point comes in 1918, when war-time Attorney General Thomas Gregory declared that "the natural laws of trade" could no longer be relied upon to guide the conduct of enterprises

⁶⁰ For a US perspective, see Maurice E. Stucke, Is competition always good?, J Antitrust Enforcement (2013) 1 (1): 162-197 where, after noting that the economic crisis prompted some US policymakers to reconsider certain basic assumptions, but not including the virtues of competition, Stucke identifies scenarios where competition yields suboptimal results.

⁶¹ Peter Freeman, Competition Advocacy In Time Of Recession The UK Competition Commission's Approach, International Competition Forum, Warsaw 15 April 2009, available at: http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_warsaw_150409.pdf, at 4; Nicholas Crafts, History lessons: what the world's financial crises taught us, Bulletin of the Warwick Economics Research Institute, Spring term 2011(Special edition: Examining the financial crisis), at <http://www2.warwick.ac.uk/fac/soc/economics/research/centres/eri/bulletin/bulletinjanuary2011/>.

faced with the need to expand output to meet the nation's requirements.⁶² This left the door open for cooperation and collaboration between erstwhile competitors in the name of a war effort that trumped all other economic concerns at the time.⁶³ Although it came under pressure from advocates for a complete suspension or repeal, President Hoover's administration supported the continuation of antitrust enforcement.⁶⁴ Antitrust enforcement, however, was far from a priority of Democratic President Roosevelt's and his subsequent New Deal.⁶⁵ Although the Depression did not cause the Administration to overtly rewrite its policy stance regarding the damaging effects of cartels on economic performance generally, instead of reinvigorating antitrust enforcement, the Government took the opposite tack.⁶⁶ For example, one policy response was the National Industrial Recovery Act of 1933 (NIRA).⁶⁷ This saw the creation of the National Recovery Administration ("NRA"), which allowed industries to suspend certain aspects of the US antitrust laws and permitted firms to collude to create a set of industrial codes.⁶⁸ These "codes of fair competition" set industries' prices and wages, established production quotas, and

⁶² D. Crane, "Antitrust Enforcement During National Crises: an Unhappy History", *Global Competition Review*, DEC-08 (1), at 6 citing Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, *Antitrust* (Spring 2002) at 71. See also, William H. Page, *Thurman Arnold's International Antitrust Legacy*, *Antitrust Source*, July 2003, at 1 (reviewing Wyatt Wells, *Antitrust and the Formation of the Postwar World* (2002)), available at <http://scholarship.law.ufl.edu/facultypub/163>; Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *The Paranoid Style In American Politics And Other Essays* (Harvard University Press 1996).

⁶³ D. Crane, "Antitrust Enforcement During National Crises: an Unhappy History", *Global Competition Review*, DEC-08 (1), at 6; Peter Temin, *Lessons from the Great Depression: The Lionel Robbins Lectures for 1989*, MIT Press (1990). On the varying views on the role of cartels as price stabilising mechanisms in light of the dangers of deflation inherent in the Gold Standard system used at that time, see: Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar 2008), p.135.

⁶⁴ Jenny R. Hawkins, *Antitrust Enforcement During the Great Depression* (May 2014), at: <http://www.csuohio.edu/class/sites/csuohio.edu.class/files/Hawkins%20paper.pdf>. See also, Peter H. Irons, *The New Deal Lawyers* (Princeton University Press 1993), p.18 describing the Hoover Administration's antitrust policies as "vigorous".

⁶⁵ E. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Fordham University Press 1995); Greg Hannsgen and Dimitri B. Papadimitriou, *Lessons from the New Deal: Did the New Deal Prolong Or Worsen the Great Depression?*, *Levy Economics Institute Working Paper No. 581* (October 2009), at: <http://ssrn.com/abstract=1488789>.

⁶⁶ For a retrospective view on Depression-era economic policies from a modern standpoint, see: *Economic Report of the President, Prerelease of Chapter 7: The 70th Anniversary of the Council of Economic Advisers* (February 2016), at: https://www.whitehouse.gov/sites/default/files/page/files/20160210_erp_chapter_7_prerelease.pdf.

⁶⁷ See generally, Otto Nathan, *The N.I.R.A. and Stabilization*, *The American Economic Review*, Vol. 25, No. 1 (Mar., 1935), pp. 44-58.

⁶⁸ For a detailed case study of the impact of Depression-era policies, including NIRA and the New Deal, on the West Virginia coal industry, see: Jerry Bruce Thomas, *An Appalachian New Deal: West Virginia in the Great Depression* (University Press of Kentucky 1998).

imposed restrictions on entry.⁶⁹ At the core of the NIRA was the idea that low profits in the industrial sectors contributed to the economic instability of those times. The purpose of the industrial codes was to create “stability” – *i.e.*, higher profits – by fostering coordinated action in the markets.⁷⁰ The result of these industrial codes was that competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers.⁷¹ Unsurprisingly, the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power.⁷² One such restraint, examined in the *Socony-Vacuum* case, was a comprehensive and complicated arrangement among leading oil companies to stabilize the price of unregulated or “hot” oil coming from independent oil fields with the tacit approval of the US Secretary of Commerce.⁷³ The price control mechanism in *Socony-Vacuum* closely resembled the NIRA industry codes in that it was designed to increase stability in an otherwise volatile market. However, the NIRA structures eventually fell to constitutional challenge in *Panama Refining*, which specifically concerned the regulation of hot oil through a “Petroleum Code”.⁷⁴ The result was that government sanction for such codes fell away and, as Nachbar described it, “what on one day could be described as a patriotic attempt to further national economic policy the next became a criminal violation of the U.S. Code”.⁷⁵

It has come to be a widely held view among economists that these policies did not help the economic recovery after the Great Depression and may even have exacerbated it. Christina Romer, a former Chair of the US President’s Council of Economic Advisors, concluded that the NIRA diminished the responsiveness of price to output and thus ‘prevented the economy’s self-correction mechanism from working’.⁷⁶ Indeed the New Deal cartelisation policies appear to have been a key factor behind the weak recovery, accounting for about 60 percent of the difference

⁶⁹ Lee H Ohanian, *The Great Depression, Macroeconomics of the New Deal*, in Randall E. Parker & Robert Whaples, *Routledge Handbook of Major Events in Economic History* (Routledge, 2013).

⁷⁰ D. Crane, “Antitrust Enforcement During National Crises: an Unhappy History”, *Global Competition Review*, December 2008

⁷¹ Crisis Cartels, Contribution of the United States to OECD Global Forum on Competition (February 2011), DAF/COMP/GF/WD(2011)11, at: <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1102crisiscartels.pdf>.

⁷² John D Harkrider ‘Lessons from the Great Depression’, *Antitrust*, spring 2009, Volume 23, No 2.

⁷³ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). See further, Daniel Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in Eleanor M. Fox & Daniel A. Crane (eds.) *Antitrust Stories* (Foundation Press 2007).

⁷⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 408-10 (1935).

⁷⁵ Thomas B. Nachbar, *The Antitrust Constitution*, 99 *Iowa L. Rev.* 57 (2013-2014), at 89.

⁷⁶ C.D. Romer, “Why Did Prices Rise in the 1930s?” *Journal of Economic History* 59 (1999), 167–197

between actual output and trend output, and may even have lengthened the Great Depression by up to seven years.⁷⁷

The Depression was eventually halted by countercyclical measures and governmental intervention in the form of public regulation or ownership of basic economic activities, wage fixing and the introduction of the welfare State.⁷⁸ Following the Supreme Court's invalidation of NIRA,⁷⁹ sentiment within the Roosevelt Administration turned towards a renewal of antitrust enforcement.⁸⁰ While World War II saw a second relatively brief period of suspension of antitrust enforcement,⁸¹ thereafter enforcement trends largely stabilized.⁸² The advice of the Temporary National Economic Commission brought about an acceptance of the idea, interesting in light of the development of similar thinking in Europe that is described in Chapter 3, that high levels of concentration could be dangerous and deserved to be the focus of national attention.⁸³ Such thinking subsequently fed into modifications of the Clayton Act in 1950 intended to stop monopolies, or near monopolies, from being formed through mergers.⁸⁴ Although there were some exemptions and enforcement was directed towards impeding certain restrictions relevant to the war efforts during the Korean and Vietnam wars,⁸⁵ US antitrust enforcement has never been sidelined to such an extent since. While this could partly be described as a reflection that the wars and financial crises of the second half of the twentieth century were less severe

⁷⁷ H. Cole & L.E. Ohanian, "New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis", *Journal of Political Economy*, vol. 112, No. 4

⁷⁸ Peter Temin, *Lessons from the Great Depression: The Lionel Robbins Lectures for 1989*, MIT Press (1990)

⁷⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)

⁸⁰ For an account of the role of antitrust as policing the private exercise of regulatory power, Thomas B. Nachbar, *The Antitrust Constitution*, 99 *Iowa L. Rev.* 57 (2013-2014).

⁸¹ Spencer Weber Waller, *The Antitrust Legacy Of Thurman Arnold*, *St. John's Law Review*, Vol.78, 569

⁸² Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, 16-SPG *Antitrust* 71, 71-72 (2002). For a comparative analysis of the development and enforcement of two other antitrust regimes shaped by American strategies and policies following World War II, see: John O. Haley, *Antitrust in Germany and Japan The First Fifty Years, 1947-1998* (University of Washington Press 2001).

⁸³ See further, Robert A. Brady, *Reports and Conclusions of the Temporary National Economic Committee*, *The Economic Journal* Vol. 53, No. 212 (Dec., 1943), pp. 409-415; James Stuart Olson, *Historical Dictionary of the Great Depression, 1929-1940* (Greenswood 2001).

⁸⁴ See generally, David Dale Martin, *Mergers and the Clayton Act - Consolidation and merger of corporations* (University of California Press 1959).

⁸⁵ See, e.g., describing a "continued step up in antitrust enforcement" in the period 1952-1956, see *Proceedings of Antitrust Law Symposium – How to Comply with the Robinson Patman Act (1957)*, p.26. On the other hand, describing a "deliberate suspension" of antitrust law during the Korean War, see Theodore J. Kreps, *An Evaluation of Antitrust Policy*, Joint Economic Committee Study Paper No. 22 (January 1960), at:

https://fraser.stlouisfed.org/docs/historical/jec/19600130_jec_empgrowth_study paper22.pdf.

than those of the first half, but it is also a reflection of an underlying faith in market economics whereby the dynamics of competition in an enterprise economy were recognised as having played a significant role in sparking the rapid productivity increases that eventually allowed the global economy to emerge from the Great Depression.⁸⁶

d) European Commission during the economic downturn of the 1970s

The view taken by the Commission during the economic downturn of the 1970s, for example, was a ruthlessly pragmatic in that it effectively granted preferential treatment to certain sectors facing fierce competitive pressures and, in an attempt to discourage governments from wastefully supporting duplicate national favourites, promoted Eurochampions.⁸⁷ Ostensibly its policy was shaped by democratic considerations of the public interest manifested in pro-employment initiatives, but it was also conducted in an environment where the usefulness and relevance of competition rules were being questioned while the whole integration project again threatened to fall apart.⁸⁸

As examined in Chapter 3, competition policy as it developed in Europe had to reconcile the mainstream capitalist tendencies that came to be the driving force of the trade bloc with the social and democratic character of the broader integration project. At no time was this balancing act more apparent than with the onset of a deep economic crisis in 1973, which was to last well into the next decade.⁸⁹ Europe's nascent competition policy found itself having to respond to an economy experiencing sharp decreases in output, productivity and exports combined with

⁸⁶ Frank G. Steindl, What Ended the Great Depression?, *The Independent Review*, v. XII, n. 2, Fall 2007, 179-197, at 192

⁸⁷ See Chapter 3. On the development of EU competition law and policy during the 1970s generally, see: Lee McGowan, *The Antitrust Revolution in Europe Exploring the European Commission's Cartel Policy* (Edward Elgar 2010). On the view that, even until the mid-1980s, most EU Competition Commissioners were in favour of Eurochampions, see: Simon Hix & Bjørn Høyland, *The Political System of the European Union*, (Palgrave Macmillan 2011), p.196.

⁸⁸ For a chronological overview, see: Maarten-Pieter Schinkel, Martin Carree & Andrea Günster, *European Antitrust Policy: An Analysis of Commission Decisions during 1964-2002*, (March 2006) EARIE 2006 Conference in Amsterdam, at:

http://www.earie2006.org/admin/papers/AppealspaperEARIE2006_20060328_0638.PDF.

⁸⁹ On the effect of the oil crisis of the 1970s on the European economy, see Ivan T. Berend, *A Restructured Economy: From the Oil Crisis to the Financial Crisis, 1973–2009*, in *THE OXFORD HANDBOOK OF POSTWAR EUROPEAN HISTORY* (Dan Stone ed., 2012).

increasing unemployment and inflation.⁹⁰ In the end, Chapter 3 describes how the development of competition policy in the 1970s bore witness to the strain being placed on the economic and political integration project as a whole but that the aftermath of that economic, fiscal and employment crisis was that it served to strengthen the social aspects of the Community and saw the project take on deeper and broader goals.⁹¹

In conclusion, we can observe that historically competition enforcement was sometimes used as a bargaining chip. To describe this phenomenon is not necessarily to criticise it as there here may be good reasons for using a policy shift in this way. However, it is clear now that deep thought should be given as to when such a move is capable of improving matters or whether it is more likely to simply mask worsening conditions. From an industry's point of view, the strategic decision to expand, and the method chosen to do so, is a function of many variables but key amongst them are the economic and regulatory circumstances at the time. As a research mechanism, therefore, using crisis industries provides an interesting backdrop to gain insight into how market participants perceive competition law baselines in light of the various objectives attributed to competition law and policy, as discussed in Chapter 3.

3. Conclusion

As set out in the Introduction to this thesis, the industries chosen hold considerable interest in a number of ways, not only due to their long and chequered pasts as high profile, crisis-prone sectors susceptible to frequent political intervention, but also because of the large potential for growth on a global scale with pushes the stakes ever higher for the major players grappling with new business models and ambitious market entrants.

Although there has come to be near consensus among economists that competition policy and strong antitrust enforcement has an important role to play in improving the productivity (and therefore the growth prospects) of an economy, regardless of the position of that economy in the business cycle,⁹² crisis conditions tend to result in

⁹⁰ J.A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* 363 (2006).

⁹¹ CONSTANZE SEMMELMANN, *SOCIAL POLICY GOALS IN THE INTERPRETATION OF ARTICLE 81 EC* (2008).

⁹² Jenny F., *La crise économique et financière, la régulation et la concurrence*, *Concurrences* N° 2-2009

calls for reforms or adaptations in favour of the interests of firms threatened with extinction. Publicly, competition authorities respond by emphasising the potential benefits of competition enforcement and encourage more vocal advocates for competition policy at a national level.⁹³

From a methodological perspective, this chapter has described the decision to focus on industries facing severe crises because they are more likely to produce such flashpoints between competition and other economic policy objectives. The use of case studies and empirical research, likewise, allows for a degree of focus on decisions made under such strained circumstances and, overall, will help in garnering some interesting conclusions on the role and utility of competition law and policy in times of economic distress.

⁹³ Alberto Heimler, *The economic crisis: which jurisdiction is better placed, the US or the EU?* Concurrences No.2-2010, pp.37-44, at 44; Kroes N., *“Dealing with the current financial crisis”*, Address before the Economic and Monetary Affairs Committee, European Parliament, Brussels, October 6, 2008 (SPEECH/08/498, available at http://ec.europa.eu/comm/competition/speeches/index_2008.html)

CHAPTER 3: BALANCING COMPETITION GOALS IN THE DEVELOPMENT OF THE EUROPEAN UNION*

1) Introduction

As set out in the Introduction, the analysis in this thesis aims to follow certain themes in the individual chapters, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the ability and role of National Competition Authorities (NCAs) in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law. The role of this particular chapter is to lay the groundwork by examining the aims behind the incorporation of competition rules into the European project and studying how the development of the doctrine has been moulded to the specific circumstances and outlooks encountered in post-war Europe. Before embarking on an examination of the internal balancing undertaken by the Court and the Commission between the sometimes conflicting goals within competition policy, the doctrine itself must be placed in its wider European context in order to understand its role as part of the greater integration project.

National political and policy-making systems are alive and well in the European Union (EU) but the complementary political system centred on Brussels means that some major questions of how to balance and implement political ideals are made at a central EU level.⁹⁴ One such question is how to apply a specifically European version of capitalism to an area as diverse as the EU in a democratically legitimate and socially acceptable way. This chapter argues that competition policy constitutes one of the most important tools that the EU has used to balance the economic, social and political goals of the European project. Given that national governments, parliaments, courts, and other bodies participate in the EU system, alongside the EU institutions such as the Commission and the European Parliament, competition policy in the EU has developed in different directions and at different speeds since the European integration project emerged following World War II.

* See also, Conor Talbot, *Ordoliberalism and Balancing Competition Goals in the Development of the European Union*, *Antitrust Bulletin* (forthcoming June 2016).

⁹⁴ Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (3rd edn, Rienner 2005).

In contrast to the totalitarianism that characterised much of Europe until the end of World War II, the EU project sees itself as pluralistic and open, as a place where individuals and corporations are free to pursue their ambitions. This vision of a pluralistic society and the horror of concentrated power provide the backdrop for the development of competition policy within the EU framework in the 1950s and 1960s. Mainstream social scientists and legal scholars were inspired by the image of a unified European marketplace for ideas, goods and services, capital, and political decisions. However, a recurring problem in this vision is the undemocratic persistence of enormous disparities in power. The collision between the elements in the evolving ideology, including competition policy, took place through debates in the domains of politics and economics, with public interest groups, corporations, legislators and judges all participating. This contribution investigates these collisions and the effect they had on the theories and policies that emerged as the EU searched for a compass to navigate between the different ethics and outlooks that fed into the European project's vision of marketplace pluralism. The investigation conducted here leads to a conclusion that competition law in the EU context plays a role akin to a public law function, whereby it represents a tool for balancing the effects of the different strands of development in the European project. As such, it is argued here that the objectives of competition law in the EU go beyond economic or legal standards that are applied in individual cases; rather, competition law and policy have been calibrated to contribute to allowing the EU project to harness the benefits of an open capitalist economy within the context of a democratic European society.

The aims of any law or policy initiative are closely linked to the specific and general intentions of the drafters, and both have a direct impact on the choice of standards used to apply it in practice. In the case of competition law, for instance, if the objectives of the European Union's competition rules were accepted as being aligned with purely 'Ordoliberal' teachings, this would exclude the application of 'welfarist' efficiency-based standards as well as having fundamental impacts on the legitimate use of competition law in an internal and external context.⁹⁵ The analysis in this chapter aims to demonstrate that while, undoubtedly, Ordoliberal thinking

⁹⁵ Pinar Akman, *Searching for the Long-Lost Soul of Article 82 EC* (2007), at: https://www.uea.ac.uk/polopoly_fs/1.104585!ccp07-5.pdf.

played a role in the development of European competition law and policy, there were several other social, political and macroeconomic influences at play as well. The fact that competition policy was able to absorb diverse influences has been especially important in an EU context because of the multitude of goals that the grand European project has had over the years. It is argued here that competition policy has been called upon to fill gaps and reach places that Brussels' other tools cannot, even if ultimately this has been to the detriment of the internal coherence of competition doctrine in the EU. Aside from the annual economic benefits to the EU from having a competition regime, the EU has benefitted in a social and democratic sense from prohibiting the unchecked exercise of market power. Indirect social benefits of the EU's antitrust regime come about because this limitation on the exercise of market power prevents the excesses of capitalism negatively impacting on the democratic societal structures of the EU.

For each individual instance of competition law being applied at the EU level we can point to several different objectives at play. Oftentimes they are internally coherent – a short-term tactic employed to reach a long-term strategic outcome, for example – but not always. It is when there is a clash of such objectives, however, that we see the real direction the law is going to – and the cases studied below aim to give an insight into the Commission and Courts' thinking. As we shall see, times of economic and financial crisis are more likely to produce such flashpoints between competition objectives, so a degree of focus on decisions made under such strained circumstances garners some interesting conclusions.

A further view proposed here is that European competition law is best seen as a form of public law and not as simply a form of private market regulation.⁹⁶ Since European capitalist economies are heterogeneous, this demands a form of competition law that is innately political rather than merely technical. Simply recognising the different political goals behind competition law within standard doctrinal jurisprudences tends to obscure the innately political balancing behind the European capitalistic order enshrined in the EU and, therefore, promoted and facilitated by EU competition law. By recognising this, one can obtain a better

⁹⁶ See further, Michael W. Dowdle, On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism (April 21, 2014). NUS - Centre for Law & Business Working Paper No. 14/02; NUS Law Working Paper No. 2014/004.

understanding of the process of political balancing behind each step of the development of EU competition law. From one perspective, competition policy in the EU is a necessary complement to the bloc's trade policy because the liberalisation which underpins the whole European project would be frustrated by an absence of enforcement of competition policy. In practice, the essence of the EU is a joint political decision to simultaneously and gradually liberalise trade thereby allowing a potential flow of imports following the reduction or elimination of trade barriers. The EU model is based on the benefits of this liberalisation accruing to consumers, and undoubtedly competition policy acquired its important status within the EU project due to the realisation that those all-important benefits of trade liberalisation can be defeated by restrictive practices in the liberalising market. For example, an agreement whereby retailers and manufacturers restrict imports or prohibit entry into a sector clearly causes trade policy liberalisation to be frustrated. Therefore, competition policy plays a crucial role in the other public law initiatives that drive the overall European integration project and the pressures and strain that it has come under over the course of the development of the European Union are a direct result of the attempt to use competition policy as a forum within which to balance several public policy objectives.

2) Influences behind the Development of European Competition Policy

By way of a starting point, it is proposed to commence with the proponents of Ordoliberal principles who came to prominence under the so-called 'Freiburg School' in the interwar period and have retained an influence over the drafting of competition laws in both Germany and Europe ever since.⁹⁷ Wernhard Möschel distilled an Ordoliberalist's approach to competition policy down to four preliminary elements which must be outlined before we can begin to assess the extent of the doctrine's impact on the rules as they developed and as they stand today.⁹⁸

The four preliminary elements identified by Möschel were as follows:

- guaranteeing individual economic freedom;

⁹⁷ DAVID GERBER, LAW AND COMPETITION IN TWENTIETH-CENTURY EUROPE, PROTECTING PROMETHEUS (2001).

⁹⁸ Wernhard Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, 157 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 3 (2001). See also: REINHARD BLUM, SOZIALE MARKTWIRTSCHAFT (1969); Lawrence A. Sullivan and Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L LAW 197 (1998).

- the state's strong role in preserving the competitive system, but without direct government intervention;
- competition policy as a rule of law; and
- competition policy must be embedded into the economic constitution of a free and open society.

Essentially, the primary goal of competition is the guaranteeing of individual economic freedom, from which the goal of economic efficiency is merely derived and to which all other goals are subservient. In order to help assure a sufficient level of freedom, the state has a strong role preserving the prerequisites of the competitive system, but no direct government intervention (in the form of price controls, for instance) would be sanctioned. It is also essential that competition policy be enacted as a rule of law, and not subject to discretionary powers capable of political manipulation while also, finally, being embedded into the economic constitution of a free and open society – again in the aim of allowing the attainment of a fruitful economic freedom.⁹⁹ As the freedom to act is paramount, rules that attach normative significance to ensuring the prerequisites for this are preferable to those that deem the performance more essential.¹⁰⁰

Particularly important for the purposes of this discussion is that Ordoliberalism would not allow any selective intervention by government, even on a very exceptional basis, because such policies tend to represent a view of competition policy as a kind of governmental management technique for the achievement of concrete goals. The theory behind this is that the all-important freedom to act in the economic sphere is effectively eliminated if the context of an actor's decisions is determined in advance.¹⁰¹ In practice then, the focus of Ordoliberal competition rules should be the monitoring of the exercise of economic freedom in order to prevent this freedom from destroying its own prerequisites. Mestmäcker interpreted the importance placed by the school's founding fathers – in particular Walter Eucken – on the possibility of competition to prevail in modern economies as being in direct response to the great contradiction, noted by Marx and Schumpeter, whereby capitalism requires a healthy degree of competition yet actors are liable to do everything they can to destroy their

⁹⁹ Wernhard Möschel, *Competition Policy from an ORDO Point of View*, in GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY 142, (A. Peacock & H. Willgerodt eds., 1989).

¹⁰⁰ Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, FREIBURGER DISKUSSIONSPAPIERE ZUR ORDNUNGSÖKONOMIK 04/11, <http://hdl.handle.net/10419/4343>.

¹⁰¹ Möschel, *supra* at 148.

competitors.¹⁰² Thus, by the time of the Ordoliberals' first contributions, cartels and business conglomerates had come to be seen as an inevitable phenomenon of a late capitalist economy. A key aim of the Freiburg writers such as Franz Böhm was, therefore, to convince contemporary politicians that competition left to its own devices eventually self-destructs, while still expounding the virtues of rivalry and arguing that restraints on competition should be made illegal in order to protect it.¹⁰³ For such a system to be practically sustainable, markets and market actors cannot be left to develop alone, so an Ordoliberal competition policy plays a regulatory role in the sense that creating and maintaining a functioning market place requires the forging of a balance of power between various socioeconomic players.¹⁰⁴ In other words, under Ordoliberalism one abandons the hope that the market will develop perfect competition without state intervention because it will always be in the interest of companies to rid themselves of irksome competition in order to secure monopoly profits. In this sense, competition policy consists of the active engagement of the state, but strictly with the sole goal of preserving or enhancing competition.¹⁰⁵

It is important to note at this point that there were significant economic and, particularly, macroeconomic, influences on the development of European competition policy. One undeniable influence on the European economic order and, therefore, the shape of the competition law approach adopted, was the American ambition at the time. At the time, the US aimed at a major reorganisation of the European state system in a viable framework for controlling Germany, containing the Soviets and sparking an economic recovery through creating and securing multilateral trade between the continental countries.¹⁰⁶ Sharing the German force and industrial might amongst the rest of Europe was seen as the only way to reconcile the German revival with the security and economic concerns of

¹⁰² Ernst-Joachim Mestmäcker, *Competition Policy and Antitrust: Some Comparative Observations*, 136 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 387, 388 (1980).

¹⁰³ Ulrich Immenga, *Biography of Franz Böhm*, in SOCIAL MARKET ECONOMY HISTORY, PRINCIPLES AND IMPLEMENTATION – FROM A TO Z 29 (Rolf H. Hasse, Hermann Schneider & Klaus Weigelt eds., 2008).

¹⁰⁴ On the modern interpretation of the contribution of Ordoliberal policies, see: Mathias Siems & Gerhard Schnyder, *Ordoliberal Lessons for Economic Stability: Different Kinds of Regulation, Not More Regulation*, 27 GOVERNANCE 377 (2014).

¹⁰⁵ CHRISTIAN A. CONRAD, IMPROVING INTERNATIONAL COMPETITION ORDER AN INSTITUTIONAL APPROACH 11 (2005).

¹⁰⁶ Michael J. Hogan, *European Integration and German Reintegration: Marshall Planners and the Search for Recovery and Security in Western Europe*, in THE MARSHALL PLAN AND GERMANY 115 (Charles S. Maier & Gunter Bischof eds, 1991).

neighbours.¹⁰⁷ Against that political and economic background, the role of competition policy and enforcement begins to gain increasing importance from a pan-European perspective. As occupied Germany was gradually being freed of economic controls, the French began to develop measures to 'bind Germany economically and politically into the structure of Western Europe' in order to remove Germany's opportunity and need to seek new markets through a rapprochement with the Soviet Union or, indeed, another invasion of her Western European neighbours.¹⁰⁸ The resultant Schuman Plan received a warm reception from the Americans in part because, by binding Germany thus to Western Europe, it also bound France to Western Europe and her Atlantic allies: up until this point, the threat of a revival of German economic and military might had seen France keep the door open for a possible rapprochement with the Soviet Union in order to contain an independent and strong Germany. By ending Franco-German enmity, the plan would see America reposition the Soviet Union as the main threat.¹⁰⁹

European integration, and therefore a unified competition order, was also crucial to the overall economic project of the US in securing democracy and capitalism in Europe because it allowed for the merging of economically sovereign states into an integrated economic order superintended by a supranational institution of coordination and control. It was sold as a way of allowing France and the rest of the Western continent to use German resources without becoming dependent or dominated by her.¹¹⁰ One reading of the literature on the events leading up to the creation of the European integration process would put the role of competition policy, as we know it today at least, very much in the background compared to wider political and security concerns. As Germany was being rehabilitated as a member of the European community of nations, the French realised that only an offer of equality and co-operation on a permanent basis and in a new form would see Germany agree to participate in her own containment. A public preoccupation with coal prices and levels of steel production – widely circulated as the practical reasons for the creation of the European Coal and Steel Community (ECSC) – concealed a historic

¹⁰⁷ Hogan, *supra*, at 127.

¹⁰⁸ Roger Bullen, *An Idea Enters Diplomacy: The Schuman Plan, May 1950*, in IDEAS INTO POLITICS: ASPECTS OF EUROPEAN HISTORY, 1880-1950 150 (Roger Bullen, Hartmut Pogge von Strandmann & Antony Polonsky eds., 1984).

¹⁰⁹ Bullen, *supra* at 197.

¹¹⁰ Hogan, *supra* at 116.

reversal of policy and a diplomatic revolution.¹¹¹ Given these overarching policy concerns, the drafters of EU competition policy always had one eye on the external political and macroeconomic dimension of the EU, and it is submitted that competition policy retains this preoccupation today. This is clearly evidenced by the role of competition policy during economic downturns when governments try to evade their international commitments by relaxing free competition in relation to particular strategic, prestige or traditionally embedded industries and products. Therefore, preventing the return of protectionism in advanced industrial countries is a key driving factor in modern day European competition policy. Behind competition policy pronouncements and enforcement strategies is the underlying belief in a competition theory that asserts that those countries which have the highest rate of technical progress will also have the highest rate of growth and that the greater or more intense the competition, the greater the rate of technical progress. On that basis, the internal and external dimensions are reconciled in that competitive markets are seen as being the best way to efficiently organise the production and distribution of goods and services, while domestic and, in the EU context in particular, external competition provides the incentives that promote entrepreneurship and technological progress.

3) Birth of the Integration Project and Europe-wide Competition as a Consolation Prize

The next step in our analysis consists of an examination of the ideals and objectives at play during the drafting of the competition provisions of the European project's foundational documents. The main actors up to this point were the European states themselves along with the sporadic but crucial input of the United States. Once we move into the 1960s, however, the European institutions, in particular the European Commission and the European Court of Justice, take up a more prominent role. In light of this contribution's aim of highlighting the balancing exercise being undertaken as between the different interested parties that influence the fixing of European competition policy objectives, there is some attention also devoted to the role of industry players and their representative groups.

¹¹¹ Bullen, *supra* at 195.

While the ECJ has since followed a ‘teleological’ method of interpretation with the effect of reading the competition provisions in light of what it deemed to be required for the integrationist goals of the Treaty, the legislative intent can still matter when there is uncertainty as to the aim or scope of the rules at hand.¹¹² Gerber, on the other hand, goes even further and states that to get to the root of the rules eventually enshrined in the Treaty in 1958 one must recognize the depth of the pre-existing European traditions in competition issues at the national level.¹¹³ This is especially true as regards the works of Ordoliberal authors in Germany whose belief in a market economy where competition policy formed the cornerstone of the economic constitution constituted the starting point for the European debate.¹¹⁴ Although these ideas helped shape the mind-sets, they were far from the sole dominant force with American encouragement and interest from the UK also playing a role in the balancing process, as did the caution of the French when it came to ceding ground on the preponderant issues for them, namely agriculture and nuclear energy.¹¹⁵

The unique economic and political backdrop provided by post-war Europe for the 1950 Schuman Declaration¹¹⁶ and the subsequent Treaty of Paris¹¹⁷ cannot be fully analysed here but its influence remains relevant because the establishing of the ECSC was the crystallisation of a struggle between different legal and social heritages who set aside a part of their traditions in an ambitious collective project. Competition policy arose as part of the idea of closer integration through the creation of a common market, which itself was attractive to the different original “ECSC 6” for diverse reasons, both inward- and outward-looking. The Messina Conference in July 1955 was an important signal of the desire to re-launch the idea of a united Europe.¹¹⁸ A clear mandate was given to an Intergovernmental Committee of

¹¹² Akman, *supra* at 5.

¹¹³ GERBER, *supra* at 144.

¹¹⁴ WILLIAM WALTERS & JENS HENRIK HAAHR, GOVERNING EUROPE: DISCOURSE, GOVERNMENTALITY AND EUROPEAN INTEGRATION (2005).

¹¹⁵ LEE MCGOWAN, THE ANTITRUST REVOLUTION IN EUROPE: EXPLORING THE EUROPEAN COMMISSION’S CARTEL POLICY 97 (2010).

¹¹⁶ Available at http://europa.eu/abc/symbols/9-may/decl_en.htm. For the background to the Schuman Declaration, see: GISELA HENDRIKS & ANNETTE MORGAN, THE FRANCO-GERMAN AXIS IN EUROPEAN INTEGRATION (2001).

¹¹⁷ Available at

http://www.ena.lu/treaty_establishing_european_coal_steel_community_paris_18_april_1951-2-16303. On the background to the Treaty of Paris, see: SERGIO FABBRINI, WHICH EUROPEAN UNION? 6 (2015).

¹¹⁸ At Messina, the “ECSC 6” adopted a resolution in which they stated their determination to make ‘further progress [...] towards the setting up of a united Europe by the development of common

delegates and experts formed under the chairmanship of Paul-Henri Spaak, the Belgian Minister for Foreign Affairs, to come up with workable tools that could be used to bring about the politicians' ambitious aims of liberalisation and integration – in other words, to put flesh on the bones of the concept of the common market.¹¹⁹ Against this background, the Spaak Report explicitly promoted the adoption of competition rules directed at enterprises, in addition to its support for provisions which would guarantee the free movement of production factors, and it has been opined that the Spaak Report clearly shows that economic efficiency was an original objective within the field of EU competition law.¹²⁰

The three major schools of thought present at the time were the federalists like Monnet, the German Ordoliberals and the American pro-business lobby. Where the objectives of all three overlapped was on the use of the integration experiment to modernise and instil more political and economic efficiency into European governance and culture. Thus the creation of the common market was not only an inward-looking goal but also an instrument to strengthen the competitiveness of European industry as regards their international rivals, something emphasised when the European Commission subsequently took the reins of the bloc's competition policy.¹²¹ In the immediate aftermath of World War II continental cultures were not only statist, there was a rooted principle that the cartel was a positive manifestation of the freedom of trade.¹²² In the face of increasingly efficient competition and struggling domestic industrial investment and innovation, State protectionism and

institutions, the gradual merging of national economies, the creation of a common market and the harmonisation of their social policies'. See: Centre Virtuel de la Connaissance sur l'Europe, *From the Messina Conference to the Rome Treaties (EEC and EAEC)* (2012), http://www.cvce.eu/content/publication/2011/11/24/950e8fdc-263d-4ef1-aae2-bd336cfac54/publishable_en.pdf; RENATO NAZZINI, *THE FOUNDATIONS OF EUROPEAN UNION COMPETITION LAW* (2011).

¹¹⁹ According to the introduction of the Spaak Report: "The purpose of a common market must be the creation of a large area with a common economic policy, so that a powerful unit of production is formed and continuous expansion is made possible, as well as an increased stability, an accelerated increase of the standard of living, and the development of harmonious relations between the Member States". Translation available at http://www.ena.lu/the_spaak_report-2-26304

¹²⁰ ULF ADOLPHSON, ARTICLE 102 TFEU, AIMED AT SERVING THE ORDOLIBERAL AGENDA OR EUROPEAN CONSUMERS? (2010), http://www.kkv.se/globalassets/forskning/uppsatser/ulf_adolphson_106-2011.pdf.

¹²¹ Wulf-Henning Roth, *Strategic competition policy: a comment on EU competition policy*, in *THE EVOLUTION OF EUROPEAN COMPETITION LAW: WHOSE REGULATION, WHICH COMPETITION?* (Hanns Ullrich ed., 2006), citing European Commission, *XIII Report on Competition Policy* 11 (1984) as an example of a trend beginning in earnest in the 1970s.

¹²² G. AMATO, ANTITRUST AND THE BOUNDS OF POWER: THE DILEMMA OF LIBERAL DEMOCRACY IN THE HISTORY OF THE MARKET 39-40 (1997).

intervention in the guidance of the economy had become seen as a commonplace hindrance and was viewed as another barrier to integration that could be tackled through the deployment of competition rules.

From this reading of the first stage of the evolution in European competition policy we can see the main factor driving its development was the need of the main players for a reliable yet adaptable tool around which to base the integration process. Competition policy was attributed wide-ranging goals from the outset: beyond mere economic integration, there was a sense that it had a contribution to make to Germany's general rehabilitation as a part of the European family. A clear declaration of the policy's important status came by way of its prominent place in the Treaty's proclamation of the movement's goals and activities and, although scholars may not have realised its significance amidst the other symbolic gestures of the time, the dramatic effect it would have on the European economy would soon become apparent to all. From this it is clear that competition law, as it is understood in a European context, is indeed a form of public law in the sense that it is a branch of law that governs the governing of the state. As such, European competition law developed into an inherently political form of regulation as it is strained and stretched in order to take into account factors going far beyond the mere promotion of the economic efficiency of the market.

The end result of trying to reconcile the different national ideas and concerns from interested observers was that the Treaty provisions were rather vague and short on detail, to such an extent that Motta states that it was 'difficult to see exactly what the objectives of competition policy were for those who drafted the Treaty of Rome'.¹²³ This has meant that those in charge of applying the provisions have had broad discretion to shape them by means of their interpretation. Thus the doctrine has the ability to shift between the prevailing schools of thought on any given issue much more easily than other areas of law, so over the years we have encountered a variety of approaches to competition law.¹²⁴ Recognising the initial pragmatic use of competition rules as a tool for bringing about an unprecedented level of integration amongst the major continental European powers, Wesseling observes that the rules

¹²³ MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 14 (2004).

¹²⁴ Constanze Semmelmann, *Non-competition goals in the interpretation of Article 81 EC*, 1 GLOBAL ANTITRUST REV. 15 (2008).

on competition had a “normative-functional” character.¹²⁵ The introduction of the element of free competition can be seen as functional in light of its envisaged role in generating one common market on the basis of a prohibition of discrimination along national lines. Wesseling argues that the competition rules represented a normative socio-political choice in favour of using a competition framework, instead of regulation, as the primary means of integrating the economies and then governing these economic processes in the nascent common market.¹²⁶

In light of the duality highlighted by Wesseling, there was a wide remit for steering and nurturing the growth of the competition rules, so the role of Competition Commissioner and the make-up of its Services was to have an important influence on the direction competition policy took from the outset. In the horse-trading and bargaining processes of the corridors of power in Brussels, control of one or other of these offices has been widely sought after. This effect would also tie in with the tendency towards the creation of independent regulatory authorities, considered very important under Ordoliberal thinking.¹²⁷ Much of the importance of these roles has also been borne out in practice as even modest changes in philosophy or attitude of the holder of the Commission’s competition portfolio have been shown to have had wide ranging effects on the direction the Community’s enforcement policy has taken.¹²⁸

The influence of Ordoliberalism in the final wording of Article 101(3) can be seen in how the language used deliberately left room for the establishment of a strong enforcement agency with discretion to calibrate the implementation of the rules in a way it deemed appropriate. In particular, Wesseling points to the references to terms such as ‘substantial’ part of the market, requiring consumers to receive a ‘fair’ share of the resulting benefits, promoting ‘technical or economic progress’, and the requirement that restrictions be ‘indispensable’ to the particular goal, which are all vague enough to allow for a wide discretionary scope.¹²⁹

¹²⁵ REIN WESSELING, *THE MODERNISATION OF EC ANTITRUST LAW* 12 (2000).

¹²⁶ WESSELING, *supra* at 12.

¹²⁷ WALTERS & HAAHR, *supra* at 51.

¹²⁸ MCGOWAN, *supra* at 138.

¹²⁹ WESSELING, *supra* at 19.

The founding Treaty and the implementing Regulation 17/62¹³⁰ established a centralised system for the development and enforcement of competition rules. This allowed for the Commission to take over the direction of the Community's competences in the area and, since then, it has always pursued, with more or less rigor depending on the surrounding circumstances and the political will, a strategic competition policy.¹³¹ The factors influencing the approach taken by the Commission have been a topic of constant debate since then. Giocoli, for one, claims that American antitrust tradition had less influence than is commonly claimed over EU competition policy and that Ordoliberalism played a more important role in the birth of EU competition policy as we now know it.¹³² During the early application of the competition rules by the European Commission we see the economic logic of marginal utility come to shape the view of consumer preferences. This rhetoric often took on a political aspect, in that consumer-led democracy would bring about progress capable of defusing the dangers of class dissent and inequality that threatened to pull at the loose threads of the European project. Internally, the European project was based on a "Community" model designed to forge an ever closer union among the peoples of Europe with the first major objective from the trade perspective being the removal of interstate tariffs achieved in 1968. From the point of view of developing a distinctive brand of European capitalism, the EU at this point represented more than a customs union but less than an a full economic union. This was so because the common policies in coal and steel as well as agriculture brought it outside the definition of a simple customs union, as did attempts to unify transport and energy sectors. However, it remained less than a full economic union as the barriers to the free circulation of goods, services and capital hampered the economic integration while there were still no common macroeconomic or specific sectoral policies. It is submitted that the Commission's use of competition policy played an important role in filling these gaps and pushing the EU further along the road to becoming an 'ever closer union' in the social, political and macroeconomic sense.

¹³⁰ Council Regulation (EEC) No. 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, O.J. 13 (Feb. 21, 1962) 204 – 211.

¹³¹ Roth, *supra* at 41.

¹³² N. Giocoli, *Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy*, 5 J.C.L. & E. 747 (2009).

4) Competition Law in the EC Context – an application of Ordoliberal Principles?

The major practical problem identified as preventing the full implementation of the Freiburg School's ideas was that it is not sufficiently empirically-oriented as a model and so is criticised as being incapable of providing satisfactory analytic tools for a functioning competition policy.¹³³ It has been said that this weakness in Ordoliberalism as a set of workable principles has led to space being left for pure Ordoliberal objectives to be diluted and pushed to the periphery in the practical application of competition policy by the European Commission.¹³⁴ So, although the Ordoliberal theories have been drawn upon by the Commission in some of its latest policy guidelines, discussed below, this is only done in combination with more economic insights which enable a "more realistic, case-orientated approach".¹³⁵ Although the promotion of economic democracy is still widely seen as more important than achieving a perfectly efficient allocation of resources, the role of competition is no longer seen as based solely around ensuring economic freedom.¹³⁶ Thus, in a gradual change also witnessed at the European level and explored further throughout this chapter, it is now argued that a fundamentally different concept of competition has eventually been settled upon such that it has effectively become an instrument for the realisation of more pluralistic objectives laid out by the economic policy authorities.¹³⁷

An absolute priority of competition over democratic and social interests has never existed in EU constitutional law. Such an option is excluded by the very wording of the Treaty and neither the Court nor the Commission have ever contended that such interests could only be provided for subject to the goals of competition being realised. The legal debate, instead, takes place in terms of whether there should be a relative priority of competition over those, and other, interests at any given point. Since the text of the Treaty lends itself to different readings, the point of departure

¹³³ CHRISTIAN A. CONRAD, IMPROVING INTERNATIONAL COMPETITION ORDER AN INSTITUTIONAL APPROACH 24 (2005).

¹³⁴ On the broad range of principles required for a pure Ordoliberal approach, see H. G. Grosseckettler, *On Designing an Institutional Infrastructure for Economics – The Freiburger Legacy after 50 Years*, 21 J. OF ECON. STUDIES 9 (1994).

¹³⁵ CONRAD, *supra* at 25.

¹³⁶ Frederic Jenny, *Competition Law and Policy: Achievements and Failures from an Economic Perspective*, in COMPETITION POLICY ANALYSIS 23 (Einar Hope ed., 2000).

¹³⁷ Hans Otto Lenel, *Does Germany Still Have a Social Market Economy?*, in GERMANY'S SOCIAL MARKET ECONOMY : ORIGINS AND EVOLUTION 266 (Alan Peacock & Hans Willgerodt eds., 1989).

could not be more open. In choosing an interpretation, authorities and lawyers are, to some extent, guided by their political conceptions and understanding of the underlying purpose of EU law. A competition law exclusively aimed at economic efficiency may be given more or less weight in a given instance, but lying behind the European conception of competition law is an Ordoliberal influence in favour of taming private economic power and guaranteeing economic liberty since this balancing of the capitalist tendencies in the bloc is seen as important, socially and constitutionally. Therefore, competition law assumes a public law role revolving around the maintenance of a free and competitive economic system.

Another way in which European competition policymaking and implementation does not strictly adhere to an Ordoliberal point of view is the dubious degree of political intervention into, and sometimes downright manipulation of, the decision making process. In being subject to the approval of the college of Commissioners, the independence of the EU civil servants charged with developing and applying competition rules is sometimes characterised as unduly compromised and influenced by both national and industrial concerns. The granting of broad discretion to political executives is commonly justified on the grounds of being necessary to properly manage new circumstances, such as rapid developments in the legal, economic or technological spheres.¹³⁸ The law, and in particular administrative law, responds to the urge to bring that discretion under the control of transparent rules, even as new discretions are granted.¹³⁹ By the same token, this discretion formed part of the incentive for the emergence of Euro-level lobbying.¹⁴⁰ As European decisions can have an adverse effect on interests some affected parties will always attempt to reduce their own uncertainty by influencing the shaping of new measures and policy.¹⁴¹ Of course, such lobbying leads to more lobbying as one side's attempts to reduce their uncertainty creates more uncertainty for others, which in turn begets more lobbying.¹⁴² For instance, trade unions were inspired to form European level

¹³⁸ On justifications in public law for executive discretion and judicial deference, see *generally* DAVID DYZENHAUS, *THE UNITY OF PUBLIC LAW* (2004).

¹³⁹ Martin Shapiro, *The Institutionalization of European Administrative Space*, in *THE INSTITUTIONALIZATION OF EUROPE* 94 (Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein eds., 2001).

¹⁴⁰ On the impact of lobbying in democracies, see Timothy Besley and Stephen Coate, *Lobbying and Welfare in a Representative Democracy*, 68 *REV. OF ECON. STUDIES* 67 (2001).

¹⁴¹ Sonia Mazey & Jeremy Richardson, *Institutionalizing Promiscuity: Commission-Interest Group Relations in the European Union*, in *THE INSTITUTIONALIZATION OF EUROPE*, *supra* at 74.

¹⁴² JOHN P. HEINZ, EDWARD O. LAUMANN, ROBERT L. NELSON & ROBERT H. SALISBURY, *THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING* (1993).

organisations not only by the opportunity to be involved in meaningful policy development with regional organisations as the EC, but also because of a perceived threat from the expanding multinational corporations who had already organised business groups.¹⁴³ As regards the development of competition policy in the emerging EU capitalist order, the Commission has proclaimed that it is generally receptive to interest groups to a certain extent because ‘interest groups can provide the services with technical information and constructive advice.’¹⁴⁴

Although faced with considerable structural restraints on decisional freedom, former Competition Commissioner Mario Monti always publicly maintained that competition policy was ‘a matter of law and economics, not politics’¹⁴⁵ and, even at the height of some of the most controversial Trans-Atlantic disputes, the relative independence shown by the Commission’s services has been lauded.¹⁴⁶ With time and experience the confidence and capacity of the Commission’s Competition Directorate has grown, and it now operates with significant autonomy – despite the inevitable lobbying and pressure received from above and below. Notwithstanding this, much of the criticism the Commission continues to face is due to its inherently contradictory role in providing both political leadership and an impartial civil service.¹⁴⁷ The large lobbying community which is active in competition law circles in Brussels represents one of the main points of interaction between antitrust, democracy and capitalism in the EU. Following a serious scandal (dubbed the “cash for amendments” affair¹⁴⁸) the European Parliament recently introduced a stricter Code of Conduct for MEPs,¹⁴⁹ requiring them to declare payments received and

¹⁴³ Emil J. Kirchner, *International Trade Union Collaboration and the Prospects for European Industrial Relations*, 3 W. EUR. POLITICS 132 (1980).

¹⁴⁴ Commission Communication No. 93/C63/02 of 12 December 1992 on an open and structured dialogue between the Commission and special interest groups, SEC/92/2272 final.

¹⁴⁵ Press Release, European Commission, Monti Dismisses Criticism of GE/Honeywell Merger Review, Deplores Politicization of the Case (Jun. 18, 2001).

¹⁴⁶ David S. Evans, *The New Trustbusters: Brussels and Washington May Part Ways*, 81 FOREIGN AFFAIRS 71 (2002).

¹⁴⁷ Thomas Christiansen, *The European Commission: The European executive between continuity and change*, in EUROPEAN UNION: POWER AND POLICY-MAKING 100 (Jeremy Richardson ed., 2006).

¹⁴⁸ The English newspaper The Sunday Times conducted an undercover investigation and published an article claiming that several MEPs were willing to take money in exchange for filing legislative amendments. Three MEPs were named – the Austrian centre-right Ernst Strasser, the Slovenian Socialist Zoran Thaler and the Romanian Socialist Adrian Severin. See: Jonathan Calvert, Claire Newell & Michael Gillard, *‘I must be careful: there is a smell to lobbying’*, THE SUNDAY TIMES (Mar. 20, 2011).

¹⁴⁹ Code of Conduct for Members of the European Parliament with respect to financial interests and conflicts of interest (2011), http://www.europarl.europa.eu/pdf/meps/201305_Code_of_conduct_EN.pdf. See, European

potential conflicts of interests, in order to complement the “Transparency Register”¹⁵⁰ which lists the activities and means of organisations representing particular interests at EU level. Critics complain that the Code of Conduct is not sufficiently well enforced and emphasise that registering with the Transparency Register is still voluntary. On the other hand, advocates of the current system argue that EU institutions must interact with a wide range of groups and organisations representing specific interests as part of their function and, since this is required to ensure EU policies reflect citizens' real needs, lobbying is a legitimate and necessary part of the decision-making process. The measures to introduce increased transparency are an acknowledgement that EU decision-making processes must allow for proper scrutiny and accountability.

As a substantive area, competition law and policy has seen a significant growth in the lobbying activities and strategies targeted to it.¹⁵¹ Due to the plurality of access points to the decision-making process, commentators note that influence can be exerted by pressure groups on specific politically sensitive cases. Overall, however, the European competition law enforcement system seems prepared to accept efforts made by companies to influence relevant authorities, including the European Commission, as being a legitimate part of the democratic process, which recognises the right of association and petition.¹⁵² Initially, the Commission deliberately kept a low profile, conducting cases via negotiations and seeking minimal publicity, and the few cases pursued tended to focus on the ‘closed circuit’ style cartels which protected a national market.¹⁵³ Despite the fact that cartels had been tainted by their association with the Third Reich and could arguably have been a legitimate target, the application of the market unification goal instead manifested itself by way of

Parliament Decision No. 2011/2174 of 1 December 2011 amending the Rules of Procedure relating to a Code of Conduct for Members of the European Parliament with respect to financial interests and conflicts of interest.

¹⁵⁰ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, O.J. L277 (Sept. 19, 2014) 11–24. See, <http://ec.europa.eu/transparencyregister/public/consultation/statistics.do?locale=en&action=prepareView>.

¹⁵¹ Cristina Mariani & Simone Pieri, *Lobbying Activities and EU Competition Law: What Can be Done and How?* 5 J. OF EUR. COMPET. L. & PRACTICE 423 (2014).

¹⁵² Adrian J. Vossestein, *Corporate efforts to influence public authorities, and the EC rules on competition* 37 CML REV 1383 (2000).

¹⁵³ See, e.g., Recommendation of Commission of 24 July 1963, Convention Faience (Belgian Tile Cartel), European Commission IX General Report 58 (May 13, 1964).

investigations into vertical agreements involving individual private companies.¹⁵⁴ The Commission's early enforcement priorities thus seemed to revolve around empowering businesses engaged in cross-border transactions and thereby showcasing the benefits of competition as opposed to the traditional "stability" that, seen from today's perspective, amounted to masked discriminatory treatment.¹⁵⁵

A careful line was tread by the Commission in the development of its competition law competences. On the one hand, its style of implementing and enforcing the bloc's antitrust law aimed to promote integration by guaranteeing the proper functioning of the capitalist free market mechanism. On the other hand, as Wesseling points out, this freedom of competition did not stretch as far as to allow business practices which were capable of re-dividing the nascent internal market along national lines, even if it could be argued that they enhanced competition.¹⁵⁶ Integration, however, was never fixed as the sole goal of competition so the objectives of the policy have since been seen as capable of changing as society's needs change - with the result that the Commission has had to juggle, without necessarily assigning priority, a multitude of economic, social, and political goals.¹⁵⁷ In its role as a competition policymaker, Stucke has noted that the Commission accumulates various objectives in the knowledge that some of them will inevitably conflict, such as in the classic example of "freedom of trade, freedom of choice, access to markets, and achievement of economic efficiency to maximise consumer welfare."¹⁵⁸

Thus, when combining a competition policy with an ambitious project to integrate traditionally independent and rival domestic markets, a delicate balancing act was called for. From a realistic point of view, Bouterse rightly notes that it was unavoidable that this process of establishing, and then ensuring the proper functioning, of a single market that itself assumed many characteristics of a national market would require at least some intervention in markets with the aim of economic development.¹⁵⁹ Warlouzet interprets the early years of the Commission's

¹⁵⁴ C.f. Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209 (2005), available at <http://scholarship.law.georgetown.edu/facpub/566>.

¹⁵⁵ TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM 1930–2004 287 (2006).

¹⁵⁶ WESSELING, *supra* at 19.

¹⁵⁷ Maurice E. Stucke, *Reconsidering Competition and the Goals of Competition Law* (2010), <http://ssrn.com/abstract=1646151>.

¹⁵⁸ Stucke, *supra*.

¹⁵⁹ R.B. BOUTERSE, COMPETITION AND INTEGRATION – WHAT GOALS COUNT? 57 (1994).

enforcement of competition policy as typical of the first main transitional period in the history of the European project, and concludes that it was legitimate for Brussels to concentrate information and decisions in its hands because of the public policy justifications supplied by the overarching common market goals. From here on in, however, a slight ideological shift can be identified – within competition policy but also regarding the Community as a whole – whereby the enforcement of the Treaty rules began to be viewed as capable of engendering benefits beyond integration per se, such as protecting consumers, limiting inflation and promoting economic growth.¹⁶⁰

To assess whether the EU's competition laws have been successful in contributing to achieving faster economic growth in the macroeconomic context is difficult because of the various other factors that affect the overall economic growth rate, including other policies introduced at the same time. One positive effect of competition law on economic growth is typically ascribed to the increased productivity that a competition regime tends to facilitate, but a further important impact comes via an effect on investment, especially in development of the EU, because the EU competition regime has had the effect of boosting business confidence and the perception of a level playing field. Perhaps what has impacted on the EU's macroeconomic situation more directly has been the product market deregulation that tends to accompany the application of strong competition principles. Furthermore, regulatory policies specifically designed to introduce and promote competition – especially in network industries – have resulted in productivity gains.

The evolution of the approach to competition policy witnessed within the framework of the European integration project is somewhat matched by the variance in the mainstream view of industrial policy or public support to business. Some authors claim that there is a new European economic and constitutional order centred on State aid law, liberalisation, public monopolies, public procurement which together represent a means of compromising the traditional ideals of European democracy.¹⁶¹ Whilst no state has ever, or could ever, possess complete freedom of action,

¹⁶⁰ Laurent Warloutzet, *The rise of European competition policy, 1950-1991 : a cross-disciplinary survey of a contested policy sphere* 13 (2010), <http://cadmus.eui.eu/handle/1814/14694>.

¹⁶¹ DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* (2010).

nonetheless the emergence and gradual strengthening of the Commission's competences in the State aid field means that national autonomy as regards granting direct and indirect supports to domestic industry is now significantly restricted. The way in which these economic constraints have been brought into existence has been through the adoption of effective enforcement machinery, both embedded within the nation states, through the principle of direct effect,¹⁶² as well as at transnational level through the European Commission's services. The result is that each EU Member State is now enmeshed in a web of supranational economic and legal structures whereby the principles of competition law are applied so as to restrict the manner in which a democratically elected European government decides to spend public money.

In the context of an effort to distil the influencing factors behind EU competition policy generally, in the State Aid sphere it is necessary to look first to the problem of the differing national approaches to industrial policy. The classic example in the European context is between that of the clash between the French and German conceptions.¹⁶³ In France, strong political interference traditionally prevailed while, in Germany's post-WWII social market economy, industrial policy was more implicit and ambiguous and the role of the State was "primarily to develop a regulatory framework (*Ordnungspolitik*) that ensures equilibrium between market and social justice".¹⁶⁴ During the second part of the 1980s, France turned towards a more market-oriented organisation of the economy and, more generally, the gradual completion of the Single Market and the well-documented neo-liberal turn in Western European economic policy served to delegitimise widespread state interventions in industry.¹⁶⁵ This demonstrates the major tension which characterised the modern chapter in the development of the role of competition policy within the overall EU movement. Given the diversity of European society, clearly some important constituents of the European integration project have very different takes on how markets should work. As competition policy has come to be viewed by many as a

¹⁶² Article 108(3) TFEU has direct effect in Member States' judicial systems, therefore parties affected by unlawful State aid can bring direct action before national courts for damages, recovery and/or injunctive measures.

¹⁶³ Geoffrey Owen, *Industrial policy in Europe since the Second World War: what has been learnt?* (2012), <http://eprints.lse.ac.uk/41902/>.

¹⁶⁴ Jean-Marc Trouille, *Re-inventing Industrial Policy in the EU: A Franco-German Approach*, 30 W. EUR. POLITICS 511 (2007).

¹⁶⁵ B. JOBERT, *LE TOURNANT NÉO-LIBÉRAL EN EUROPE* (1994).

free market oriented neo-liberal tradition, a tension arises vis-à-vis Left Wing political parties, which have a traditionally strong core of support in Continental European countries in particular and have long opposed the policies of privatisation and market liberalisation that have permeated the EU in its modern, neoliberal-inspired, configuration. Yet despite the strong influence of parties of the Left in many arenas in Europe, competition policy continues to play a role and gradually increased its importance within the European order.

In the Maastricht Treaty, Article 130 (renumbered Article 157 by the Amsterdam Treaty, now Article 173 TFEU) endowed the Community with a mandate to coordinate the bloc's policy based, inter alia, on the principles that free trade and the competitive functioning of markets should promote permanent adaptation to industrial change in an open and competitive market.¹⁶⁶ Meanwhile, a corollary of this was that industrial problems at a regional or sectoral level should be increasingly resolved by horizontal measures.¹⁶⁷ This reflected an agreement on a horizontal and pragmatic approach, aimed at improving competitiveness.¹⁶⁸ A horizontal industrial policy represents a market oriented approach, the goal of which is sometimes described as being to “*get the basics right, so that firms and industries can emerge and prosper*”.¹⁶⁹ Although most Member States outwardly support the Commission's drive towards reducing state aids, their relationships with big business remain and governments, for political reasons, have sometimes sought to justify public funding of firms by looking to the general interest, both national and European.¹⁷⁰

If pushed to its limits, the competing logics of state aid and regional policy will generate contradictions. States aids rules fall under a market perfection logic, whereas regional policy is about social cohesion or market correction. For some Commissioners such as Leon Brittan, fair competition was a more important and legitimate goal than social cohesion or other values. Conflicts related to the

¹⁶⁶ See generally CARL MICHAEL QUITZOW, STATE MEASURES DISTORTING FREE COMPETITION IN THE EC: A STUDY OF THE NEED FOR A NEW COMMUNITY POLICY TOWARDS ANTI-COMPETITIVE STATE MEASURES IN THE EMU PERSPECTIVE (2001).

¹⁶⁷ European Commission Communication, *Industrial Policy in an Open and Competitive Environment – Guidelines for a Community Approach*, 90 COM 556 (Nov. 16, 1990).

¹⁶⁸ E. Maincent and L. Navarro, *A Policy for Industrial Champions: from picking winners to fostering excellence and the growth of firms*, 2 INDUSTRIAL POLICY AND ECONOMIC REFORMS PAPERS (2006).

¹⁶⁹ E. Cohen and J.-H. Lorenzi, *Politiques industrielles pour l'Europe*, 26 RAPPORT DU CONSEIL D'ANALYSE ÉCONOMIQUE 90 (2000).

¹⁷⁰ Patrick Le Galès, *Est Maître Des Lieux Celui Qui Les Organise: How Rules Change When National and European Policy Domains Collide*, in THE INSTITUTIONALIZATION OF EUROPE, *supra* at 139.

interpretation of EU rules are not simply formal or legalistic, but deeply political so questions over the content and application of individual rules mask deeper political and ideological clashes. State aid controls must be viewed in the modern macroeconomic context and, in that sense, serve to tie the principles of capitalism and democracy together in the European context. For instance, imposing controls on State aids in a multinational context can help prevent harmful predatory behaviour of national firms and, in the end, encourage domestic legislators to develop procompetitive solutions. State aid can correct market failures associated with capitalist systems, such as externalities and public goods, and informational asymmetries in capital markets. Clearly, however, all these potentially positive effects of correcting market failures have to be balanced against the possibly larger effects of government failure.

From one perspective, the European Commission could be seen as overstepping its role by preventing governments from engaging in certain types of public spending. In this sense, the Commission is necessarily overruling the citizens of a democratic country by restricting their governments from spending public funds inefficiently. However, even putting aside the question of whether such spending causes harm to other countries, State aid controls assist countries in their proper functioning by acting to limit the power of interest groups. Therefore, they should more correctly be seen as a supplement to national norms such as constitutional clauses constraining the ability of their governments or parliamentary majorities to favour arbitrarily selected private firms. State aid controls, like competition policy principles in general, have their basis in core values that are concurrently present in many constitutions, such as general antidiscrimination and equality clauses.

5) Mainstreaming and Glimpses of Competition Policy's Role

Continuing our study of how the European vision of competition policy emerged over time, the 1970s see the European Commission becoming more comfortable and assertive in its role as the engine behind the integration process. As was alluded to above, the Commission benefited from the wide-ranging powers granted to it to guide the emergence of the EU's capitalist economy through the competition provisions of the Treaty to overcome its initial – and arguably continuing – problems in proclaiming its relevancy and responding to criticism of its democratic legitimacy.

By undertaking a study of the Commission's policy pronouncements, Bouterse unearthed significant insight into how the different pieces of the puzzle were put together without any one completely overshadowing the others.¹⁷¹ Initially, Brussels was careful to state that the rules on competition could be applied neither in isolation nor independently of Community action in other fields, so there appears to have been a clear awareness from the beginning that competition is a cog in the Community's wheel rolling to grander destinations.¹⁷² Indeed, even these early remarks must be seen in the context of the economic integration already underway at the time and in light of the Commission's pre-existing designs on founding not only an economic, but also a monetary union.¹⁷³

The European Commission's reaction to economic developments must also stay somewhat in line with Member State and even corporate interests, albeit with a more Euro-centric approach. The view taken by the Commission during the economic downturn of the 1970s, for example, was a ruthlessly pragmatic in that it effectively granted preferential treatment to certain sectors facing fierce competitive pressures and, in an attempt to discourage governments from wastefully supporting duplicate national favourites, promoted *Eurochampions*. Ostensibly its policy was shaped by democratic considerations of the public interest manifested in pro-employment initiatives, but it was also conducted in an environment where the usefulness and relevance of competition rules were being questioned while the whole integration project again threatened to fall apart.¹⁷⁴

In this period, European competition law and policy distinguishes itself from the purist or orthodox model of competition law, as originated in the advanced industrial economies of the Fordist West, which presumes a capitalism system that is founded upon a rational set of objective economic principles that in turn objectively dictate the construction and demands of competition law. In such an environment, there cannot be any room for political influence as any such manoeuvring amounts to introducing extraneous and often corrupting inputs into the regulatory process. As such, competition policy as it developed in Europe had to reconcile the mainstream

¹⁷¹ BOUTERSE, *supra*.

¹⁷² European Commission, *First Report on Competition Policy* 12 (1972).

¹⁷³ On the history of the European Monetary Union from the Commission's perspective, see George Ross, *Globalization, Democratization, and the Moore Theses*, in DEMOCRACY, REVOLUTION, AND HISTORY 240 (Theda Skocpol ed., 1999).

¹⁷⁴ European Commission, *supra* at 17.

capitalist tendencies that came to be the driving force of the trade bloc with the social and democratic character of the broader integration project.

At no time was this balancing act more apparent than with the onset of a deep economic crisis in 1973, which was to last well into the next decade.¹⁷⁵ Europe's nascent competition policy found itself having to respond to an economy experiencing sharp decreases in output, productivity and exports combined with increasing unemployment and inflation.¹⁷⁶ With their backs to the wall, integration and competition slipped down the list of priorities for Member States who largely sought to face up to the 'American challenge' through the creation of national champions and boosting strategic national industries.¹⁷⁷ As regards the evolution and balancing of competition policy and enforcement objectives, here again we see the surrounding economic circumstances necessitating a distinct move away from Ordoliberal ideas which would have envisaged an 'ordered' economy, consisting to the maximum possible extent of SMEs,¹⁷⁸ competing vigorously against each other under the watchful eye of the politically-neutral regulator. In fact, Buch-Hansen and Wigger see this period as a low point in the influence of Ordoliberal policies in European competition policy because national governments looked to bolster flagging industries through their acquiescence to economic concentration and the encouraged emergence of 'big business'.¹⁷⁹

This period saw more discrete changes in the application and enforcement strategies of the Commission, rather than any great shift in the substantive aims of the policy as a whole. Rather, Brussels weathered the economic storm as best it could, protected its vulnerable reputation and kept its powder dry for the challenges ahead. The Commission was not empowered to conduct a genuine industrial policy which

¹⁷⁵ On the effect of the oil crisis of the 1970s on the European economy, see Ivan T. Berend, *A Restructured Economy: From the Oil Crisis to the Financial Crisis, 1973–2009*, in THE OXFORD HANDBOOK OF POSTWAR EUROPEAN HISTORY (Dan Stone ed., 2012).

¹⁷⁶ J.A. FRIEDEN, GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY 363 (2006).

¹⁷⁷ Hubert Buch-Hansen & Angela Wigger, *Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy*, 17 RIPE 28 (2010)

¹⁷⁸ On this aspect of Ordoliberalism as applied in the EU, see generally: Angela Wigger, *Towards a Market-Based Approach*, in THE TRANSNATIONAL POLITICS OF CORPORATE GOVERNANCE REGULATION (Henk Overbeek, Bastiaan van Apeldoorn & Andreas Nölke eds., 2007); Peter Nedergaard, *The Influence of Ordoliberalism in European Integration Processes – A Framework for Ideational Influence with Competition Policy and the Economic and Monetary Policy as Examples* (2013), <http://mpira.ub.uni-muenchen.de/52331/>.

¹⁷⁹ Buch-Hansen & Wigger, *supra* at 29, pointing to the reluctance to adopt merger controls and the legality of holding dominant positions as evidence of a bias towards 'champions'.

reduced the degree of flexibility it had when applying its antitrust policy.¹⁸⁰ Nevertheless, in those circumstances, the Commission felt a particular need for its competition policy to go beyond simply sustaining effective competition – it had to be used to further a more general “industrial policy which promotes the necessary restructuring”.¹⁸¹

In its justification of the exceptional arrangements made in the mid-1980s to accommodate the petro-chemicals sector,¹⁸² the Commission argued that consumers would stand to gain from the improvement in production since the industrial structure which would eventually emerge would be healthier and more competitive, and therefore able to offer them better products thanks to greater specialisation. In the context of this chapter, this view is interesting because this reasoning goes directly against belief in competition as the main principle for economic organisation and illustrates the difference that a particular economic backdrop can make to the way in which competition policy objectives are expressed and rationalised.¹⁸³

In the context of the aims of this chapter, this period in the development of EU competition law and policy demonstrates that there are policy objectives other than purely capitalist goals, such as GDP growth, behind EU competition law and the EU has been – albeit occasionally and sometimes unpredictably – a champion of such objectives by taking them into account when formulating and applying policy. However, the impact of such non-capitalist or non-economic goals is difficult to measure and the effect of the EU’s competition regime on social goals such as reducing inequality has been little studied. Competition regimes are often assumed to be increase inequality as competition creates winners and losers but the EU competition policy focus is on preventing restrictions of competition that benefit the select few while causing harm to the wider public. In that sense, EU competition policy is a public law tool to balance the excesses of a capitalist and competitive order and align the economic functioning of the EU with the democratic ideals of the EU societal structure. For instance, proponents of EU competition policy will point

¹⁸⁰ WESSELING, *supra* at 37.

¹⁸¹ European Commission, *X Annual Report on Competition Policy* 9 (1981).

¹⁸² Case IV/30.863, Commission Decision, BPCL/ICI (Jul. 19, 1984); Case IV/31.055, Commission Decision, ENI/Montedison (Dec. 4, 1986).

¹⁸³ WESSELING, *supra* at 39.

out that the poorest in society receive considerable protection from competition policies which prevent the higher prices or lower quality and choice that result from restrictions on competition. Inevitably, however, there is often a gap between reality and perceptions as regards the true strength of competition policy to protect social and democratic concerns in the broader economic context. For instance, employment concerns have been prominent in competition policy pronouncements and, occasionally, enforcement actions at different stages over the course of the development of the EU. Employment issues arise in the competition context because restrictions on competition have been shown to reduce output and employment. On the other hand, the productivity gains caused by competition can result in layoffs. Competition policy, therefore, impacts on unemployment because it represents a manifestation of practical capitalist policies of economic and technical progress. Within each competition decision, therefore, is an implicit or explicit attempt to temper the impact of capitalist-inspired economic progress in order to render EU competition policy – and with it the whole European integration project – more democratically acceptable to European societies.

A noticeable effect of the aftermath of the economic, fiscal and employment crisis of the 1970s was that it served to strengthen the social aspects of the Community and saw the project take on deeper and broader goals.¹⁸⁴ There had already been a subtle change in tack as regards certain goals of the Community project in general:¹⁸⁵ after decades of social legislation focusing on the free movement of workers, the European movement declared that economic expansion was not an end in itself; rather the Community should be geared to lead to improvements in general living standards and especially working conditions for its citizens.¹⁸⁶ This demonstrates that social concerns came to have an impact at a European policy-setting level, as political power was gradually being used to supersede, supplement

¹⁸⁴ CONSTANZE SEMMELMANN, SOCIAL POLICY GOALS IN THE INTERPRETATION OF ARTICLE 81 EC (2008).

¹⁸⁵ For instance, on the introduction of a proposed environmental plan at the Paris Summit of 1972, see: Laura Scichilone, *The Origins of a Common Environmental Policy*, in *THE ROAD TO A UNITED EUROPE: INTERPRETATIONS OF THE PROCESS OF EUROPEAN INTEGRATION* (Morten Rasmussen & Ann-Christina L. Knudsen eds., 2009).

¹⁸⁶ Gerda Falkner, *The EU's Social Dimension*, in *EUROPEAN UNION POLITICS* (Michelle Cini & Nieves Pérez-Solórzano Borragán eds., 3rd ed 2010).

or modify the operations of the European economic system to achieve results which it could not achieve alone.¹⁸⁷

This phenomenon manifested itself in competition law through the ECJ's interpretation of the central aim of the then Article 81(3) as being to reach a degree of 'workable competition' sufficient to achieve the basic requirements and objectives of the Treaty in general.¹⁸⁸ This came to light in the *Metro* case regarding a controversial style of selective distribution system.¹⁸⁹ The Court, in confirming the Commission's practice, approved the selective distribution system in *Metro* because it did not threaten the formation of a single market or reduce "the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty".¹⁹⁰ The Court also stated that this degree of competition may vary with the product and economic structure of the relevant market in question. The general tone of this judgment acted as confirmation that social policies did have a role to play in the competition framework after all – to such an extent that this case is sometimes seen as a departure point for the inclusion of non-competition goals.¹⁹¹ The Court's treatment of the employment advantages of the arrangements was non-conclusive, but the mere reference to the unfavourable market conditions has been taken as conflicting with the traditional theory of viewing and trusting markets to be self-regulating.¹⁹² This kind of decision is a good example of the balancing between the various goals within EU competition law and policy.

During the 1970s the development of competition policy bore witness to the strain being placed on the economic and political integration project as a whole, and the Ordoliberal principles in particular. The types of objective attributed to individual applications of competition policy often had pragmatic, crisis-related goals in the short-term but the long-term goals of integration and global competitiveness remained in the background of each instance of the Commission's thinking. The

¹⁸⁷ T. H. MARSHALL, *SOCIAL POLICY IN THE TWENTIETH CENTURY* (4th ed, 1975).

¹⁸⁸ In the terminology of the EU, the notion of workable competition revolves around the degree of competition necessary to ensure the observance of the basic requirement and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.

¹⁸⁹ Case 26/76, *Metro Großmarkte v. Commission*, [1977] ECR 1875, paragraph 20.

¹⁹⁰ *Metro*, *supra* at para. 4.

¹⁹¹ SEMMELMANN, *supra* at 123. See also: Ben Van Houtte, *A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85*, 4 Nw. J. Int'l L. & Bus. 497 (1982).

¹⁹² SEMMELMANN, *supra* at 122.

painful restructuring processes imposed, albeit gradually, on some of the Community's oldest industries show the Commission's commitment to instilling a culture of competition in Europe and also serve as a testament to its confirmed position as the dominant force within the policy-setting arena.

From the 1970s onwards, big business took on a new dimension in Europe and we see the forces of capitalism using channels of the Member States' and the EU's democratic institutions to influence competition law – and vice versa. The corporate growth, being a result of Member State industrial policy at the time, became a target for a relatively sudden reinvigoration of policy making and application in the 1980s. Political scientists argue that, in this regard, competition regulation merely reflected a broader shift towards a newly emerging Neoliberal order – all of which took place against the background of globalisation and the trans-nationalisation of capital.¹⁹³ In practice, this translated the adoption of a 'competition only' vision whereby primacy was given to efficiency criteria. Indeed, Apeldoorn has stated that the neo-liberal view that competition, and competition alone, can create efficiency and economic growth has cast a spell over the European integration process ever since.¹⁹⁴ The ascendance of economic liberalism in policy-making circles also provided the European Commission President Jacques Delors with fertile conditions to advance the Commission's institutional grandeur. The idea that economic competitiveness could best be served through more effective competition was deemed to require full implementation of the single market program – which could only be brought about by the European Commission's regulatory apparatus.¹⁹⁵

The choice of a more integrated approach at this time was linked to the key neo-liberal tenet of economic and social policy being two interdependent aspects of an indivisible whole.¹⁹⁶ Whereas, during the early stages of the single market project, the rhetoric about 'social Europe' seemed to suggest Europe would aim to replicate Germany's social market economy, when the liberal market dimension of the project gained momentum the 'social' aspects of the model came to be iterated so as to

¹⁹³ THE POLITICS OF EUROPEAN COMPETITION REGULATION - A CRITICAL POLITICAL ECONOMY PERSPECTIVE (Hubert Buch-Hansen & Angela Wigger ed., 2011).

¹⁹⁴ Bastiaan van Apeldoorn, *Foreword*, in THE POLITICS OF EUROPEAN COMPETITION REGULATION, *supra*.

¹⁹⁵ M.P. Smith, *Germany's Quest for a New EU Industrial Policy: Why it is Failing*, 14 GERMAN POLITICS 315 (2005).

¹⁹⁶ M. Wegmann, *European Competition Law – Catalyst of Integration and Convergence*, in THE MANY CONSTITUTIONS OF EUROPE 95 (Kaarlo Tuori & Suvi Sankari eds., 2010).

highlight the benefits of economic efficiency and objectives related to job creation and social inclusion.¹⁹⁷

By way of investigating the source of this change we can remark that, from the mid-1980s, European political and corporate elites started to follow the Anglo-Saxon world's experience of Reaganomics and Thatcherism by endorsing neoliberal ideas.¹⁹⁸ In particular, the European Roundtable of Industrialists (ERT) was vocal in encouraging programs of privatisation to put highly concentrated markets and monopolies in private hands, albeit under the supervision of European and national authorities.¹⁹⁹ Other potentially competitive markets were deregulated and, in the late 1980s, the reforming Delors Commission even eventually introduced merger regulation at the European level.²⁰⁰ Once again, the influence of vested interests, especially the ERT, became particularly apparent during the 1980s and these forces for change in competition policy were later seen as crucial in ending the general European integration paralysis that stretched back to the 1970s and was beginning to take hold again in the 1980s.²⁰¹ Although the 1980s are often downplayed when examining the history of European competition law,²⁰² the subtle readjustment in outlook outlined above has had a profound impact on the development of the doctrine henceforth. The trend begun by the Delors Commission has continued, as we shall see below, because the business lobby and the free-trade objectives of the European project as a whole have retained a significant influence over the objectives and practices of competition policy.

6) Competition Policy in the Changing Macroeconomic Context

A remarkable combination of domestic agendas of the most powerful heads of state at the time and their respective views on macroeconomics resulted in the Single European Act of 1985 with the aim to create a single European market by the end of 1992. Germany's Kohl was keen to build a reputation by acting on the European stage, France's Mitterrand was looking for something to distract attention from a

¹⁹⁷ Smith, *supra*.

¹⁹⁸ HUW MACARTNEY, *VARIEGATED NEOLIBERALISM: EU VARIETIES OF CAPITALISM AND INTERNATIONAL POLITICAL ECONOMY* (2010).

¹⁹⁹ JÉRÔME MONOD, PEHR G. GYLLENHAMMAR & WISSE DEKKER, *RESHAPING EUROPE: A REPORT FROM THE EUROPEAN ROUND TABLE OF INDUSTRIALISTS* (1991); BASTIAAN VAN APeldoorn, *TRANSNATIONAL CAPITALISM AND THE STRUGGLE OVER EUROPEAN INTEGRATION* (2003).

²⁰⁰ *CASES IN EUROPEAN COMPETITION POLICY: THE ECONOMIC ANALYSIS 5* (Bruce Lyons ed., 2009).

²⁰¹ R.W. COX & D. SKIDMORE-HESS, *US POLITICS AND THE GLOBAL ECONOMY* (1999).

²⁰² See, e.g., WESSELING, *supra*.

doomed domestic macroeconomic policy that had been humiliated by international financial markets, and Thatcher had finally found something from Brussels that she could support after years of obstructionism.²⁰³

The Internal Market must be understood against the background of the mutual recognition of national rules by the ECJ in the *Cassis de Dijon*²⁰⁴ case and the subsequent adoption of the Commission's White Paper on the completion of the internal market in 1985.²⁰⁵ The economic policy developed during this period, with competition policy at its heart, requires the primacy of the market, whereas the type of competition policy that some countries would have preferred, i.e. one capable of being dominated by industrial policy prerogatives, requires the primacy of policy. Mestmäcker, for one, went to lengths to highlight this conflict by using the example of the need for the EU to be able to respond to the pervasive problems posed by stagnant industries.²⁰⁶ Unlike its predecessor ECSC Treaty, the Treaty of Rome did not feature instruments to fight the structural crises that consumed the public's attention for much of the 1970s and 1980s. Competition policy, by providing the tool for the European institutions to engage with struggling industries, allowed the EU to remain relevant. Even though, as we have seen, competition policy became increasingly influenced by neo-liberalism, it still remained a sufficiently flexible tool to allow a plethora of social and democratic interests be recognised when dealing with industries hit by a crisis. In this sense, one could ask whether today's competition policy operates subject to the primacy of the market. When it comes to balancing the negative aspects of capitalism and then overall competitive order introduced and encouraged by the European Union, a strong competition policy may play a moderating role which is capable of quelling the calls for the re-introduction of stronger regulatory policies and oversights in the aftermath of the political and financial crises of recent years.

²⁰³ Bruce Lyons, *An Economic Assessment of European Commission Merger Control: 1958–2007*, in *COMPETITION POLICY IN THE EU FIFTY YEARS ON FROM THE TREATY OF ROME* 140 (Xavier Vives ed., 2009).

²⁰⁴ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²⁰⁵ European Commission, *Completing the Internal Market: White Paper from the Commission to the European Council* (Jun. 28, 1985) COM(85) 310, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.

²⁰⁶ Ernst-Joachim Mestmäcker, *Auf dem Wege zu einer Ordnungspolitik für Europa*, in *EINE ORDNUNGSPOLITIK FÜR EUROPA. FESTSCHRIFT FÜR HANS V.D. GROEBEN* (E.-J. Mestmäcker, H. Möller & H.P. Schwartz eds., 1987).

In 1993, Commissioner van Miert showed signs of a further evolution in the set of goals pursued through competition policy by the Commission, as the Commission benefitted from having secured its position as the undisputed driving force behind the definition and development of the Community's overall objectives.²⁰⁷ On one level the realignment reflects the Ordoliberal influence on the development of modern competition policy in that it places a heavy emphasis on its role in nurturing a "pluralistic democracy which could not survive a strong concentration of economic power" while at the same time indicating its hybrid nature by referring to its economic, political and social goals – mentioning in particular the objectives of efficient production, building a common market with harmonised economic policies and growth.²⁰⁸

This shift must be understood in the wider context of the Union becoming ever broader and deeper, and in light of the then Commission President Jacques Delors' threefold blueprint for European economy and society, based on a 'tritych' of *co-operation* between the social partners, *competition* in the market and *solidarity* through redistribution.²⁰⁹ The 1993 White Paper²¹⁰ was designed to redress the balance within the triptych in favour of co-operation and solidarity, with competition having been the key priority of the internal market program.²¹¹ It also constituted the first endorsement of the idea that competition leads to more competitiveness – an

²⁰⁷ EUGÈNE BUTTIGIEG, *COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST : A COMPARATIVE ANALYSIS OF US ANTITRUST LAW AND EC COMPETITION LAW* 130 (2009).

²⁰⁸ Commissioner Karel Van Miert, *Frontier-Free Europe* (May 5, 1993), quoted in Per Jebsen & Robert Stevens, *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 450 (1996); see also Karel Van Miert, *The Future of European Competition Policy*, Speech IV/1351/98-EN, (Sept. 17, 1998) available at http://ec.europa.eu/competition/speeches/text/sp1998_042_en.html.

²⁰⁹ HELEN DRAKE, *JACQUES DELORS: PERSPECTIVES ON A EUROPEAN LEADER* 129 (2000).

²¹⁰ European Commission, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century - White Paper*, 93 COM 700 (1993).

²¹¹ DOMINIQUE WOLTON, *JACQUES DELORS - L'UNITE D'UN HOMME: ENTRETIENS AVEC DOMINIQUE WOLTON* 222 (1994).

idea that has been largely followed as recently as the Lisbon Agenda²¹² and Europe 2020²¹³ policy restatements.

In line with the view presented here of competition policy as a tool for political balancing between the social, capitalist and democratic tendencies of the EU, the contemporary academic reaction to Commission pronouncements from this era was that more and more decisions took the efficient allocation of resources to be the predominant goal of EC competition policy.²¹⁴ This supports the view that there was, during this period, a discernible and deliberate shift away from the focus on achieving market integration through the protection of the economic freedoms of market participants, and the trend has largely continued in the meantime.

From the above one can observe the effect that changes in the overarching aims of the European project had on the immediate goals of competition policy. It has been argued that this change in emphasis in competition policy came as a part of political attitudes in Europe generally shifting towards supporting market forces, as illustrated especially in the context of the deregulation and liberalisation of key network industries around this period.²¹⁵ More poignant, perhaps, is the sense of competition rules once again being instrumentalised by an opportunistic Commission with the result that some of its core original principles, such as those inherited from Ordoliberalism, were marginalised. Importantly, competition policy further enhanced its status as a considerable tool at the Commission's disposition and its timely manipulation is testament to its importance for the project as a whole.

The main reason behind this change may well be the Commission's attempt, according to its rhetoric at least, to develop European competition policy as an apolitical element of the European project by placing the emphasis on the economic and efficiency aspects of competition law in practice. However, in line with the thesis

²¹² The Lisbon Strategy for Growth and Jobs was launched in 2000 with the objective for the EU "to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment". See European Commission, *Lisbon Strategy evaluation document*, SEC (2010) 114 (Feb. 2, 2010), available at http://ec.europa.eu/archives/growthandjobs_2009/pdf/lisbon_strategy_evaluation_en.pdf.

²¹³ European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 (Mar. 3, 2010) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

²¹⁴ Semmelmann, *supra* at 18.

²¹⁵ LARS BERGMAN & ROMESH VAITILINGAM, EUROPE'S NETWORK INDUSTRIES : CONFLICTING PRIORITIES: TELECOMMUNICATIONS 39 (1998).

presented here, each substantive position taken by the Commission based ostensibly on economic grounds is, simultaneously, a decision to follow a particular political path. Since economic viewpoints are not politically neutral, the Commission's longstanding rhetoric that competition is "apolitical" and "based on economics, not politics" belies competition policy's overarching function as a malleable political tool in the broader European project.

Competition policies and rules have been adopted throughout the world, including by number of ostensibly communist countries. The seemingly universal acceptance of competition policies, and particularly their ever increasing popularity amongst the demos, may only be partially attributable to market liberalisation and neo-liberal values. The European Commission has been careful to present tackling anticompetitive behaviour as being about preventing concentrations of economic power from being artificially created and abused. In that sense, competition policy provides an important tool for the European Commission to balance some of the unpopular and harsh aspects of capitalist economies. Competition policy as it has been developed in the EU context prevents wealth transfers from consumers to wealthy businesses, promotes and protects individual choice and brings a host of other benefits that the European Commission in particular are quick to emphasise.

The founding Treaty and the implementing Regulation 17/62 established a centralised system for the development and enforcement of competition rules, which was in itself unusual in that the competition sphere was the only one where the Commission is entitled to apply Community-based rules directly to citizens and firms.²¹⁶ Nevertheless, by the 1990s there was a sense of equilibrium in the enforcement of competition rules and the development of policy goals within Europe. The Commission operated within its sphere, seldom causing problems for Member State authorities and although there were complaints that the Commission was becoming too powerful and that the most important decisions were moving from the Member States to Brussels, the period between 1963 and 1998 was, from the point

²¹⁶ Claus Dieter Ehlermann, *The Modernization of EC Antitrust Policy: a Legal and Cultural Revolution*, 37 C.M.L.R. 540.

of view of practitioners and most likely the large enterprises who had benefitted from the policy's flexibility, seen as "unquestionably...one of success".²¹⁷

During this period the implementation of Community competition law had been dominated by the Commission, which had built a Brussels-centric system around its monopoly on examining notifications and granting exemptions while national competition agencies' incentives to follow independent interpretations were 'chilled' by the Commission's dominance.²¹⁸ Rather, the national agencies and courts were recruited as decentralized enforcers of the Commission's creed: firstly through the ECJ's application of its direct effects and supremacy doctrines to establish that individuals could enforce competition complaints at the national court level; and then through the *Delimitis*²¹⁹ jurisprudence which set out a standard approach for national courts to ensure conflicting decisions were avoided.²²⁰

Whether or not this central accumulation of power in the hands of the Commission resulted in the optimum possible level of compliance and enforcement activities is debatable, but over the years the Commission did arguably succeed in sowing the seeds for a competition culture to take root across the Union.²²¹ The perennial tension between French 'dirigisme' and German 'Soziale Marktwirtschaft', as touched upon above, continued at a European level and governmental interference in markets was increasing at the behest of promoters of industrial policy.²²² In the macroeconomic scenario that had prevailed up to this point, the vested interests impacted by competition reforms were so tightly entrenched that a strategy of widening the political base for reform through social and political dialogue would have needed the support of virtually all social or political actors, with the result that convincing opponent to the reforms through targeted concessions would not have

²¹⁷ Ian Forrester, *Modernization of EC Competition Law*, 23 FORDHAM INT'L L. J. 1037 (1999).

²¹⁸ G. Marengo, *The Uneasy Relationship of Article 85 EEC as Between Community and National Levels*, 20 FORDHAM L. INST. 623 (1994).

²¹⁹ Case C-234/89, *Stergios Delimitis v. Henniger Brdu AG*, 5 C.M.L.R. 210 (1992). See also Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd*, 4 C.M.L.R. 14 (2000).

²²⁰ CLIFFORD A JONES, *THE SECOND DEVOLUTION OF EUROPEAN COMPETITION LAW: EMPOWERING NATIONAL COURTS, NATIONAL AUTHORITIES, AND PRIVATE LITIGANTS IN THE EXPANDING EUROPEAN UNION* (2003) available at <http://aei.pitt.edu/2882/>.

²²¹ CLIFFORD A JONES, *THE SECOND DEVOLUTION OF EUROPEAN COMPETITION LAW: EMPOWERING NATIONAL COURTS, NATIONAL AUTHORITIES, AND PRIVATE LITIGANTS IN THE EXPANDING EUROPEAN UNION* 22 (2003) available at <http://aei.pitt.edu/2882/>. See also, Eleanor Fox, *Modernisation: Efficiency, Dynamic Efficiency and the Diffusion of Competition Law*, in Claus-Dieter Ehlermann & Isabela Atanasiu, *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Bloomsbury 2001).

²²² Ehlermann, *supra*.

been feasible without a massive watering down of the reforming effort. Thus, the legal and political climate was essential for the acceptance and feasibility of competition as the underlying market principle could only really be imposed from above by the Commission. Once this was sufficiently in place, it could proceed with the decentralisation process which came as part of the fundamental changes undertaken by the European project around forty years after its inception.

With the expansion of EU membership to fifteen in 1995 and the prospect of even more new Member States on the horizon, there arose a need to adapt the functioning of the European competition authorities – both at the central and Member State level.²²³ This led to a series of political and diplomatic power-plays in which the main actors in the competition field sought to fight their corner and influence the outcome of these unavoidable changes. The vested interests saw this as a once-in-a-generation opportunity to influence the future direction of the system, so the winds of change served to fuel criticisms of the existing system. In line with the trend highlighted in the preceding sections, the business and legal circles were very effective in representing their complaints and, perhaps sensing blood, swiftly became more targeted and specific as regards the broad areas of discretion held by Brussels under the then Article 81.

While these perceived improvements in Member States' status and role within the competition law regime had the effect of ensuring that they were collectively passive in the drafting process, the Commission cemented its central role as the driving force in the domain by requiring that EU competition law be applied by Member States to all conduct that had a European dimension. This strengthened the position and role of the Commission and becomes even more significant when seen in light of the substantive changes in the make-up of competition law and policy which occurred parallel to these procedural changes.²²⁴

As witnessed by the preceding sections, the surrounding economic and political context can have an important effect on the choice of goals sought through competition law, and therefore how those rules are calibrated and applied in practice. This is also true when we speak of the modernisation process undertaken in the

²²³ David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L L.J. 1238 (2007).

²²⁴ Gerber, *supra* at 1246.

early years of the 2000s. The disparity between the rapid growth enjoyed by the U.S. economy in the 1990s and the difficulties encountered by their European counterparts saw a re-emergence of the 'American challenge' as a policy concern, with consequent effects on the goals pursued by the EU's brand of a capitalist economy and EU competition policy in particular.²²⁵ Generalist measures were designed to foster the competitiveness of European industry,²²⁶ but there was also a push to remove any laws affecting businesses that could be perceived as stricter than their American equivalents and thereby inhibiting growth.²²⁷ Thus, the period was one when the aim was not to develop a distinctly European regime to suit the needs of European businesses, consumers and societies but, rather, when EU policymakers came under pressure to replicate the US system in a transatlantic game of competitiveness catch-up.²²⁸ The types of reforms envisaged by the EU involved taking away rents, often by reducing or modifying perceived "acquired" rights, across social groups that had been better protected in some national economies than in others. Clearly, competition policies affect the rents of both entrepreneurs and their workers and resistance from the beneficiaries of such rents or acquired rights formed the major to introducing reforms due partly to the political influence of such social groups in the Member States. Therefore, the strength of resistance in an industry was not only affected by the size of rents, but also by the ability of workers, firms and their national representatives to organise and have their interests taken into account at the supranational level. This process of introducing reforms in the face of macroeconomic trends coupled with social pressures from well-resourced national lobbies, tells the tale of European competition law and policy as it relates both to the intrinsic characteristics of the industries and to the degree of market and bargaining power allowed by product and labour market institutions.

Throughout this tumultuous period, however, the Commission strived to ensure that it was in a position to introduce a successful competition policy for the EU with a

²²⁵ For a contemporaneous account, see Daniel J. Gifford & Robert T. Kudrle, *European Union competition law and policy: how much latitude for convergence with the United States?*, 48 ANTITRUST BULL. 727 (2003).

²²⁶ See, e.g., The "Lisbon Strategy" promoted by the Commission in 2000.

²²⁷ For a comparison of post-modernization EU and US competition policy, see DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* (2015).

²²⁸ For a contemporaneous view of the modernization of EC competition policy, see Alan Riley, *EC Antitrust Modernisation*, 11 E.C.L.R 604.

balancing function and ultimate definition of success based on the needs of European interests – not a copy and paste of US ideals. In this respect, the important outcome of this period was the dual procedural and substantive modernisation that has seen the European Commission augment and ring-fence its power in important ways so that it retained effective control of most significant competition law issues throughout Europe.

7) Conclusions – Influences on the Goals of European Competition Policy

The aim of this chapter was to lay the groundwork by examining the ever-evolving aims behind the incorporation of competition rules into the European project and studying how the development of the doctrine has been moulded to the specific circumstances and outlooks encountered in post-war Europe.

The gradual and incremental way in which competition policy was mainstreamed into the European Community's overall objectives has a clear result: competition rules, for better or worse, are at the heart of the grand European project and they have been used as a tool for the original goal of integration as well as to contribute towards the EU's more rounded and socially aware objectives. So it is not just the objectives of competition policy which shift and morph, but also the reasons underlying its presence at the top-table of EU policy branches and even its very identity.

Economic analysis of the relative economic performance of the EU and other capitalist economies generally tends to emphasise the role of labour and capital markets in differentiating between the different outcomes achieved by different economies. However, it is clear in this author's view that a strong competition policy, or the absence thereof, can interact with and facilitate other economic policies to such an extent that it has as important a role in achieving economic outcomes as macroeconomic policies writ large. When it comes to introducing capitalist economic and technical progress, for instance, the presence of a competition policy as has been developed in the EU can balance the harsh aspects of the capitalist-inspired policies in order to render the overall project more acceptable to modern democratic societies. Due to the labour-intensity of certain well-protected sectors of the European economy, socially-inspired labour laws had the effect of hindering new entrants by denying them the full flexibility in employment conditions that would

otherwise be permitted under legislation drafted purely from a modern capitalist standpoint (such as flexibility in wages and work rules). Such rules threatened the fabric of the EU since they risked restraining the direct competition that liberalisation was introduced to foster. However, gradually competition law was employed, in tandem with other policy initiatives, to ensure that labour regulations do not pose a significant impediment to liberalisation of strategic sectors and markets in the EU as whole, even if provisions and industries in certain member states may warrant further consideration to this day.

Since the modernisation process in EU competition law, many have come to perceive competition policy as a purely economic policy or simply an instrument in the EU's general industrial policy.²²⁹ From this perspective, competition policy is reduced to being merely a question of regulating the market and enforcing the rules in the light of precise economic objectives. However, others have broader perceptions of EU competition law and policy. This contribution has set out to show that competition policy in post-war Europe has not purely been about regulating the economy along free market principles, but rather it has always had “political” goals.²³⁰ Competition policy, therefore, plays a role in the overall political and economic order of the EU, and is crucial to the way in which the EU's initiatives impact on ordinary EU businesses and citizens. Going forward, it would appear that the role played in balancing the capitalistic tendencies of the European Union project as it has evolved. This is demonstrated in how the European public's overall attitude towards punishing anti-competitive behaviour has hardened considerably since 2007, perhaps as a result of the financial crisis and the various financial scandals that have emerged in that time. Clearly, in light of the EU's ongoing problems in terms of its perceived democratic deficit, any contribution that competition policy can make to balance the harsh capitalist aspects of the European Union as it has become in the neoliberal era will be welcome from Brussels' perspective. Neo-liberal policies (such as the promotion of privatisation) are criticised in some quarters because they tend to erode democracy by transferring decision-making away from

²²⁹ THE EC LAW OF COMPETITION 14 (J. Faull & A. Nikpay eds., 1999).

²³⁰ Laura Parret, *Do we (still) know what we are protecting?*, TILEC Discussion Paper (Apr. 1, 2009).; see also Heike Schweitzer, *Judicial Review in EU Competition Law*, in RESEARCH HANDBOOK ON EU ANTITRUST LAW (Damien Geradin & Ioannis Lianos eds., 2012).

state structures that are subject to potential democratic influence or control and into the hands of unelected and unaccountable corporate agents.

Some commentators have warned that “the inclusion of other, non-competition values is very dangerous, and we need to be very careful with it”,²³¹ while Semmelmann adds that this is accentuated by the fact that the procedures used to decide upon and apply competition rules are often very complicated and far removed from the gaze of the public. On the other hand, the caution called for should not be overstated since the political and socio-political goals cannot, and do not, drive competition policy alone because they lack the precision and immediate specificity, despite their relevance to decision-makers.²³²

The balancing process undertaken by EU institutions, especially the Commission, is complicated by the difficulty of being responsible for such a flexible policy that is capable of impacting citizens and firms across the continent. For many years, the Commission’s Services have been under pressure from industrialists to broaden its definition of consumer interest to encompass more long run effects whereby European consumers will apparently benefit most from European companies that are able to compete on a global scale.²³³ In its much-publicised efforts to keep the policy up to date and relevant, the Commission opens itself up to the demands of all European stakeholders, backed up by increasingly complex economic arguments. Thus, in the context of an EU founded on the ideals of democracy and participation, the choice of policy goals becomes ever more contentious and any evolution in objectives, strategies or priorities is subject to intense scrutiny.

We have seen from the analysis of the evolution of competition policy in post-war Europe that Europeans have always had a unique, pluralist view of competition policy and what it can and should achieve. If today’s competition policy has left a purist Ordoliberal view behind in favour of becoming more orientated towards the single goal of the protection of competition for its own sake, it has not gone so far as to abandon completely its pluralistic nature.

²³¹ R. Hewitt Pate, *Competition and Politics* (2005), <http://www.justice.gov/atr/public/speeches/210522.htm>

²³² SEMMELMANN, *supra* at 48.

²³³ Lars-Hendrik Röller, *Challenges in EU Competition Policy*, ERT Competition Policy Working Group Paper (2008).

European competition law and policy has always been used in a functional and multi-purpose manner in that the Commission and national competition authorities have pursued objectives that were not directly related to competition. The most obvious example that is evident from the above is that of market integration, but competition policy as it has evolved in the EU has seen otherwise questionable agreements being permitted and even encouraged on non-competition grounds as broad as social, environmental and industrial policy, and, albeit to a lesser extent, cultural policy.

Given the presence in many Member States of traditional state-interventionist attitudes and close ties between government and organised labour, it would have been understandable if the EU had taken a sceptical view of competition policy. However, a core competition policy goal is granting consumers lower prices and that can be very beneficial to salary-earners so even traditional opponents of capitalism find a degree of support for competition policy. We have seen that European competition policy assumed a public law status in disciplining the different branches of the EU and balancing their disparate objectives. Acting on foot of each such demand completely would require adopting a specified course of action, to the exclusion of a rival constituency. Instead, a balancing approach was adopted whereby competition policy, to the extent possible, set about beating a path between similarly legitimate outcomes.

CHAPTER 4: INTRODUCTION TO CASE STUDY OF THE AIRLINE INDUSTRY

1. Introduction

This section continues the theme of this project where the focus is on the practical effects of competition law and policy, and the emphasis is on the impact of competition regulation and enforcement on real world strategic decisions of firms in key European markets. The focus of this chapter is on how competition law has been applied in the passenger airline industry, a sector which has undergone a remarkable transformation from being exclusively state-run to one that is almost fully privatised, but where the influence of domestic and regional politics is still an important factor.

This chapter outlines the problems facing the industry and their attempts to counteract them within the constraints of competition rules. The size and strategic nature of the industry has meant that it has sometimes been suspected of receiving special treatment, especially as regards the alliance-building trend which forms the main subject of the analysis below. Even with the dawn of a new global age, the airline business remains a regulatory mire of competing national, international, environmental and purely economic interests so a full analysis of the industry is beyond the scope of this work. However, the insights gleaned from the chosen phenomena and the solutions applied by regulators, when coupled with the views of the industry actors themselves, serves to add depth to this project's core aim of examining the practical use of competition law in times of economic strife.

The analysis in this chapter follows the themes explored in other chapters in this work, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the role of NCAs in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law. Specifically, the aim of this chapter is to set out the theory behind the main issues that arise in the empirical investigation conducted in the next chapter.

For the purposes of this chapter, mergers are all operations which entail structural changes caught either by the EU Merger Control Regulation or Article 57 of the EEA

Agreement, or by one or more merger control regimes of the national states.²³⁴ Alliances here denote cooperation agreements through which airlines integrate their networks and services but without the irreversibility of a concentration. To the extent that they amount to the elimination of competition between the members of the alliance, these arrangements are caught either by Article 101 (1) TFEU and/or Article 53 (1) of the EEA Agreement or by the corresponding provisions in the competition laws of one or more of the national states. These kinds of agreements tend to include several or all of the following fields of cooperation: code sharing; revenue and cost sharing; joint pricing; coordination of capacities; route and schedule planning; coordination of marketing, advertising, sales and distribution networks; coordination of travel agents and other commissions; branding/co-branding; integration and development of information systems; information technologies and distribution channels; coordination of frequent flyer programmes; and the sharing of facilities and services at airports.²³⁵

2. Role of the General Context: Passenger Airline Industry in Europe

According to the European Commission, air transport makes a key contribution to the European economy, with more than 100 scheduled airlines, a network of over 400 airports, and 60 air navigation service providers and some 900 million passengers departing or arriving at EU airports in 2014.²³⁶ Airlines and airports contribute more than €140 billion to the EU GDP while the aviation sector employs some 2.3 million people in the EU.²³⁷ The Association of European Airlines (AEA) was established originally in 1952 and brings together 22 major European airlines. These collectively carry nearly 310 million passengers serving 530 destinations in

²³⁴ Council Regulation (EEC) No 139/04 on the control of concentrations between undertakings, OJ L 24 of 20.01.2004, p. 1,

http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf

²³⁵ Antonio Tugores-García, Analysis of Global Airline Alliances as a Strategy for International Network Development, Massachusetts Institute of Technology (June 2012), available at: <https://dspace.mit.edu/bitstream/handle/1721.1/75853/821869736-MIT.pdf?sequence=2>; Report of the ECA Air Traffic Working Group, Mergers and Alliances in Civil Aviation (May 2004), available at: <http://ec.europa.eu/competition/publications/eca/report.pdf>; Pablo Mendes de Leon (ed), From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law (Brill 2013).

²³⁶ See: Directorate General for Mobility and Transport website, available at: http://ec.europa.eu/transport/modes/air/internal_market/index_en.htm. See also, Communication from the Commission, Guidelines on State aid to airports and airlines, (2014/C 99/03).

²³⁷ Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010. Steer Davies Gleave for the European Commission, DG MOVE. Final report of August 2012.

140 countries.²³⁸ The liberalisation of air transport in 1997²³⁹ paved the way for the emergence of low-cost carriers, operating a new business model based on quick turn-around times and very efficient fleet use. The European Low Fares Airline Association (ELFAA) was established in 2003 and its members collectively carry 300 million passengers every year.²⁴⁰ Low-cost carriers' (LCCs) traffic has grown at a fast pace since 2005 and in 2012, for the first time, low-cost airlines exceeded the market share of incumbent air carriers.²⁴¹

a) Legal Context: Influence of International Law on Structure of Sector

The Chicago Convention of 1944 provides the foundations for the development of the modern structure of the airline industry in that it gives us the starting point of each country having “full and exclusive sovereignty over its territory’s air space”.²⁴² This meant that each nation could decide which airlines could operate flights into, out of and across its territory and so served to perpetuate the comfortable position of domestic, often state-owned, flag-carriers growing networks without necessarily having a sufficiently large home market to make their operations efficient or profitable.

In the post war period, a dense web of bilateral Air Service Agreements (ASA) developed whereby two jurisdictions guarantee rights of access for airlines of both countries to their respective air space, territories and markets. These agreements typically have Ownership & Control provisions (known as O&C clauses) whereby an airline will be refused access to one contracting party if it was not owned and effectively controlled by the other contracting party or its nationals. These nationality rules were originally motivated by national security concerns arising from the fear enemy states would attain indirect market access by acquiring airlines in friendly countries upon which traffic rights had been conferred.²⁴³

²³⁸ See, <http://www.aea.be/>.

²³⁹ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

²⁴⁰ See: <http://www.elfaa.com/statistics.htm>.

²⁴¹ Communication from the Commission, Guidelines on State aid to airports and airlines (2014/C 99/03), para 3.

²⁴² Convention on International Civil Aviation, December 7, 1944, 15 U.N.T.S. 295

²⁴³ 2 U.S. Dep’t Of State, Proceedings Of The International Civil Aviation Conference 1283 (1948)

This system was inherently inflexible and was geared towards protecting the market shares of state-owned airlines which formed part of national political and economic interests.²⁴⁴ The broader protectionist effects of the nationality rule, in particular, came about because air services traffic between any two states were reserved to the home airlines of those states – regardless of their efficiency relative to third country air carriers. Furthermore, the nationality rule served to choke off foreign capital flows by discounting the possibility of mergers, acquisitions and consolidations that other sectors would take as a given.²⁴⁵ The agreements governing the air transport sector also went as far as prohibiting airlines from creating foreign subsidiaries - the so-called “right of establishment” that is a mainstay of most bilateral investment treaties.²⁴⁶

The general wave of market liberalisation during the 1990s also impacted on the airline industry, and on this side of the Atlantic saw the EU become a single integrated aviation market.²⁴⁷ With the creation of such a large potential market, the US pushed for a series of Open Skies Agreements (OSA) with larger EU Member States which included the right for an airline to fly onward from the primary destination to a destination in another country (the so-called “fifth freedom”).

Two remaining restrictions are that, under "cabotage" rules, domestic operations by foreign carriers are prohibited while the foreign ownership of domestic airlines is similarly capped. Under US law, for example, at least 75% of the voting stock of a US airline must be owned by US citizens.²⁴⁸ Moreover, the president and at least two-thirds of the board of directors and "key management officials" of US airlines must be US citizens. Meanwhile, in Europe, the definition of a "Community carrier" is an airline owned and continuously owned directly or through a majority ownership by

²⁴⁴ H.S. Rutger Jan Toe Laer, “The ECJ Decisions: Blessing in Disguise?”, Air & Space Law, Vol. XXXI/1 (February 2006), at p2

²⁴⁵ Brian F. Havel & Gabriel S. Sanchez, The Emerging *Lex Aviatica*, Georgetown Journal Of International Law, Vol. 42, 639, Electronic copy available at: <http://ssrn.com/abstract=1885187>, p.649

²⁴⁶ Jeswald W. Salacuse, The Law Of Investment Treaties, OUP (2009), pp.196–204.

²⁴⁷ The Single European Sky project was completed by a four-part legislative package in 2004: Reg No 549, 550, 551 & 552/2004, OJ L 96 of 31 March 2004.

²⁴⁸ US 1938 Civil Aeronautics Act, ch. 601, § 1(13), 52 Stat. 973, 978. Thus, although foreigners may now own 50% of the equity in a US airline, foreign nationals are still forbidden from holding more than 25% of the voting rights. See also, Federal Aviation Act of 1958 (49 U.S.C. 1401) and subsequent amendments; Josh Cavinato, Turbulence in the Airline Industry: Rethinking America's Foreign Ownership Restrictions, Southern California Law Review, (2008) Vol. 81, p.311.

Member States and/or nationals of Member States.²⁴⁹ As a result, it must at all times be effectively controlled by such states or such nationals.²⁵⁰ Given the broad definition of “effective control”,²⁵¹ EU national governments or their citizens must own more than 50% of an airline in order to effectively control it.

The main point to take away from the above is that the airline industry is one that is in considerable flux, with an evolving structure whereby legacy Full Service Carriers (FSCs) in Europe are under pressure from LCCs within Europe and large US and Middle Eastern carriers on the global stage. Meanwhile, the vestiges of an antiquated international law regime prevents the free circulation of capital within the global airline industry. The result has been that European airlines have had to turn to less conventional means of attracting investment, expanding and consolidating. The section below turns to some of the competition issues which have arisen as a result of airlines’ unconventional strategies, and how these have been dealt with by the European competition authorities.

b) Economic Context: Airlines’ Strategies and Relevant Theories of Harm

Airline companies’ profits fluctuate significantly, which can be explained by the fact that they use very specific assets and face substantial fixed costs in producing a product that is subject to highly cyclical demand and frequent shocks to variable cost – factors which are not unique to airlines. Such volatility of demand becomes

²⁴⁹ Council Regulation 1008/2008, art. 2(9), 2008 O.J. (L 293) 3

²⁵⁰ Article 4 of Regulation 1008/2008 states that an “undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that [...] Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party.” See further, Martin Staniland, *Open Skies - Fewer Planes? Public policy and corporate strategy in EU-US aviation relations*, University of Pittsburgh European Policy Paper Series, available at: <http://aei.pitt.edu/id/eprint/33>. On the previous regulation, Council Regulation 2407/92 of 23 July 1992 of Licensing of Air Carriers, see: George Middeldorp, “Substantial Ownership and Effective Control of International Airlines: The Netherlands”, 6(4) EJCL (December 2002). On proposals to have air services included in the Transatlantic Trade and Investment Partnership, see: Laura Puccio, *EU-US negotiations on TTIP: A survey of current issues*, European Parliamentary Research Service (June 2015), available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/559502/EPRS_IDA\(2015\)559502_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/559502/EPRS_IDA(2015)559502_EN.pdf).

²⁵¹ For the purposes of Regulation 1008/2008, ‘effective control’ means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.

problematic for carriers because the good is not storable and their strict short-run production constraints.

Similarly, fixed capital costs hinder the adjusting of production levels quickly, so airlines are unable to easily reduce costs when demand falls off or to expand rapidly when demand picks up again.²⁵² Another contentious factor is the labour costs encountered by the airline operators. Wages and benefits are a large cost driver for airlines and are also unresponsive to demand changes, especially in the highly unionised legacy flag-carriers. Indeed, it comes as no surprise that labour-savings are a well-known element of low cost carriers' business model – even if stringent safety training requirements mean that there is a minimum cost base that cannot be eroded.

The global alliance strategy is rooted in the fundamentals of network economics and a global economy.²⁵³ The business models of major legacy carriers on both sides of the Atlantic came to be predicated on a “from anywhere to everywhere” consumer proposition.²⁵⁴ However, since no airline would be able to efficiently serve every destination its customers require with its own aircraft and few city-pairs can generate sufficient demand on a daily basis to sustain non-stop service, carriers sought commercial partners to provide greater network coverage and increased service options.²⁵⁵

Airlines compete for passengers and market share based on a combination of three key factors: the frequency of flights and convenience of the schedule on a given

²⁵² Severin Borenstein & Nancy L. Rose, *How Airline Markets Work...Or Do They? Regulatory Reform in the Airline Industry* in N.L. Rose (ed.), *Economic Regulation and Its Reform: What Have We Learned?*, University of Chicago Press, October 2008, at p.40

²⁵³ A common and defining feature of network industries is the fact that they exhibit increasing returns to scale in consumption, commonly called 'network effects'. The existence of network externalities is the key reason for the importance, growth, and profitability of network industries. A market exhibits network effects (or network externalities) when the value to a buyer of an extra unit is higher when more units are sold, everything else being equal. See: Nicholas Economides, *Competition policy in network industries: an introduction*, in Dennis W. Jansen (ed), *The New Economy Past, Present and Future* (Elgar 2006).

²⁵⁴ Steven Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (Routledge, 2013); US GAO, *Commercial aviation legacy airlines must further reduce costs to restore profitability* : report to congressional committees (August 2004).

²⁵⁵ European Commission & US Department of Transportation, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches* (16 November 2010) available at: http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf.

route, the price charged, and the quality of service offered.²⁵⁶ Barring those locked into corporate agreements, most passengers will choose the combination of flight time, price and service quality that maximises their utility. Economists move on from this to conclude that, all else being equal, an airline's market share will boil down to roughly match their frequency shares, expressed in terms of competing non-stop flight departures in a given Origin/Destination pair. This theory is taken as a rule of thumb and is based upon an assumption that passengers will choose a flight closest to their desired departure time wherever possible. Thus, the airline with the greatest frequency of departures will capture the most passengers because it will take all those who want to fly when only it offers a flight, while it will compete for and share the custom of those fliers wishing to depart at times when both it and airlines offer flights.²⁵⁷ This helps to explain the use by airlines of flight frequency as an important competitive weapon.²⁵⁸ Importantly for our purposes, this also increases the incentives on airlines to join alliances and code-sharing agreements which see them increase frequencies at relatively low cost.

The fact the airline business is highly concentrated is further complicated by the fact that airlines compete with each other in several markets within the industry. This type of situation can lead to harm through mutual forbearance, whereby the existence of multimarket contact leads to more cooperation in markets that are common to the rivals due to strong interdependence across those markets. This interdependence is bolstered by a fear of retaliation on one market for the application of competition pressure on another.²⁵⁹ Studies have found that when the same firms come into

²⁵⁶ On the techniques used by airlines to develop schedules, see T. L. Jacobs et al, *Airline Planning and Schedule Development* in C. Barnhart and B. C. Smith (eds.), *Quantitative Problem Solving Methods in the Airline Industry* (Springer 2012).

²⁵⁷ Amedeo Odoni, *The International Institutional and Regulatory Environment* in Peter Belobaba, Amedeo Odoni and Cynthia Barnhart (eds.), *The Global Airline Industry*, Wiley (2009), at p.68. However, certain commentators argue that there is an "S-curve" relationship between airline market share and frequency share, such that there is a disproportionate response of market share to frequency share. For example, in a two-airline competitive market, if one airline offers 60% of the non-stop flights it is likely to capture more than 60% of the market share. Conversely, the other airline (with 40% frequency share) will see less than 40% market share. See: William E. O'Connor, *An Introduction to Airline Economics*, Greenwood Publishing Group (2001), p.114

²⁵⁸ Jennifer Cheung, *Airline Competition and Operating Strategy in Multi-Airport Systems* (December 2004), available at:

http://ardent.mit.edu/airports/ASP_exercises/ASP%20MAS%20Cheung.pdf

²⁵⁹ C.D. Edwards, 'Conglomerate Bigness as a Source of Power', in National Bureau of Economic Research, *Business Concentration and Price Policy* (Princeton University Press 1955).

contact in numerous markets it can lead to higher prices, increased profits and a generally more stable and comfortable competitive environment.²⁶⁰

It could be argued that the emergence of the web of alliances that we see today represents an attempt by airlines to create a credible threat of retaliation through establishing and strengthening their networks in such a way as to maximise the levels of multimarket contact with their key rivals.²⁶¹ Even within alliances, when airlines expand onto routes where their partners are already operating it can also be seen as a move to strengthen the ties within the alliance and solidify the group overall. Given that there is a possibility for communication, even indirectly, through alliances, this can lead to entry being made with so-called “friendly intentions”²⁶² - i.e. without actually being an aggressive pro-competitive decision to enter a given market.

Alliance building not only reduces competition in the strict terms described by the legal agreement submitted to the authorities, it can also foster mutual forbearance through familiarity and deterrence.²⁶³ Cooperating closely gives airlines ample opportunities to become familiar with their partners’ styles, abilities and strategic preferences. Similarly, as they interact more and more closely, alliance members are faced with understandably strong incentives to refrain from harming their partners as their interests are intertwined. A study by Li and Netessine shows that, as the intensity of competition is gradually eroded by the alliance, the members will seek to overlap their networks even further by expanding capacity in markets in which they cooperate – apparently at the expense of aggressively moving into the markets

²⁶⁰ S. Jayachandran, J. Gimeno, P.R. Varadarajan, The Theory of Multimarket Competition: A Synthesis

and Implications for Marketing Strategy, *Journal of Marketing* 63(3) 49-66.

²⁶¹ Under pre-alliance conditions in the US airline industry, price wars were so common as to be seen as the rule rather than the exception. Looking at the US market, Busse found 31 major price wars between the 14 largest airlines during the period of 1985-1992 alone. See: M. Busse, Firm financial condition and airline price wars, *RAND Journal of Economics* 33(2) 298-318.

²⁶² Ola Andersson and Hakan Holm, Endogenous Communication and Tacit Coordination in Market Entry Games – An explorative experimental study, Second Nordic Workshop in Behavioral and Experimental Economics, Goteborg, (November 2007), available at: <http://www.konkurrensverket.se/globalassets/forskning/projekt/endogenous-communication-and-tacit-coordination-in-market-entry-games.pdf>.

²⁶³ Lucio Fuentelsaz & Jaime Gómez, Multipoint Competition, Mutual Forbearance and Entry into Geographic Markets (February 2002), available at: <http://www.ivie.es/downloads/2002/12/ponencia04.pdf>.

operated by competitors from different alliances.²⁶⁴ Given the combined coverage of the web of alliances amongst airlines, this trend could be replicated across almost the entire market for air passenger services – leading to generally less aggressive competition and thereby allowing carriers to charge a hidden premium.

Airlines have seen their fixed costs rise which has resulted in firms needing to access new markets. Like in many other industries, pragmatism has prompted airlines to seek partners in foreign markets to expand their networks. Consolidation is also needed because, although load factors are respectable, the high fuel costs when combined with the needless duplication of fixed overheads has come to be seen as wasteful for shareholders, while being portrayed simultaneously as acting to the detriment of consumers.²⁶⁵ The efficiencies in question are thus gained by obtaining economies of scope as the airlines' cost of supplying two products jointly is cheaper than if each were to produce them separately. Such savings come about especially when the cost does not relate to a particular route, but to the network as a whole – such as advertising, frequent flyer schemes and computer reservation.

A good example of creative use of strategic consolidation and alliance-building was the model employed by Scandinavian Airline Systems (SAS) who managed to turn the clear disadvantage of a small, peripheral home-country base with very limited bargaining power in international air service negotiations into an offensive and high-growth strategy.²⁶⁶ By developing a network of relationships with other national, secondary and especially transatlantic airlines, it built up an impressive portfolio of one-stop destinations to offer to its time- and quality-orientated business clientele. Furthermore, SAS has also followed a policy of exchanging ownership stakes with its alliance partners in order to lend some substance and stability to the cooperative network, but with the result of throwing up some novel problems for competition authorities in examining these cross-ownership structures.²⁶⁷

²⁶⁴ Jun Li & Serguei Netessine, Partnering with Competitors – An Empirical Analysis of Airline Alliances and Multimarket Competition, INSEAD Working Paper 2011/24/TOM/ACGRE, available at <http://ssrn.com/abstract=1761211>.

²⁶⁵ Financial Times, 19 November 2007, referring in particular to the duplication of terminal and ground staff at the neighbouring hubs of Philadelphia and Newark airports in the US.

²⁶⁶ Waleed Youssef & Mark Hansen, The Consequences of Strategic Alliances Between International Airlines: The Case of Swissair and SAS, University of California Transportation Center, Working Paper UCTC No. 405 (August 1993), available at: <http://www.uctc.net/research/papers/405.pdf>.

²⁶⁷ Peter Lorange and Johan Roos, Strategic alliances : formation, implementation, and evolution, Cambridge, Mass., USA : Blackwell Business, 1992

In both the US and Europe, the huge costs of developing hub-and-spoke systems made it imperative to exploit these hubs to the maximum.²⁶⁸ For European operators, this translated into a compelling need to gain access to the huge US domestic market while airlines on the other side of the Atlantic found themselves needing to control the "feed" from European markets via transatlantic flights through their hubs by any means available.²⁶⁹ In light of the restrictions on corporate strategy explored above, "Enterprise alliances" between American and European airlines were the pragmatic although imperfect solution. As one airline official put it succinctly: *"Alliances are ... a reasoned response to an antiquated regulatory system ... [They] permit indirect access to restricted markets"*.²⁷⁰

An important step forward in shaping the airline industry as we know it today came by way of the ECJ's Open Skies decisions in 2002 whereby the mandate for negotiating Air Service Agreements or Open Skies Agreements was passed to Brussels.²⁷¹ In particular, the ECJ found that the nationality clauses in ASAs barred EU carriers from enjoying the opportunities of air service agreements other than those entered into by their home Member State, and so were in violation of the freedom of establishment enshrined in Article 43 of the Treaty of Rome (now Article 49 TFEU). By recognising the principle that an airline based in one Member State should have the same status in law as an airline based in any other Member State, the Court developed the concept of a "Community carrier" whose nationality was less important for the purposes of ASAs and thereby greatly facilitated cross-border mergers of airlines in the EU.

²⁶⁸ Athina Sismanidou, Joan Tarradellas, Germà Bel & Xavier Fageda, Estimating potential long-haul air passenger traffic in national networks containing two or more dominant cities, *Journal of Transport Geography* 26 (2013) 108–116.

²⁶⁹ On the practices and processes that produce particular patterns of air transport regionally and globally, see: Andrew R. Goetz & Lucy Budd, *The Geographies of Air Transport*, (Ashgate 2014).

²⁷⁰ Leo van Wijk, Managing Director of KLM Royal Dutch Airlines, quoted in Joan M. Feldman, "Right Ends, wrong means," *Air Transport World*, January 1995, 60.

²⁷¹ *Commission v. Denmark*: C-467/98; *Commission v. Sweden*: C-468/98; *Commission v. Finland*: C-469/98; *Commission v. Belgium*: C-471/98; *Commission v. Luxemburg*: C-472/98; *Commission v. Austria*: C-475/98; *Commission v. Germany*: C-476/98; *Commission v. UK* [2002] E.C.R. I-9427. See: R Holdgaard, 'The European Community's Implied External Competence after the Open Skies Cases' (2003) 8 *European Foreign Affairs Review* 370; Ruwantissa Abeyratne "The Decision of the European Court of Justice on Open Skies – How can we take liberalization to the next level?" (2003) 68 *J. Air.L & Com.* 485; Paul S. Dempsey, "Evolution of Air Transport Agreements" (2008) 33 *Ann. Air & Sp. L.* 127.

From Brussels' point of view, this new mandate was used in the first EU/US Air Transport Agreement²⁷² signed in Washington on March 30th 2007. This agreement includes so-called 7th freedom rights for "Community carriers" whereby they can operate services from any point in the EU to any point in the US. This has unlocked the transatlantic market for new services, increased frequencies and more rationalised airline networks. However, the US domestic market remains firmly closed to EU carriers, and vice versa, as there is a near total prohibition on cabotage rights, i.e. the right for a foreign air carrier to operate between US destinations. Thus, despite some progress in terms of opening the international markets to competition, national barriers to investment remain in place. Clearly, this has also been a driving force behind the web of alliances that has emerged in the international passenger airline sector. Much of the rationale for government regulation in the airline sector has tended to be based upon non-economic factors, such as the fear of domestic political repercussions of the loss of a national carrier or other vested interests.²⁷³ Furthermore, many of the policy reforms which have taken place in recent years have been more the product of general ideological shifts regarding the role of government rather than any in depth economic analysis of the characteristics of the airline industry itself.²⁷⁴

Demand for air services is derived from that of individuals wishing to engage in some other final activity, such as business or holidaymaking, so the demand curve is highly sensitive to changes in income levels.²⁷⁵ The industry is both capital- and personnel-intensive with high levels of unionisation amongst legacy carriers, meaning very limited flexibility in case of market disruptions.²⁷⁶ Furthermore, even in times of low

²⁷² Available on DG TREN website:

http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/us_en.htm

²⁷³ See, e.g.: Air Line Pilots Association, "Keep U.S. Airlines Strong: Maintain Current Foreign Ownership and Cabotage Restrictions", available at: <http://www.alpa.org/advocacy/foreign-ownership>.

²⁷⁴ Kenneth Button, Liberalising European Aviation: Is There an Empty Core Problem? *Journal of Transport Economics and Policy*, Vol. 30, No. 3, pp. 275-291, p.289

²⁷⁵ Kenneth Button, Does the theory of the 'core' explain why airlines fail to cover their long-run costs of capital? *Journal of Air Transport Management* 9 (2003) 5–14, p12

²⁷⁶ On the highly capital intensive nature of the industry, see: easyJet plc, Annual Report and Accounts 2013, "The aviation market is a highly capital intensive industry and it is important for airlines to give careful consideration to their financing and balance sheet positions to balance risk, growth, access to funding and shareholder returns. A strong balance sheet allows easyJet to withstand external shocks such as an extended closure of airspace, significant fuel price increases or a sustained period of low yields [...]", available at <http://corporate.easyjet.com/~media/Files/E/Easyjet-Plc-V2/pdf/investors/result-center-investor/annual-report-2013.pdf>, p.27.

demand, airlines remain tied into many high fixed costs such as aircraft leases²⁷⁷ and complex contractual arrangements with airports.²⁷⁸ This inability to curtail activities in times of economic difficulty is compounded by the fact that any eventual moves towards expansion have to be planned long in advance, due to the lead times for aircraft orders and pilot training.²⁷⁹ When demand declines, the average number of passengers carried per flight decreases with the result that the flight-specific costs are to be covered by fewer paying clients thereby driving up the cost-revenue ratio. The observed profit and loss cycles for the industry are therefore seen, albeit by industry insiders, as an inescapable consequence.²⁸⁰

c) Empty Core Theory and the Global Airline Industry

The sections above help identify some of the reasons why the airline industry has developed in the way that it has. However, some of the economic literature suggest that there are intrinsic features of the scheduled network airline industry that makes the current structure of liberalised markets unsustainable. Understanding these issues will also be important in informing the analysis of the approach of competition authorities confronted with the cooperation and consolidation schemes. In particular, the question arises of whether the alliances serve a positive economic purpose in light of the instability and volatility of the sector, or whether they amount to ways for airlines to extract economic rent at the expense of competition.²⁸¹

One analytical tool applied to the airline sector by some economists is "core theory" which was originally developed by Francis Edgeworth as a means of understanding how competition between different traders distils down to a negotiation mechanism and sees individuals form coalitions in order to arrive at Pareto efficient outcomes whereby the whole group of individuals cannot improve, there is no deadweight loss and it is not possible to make one person better off without making at least one other

²⁷⁷ On the economics of aircraft fleet management, see Peter P. Belobaba, "The Airline Planning Process" in Peter Belobaba, Amedeo Odoni & Cynthia Barnhart (eds), *The Global Airline Industry* (2nd ed, Wiley 2015).

²⁷⁸ FAA/OST Task Force, *Airport Business Practices and Their Impact On Airline Competition* (October 1999), available at: <http://ntl.bts.gov/lib/17000/17100/17129/PB2000108301.pdf>

²⁷⁹ Holger Hättö & Sebastian Hollmeier, Airline strategy in the 2001/2002 crisis—the Lufthansa example, *Journal of Air Transport Management* 9 (2003) 51–55, p51

²⁸⁰ Holger Hättö & Sebastian Hollmeier, Airline strategy in the 2001/2002 crisis—the Lufthansa example, *Journal of Air Transport Management* 9 (2003) 51–55, p51

²⁸¹ Kenneth Button, Does the theory of the 'core' explain why airlines fail to cover their long-run costs of capital? *Journal of Air Transport Management* 9 (2003) 5–14, p.6

person worse off.²⁸² The core itself is the set of all of these Pareto efficient allocations that enhance the welfare of each subject involved in the negotiation. On the other hand, the core is said to be empty when an entirely competitive market does not succeed in providing any Pareto efficient results. Thus, if the process of liberalisation of air transport markets cannot generate a long run sustainable (i.e. profitable) environment for airlines then we could define it as having an empty core.²⁸³

In particular, industries faced with fixed costs problems are the best known cases for a core being empty.²⁸⁴ Network industries also have the potential for a wide range of factors affecting cost including economies of scope scale and density.²⁸⁵ Economies of route density are generally acknowledged in the airline sector, and Button observes that, when such economies exist on routes subject to competition, airlines will cut prices to the level of short-run marginal cost when faced with variations in demand that cause them to have excess capacity. As the resulting prices will be too low to cover the full costs of operating an efficient set of schedules, this points to the core being empty.²⁸⁶ Even if consumers obtain short-term benefits from these price wars, it can be argued that such market conditions bring about a reduction of overall social welfare because of inevitable reductions in product quality due to cost cutting or, in the extreme case, the destruction of the industry.

If the sector does indeed have a natural tendency towards exhibiting empty core conditions, airlines could argue that they not have any other option but to pursue strategies to remove capacity and price competition from the market. We would then be left with the public policy question of whether to use government intervention to regulate the alliances or to leave the sector to manage itself. In absence of some degree of industry regulation, firms will be pushed towards making agreements among themselves in order to fix prices or/and supply quantities at sustainable

²⁸² F. Y. Edgeworth, *Mathematical Psychics*, London: Kegan Paul (1881).

²⁸³ M. W. Trethaway & W. G. Waters, Reregulation for the airline industry: could price cap regulation play a role, *Journal of Air Transport Management*, 4, 47–53.

²⁸⁴ Jacob Viner, Cost curves and supply curves, *Zeitschrift für Nationalökonomie* 3, 23–46 (1931).

²⁸⁵ Kenneth Button, Does the theory of the 'core' explain why airlines fail to cover their long-run costs of capital? *Journal of Air Transport Management* 9 (2003) 5–14, p.12

²⁸⁶ Kenneth Button, Liberalising European Aviation: Is There an Empty Core Problem? *Journal of Transport Economics and Policy*, Vol. 30, No. 3, pp. 275-291, p.288

levels.²⁸⁷ Interesting in this regard is Bittlingmayer's investigation of the US cast-pipe industry in the period following the *Addyston Pipe* case,²⁸⁸ which arrives at the conclusion that US antitrust legislation in the days before the "rule of reason" approach was adopted, by preventing different forms of cooperation despite the core of sustainable market outcomes being empty in that particular industry, effectively forced market players down the merger path as no other strategies were open to them.²⁸⁹

One possible policy implication of this would be that the Commission and other regulators with an interest in the long term preservation of a healthy airline industry with more than just a handful of players would need to allow firms to gradually adjust their operating circumstances in order to mitigate two major problems – namely, the impossibility of obtaining significant economies of scale and the relative ease with which competitors can enter onto markets – through the use of cooperative agreements. These measures would allow legacy airlines to build up economies of density (in lieu of scale) but, since fortress hubs would likely be one outcome, they would also effectively create or increase barriers to entry for potential competitors.²⁹⁰

Reliance on core theory in general comes with the caveat that many of the forces that see actors cooperating to avoid an empty core are identical to those that urge rent-seeking cartel behaviour. For example, the high level of market concentration amongst the major airlines is consistent with both situations so this alone sheds little light on the question of the existence of an empty core rather than pure rent-seeking.²⁹¹ Nevertheless, this debate shows another side to the structure of the airlines' cooperation agreements, and may be useful in understanding how they have been received by the regulators in the next section.

²⁸⁷ Fabio Domanico, The European airline industry: law and economics of low cost carriers, *Eur J Law Econ* (2007) 23:199–221, p.204

²⁸⁸ *United States v. Addyston Pipe & Steel Co*, 175 U.S. 211 (1899).

²⁸⁹ G. Bittlingmayer, Did Antitrust Policy Cause the Great Merger Wave? *Journal of Law and Economics*, vol 28, pp.77-118.

²⁹⁰ Fabio Domanico, The European airline industry: law and economics of low cost carriers, *Eur J Law Econ* (2007) 23:199–221, p.205. However, the same author does acknowledge that viewing the airline industry's practices as merely necessary reactions to the inevitable collapse of an 'empty core' may be overly generous on the actors involved. Pointing out that there has yet to be any conclusive evidence of the sector, for all its difficulties, actually being unsustainable Domanico then looks to the well-reported successes of LCCs as indicating that the contrary is true.

²⁹¹ Kenneth Button, Liberalising European Aviation: Is There an Empty Core Problem? *Journal of Transport Economics and Policy*, Vol. 30, No. 3, pp. 275-291, p.284

3. Baseline for Permissible Conduct: Approach of European Authorities

a) Legal basis for Commission intervention

By way of introduction, the different legal mechanisms used by the Commission to review an alliance depended on the form of the alliance and the competences granted to the Commission under the Treaty and legislative acts of the day. As a general rule, alliances involving cooperation between airlines within the EU falling short of equity sharing were most likely be evaluated under the equivalent of Article 101 of the TFEU. Where such an alliance arrangement involved routes outside of the European Union, the Commission was for a long time restricted to acting under the transitional provisions in what is now Article 105 of the TFEU,²⁹² with Member State authorities likely reviewing the alliance in tandem pursuant to what is now Article 104 of the TFEU. Finally, when the alliance in question took the form of a concentration with turnover sufficient to give it a Community dimension, it was reviewed under the Merger Regulation.

The background to the different Commission competences in the area in the modern era can be traced to April 1986, when the European Court of Justice sparked a new push for liberalisation by finding the Treaty's competition rules to be applicable to air transport in the *Nouvelles Frontières* case.²⁹³ This led to Council Regulation 3975/87,²⁹⁴ as amended by Council Regulations 1284/91²⁹⁵ and 2410/92,²⁹⁶ which lay down provisions that clarified the effect of the Treaty antitrust rules in the sector. In particular, the Regulations set out certain - non-exhaustive - categories of agreements that did not fall under the antitrust provisions as long as the sole object or effect of these agreements was to achieve technical improvements or cooperation. Under Regulation 3975/87, undertakings and associations of undertakings could apply to the Commission for exemption from Regulation

²⁹² Regulation 141/62 retroactively removed air transport from the scope of the general implementation Regulation 16/62.

²⁹³ Cases 209-213/84 *Ministere Public v. Asjes*. See: Jacqueline O. LiCalzi, Competition and Deregulation: *Nouvelles Frontières* for the EEC Air Transport Industry?, *Fordham International Law Journal*, Volume 10, Issue 4 (1986) <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1164&context=ilj>.

²⁹⁴ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374, 31.12.1987, p. 1.

²⁹⁵ OJ L 122, 17.5.1991, p. 2.

²⁹⁶ OJ L 240, 24.8.1992, p. 18.

3975/87²⁹⁷ or negative clearance in the form of a certification that, on the basis of facts in their possession, then Articles 81(1) and 82 did not apply to a particular situation.²⁹⁸ Some cases of cooperation falling short of a merger or full function joint venture were dealt with under the exemption system, while more permanent tie-ups were considered under the ECMR following its coming into force in 1990. Later cases that fell short of transfers of control for the purposes of the EUMR were dealt with under commitment procedure in Article 9 of Regulation 1/2003 as they represented transactions that fell to be analysed under Article 101 TFEU but required complex remedies due to the fact that they were similar to mergers in their effects.²⁹⁹

b) Issue of Market Definition

When it comes to the definition of the relevant market for competition purposes, the tendency has been to see the basic product as being tickets for scheduled air transport services bought by passengers seeking to move between a given point of origin and a point of destination (O&D).³⁰⁰ As elsewhere, the market definition also has a geographic dimension but because the provision of air transport services has an inherent geographic dimension in itself, it has been deemed less useful to distinguish between these two dimensions.³⁰¹

Demand substitution exists whenever an increase in the price of a product causes consumers to switch from the purchase of that product to an alternative (substitute) product. Supply-side substitution occurs when, in response to a price increase, other suppliers enter the market by switching their production to offering the product in question. In the case of air transport, a demand-based approach to market definition entails making a distinction between different groups of passengers, most usually between time- and price-sensitive passengers and between point-to-point and connecting passengers.³⁰² This first distinction generally amounts to differentiating

²⁹⁷ Article 5 of Regulation 3975/87.

²⁹⁸ Article 3(2) of Regulation 3975/87.

²⁹⁹ Richard Whish, Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions in: M. Johansson, N. Wahl and U. Bernitz (eds), *Liber Amicorum in Honour of Sven Norberg*, (Bruylant 2006), p.564.

³⁰⁰ See: Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803.

³⁰¹ Report of the ECA Air Traffic Working Group: Mergers and alliances in civil aviation, available at: ec.europa.eu/competition/publications/eca/report.pdf, p.4

³⁰² Case M.1305 – Eurostar, para. 14, www.europa.eu.int/comm/competition/mergers/cases/decisions/m1305_en.pdf ; Case M.2041 –

between business and leisure travellers, with the former expecting faster connections, better punctuality and to be able to change reservations at short notice while the latter are taken as being most interested in obtaining the lowest fares. As precise figures on each category of traveller are unavailable and largely unobtainable due to the fluid nature of the definitions, the authorities have chosen to use proxies such as the purchase of restricted/unrestricted tickets to guide their assessments. In this regard, connecting passengers are those for whom a given flight between two airports forms only part of their travel and the airport where the connection is made is neither their point of origin nor their point of destination. Importantly, these kinds of passengers tend to have a wider choice of flight alternatives than O&D compared to simple O&D or 'point-to-point' passengers. However, in some cases even airlines are not able to give quantitative information about the types of passengers carried, so any breakdowns along these lines tend to be indicative at best.

The O&D approach to market definition has generally been used by the European Commission as the starting point for a competition analysis of air transport cases as it allows many relevant competition aspects to be taken into account reasonably quickly, albeit at the expense of largely dismissing the commercial realities of the airlines often treating cooperation agreements and integrated operations as a unified whole rather than a series of isolated routes.³⁰³ This approach is essentially demand-based as each pairing of origins and destinations is to be seen as a separate market. The analysis becomes more difficult when there are two or more airports in the same region with overlapping catchment areas. Such airports may be considered as possible substitutes depending on a number of factors, including the frequency of the services, the distances involved, price differences and the type of passengers travelling. Furthermore, airport substitution is only seen as capable of increasing competition where the additional choice of a different airport brings with it a wider choice of airlines.³⁰⁴ More recently, especially with the emergence of Low Cost Carriers, authorities have been posed the question of assessing the competitive

United Airlines/US Airways, para. 18, http://www.europa.eu.int/comm/competition/mergers/cases/decisions/m2041_en.pdf; Case JV.19 - KLM/Alitalia, para.21, www.europa.eu.int/comm/competition/mergers/cases/decisions/jv19_en.pdf

³⁰³ See, e.g., SAS/Maersk Air and Sun-Air v SAS and Maersk (Case COMP.D.2. 37.444 and COMP.D.2 37.386) Commission Decision 2001/716/EC [2001] OJ L265/15 (SAS/Maersk) para 27.

³⁰⁴ European Commission, United Airlines/US Airways, para. 20; OFT, BA/British <http://www.of.gov.uk/business/mergers+fta/advice/clearances+and+referrals/ba.htm>

influence of 'secondary' airports which tend not to be as attractive to some travellers as 'primary' airports. For example, the European Commission has examined the competitive pressures supplied by London's airports (Heathrow, Gatwick, Luton and Stansted) and found that they were all sufficiently substitutable to form a single geographic catchment for non-time-sensitive passengers, but less-so for time-sensitive travellers.³⁰⁵ The focus on demand-side substitutability of O&D routes, therefore, means that bundles of routes can be accepted being as the relevant market where those routes all connect two geographical areas depending on issues such as the length of the routes, the distance between airports in question and the number of frequencies available on those routes.³⁰⁶

Whether network effects in the air transport sector can be taken into consideration as part of the market definition process is still a source of controversy and uncertainty.³⁰⁷ A network effect for this purpose can be taken to mean a change in the benefit, or surplus, that an agent derives from a good when the number of other agents consuming the same kind of good changes.³⁰⁸ In particular, the network effects we refer to here are the broader competition issues which are sometimes discussed in addition to individual O&D markets, such as competition between different airlines' hubs or amongst alliances. However, it has proved difficult for authorities to settle upon what should be included in the definition of 'network effects' for the sector or the appropriate weight to be given to such factors in the airline industry.³⁰⁹ For instance, the European Commission considered network effects but did not deviate from the O&D approach in *Air France/KLM* where it concluded that demand substitution justified the O&D approach but also noted that corporate

³⁰⁵ European Commission, Case COMP/38.479 – British Airways/Iberia/GB Airways, 14.1.2004, para 21-24. In effect, this assessment meant that slots in Gatwick airport were deemed – to a certain extent – equivalent to slots at Heathrow when it came to agreeing slot divestiture remedies.

³⁰⁶ *Air France/Sabena* (Case IV/M.157) [1992] OJ C272/5 (AF/Sabena) para 25. See also: *British Airways/TAT* (Case IV/M.259) [1992] OJ C326/16 (BA/TAT) para 19; *British Airways/Dan Air* (Case IV/M.278) [1993] OJ C63/5 (BA/Dan Air) para 10

³⁰⁷ For a recent overview of issues including the role of network airlines in the liberalisation of the market and the various barriers to competition that remain, see: Guillaume Burghouwt, Pablo Mendes De Leon & Jaap de Wit, *EU Air Transport Liberalisation Process, impacts and future considerations*, OECD/ITF Discussion Paper No. 2015-04 (January 2015), at: <http://www.internationaltransportforum.org/jtrc/DiscussionPapers/DP201504.pdf>.

³⁰⁸ "The purported problems due to network effects are several, but the most arresting is a claim that markets may adopt an inferior product or network in the place of some superior alternative", see; S. J. Liebowitz & Stephen E. Margolis, *Network Externalities (Effects)*, available at: <https://www.utdallas.edu/~liebowit/palgrave/network.html>.

³⁰⁹ Report of the ECA Air Traffic Working Group: Mergers and alliances in civil aviation, available at: ec.europa.eu/competition/publications/eca/report.pdf.

demand was driven both by network effects and by O&D considerations.³¹⁰ After examining the stand out characteristics of the airline industry in some more depth, we shall return to the issue of whether or not it is appropriate to integrate some more meaningful recognition of these network effects with particular regard being paid to the authorities' choice of remedies imposed when clearing such cooperation agreements. The following sections examine the Commission's treatment, first, of intra-EU arrangements before looking at some of the major transatlantic alliances.

c) Approach to European Agreements

As noted elsewhere in this thesis, there is a perception that the European Commission's practice in this area appears to be informed by a view that there were too many airlines in Europe – leading to a need for a degree of consolidation in industry.³¹¹ In significant alliance cases, in particular, the Commission took an approach of accepting the need for cooperation through alliances but seeking remedies when there was a risk of elimination of competition resulting from the agreements at issue.

In the *Lufthansa/SAS*³¹² alliance in 1996 the two carriers held considerable power over the markets between Germany, Scandinavia and Northern Europe in general. In recognition of the parties' complementary networks and the potential efficiencies bound up in the deal, the Commission were relatively open to the partnership and set about designing means of obliging the two airlines to assist and encourage new competitors on the overlap routes where competition would be eliminated. These took the form of requiring both parties to cooperate with any new entrants in order to allow them to offer feasible and attractive services in competition with their own. In practice, this meant they had to give up slots at congested airports, postpone any plans to expand capacity, put interlining arrangements in place with potential competitors while also opening up their Frequent Flier Programs for new entrants' customers.

³¹⁰ European Commission, *Air France / KLM*, paras. 15–+16

³¹¹ John Balfour, EC competition law and airline alliances, *Journal of Air Transport Management* 10 (2004) 81–85, at 81

³¹² *Lufthansa/SAS*, OJ 1996 L54/28

In the *bmi/Lufthansa/SAS*³¹³ case, for example, the Commission assessed that there was a risk that competition would be eliminated for a substantial part of local time-sensitive passengers on the London-Frankfurt route. The co-operation between Lufthansa and bmi resulted in only two carriers remaining on the market for local time-sensitive passengers, i.e. the predominant Lufthansa/bmi combination and BA. It was only on the basis of market testing that the Commission granted an exemption to the alliance, as it was satisfied that there was actual interest from third party competitors to enter or expand their services on the relevant routes in view of the proposed remedies.³¹⁴

In June 1999, the Commission received a notification of a proposed *KLM/Alitalia*³¹⁵ concentration pursuant to Article 4 of Council Regulation (EEC) No. 4064/89.³¹⁶ The notified transaction was a long-term alliance between KLM and Alitalia, two national flag-carriers with deeply entrenched market positions at their bases, as a result of which the parties would progressively integrate their scheduled passenger network, sales, revenue management and cargo business. The parties contended the development of hub-and-spoke systems and deregulation had already led to significant evolutions in the air transport sector such that it was appropriate to consider the transaction by reference to a "global air transport market" where networks compete against each other. While the Commission pointedly did not deny this evolution that affects the supply side of the market, it concluded that, from the demand side, consumer continued to ask for a transport service between two points. As such, the Commission examined the transaction from the perspective of each point-of-origin / point-of-destination pair (O&D pairs) operated by either of the parties constituting a relevant market. This meant that the competitive concerns identified by the Commission were limited to cases of direct overlap in the shape of O&D pairs where both parties operated with direct flights. Four O&D pairs arose in that instance: Amsterdam-Milan, Amsterdam-Rome, London-Milan and London-Rome.

The Commission thus allowed the arrangements to proceed only after the parties proposed to divest slots at their key home airports, namely Amsterdam, Rome and

³¹³ British Midland / Lufthansa / SAS, OJ C 83, 14.03.2001, p. 6-10

³¹⁴ D. Geradin, Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation, (Intersentia 2004), p.245.

³¹⁵ Case No COMP/JV.19 - KLM / Alitalia,
http://ec.europa.eu/competition/mergers/cases/decisions/jv19_en.pdf.

³¹⁶ OJ L 395, 30.12.1989, p.1

Milan. In recognition of the importance of flight frequency for non-leisure passengers and to make entry onto these markets more attractive for outside companies, these slots were to be opened up for fifth freedom services as well while the merging companies were required not only to freeze their capacity levels, but even to reduce their frequencies on a number of key routes by as much as 40% in the event that a competitor did emerge. By way of an attempt to indirectly level the playing field amongst the incumbents and newer start-up airlines, the Commission sought and obtained concession on the part of the merging parties regarding rebates and bonuses available for corporate customers. As regards travel agents, who tended generally to be loyal to major airlines due to the more attractive volume and margins, the merging parties were ordered reconfigure their Computer Reservation System screens in order to give a true reflection of the range of services and full information about code sharing. By allowing these arrangements to proceed subject only to remedies aimed at lowering barriers to entry, the Commission appears to have taken a view that potential entrants did exist for the markets in question. As such, the Commission's perspective of the sector does not appear to agree with the "empty-core" theory outlined above in that the structure of the market was deemed capable of supporting future profit-seeking entrants.

An example of an assessment under Regulation 3975/87 can be found in the Commission's treatment of *British Airways/SN Brussels Airlines*³¹⁷ in March 2003. That parties sought to co-operate on all routes across their respective networks in terms of pricing, scheduling and capacity. This cooperation was particularly important on the London-Brussels route, through which SN passengers could access the British Airways network from London. The same was true for regional routes between the UK and Brussels, which gave UK passengers access to SN's African destinations. In this case the two companies' pre-existing networks were largely complementary and did not overlap to an enormous extent, so it was easy for the Commission to find that their cooperation would bring advantages for passengers. Where there was significant overlap, however, was on two important commercial routes, namely Brussels–London and Brussels–Manchester. The London-Brussels link was an easier case because of the presence of powerful competitors in the shape of bmi British Midland's air services as well as the Eurostar rail link. Thus, the

³¹⁷ http://ec.europa.eu/competition/antitrust/cases/dec_docs/38477/38477_19_3.pdf

Commission decided that the alliance would not eliminate competition on that market, so it caused no impediment. On the Manchester route, however, the joint market share of the cooperating airlines was to be 100%, so stronger remedies were deemed appropriate to encourage new entrants. Having examined the market conditions, the Commission concluded that the main barrier to entry was the shortage of slots at peak times – especially for business travellers seeking to return in the same day - at Brussels Airport, so therefore the airlines were forced to release slots to allow a competitor provide suitable services.³¹⁸

By way of a brief comment on the Commission's approach in this case, it can be said to reflect the Commission's policy approach of viewing the markets in question as being merely one-off O&D routes. However, some of the remedies imposed appear to have been aimed at minimising the competitive impact of the strong network effects generated by the parties' entrenched positions in their respective bases. The trend appeared to be in the direction of strengthening the remedies in subsequent cases as the Commission's experience increased - for example, by obliging the parties to try to find new entrants up front, requiring the availability of slots to be advertised, and doing more to help new entrants establish a mini-base at the hub airport in question.³¹⁹ However, some have argued that even these enhanced remedies were not effective, with a study by Airneth in 2011 of seven airline merger cases in which slot remedies had been imposed finding that on 36% of city-pairs with remedies new entry had taken place, but that this had reduced to 20% after two years, and that new entry was substantially lower on long-haul routes than on short-haul.³²⁰

d) Transatlantic Arrangements

This section studies the issues arising in the European Commission's examination of transatlantic cooperation agreements between passenger airlines. Perhaps the most interesting such relationship was between KLM and Northwest Airlines beginning in 1989 when KLM acquired a 19.3% stake in Northwest. Cooperation between the two

³¹⁸ John Balfour, EC competition law and airline alliances, *Journal of Air Transport Management* 10 (2004) 81–85, at 84

³¹⁹ See generally: OECD, *Airline Competition -- Background Paper* by the Secretariat (June 2014), at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2014\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2014)14&docLanguage=En).

³²⁰ Airneth, *Routes with Remedies*, European Aviation Club/Airneth Seminar, Brussels 9 December 2011.

gradually intensified and the competition law treatment of its joint venture on North Atlantic routes would go on to serve as a template for all subsequent alliances.³²¹ As a starting point, it should be noted that the background to KLM-Northwest was a pro-liberalisation policy stance in both Washington DC and Amsterdam. The swift approval that this arrangement received from the US authorities was reportedly based on the prospect of KLM being at a competitive advantage to other European airlines in terms of accessing US destinations, which would eventually “corrode resistance” to liberalisation.³²² Although this policy imperative was not explicitly acknowledged as a factor, the Commission’s decision in October 2002 does give significant prominence to the effect of the business model of KLM which saw passengers largely routed through their Amsterdam hub before being re-directed to their ultimate destination. To the Commission, this indicated that the taking of multiple flights was already acceptable to their customers, thereby allowing it loosen the criteria for defining a substitutable product. As a result, the Commission assessment took into consideration the effect of indirect competition by way of connecting flights as a counterbalance to the parties having market shares as high as 88% and 78% on two important routes.³²³ The Commission concluded that there was no effect on competition and declined to seek any of the types of remedies outlined above. Furthermore, the intergovernmental relations between the Netherlands and the US also led the Commission to accept that no structural or regulatory barriers to entry by competitors would subsequently be placed on the market.³²⁴

The Commission decision on the *Lufthansa/SAS/United* alliance in October 2002, on the other hand, is illustrative of the complex package of remedies and restrictions

³²¹ Commission notice concerning the Alliance between KLM Royal Dutch Airlines and Northwest Airlines, Inc. (case COMP/D-2/36.111 — procedure under Article 85 (ex 89) of the EC Treaty) (2002/C 181/03). On the technical aspects of the alliance, see: P. N. Ghauri, L. Karsten, & S. Wahyuni, *KLM - North West Alliance*, (ECCH 2007). See also: Adam Remetei-Filep, *Strategic airline alliances and restrictions of competition by object under EU competition law*, Thesis submitted for PhD in Law at King’s College London (21 January 2013), available at: https://kclpure.kcl.ac.uk/portal/files/13554825/Studentthesis-%C3%81d%C3%A1m_Remetei-Filep_2013.pdf, p.23.

³²² On this so-called “encirclement strategy”, see: Paul Stephen Dempsey, *Airline Alliances*, Institute of Air & Space Law (2011) available at: <https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf>.

³²³ In particular, the parties argued that KLM’s base at Amsterdam Schiphol airport faced competition from other gateways within its catchment area, in particular from Brussels Zaventem and Frankfurt. Also, according to the parties there were various (indirect), one-stop alternative routes on the routes between Amsterdam and Detroit and Minneapolis/St. Paul.

³²⁴ John Balfour, *EC competition law and airline alliances*, *Journal of Air Transport Management* 10 (2004) 81–85, at 85

that the Commission deemed necessary to render benign the effects of such partnerships where overlap did arise.³²⁵ The major issue arising in this case was high combined market shares the cooperating companies were to have on four transatlantic routes to and from Lufthansa's key base at Frankfurt. This case is another example of the Commission's willingness to be persuaded that the possibility of taking indirect flights to the key destinations concerned represented at least some competitive pressure on such markets. This arose in the framework of what is now an Article 101(3) analysis whereby it had to be shown that the alliance did not afford the parties the opportunity of eliminating competition in respect of a substantial part of the markets for air transport. While certain undertakings were agreed by the airlines in some relevant markets, on the Copenhagen–Chicago O&D route the Commission accepted that there would be effective competition from indirect services.³²⁶ Similarly to the cases above, this was supplemented by the cooperating airlines offering competitors slots at the main Frankfurt hub as well as access to interlining and frequent flier programmes. Furthermore, the parties also agreed to a 45% frequency reduction on two of the main routes affected.

However, in contrast with the KLM-Northwest case, potential regulatory barriers were more pronounced in this case so the Commission, after holding discussions with the US authorities, took the view that undertakings were required to substantially increase the scope for competition on the relevant markets by extending the traffic rights of Community airlines other than those owned or controlled by nationals of the home states of the parties to the alliance. This was deemed necessary in order to ensure a sufficient degree of potential competition. As part of the package of remedies, the Commission required the authorities of the Member States concerned to authorise any Community carrier established in the EEA to operate direct and indirect services between any airport in their territory and the United States, setting its fares freely. Furthermore, the Commission retained for itself the role of assessing whether the national authorities had indeed authorised the operation of a sufficient number and type of flights capable of ensuring that the alliance did not have the

³²⁵ Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 (ex 89) EC) (2002/C 181/02), available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0730\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0730(01)&from=EN).

³²⁶ Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 (ex 89) EC) (2002/C 181/02), para 27.

possibility of eliminating competition in respect of a substantial part of the relevant markets.

A recent example of the approach in this context dates from 2009 and 2010 when Air France/KLM, Alitalia and Delta – members of the SkyTeam airline alliance - signed agreements establishing a transatlantic joint venture.³²⁷ To address the Commission's concerns in relation to overlap markets,³²⁸ the companies jointly offered a set of commitments aimed at enabling competing airlines to start operating or extend existing operations on the routes in question by lowering barriers to entry or expansion. In October 2014, the Commission consulted stakeholders on these commitments and the Commission eventually found that the final commitments³²⁹ adequately addressed the competition concerns identified and made them legally binding on the parties under Article 9 of Regulation 1/2003.³³⁰ Interestingly, and unlike in some domestic or regional transactions where the NCA is given an enforcement or supervisory role, an independent monitoring trustee was entrusted to monitor the parties' compliance with the negotiated commitments.³³¹

e) Commitment Decisions under Article 9 of Regulation 1/2003

One of the more controversial legal provisions applied by the European Commission to the antitrust concerns that arise in the context of the airline industry has been Article 9 of Regulation 1/2003. This provision sets out that “[w]here the Commission intends to adopt a decision requiring that an infringement be brought to an end and

³²⁷ Case AT.39964 - Air France/KLM/Alitalia/Delta, 12/05/2015, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964/39964_1755_5.pdf.

³²⁸ Specifically on the Paris-New York route (for premium passengers), Amsterdam-New York and Rome-New York routes (for premium and non-premium passengers).

³²⁹ Available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964/39964_1756_3.pdf.

Under the final commitments, the parties will: (1) make available landing and take-off slots at Amsterdam, Rome and/or New York airports on the Amsterdam-New York and Rome-New York routes; (2) enter into agreements which would enable competitors to offer tickets on the parties' flights on the three routes ("fare combinability agreements"); (3) enter into agreements which would facilitate access to the parties' connecting traffic on the three routes ("special prorated agreements"); (4) provide access to their frequent flyer programmes on all three routes; (5) allow passengers of competitors who have no equivalent frequent flyer programme to accrue and redeem miles on the parties' frequent flyer programmes; and (6) submit data concerning their cooperation, which will facilitate an evaluation of the alliance's impact on the markets over time.

³³⁰ The Commission used the same procedure to accept commitments by members of the joint venture within the oneworld alliance (Case COMP/39.596, BA/AA/IB) in July 2010 and by members of the joint venture within the Star Alliance in May 2013 (Case COMP/AT.39595 Continental / United / Lufthansa / Air Canada).

³³¹ Case 39.964 AF-KL/DL/AZ Commitments to the European Commission, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964/39964_1756_3.pdf.

the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.”

In practice, these commitment decisions can lead to a situation of “give and take” whereby the parties involved may make concessions on grounds that might not otherwise have been proven by the Commission to the requisite standard in order to obtain commercial and legal certainty going forward.³³² Indeed, commentators have opined that the Commission has engaged in a strategic application of the Article 9 procedure in cases where its theories of harm are weaker or untested or where the Commission’s decision forms part of a long-run bargaining process.³³³

In the context of airline alliance cases, the Article 9 procedure has been used to supplement other competition provisions, for example where the its “preliminary assessment” led the Commission to the “provisional conclusion” that the parties’ cooperation “raised concerns as to its compatibility with Article 101 of the Treaty”.³³⁴ In light of the overarching aim of this thesis to examine the influence of politics and non-competition objectives on competition law in practice, it is interesting to note that the Article 9 procedure has been criticised as allowing the Commission to achieve goals that would ordinarily fall outside realm of antitrust.³³⁵ Indeed, the Article 9

³³² See, ECJ in C-441/07 P *Commission v Alrosa*, para.48: “Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.”

³³³ Niamh Dunne, “Challenge or Convenience? Commitment Decisions in EU Competition Law”, King’s College London (15 May 2015), available at: <http://www.law.leeds.ac.uk/assets/files/events/2015/Niamh-Dunne-Challenge-or-convenience-Commitment-decisions-in-EU-competition-law.pdf>.

³³⁴ Case AT.39595, Commission Decision of 23.5.2013 addressed to Air Canada, United Airlines, Inc. and Deutsche Lufthansa AG relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (“A++ agreement”), available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf, para 4; see also: Case COMP/39.596 – BA/AA/IB, Commission Decision of 14.07.2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf.

³³⁵ Von Rosenberg, “Unbundling through the back door . . . the case of network divestiture as a remedy in the energy sector”, 30 ECLR 237(2009) . On the pros and cons of the Article 9 procedure, see: Florian Wagner-von Papp, Best and Even Better Practices in Commitment Procedures after

procedure has been interpreted as leaving the Commission with a framework to reach beyond its normal antitrust competences to pursue more ambitious strategies, such as attempting to restructure markets³³⁶ or to implement noncompetition goals.³³⁷

The airline alliance cases represent examples of situations where the article 9 procedure provided a flexible means for the Commission to provide assurance to the participants while also securing beneficial modifications to the co-operation agreements.³³⁸ Indeed, the way in which the Commission has used commitment decisions are reminiscent of exemption decisions under Regulation 17/62 in that the Commission and parties avail of Article 9's flexible procedural framework to negotiate fine-tuned remedies that meet with the Commission's interpretation of the requirements of Article 101(3).³³⁹

The criteria upon which the Commission decides whether a commitment decision would be appropriate to resolve a case, or whether to pursue infringement proceedings under Article 7(1) of Regulation 1/2003, is not publicly known. Frequently, the choice between a commitment decision under Article 9(1) and an infringement decision under Article 7(1) of Reg. 1/2003 is left open for some time.³⁴⁰ Further concerns potentially arise in the context of airline alliance case, in opting for the Article 9 procedure, the Commission may be giving more weight to the benefits of fast-track resolution at the expense of creating rigorous precedent with a fully

Alrosa: The Dangers of Abandoning the 'Struggle for Competition Law', *Common Market Law Review*, Vol. 49, No. 3, (2012).

³³⁶ Mestmäcker, EBOR 2000, 401; On divestitures in the energy sector, see: Oliver Koch, Károly Nagy, Ingrida Pucinskaite-Kubik & Walter Tretton, The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns, *Competition Policy Newsletter*, Number 2 — 2009, p.32, available at: http://ec.europa.eu/competition/publications/cpn/2009_2_7.pdf.

³³⁷ Georgiev, *Utah Law Rev.* 2007, 971, at 1031-1032, suggesting that "EU commitment decisions reflect regulatory policy, rather than antitrust law".

³³⁸ Greg Olsen & Chandralekha Ghosh, Too much of a good thing?, *Competition Law Insight*, 16 September 2014, p.16.

³³⁹ On the practical equivalence of commitment decisions and conditional exemption decisions under Regulation 17/62, see: John Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' in Barry E. Hawk (ed), *International Antitrust Law and Policy* (Fordham Corporate Law Institute 2005) 265-324; See also, e.g., COMP/37.749 – Austrian Airlines/SAS which procedure began in December 1999 when the parties notified a cooperation agreement to the Commission with a view to obtaining an individual Article 81(3) exemption and which was ultimately closed under the Article 9 procedure in

³⁴⁰ Heike Schweitzer, Commitment Decisions under art. 9 of Regulation 1/2003, *EUI WP LAW* 2008/22, p.9. See also: Wouter P. J. Wils, The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles. *World Competition: Law and Economics Review*, Vol. 31, No. 3, 2008. Available at SSRN: <http://ssrn.com/abstract=1135627>.

reasoned Article 7 decision. This leaves businesses and practitioners with less clear guidance and forces future airlines into negotiations with the Commission rather than contracting freely within the precedents set down previously. From the point of view of assessing whether and how policy issues influence the application of competition law rules in practice, the political sensitivity of airline cases may well have influenced the Commission to favour the Article 9 procedure in this sector since it affords it more latitude to impact on the structure of the market. While the evolving structure of the airline sector has been the subject of considerable political attention, the Commission's shaping of the industry through these commitment decisions has been less exposed to controversy – thanks, in part at least, to the fact that the parties to the agreements in question agreed to remedies imposed in negotiations with Commission officials.³⁴¹ Frederic Jenny notes that commitment decisions offer the Commission an easy way to bypass both the complexity of articulating a theory of harm that would withstand the scrutiny of courts and economic experts, while also avoiding the risk of a court challenge to the decision.³⁴²

f) Comment

When evaluating the Commission's approach it is important to note that long distance routes are typically the most lucrative for the carriers capable of operating them, especially since the low cost revolution has largely by-passed these longer flights because the cost-revenue ratios do not fit within the organisational model.³⁴³ Positions of strength on long haul destinations have been used over the years by the major carriers to increase the network effects at play in the sector. In particular, these effects arise because of the fact that access to long-distance routes has been concentrated at the major incumbents' home airports, which increases the desirability of those airports in the eyes of consumers. A knock on effect of this has been to increase the attractiveness of the legacy carriers' feeder networks simply because, due to the scarcity of slots, they are the only means of accessing the

³⁴¹ Yves Botteman & Agapi Patsa, Towards a more sustainable use of commitment decisions in Article 102 TFEU cases, *Journal of Antitrust Enforcement* 1, 1-28 (2013).

³⁴² Frederic Jenny, Worst Decision of the EU Court of Justice: the Alrosa Judgment in Context and the Future of Commitment Decisions, in *Fordham Competition Law Institute, International Antitrust Law & Policy 2014* (Barry Hawk ed., 2015).

³⁴³ Fabio Domanico, The European airline industry: law and economics of low cost carriers, *Eur J Law Econ* (2007) 23:199–221, p.210. On attempts to enter the long haul market by low cost operators, see: Peter Morrell, Can long-haul low-cost airlines be successful?, (2008) *Research in Transportation Economics* 24(1) 61.

airports where intercontinental flights are available. Thus, while the LCCs have had a significant impact in the short-haul point-to-point market, they have been locked out of the hub airports so they have much less competitive presence on the market providing short transfers on hub-to-spoke routes.

These network effects are sometimes controversially eschewed in competition assessments of airline markets because, partly at least, of the Commission's policy of examining deals on a case by case, almost flight by flight, basis. As studied above, a typical market investigation begins with the O&D city pair as the basic market definition. Benacchio, for example, questions the appropriateness of taking this approach from the outset because it seems to support a fragmented market definition which does not capture all the relevant competition issues involved.³⁴⁴ Rather, in cases with significant network effects aspects, a more sophisticated market analysis should arguably be used in order to take more account of the competition between different hubs and the main alliances. This would aid in giving appropriate weight to the value of the bundle of routes offered by the merging airlines, as well as important ancillary factors such as their frequent flying programmes, for specific categories of clients. The overall impact of this approach would probably be that it would become more difficult to obtain Commission approval for transatlantic and global alliances between airlines with heavily entrenched positions at 'fortress' airports and home markets. Reluctance on the part of the Commission to adapt its approach to give more weight to network effects has led to suggestions – detailed in the following chapter – that the Commission harbours a policy preference for the emergence of a small number of strong European airlines and that this policy objective is influencing how it applies competition law rules in practice.

The first point in any comprehensive analysis of any of the many passenger airline markets influenced by network effects or demand-side economies of scale should be to recognise that they arise as a result of the possibility of interconnection or interoperability. Consumers see a particular airline's services as more valuable with every addition to the variety of destinations and the wider and denser a network becomes the more qualitative benefits flow to consumers, especially through an

³⁴⁴ Marco Benacchio, Consolidation in the air transport sector and antitrust enforcement in Europe, EJTIR, 8, no. 2 (2008), pp. 91-116, p.102

increased frequency of services.³⁴⁵ These network benefits are highly valued by a significant number of users so it could be argued that they should be treated as the main objective of many airline M&A transactions and alliance agreements.³⁴⁶

The Commission has recognised the value of additions to the attractiveness of an airline's product in the holistic or network-wide sense, but only in the sense of them being barriers to entry for potential competitors. Furthermore, its O&D approach has led it to determine that the competitive harm of these network gains can be remedied using individual structural remedies at given points – specifically at congested hubs where cooperating firms have been required to give up slots and reduce frequencies.³⁴⁷

Although these remedies were intended to encourage and allow new entry onto the individual overlapping point to point routes, and thus to restore effective competition for O&D passengers on these routes, they have come in for criticism because they also affect connecting passengers for whom the alliance was designed. In particular, Ryan argues that slot divestitures in particular curtail the merging firms' or alliance's ability to maximise frequencies and thereby the efficiencies of scope for which the deal was drawn up. Thus, so the argument goes, these kinds of remedies make connecting flights less efficient and jeopardise the fare reductions which constitute the source of the increase in consumer welfare promised by the deals and so are "*in fact counter-productive since in order to protect O&D passengers, they remove the alliance benefits for connecting passengers.*"³⁴⁸

Criticism of this style of remedy package amounts to a call for competition policy to focus on guaranteeing the presence of non-aligned options only where the market can support them on a standalone basis: and without preventing the development of networks.³⁴⁹ Some indications that European competition authorities are aware of a need to draft and enforce policy so as to avoid preventing network airlines from

³⁴⁵ Alan Ryan, As the Airline Industry Evolves to a Network Industry, How Should Competition Policy Adapt? 1 J. Network Ind. 157 2000, p.167

³⁴⁶ Michael E. Levine, Airline Alliances and Systems Competition: Antitrust Policy toward Airlines and the Department Of Justice Guidelines, 45 Hous. L. Rev. 340 2008-2009, p.340

³⁴⁷ For example, Commission decision of 16 January 1996 in case IV/35.545 LH/SAS, 1996 O.J. L54/28.

³⁴⁸ Alan Ryan, As the Airline Industry Evolves to a Network Industry, How Should Competition Policy Adapt? 1 J. Network Ind. 157 2000, p.179

³⁴⁹ Michael E. Levine, Airline Alliances and Systems Competition: Antitrust Policy toward Airlines and the Department Of Justice Guidelines, 45 Hous. L. Rev. 340 2008-2009, p.340

expanding could be gleaned from more recent decisions where, in light perhaps of the difficult trading conditions being faced by these airlines on the global stage, their ability to protect themselves against competitors on their local feeder markets has been augmented without significant opposition from Brussels. The next section highlights situations where the Commission's policy preference has arguably played a role in its analysis, even if the extent of the influence of this preference is difficult to ascertain.

4. Role of European Commission Policy Preferences

a) Commission policy approach to airline alliances

Today, the Commission takes a broadly positive policy approach to international airline alliances due to the benefits they can bring to consumers and the economy as a whole through efficiency-triggered cost savings, new seamless services, improved schedules or reduced fares.³⁵⁰ From a policy perspective, and beyond its administrative and practical advantages, the Article 9 procedure examined above also appears to suit the Commission's ability to pursue a specific approach in that it is somewhat freer in its mandate to enforce the competition rules by engaging in direct negotiations with alliance members who are eager to commence cooperating.³⁵¹ Being subject to the Commission's broad discretion in the design of the commitment procedure is, for some parties, balanced by the ability to reach a faster outcome under an Article 9 procedure. For instance, the parties to the oneworld alliance reportedly decided to pursue the commitment path rather than attempting to convince the Commission on the basis of a detailed analysis of efficiencies, since it provided a faster solution.³⁵²

Historically, the strong focus on market entry barriers in the Commission's airline alliance competition assessment practice, especially in terms of remedies, has been reflective of its policy of concentrating on the "real market effects" of alliance

³⁵⁰ Michael Gremminger, The Commission's approach towards global airline alliances — some evolving assessment principles, Competition Policy Newsletter, Number 1, (Spring 2003) p.75.

³⁵¹ Heike Schweitzer, Commitment Decisions under art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law, EUI Working Paper 2008/22, p.10.

³⁵² Ádám Remetei-Filep, Strategic airline alliances and restrictions of competition by object under EU competition law, Thesis submitted for PhD in Law at King's College London, p.253.

agreements, i.e. the demand side driven perspective.³⁵³ Going forward, the Commission's overall approach to this area seems set to be influenced by an ever increasing number of policy objectives, as highlighted in the Commission's Aviation Package³⁵⁴ presented by the Transport and Energy Union Commissioners which contains a wide range of measures designed to improve connectivity, tackle airports' capacity constraints and other regulatory issues while also aiming to "*keep European companies competitive, through new investment and business opportunities*".³⁵⁵ Given how the shape of the modern airline industry is being gradually changed by the emergence of major global players from outside the traditional aviation heartlands in the EU and US, it is noticeable that the Commission is now turning its sights on ensuring protections are in place against subsidisation and unfair pricing practices internationally. As there is currently no international legal framework to deal with possible unfair commercial practices in international aviation, it will be interesting to see if competition law is used to indirectly address these issues in the absence of progress in the negotiation of EU comprehensive air transport agreements and policy action at the International Civil Aviation Organization level.

The Commission's rhetoric and practice appears to acknowledge that cooperation in the form of alliances is essential in order to achieve efficiencies for passenger airlines. As the market moves gradually to being characterised by competition between networks or alliances, rather than between individual airlines on individual routes, it calls into question the Commission's continued reliance on the O&D approach for its competitive assessments of proposed transactions.

An important factor in the authorities' clearing of any of these mergers or commercial partnerships has always been the convenient presence of Low Cost Carriers who generally stand ready to enter markets at relatively short notice wherever monopoly- or even just above-average profits are to be made. This tallies with a chain of American research that has down-played the importance of market power concerns

³⁵³ Michael Gremminger, The Commission's approach towards global airline alliances — some evolving assessment principles, Competition Policy Newsletter, Number 1, (Spring 2003) p.75, at p.76.

³⁵⁴ Commission Communication "An Aviation Strategy for Europe", COM/2015/0598 final.

³⁵⁵ European Commission Press Release, "Commission presents a new Aviation Strategy for Europe", IP/15/6144 (7 December 2015).

whenever there is even the threat of entry from an LCC such as Southwest.³⁵⁶ However, as such airlines also find themselves exposed to the vagaries of the international oil markets and to the turbulent economic conditions generally, it remains to be seen how the Commission would handle a substantial wave of consolidation amongst these players – especially as they often play the disciplining role of the market maverick – when it comes to the overall health of the industry.

b) Examples of political interference

A constant factor at play in the airline sector is, as identified in the introduction to this chapter, the risk of political interference based on the perceived strategic importance for a national economy of having adequate air services. One good example of the importance of political interest in the airline sector came at the height of the 2007-2009 global financial crisis when certain principles of merger control law in Italy were effectively suspended to ensure that a strategic restructuring in the domestic airline market was authorised.³⁵⁷ In 2008, the Italian government, by means of Law Decree No. 134/2008, the so-called “Alitalia Decree”,³⁵⁸ adopted ad hoc urgency measures exempting from merger control scrutiny those “mergers [that] fulfil major public interests”.³⁵⁹ The law applied to mergers of all large firms in financial distress up until 30 June 2009 but, in practice, the only operation that fell within the criteria set in the law was the merger of Alitalia and Air One, the first and second Italian airlines in terms of passengers. The transaction led to an overlap between the parties’ activities

³⁵⁶ Austan Goolsbee & Chad Syverson, How Do Incumbents Respond to the Threat of Entry? Evidence from Major Airlines (2008) Quarterly Journal of Economics 123(4) 1611-33. See further, Nancy L. Rose, Economic Regulation and Its Reform: What Have We Learned? (University of Chicago Press 2014).

³⁵⁷ M. Libertini ‘I fini sociali come limite eccezionale alla tutela della concorrenza: il caso del “Decreto Alitalia”’(2010) Giurisprudenza Costituzionale 474; Marilena Fillipelli, Le misure correttive per abusi di posizione dominante e cartelli tra imprese nel diritto della concorrenza (2011) Concorrenza e Mercato 567; Nicoletta Cottone, Il decreto Alitalia è legge, Il Sole 24 ORE (24 October 2008), available at: <http://24o.it/VI2hvH>.

³⁵⁸ Not to be confused with the so-called “Save Alitalia Decree” whereby the Italian State provided aid directly to the restructured entity, and which was the subject of a State aid complaint to the European Commission by the European Low Fares Airline Association, see: ELFAA Press Release, ELFAA complains to European Commission against €700m subsidy for CAI / Alitalia, (8 January 2009), at: http://www.elfaa.com/ELFAA_PressRelease_Complaint_Alitalia_080109.pdf.

³⁵⁹ On the background to Law Decree n. 137/2008, see: AP Scarso, Debt restructuring in the “new” Italian Insolvency Law, at www.law.umk.pl/upload/.../SIT_5_01_Alessandro%20P.%20Scarso.pdf; on reforms of Italian bankruptcy and business recovery laws, see: Roberta Provati & Patrizia Riva, Crisis and Controls: The Italian Model, (2013) Corporate Ownership & Control 11(1) 423. For the international business press view on Decree 134/2008, see ‘Rome changes law to help rescue Alitalia’, International Herald Tribune, 28 August 2008, at: http://www.nytimes.com/2008/08/28/business/worldbusiness/28iht-28air.15717667.html?_r=0.

on a number of domestic and international routes, resulting in very large aggregated market shares on several routes. Under the provisions of Decree 134/2008, however, the Italian NCA was barred both from prohibiting the transaction and from imposing structural remedies such as the divestiture of airport slots.³⁶⁰ As Decree 134/2008 only “suspended” the NCA’s powers in relation to the concentration for three years, an investigation was subsequently undertaken to ascertain whether the 2008 transaction created or strengthened a dominant position on certain routes and whether any such dominant position persisted. Thus, due to the legal framework in which the merger was reassessed, the NCA could not directly impose remedies on the party but only indicate a term by which market power had to be removed. The NCA duly indicated that Alitalia should release certain slots on identified overlap routes to allow entry by a competitor.³⁶¹

In the long run, the decision of the Italian legislature and its implementation by the NCA had the result of allowing the domestic industry in Italy to advance along the path of economic restructuring, through full-scale mergers and internal growth strategies, broadly in line with the Commission’s ultimate objective of having airlines with European-wide operations. From a competition policy perspective, however, any such consolidation process should ordinarily be triggered by the needs of the individual actors on the market and the normal application of the rules does not afford space for a preference towards any specific institutional design or airline size.³⁶² As regards the actions of the Italian legislature and NCA set out above, they were symptomatic of their time and should perhaps be confined to their facts, but the lack of objection and intervention from the Commission is noteworthy – and it is doubtful if the silence from Brussels would have been replicated had the proposed outcome not dovetailed so well with the Commission’s overarching policy approach to the sector.

³⁶⁰ E. Bergamini, S Gitto & P Mancuso, Restructuring the Alitalia Business Model, (2010) *Journal of Air Transport Management* 16.

³⁶¹ Written contribution from Italy submitted for Item IX of the 121st meeting of OECD Competition Committee on 18-19 June 2014, DAF/COMP/WD(2014)38.

³⁶² Joos Stragier, Outlook of European Commission's Competition Policy and Enforcement Priorities in Air Transport, EALA Conference (22 November 2002).

5. Role for NCAs

a) Enforcement or supervisory role

While in some of the merger transactions, most notably the *Aegean-Olympic* transaction examined in more detail in the next chapter, the European Commission has delegated to the relevant NCA an enforcement or supervisory role, in some larger transactions the role of monitoring the parties' compliance with the commitments negotiated with the Commission has been given to an independent trustee. In practice, these independent trustees tend to be one of the large global accounting and auditing firms which, presumably in the view of the Commission and the parties involved, are better equipped to monitor the cross-border or even global effects of the transaction. From a policy perspective, this approach would appear to cement the Commission's leadership role in the area by effectively by-passing the oversight function of NCAs in larger alliance situations.

An interesting aspect of the Commission's decisions in terms of the role foreseen for national authorities is the undertaking entered into by the German authorities in the *Lufthansa/SAS/United* alliance.³⁶³ The remedies package in that case included an undertaking whereby the German authorities would refrain from applying restrictive price control measures on fares on indirect sixth freedom services on the routes in question.³⁶⁴ Due to the Commission's lack of specific enforcement powers to rule on air transport between the European Union and third countries under Regulation 3975/87,³⁶⁵ it was required to enter into "close co-operation" with the Member States concerned to reduce the market entry barriers. In that context, along with the usual slot divestiture requirements, the Commission identified a potential regulatory entry barrier in that national governments could impose price controls on competitive indirect services on the routes where the Commission's assessment had found overlap. The German aviation authorities at the time required that published fares for

³⁶³ Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 (ex 89) EC) (2002/C 181/02), available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0730\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0730(01)&from=EN).

³⁶⁴ John Balfour, EC competition law and airline alliances, *Journal of Air Transport Management* 10 (2004) 81–85, at 84

³⁶⁵ The scope of Regulation (EEC) No 3975/87, laying down rules for the application of Article 81 and 82 of the Treaty to the air transport sector was limited to transport services between Community airports.

indirect services to Germany be filed with them. In the event that such indirect services undercut the direct services being offered by German or US carriers on the same city pairs, the authorities could impose price controls.³⁶⁶ The undertaking agreed with the Commission effectively saw the national authorities surrender a regulatory function in order for clearance to be granted to the alliance. While the previous Commission assessments had undoubtedly taken into account the presence of bilateral inter-governmental negotiations on air access arrangements, for example in *Swissair/Sabena*,³⁶⁷ the move to use a binding undertaking to strip a national regulator of long standing powers is another indicator of the Commission's assertiveness and leadership role in the domain.³⁶⁸

Historically, the review of airline alliances has long been somewhat of a competence battleground between the Commission and national authorities. Following the *Nouvelles Frontières* judgment, it was clear that the competition rules applied to the entire field of air transport, including routes between Member States, within Member States, and between Member States and third countries. However, in sectors where there was no implementing regulation (which included air transport agreements involving third country routes), the Commission could not act unilaterally under what is now Article 101 TFEU. Since it was forced to use the transitional provisions in what is now Article 105 TFEU, the Commission could only act under the antitrust rules "in cooperation with the competent authorities in the Member States". One would have expected, therefore, national authorities to be given a prominent role in reviewing alliances involving third country routes.³⁶⁹ However, the judgment of the ECJ in *Ahmed Saeed*,³⁷⁰ by stating that the Community competition rules in principle applied to air transport between Member States and non-Member States, left the door open to the Commission to seize the initiative and claim the leadership role in reviewing the transatlantic alliance structures. The proactive approach taken by the

³⁶⁶ Geert Goeteyn, Remedies in the Air Transport Sector, in Damien Geradin (ed), Remedies in Network Industries: EC Competition Law Vs. Sector-specific Regulation (Intersentia 2004).

³⁶⁷ Case No IV/M.616 - Swissair / Sabena, para 42-44.

³⁶⁸ See further, Case No COMP/M.3280 - Air France / KLM, para 163, noting that the French and Dutch governments declared that they will not restrict price competition between indirect and direct services on specified long-haul routes to or from France or The Netherlands.

³⁶⁹ See further: Angela Cheng-Jui Lu, International Airline Alliances : EC Competition Law/US Antitrust Law and International Air Transport, (Kluwer Law International, 2003), p.261; Isabela Atanasiu, Constructing the EU Network of Competition Authorities, (Hart Publishing, 2004), p.238.

³⁷⁰ Case 66/86 Ahmed Saeed Flugreisen, 1989 E.C.R. 803, 822-23, [1990] 4 C.M.L.R. 102 (1990).

Commission was not welcomed by some major players in the industry,³⁷¹ and there were instances of mismatches between the Commission's Community-centric policy-driven approach and the interests of national regulators. The Commission, for its part, actively encouraged Member State governments to move away from seeing themselves as guardians and sponsors of the interests of their own national carriers, and to focus instead on a shared responsibility for all Community air carriers to ensure "fair competition" with "a maximum of operational freedom for air carriers and no governmental intervention other than in exceptional circumstances".³⁷²

b) Role of commitment decisions

Having considered the controversial role of commitment decisions at the EU level above, it is worth noting that Regulation 1/2003 also encourages the development of commitment decisions at the national level by providing that, "[t]he competition authorities of the Member States shall have the power to apply Articles [101] and [102] of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions . . . accepting commitments [...]".³⁷³ As a consequence, nearly all Member State NCAs have now the possibility to accept commitments and some of them use this possibility quite intensively.³⁷⁴ The procedural context of commitment decisions varies from one Member State to another, which means that some of the concerns raised at the EU level may be

³⁷¹ See, e.g., Karl-Heinz Neumeister, Secretary General of the Association of European Airlines: "The Commission's role should then be that of a good referee [...] we particularly want them to refrain from creating their own rules and interpretations as they go along. This, however, seems not to be the case." Remarks at "Meeting the Global Challenge: The Outlook for Civil Aviation in the EU" (organised by Forum Europe) (Jan. 27, 1998), cited by G. Porter Elliott, *Learning To Fly: The European Commission Enters Unfamiliar Skies In Its Review Of The British Airways-American Airlines Alliance*, 64 J. Air L. & Com. 157, at 164.

³⁷² Neil Kinnock, Member of the European Commission responsible for Transport, Opening remarks for "Meeting the global challenge : the outlook for civil aviation in the EU" (organised by Forum Europe), Brussels, 27 January 1998, SPEECH/98/11, available at: http://europa.eu/rapid/press-release_SPEECH-98-11_en.pdf.

³⁷³ Article 5 of Regulation 1/2003. An Irish example would be the provisions of Section 14B of the Competition Act 2002, which allows the NCA to apply to the national High Court to make a commitment agreement between the NCA and an undertaking allegedly breaching Articles 101 or 102 TFEU an order of the court. By virtue of the commitment agreement, the alleged infringer agrees to do or refrain from doing something to bring its behaviour to an end, in return for the NCA closing its investigation and refraining from court proceedings. See: Marek Martyniszyn and Anna Louise Hinds, *The Irish High Court Issues its First Order on a Commitment Agreement between the NCA and an Undertaking (FitFlop), e-Competitions*, N°51262, April 2013.

³⁷⁴ Frederic Jenny, *Worst Decision of the EU Court of Justice: the Alrosa Judgment in Context and the Future of Commitment Decisions*, in *Fordham Competition Law Institute, International Antitrust Law & Policy 2014* (Barry Hawk ed., 2015), available at: http://fordhamilj.org/files/2015/05/FILJ_Jenny_WorstDecisionoftheEUCourtOfJustice.pdf.

relevant in some countries and not in others. Likewise, the types of arrangements envisaged by airlines will typically fall under the jurisdiction of the Commission rather than individual NCAs due to their inherent cross-border nature. However, should the general proliferation of commitment decisions at the national level lead to NCAs using such procedures to deal with potential competition issues at domestic airports, this will make it more difficult for cooperating airlines and their competitors to establish the baseline for acceptable levels of cooperation without entering into negotiations with the NCA and putting themselves in an unenviable bargaining position.³⁷⁵

Oum et al argue that due to the pace of liberalisation and deregulation of markets around the world, there could be a need for an unprecedented super-national regulatory body to ensure that companies are always judged against the same criteria – even when they are expanding alliances into jurisdictions with under-developed competition authorities. However, they note that the major argument against developing such a multilateral system is the possibility that it too could be captured by various interests and exploited to their ends. They maintain, nevertheless, that the current fragmented system is less than satisfactory because significant impediments to structural change on a global stage remain.³⁷⁶ We shall see in the next chapter that the airlines surveyed clearly perceived a clear division of competences between the Commission and the NCAs, with some airlines portraying the Commission's leadership role as being very pronounced – for good or for bad.

6. Conclusion: Objectives for the Empirical Study

As seen from the introduction above, the airline industry is as complex as it is perplexing. The analysis in this chapter follows the themes explored in other chapters in this work, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the ways in which the Commission's overarching policy goals

³⁷⁵ On the independence of competition authorities, see: William Kovacic, Competition Agencies, Independence, and the Political Process, DAF/COMP/WD(2014)86, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)86&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)86&doclanguage=en); Fabrizio Gilardi, The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors, (2005) Swiss Political Science Review 11(4): 139-167, available at: <http://fabriziogilardi.org/resources/papers/Gilardi-SPSR-2005.pdf>.

³⁷⁶ Tae Hoon Oum, Chunyan Yu and Anming Zhang, "Global Airline Alliances: International Regulatory Issues", Journal of Transport Management, January 2001, pp 57-62.

can influence the application of competition law, and (iv) the role of NCAs in applying competition law. Specifically, the aim of this chapter was to set out the theory behind the main issues that arise in the empirical investigation conducted in the next chapter.

In recent times, it would appear that the European market is concentrating around five large airlines with Air France-KLM, International Airlines Group and Lufthansa representing the traditional flag-carriers or legacy airlines, and players such as EasyJet and Ryanair solidifying their positions as the major new forces in the LCC model. Whether the wave of consolidation amongst European airlines has reached its optimum level is difficult to say, but these key airlines are increasingly influenced by the web of global alliances and partnerships which appears to provide direction and focus for their future expansion and competitive strategies generally. Airline managers, though ostensibly geared towards competition, are being called upon to deepen their levels of mutual coordination in order to provide integration and stability to the air transport industry as a whole.³⁷⁷

Although airlines and the aviation lobby will maintain that the global alliance structure came about purely because of the difficulties associated with attaining a sufficient scale within the industry (such as the high fixed costs, low return on investment and various legal barriers), it has had the effect of allowing a few long-standing market players to secure their control over some key markets by reinforcing the entry barriers, such as their rights to slots at congested airports. Thus, it could be argued that airline alliances have exacerbated a problem whereby there was already a clear tendency towards dominance by single carriers in their respective hub airports.

The Commission's continued focus on an O&D approach to market definition has the effect of rejecting the view that the commercial reality of alliances is that they must be assessed as unified wholes competing against each other at a network level. Under the O&D approach, competition authorities have proposed a variety of remedies in the hope of maintaining effective competition, including requiring the divestment of slots, provisions ensuring access to computer reservation systems, and opening access to airport facilities. It has become clear, however, that slot

³⁷⁷ Taïeb Chérif, Foreword in Kostas Iatrou & Mauro Oretti, *Airline choices for the future: from alliances to mergers* (Ashgate 2007), p. xi.

divestitures – the main tool used up until now – may not suffice to eliminate the competition concerns. Within this approach, there have since been some major differences between agencies as to what further remedies should be imposed, most notably in the divestitures required of the BA-AA alliance on either side of the English Channel and on either side of the Atlantic.³⁷⁸ As such, one of the aims of this study will be to examine how – and under whose influence – such decisions are arrived at. A key objective of this work is to gauge the level of protection granted to the interests of airline companies and their employees by means of competition law-making and enforcement.

Another interesting angle to be explored in this work is the relationship between different enforcement agencies when it comes to deciding how best to deal with airline consolidation. A certain degree of tension is evident in the submissions to an OECD Roundtable on the issue,³⁷⁹ and it stems perhaps from the different strategies being pursued by the national airlines of the states in question. As more and more of the deals being proposed in the airline sector take on a global significance, the need for cooperation between policy enforcers becomes more acute and airline executives will not hesitate to tailor their arrangements to find the most sympathetic institutional audience. Indeed, in one of the most controversial deals in recent times – which saw IAG further strengthen its position at Heathrow airport through the purchase of BMI British Midland – airlines potentially affected were vocal about the most appropriate forum for the examination of the deal.³⁸⁰ By surveying a wide range of figures directly involved in the enforcement of competition rules in one particular industry, the hope is to glean some insight into the workability of competition regulations, and to match their the rules’ objectives in theory with the outcomes for interested individuals in practice.

The analysis aims to examine how airlines themselves view mergers, cooperation and alliances but also how the competition rules impact upon the benefits they feel such transactions can offer. Similarly, they are surveyed the precise areas in which these benefits, or indeed any eventual problems, could arise. Participants are also

³⁷⁸ See generally, G. Porter Elliott, *Learning To Fly: The European Commission Enters Unfamiliar Skies In Its Review Of The British Airways-American Airlines Alliance*, 64 J. Air L. & Com. 157.

³⁷⁹ OECD, *Airline Mergers and Alliances*, (2006), available at: <http://www.oecd.org/dataoecd/1/15/2379233.pdf>.

³⁸⁰ *Financial Times*, 15th January 2012, Steve Ridgway, Virgin’s chief executive, is reported as stating that the deal would get “much stronger and much more realistic scrutiny if looked at in the UK”.

asked to predict the nature of future developments in the industry, in particular the rate of sector consolidation and the of role alliances compared to more traditional mergers and acquisitions in light of the financial turmoil which provides the backdrop for this whole project. By focussing on the effects of competition rules on innovations in cross-border cooperation arrangements from an industry point of view, this research aims to be of interest not only to the industry itself but to government officers, competition authorities and academics involved in the drafting or enforcing of competition rules.

CHAPTER 5: EMPIRICAL RESEARCH ON EUROPEAN AIRLINES' INTERACTION WITH EUROPEAN COMPETITION RULES

1. Introduction

This chapter presents the results of the empirical work undertaken as part of this thesis. The responses of the major airlines surveyed are presented and analysed in the context of the various regulatory and policy factors at play in the sector. The sections on the airlines' views are followed by case studies demonstrating instances where the issues highlighted by the survey arose in practice.

It has become clear during the course of the foregoing chapters that competition law and policy do not operate in a vacuum and, as such, must be capable of being implemented alongside other regulatory regimes and policy imperatives. This chapter examines the practical application of EU competition rules in the European passenger airline industry. This particular industry was chosen because of its numerous moving parts – the long held view of airlines as being of strategic national importance, the emergence of Low Cost Carriers (LCC) to rival traditional flag carriers, the trend towards rationalisation amongst major airlines, the presence of longstanding restrictions on airline ownership and control (O&C) based on the nationality of the controlling shareholders, the use of alliance structures and minority shareholdings to facilitate consolidation within the confines of O&C rules, and the notable expansion of airlines from the Middle East which appear to be threatening the future prospects of the incumbent major airlines as they exist today.

Even amidst all of these elements, competition rules clearly play an important role in the development of the passenger airline sector in Europe and the European Commission have examined the sector in many different ways – most notably in the context of reviewing proposed mergers and investigating cooperation agreements within alliance groupings. Therefore, this chapter explores stakeholders' perspectives, especially their criticisms, of how competition rules are applied in a sector in which it is only one of many different regulatory regimes that attempt to mould the future development of the industry.

The analysis in this chapter broadly follows the themes explored in other chapters in this work, namely: (i) the role of the general economic context in the application of

competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the ability and role of NCAs in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law.

However, for the purposes of analysing the responses received during this part of the research project, more specific themes have been separated out to serve as signposts for navigating the rest of this chapter. Specifically, those themes are: (1) the respondents' perception of certain aspects of the application of the EU Merger Regulation (EUMR)¹; (2) the treatment of minority shareholdings under the EUMR and proposed reforms in this matter; (3) the role of National Competition Authorities (NCAs) vis-à-vis the EU authorities in the enforcement of competition law in the passenger airline sector; and (4) the objectives and strategic outlook of EU competition law as applied by the Commission in the passenger airline industry. As such, the sub-themes (1) and (2) relate most closely to the broader theme (ii) as regards identifying baselines applicable in crisis conditions; whereas sub-themes (3) and (4) refer back to the broader themes (iii) and (iv), respectively.

The varying depth and detail of the responses received mean that not all respondents touch on all of these points, but this is to be expected with a work of this nature. As regards the contribution of this work to overall competition law literature, the elements of most interest arise when the different themes interact with one another. For example, there are numerous points at which the European Commission's approach to applying the EUMR in practice is, according to the responses received, influenced by the Commission's preferred outcome for that sector. This, inevitably, has a knock-on impact on airlines' strategic planning processes. Further, the role of NCAs crops up in most of the responses received and, while the NCAs do not appear to play a leadership role as regards the Commission's policy preference for the airline sector, it is clear from the responses received that NCAs do play an important role in the enforcement of the Commission's application of the EUMR.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en>.

2. Empirical Study

a) Technical details of study

The study was undertaken by way of a detailed questionnaire which was then supplemented by a follow-up questionnaire and telephone conversations where the respondents were amenable to same.² The respondents were advised that the information contained in their responses would be treated with the strictest confidentiality in accordance with the EUI's Research Code of Ethics.³ The research project was reviewed and approved by the EUI Ethics Committee and each recipient of the questionnaire was also provided with a confidentiality statement signed by the researcher.⁴

The questionnaire was widely circulated to the legal departments or, where identifiable, the general counsels of airlines active in the EU. Given the importance of the issues raised, the response rate was surprisingly low despite repeated attempts and flexibility in terms of response times. As a result, the sample size of the empirical study is small with four complete responses received from a circulation list of 30 airlines and airline alliances. The complete list of recipients of the questionnaire is provided below, with recipients listed in alphabetical order.

While the small sample size could suggest that there was a sampling bias, in that airlines actually involved in competition assessments and decisions have more incentive to respond and may not reflect the views of typical airlines. While there may be truth to this, any weakness in the study as a result of this is arguably compensated by the value-added that comes with the quality of the responses received and the level of reflection that went into each. Ultimately, the responses can be seen as broadly representative in that they came from (i) both full service carriers and low cost airlines, (ii) airlines both within and outside of the major airline alliances,

² See Annex 1. The author is grateful to Dr Mirko Schnell for his advice on the formulation of the questionnaire and follow up interviews. See also, Mirko Schnell, Investigating the perception of route entry barriers by airline managers: A questionnaire-based approach (paper presented at 1st German Aviation Research Seminar), at: <http://www.iwim.uni-bremen.de/gars.ALT/020112-Schnell.pdf>; Mirko Schnell, Managerial perception of barriers to route exit: evidence from Europe's civil aviation markets (2001)

Journal of Air Transport Management 7(2) 95-102.

³ See Annex 2. See also, EUI Code of Ethics in Academic Research, IUE 80/2/13 (ca 79) rev. 2, available at: <http://www.eui.eu/Documents/ServicesAdmin/DeanOfStudies/CodeofEthicsinAcademicResearch.pdf>.

⁴ See Annex 3.

(iii) airlines from a range of EU countries, and (iv) airlines that are both sides of potential acquisitions.

b) Airlines surveyed

Air Berlin
Aer Lingus
American Airlines
CityJet
Continental Airlines
EasyJet
Emirates
Etihad
FinnAir
FlyBe
IAG
Japan Airlines
Kingfisher
KLM
Korean Air
LAN
Lufthansa
Norwegian Air

OneWorld
Qantas
Qatar Air
Ryanair
S7
SkyTeam
Star Alliance
Swiss International Air Lines
TAM
US Airways
Virgin Australia

c) Other recipients

International Air Transport Association
Air Transport Action Group
Association of European Airlines
Airports Council International
International Civil Aviation Organization
Airlines for America
European Low Fares Airline Association

d) Structure of the Chapter

This chapter is organised as follows. The opening sections present the results of the survey conducted of major European airlines into the functioning of EU competition rules in the passenger airline context. Each airline was asked largely the same questions but, as would be expected, the responses from each tended to focus on the issues which most affected them. Despite the differences between the airlines, in terms of them being LCCs or full service carriers as well as a split between members of alliances and independent airlines, a number of themes arose in the responses which are the focus of the attention in those sections. A separate section is used to present a case study of two major European airlines which demonstrates the approach taken to applying competition law principles in a very recent situations where the legacy issues and potential problems of the airline in question seem to carry significant weight in the ultimate decision making process. A concluding section brings together some of the insights from the preceding sections in light of the overall thesis.

e) Airline profiles

By way of introduction to the empirical research conducted, each of the airlines contacted received a standard questionnaire which included a confidentiality guarantee approved by the EUI's Ethics Committee. As such, the responses to the standardised questions and the supplementary comments provided by the airlines were given under an assurance that neither the individual respondent nor the airline represented would be identified.

In order to provide some context to each respondent's input, a brief profile of the airlines they represent is given below. Since one of the early questions of the questionnaire enquired as to how much, if any, interaction the airline had with the European Commission's Services in a competition law context, the response provided to this question is taken as the starting point.

LCC1 is amongst the largest Low Cost Carriers operating in Europe. The respondents on behalf of LCC1 stated that it has a long history of interaction with the Commission's Services, as well as the EU Courts, when it comes to the enforcement of competition law, the application of EU merger control rules and State aid rules. In

particular, LCC1 had very frequent contact with DG Competition, most notably with respect to its attempted takeover of other airlines, but also in the context of State aid assessments and antitrust complaints.

FC1 is a legacy flag carrier with a global presence and is an anchor member of one of the major international alliances. Similarly, FC1 has had multiple interactions with the European authorities in recent years. Interestingly, the view of the respondents was that this has not necessarily meant that FC1 has a better bargaining position in such interactions. Indeed, the respondents put forward the view that repeated interaction with the authorities brings its own drawbacks because the Commission appeared to them to have developed a static view and, if the attempted transaction does not fit in with it, they can slow the process down and make it very burdensome on the parties. This leads to very detailed and sophisticated data requests and the respondents remarked that their experience was that there is a confirmation bias at play.

FC2 is also legacy flag carrier with a global presence. It is an anchor member of one of the major international alliances in competition with the alliance of which FC1 is a member. FC2 is a senior partner in its alliance in that it operates a major hub and a collection of long-haul routes. As with other members of such alliances, a large part of its role has also been to provide regional feeder flights in order to supply passengers to the other alliance members' networks. It also provides long-haul coverage to destinations which traditionally did not form part of the networks of the other members of its alliance.

LCC2 is amongst the largest low cost carriers in Europe is a direct competitor of LCC1. LCC2 has in the past been vocal in its support of the goals of European law generally, including competition law, which it sees as having being to promote competition, to allow companies to access and expand into new markets and to facilitate the movement of people around the countries of the European Union.

3. Themes of Responses Received

a) Perception of the Application EU Merger Regulation

There is a substantial body of literature on developments in the passenger airline industry on the European and global stage in recent decades. However, the

particular contribution made by this chapter is that it incorporates the views of some of the European airlines which have had the most interaction with the EU competition authorities in recent years. Within the survey circulated throughout the European airline sector, a particular emphasis was placed on the workability of the EU's competition rules in practice – especially on the predictability and certainty of the European Commission's decision-making. Perhaps unsurprisingly, many of the respondents chose to focus on merger decisions and much of the analysis of this chapter relates to that field of competition law. The most interesting view expressed is essentially that the EU has a pre-conceived policy preference for the sector and that competition rules are applied inconsistently in order to arrive at the pre-ordained outcome. The approach taken is somewhat inspired by that of Mirko Schnell who conducted a questionnaire survey asking the question "How do airline managers perceive barriers to route entry?".⁵ Schnell's view was that, since only perceived entry barriers prevent entry, it was important to understand which entry difficulties are noticed by whom and to what extent these obstacles deter entry in practice. In a similar vein, this work seeks to gain insight into how the application of competition rules is perceived by airlines since it is these perceptions which will go on to influence their corporate planning.

b) Minority Shareholdings under EUMR

Much has been written about the possible existence of an enforcement gap in the EUMR whereby the European Commission does not have jurisdiction to examine the acquisition of shareholdings which fall short of granting the purchaser joint or sole control over the target or the target's assets. Recent years have seen the European Commission embark on a long-running legislative procedure toward a more effective merger regime, to include assessments of non-controlling interests.⁶ This has entailed a broad consultation process undertaken by the Commission which has received input from a large cohort of stakeholders, including certain airlines which also responded to the survey conducted for this work.

⁵ Mirko Schnell, Investigating the perception of route entry barriers by airline managers: A questionnaire-based approach (paper presented at 1st German Aviation Research Seminar), at: <http://www.iwim.uni-bremen.de/gars.ALT/020112-Schnell.pdf>.

⁶ European Commission Public Consultation: Towards more effective EU merger control, http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.

Given the manner with which certain airlines have pursued a program of expansion and strategic consolidation based on partial and passive acquisitions or other airlines, it is clear that the airline sector will be affected by any legislative changes to the EUMR to cover minority shareholdings going forward. Therefore, the survey conducted for this work included questions regarding the perceived existence of a lacuna in the EUMR and whether and how this should be changed. Naturally, the responses should be seen for what they are – the views of individual airlines at a particular point in time and, as such, are a function of that particular airline's commercial interests and outlook. Nevertheless, the responses give some interesting insights into the effect which the amendments to the EUMR may have on the strategic planning processes of undertakings which have a track record of regularly using investments falling short of acquiring control for strategic ends.

c) Goals of EU Competition Law in Practice

A theme throughout this thesis has been to query whether the application of EU competition law has a role in responding to economic crises and, if so, whether it is capable of doing so in a coherent manner. The timing of this work is opportune as the phase of consolidation and investment in the sector continued through the economic downturn, but with some specificities which show the impact that the external economic circumstances can have on the application of competition policy to a given situation.

More generally, however, this chapter provides indicative evidence of the European Commission taking into account the overall nature and development of a sector in a global context when applying competition rules in individual cases. While such an approach, in itself, may well be justifiable, the responses received from the airlines most affected by the application of competition rules indicate that the Commission's methods have rendered their decisions unpredictable because the overarching policy concerns have not been explicitly incorporated into decisions. Instead, according to the respondents on behalf of some airlines, the Commission's use of otherwise standard methodology has been skewed in order to arrive at decisions which allow for the emergence of an airline sector which conforms to the Commission's policy-driven preferences.

d) Airlines' Strategic View of Competition and Consolidation

The industry literature has long described and analysed the main advantages of the moves towards consolidation in the passenger airline industry. In particular, from the point of view of the major airlines which responded to the survey employed for this work, the main advantages are the financial benefits of the resulting synergies and the possibilities to expand into new markets. For the purpose of this work, the main focus was on whether and how the application of EU competition rules impacts on airlines' strategic thinking in this regard.

The main thrust of the responses received is that the application of EU competition rules to the passenger airline industry is subject to an overriding policy objective on the part of the European Commission which does not necessarily align with the strategic plans of the airlines surveyed. In particular, the responses received indicate that the Commission favours the creation of large network-based airlines which draw on a web of regional feeder-routes and are capable of competing with global airlines on transnational and transcontinental markets.

Depending on the respondent in question, such a policy preference is described as a vice or a virtue. Either way, it is clearly an element which has affected the European airline industry profoundly, with certain major carriers being seemingly selected to compete on the international network-based market and other LCCs being earmarked as the point-to-point airlines that will supply volume and geographic coverage to the large carriers. Importantly, it would appear from the responses described below that the Commission has used its role in the application of merger control rules to encourage the emergence of such European champions without clearly and unequivocally stating that this is a policy element playing a role in its assessment. This is of interest in the context of the rest of this thesis as it amounts to an argument that the application of competition law rules has been adapted to take into account overall economic trends, for good or for bad, and allows us to study the impacts of attempts to do so on the overall workability of the EUMR and competition law rules generally.

The broad conclusion reached by this chapter, in line with the general findings of this thesis, is that competition law enforcement can and does adapt to overall economic trends and circumstances but only at a cost – namely, the levels of certainty and

predictability attaching to any given Commission decision. The decision to use competition rules as a tool to shape the airline sector can be explained by the inability of the EU to directly mould the structure of the industry due to the presence of legacy issues from the Chicago Convention and other vested (political) interests. The contribution of this chapter is to highlight the impact that the use of competition law rules in such a fashion has on the stakeholders most directly affected.

e) Practical Interaction of NCAs and European Commission

Recent years have seen calls not only for better cooperation between NCAs and between NCAs and the Commission, as well as for increased convergence of diverse national merger review procedures. It is interesting to note that the undertakings involved tend to perceive the NCAs with which they have had contact as having been recruited as mere watchdogs for the implementation of the decisions handed down by the Commission and focus their attention on Brussels when it comes to attempting to influence the future application and development of competition law rules.

The White Paper of July 2014 also makes proposals aimed at reforming the referral system between the Commission and NCAs, making it more business-friendly by streamlining and shortening the procedures.⁷ It is interesting to note that it is a live issue for stakeholders and may warrant further research in the future in light of the changes proposed.

4. Airline Responses

The responses of the airlines surveyed are organised thematically as follows:

- Perceptions of the EUMR, especially the market definition rules;
- Comments on the strategic goals of competition policy as applied by the European Commission in the passenger airline sector;
- Comments on the role of minority shareholdings and their treatment by the European Commission; and

⁷ See http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf, para 59 et seq.

- Comments on the role of NCAs.

a) General Perception of EUMR

There is an overall sense of scepticism which comes through in most of the responses regarding the amount of political influence being brought to bear in the application of competition law rules in the airline sector and, in particular, the presence of a clear Commission's policy preference for the emergence of strong network-based pan-European airlines. We will return to this criticism below, but it is interesting to note that this line appears strongest in the responses of LCC1 while the respondent on behalf of FC2 states that the single most important potential improvement in the application of competition law would be an *increased* recognition of the strategic importance of the airline industry. Clearly, therefore, there is an internal incoherence in the views of the airlines as regards the appropriateness of an overarching strategic policy for the sector depending on the role played by the particular airline.

This divergence between LCCs and FCs has also arisen elsewhere. For instance, LCC2 has publicly criticised the apparent preferential treatment which it perceives larger airlines to be benefitting from in terms of how slots at some of Europe's busiest airports are allocated. In particular, LCC2 have criticised the way that relevant authorities fail to take into account the manner through which already-dominant carriers manipulate the rules in order to further increase their dominance to the detriment of the consumer. That criticism is relevant because it is in line with the responses received from other airlines regarding the existence of a Commission policy preference to facilitate the emergence of large network-based airlines. This Commission preference, according to LCC2, manifests itself in the use of slot allocation procedures to secure the positions held by major airlines in crucial hub airports. The particular example given is that of Air France's slot holding at the slot-constrained Orly steadily increasing while the slot holding of the second biggest carrier has been reduced to such an extent that no single competitor is capable of providing competition to Air France on a large number of routes while Air France is able to leverage economies of scale in its operation and marketing.

In essence, LCC2's stated position is that it is dissatisfied with the Commission's approach to regulating the airline sector generally, in particular in its oversight of slot

allocation issues, and expresses the view that the Commission's interference is not facilitating competition in terms of encouraging entrance into different relevant markets. In line with this, to some extent, is LCC1's respondent's statement that it is in favour of a stripped down approach to competition policy objectives. In particular, the respondent on behalf of LCC1 states that the most appropriate competition policy objective for an authority dealing with the airline industry is to ensure that regulation is reduced so as to allow entry so that consumers can identify the products and services they desire and the price they are willing to pay.

In contrast, when questioned on the application by the European Commission of the EUMR in practice, the main criticism of the respondent on behalf of FC2 was that there should be special attention paid to the structure of the airline industry. In particular, FC2 pointed out that the EUMR's main shortcoming was in its jurisdictional criteria for mergers falling to be considered within its sphere. This view can be contrasted with that of LCC1 that competition rules, in the context of assessing future potential acquisitions, are already very restrictive (rated at 4 out of 5). This view may well have been influenced by whether the airline in question was in an expansionist mode or whether it saw itself as the potential target of either a full or partial acquisition. It should be noted that, for example, the prohibition of Ryanair's attempted takeover of Aer Lingus occurred shortly before the questionnaire was circulated. As such, it would be interesting to conduct further research at regular intervals to see whether this assessment is consistent or solely based on recent decisions.

An interesting comment on the Commission's practice made by the respondent on behalf of LCC1 is the view is that airline mergers presenting issues only on domestic markets are being prohibited on an unduly regular basis. Again, the approach of the Commission was described as overly strict when seen in light of proposed mergers between flag carriers with major hubs that met with the approval of the Commission. Notwithstanding the seemingly anomalous decision in the re-notified Olympic/Aegean concentration (examined below), this perception of domestic airline mergers receiving a less generous appraisal from the Commission's Services is linked to LCC1's clear view of the injustice of the Commission's policy objectives linked to the emergence of strong network-based pan-European airlines.

b) Predictability of EUMR

LCC1 rates the clarity and comprehensibility of the European Commission's competition decisions at 3 out of 5. More damning, perhaps, is the assessment of the predictability of the European Commission's competition related decisions at only 2 out of 5. When asked to rate the current rules for predictability, the respondents from FC1 only give the rules a 1 or 2 out of 5. The respondents from FC1 stated that the only real predictable element is that complying with merger control assessment requirement is becoming increasingly burdensome. In support of their view, the respondents on behalf of FC1 noted that there were some 5 billion data points in the recent submission on the acquisition of another airline. From FC1's point of view it was questionable whether this is an efficient use of public resources.

In contrast to some of the more critical responses supplied by other respondents, the respondent on behalf of LCC2 state that the decisions of the European Commission in the airline sector were both predictable and in line with the market's expectations. The respondents from FC1 were of the view that the European Commission's competition enforcement and merger control rules as they stand do not appear to be very predictable. In support of that view they pointed to the moves of industry players such as Ryanair (Aer Lingus) and Aegean (Olympic) to resubmit previously blocked transactions in the aftermath of IAG's acquisition of BMI. Indeed, the FC1 respondents specifically noted that the applicable framework should have been the same since IAG and BMI shared the same base, and stated that some frustrations on the part of Ryanair and Aegean were understandable from their point of view.

In a similar vein is the assertion from the respondent on behalf of LCC1 that it is hard for the market or individual undertakings to predict the outcome of an interaction with the Commission's Services at a given time because their responses depend on their priorities at that point in time. This seems to be a distilling of the general sense of the frustrations alluded to above. The view of LCC1 is that the rules are currently being used to that end – given the Commission's apparent preference for a particular market structure in the medium and long term – and it is having a detrimental effect on the workability of the merger rules for the rest of the industry.

c) Market definition

In competition law, defining the relevant market sets the parameters within which the effect of a given transaction or arrangement is assessed. While the definition of the relevant market is often a bone of contention, it appears that there is an even more pronounced discord between the Commission's approach to market definition in the airline sector and the approach preferred by certain stakeholders. Interestingly, some of the airlines surveyed for this work argue that the approach to market definition used by the Commission in the airline sector has been reverse-engineered in order to allow the Commission's decisions arrive at the preferred policy outcome (i.e. a small number of strong internationally competitive network airlines being fed by point-to-point LCCs).

For instance, LCC1's major criticism of the application of the EUMR rules in practice is the mismatch between the approach taken by the Commission to the point-to-point airline market compared to the view taken of network airlines and, in particular, consolidation occurring at major hub airports. By way of an example of this, LCC1 pointed to Commission's approval of the acquisition of British Midland by British Airways which, in the opinion of the respondent for LCC1, resulted in a significant strengthening of British Airways' position at London Heathrow airport.⁸ This decision is presented by the LCC1 respondent as forming part of the Commission's policy decision to allow – and even encourage – the emergence of strong network-based airlines capable of competing on the global scale. It is recognised that the capacity restraints posed by a lack of ability to expand hubs such as Heathrow threaten the economic expansion plans of major airlines, including British Airways, and LCC1's dissatisfaction with such decisions centres around a perception that those issues lead to more favourable treatment in merger assessments than would otherwise be warranted.

Furthermore, on the substance of the application of merger control rules, the respondent on behalf of LCC1 criticised how the Commission's recent approach does not properly recognise the entry/exit dynamic in the short-haul, point-to-point passenger airline sector. The view expressed by LCC1 is that the Commission

⁸ Case No COMP/M.6447 - IAG/ BMI,
http://ec.europa.eu/competition/mergers/cases/decisions/m6447_20120330_20212_2452290_EN.pdf.

should increase the emphasis it puts on the ease with which operators can launch services on the many point-to-point destination-based services offered, in particular, by low cost airlines such as LCC1 itself. An approach whereby entering and exiting the market is seen as less costly would, for the purposes of a merger assessment, amount to an increase in the level of potential entry. Such potential entrants can often play a key role in reducing the perceived competitive harm deemed to result from a merger or acquisition leading to the merged entity holding a significant share on the relevant market, since the prospect of immediate entry by a competitor acts as a disciplining factor and prevents the exercise of market power by the merged entity.

When asked for its critique and a view on the single biggest potential improvement in the application of European competition rules, LCC1's emphasis returned to the need for increased recognition in the market definition phase that O&D markets are not entirely independent from each other.

According to the respondents from FC1, meanwhile, the Commission does not look to economic demand of consumers in the same terms as it. The criticism from the point of view of FC1 is that the Commission is overly focused on the actual number of competitors functioning on a market rather than, for instance, the capacity available at each. When asked for a critique of the economic analysis employed by the Commission in its assessments of the airline sector, the respondents from FC1 remarked that the concept of demand in the passenger airline industry covers a very wide spectrum, especially since market segmentation and price differentiation are so important. The point was made that the Commission's division of demand into business/leisure and point-to-point/connection is crude compared to airlines' attempts to sub-divide demand down to individual level.

The respondents from FC1 also criticised the Commission's approach to market definitions, and specifically stated that they need to be improved as regards the O&D/network effects aspects. In particular, the respondents on behalf of FC1 stated that the strategic effects of efficiencies are never given their proper weight in the Commission's current assessments while jobs, and where they are located/lost, takes too much precedence. Again, FC1 were of the opinion that it would be better to take a longer term view.

Another criticism from the respondents on behalf of FC1 was that the Commission ought to also take into account the heterogeneous nature of the current European economy. From the FC1 perspective, London should be seen as almost an economy unto itself, and is radically different to that of Athens, for instance. The approach suggested by FC1 would require a more bespoke set of market definitions whereby the economic context of a particular hub or destination is given more weighting than is currently the case. While the sources of demand sustaining a given airport already plays a role in the Commission's identification of that airport's catchment area and competitors, the suggestion of FC1 effectively amounts to a requirement for more in-depth analysis of the demand drivers behind each airport.

The respondents from FC1 stated that the main objectives of European competition law enforcement officials would appear to be price and choice. However, the criticism from FC1's point of view was that the Commission is "fixated on rivalry" and the narrow approach to market definition is purposefully chosen because it is the approach that "gets them to that place".

Similarly, the respondent on behalf of LCC2 noted that, from an airline's perspective, the single most welcome adjustment to the Commission's approach to applying competition law to the airline sector would be a change to its market definitional practice in order to take into account the fact that O&D markets are not entirely independent of each other in practical terms.

d) Strategic goals of competition policy in the passenger airline sector

Looking to the future strategies at play in the airline industry in the EU, the respondent from LCC1 predicted that there would be far more consolidation of airlines if the non-EU ownership rules were removed whereas the potential for further and meaningful cross-continental consolidation in today's economic context was deemed to be unrealistic (2 out of 5) as things stand.⁹

⁹ At the time of writing, the possibility of developments in this area appear to have increased as the European Commission has announced it is prepared to dilute its requirements on foreign investment for European airlines which cap non-European ownership of EU airlines at 49 per cent through deals with individual countries (specifically those states that agree to abide by strict regulations on state subsidies). See , Communication from the Commission to the European

However, the view of the respondent on behalf of LCC1, shared by many in the industry, is that this consolidation will not be fully achieved and that a certain amount of fragmentation will persist on regional lines due to the ownership rules. It is worth reiterating that the criticism levelled by the respondent on behalf of LCC1 towards the Commission's appraisal of the entry barriers in the EU short-haul point-to-point sector are also linked to its perception of the Commission as being (unjustifiably, in LCC1's view) biased towards the development of large network-based pan-European airlines. Indeed, LCC1's response specifically notes that an approach whereby entry barriers are deemed to be relatively low on point-to-point markets would lead to a more equal treatment of major international airlines and smaller, EU centric airlines.

Other responses received also clearly demonstrated the important influence that the existence and application of merger control rules have on the strategic planning of firms in the passenger airlines industry. Even in the context of an industry that is subject to regulatory intervention at many different levels, including the notable restrictions on non-EU entities gaining control over EU airlines, the respondent on behalf of LCC1 deems competition rules to have a strong influence on an airline's future strategy (rated at 3 out of 5).

The respondents on behalf of FC1 stated that, in their view, the three big network carriers were all in favour of strategic consolidation. Furthermore, and perhaps unsurprisingly, the respondents from FC1 were of the opinion that strategic consolidation is good for the airline sector. In support of this, the respondents pointed out that the passenger airline industry is a capital-intensive industry much like the automobile and shipping industries. The respondents went further to state that, in their view, it would be preferable to follow the model used in those sectors because consolidation there has added stability. When asked to comment on the general level of strategic consolidation in the aviation industry, the respondents from FC1 were of the view that Europe is lagging behind. This was stated to be on

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -

An Aviation Strategy for Europe, Brussels, 7.12.2015 COM(2015) 598 final (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0598&from=EN>) at p.5: "The Commission will continue to pursue the relaxation of ownership and control rules on the basis of effective reciprocity through bilateral air services and trade agreements with the longer term objective to do so at multilateral level."

account of, partly at least, the different nationalities and regulatory regimes involved and the lingering desire for most major states to have their own flag-carrier.

The view of the respondents from FC1 was that the objectives of the Commission in applying competition rules should be shaped around taking a longer term view so as to secure the sustainability of the airline sector in Europe. In support of this view, the respondents from FC1 pointed especially to the external pressures and the trend of globalisation which sees most growth occurring outside EU. This, in their view, meant that there is a need for EU airlines to achieve sufficient scale before being able to expand to markets such as China, which will be crucial for their long-term survival. In further support of this view, it was stated that this approach is already being argued for in telecommunications industry. In general, the respondents on behalf of FC1 stated that consolidation should be seen in light of globalisation.

The respondents on behalf of FC1 stated that their view was that the Commission has settled on its own conception of the future state of the airline industry, and that the Commission's objective for the sector is based on three major European network carriers and strong competition between three global alliances, supported and fed by point-to-point competition from LCCs and regional operators. The respondents on behalf of FC1 severely criticised the Commission for assuming the role of central planners (even comparing them to the Chinese authorities) and suggested that the Commission would be better served by following market developments rather than intervening to direct them. More pointedly, FC1 stated that regulation should be reduced to a minimum level so as to allow customers make as many of the decisions as possible. Competition enforcement should be limited to ensuring that barriers to entry are sufficiently low so that the decision making power lies in the hands of consumers where possible. Further, the respondents from FC1 took the view that the pursuit of consumer welfare ideals is a laudable goal, but state that more emphasis should be placed on the long-term health of the passenger airline industry given its capital intensive nature.

On the other hand, the respondent on behalf of FC2 took the view that the goals foremost in the minds of European competition enforcement officials are concerned with the range of choices and prices offered to consumers. Contrary to some of the views expressed by counterparts in other airlines, the respondent from FC2 noted

that, while the overall efficiency of the European airline industry does play an important role in the Commission's approach, the Commission's stance does not extend to positively protecting the interests of flag-carriers.

The respondent on behalf of LCC2 expressed the view that the most important goals pursued by Commission officials in their application of competition rules to the airline sector were promoting the efficiency of the industry generally while also looking to prices and choices offered to passengers.

e) Minority shareholdings

When questioned on the application by the European Commission of the EUMR in practice, the main criticism of the respondent on behalf of FC2 stated that the jurisdictional criteria of the EUMR should be tightened by adding more focus on minority shareholdings.

In this light, it is relevant to note that a representative of Aer Lingus has publicly argued that there is an enforcement gap in the EUMR since the anti-competitive effects of minority shareholdings are already recognised in certain domestic jurisdictions, specifically citing the UK, Germany and the US. The Aer Lingus view was that the current enforcement gap in the EUMR should be addressed to avoid continuing the unnecessary legal uncertainty which existed for entities operating on the borderlines between EU and domestic jurisdictions. In particular, the representative on behalf of Aer Lingus remarked that the current situation was the source of unnecessary delays and costs for the undertakings concerned.

This can be contrasted with the view put forward publicly by Ryanair that no such enforcement lacuna exists specifically pointing to the fact that Member States such as the UK, Germany and Austria have legislated to account for such situations. Ryanair's view is that there is no legislative lacuna in terms of scrutiny of minority shareholdings, only the choice of national legislatures not to apply national merger control to this particular area.¹⁰

The views of both Ryanair and Aer Lingus on the introduction of stricter controls on the acquisition of minority shareholdings in rival companies must be considered in

¹⁰ http://ec.europa.eu/competition/consultations/2014_merger_control/ryanair_en.pdf

light of its vocal public opposition to Ryanair's purchase of 29% of its shares,¹¹ thereby becoming the single largest shareholder in its main rival at Dublin airport but falling short of the definition of joint or sole control for the purposes of the Consolidated Jurisdictional Notice which delineates the scope of application of the EU merger regime.¹²

f) Role of NCAs

The most important role played by NCAs, meanwhile, according to LCC1, is to monitor and prevent barriers to entry, and encourage healthy competition amongst airlines.

For LCC1, relations with competition authorities at the European level are more important than those with NCAs at the domestic level. To a certain extent, this is to be expected given the size of LCC1's operations and the fact that it is active on a pan-European basis.

In this context, it is interesting to note that Ryanair has, in the recent past, purposefully opted to use the European Commission as the forum for lodging a high-profile competition complaint against the Dublin Airport Authority and Aer Lingus regarding the financial arrangements behind the building and funding of the new Terminal 2 at Dublin Airport.¹³ It appeared that Ryanair was particularly concerned about political issues and influence being brought to bear in order to protect the interests of traditional flag carriers, even within the competition law enforcement arena. However, the decision to go to the European Commission with a complaint that (even in the assessment of the European Commission) appeared to be more suited to a domestic procedure, indicates that the European Commission is seen as a fairer and more independent body – at least compared to the Irish Competition Authority (now the Irish Competition and Consumer Protection Commission).

¹¹ http://ec.europa.eu/competition/consultations/2014_merger_control/aer_lingus_en.pdf

¹² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>.

¹³ Case No COMP/39.886 – Ryanair/DAA-Aer Lingus, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39886/39886_205_3.pdf.

Regarding the role of NCAs in the enforcement of the EUMR and competition rules generally, a representative of Aer Lingus¹⁴ has publically emphasised the importance of legal certainty and the reduction of the transaction costs and risks associated with such investments. The representative stated that it was important that domestic (i.e., Irish) competition legislation should immediately be updated and amended to reflect any such changes at the EU level.

g) Comment on responses

Interestingly, when asked to contextualise the relative influence of EU regulatory initiatives, including the EUMR and the EU ETS, on the long term planning of a major airline, the respondent from LCC1 stated that the presence of restrictions on non-EU entities investing in and controlling EU airlines plays a more important role. Similarly, LCC2 stated that the bilateral ASAs and the related O&C restrictions are the single most important regulatory framework when it comes to the long term strategic planning processes undertaken by airlines. As regards the outlook for the industry generally, the respondent on behalf of LCC2 states that the consolidation witnessed in the sector will continue and that cross-continental consolidation is a realistic expectation for industry players.

Similarly, regarding the moves towards strategic international consolidation amongst the major airlines, LCC1's perspective is that the prospects for such deals depend more on the nationality requirements than competition rules – again reflecting the belief that the Commission has already adopted the view that merger control rules will not be used to block the consolidation of the sector around major network-based carriers with global reach.

However, competition law rules are described by the respondent on behalf of LCC2 as being very important for the development of an airline's strategy specifically in the sense that those rules are deemed to be substantively restrictive of an airline's investment and expansion plans.

¹⁴ Laurence Gourley, Legal Director, Aer Lingus, ISEL Competition Law Forum, Matheson Solicitors, Dublin, 5th March 2014. The talk was given in the aftermath of the UK Competition Commission's decision to order Ryanair to reduce its stake in Aer Lingus down to 5% through a forced divestiture overseen by an official trustee, but before Ryanair's appeal of that decision had been heard at the English Court of Appeal. The remarks were also made before news emerged of IAG's proposed acquisition of Aer Lingus in December 2014.

From the point of view of the respondent on behalf of FC2 at least, the application of the competition rules on the part of the Commission does take into account the strategic plans and outlooks of the airlines in question. As stated above, the creation of FC2's alliance is a good example of a strategic move towards creating large network-based airline systems which, thanks to the web of regional feeder-routes supplied by the established carriers' domestic presences, is capable of competing with global airlines on the transnational and transcontinental market. What emerges from this survey is a clear trend which has affected the European airline industry profoundly, with the surviving carriers such as FC2 appearing to be the beneficiaries in the EU context, but it would appear from the responses described below that the Commission has also used its role in the application of merger control rules to encourage the emergence of such European champions even when ostensibly applying standardised rules.

Another point to note is that, while being a major carrier that one would expect to benefit from the Commission's preference for the emergence of a small number or large operations, FC1 continues to have considerable issues with the application of the EUMR by the European Commission in the context of the passenger airline industry. While it is to be expected that stakeholders would occasionally take a different view of economic issues compared to those of the regulators, the lack of predictability is an important problem cited by FC1. Added to this is FC1's discomfort and dissatisfaction with a perceived overarching – but unelaborated – policy preference on the part of the European authorities which appears to mean that competition rules in the airline sector have certain specificities peculiar only to that sector.

Looking to the future of the industry strategy, the respondent from FC1's strategic planning unit expressed the view that the LCCs will have to take over the point-to-point business because of their more attractive cost-base while network carriers will grow to compete. The background to this statement is a clear feeling on the part of the respondents that future growth for major airlines such as FC1's brands will be based on long-haul routes to and from areas of new growth on the global stage, with China being the example most often cited. Implicit in this comment is an underlying perception that extraneous and inherently political elements, such as the prevailing macroeconomic circumstances, can and do influence the Commission's

assessments, in particular under State aid rules. Again, it is unavoidable to link this back to the respondent's firmly held view that an overarching policy-driven approach is being applied by the Commission's Services to ostensibly objective assessments of market conditions under competition law rules.

The mere perception of political interests being brought to bear in a given industry can lead to undertakings and other stakeholders gradually losing faith in the objectivity of the assessments handed down by the authorities. For example, the respondent on behalf of LCC1 also pointed to the existence of other unspecified issues involving significant political interests and influential actors in the industry that have been "swept under the carpet" during the crisis period. While such views can, to a certain extent, be accounted for as a vested interest expressing understandable dissatisfaction with a perceived disadvantage vis-à-vis a competitor, if such views are widely held across an industry and are found to have a negative impact on firms' plans for expansion or investment then it would have to be seen as a concern for the authorities in question.

Further research, conducted anonymously and over a longer period of time, on how widespread and consistent these sentiments are in the industry would be of considerable interest. Given the limitations of the standardised survey conducted, it is not clear from the responses which particular decisions form the basis for certain comments, and further research could perhaps explore whether particular decisions (for example, the Aegean/Olympic decisions described below) were more or less surprising to different airlines with different outlooks.

Given the potential advantages which can be gained from exploiting the perception of the airline industry as being not only an economic operator but also key to the sense of identity and sovereign independence of a territory, it is not surprising to see a large operator such as FC2 argue that the strategic importance of airlines should be taken into account more often by the authorities. Interestingly, FC2's alliance has received significant political support in the past – something which may have informed this view. It would appear, in any case, that this view is not shared by the respondents on behalf of LCCs who seem more in favour of receiving a more standardised treatment along the same economic lines as other sectors (albeit with changes to how the Commission define markets in the airline industry).

This is in the same vein as calls made by certain stakeholders in other markets, such as telecommunications operators, where markets for competition assessments are traditionally defined in line with the regulatory limits imposed on the parties operating in that space. The calls from airlines revolve around arguments that there are specific features of modern airline travel that mean the traditional O&D market definitions are antiquated.

Most damning of all, perhaps, is the patchy assessment of the predictability of the European Commission's competition related decisions. Much of this could be down to the nature of the cases which reach the final decision level at the Commission in general competition law matters, since the Commission has assumed a clear approach of strategically choosing cases in uncertain, developing or policy-driven areas of competition law. However, it is clear that there is a sense of frustration and dissatisfaction amongst stakeholders as regards the predictability of Commission decisions. More research could be warranted as regards the underlying reasons for this frustration and dissatisfaction, such as a lack of communication of the Commission's views. While complete certainty in interaction with regulators of any ilk is rarely, if ever, achieved, the idea that the undertakings most closely affected by the Commission's merger control function are of the view that its approach is subject to shifting priorities to such an extent that the outcomes are unacceptably unpredictable will be a concern to the Commission. This assertion ties in with the argument, discussed in the opening chapters, over whether the EU's merger control function is amenable to be being used as a tool for sector regulation.

Furthermore, LCC1 rates the clarity and comprehensibility of the European Commission's competition decisions at 3 out of 5. This strikes at the heart of the usefulness of Commission decisions in guiding the future conduct of undertakings since, if the decisions are not clear enough to create precedents and shape the market's view of what is deemed acceptable to the Commission, then the parties to a transaction are faced with increased risks of the proposed transaction being rejected at the merger control stage – a risk which amounts to an increased cost for the parties to a transaction to bear.

5. Case Study 1: Olympic/Aegean

a) Introduction

Given the controversial opinions regarding the European Commission's approach to the airline industry and the recent trend towards consolidation amongst carriers, it is useful at this point to examine the Commission's application of merger rules to a concrete case of a proposed merger between two passenger airlines with significant overlap. In light of the above responses to the empirical research conducted amongst the airlines most active in mergers – and most vocal on the issue of merger policy – the approach adopted here is to examine the Aegean/Olympic merger from the perspective of the following themes:

- Does the Commission's approach indicate which are the main objectives being pursued, and are there signs of a sector-specific set of policy imperatives playing a (disproportionate) role?
- What role is foreseen for NCAs in the implementation of the decision handed down?

Although none of the stakeholders involved in the Olympic/Aegean transaction responded to the questionnaire requesting their views on the application of EU merger rules to the European passenger airline industry, significant insight can be gleaned into the transaction from trade publications and other industry sources.¹⁵ While the sections above give the subjective views of the industry players, this section deals largely with the European Commission's application in a concrete case of rules that, as will become clear, involve significant degrees of discretion and flexibility. Further research could well be conducted into the specific reactions of other European and global passenger airlines to this and other Commission decisions, which would have the benefit of being focussed on the issues raised in that case but would lack the general application of the empirical study attempted in this work.

¹⁵ See, e.g., <http://centreforaviation.com/analysis/aegean-airlines-acquisition-of-olympic-approved-by-european-commission-but-questions-remain-133583>

b) Background

This section provides a brief background to the Olympic/Aegean transaction. Aegean Airlines was founded as 'Aegean Aviation' in 1987, and originally focussed on operating VIP charters. The Aegean Airlines name was adopted with the start of scheduled passenger services in May 1999.

Olympic Air was once known as the carrier for cosmopolitan passengers, reflecting the taste of its founder, Aristotle Onassis.¹⁶ It was transferred to the Greek State in 1975 and operated as the national carrier of Greece until it was sold to private investors in 2009. Olympic was never profitable following its privatisation and received considerable financial support from its sole shareholder, Marfin Investment Group.¹⁷

On 9 October 2013, the European Commission finally approved the acquisition of loss-making Olympic Air by Aegean Airlines which was also Athens-based (and also reportedly loss-making). Although a previously proposed merger of the two was blocked by the Commission in early 2011,¹⁸ the analysis conducted by the Commission into the transaction the second time it was proposed indicated that Olympic would exit the market in the near future if it were not acquired by Aegean. Specifically, the Commission applied what is known as a Failing Firm Defence which can be applied to mergers leading to monopoly or near monopoly situations. In its Horizontal Mergers Guidelines, the Commission states that it “*may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger*”.¹⁹

At the time of the transaction, Olympic's exit would have left Aegean as the only company operating a significant number of domestic routes. The Commission argued that the competition provided by Olympic on domestic routes would have

¹⁶ See further, <http://www.onassis.gr/en/founder-will.php>

¹⁷ See further, <http://www.marfininvestmentgroup.com/en/history>

¹⁸ Case No COMP/M.5830 - Olympic/ Aegean Airlines. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5830_7897_2.pdf.

¹⁹ Commission Guidelines on the assessment of Horizontal Mergers, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN), para 89.

disappeared regardless of the acquisition. It therefore concluded that any competitive harm caused by the removal of Olympic as an independent competitor could not actually be considered as being caused by the merger, and thus the proposed merger was compatible with the internal market and capable of being authorised. In support of the conclusion that Olympic's exit from the market was imminent, the Commission asserted that: "*A thorough analysis of Olympic's business prospects has confirmed that the company is highly unlikely to become profitable in the foreseeable future under any business plan*".²⁰

The approach of the Commission in this regard raises some interesting questions. For example, in line with the criticisms of LCC1 above, it could be queried why the Commission did not give fuller consideration to the possibility that new entrants might fill the gap left by Olympic on the point-to-point markets. Since the decisions of potential entrants surveyed and assessed by the Commission played such an important role in its decision to apply the failing firm defence, it is useful to look to the specific circumstances of the transaction and the surrounding economic climate – especially in Greece – during the period in question.

The re-notified transaction came about when Marfin Investment Group (MIG), Olympic's owner, negotiated the sale of Olympic's assets to Aegean in October 2012. Looking to the economic conditions in Greece at the time, the Greek financial crisis had precipitated a substantial fall in domestic passenger numbers of 26% between 2009 (6.1 million passengers) and 2012 (4.5 million). The first half of 2013 saw a further 6.3% decline year on year.²¹

Given this as a backdrop, one can see why the Commission accepted the first part of its rationale for accepting the merger, in particular that, since MIG was no longer prepared to support Olympic, its permanent exit from the market was highly likely in the near future. However, it could be argued that the second part of the Commission's analysis is flawed in that it seems to assume that, since Olympic was in a dire financial condition, the only two possible outcomes were (i) Olympic being acquired by Aegean or (ii) the permanent closure of Olympic.

²⁰ Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Statement on Aegean/Olympic Air merger, http://europa.eu/rapid/press-release_SPEECH-13-800_en.htm.

²¹ See http://en.aegeanair.com/files/1/Content/IR_Annual_Reports/Prospectus_en.pdf, p. 9. See also: <http://data.worldbank.org/indicator/IS.AIR.PSGR>.

c) Commission Investigation

Looking in more detail to the Commission's investigation, it largely accepts the views of the parties that the proposed transaction was, in the circumstances, the most advantageous outcome. In line with the criticisms levelled by some of the airlines above as regards the role of the Commission's policy preference for the airline sector playing an inappropriately strong role in its merger decisions, the grounds provided by the Commission largely revolve around assessments of the state of the Greek economy and the Greek airline industry as well as broad assertions as to the role that a Greek player could have in the emerging European-wide passenger airline sector. Thus, for example, the Commission says that its investigation revealed that entry in the immediate future by other airlines onto the Greek domestic market most affected by the merger is unlikely on any of those routes flagged as causing the most concern. It attributes this lack of likely entry to a number of reasons, including costs of entry, but also to more subjective and unpredictable elements such as the Greek economic situation and the argument that potential market entrants regard there to be more profitable opportunities elsewhere.

Looking to the specifics of the proposed transaction, the number of overlap routes between Aegean and Olympic fell from 17 in 2011, of which nine raised competition concerns, to seven by the time of the Commission's decision. According to the Commission, five of those seven routes were duopolies (specifically Athens to Chania, Mytilini, Santorini, Corfu and Kos) so the investigation focused on these five domestic routes.

Despite the clear consideration of the importance of the strategic trend towards consolidation and cross-investment in the overall European airline industry which forms part of the rationale for accepting that no other entrant would be interested in acquiring Olympic, the Commission's substantive investigation focused on the domestic market, where Aegean and Olympic jointly controlled 90% of seats and LCC competitors had less than 3% of seats. Indeed, according to industry data, Aegean and Olympic had 99.6% of domestic seats at Athens Airport between them at the relevant time.²² By contrast, on international routes, their joint share was only 17%, virtually all of which was Aegean's. LCCs' 2103 share on international routes

²² Source: Innovata.com data for week of 2 September 2013.

was reported as more than 35%, up from less than 32% in 2012 and less than 5% a decade previously. From this perspective, the Commission's focus on domestic routes, where there were serious competition concerns, and the lack of emphasis on international routes make sense.

d) Application of the Failing Firm Defence

A major criticism of the functioning of the EUMR in practice by FC1 was that the approach taken by the Commission did not take certain factors sufficiently into account,²³ with FC1's suggestion being that a looser approach would be warranted where the target entity is, for example, a poorly performing business.

The view was expressed by FC1 that the EU should reassess its approach to restructuring and the respondent pointedly criticised the original approach taken to the Olympic-Aegean proposed merger of two airlines described as being "on the brink of bankruptcy". The respondents on behalf of FC1 were of the view that it was never clear to them that there was a real need for both players to survive. Indeed, the point was made that the continuing existence of both had the potential to lead to "irrational competition".

So although the end result in the second Olympic-Aegean merger may tally with the approach suggested by FC1, the Commission's investigation and the conclusions drawn from it may be unsatisfactory in terms of setting a precedent and a predictable baseline going forward. Looking to the Commission's conclusion that Olympic would disappear unless Aegean acquired it, it is based on an assumption that a near-monopoly situation was inevitable even in the absence of the merger. Industry sources at the time were understandably sceptical as to whether another credible buyer would ever have come forward for Olympic but, at least to some extent, the Commission's previous rejection of the Aegean/Olympic transaction must have played a role in potential investors declaring themselves to be uninterested at that point. This is because, since the writing was on the wall for Olympic, it would not have made sense for potential investors to have come forward and trigger a bidding

²³ Specifically, the respondent provided the example of where the FC1 had acquired another airline only for it to emerge that many of the routes operated by that airline were effectively being subsidised by its parent group because the tickets were being sold at below marginal price. The respondent stated the EUMR, as it stands, could not take this information into consideration since it came to light after the transaction had closed.

war for a loss-making airline in circumstances where they had good reason to believe that the Olympic-Aegean deal would be blocked by the Commission leaving Olympic highly likely to collapse. Indeed, market experts and industry sources were broadly surprised by the clearance granted to the transaction so it would appear that investors – as well as the market in general – believed that the acquisition would be blocked.

This theory tallies with the view expressed by the respondents on behalf of FC1 above, that stepping into the vacuum created by a bankrupt carrier that has exited is a far more affordable, and less risky, than acquiring a failing or flailing business. In such a situation, the inefficient operations of the failing business need not be acquired and the more efficient and better managed new entrant can more easily obtain market share by strategically choosing parts of the failed operator's network to replicate. Previous examples of this approach would be Ryanair's decision in 2012 to open bases in Budapest and Barcelona following the demise of Malev and Spanair, respectively.²⁴

At the time of the transaction being approved and completed, Aegean competed with Olympic on domestic routes using a mix of 168-seater Airbus A320 aircraft and 195-seater A321 aircraft. Industry publications indicate that, given the nature of these routes, an LCC could potentially have entered any of these markets, albeit with fewer frequencies than previously by Olympic, using the A320 family or Boeing 737 aircraft typically operated by LCCs. Previous industry analysis has shown that LCCs have a significant cost advantage to Aegean, meaning that they would logically have captured significant market share had they entered in direct competition to Aegean.²⁵ As such, although alternative purchasers for Olympic were unlikely to emerge, it would appear that the Greek domestic market was ripe for an LCC to enter had Olympic been allowed to fail. Furthermore, any subsequent entry by LCCs on Olympic's old routes would likely have proved damaging to Aegean. Indeed, industry experts CAPA observed in a report on Aegean that, "the acquisition would provide a strong domestic basis and keeping LCCs out of the domestic market would be indirectly positive for Aegean's international position."

²⁴ Ryanair Plc Annual Report 2012,

http://www.ryanair.com/doc/investor/2012/final_annual_report_2012_310712.pdf, p.7.

²⁵ See further, <http://centreforaviation.com/analysis/aegean-airlines-caught-between-the-devil-and-the-deep-blue-sea-after-three-annual-losses-in-a-row-103823>

Given the end result, it is understandable that LCCs in particular claim that the Commission's policy preference in favour of the strategic emergence of strong network-based airlines capable of competing on the international stage did play a role in the Olympic/Aegean transaction. The question of whether such policy imperatives played a disproportionate role depends, to a certain extent, on the subjective weighting given by the reader to the importance of the overall health of the European passenger airline industry compared to the value for money available to Greek domestic fliers. Clearly Aegean emerged as a strong airline, with a secure regional base capable of feeding into an international network. Indeed, Aegean is a full member of the Lufthansa/United-anchored Star Alliance²⁶ and, interestingly, also entered into a partnership with Etihad Airways in May 2014 with the launch of new direct flights supplying passengers to Etihad's hub in the United Arab Emirates.²⁷

However, the benefits of having a strong Aegean active on the external markets must be balanced with the effect that the merger had in delaying or impeding the entry of LCCs onto the Greek domestic market, in light of the view expressed by stakeholders and industry commentators that entering a market in the aftermath of a failure by a previous incumbent is more attractive than entering in direct competition to a well-established (and, in this case, expanding) player. Although Ryanair is gradually gaining traction in the domestic market in Greece, the margins being earned by Aegean there indicate that further entrants would perhaps have arrived earlier and in greater scale had Olympic been allowed to fail – despite the Commission's findings to the contrary in its 2013 decision. One could argue that this is an example of where the strict parameters of the failing firm defence have been used by the Commission to include certain characteristics of the market in question but exclude others in order to arrive at an end result that is in line with its preconceived policy preference.

e) Comment

It would appear that, in line with some of the perceptions noted in the sections above, the overall rationale of the merger was presented to the European Commission in terms of the overall structure of the European airline market, rather

²⁶ http://www.staralliance.com/en/about/airlines/aegean_airlines/#
²⁷ <http://en.aegeanair.com/all-about-us/milestones/?f=2>

than the domestic market issues which dominate the bulk of the Commission's analysis in its assessment of the renewed merger proposal. Indeed, in relative terms, the absorption of Olympic into Aegean would not have made a drastic difference to the choices on offer to domestic Greek passengers: Aegean was 10 times larger than Olympic based on scheduled ASKs (Available Seat Kilometres) in October 2013 by which point Olympic operated only 14 turboprop aircraft.

Instead, industry sources indicate that the Aegean plan was to tap into the Commission's pre-defined policy preference of having strong European airlines with their own efficient networks that allow them to operate on the overall European market. In that context it is interesting to note the reported statement of Aegean chairman, Theodore Vassilakis, after receiving the Commission's approval for the merger that *"...the synergies will allow us to support an improved growth rate for our international network, both from Athens and the periphery."*

Similarly, the following passage from the Aegean corporate prospectus detailing the commercial rationale is instructive: *"Obtain a sufficient size, which will allow it to compete efficiently in the global aviation field and should create the conditions for sustainable growth through the exploitation of expected synergies"*.²⁸

Therefore, it would seem that the focus on the domestic markets in the Commission's approval system belies a view of the merger as being part of a welcome strategic trend towards consolidation of weaker regional airlines into network-based carriers capable of competing on the wider stage in the context of close cooperation within the various alliances. Arguably, the impact of the Aegean/Olympic merger on international markets was too insignificant to warrant intervention by the competition authorities, but the international aspect clearly was an important element of the motivation behind the merger so, in the interests of certainty for the rest of the sector if nothing else, it could be said that it deserved more attention in the Commission's decision.

Legal commentators have opined that, *"rather than representing a relaxation of the requirements for the [failing firm defence], this decision may simply demonstrate that in this particular instance there was ample evidence – given the significant decline in*

²⁸ http://en.aegeanair.com/files/1/Content/IR_Annual_Reports/Prospectus_en.pdf

*Olympic Air's financial position over the course of a three year period, which was largely attributable to the Greek economic crisis – that the [failing firm defence] criteria had been met”.*²⁹ However, given the above analysis, it may be instructive to briefly compare the arguments accepted in the Olympic/Aegean case with the failing firm defence put forward in the IAG/BMI transaction. In the latter, the Commission held that BMI could not be said to be a failing firm, largely because its slot holdings at London Heathrow meant that it was an attractive prospect for other potential investors despite its myriad other financial woes (see the comments in that regard by the respondents on behalf of FC1, above). Therefore, to put it in simple terms, the fact that Olympic’s slots were at a peripheral airport rather than a major hub meant – even though both sets of assets were heavily encumbered – that it was within the failing firm definition whereas BMI could not qualify for that since its slots were of potential strategic value to other airlines or alliances. This approach can be lauded in the sense that it sees the Commission take into account the practical realities of hub-economics on the airline market, but it does suggest that the Commission has a view of airlines such as Olympic as being superfluous to the future development of the overall airline industry in Europe, whereas BMI’s importance and value is somewhat inflated by the fact that it possessed slots that were highly sought after by the global alliances.

f) Effect of Transaction

Given the fact that this was the second time that the Aegean management had tried to push this transaction through, it is perhaps unsurprising that the equity markets welcomed the deal when Commission approval was finally obtained.³⁰ Aegean’s share price rose by 20% in the period between 1 October 2013, the day before the

²⁹ Kyriakos Fountoukakos & Lisa Geary, Time to Bid Farewell to the Failing Firm Defense? Some Thoughts in the Wake of Nynas/Shell and Olympic/Aegean, Competition Policy International, December 2013, <https://www.competitionpolicyinternational.com/assets/Uploads/EuropeDecember2.pdf>. On a recent application of a failing firm-type defence in Ireland, see Irish Competition and Consumer Protection Commission, Baxter Healthcare / Fannin Compounding, M/15/026, (21 October 2015); see also Conor Talbot, The Irish Competition and Consumer Protection Commission approves a merger following the parties’ submission of a failing division argument, e-Competitions Bulletin October 2015, Art. N° 77675.

³⁰ See further, <http://centreforaviation.com/analysis/aegean-airlines-annus-mirabilis-but-can-it-maintain-the-momentum-in-2014-157212>

Commission decision was leaked, and 10 October 2013, the day after official confirmation was announced.³¹

Seemingly independent of the acquisition, although perhaps linked to the problems being faced by its main domestic rival Olympic, in 2013 Aegean Airlines returned to profit for the first time since 2009, and recorded its best result since its 2007 listing on the Athens Stock Exchange. Industry commentary suggests that Aegean's improved performance in 2013 was predominantly the result of improved demand for tourism in Greece from international passengers although it was helped by the capacity reduction of Olympic in the domestic market.

Furthermore, it is worth noting that the Aegean Airlines Group's 2014 operating margin places it amongst the best European airlines.³² The Aegean Group's gross cash balance was €259 million at the end of September 2014, equivalent to 103 days of revenues, and its debt (in the form of finance lease obligations) remained stable. The fact that Aegean is one of Europe's most profitable airlines undoubtedly goes some way to explaining the interest of LCCs in expanding on the Greek market.

Since the completion of the combination, both Aegean and Olympic have continued to operate under their respective brands. The group is managed on an integrated basis, and improvements in the consolidated group's result are reported as being down to significant cuts in capacity at Olympic which has brought down its costs.³³ This is interesting given that a key factor in the Commission's approval of the transaction was that, absent the merger, the market would be harmed by Olympic's assets being withdrawn from the market. Seemingly alive to the prospect that Aegean would simply run down Olympic operations over time in order to effectively retain the combined group's stranglehold over the domestic Greek market for itself, the Commission asked the Greek NCA to monitor the future conduct of Aegean, given the strong position it will have following the merger. This ties in with the comments made by some of the respondents that the NCAs are effectively being recruited by the European Commission to police the implementation of its decisions

³¹ See further, <http://centreforaviation.com/profiles/airline-groups/aegean-airlines-group>

³² <http://centreforaviation.com/analysis/aegean-airlines-good-results-continue-in-3q2014-but-competition-with-ryanair-is-growing-198800>

³³ <http://centreforaviation.com/analysis/aegean-airlines-group-losses-narrow-thanks-to-cuts-at-olympic-but-parent-company-losses-grow-in-1q-170327>

and do not constitute a driving force of the application of competition policy in the airline sector – even in what is essentially a domestic transaction.

Perhaps the most significant development since the Commission's approval decision has been the entry and expansion of Ryanair onto Greek markets, including the domestic routes that were previously the exclusive domain of Olympic and Aegean. For the purposes of this section, the most notable element of Ryanair's Greek expansion is that it is moving into the Aegean's Athens stronghold and that it is increasing its domestic Greek activities. Thus, within months of the European Commission approving the Aegean acquisition of Olympic, partly on the grounds that no competitors were likely to enter routes where they operated a duopoly, Ryanair is going head to head on four of Aegean's top 10 domestic routes (including one former duopoly route).³⁴

Clearly, this calls into question the analysis conducted by the Commission and would appear to support the views expressed above of the Commission's assessments being influenced by a pre-conceived preference for strong network-based carriers as the basis for European airlines being able to compete on the international stage, with the importance of market access for LCCs being a secondary consideration. It is interesting to note that, according to the publicly available version of the Commission's 2011 decision to block the first proposed merger between Olympic and Aegean, Ryanair never fully discounted the possibility of operating domestic Greek flights if conditions were favourable: *"Ryanair's commercial decisions on whether to enter on any of the routes will be unaffected by the merger or by the remedies offered. Ryanair is of the view that we would not need to take advantage of any of the proposed remedies in order to enter any of these routes. The sole obstacle to entry on these routes, for Ryanair, is the high airport charges at Athens, not any competitive concern regarding the undertakings involved"*.³⁵

In the Greek domestic market, Ryanair's share of seats was 18% in November 2014, up from 2% a year earlier.³⁶ Over the same period, the Aegean Group's share of seats fell to 76% from 94%. On routes from Greece to Western Europe, in

³⁴ See further, <http://centreforaviation.com/analysis/ryanairs-growth-in-greece-threatens-aegeans-turnaround-only-months-after-olympic-acquisition-149078>.

³⁵ Case No COMP/M.5830 - Olympic/ Aegean Airlines, para 2180.

³⁶ OAG data: <http://www.oag.com/Aviation-Data>.

November 2014, Aegean's share of seats was 35%, down from 39% a year earlier, while Ryanair's share was up to 19% from 7% a year previously.³⁷ Aegean still has a stronger position overall in the Greek market, but Ryanair's superior pan-European presence and its efficiency advantages are reported as more than 40% against Aegean, making it a formidable competitor.³⁸

g) Conclusion

The parties and their representatives painted the Commission's approval decision as very welcome news for the Greek airline sector and for Greek passengers as it looked set to "permit badly needed consolidation that will allow Aegean to compete more aggressively on the European stage".³⁹ To place the Olympic-Aegean transaction in the context of the comments received from airlines and reported above, the Commission's approach to this case can be – and has widely – perceived as tangibly favouring the emergence of large network based European champions. While each case stands and falls on its own circumstances, the view held not only by respondents to the survey conducted here but also by the wider industry that such a preference exists would appear to be justified on the strength of the Commission's treatment of the Aegean/Olympic transaction. Regardless of whether such a preference is justifiable on policy grounds, or even whether it actually exists in practical terms, the existence of such a widely held perception amongst some of the most active and dynamic airlines operating in the EU calls into question the European Commission's ability to communicate its enforcement policies and priorities in such a way as to alleviate the uncertainty and doubt caused to industry players when planning potential investments.

As to whether the Commission's approach to its competition assessment actually enables it to tailor the outcomes to favour the emergence of a large network-based airline on the European scale, this would appear to have been the case in this particular instance. The focus on the domestic routes, to the exclusion of an assessment of the impact of the transaction on the broader European-international market, resulted in an analysis whereby the Commission satisfied itself that no harm

³⁷ Source: OAG, week of 24 November 2014 versus same week of 2013.

³⁸ See further, <http://centreforaviation.com/analysis/aegean-airlines-good-results-continue-in-3q2014-but-competition-with-ryanair-is-growing-198800>.

³⁹ See further, White & Case Press Release, White & Case Secures Merger Clearance in Aegean/Olympic II, (09 Oct 2013) at: <http://www.whitecase.com/press-10092013/>

would come about as a result of the merger since the only market examined was that of the domestic routes within a Greek economy that was experiencing serious difficulties. As noted above, it is not at all clear that the merger would have warranted being blocked on the strength of its impact on the international market but, given that the international context played such an important role in the parties' rationale for the deal and – implicitly at least – in the Commission's acceptance of it, the international elements of the deal should surely have featured more prominently in the Commission's decision. In this light, it is plain to see the basis of the criticisms levelled above against the Commission by the respondents on behalf of some notable airlines since there appears to be a lack of genuine transparency in the Commission's assessments which denies stakeholder the certainty required to formulate effective investment plans.

In light of the criticisms of the Commission's application of the EUMR in the airline sector above, the Olympic/Aegean decision was clearly unexpected and remains controversial. In an industry yearning for certainty given the amount of unavoidable exposure to risk of global fluctuations in economic conditions and oil prices that are an unavoidable part of the airline industry, it is most unwelcome to have a regulator of any kind that makes unexpected and controversial decisions based on pre-conceived policy preferences that are not fully weighted and explained in its official decision.

6. Case Study 2: Etihad/Alitalia

a) Introduction

This transaction neatly brings together the three major issues broached in the context of the airline industry in this thesis and shows how they interact with one another. The major themes, as have emerged in other sections of this chapter, are as follows:

- The influence of the economic context, as manifested in the O&C restrictions, on the strategy of investment by Etihad and, in turn, on how the Etihad-Alitalia transaction was received by the European Commission;
- How Etihad's Equity Alliance, through which it acquired multiple non-controlling minority stakes falling outside the scope of the EUMR, was viewed

by the Commission in the context of its apparent preference for the emergence of strong network based EU airlines capable of competing on the international stage.

b) Background

The investment by Etihad in Alitalia came following Air France-KLM's rejection of the business case for merging with Alitalia, and reported unwillingness to participate in another equity injection.⁴⁰ The Franco-Dutch group ceded its position as Alitalia's largest shareholder after not participating in a previous bailout backed by the Italian Government in 2013.

In 2014, the long-mooted deal came to fruition in a complex transaction worth €1.75 billion, which saw the Abu Dhabi-based carrier take a 49% stake in Alitalia for €387.5 million.⁴¹ Since restrictions on foreign ownership of EU airlines mean Etihad is prohibited from taking control of European carriers such as Alitalia, it has embarked on a business model of acquiring minority investments to expand its presence in EU markets. Another element at play here is that all of the State-backed Gulf carriers' strategies in the EU have been the subject of sustained political lobbying on the part of the established European carriers.⁴²

The Etihad-Alitalia deal allows Etihad gain access to one of Europe's major markets by adding a significant member to its "Equity Alliance". The Etihad Equity Alliance is a collection of airlines, spanning across all the major international alliances, in which Etihad has acquired minority stakes.⁴³ By adding an extra layer of alliances and code-share agreements, sometimes inconsistent with the alliance memberships of the individual airlines that have received investment from Etihad, the Equity Alliance is threatening to undermine the delicate strategic balance which the alliance system

⁴⁰ Andrew Parker, Andy Sharman & Giulia Segreti, Financial Times, 25 June 2014, Etihad set to take 49% stake in loss-making Alitalia, <http://on.ft.com/1qvE7W0>.

⁴¹ Etihad Airways – Alitalia Statement, 25 June 2014, <http://corporate.alitalia.com/static/upload/201/20140622-etihad---alitalia-statement-en.pdf>.

⁴² "Airline Executives: EC Must Enforce Ownership, Control Rules", *Aviation Week Market Briefing*, 23 June 2014, http://awin.aviationweek.com/portals/awin/cmsfiles/media/pdf/ad_pdf/2014/06/23/ad_06_23_2014.pdf

⁴³ See: <http://www.etihad.com/en-us/about-us/our-equity-partners/>. See also, "Etihad: Flying against convention", *Economist*, 28 June 2014 <http://www.economist.com/news/business/21605927-ambitious-airline-trying-riskier-route-expansion-its-gulf-rivals-flying-against>

had brought to the business models of the major international airlines and, thus, has been the subject of vocal criticism from these airlines.⁴⁴

c) Compliance with EU O&C Rules

As a preliminary point, compliance with the EU ownership and control rules played an important role in the structure of this transaction. Article 4 of Regulation 1008/2008⁴⁵ states that an “*undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that [...] Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party.*” Given the broad definition of “effective control”,⁴⁶ EU national governments or their citizens must own more than 50% of an airline in order to effectively control it.

As part of its review of the EU external aviation policy, the European Commission commenced a preliminary investigation in April 2014 into “*certain non-EU investments in European airlines*”.⁴⁷ These reportedly included Delta Air Lines' 49% stake in Virgin Atlantic, Etihad Airways' 29% stake in AirBerlin and 33% stake in Darwin Airlines (now renamed Etihad Regional), Korean Air's 44% stake in CSA

⁴⁴ “Lufthansa calls on EU to block possible Etihad-Alitalia tie-up”, *Reuters*, 3 February 2014, <http://uk.reuters.com/article/2014/02/03/etihad-alitalia-lufthansa-idUKL5N0L82UT20140203>

⁴⁵ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008

on common rules for the operation of air services in the Community (Recast). On the previous regulation, Council Regulation 2407/92 of 23 July 1992 of Licensing of Air Carriers, see: George Middeldorp, “Substantial Ownership and Effective Control of International Airlines: The Netherlands”, 6(4) *EJCL* (December 2002).

⁴⁶ For the purposes of Regulation 1008/2008, ‘effective control’ means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.

⁴⁷ Since the “Open Skies” judgments of November 2002 (Cases C-466/98 etc), Member States can no longer act in isolation when negotiating international air services agreements. International air services negotiations are now carried out in close cooperation and coordination between the European Commission and EU Member States. See: Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries.

Czech Airlines and HNCA's 35% stake in Cargolux.⁴⁸ Indeed, Etihad's investment in Darwin Airlines was also the subject of a review by Switzerland's Federal Office of Civil Aviation which led to Etihad granting assurances that it would remain majority owned by Swiss shareholders and operated by Swiss management.⁴⁹

d) Commission Merger Approval

In November 2014, the European Commission approved the transaction under the EU Merger Regulation, subject to specific conditions.⁵⁰ The Commission's only substantive concerns related to the potential for a monopoly to be created by the transaction on the Rome–Belgrade route which could lead to higher prices and a loss of service quality for passengers.

The Commission was reported to have sought information on flights on the Belgrade-to-Rome route, which Air Serbia operates, and on flights between Brussels and New York, where Jet Airways is active. Etihad holds a 49 percent stake in Belgrade-based Air Serbia and has a 24 percent holding in Mumbai-based Jet Airways. Meanwhile, Alitalia flies between Belgrade and Rome and the Italian carrier is also part of Air France-KLM Group's trans-Atlantic joint venture with Delta Air Lines, which operates flights between Brussels and New York. In the end, the Commission was satisfied for the airlines to agree to commitments aimed at facilitating the entry of new airlines on the Rome to Belgrade route.

The deal drew criticism from Europe's legacy carriers such as Lufthansa, which had asked the EC to block the deal, citing unfair competition.⁵¹ Air France-KLM, meanwhile, had voiced concern over the impact on the market of the large-bodied aircraft that Middle Eastern carriers operate out of Schiphol airport.⁵²

⁴⁸ Tom Fairless & Daniel Michaels, "EU Probes Ownership of Virgin, Four Other Airlines", *Wall Street Journal*, 4 April 2013,

<http://www.wsj.com/articles/SB10001424052702303847804579481071621614740>.

⁴⁹ "Etihad plan to buy Darwin stake fails to meet Swiss rules –agency", Reuters, 21 August 2014, <http://www.reuters.com/article/2014/08/21/swiss-airlines-etihad-idUSL5N0QR4MB20140821>

⁵⁰ Case M.7333 Alitalia / Etihad,

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7333

⁵¹ "Lufthansa calls on EU to block Etihad and Alitalia tie-up", *Khaleej Times*, 4 February 2014, http://www.gulfinthemedia.com/index.php?m=economics&id=684086&lim=160&lang=en&tblpost=2014_02

⁵² Sananda Sahoo, "Etihad Airways wins EC clearance on Alitalia stake", *The National*, 15 November 2014, <http://www.thenational.ae/business/aviation/etihad-airways-wins-ec-clearance-on-alitalia-stake>

As in other decisions examined in this section, the Commission tread a path between continuing to use its O&D based market definition but seemingly managing to find room in its competition assessment to take into account, at least implicitly, its overarching policy preference in light of the global development in the international aviation industry. Thus, the Commission examined the competitive effects of the proposed acquisition and concluded that on all affected routes, with the exception of the Rome–Belgrade route, the transaction did not raise any serious competition concerns, “mainly because of the competitive pressure exerted by other carriers”.⁵³ This phrase is the only indication one gets that the external context was taken into account the strategic developments in the sector, in a transaction so obviously driven by market forces on a global scale.

Indeed, the Commission’s decision expressly acknowledges that the notifying parties were of the view that in the case of network carriers, and in particular for O&Ds where significantly more passengers are connecting passengers rather travelling on the O&D, the O&D analysis needs to be balanced. The notifying parties argued that this approach does not allow distinguishing the situation of O&D routes connecting hub and non-hub airports from that of routes connecting two hubs (hub-to-hub connection). In response to this, the Commission states that a large majority among all groups of respondents to the Commission’s own market investigation confirmed the relevance of the O&D approach for the purpose of analysing the competitive effects on the overlap routes. That said, the Commission acknowledges that Air France's, Austrian Airlines', Delta Airlines', Lufthansa's, GermanWings' and United Airlines' replies to its market investigation each expressed the view that network competition should be taken into account too.

Thus, while some major network carriers argued that competition between carriers takes place on the network level, the Commission opted to stay in line with its previous decision practice and gave “pre-eminence” to demand-side substitution, in the sense that it views customers as needing transportation from one point to another such that competition takes place on an O&D city-pair basis. The result of this was that the bulk of the merger assessment amounted to a study of airport

⁵³ European Commission - Press release, Mergers: Commission approves Etihad's acquisition of joint control over Alitalia, subject to conditions, Brussels, 14 November 2014, http://europa.eu/rapid/press-release_IP-14-1766_en.htm.

substitutability while network competition was only taken into account in the Commission's analysis of Etihad's minority shareholdings.

e) Economic Rationale

Given the approach taken by the Commission in its competition assessment, it is interesting to review the actual or perceived economic rationale for the transaction in that the network effects of the addition of Alitalia to the Etihad grouping is undoubtedly taken as being the driving force. Industry sources explain Etihad's investment strategy as being based on acquiring minority stakes in struggling regional carriers that will feed passengers into its long-haul routes. For example, Air Berlin, though still losing money,⁵⁴ gives it access to around 35 million potential customers while Alitalia obviously adds access to the Italian population and major industrial and urban centres such as Rome and Milan. The previous success of this strategy can be seen in the 75% year-on-year increase in common passengers reported by Air Berlin in 2013.⁵⁵

Upon finalising its acquisition of joint control of Alitalia, Etihad was reported as envisaging a thorough restructuring of Alitalia with apparent hopes of returning it to profitability by 2017.⁵⁶ Similar to the approach taken by Aegean following its acquisition of Olympic, described above, the post-Etihad era for Alitalia appears based around reducing capacity and increased focus on deploying its operations in a manner that feeds into the Etihad group strategy. For example, at the time of writing it had already been announced that Alitalia's 90 in-service narrow body aircraft, all in the A320 family, were to be reduced to about 78 aircraft.⁵⁷ According to industry commentators, the fleet changes are a clear indication of Etihad's strategy for Alitalia. In particular, there will be reduced exposure to short-haul markets, where

⁵⁴ Air Berlin Annual Report 2013, http://ir.airberlin.com/dms/investor-relations/DE/Termine-Veranstaltungen/Conference-Calls/2014/airberlin_GB2013_En/airberlin_GB2013_En.pdf. See also, Richard Weiss, "Etihad Bails Out Air Berlin Again With Convertible Bond", Bloomberg Business (April 28, 2014), <http://www.bloomberg.com/news/articles/2014-04-28/etihad-bails-out-air-berlin-again-prior-to-deeper-revamp>.

⁵⁵ Air Berlin Annual Report 2013, http://ir.airberlin.com/dms/investor-relations/DE/Termine-Veranstaltungen/Conference-Calls/2014/airberlin_GB2013_En/airberlin_GB2013_En.pdf, p.3.

⁵⁶ Gulf carrier Etihad to 'reboot' Italy's ailing Alitalia, *USA Today*, 11 August 2014, <http://www.usatoday.com/story/todayinthesky/2014/08/11/gulf-carrier-etihad-to-reboot-italys-ailing-alitalia/13885993/>.

⁵⁷ <http://centreforaviation.com/analysis/etihad--alitalia-agree-and-affirm-their-partnership-vision-protectionist-voices-will-become-louder-181662>

Alitalia has struggled to compete with high-speed rail and low-cost carriers.⁵⁸ Instead, Alitalia will embark on growth in long-haul markets, in conjunction with Etihad's overall network and providing Etihad with a foothold in a large European market. Much as in the case of IAG's acquisition of Aer Lingus, the legacy brand name will remain but there will be a major re-branding exercise which is set to include changes to Alitalia's product offerings and service levels. This investment forms part of Etihad's strategic expansion since the main benefit of such improvements flow through to the overall Etihad alliance by ensuring a consistent level of product offering across the entire alliance.

Etihad's strategy is to boost long-haul traffic from Milan, while Rome, which is already Alitalia's largest intercontinental hub, is to become a major European intercontinental hub.⁵⁹ Etihad's three-year plan to completely restructure the Alitalia operation comes in the context of Etihad's own CEO, James Hogan, stating that Alitalia is "a poor business financially".⁶⁰ Therefore, the value for Etihad in investing heavily in Alitalia is clearly the addition it can potentially make to its overall transnational business strategy - something which is far from being the emphasis of the publicly available documents recording the European Commission's review of the transaction.

Etihad has a growing collection of minority shareholdings that also includes AirBerlin, Air Seychelles, Virgin Australia, Air Serbia and Jet Airways.⁶¹ In statements to the financial markets, Etihad officials have affirmed the value of SkyTeam to Alitalia and confirmed that Alitalia's alliance membership is to continue for the foreseeable future, with reports that it will remain at least until the end of Alitalia's agreement with the alliance in 2019.⁶² As a result of Etihad's stake, Alitalia can be expected to form

⁵⁸ Matthias Finger, Nadia Bert & David Kupfer (eds), High-Speed Rail vs. Low-Cost Air: competing or complementary modes?, FSR Transport, Issue 2014/01, March 2014,

<http://fsr.eui.eu/Documents/WorkshopPaper/Transport/2014/140303HighSpeedvsLowCostObserver.pdf>

⁵⁹ Vernon Silver & Deena Kamel Yousef, "Etihad Seals \$2.4 Billion Deal to Buy 49% of Ailing Alitalia", *Bloomberg*, 8 August 2014 <http://www.bloomberg.com/news/2014-08-08/etihad-seals-2-4-billion-deal-to-acquire-49-of-ailing-alitalia.html>.

⁶⁰ Andrew Parker & Giulia Segreti, "Alitalia and Etihad sign long-awaited deal", *Financial Times*, 8 August 2014, <http://www.ft.com/intl/cms/s/0/1900ab8e-1f11-11e4-9d7d-00144feabdc0.html>.

⁶¹ <http://www.etihad.com/en-us/about-us/our-equity-partners/>

⁶² Francesco Bisozzi, Alleanza dei cieli, Etihad sfida Sky Team, *Il Messaggero*, 9 January 2014, http://economia.ilmessaggero.it/economia_e_finanza/alleanza-cieli-etihad-sfida-sky-team-alitalia-resta-fuori/946918.shtml

strategic commercial ties, including code sharing, with Etihad's other equity partners. These ties result in considerable conflicts with the web of inter-airline relations which have built up over recent decades through the emergence of the three major international airline alliances. For example, there are code sharing arrangements between two members of the Etihad Equity Alliance, AirBerlin and Virgin Australia, despite AirBerlin also being a member of oneworld, the alliance which includes the major Australian competitor of Virgin Australia, Qantas.⁶³ These arrangements clearly seem contrary to the interests of the major anchor airlines of the alliances, with Delta Airlines being particularly vocal in its opposition to the developments.⁶⁴ For instance, Delta filed an official complaint to the US Department of Transport against the plans of Air Serbia, an Etihad Equity Alliance member, to commence codeshare operations to the United States with Etihad.⁶⁵

From the perspective of Etihad, it appears that its strategy is purposefully to expand its interests to the limits of the O&C restrictions and to attempt to undermine the stability of the seemingly balanced relationship between the three major global alliances. It would further appear that it is prepared to accept non-exclusivity in its ties with airlines in order to further its planned global network – already described as covering over 325 destinations worldwide – with the ultimate aim of directing traffic through its hub in Abu Dhabi and creating it as a gateway to the Middle East, Asia and Australia for its partners.⁶⁶

f) Comment

The sections above demonstrate how the different regulatory regimes – competition and O&C – interact in the context of a single transaction. The unconventional form of the investment by Etihad in Alitalia confirms the view stated by LCC2, above, that the O&C restrictions are the single most important regulatory framework when it comes to the long term strategic planning processes undertaken by airlines. The investment strategies of all parties concerned are restrained by both the EUMR and the O&C regime, but it appears increasingly that the Commission's approach to

⁶³ http://www.airberlin.com/en-WW/site/landingpages/airline_partner.php

⁶⁴ "Delta launches fresh attack on Air Serbia", *EX-YU Aviation News*, 23 January 2014, <http://exyuaviation.blogspot.ie/2014/01/exclusive-delta-launches-fresh-attack.html>

⁶⁵ Consolidated Answer of Delta Air Lines, Inc., to the Application of Jet Airways a.d. Belgrade for an exemption from 49 U.S.C. § 41301, <http://centreforaviation.com/files/analysis/132188/839.pdf>.

⁶⁶ <http://www.etihad.com/en-us/about-us/our-equity-partners/>.

applying merger rules has been tailored to specifically take into account the nature of Europe's passenger airlines and the need for outside investment and consolidation amongst the European airlines going forward. The Etihad-Alitalia transaction, and its subsequent clearance subject to only minimal conditions, can be taken as further evidence of the existence of a strong preference for the emergence of network-based carriers capable of operating on the international stage. The trend in the market is confirmed by the 2015 acquisition by IAG, parent company of Iberia and British Airways, of the Irish flag-carrier, Aer Lingus. Aer Lingus was long seen as a potential takeover target for IAG, given Ireland's geographical location and its potential to provide feed for British Airways' main hub at Heathrow. In an example of the many moving parts involved in any transaction in the sector, not only was the acquisition be subject to a review by the European Commission on competition grounds, but the Irish government also sought assurances that some direct long-haul flights would remain from both Dublin and Shannon airports.

The Etihad-Alitalia transaction is also interesting as it demonstrates the Commission's willingness, even without a change to the EUMR, to utilise its resources to investigate the impact of the acquisition and holding of minority interests in rival companies. That said, the action taken here would not satisfy the respondent on behalf of FC2 who stated, above, that the jurisdictional criteria of the EUMR should be tightened by adding more focus on minority shareholdings. However, the decision does state that the Commission included AirBerlin, Jet Airways and Darwin Airline in its competitive assessment of the transaction.⁶⁷ This is interesting to the extent that the notifying parties submitted that AirBerlin would "continue to determine its commercial strategy independently of Etihad"⁶⁸ but the Commission, looking to the fact that Etihad was AirBerlin's single biggest shareholder and the existence of a commercial cooperation agreement, deemed it nevertheless appropriate to assess the overlaps between the activities of Alitalia and AirBerlin.⁶⁹ This situation highlights the internal contradiction of the current EUMR whereby the acquisition of those stakes did not require clearance under the EUMR since they did not lead to the acquisition, directly or indirectly, of sole or even joint

⁶⁷ Case No COMP/M.7333 - Alitalia / Etihad, http://ec.europa.eu/competition/mergers/cases/decisions/m7333_2319_2.pdf, para 55.

⁶⁸ COMP/M.7333, para 35.

⁶⁹ COMP/M.7333, section 7.4 et seq.

control but yet the Commission deemed those assets to be sufficiently under the control of Etihad to warrant including them in its overlap assessment in the Alitalia transaction.

Looking to the final result in the Etihad-Alitalia assessment under the EUMR, it would appear to confirm the views of FC2, above, that the Commission's application of the competition rules does take into account the strategic plans and outlooks of the airlines in question. However, the application of a specific approach by the Commission based on an industrial policy preference for a strong but consolidated European airline sector would also lend credence to the assertion of LCC1, above, that it is hard for the market or individual undertakings to predict the outcome of an interaction with the Commission's Services at a given time because their responses depend on their priorities at that point in time. If, as it appears, the EUMR is being applied in the airline sector in a manner inconsistent with its application in other sectors owing to the Commission's preference for a particular market structure in the medium and long term, this would give rise to a risk of a detrimental effect on the workability of the merger rules for the rest of the airline industry.

Overall, the Etihad-Alitalia transaction represents further evidence of the move towards encouraging the emergence of efficient, large-scale European carriers capable of competing on the global stage courtesy of a web of smaller regional airlines that supply feed to their major hubs.

7. Conclusion

It would appear clear from the above that the policy and economic factors at play in the application of competition policy to the treatment of mergers and related transaction in the European passenger airline industry are many and varied.

The first criticism to arise from the empirical study carried out is that there is significant uncertainty amongst airlines in Europe as to certain aspects of the application of merger control rules to transactions in their sector. This raises concerns about the efficacy of the Commission's communication policy and, in particular, the clarity with which it has drafted certain decisions relevant to the sector. This lack of clarity undermines the trading certainty of stakeholders and,

consequently, makes transactions riskier and ultimately discourages investment and expansion.

Secondly, it appears clear that there is a widely held perception in the sector that the European Commission is pursuing a pre-conceived policy objective in the passenger airline sector. As detailed above, many stakeholders expressed the view that the Commission favours the emergence of large, network based carriers capable of competing on the global scale which are supported by smaller, but efficiently run, carriers that feed the major airlines' large hubs. The conclusion reached by some of the respondents was that the application of the EU's merger control rules to the sector has been tailored to allow for such airlines to emerge. This chapter has considered two particular case studies, that of the Olympic/Aegean merger and the acquisition of joint control of Alitalia by Etihad, both of which appear to support this argument.

A third point relates to the calls to introduce tighter supervision of the holding of minority interests which fall outside of the realm of EU or national merger control rules because they fall short of amounting to a transfer of control to the investor. This issue was examined in the context of the emergence of an alternative to the three established global alliances, which each have strong European airlines as anchoring members, in the form of Etihad's Equity Alliance. The latter is built around the acquisition by Etihad of minority interests in European airlines with the broad intention of using their presence in EU markets to supply long-haul passengers to its transcontinental services. Given the background and the political will in favour of the continued growth of large European network airlines, it will be interesting to see how any new controls on minority shareholdings are applied by the European Commission in the airline sector.

The empirical study tends to confirm the view that the European Commission's approach to applying and enforcing EU competition rules, in particular in the merger domain, has seen the effective recruitment of NCAs as watchdogs for the implementation of the decisions handed down by Brussels. It is particularly interesting to note that the undertakings involved perceive the NCAs in this light and focus their attention on the Commission when it comes to attempting to influence the future application and development of competition law rules.

It has been demonstrated in previous chapters that the prevailing political interests of the day can play a role in influencing the Commission's approach to competition policy enforcement. This hypothesis has been borne out in the examination of the European airline sector conducted in this chapter, while the empirical element gives an interesting insight into the costs and difficulties encountered by market players as a result of the application of policy driven preferences that seem to lead to results that are, at least to a certain extent, at odds with the typical baseline treatment that parties would have reasonably come to expect.

Further research into the respective viewpoints of other interested parties, such as passenger groups, airline employee representatives, airport operators and domestic and European politicians would be an interesting exercise in that it could provide a degree of balance that is difficult to obtain when focussing purely on the views of airlines compared to official statements of the decision-makers. This is particularly true because the passenger airline industry, perhaps more than any other, is rife with political interests and legacy issues of sovereignty and national defence. Nevertheless, in the context of a thesis dealing with the nature and role of competition law in a broader context of the European project, the results of this chapter have provided an interesting contribution to the literature in the field from the point of view of the parties most directly affected by the application of EU competition rules.

CHAPTER 6: CASE STUDY OF THE IRISH BEEF PROCEEDINGS*

1. Introduction

The aim of this chapter is to draw on original research and an analysis of legal precedents to discuss the baseline treatment which operators and economic policy actors in a crisis-stricken sector must now expect from competition authorities in the European Union (EU). Given its general leadership position in the development and enforcement of competition law rules in the EU, the approach of the European Commission (Commission) must be examined in considerable detail in order to gain an understanding of the area. However, a significant role is also played by National Competition Authorities (NCAs) in the daily enforcement of competition law in EU Member States. As such, the relationship between the Commission and NCAs also warrants attention. The methodological approach taken here is to focus on the saga that unfolded in the Irish beef processing sector in the late 1990s and early 2000s. That sector is interesting as it represents a crisis industry which came to be the focus of policy decisions and judicial pronouncements at both the domestic and European level.

This particular chapter focuses on so-called crisis cartels since they constitute some of the most significant interactions between competition authorities and commercial operators, so the level of certainty and predictability is important for regulators and practitioners alike.¹ Using crises as a bellwether can allow for insight into the way in which competition law rules are enforced and applied in practice, and especially whether they are subject to influence by outside factors. Therefore, this chapter examines the application of competition law rules in a specific case where the operators were affected by crisis conditions. More broadly, the discussion in this chapter loosely follows the themes explored in the other chapters of this, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the role of National Competition Authorities (NCAs) in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law.

* See also, Conor Talbot, Finding a Baseline for Competition Law Enforcement During Crises: Case Study of the 'Irish Beef' Proceedings, *Irish Journal of European Law*, Vol 18, Issue 2, 2015.

¹ For background on crisis cartels and the approach to competition law enforcement in the EU generally, see Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart 2000); Christopher Harding & Julian Joshua, *Regulating Cartels in Europe* (OUP 2010).

The argument will be made that a timely public restatement of a comprehensive baseline approach to the application of competition law rules to so-called crisis cartels could well have led to a more optimal solution being found in the Irish beef sector, without engendering the lengthy litigation and controversy which resulted from the main actors being largely left to their own devices until the relevant schemes were actually put in place. The simple normative goal proposed here is that all parties should be able to find the benchmark treatment which a typical commercial operator can be reasonably deemed to expect in a given situation. Clearly, this practical commercial requirement is amplified in crisis situations where desperate measures may well be under consideration.

Section 2 examines the developments that set the scene for the case study by describing the background to the measures proposed in the beef sector. Section 3 sets out the rules which the actors in the beef sector would appear to have deemed to be applicable to them. As we shall see, this particular area of the law had been characterised by a certain amount of flexibility being afforded to actors in previous economic crises encountered by various industries in the EU. However, as Section 4 examines, this sense of flexibility gradually dissipated and the final pronouncements on the beef industry litigation and subsequent clarifications are such that a predictable baseline approach is now arguably in place. Sections 5 and 6 provide a comment and some conclusions.

2. The *Irish Beef Case*

a) Background

The Irish Competition Authority's long-running case against the Beef Industry Development Society (BIDS) concluded in 2011. The end result was a clear message that any plan to restructure an industry by agreement between competitors is likely to restrict competition and therefore breach national and European competition law. This case is interesting because of the high level of government involvement in this agreement, in the sense that the Irish Government, through the Ministry for Agriculture and Food, was a strong and active supporter of the BIDS scheme. Although the strategic thinking behind the BIDS scheme came from the highest levels of the Irish Government, the economic crisis appears to have exerted

considerably more pressure on the Government and the national court than on the competition authorities involved. The objective of the case study is, therefore, to examine (i) the background to how the state weighed various options, (ii) the competition law implications of the high levels of state involvement in the industry restructuring plan, and (iii) the way in which the NCA, the Courts and the European Commission handled the case in a highly politicised context.

The handling of the case, particularly by the national court of first instance, has come in for significant criticism from competition law practitioners² due to the inconsistent application of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).³ Industry groups were also dismayed as the participants to the scheme in question were seemingly genuine in their belief that it was a necessary means of ensuring the sector regained a degree of efficiency, yet, owing to the way in which the case progressed, the efficiency arguments for the scheme were never heard before any court.

b) McKinsey Report on the Irish Beef Sector

By way of a starting point, a 1998 report by the consultancy firm McKinsey identified significant problems in the Irish beef processing industry and recommended the rationalisation of the industry.⁴

A closer look at the details of this report is instructive in that it describes the underlying issues within the beef industry in Ireland which the scheme sought to remedy and shows that the entire initiative was originally conceived without any consideration of the potential competition law impact on its legality. It also shows that government bodies were amongst the most significant driving forces behind the eventual developments in the beef industry in Ireland from the very outset.

In describing the overcapacity in the sector, and particularly the reasons why no rationalisation had taken place in the industry up until that point, the McKinsey report

² Vincent Power, 'Ireland: Competition – Industry Restructuring Agreements' (2011) 22(5) ICCLR N14.

³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

⁴ McKinsey and Company, 'Preparing the Irish Beef Sector for the 21st Century' (Enterprise Ireland 1998). The author is grateful to Aisling nic an tSithigh of Enterprise Ireland for providing access to this unpublished report.

details the following elements which indicate that the overcapacity problem was a fundamental sector-wide structural issue:

- The players then active in the sector did not have the “foresight or wherewithal” to take the action necessary to ameliorate the situation;
- Sufficient financial pain was not yet being felt by the processors to motivate them to proactively pursue rationalisation;
- Mistrust between the producers and processors inhibited the introduction of any form of a partnership arrangement;
- The market players were over reliant on government and EU policies to drive changes in the sector, resulting in a severe lack of leadership by the producers and processors.⁵

The report also highlights the mismatch in the interests of stakeholders at different levels of the production chain because only producers (i.e. farmers) wanted high cattle prices, whereas the processors’ business model meant they could earn their margin regardless of underlying cattle price.⁶ The report’s conclusions suggest that the entire initiative was conceived without any consideration of the potential competition law impact on its legality and that government bodies were amongst the most significant driving forces behind the developments from the very outset. In describing the overcapacity in the sector, the McKinsey report detailed elements which indicate that the overcapacity problem was a fundamental sector-wide structural issue.⁷

In light of the dynamic prevailing in the market, the McKinsey report foresaw important roles for the different branches of the State.⁸ The sophisticated business case presented for rationalisation was supplemented by a well-organised public affairs campaign, which set about highlighting the hardship being endured by the beef sector and deliberately painting the State as the only actor capable of ensuring the survival of the industry in Ireland. From reading the report, it is clear that there

⁵ *ibid* 8.

⁶ McKinsey & Company, p.43.

⁷ *ibid* 8.

⁸ *ibid* 65. An Bórd Bia (Irish Food Board), the Department of Agriculture and Food, and Enterprise Ireland were proposed for roles in coordinating the process of rationalisation, along with the Irish Meat Association and the Irish Farmers Association.

was a comprehensive and concerted push towards promoting a State-sponsored and centrally organised rationalisation as the only feasible way of rescuing the beef processing industry.

The competition law implications of the proposed plan were not raised at any point of McKinsey's lengthy analysis. With the wisdom of hindsight, it would arguably have been preferable for the Irish Competition Authority (Competition Authority, Authority) – now the Competition and Consumer Protection Commission (CCPC) – to have been consulted at this point or, alternatively, for it to have used its broad mandate to voice its concerns with the anti-competitive nature of the plans. In the absence of clearly stated boundaries and baselines, the commercial actors in what was plainly a crisis-stricken industry can be only partially blamed for the ensuing legal saga.

c) Reports of the Beef Task Force & Independent Expert Group

The initiatives in the McKinsey report were almost unanimously endorsed by a series of publicly appointed expert bodies in quick succession. In 1999, the Irish Ministry of Agriculture and Food set up a Beef Task Force chaired by a senior Government official and consisting of well-known experts in the sector. The Beef Task Force duly reported in June 1999.⁹ The benefits of the McKinsey scheme were described as outweighing the costs, and the report states that the impact of the creation of the fund on producer prices should be “at worst neutral and, probably, positive”.¹⁰ The Beef Task Force report also stated that the major banks were prepared to support the program by providing the credit lines that would be required to finance the buy-out scheme.¹¹ This willingness on the part of the banks was reportedly driven by the benefits to be derived from rationalisation, alongside the prospect of grant-aid from the EU structural funds being forthcoming for capital investment in the sector.¹² From the Beef Task Force's perspective, the removal of excess capacity would provide for more full time jobs and the development of a skilled workforce (the report notes that over half of the workforce at the time was on a two- or three-day week). The availability of alternative full-time employment opportunities (especially in the

⁹ See John Malone and the Department of Agriculture and Food, *Report of the Beef Task Force* (June 1999). The author is grateful to the staff at the University College Dublin Veterinary Medicine Library for access to this report.

¹⁰ Beef Task Force, p.21.

¹¹ *ibid.*

¹² *ibid* 21.

booming construction sector in Ireland at the time) meant that this underutilisation of workers in the sector was unsustainable and there had been a drain of skilled workers away from the sector which had already become a major impediment to the development of the industry.¹³ We therefore see an alignment of the most influential institutions of Irish society – namely the State, the financial institutions and civil society groups – behind the BIDS scheme.

A further Independent Expert Group was appointed by the Minister for Enterprise, Trade and Employment in January 2000 to examine allegations of anticompetitive practice in the beef industry.¹⁴ The report's major finding is that the structure of the industry was such that it was effectively incapable of supporting any particular anticompetitive practices. However, the bulk of the report goes on to deal with the underlying profitability problems being faced by the industry, rather than conducting a meaningful analysis of the actual anticompetitive concerns.¹⁵ The report noted that the office of the European Commissioner for Agriculture had informed the Independent Expert Group that the European Commission's Competition Directorate had found that 'the evidence brought forward to date by the Irish Authorities or the Irish beef sector is insufficient to become actively involved by launching its own investigation'.¹⁶

Thus, while Irish government agencies and reports recognised that the beef industry required restructuring, and public officials acknowledged that the sector was subject to "massive undercutting in the marketplace" as Ireland continued to export approximately 60 per cent of its beef to non-EU countries where prices were lower and markets more open to fluctuation,¹⁷ no official action was deemed necessary in terms of setting the boundaries for the type of remedial action which were open to the market participants. It was important from the point of view of the State that the beef processing sector would at all times remain part of the private sector, and the

¹³ Beef Task Force, p.20.

¹⁴ Department of Enterprise, Jobs and Employment, 'Report of the Independent Group on Anti-Competitive Practice in the Irish Beef Industry', September 2000, (hereafter 'Independent Group').

¹⁵ Department of Enterprise, Jobs and Employment, *Report of the Independent Group on Anti-Competitive Practice in the Irish Beef Industry* (September 2000) 14.

¹⁶ *ibid.*

¹⁷ Minister of State at the Department of Agriculture and Food (Mr. N. O'Keeffe), Dáil Deb 28 April 1999, Vol 503 No 7.

task that the State foresaw for was to promote the industry rather than intervening directly.

d) Beef Industry Development Society

Eventually, meetings were organised to negotiate the rationalisation programme and the plans were well received by the Government and the industry players from the outset.¹⁸ In June 2002, the ten biggest meat processors in Ireland finally created the BIDS scheme, which envisaged, along the lines of the McKinsey plan, that plants processing up to 25 per cent of all cattle per year would leave the industry by agreement. Governmental support for the scheme is clear from the statement from a spokesman for Enterprise Ireland, the state agency involved in the talks, in which falling revenues and rising costs were described as meaning that rationalisation was not an option for the industry, but a necessity.¹⁹

e) Comment: State Action Defence

At this point, a question which may be asked is whether this explicit encouragement that the BIDS members received from State agencies is capable of legitimising the BIDS arrangement and putting it beyond the reach of the competition authorities. Articles 101 and 102 of the Treaty²⁰ are concerned only with the conduct of undertakings and not with national legislation.²¹ As such, Articles 101 and 102 apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 101 and 102 do not apply. In such a situation, the

¹⁸ Editorial, 'Factory Rationalisation on Agenda for Beef Summit' *The Irish Independent* (Dublin, 3 December 2002).

¹⁹ Editorial, 'Irish Meat Processors in Rationalisation Talks' *UK Farmers Weekly* (London, 14 June 2002); Editorial, 'Rationalisation Plan Aired by Meat Processors' *The Irish Times* (Dublin, 3 June 2002).

²⁰ TFEU (n3).

²¹ The ECJ has consistently held that the Treaty requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU (n3) or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. See Case 267/86 *Van Eycke v Aspa* [1988] ECR 4769.

restriction of competition is not attributable to the autonomous conduct of the undertakings. Articles 101 and 102 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.²²

To be recognised as a defence, state compulsion does not have to be achieved by formal law. In *Asia Motors III*,²³ the Court of First Instance recognised that, even in the absence of any binding regulatory provisions imposing the conduct in question, Article 101 TFEU will not be applicable if the conduct was unilaterally imposed by the authorities through the exercise of ‘irresistible pressure’. Although the term was not defined by the Court, it is clear that the existence of pressure of this type would need to be proven on the basis of objective, relevant and consistent evidence and, in the circumstances of that case, the requisite level of pressure was illustrated by a threat to adopt measures likely to cause substantial losses for the undertaking involved.²⁴

From a policy perspective, it can be said that this line of case law has successfully restrained the Member States’ ability to use domestic legislation or legislative frameworks to help or encourage a national industry or sector to evade the requirement to follow competition rules. Undoubtedly, this type of an approach is important for the creation of a level playing field and for channelling such policy decisions into the State aid field where the Commission can oversee the application of horizontal or targeting aid schemes. The high threshold for ‘irresistible pressure’ means that, despite the Irish State’s clear preference for the rationalisation scheme devised by McKinsey, the parties in the BIDS case could not legally be deemed to

²² Article 4(3) of the Consolidated Version of the Treaty on European Union [2012] OJ C326/13, the ‘loyalty clause’, meanwhile, prohibits Member States from taking any measures jeopardising the Treaty’s goals and offers an additional basis for challenging anti-competitive measures, including legislation, of a Member State. See Joined Cases C-359 and 379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265; Case C-35/96 *Commission v Italy* [1998] ECR I-3851; Lorenzo Frederico Pace, *European Antitrust Law: Prohibitions, Merger Control and Procedures* (Edward Elgar 2007) 157-158.

²³ Case T-387/94 *Asia Motor France SA and others v Commission of the European Communities* [1996] ECR II-961.

²⁴ In *CIF*, the Court of Justice suggested that the principle of legal certainty could represent the underpinnings for the doctrine. As such, if a mandatory statutory requirement prevented companies from engaging in autonomous conduct, the companies should not be exposed to any penalties for such conduct as was required by the statute in question. See Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055 (*CIF*). See also, Marek Martyniszyn, ‘A Comparative Look at Foreign State Compulsion as a Defence in Antitrust Litigation’ (2012) 8(2) *Comp L Rev* 143.

have been deprived of their autonomy and so were left exposed to the full rigours of an investigation by the Irish Competition Authority. The question of whether the Competition Authority should have intervened at an earlier stage in order to shape or influence the parties' plans is dealt with below.

At a more general level, the fact that professional advisors to the BIDS parties and their backers in Ireland's largest financial institutions were seemingly not in a position to identify their scheme as illegal leads us back to the core question of whether and how it is possible to identify a baseline for competition law-compliant conduct for undertakings faced with crisis conditions. We will now turn our attention to the principles of competition law as they have developed in relation to previous crises, before examining how those principles were applied in the *Irish Beef* proceedings.

3. Identifying the Baseline: Principles in the EU Approach to Crisis Cartels

Initially the provisions of the Treaty of Rome²⁵ on restrictive agreements were applied so as to further the long-term objective of integrating the Member States' domestic markets in order to realise the ideal of a single European marketplace. The Commission's early enforcement priorities emerged from complaints by businesses engaged in cross-border transactions and thereby showcasing the benefits of competition as opposed to the traditional 'stability' that, seen from today's perspective, amounted to masked discriminatory treatment.²⁶ While, to some extent, US antitrust in the post-war period was being calibrated in order to promote competition through the protection of small, locally-owned businesses in fragmented

²⁵ Treaty Establishing the European Economic Community 1957, art 85.

²⁶ Tony A Freyer, *Antitrust and Global Capitalism 1930–2004* (CUP 2006) 287. A preliminary point to note is the distinction between the role of Article 101 and Article 101(3) TFEU (n3), as compared to the rule of reason approached adopted in the United States. Article 101 provides the general framework for analysing the competitive effect of an agreement. Therefore, under Article 101(1), one considers both whether the agreement has the object ('object restrictions') or effect ('effect restrictions') of restricting competition. If so, parties to the agreement can attempt to show that the conditions of Article 101(3) are met. The broad frameworks for analysis are similar in the EU and the US in that they are both concerned with the likelihood of adverse impact on prices or quality and both regimes feature safe harbour thresholds. The key difference is that if collaboration is analysed under the rule of reason in the US, the balancing of pro- and anti-competitive effects is central to the analysis, whereas in the EU it is the second limb of a two-staged test.

industries and markets,²⁷ during the same period the European Commission was developing its competition competences against the backdrop of sluggish European economies and large scale structural overcapacity in certain high-profile industries. The Commission was effectively forced to recognise that there may indeed be market situations where the problem of overcapacity may not be remedied by market forces alone.²⁸

Economists describe these structural overcapacity situations by reference to what in game theory is called a 'prisoner's dilemma', whereby individually rational behaviour can lead to a collectively irrational outcome.²⁹ This is because, if it is expected that one firm will suffer more than its competitors from the persistence of overcapacity problems, its incentives to reduce capacity would be higher and it would be more likely to reduce capacity first. Moreover, the general waste of economic resources caused by a 'war of attrition' may significantly impair the industry's competitiveness which could ultimately result in consumer harm. Thus, the Commission has accepted that in such (very rare) types of situations, an industrial restructuring agreement could possibly be acceptable.

The cases most commonly cited when considering the early application of the competition rules to crisis cartels are *Synthetic Fibres*³⁰ and *Dutch Bricks*,³¹ in which the Commission granted exemptions under Article 101(3) TFEU.³² In EU competition

²⁷ See, for example, *Brown Shoe v United States* 370 US 294, 344 (1962). On the objectives of US antitrust law and policy since then, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (3rd edn, West Group 2005) 69.

²⁸ For instance, the Commission explained in its *Twelfth Report on Competition Policy* (1982) para 38 that 'structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term'.

²⁹ See, for example, Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (2nd edn, HarperCollins College Publishers 1994) 254-256 and Robert Gibbons, *Game Theory for Applied Economists* (Princeton University Press 1992) 2-8.

³⁰ *Synthetic Fibres* (Case IV/30.810) Commission Decision 84/380/EEC [1984] OJ L207/17.

³¹ *Stichting Baksteen* (Case IV/34456) Commission Decision 94/296/EEC [1994] OJ L131/15.

³² On crisis cartels generally, see: Bruce Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest and Institutional Considerations' (2014) 10(2) Euro CJ 311; Bertold Bar-Bouyssiere and Hartmut Kamrad, 'Crisis Cartels' (2009) 8(3) Comp LJ 15; Ioannis Kokkoris and Rodrigo Olivares-Caminal, 'Competition Law and Financial Crisis' (2013) 34(1) Bus LR 13; Stephen Hornsby, 'Competition Policy in the 80's: More Policy Less Competition?' (1987) 12(2) EL Rev 79; Arianna Andreangeli, 'EU Competition Law in Times of Crisis: Between Present Challenges and a Largely Unwritten Future' (2013) 9(2) Comp L Rev 91; Saskia Lavrijssen, 'What Role for National Competition Authorities in Protecting Non-Competition Interests After Lisbon?' (2010) 35(5) EL Rev 636.

law terminology, situations where competitors agree to restrict the volume of their supply or production capacity (either for one or both of the parties) are seen as a restriction of output, which in turn is considered a restriction by object under Article 101(1). For some years, however, an analytical structure prevailed in the Commission's decisions, whereby the facts that explained why the agreement was anti-competitive under Article 101(1) were also used to show that the agreement yielded economic benefits under Article 101(3). For example, in *Bayer/Gist*³³ the joint venture in question restricted competition between the parties but was justified because it allowed for an expansion in production by causing sales by Gist to triple. Similarly, in *Vacuum Interrupters*³⁴ a joint venture was to have the effect of quashing potential competition between the parties, but the Commission was swayed by the fact that a new product would not have been developed without it. The conceptual weakness of this approach saw it characterised as an 'intellectual detour',³⁵ but the purpose behind it was clearly to allow the Commission to exert control over transactions and shape the development of certain types of arrangements in order to minimise the anti-competitive effect.

a) Commission Practice & Article 81(3) Guidelines

In the context of the task of locating the baseline approach to be applied in crisis situations, some useful guidance can be taken from the Commission's decisional practice. When the conditions of Article 101(3) TFEU are fulfilled,³⁶ the restrictive effects on competition generated by the agreement can be considered to be offset by its pro-competitive effects, thereby compensating consumers for the adverse effects of the restrictions of competition. The requirements of meeting the conditions, as interpreted by the Commission, are examined below.

³³ *Bayer/Gist-Brocades* (Case IV/27.073) Commission Decision 76/172/EEC [1976] OJ L30/13.

³⁴ *Vacuum Interrupters* (Case IV/27.442) Commission Decision 77/160/EEC [1977] OJ L48/32.

³⁵ Luc Gyselen, 'The Substantive Legality Test Under Article 81(3) EC Treaty – Revisited in Light of the Commission's Modernization Initiative' in Armin von Bogdandy, Petros C Mavroidis and Yves Mény (eds), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer 2002).

³⁶ Under the terms of Article 101(3) TFEU (n3), the prohibition in paragraph 1 of Article 101 may be declared inapplicable in the case of an agreement which: 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

- *Agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress*

This condition requires an assessment of the pro-competitive benefits, i.e., efficiency gains, which result from the agreement at issue.³⁷ As stated by the Court of Justice of the European Union (CJEU) in *GlaxoSmithKline*,³⁸ the agreement should lead to ‘appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition’.³⁹ An agreement reducing capacity may achieve pro-competitive benefits by removing inefficient capacity from the industry, but precedents in this area are limited.⁴⁰

- *Consumers must receive a fair share of the resulting benefits*

The party seeking to obtain the benefit of Article 101(3) TFEU needs to show that consumers would receive a fair share of any pro-competitive benefits resulting from an agreement between undertakings to reduce overcapacity. The concept of a ‘fair share’ implies that the pass-on of benefits must at least compensate for any actual or likely negative impact caused to consumers by the restriction of competition found under Article 101(1).⁴¹ The degree of competitive constraint on the market players is a central element in the assessment of pass-on. As a general rule, undertakings with excess capacity tend to be subject to greater competitive pressure from purchasers than undertakings on markets with low overcapacity.⁴²

- *Restrictions must be indispensable to the attainment of these objectives*

³⁷ Commission, Guidelines on the Application of Article 101(3) TFEU (formerly Article 81(3) TEC) [2004] OJ C101/97 (Article 81(3) Guidelines) para 50.

³⁸ Joined Cases C-501, 513, 515 and 519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291.

³⁹ *ibid* paras 9 and 92.

⁴⁰ *Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited*, Observations of the Commission under Article 15, Paragraph 3, of Regulation No 1/2003 (Commission Amicus Curiae Submission) para 4 <http://ec.europa.eu/competition/court/amicus_curiae_2010_bids_en.pdf> accessed 28 October 2015.

⁴¹ Article 81(3) Guidelines para 85.

⁴² Case C-209/07 *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 (*TCA v BIDS*), Opinion of AG Trstenjak, para 70.

The restrictive agreement must be reasonably necessary in order to achieve the pro-competitive benefits and the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of those pro-competitive benefits.⁴³ As stated by the CJEU, ‘the concept inherent in the Treaty provisions on competition ... [is that] each trader must determine independently the policy which he intends to adopt on the common market’.⁴⁴ Hence, it can be expected that competition would itself correct overcapacity problems and would, within a reasonable period of time, bring the market back to equilibrium without any need for coordination between the undertakings on the market. Therefore, when assessing whether the restrictive agreement as such is reasonably necessary, it needs to be examined whether there are no other economically practicable and less restrictive means of achieving the efficiencies referred to in the first condition.⁴⁵

- *Elimination of competition*

The final precondition of Article 101(3) TFEU means that parties cannot be afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.⁴⁶ Whether competition is being eliminated depends on the degree of competition existing prior to the agreement, as well as on the impact of the restrictive agreement on competition. Therefore, sources of actual as well as potential competition must be taken into account.⁴⁷ Thus, this condition is particularly important in cases when an agreement eliminates price competition or competition in respect of innovation and development of new products.⁴⁸

b) Comment: Consideration of the Economic Context

EU competition law recognises that certain horizontal agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. An analysis under Article 101 TFEU is not confined to looking at how

⁴³ Article 81(3) Guidelines para 73.

⁴⁴ Case C-7/95 *P. John Deere Ltd v Commission* [1998] ECR I-3111, para 86.

⁴⁵ *Visa International - Multilateral Interchange Fee* (Case COMP/29.373) Commission Decision 2002/914/EC [2002] OJ L318/17, para 98.

⁴⁶ Case 75/84 *Metro II* [1986] ECR 3021, para 2.

⁴⁷ Article 81(3) Guidelines para 107.

⁴⁸ *ibid* para 110.

the agreement limits competition between the parties. Therefore, a horizontal agreement such as that proposed amongst the members of BIDS must be examined from the perspective of the likelihood that it will affect competition in the overall market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.⁴⁹ Whether the agreement causes such negative market effects depends on the economic context, taking into account the nature and content of the agreement, the parties' combined market power, and other structural factors. Therefore, an analysis will also look beyond the parties themselves to the overall market and assess how the agreement in question might increase or strengthen the parties' market power.

On the one hand, regard will be had to factors such as the parties' combined market shares and the presence of barriers to new entrants. On the other hand, however, the market positions of the parties' competitors will also be considered in assessing whether the agreement will impact negatively on competition to a significant degree. Further structural factors that are taken into account by the Commission's analysis are the presence of countervailing power on the part of buyers or suppliers, and the existence of legal or natural barriers to entry in the markets in question. Finally, the Commission has retained a broad scope to look to other features of the relevant markets being assessed, which may increase the likelihood of a reduction in competition arising out of a given agreement. For instance, the Commission may look to whether there is a declining market overall, or the fact that one or both of the parties to the arrangement being investigated are failing firms.

The impetus for the Commission to lend weight to the importance of the economic context in an assessment of a potentially restrictive agreement came, in part, from progressive statements from the CJEU which sparked an increase in the use of economic theory by the Commission. An early instance of this was *Société Technique Minière*,⁵⁰ where the Court stated that the assessment of the level of competition in question must be understood within the actual context in which it

⁴⁹ Article 101(1) TFEU (n3) covers only appreciable interferences with competition. See Case 5/69 *V Ca v Vervaecke* [1969] ECR 295.

⁵⁰ Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235.

would occur in the absence of the agreement in dispute.⁵¹ The Court further doubted whether there could be said to be an interference with competition if the agreement in question is indeed necessary for the penetration of a new area by an undertaking. In particular, it was deemed appropriate to take into account the parties' positions on the market.⁵²

Later, the 2001 Horizontal Cooperation Guidelines⁵³ witnessed economic criteria, such as the market power of the parties and other factors relating to the market structure, form a key element of the assessment under Article 101 TFEU. Importantly, it was accepted that the starting point for the analysis must be the position of the parties in the markets as this informs the likelihood of the agreement allowing them to maintain, gain or increase market power.⁵⁴ Again, the use of market power here is taken as a device for measuring the parties' ability to cause negative market effects on prices, output, innovation or the variety or quality of goods and services.

In the 2004 Article 81(3) Guidelines, the Commission's chosen methodology was based on an economic approach which included an exercise in balancing anti- and pro-competitive effects. Ultimately the aim of the analysis envisaged is to determine whether the net effect of such agreements is to promote the competitive process, with the protection of rivalry and the competitive process overall given priority over potentially pro-competitive efficiency gains.

One of the consequences of the modernisation in European competition law has been the narrower application of Article 101(1) TFEU, with theories of harm to competition being expressed in consumer welfare terms, such as increases in prices, reduction in output, choice, quality and innovation, but remaining largely dependent on the presence of market power. As we shall see below, the precise scope and interrelation of the different assessments within the Article 101 framework remain an area of debate and, to some extent at least, the fluidity of the relationship led to a

⁵¹ *ibid* 250.

⁵² *ibid*.

⁵³ Commission, 'Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements' [2001] OJ C3/2.

⁵⁴ *ibid* para 27.

confusing – and ultimately erroneous – application of the Article 101 standards in the *Irish Beef* case by both the parties and the Irish High Court.

4. Application of Principles in *Irish Beef*

a) Irish High Court

In 2003, after having examined the BIDS scheme, the Irish Competition Authority made an application to the Irish High Court for an order restraining BIDS from giving effect to the arrangements.⁵⁵ The Authority, it would appear, was acutely aware of the political support for the scheme, the well-connected nature of its proponents, and the potential for setting an international precedent.⁵⁶ The High Court rejected the Authority's application in July 2006, concluding that the three main features of the rationalisation scheme – the capacity reduction, the financial contributions from the Stayers⁵⁷ to the Goers,⁵⁸ and the restrictive covenants on the Goers⁵⁹ – did not have the object of restricting competition and so did not breach Article 101(1) TFEU or the domestic equivalent, Section 4(1) of the Irish Competition Act 2002 (as amended).⁶⁰

The High Court judgment accepted that the fundamental purpose for the scheme was to implement the conclusions and recommendations of McKinsey and the Beef Task Force.⁶¹ In effect, the justifications proffered for the arrangement consisted of relying on the series of government sponsored reports noted above. The most senior official from the Department of Agriculture and a senior official from Enterprise Ireland both gave evidence in support of BIDS.⁶² Ultimately, the High Court's decision indicates that it was convinced there would still be a sufficient level of competition in the market, even after the rationalisation had been implemented.

⁵⁵ *The Competition Authority v The Beef Industry Development Society and Barry Brothers (Carrigmore) Meats Limited* [2006] IEHC 294 (*Irish Beef*).

⁵⁶ Victoria Balaguer, Case Officer/Irish Competition Authority, 'Disguised Cartels: Industry Restructuring' (EU-China Competition Week, 24 October 2013) <<http://www.euchinacomp.org/attachments/article/345/2.0-EN-Crisis%20Cartels%20Session-Victoria.pdf>> accessed 15 May 2015.

⁵⁷ "Stayers" means the members of BIDS who would not exit the beef industry under the Programme', *Irish Beef* para 31 (McKenchie J).

⁵⁸ "Goers" means the members of BIDS who would voluntarily agree to exit the beef industry under the Programme', *ibid*.

⁵⁹ *ibid* para 4(c).

⁶⁰ *ibid* para 98.

⁶¹ *ibid*.

⁶² Paul K Gorecki, 'Competition Policy in Ireland's Recession' (2012) 43 *Econ & Social Rev* 597, 612.

Having considered the explanations of the beef industry representatives, the High Court based its approval on the absence of clauses in the BIDS agreements which could be said to fix prices or share customers.⁶³ Bizarrely, given the nature of the scheme, the Court also stated that there were no arrangements that could be described as plainly or evidently limiting output, sharing markets or prohibiting investment.⁶⁴ It arrived at this conclusion by reasoning that the agreement to reduce capacity did not equate to an agreement to reduce output.⁶⁵ The Court interpreted the object prohibition in Article 101(1) TFEU as referring exclusively agreements to fix prices, limit output and share markets or customers. Finding that the BIDS scheme did not fit within any of these three categories of agreement, the Court held that the scheme was not caught by Article 101(1). Notwithstanding that the CJEU would later confirm this to be a mischaracterisation of Article 101(1),⁶⁶ it is interesting to chart how the High Court arrived at the conclusion that the reduction of the total capacity was not to be regarded as a limitation of production.

The decoupling of a reduction in capacity and a reduction in output in the High Court's analysis is based partly on an appreciation of the economic context (i.e. that beef output was essentially doomed and would drop regardless of whether the capacity was removed or not), and partly on an economic viewpoint which allowed space for the Court's clearly very positive attitude towards the arrangement to influence the substantive liability standard applied. Therefore, in this case we see a very interesting instance of policy considerations causing a High Court judge to push the limits of competition law in order to arrive at a particular outcome.

A 25% reduction of total capacity might, in the view of the McKechnie J, restrict competition only if it led to a capacity shortage which caused rising prices. Since overall beef production in Ireland would not increase in future, but would tend to decline, even if total capacity were reduced by 25% it would ensure that all beef would be processed. In addition, the Court noted with seeming approval that prices

⁶³ *Irish Beef* para 98.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Case C-209/07 *TCA v BIDS*.

were not expected to increase as a result of the scheme.⁶⁷ Notwithstanding the levies introduced as part of the scheme which would increase the processing costs incurred by the processors, McKechnie J felt that a price increase could be ruled out because the reduction of total capacity would result in economies of scale among stayers. Furthermore, the processors' customers would, in any event, have strong negotiating power since they consisted to a large degree of multiples with undisputed bargaining power. The High Court also concluded that the restrictions on use and disposal were not a restriction of competition. While recognising that, under the market conditions prevailing at the time, it would not have been economically feasible to construct new processing plants, the Court found that potential competitors could enter the market in the future by purchasing other processing plants, either from stayers or non-members of BIDS.⁶⁸

The High Court judgement also addressed, *obiter*, the conditions of Article 101(3) TFEU.⁶⁹ Notwithstanding the 'clear imperfections' in the economic and econometric evidence presented to the court, McKechnie J was content to point to the cost savings predicted by the McKinsey report and accepted that 'some significant, though not scientifically quantified, economic gains have been shown to exist'.⁷⁰ For instance, as regards the requirement of Article 101(3) that the restrictions must be

⁶⁷ *ibid* para 27.

⁶⁸ *ibid* para 81.

⁶⁹ In relation to the first of those conditions, McKechnie J, at para 126, expressed himself to be satisfied that the arrangements did offer economic benefits and gains and that the requirement that 'the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress' had been met. Interestingly, McKechnie J noted with disapproval that BIDS had not arrived at its ultimate figure for economic gains until during the course of the court proceedings, suggesting that parties that can provide evidence of having weighed up in advance the compliance with the economic aspects of Article 101(3) TFEU would stand a greater chance of being found within that provision. In relation to the second requirement of Article 101(3), namely that the consumer must receive a 'fair share' of the resulting benefits, McKechnie J opined that it would be necessary to know with precision the size of the efficiency gains generated in order to evaluate whether what is proposed to be passed on, is or is not 'fair' to consumers. He then concluded that the evidence given on behalf BIDS, when looked at in the context of the evidence furnished with regard to efficiency gains, was not sufficient to discharge the onus of proof upon it in that regard. The finding that BIDS had failed to establish 'with precision' how consumers would derive a fair share of the benefit resulting from the BIDS arrangements, had the effect that, in the hypothetical situation which the court was dealing with having regard to its findings under Article 101(3), BIDS would have lost the case on this ground only. As regards the requirement that the arrangement must not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question, the Authority had argued that the reduction of 25% of total throughput represented a substantial part of the market and that this reduction would lead to capacity restrictions and hence to an increase in price. Following the line used in the analysis under Article 101(1) TFEU, McKechnie J reiterated that no such shortage would result from the BIDS scheme; consequently, there would be a sufficient level of competition remaining within the industry post-rationalisation.

⁷⁰ *ibid* para 127.

‘indispensable’ to the attainment of the pursued objectives, McKechnie deemed this to be satisfied based on the economic evidence proffered by BIDS to the effect that the natural process of competition between plants would not be able to eliminate the excess capacity in the industry.⁷¹

This passage clearly brings out how little faith McKechnie J had in free market competition, going so far as to effectively endorse a sector-wide private re-ordering of the market. While there is undoubtedly scope to consider the economic context within a competition analysis, especially under Article 101(3) TFEU, the High Court’s analysis effectively redrew the substantive competition rules in an outcome-orientated fashion with the aim of responding to economic changes that were being driven by market forces, not market power. As such, the Court engaged in policy making that defeated the purpose of competition and went far beyond the scope of its role under the antitrust rules.

b) Irish Competition Authority

The High Court decision was warmly welcomed by Enterprise Ireland, while the industry and press reports generally focussed on the potential investment rather than the reduction in competition on the market.⁷² Throughout the evolution of this case, the Competition Authority appeared to be keenly aware of the political context and the risk of governments enacting laws to exempt certain sectors from the application of competition laws on the grounds that it would hinder industry-led efforts to address the crisis in the sector.⁷³ The Authority appealed the High Court’s decision to the Irish Supreme Court, which subsequently made a reference for a preliminary ruling to the CJEU in March 2007 on whether arrangements such as those proposed in the BIDS scheme are indeed to be regarded as having an anti-competitive object for the purposes of breaching Article 101(1) TFEU.⁷⁴

⁷¹ *ibid* para 134.

⁷² Editorial, ‘Court backs plans for €2.5bn beef industry’ *The Irish Examiner* (Cork, 1 August 2006).

⁷³ Irish Competition Authority, ‘Crisis Cartels: Can They Be Justified?’ (OECD Global Forum, 17th & 18th February 2011) <<http://www.tca.ie/images/uploaded/documents/oecd%20-%20submission%20on%20crisis%20cartels.pdf>> accessed 30 November 2015.

⁷⁴ Supreme Court of Ireland, *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats Limited*, decision dated 8 March 2007 referring a question to the Court of Justice of the European Communities

c) Advocate General's Opinion

In September 2008, Advocate General Trstenjak took a diametrically opposed view to the Irish High Court's conclusion that only agreements to fix prices, limit output and share markets or customers are restrictive by object.⁷⁵ In particular, the AG's Opinion emphasised that the notion of restriction of competition by object cannot be reduced to an exhaustive list.⁷⁶ Interestingly for the purposes of this work, the AG's Opinion indicated that the industry's overall state should not be considered as particularly relevant and specifically stated that 'the fact that [their] sector is experiencing a cyclical or structural crisis does not mean ... that [Article 101(1) TFEU] does not apply'.⁷⁷

The Opinion noted that BIDS had not acted under State compulsion⁷⁸ and stated that the planned 25% reduction in the production capacity of the processing industry as a whole – as a result of processors leaving the market, the staging of levies and the restrictions on use and disposal of processing plants – meant that the object of the agreement was to restrict competition.⁷⁹ AG Trstenjak reiterated that the fact that even if a sector is experiencing a cyclical or structural crisis it does not mean that Article 101(1) TFEU does not apply and stated that the CJEU has consistently held that the fact that an agreement has a legitimate objective does not rule out the existence of a restriction on competition.⁸⁰

In terms of considering the economic circumstances in which an agreement is concluded, the Opinion warned that the requirement to consider the legal and economic context of an agreement in an assessment under Article 101(1) TFEU must not be seen as a gateway for considering any factor which suggests that an agreement is compatible with the common market. Rather, the Opinion stated that it follows from the scheme of Article 101 that account is to be taken under Article

<<http://www.tca.ie/images/uploaded/documents/Request%20for%20Preliminary%20Ruling%20to%20the%20ECJ.pdf>> accessed 27 October 2015.

⁷⁵ Case C-209/07 *TCA v BIDS* Opinion of AG Trstenjak; see also: Tjarda Van Der Vijver, 'The Irish Beef Case: Competition Authority v Beef Industry Development Society and Others' (2009) 27 ILT 235.

⁷⁶ *ibid* para 48.

⁷⁷ *ibid* para 98.

⁷⁸ *ibid* para 95.

⁷⁹ *ibid* para 67.

⁸⁰ *ibid* para 99.

101(1) only of the elements of the legal and economic context which could cast doubt on the existence of a restriction of competition.⁸¹ The Advocate General's discussion of the situations in which the assumption of a restriction of competition may be rejected or at least doubtful on the basis of the factual or legal context amounts to a delineation between an analysis under Article 101(1) and Article 101(3).

Citing previous case law of the EU Courts,⁸² the Opinion reiterated that factors which are not capable of casting doubt on the existence of a restriction of competition, such as improvements in the production of goods as a result of economies of scale, may not be taken into account in the context of Article 101(1) TFEU, but only in the context of Article 101(3).⁸³ This distinction is, according to the AG's Opinion, based on how different aspects of consumer welfare are taken into account under Article 101(1) compared to under Article 101(3). Specifically, under Article 101(1), agreements which restrict competition between market participants – and thus its function of supplying consumers optimally with a product at the lowest possible price or with innovative products – are prohibited in principle because they directly affect consumer welfare.⁸⁴

As regards contributing to identifying a baseline approach for parties to navigate by going forward, the guiding principle in this Opinion is that the legal and economic context is to be taken into account only under Article 101(1) TFEU in so far as it can cast doubt on the existence of a restriction of competition in the first place. As such, other factors are to be taken into account only in the context of Article 101(3), even where they have to be assessed positively in terms of the common market.

⁸¹ *ibid* para 50.

⁸² Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155, para 265; Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, para 109; and Case T-112/99 *M6 and Others v Commission* [2001] ECR II-2459, paras 72-74.

⁸³ Case C-209/07 *TCA v BIDS* Opinion of AG Trstenjak, para 55.

⁸⁴ *ibid* para 56.

d) Court of Justice

In November 2008, the CJEU, in a decision described as ‘terse’ by one Irish practitioner,⁸⁵ was also sceptical about the aims of the arrangements in question and deemed the subjective intentions of the parties to be ‘irrelevant’.⁸⁶ Instead, the CJEU focussed on the principle that an object restriction can be found even if the agreement does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.

In the end, the CJEU’s perception of the circumstances seemed to completely vindicate the Irish Competition Authority’s longstanding objections to the scheme as it held that the object of the BIDS arrangements was to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors, and so it could only be deemed to be anti-competitive by object. The CJEU also said that the arrangements were intended:

to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability ... That type of arrangement conflicts patently with the concept inherent in the [TFEU] provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article [101(1) TFEU] is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.⁸⁷

Although the CJEU noted that assessment of an agreement must always be made in the light of its economic context, the undoubted presence of an industry-wide crisis seems to have had little influence on the Court’s application of the cartel prohibition. Thus, it appears that the CJEU is of the view that the ‘economic context’ in which

⁸⁵ Philip Andrews, ‘Post-Modern Judgments of Ireland’s Competition Court: From *Appalachian Coal* to *Socony Vacuum* (And Back Again)’ (2011) 32(1) ECLR, 17
<<http://www.mccannfitzgerald.ie/McfcgFiles/knowledge/4081-eclr2.pdf>> accessed 30 November 2015.

⁸⁶ Case C-209/07 *TCA v BIDS* para 21.

⁸⁷ Case C-209/07 *TCA v BIDS* para 34.

one must assess behaviour in competition law terms must largely exclude general – even structural – market conditions.

The Court was clearly unimpressed by the claims that the BIDS agreement should not be caught by Article 101(1) TFEU solely on the ground that it was allegedly aimed at tackling the crisis of the Irish meat industry and reiterated that ‘industrial policy’ considerations concerning individual arrangements can only be analysed against the four conditions contained in Article 101(3), without affecting the anti-competitive nature of the arrangement.⁸⁸

The CJEU is to be praised in this instance for clearly setting out a baseline position because the approach allows analysis under Article 101(1) TFEU to remain ‘pure’, while leaving Article 101(3) to take extraneous or contextual factors into account. The decision should be read in the wider context of case law concerning Article 101, including decisions concerning restrictions of competition ‘by effect’.⁸⁹ For instance, *Meca Medina*⁹⁰ was regarded as a cautious move toward the application of a ‘standard of reason’ in the interpretation of Article 101(1) to satisfy the demands of the public interest. This decision does not sit with the bifurcated structure of Article 101 suggested by the Commission and Whish has suggested that the Commission’s framework for analysis should be relevant only for restrictions of competition resulting from the operation of regulatory structures affecting the freedom of trade of undertakings in the public interest.⁹¹

From one perspective, the approach effectively leaves the political decisions in the hands of policymakers who, following the CJEU’s reasoning, would appear better placed than courts to make such decisions. The clarity and efficacy of the CJEU’s judgment can also be argued to have had a symbolic effect in that it showed that the

⁸⁸ Arianna Andreangeli, ‘From Mobile Phones to Cattle: How the Court of Justice of the EU is Reframing the Approach to Article 101 TFEU (Formerly 81 EC)’ (2011) 34(2) *World Competition*, 215 <http://www.research.ed.ac.uk/portal/files/16272759/From_mobile_phones_to_cattle.pdf> accessed 29 November 2015.

⁸⁹ Case C-519/04 P *Meca Medina and Majcek v Commission* [2006] ECR I-6991; Case T-328/03 *O2 v Commission* [2006] ECR II-1231; for commentary, see inter alia Alison Jones, ‘Analysis of Agreements Under US and EC Antitrust Law – Convergence or Divergence?’ (2006) 51(4) *Antitrust Bulletin* 691, 788.

⁹⁰ *ibid.*

⁹¹ Richard Whish and David Bailey, *Competition Law* (6th edn, OUP 2007) 600.

CJEU was again assuming something of a leadership role in asserting that it will apply the competition rules strictly, even if a sector is in crisis.

e) European Commission

Following the receipt of the CJEU's decision, the Irish Supreme Court duly upheld the Competition Authority's appeal against the original High Court decision of 2006 and remitted the case to the High Court for an assessment of the scheme under Article 101(3) TFEU.⁹² At this point, the European Commission submitted amicus curiae observations to the Irish High Court in 2010.⁹³ The purpose of the Commission's observations was to clarify the application of Article 101(3) to crisis cartels in general.⁹⁴ The Commission submitted that agreements such as at issue in the BIDS case amounted in principle to a restriction of competition by object, for which it will be difficult to succeed with a defence under Article 101(3).

The rationale behind the Commission's decision to intervene was, on one hand, the likelihood of agreements to reduce capacity in various industries across Europe in the context of the current economic downturn and, on the other hand, the limited precedents available in respect of the application of Article 101(3) TFEU to this type of agreement since the adoption by the Commission in 2004 of its Article 81(3) Guidelines. It can, to some extent, be read as an acknowledgement of the difficulty that the parties and the Competition Authority were faced with in identifying the baseline for acceptable conduct, particularly in terms of the application of the economic arguments broached in the Article 81(3) Guidelines.

The substance of the legal submission lodged by the Commission sought to counter the effect that the proceedings had had in creating expectations that competition authorities might allow cartels in order to protect industry from an economic crisis in general. The Commission acknowledged that more long lasting overcapacity problems could exist in industries in decline due to, for example, technological

⁹² *The Competition Authority v The Beef Industry Development Society and Barry Brothers (Carrigmore) Meats Limited* (SC, 3 November 2009).

⁹³ Pursuant to Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art 15(3), the Commission, acting on its own initiative, may submit written observations ('amicus curiae' observations) to courts of the Member States where the coherent application of Article 101 or 102 TFEU so requires.

⁹⁴ Commission Amicus Curiae Submission.

changes in the market, or in industries where firms have been substantially overinvesting for a prolonged period of time. However, the Commission's view was that the relevant question to ask in such situations is whether market forces alone would be able to solve the problem or whether some kind of intervention by the affected undertakings in the market concerned is necessary.

Regarding the possibility for a scheme like BIDS to obtain the benefit of the Article 101(3) TFEU exception, the Commission's analysis starts from the viewpoint that the parties have to show that the agreement leads to pro-competitive benefits which offset the restriction of competition and meets the other conditions mentioned in Article 101(3). It is evident from the Commission's approach that it will be very difficult for parties to succeed with a defence under Article 101(3), largely because the Commission does not generally see the need for this type of coordinated action between competitors since normally the competitive process alone would remove excess capacity from the market.

From the industry's point of view, it appears that any attempt to defend a restructuring agreement on efficiency grounds to the Commission would need first to establish that the industry concerned indeed suffers from a specific structural overcapacity problem, whereby market forces alone cannot remove that excess overcapacity. According to the Commission, such a market failure could only really occur where there is a certain combination of stable, transparent and symmetric market structures and where giving up capacity is costly for the firms.⁹⁵

f) Conclusion

In January 2011, BIDS withdrew its claim for exemption under Article 101(3) TFEU. Therefore, even though there is no final judgment of the High Court, the Competition Authority claimed an important victory in a case dealing with a high-profile industry with considerable connections amongst the political establishment, and in the face of arguments ranging from protecting Ireland's strategic position as a large food

⁹⁵ Commission, 'Global Forum on Competition: Crisis Cartels – Contribution from the European Union – Session III' (27 January 2011) <http://ec.europa.eu/competition/international/multilateral/2011_feb_crisis_cartels.pdf> accessed 31 November 2015.

exporter to the plight of low- and semi-skilled workers in disadvantaged areas of rural Ireland.⁹⁶ Irish practitioners interpreted the final outcome of the case as a ‘general deterrent or warning to parties engaging in restructuring agreements’.⁹⁷ Meanwhile, the Competition Authority went to lengths to reiterate that the fact that a scheme of collaboration or cooperation on the part of particular companies is known, authorised or even encouraged by the State has no bearing on the applicability of Article 101.⁹⁸ Furthermore, a Competition Authority official, writing after the closing of the case, placed emphasis on the fact that the involvement of the Irish Government in the developing of the BIDS framework did not exclude the application of competition rules to it because BIDS could not claim to have been compelled by the state to act as it did, even if the McKinsey report which formed the basis of the plan was commissioned and financed by the State.⁹⁹

5. Comment

a) Role of National Competition Authorities

While it showed commendable determination to pursue its case in the Supreme Court, especially following the glowing terms with which the BIDS scheme was received in the High Court, a question must be asked as to the role – or lack thereof – played by the Authority in the period leading up to the establishment of BIDS in the first place. As noted in the Independent Group’s report, the Competition Authority had conducted an investigation into the pricing patterns in the beef market before the implementation of the McKinsey plan.¹⁰⁰ Therefore, it is clear that the Authority’s personnel were familiar with the structure of the industry and, even if no anti-

⁹⁶ Competition Authority, ‘Competition Authority Wins Beef Industry Case’ (Press Release, 25 January 2011) <<http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-wins-beef-industry-case.aspx>> accessed 29 November 2015.

⁹⁷ Power (n2) N17.

⁹⁸ Victoria Balaguer, Case Officer, Irish Competition Authority, ‘Disguised Cartels: Industry Restructuring (“Crisis Cartels”)’ (EU-China Competition Week, 21-24 October 2013) <<http://www.euchinacomp.org/attachments/article/345/2.0-EN-Crisis%20Cartels%20Session-Victoria.pdf>> accessed 30 November 2015.

⁹⁹ Victoria Balaguer, ‘Case Comment: Beef Industry Development Society - Warning on Industry Restructuring’ (2012) 33(6) ECLR, 301 citing Case C-209/07 *TCA v BIDS* Opinion of Advocate General Trstenjak, para 95.

¹⁰⁰ See John Fingleton, ‘2000-2005: A Review of the Competition Policy in Ireland’ (Competition Press Conference, Dublin, 4 October 2005) <[http://www.ccpic.ie/sites/default/files/2005-10-04%20Presentation%20\(J.F.\)_0.pdf](http://www.ccpic.ie/sites/default/files/2005-10-04%20Presentation%20(J.F.)_0.pdf)> accessed 02 December 2005.

competitive conduct worthy of a further investigation was found, one can assume that the structural problems facing the industry came to light as part of the initial review.

The Authority had strong powers to investigate and intervene in markets of its own initiative. As such, the Authority was well positioned to give its input into the BIDS proceedings – even on a private basis. In the interests of certainty and public policy, however, it would be preferable going forward if the CCPC developed a practice combining its enforcement and advocacy roles whereby it would indicate, potentially on a without prejudice basis, the types of situations which it would deem to cause competition concerns. Over time, this type of conduct could build on the extensive set of guidance and soft law materials that already exist in the Irish and European context. Ultimately, the parties and their advisors may have taken a view on the legality of the BIDS arrangement and continued regardless of the Competition Authority's input, but clarity and consistency from the part of the authorities may well have guided them in a different direction at an earlier point.

Overall, one of the most important roles of any competition authority is to educate businesses and consumers about the benefits of competition.¹⁰¹ However, competition authorities must also work at increasing predictability in the application of competition law through their advocacy activity, together with the clear elaboration of safe harbours through measures such as Block Exemption Regulations.¹⁰² In the aftermath of the saga described here, the Competition Authority issued specific guidance for industries facing similar capacity issues.¹⁰³ It pointedly stated that

¹⁰¹ In Ireland, an example of the advocacy activities undertaken by the CCPC in the competition law sphere is CCPC, 'Consortium Bidding: How to Comply with Competition Law when Tendering as Part of a Consortium - A Guide for Small and Medium Enterprise (SMEs)' (December 2014) <<http://www.tca.ie/images/uploaded/documents/Consortium%20Bidding%20Guide.pdf>> accessed 01 December 2015.

The guide sets out in accessible terms the view of the CCPC as regards consortium bids being jointly prepared by actual or potential competitors, specifically stating, for example, that a bid may be jointly prepared where no single member of the consortium would be capable of fulfilling the terms of the tender alone.

¹⁰² Bruno Lasserre, 'Several Strokes of Black and a Palette of Grays: Competitor Agreements through the Eyes of an Enforcement Agency' in Barry E Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law 2013* (Juris 2014).

¹⁰³ Competition Authority, 'Notice on Agreements to Reduce Capacity' (16 June 2011) <<http://www.ccpc.ie/sites/default/files/documents/N-11-001%20Notice%20on%20Agreements%20to%20Reduce%20Capacity.pdf>> accessed 29 November 2015.

agreements to reduce capacity which involve a large number of players accounting for a large market share and which prevent the possibility of expansion or entry of productive capacity are unlikely to satisfy the requirement that there is no elimination of competition.¹⁰⁴

Interestingly, it would appear that the CCPC, the successor agency to the Competition Authority, has learned from the *Irish Beef* proceedings, as it was quick to intervene when a subsequent initiative threatened to impact on pricing in the beef processing sector. The 'Beef Forum' was established to work towards a negotiated settlement between the stakeholders. It was chaired by the Minister for Agriculture and was attended by most of the main players in the beef sector, including farm organisations, beef processors and An Bórd Bia (Irish Food Board).¹⁰⁵ During a dispute over pricing between beef farmers and processors in late 2014, the Minister for Agriculture chaired a Forum meeting at the Department of Agriculture buildings in County Kildare. One reported outcome of the Beef Forum was 'a strong endorsement from all stakeholders for the establishment of farmer-owned Producer Organisations in the beef sector to help to rebalance negotiating power for farmers in their dealings with the meat factories'.¹⁰⁶

While the Minister's press release specified that '[s]uch organisations can also add value through the common purchase of inputs, joint distribution, marketing and the agreement of quality specification',¹⁰⁷ the CCPC promptly wrote to the Irish Farmers Association (IFA) and the beef processors, reminding the two sides of their 'legal obligations' as producers were competing undertakings and could not collaborate in order to set prices. The CCPC also warned the IFA against further protests which would halt work being carried out at factories.¹⁰⁸ While the intervention of the CCPC

¹⁰⁴ *ibid* para 6.42.

¹⁰⁵ Patrick Donohoe, 'Beef Forum Outcome: Processors and Farmers Reach Agreement on Range of Issues' *The Irish Farmers Journal* (13 November 2014).

¹⁰⁶ RTÉ News, 'Farmers and Meat Processors Agree to Negotiation Period over Beef Crisis' (30 October 2014) <<http://www.rte.ie/news/2014/1029/655477-farmers/>> accessed 29 November 2015.

¹⁰⁷ Department of Agriculture, Food and the Marine, 'Coveney Secures Agreement on Intensive Discussions between Farmers and Processors' (Press Release, 30 October 2014) <<http://www.agriculture.gov.ie/press/pressreleases/2014/october/title,78635,en.html>> [accessed 29 November 2015](#).

¹⁰⁸ Mark Paul, 'Meat Protests: Biggest Beef Yet to Be Resolved' *The Irish Times* (Dublin, 14 November 2014). The letter was addressed to IFA President Eddie Downey from the Director of

was greeted with hostility by the IFA and other farmer groups, it was subsequently reported that the Beef Forum specifically avoided addressing the issue of cattle prices.¹⁰⁹

b) Subsequent Developments

As regards the evolution of the concept of a restriction of competition and the ability for parties to identify where the baseline for permissible conduct lies, it is important to note that cases such as *Irish Beef* merely represent a point along a journey. As such, some interesting developments since then should be mentioned. Specifically, the CJEU has distanced itself from the Commission's expansive interpretation of the notion of 'by object' restriction, and has nuanced the *Irish Beef* decision as well as other contemporaneous case law such as *T-Mobile*,¹¹⁰ *GlaxoSmithKline*,¹¹¹ and *Allianz Hungaria*.¹¹² Those cases were interpreted at the time as meaning that the contextual assessment needed to decide whether a restriction can qualify as a 'by object' restriction calls for an examination of the 'potential' effects of the measures. Such restrictions would arguably now fall short of qualifying as 'by object' restrictions because, in *Groupeement des Cartes Bancaires*,¹¹³ the Court rejected the standpoint that a 'by object' restriction is a notion to be interpreted broadly and clarified that the essential legal criterion for ascertaining a restriction of competition 'by object' is the finding that such coordination in itself reveals 'a sufficient degree of harm to competition'.¹¹⁴

Thus, only where conduct reveals a 'sufficient degree of harm', such as in a price-fixing cartel, are the authorities exempted from proving that the conduct has actual detrimental effects on the market because there is sufficient experience recorded with such arrangements that make an effects analysis unnecessary. In effect, the

Enforcement at the CCPC. The contents of the letter are published in the *The Northwest Express* (December 2014) 8.

¹⁰⁹ Declan O'Brien and Joe Healy, 'Price Rise Takes Sting Out of Latest Beef Blockade Threat' *The Irish Independent* (Dublin, 19 November 2014).

¹¹⁰ Case C-8/08 *T-Mobile Netherlands BV* [2009] ECR I-4529.

¹¹¹ Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

¹¹² Case C-32/11 *Allianz Hungaria* EU:C:2013:160.

¹¹³ Case C-67/13 P *Groupeement des Cartes Bancaires v Commission* EU:C:2014:2204.

¹¹⁴ *ibid* para 58.

Court pointed to the importance of past experience in the application of the ‘by object’ concept of Article 101(1) TFEU in its case law.

In assessing whether conduct can be considered sufficiently harmful to form an ‘object’ restriction, the Court reiterated that all relevant aspects need to be taken into account, including the content of its provisions, the objectives, and the economic and legal context of which it forms part.¹¹⁵ When determining the context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question, whether or not they relate to the relevant market. Therefore, the CJEU rejected the approach that a restrictive object could be inferred from the wording of the measures alone and the mere possibility that the measures may restrict competition. As such, in the *Cartes Bancaires* case, the General Court and Commission should have considered the context of a payment system that was to be applied in a two-sided market as well as the fact that the measures sought to establish a certain balance between the issuing and acquiring activities of the members of the *Cartes Bancaires* group.

Going forward, it is noteworthy that the Court expressly states the concept of a restriction of competition ‘by object’ must be interpreted restrictively. Therefore, unless it can be clearly and easily shown that the restriction in question harms competition, by its very nature, it will be required to analyse the actual impact on the structure and functioning of the market in order to show likely harmful effects on competition. In effect, this amounts to a reversion to the notion of ‘by object’ restrictions that was initially intended by the Commission’s Article 81(3) Guidelines. Furthermore, the Court makes it clear that arrangements in novel or complex economic settings (such as network industries or multi-sided markets) are not subject to a ‘by object’ analysis because the latter is not suitable for determining whether such measures are caught by Article 101(1) TFEU.

¹¹⁵ *ibid* para 53.

In the future, it would appear that the practical effect of the *Cartes Bancaires*¹¹⁶ case will be to cause the Commission and NCAs to exercise caution and restraint when attempting to apply the notion of ‘by object’ restrictions to cases and situations with no prior relevant experience revealing a sufficient degree of harm to competition. Instead, the Commission and the NCAs will have to focus *de nouveau* on the actual effects of the conduct, which will require more work and economic analysis rather than reliance on convenient but arbitrary assumptions.¹¹⁷ From the parties’ perspective, this is arguably a more satisfactory situation as there is considerable guidance now in place and a reliance on an effects-based approach, rather than formalistic categories, allowing undertakings to objectively assess their arrangements and, if necessary, defend them using economic evidence.

6. Conclusion

What makes the BIDS scheme an interesting case study is the fact that the policy outcome was so clearly identified in advance and that the interpretation of the law (by the parties initially, and then the Irish High Court) used in order to permit that policy outcome to stand was so comprehensively opposed by the NCA, the European Commission and the EU Courts. While this could just be seen as the correction of an erroneous interpretation of competition doctrine, this episode can also be seen as a power play from the European Commission and the CJEU whereby the competence to instigate a policy-led shift in the interpretation and application of competition law is jealously retained at the EU level. Although the Irish High Court specifically states that its endorsement of BIDS’s behaviour did not have ‘a direct bearing on the case’,¹¹⁸ it is clear from the tenor of the judgment and the verdict that it was impressed by the policy outcome achieved and, implicitly, by the fact that it was introduced and supported by state agencies.

Therefore, it is clear from this instance of vigorous application of the competition rules that times of economic recession or declining demand do not grant immunity

¹¹⁶ *ibid.*

¹¹⁷ Javier Ruiz Calzado and Andreas Scordamaglia-Tousis, ‘*Groupeement des Cartes Bancaires v Commission*: Shedding Light on What Is Not a ‘By Object’ Restriction of Competition’ (2015) 6(7) JECL & P 495.

¹¹⁸ *Irish Beef* para 84.

from the application of competition law.¹¹⁹ In terms of identifying a baseline for commercial undertakings to understand the practical application of the competition rules, this case shows that competition agencies are not in a position – especially given the oversight of the European Commission – to follow a flexible approach even in state-endorsed schemes. The *Irish Beef* case also confirms that even extensive government involvement does not legitimise the approach taken to restructuring nor does it in any way preclude the application of the object restriction contained in Article 101(1) or even significantly influence the interpretation of Article 101(3). It is clear that commercial operators seeking to locate the baseline treatment to be expected from competition authorities must take independent advice on the objective application of the economic principles applicable under Article 101(3) and may not take any appreciable comfort from the fact that any restructuring or rescue scheme is being driven by government bodies.

The *Irish Beef* saga examined above shows how the modern Commission responds to what was undoubtedly an industry in crisis. Against the background of the interesting work being done to analyse and contextualise how the Commission responded to the 2008 financial crisis,¹²⁰ the case study contributes by demonstrating the leadership role of the Commission and the EU Courts, even in purely domestic situations. Additionally, it builds on the analysis in Chapter 3 to chart an episode which nicely highlights the Commission's interesting U-turn in how it responds to crises, compared to the 1970s cases mentioned above.

In the context of the overall thesis, one lesson that can be learned from the *Irish Beef* proceedings is that the space for special carve-outs from competition policy is becoming narrower and, going forward, any sectoral scheme or policy-driven 'partnership' initiative will have to include consumer representatives as full stakeholder participants. Such carve outs and the default market-based model encouraged by competition law need not be in complete tension, but it is clear that future plans will have to be more nuanced than the BIDS arrangement. Future

¹¹⁹ Andreas Stephan, 'Will the Recession Make Cartels More Likely and Cartel Enforcement More Difficult?' (2009) 19 CCP Newsletter 5.

¹²⁰ Michael Reynolds, Sarah Macrory and Michelle Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2011) 33(6) Fordham Intl LJ 1670.

empirical research based on the mismatch identified above could potentially look into other attempts to implement a policy-driven restructuring or rebalancing of a market which manage to incorporate consumer interests to the extent that the overall scheme complies with competition law. Ultimately, though it may be frustrating to the business community, this process of trial and error is the only way of identifying the applicable baseline going forward.

CHAPTER 7: CONCLUSION

1. Reviewing the Purpose of the Thesis

The objective of this thesis was to examine the role and utility of competition law within the EU's legislative and regulatory dialogue, using its response to crisis conditions as a test of its aims and abilities. In this thesis, the choice of a socio-legal methodology was taken in order to embrace the discipline of competition law as a social institution and to attempt to shed more light on the effect of competition law, and the institutions behind it. This path was also chosen in order to reflect the influence of social, political and economic factors on competition law and institutions. Each of the individual chapters demonstrates, in their own way, the influence that social, political and economic factors have on competition law, and vice versa.

As such, the main conclusion of this thesis is that competition policy acts as a forum for debate as to the direction of the European integration project, while competition law can serve as a tool for aiding in the implementation of broader policy objectives. This way of thinking of competition law amounts to seeing it as an institution within the EU, one where different policy objectives interact and where a balancing process is played out. The way in which this balancing process operates is described in the individual chapters from the perspective not only of the courts and competition authorities, but also from the point of view of the market participants who interact with competition rules on a daily basis.

2. Issues Discussed

More specifically, the analysis in this thesis followed certain themes as they arose in the individual chapters, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the ability and role of NCAs in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law.

a) Role of the general economic context

It is observed in Chapter 3 that the Commission's stance and role in the development of competition policy and enforcement has, by necessity, allowed the resulting competition rules of the EU to take into account other overriding public

policy imperatives related to the general economic context in particular. The discussion in Chapter 3 provides the backdrop by demonstrating that European competition law and policy has always been used in a functional and multi-purpose manner in that it has been utilised to pursue objectives that were not directly related to competition. The most obvious example is that of market integration but, as it has evolved in the EU, competition policy has seen the influence of other grounds as broad as social, environmental and industrial policy.

Chapters 4 and 5, which focus on the passenger airline sector in Europe, describe a market where there is a widely held perception that the European Commission, as a result of its views on the future development of the European airline sector in the global economic context, is pursuing a pre-conceived policy objective. As comes out in particular in the account provided in Chapter 5, many stakeholders expressed the view that the Commission favours the emergence of large, network based carriers capable of competing on the global scale which are supported by smaller, but efficiently run, carriers that feed the major airlines' large hubs. More specifically, the conclusion reached by some of the respondents was that the application of the EU's merger control rules to the sector has been tailored to allow for a specific type of airline to emerge in order to compete on the global market. Although the sample size of the empirical study was too small to be able to reach firm conclusions, the existence of a perceived preference on the part of the Commission does shine through. As such, the Commission's take on the economic context of the airline sector has led to airlines perceiving there to be preference in Brussels. This, in turn, appears to be shaping the corporate planning of airlines in terms of the types of transactions and structures they can use to operate in the European market.

The economic context also plays a role in the sector examined in Chapter 6, namely the beef processing industry in Ireland. In that context, however, it was the national government and the parties involved who had devised a certain structure for an important domestic industry to be able to compete in a globalising market. The study of the Irish beef sector describes how this restructuring plan was arrived at in light of the baselines apparently applicable at the time. The chapter then describes how the European Commission, the Irish NCA and the ECJ eventually had to intervene to prevent a domestic court's analysis of the economic context (i.e., that beef output was essentially doomed and would drop, regardless of whether the capacity was

removed or not) having an inappropriate influence the application of competition law in that case. Therefore, in that case we see a very interesting instance of policy considerations causing a national judge to – erroneously – push the limits of competition law in order to arrive at a particular outcome and the NCA and the European Commission intervening to ensure a more strict interpretation of competition law.

b) Baselines applicable in crisis conditions

In Chapter 6, on the Irish beef sector, the argument was made that a timely public restatement of a comprehensive baseline approach to the application of competition law rules to so-called crisis cartels could well have avoided the lengthy litigation and controversy which resulted from the main actors being largely left to their own devices until the relevant schemes were actually put in place. The simple normative goal proposed was that all parties should be able to find the benchmark treatment which a typical commercial operator can be reasonably deemed to expect in a given situation. Clearly, this practical commercial requirement is amplified in crisis situations where desperate measures may well be under consideration.

The European passenger airline sector is, in some ways, similar to the Irish beef sector in that the analysis in Chapters 4 and 5 show that there is significant uncertainty amongst certain market participants as regards the standards of the rules to be applied. The analysis does not always call for different outcomes in the decisions referenced, but it would appear that the market participants would appreciate a different and more transparent approach in terms of undertaking a competitive assessment - specifically, one which would allow for greater certainty in their corporate planning processes.

An interesting point to note in relation to the passenger airline sector is that even the major carriers – which one would expect to benefit from the Commission's preference for the emergence of a small number of large operations – have considerable issues with the lack of predictability in the Commission's approach, particularly in the merger sphere. Similarly, one of the major carriers surveyed express discomfort and dissatisfaction with the policy preference on the part of the European authorities as they deemed it to result in competition rules in the airline sector having certain specificities peculiar only to that sector.

Regardless of whether such a preference is justifiable on policy grounds, or even whether it actually exists in practical terms, the existence of such a widely held perception amongst some of the most active and dynamic airlines operating in the EU calls into question the Commission's ability to communicate its enforcement policies and priorities in such a way as to alleviate the uncertainty and doubt caused to industry players when planning potential investments. Further research, conducted anonymously and over a longer period of time, on how widespread and consistent these sentiments are in the industry would be of considerable interest. Given the limitations of the survey conducted, it was not clear which particular decisions form the basis for certain comments, and further research could perhaps explore whether particular decisions were more or less vexing to different airlines with different outlooks.

c) NCAs applying competition law

Another interesting angle to be explored in this work is the relationship between different enforcement agencies when it comes to deciding how best to deal with aggressive or defensive consolidation or cooperation.

The empirical study on the airline sector portrays a view that the European Commission's approach to applying and enforcing EU competition rules, in particular in the merger domain, has seen the effective recruitment of NCAs as watchdogs for the implementation of the decisions handed down by Brussels. It is particularly interesting to note that the undertakings involved perceive the NCAs in this light and focus their attention on the Commission when it comes to attempting to influence the future application and development of competition law rules.

Throughout the evolution of the proceedings in the Irish Beef sector, on the other hand, the Irish Competition Authority appeared to be keenly aware of the political context in which it was operating, which is interesting given that the Irish NCA ranks as an averagely independent NCA in Mattia Guidi's survey of the formal independence of the EU NCAs.¹ Chapter 6 suggests, however, that in the circumstances there was sufficient evidence for the Authority to have intervened at an earlier point in order to forestall the expense and uncertainty for the parties involved. The *Irish Beef* saga ultimately also showed how the European Commission

¹ Mattia Guidi, *Delegation and varieties of capitalism: Explaining the independence of national competition agencies in the European Union*, *Comparative European Politics* (2014) 12, 343–365.

responds to what was undoubtedly an industry in crisis and demonstrating the leadership role of the Commission and the EU Courts, even in purely domestic situations.

d) Influence of Commission's overarching policy goals

The research on the airline sector provides indicative evidence of the European Commission taking into account the overall nature and development of a sector in a global context when applying competition rules in individual cases. While such an approach, in itself, may well be justifiable, the responses received from the airlines most affected by the application of competition rules indicate that the Commission's methods have rendered their decisions unpredictable because the overarching policy concerns have not been explicitly incorporated into decisions. Instead, according to the respondents on behalf of some airlines, the Commission's use of otherwise standard methodology has been skewed in order to arrive at decisions which allow for the emergence of an airline sector which conforms to the Commission's policy-driven preferences.

On the other hand, a lesson that emerges from the *Irish Beef* proceedings is that the space for such special carve-outs from competition policy is becoming narrower. On the basis of the analysis in Chapter 6 it would appear that, going forward, any sectoral scheme or policy-driven 'partnership' initiative will have to include consumer representatives as full stakeholder participants.

3. Reflecting on thesis objectives

The broad conclusion reached by this thesis is that competition law and policy can and does adapt to overall economic trends and circumstances but only at a cost – namely, to the levels of certainty and predictability attaching to any given Commission decision. Much of the available analysis of competition law issues is necessarily limited by being restricted to the publicised legal acts of the official institutions. As such, this thesis attempted to contribute to the research in the area by considering the perceptions and preferences of stakeholders directly – in this case, the firms active on the markets in question. Other stakeholders, such as labour unions, trade associations and consumer representatives, would undoubtedly also have interesting views on the application of competition law but, despite advances in the transparency of decision-making processes, still tend to remain on the fringes of

the debate. The individual sectors examined in this thesis show how the modern Commission responds to industries in varying degrees of crisis or flux. Against the background of the interesting work being done to analyse and contextualise how the Commission responded to the 2008 financial crisis,² the case studies contribute by demonstrating the leadership role of the Commission and the EU Courts, even in what may appear to be purely domestic situations. Additionally, it charts an episode which nicely highlights the Commission's interesting U-turn in how it responds to crises, compared to the 1970s cases mentioned above.

As regards the ultimate research question of the utility and role of competition law and policy in times of economic distress, the research identified situations where attempts to implement a policy-driven restructuring or rebalancing of a market can be deemed acceptable if they manage to fulfil the nebulous and fluid weightings given by the Commission to factors such as consumer interests to the extent that the overall scheme complies with competition law. Ultimately, though it may be frustrating to the business community, this process of trial and error is the only way of identifying the applicable baseline going forward. Nevertheless, in the context of a thesis dealing with the nature and role of competition law in a broader context of the European project, the results of this research have provided an interesting contribution to the literature in the field from the point of view of the parties most directly affected by the application of EU competition rules.

This thesis aimed to look beyond the legislation and official statements to consider real-world instances of competition law's impact on firms and their corporate strategies, especially attempting to highlighting situations where the law-in-action deviates from the law-in-the-books. For example, such mismatches were found to exist due the baselines seemingly not being sufficiently clear for the parties in the Irish beef sector to predict that their proposed structure was unlawful; and (ii) where the perception of particular enforcement practices on the part of the Commission has impacted on the planning processes of the parties in the airline sector, meaning that the bright lines and guidance in the legislation are not as useful to those operators as they were designed to be.

² Michael Reynolds, Sarah Macrory and Michelle Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2011) 33(6) *Fordham Intl LJ* 1670.

In terms of exploring the role of competition policy as a forum for regulatory and legislative dialogue in the EU, the investigation conducted in Chapter 3 leads to a conclusion that competition law in the EU context plays a role akin to a public law function, whereby it represents a tool for balancing the effects of the different strands of development in the European project. As such, it was argued that the role of competition law in the EU goes beyond the application of economic or legal standards in individual cases; rather, competition law and policy have been calibrated as a balancing mechanism to contribute to the EU project's efforts to harness the benefits of an open capitalist economy within the context of a democratic society.

4. Implications of the Thesis with respect to the Overall Study Area and Areas for Future Research

It is argued in Chapter 3 that competition policy has been called upon to fill gaps and reach places that Brussels' other tools cannot, even if ultimately this has been to the detriment of the internal coherence of competition doctrine in the EU. The empirical work and the case studies built on this by demonstrating how this incoherency can be manifested when different regulatory regimes and policy imperatives can interact in the context of a single sector. The risky and unconventional form of the investment and restructuring attempted by market participants in both sectors under examination showed the importance of the existence of identifiable baselines within the regulatory framework are when it comes to the long term strategic planning processes undertaken by firms.

On the one hand, it is clear from the vigorous application of the competition rules in *Irish Beef* that times of economic recession or declining demand do not grant immunity from the application of competition law.³ In terms of identifying a baseline for commercial undertakings to understand the practical application of the competition rules, this case shows that competition agencies are not in a position – especially given the oversight of the European Commission – to follow a flexible approach even in state-endorsed schemes. The *Irish Beef* case also confirms that even extensive government involvement does not legitimise the approach taken to

³ Andreas Stephan, 'Will the Recession Make Cartels More Likely and Cartel Enforcement More Difficult?' (2009) 19 CCP Newsletter 5.

restructuring not does it any way preclude the application of the object restriction contained in Article 101(1) or even significantly influence the interpretation of Article 101(3).

On the other hand, the study of the airline industry highlights the danger of the politicisation of decisions on competition enforcement and policy in visibly exposed and strategic sectors. In setting out how such dangers manifest themselves, in Chapter 2 it was noted that such “interference” can take the form of calls for more or less intervention, depending on the circumstances, but inevitably lead to relying on private decision making instead of trusting the more long-term benefits of competition on the market. In this light, by discussing the role of the NCAs alongside the European Commission in each case study, the thesis highlights how the application of competition policy by independent agencies free of government interference is not be taken for granted.

As regards areas for future study, the case studies make it clear they merely represent a point along a journey of the evolution of competition rules and the ability for parties to identify where the baseline for permissible conduct lies. Further research into the respective viewpoints of other interested parties, such as trade unions, consumer groups, employee representatives, and sectors upstream and downstream of those studied could represent a complementary project capable of generating interesting insights in light of the research conducted here. This is especially so as they could help provide a degree of balance that it difficult to obtain when focussing purely on the views of one set or market players.

In terms of the technical points of establishing the appropriate baselines and creating certainty for firms corporate planning, it is interesting to note the contents of the Commission’s White Paper of July 2014, albeit the progress of this reform project looks to be in doubt of late. In particular, the White Paper makes proposals aimed at reforming the referral system between the Commission and NCAs, making it more business-friendly by streamlining and shortening the procedures.⁴ The long-running saga as regards assessments of non-controlling interests⁵ has entailed a broad consultation process undertaken by the Commission which has received input from a

⁴ http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf, para 59 et seq.

⁵ European Commission Public Consultation: Towards more effective EU merger control, at http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.

large cohort of stakeholders, including certain airlines which also responded to the survey conducted for this work. It is therefore interesting to note that both of these are live issue for stakeholders and may warrant further research in the future in light of the changes proposed.

5. Conclusion

Overall, as described above, the objective of this thesis was to examine the role and utility of competition policy within modern Europe's legislative and regulatory dialogue. Feeding into this discussion were themes such as an exploration of the relationship between different enforcement agencies, especially when it comes to deciding how best to deal with aggressive or defensive consolidation or cooperation during a period of crisis in a given industry. By surveying a wide range of elements directly involved in the decision-making processes in the enforcement of competition rules in particular industries, this thesis aimed to provide insight into competition regulations in practice, and to match their the rules' objectives in theory with the outcomes for individuals most directly affected.

Since European economies are heterogeneous with many moving parts, what is needed is a form of competition law that is innately political rather than merely technical. What is most striking as between the historical analysis in Chapter 3 and the modern day case studies, perhaps, is the remaining scope for competition rules once to be utilised by the Commission with the result that some of its core original principles are marginalised. This scope for political influence within competition law is at odds with the Commission's portrayal of European competition policy as an apolitical element of the European project. However, this thesis has presented a view that each substantive position taken by the Commission is, in fact, a decision to follow a particular political path. To acknowledge this is not to criticise it, but to recognise competition policy's overarching function as a malleable political tool in the broader European project.

EUI Questionnaire on Competition Law as applied to Airlines and Airline Alliances

DEPARTMENT OF LAW

Questionnaire on Competition Law as applied to Airlines and Airline Alliances

The following questionnaire forms part of a research project being undertaken under the supervision of Professor Giorgio Monti at the European University Institute in Florence. The core of the project deals with the adaptability and robustness of European competition law and policy in times of economic and financial crisis. In this context, the European passenger airline industry has been selected as a case study in order to deepen the investigation. The purpose is to compile sufficient data to allow some insight into the industry's attitude towards competition rules in light of the steady move towards consolidation and alliance-building.

The information contained in your responses will be treated with the strictest confidentiality in accordance with the EUI's Research Code of Ethics. A copy of this confidentiality statement is also attached for your approval and signature.

Please do not hesitate to contact me should you require more information or clarifications.

Contact Details:

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Via Boccaccio, 121
Firenze I-50133,
Italy
Email: conor.talbot@eui.eu
Telephone: 0039 388 9309 204

19 April 2012

1. Respondent Background Information

- a. Within the limits of anonymity, kindly supply some brief background information about yourself and your organisation:

Position	
Responsibilities	
Company/organisation's main activities / markets	
Countries that company/organisation mainly operates in	
Size of company / organisation	
When you first had contact with DG COMP	
Amount of contact you have had with DG COMP	
When you first had contact with US DoJ/FTC	
Amount of contact you have had with US DoJ/FTC	

2. Role of Competition Rules and Enforcement Agencies

Based on your experience of dealing with European competition law enforcers in the passenger airline industry, please comment on the following:

- a. On a scale of 1-10, with 1 being the least important and 10 being the most important, please indicate which, if any, of the following goals seemed to be foremost in the minds of the European competition enforcement officials you dealt with:

Overall efficiency of the global airline industry	
Overall efficiency of European airline industry	
Maintaining the structural status quo of the European airline industry	
Protecting the interests of so-called prestige airlines (especially traditional flag-carriers)	
Prices offered to end customers (i.e. passengers)	
Choice of services offered to consumers	
Political independence of airlines	
Long term competitiveness of international airline alliances	
Environmental concerns	
Regional/national employment	

- b. Please rank from 1-3, with 1 being the least important and 3 being the most important, the importance of your relations with competition authorities from a political/geographic point of view:

National level	
European level	

Transatlantic level	
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c. Which legal environment (in particular the competition rules) is the most business friendly?

d. And which poses the most barriers to business innovation?

e. Is there a cost difference in complying with US or EU competition rules, taking a proposed merger as an example?

f. As regards the technical quality of the competition and market analysis of the airline sector, which of the competition institutions or authorities are the best to deal with?

g. From your experience in the European airline industry, how clear and understandable have the European Commission's competition-related decisions been?

[Please rank from 1-5, with 1 being the least clear and 5 being the most clear]

h. How predictable do you consider that the Commission's decisions have been in the airline sector?

[Please rank from 1-5, with 1 being the least predictable and 5 being the most predictable]

i. In your view, is there sufficient consistency in the Commission's decisions? Please feel free to expand upon your answer.

j. Generally speaking how strongly do competition rules impact upon on an airline/alliance's future strategy?

[Please rank from 1-5, with 1 being the least influential and 5 being the most influential]

k. In undertaking feasibility studies and researching future acquisitions, how restrictive are competition rules seen as being?

[Please rank from 1-5, with 1 being the least restrictive and 5 being the most restrictive]

- l. Do you feel that DG COMP reacted in a timely and effective way to the financial and economic crisis that affected the airline industry over the past 4 years? Please feel free to expand upon your answer, especially with comparisons to previous times of crisis.**

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- m. Did their actual responses match up to your / the markets' expectations?**

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- n. Which of the following would be the most appropriate competition policy objective for an authority dealing with the airline industry?**

fares and rates should not lead to unsustainably low pricing or price wars, but fares should be as low as possible	
regulation should be reduced to allow consumers to identify products and services they desire and the price that they were willing to pay	
consumer welfare should be enhanced by any means available	
policy should focus on allowing network benefits, even at the cost of price competition	
other, please specify:	

- o. Which of the following are the most important roles played by national competition authorities in the airline sector?**

Oversight of companies so as to guarantee price-quality relationship	
Ensuring ownership nationality rules are respected	
Allowing for stabilisation of the sector to prevent future bankruptcies	
Monitoring usage of slots and preventing barriers against new entrants	
Encouraging healthy competition amongst airlines	

3. EU competition law and the airline industry in practice

- a. Which of the following regulatory frameworks plays the more important role in a major airline's long term planning?**

Compliance with (EU) competition law	
Bilateral air service agreements' nationality restrictions on ownership/investment	
Introduction of the EU Emissions Trading Scheme	
Other, please specify:	

- b. **Would competition rules continue to impede consolidation if Air Service Agreements' limitations were removed, or has the industry's natural level of concentration been reached?**

--

- c. **How realistic is the potential for cross-continental consolidation in light of today's economic outlook? [Please rank from 1-5, with 1 being the least realistic and 5 being the most realistic]**

--

- d. **Are major international deals more concerned with the competition authorities or the nationality requirements?**

--

- e. **Which of the following description is most apt for the direction the airline industry is likely to take vis-à-vis its global structure?**

Global consolidation amongst EU/US/ROW airlines	
Fragmented on regional lines	
EU/US isolation, with global consolidation for the ROW	
Airlines from ROW penetrating EU/US markets	

- f. **What would be the single biggest potential improvement in the application of European competition rules from the perspective of a major international airline?**

More facilitation of informal modes of cooperation	
More recognition in market definition phase that O&D markets are not entirely independent from each other	
More recognition of the strategic importance of the industry	
Economic outlook taken into account more	
Remedies should be redesigned so as to avoid preventing network producers from expanding networks or making them as attractive as possible	

- g. **Please rank the major advantages of airline consolidation, from the airlines' point of view?**

Better access to finance, ability to expand into new markets	
Increased bargaining power with national/regional administrations	
Cost/efficiency savings	
Stabilising the sector as a whole	
Qualitative improvements for customers, e.g. increased frequencies and choice	
Economic strength of new firm allows it to withstand downturns	
Other, please specify	

4. Airline Industry Economics

- a. What is the dominant factor behind the nature of the evolution of the airline industry's consolidation?**

Market players' desire, or lack thereof, to change their business model	
Impediments from competition authorities	
Impediments from nationality requirements	
Lack of financing options/economic outlook	
Difficulties faced by airlines in growing organically	
Alliances are defensive against emerging global competitors	

- b. Which of the following institutions can/should be lobbied by a major international airline seeking to expand/consolidate:**

European Commission (DG Comp)	
European Commission (DG Tren)	
EU MS NCAs	
EU17 MS NCAs	
EU MS Transport Authorities	
US Department of Justice	
US Federal Trade Commission	
US Department of Transport	
European Parliament/politicians	
National European parliaments/politicians	
US Senate/Congress	

- c. From your experience of airline managers, which of the following most aptly describes their perception of the EU's preferred aviation policy goals?**

Building of an efficient airline industry	
Ensuring there is an affordable service for customers	
Industry is comprised of strong domestic competitors	
Viability of national airports	
Responsiveness of firms to users and that they satisfy travellers' needs	

- d. Are politicians more responsive to economic (efficiency, employment, etc.) arguments or justifications based on the prestige/heritage factor of retaining a national airline?**

--

- e. What is the single biggest threat facing the future success/profitability of the international passenger airline industry?**

Price competition eroding margins too much	
Difficulties in labour relations	

Problems in accessing finance/shortage of investment	
Compliance with environmental regulations	
Inter-alliance competition foreclosing new markets before they become profitable?	
Competition from Middle Eastern long-haul carriers	

- f. Following the announcement of AirBerlin's partnership with both Etihad and the oneworld alliance, what is the probability of large unaligned ROW carriers entering into the alliance structure as it currently stands?**

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- g. Do competition rules hinder or help an individual airline's competitive tactics towards the unaligned ROW carriers?**

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- h. Would the integration of large unaligned ROW carriers into the system of alliances be a good or a bad development for legacy airlines?**

--

- i. Which of the following are the most important in an airline deciding to enter a market?**

Hub economics (i.e. reluctance to enter on point-to-point basis into another carrier's hub)	
Access to financial incentives from local governments	
Presence of, and access to, sufficient infrastructure	
Potential to increase economies of scope	
Aeroplane finance/leasing agreements costs	

- j. Which of the following characteristics of the airline industry is the most harmful in the sense of reducing profit margins and returns on investment?**

High overheads	
Sensitivity to economic cycles and geopolitical shocks	
Aversion to empty seats	
Labour relations	
Low adaptability of inputs to output needs	

- k. Which of the following are the most positive aspects of mergers between airlines?**

Economies of scale	
Corporate planning synergies	
Financial synergies	
IT synergies	
Aircraft maintenance synergies.	

l. Which of the following are the most important advantages of a full merger over a strategic alliance?

Cost synergies	
Reputational links	
Security	
Investment opportunities	
Access to know-how	
Market openings	
Increased bargaining power in the purchase/leasing of aircraft	

m. Which of the following are the most risky elements of a full merger compared to an alliance?

Loss of personnel	
Disappearance of a national aviation tradition/prestige/heritage	
Brand dilution through absorption of a weaker airline	
Loss of competitive pressure	
Loss of feeder network	
More intense scrutiny from competition authorities	

n. From the point of view of the airlines themselves, please rank the following elements in order of their importance to a typical non-business and leisure traveller:

	Business	Leisure
Frequency of flight choices		
Origin/Destination airport's proximity to major city		
Access to frequent flier/loyalty programmes		
Price		
Level of service		

Please feel free to add any further comments you might have on the substance of the questionnaire or the overall project:

ANNEX 2 – COPY OF LETTER FROM EUI ETHICS COMMITTEE



DEAN OF GRADUATE STUDIES

Florence, 11 April 2012

To whom it may concern

It is a pleasure to state that the Ethics Committee at the European University Institute has reviewed the research proposal and sample questionnaire forms submitted by Mr. Conor Talbot – doctoral researcher at the Department of LAW – “Project title: European Competition Law as applied to automobile and airline alliances.”

After due consideration the Ethics Committee is happy to state that Mr. Talbot fully complies with the rules, norms and values of the “EUI- Code of Good Practice in Academic Research.”

Sincerely;




Professor Martin Van Gelderen (on behalf of the Ethics Committee)
Dean of Graduate Studies

ANNEX 3 – COPY OF CONSENT FORM CIRCULATED WITH QUESTIONNAIRE

Consent for participation in a research questionnaire *European Competition Law as applied to Airlines and Airline Alliances*

I agree to participate in a research project led by Conor Talbot and Professor Giorgio Monti from the European University Institute (EUI) in Florence, Italy. The purpose of this document is to specify the terms of my participation in the project through completing a questionnaire.

1. I have been given sufficient information about this research project. The purpose of my participation in this project has been explained to me and is clear.
2. My participation in this project is voluntary. There is no explicit or implicit coercion whatsoever to participate.
3. Participation involves completing a questionnaire compiled by a researcher from the European University Institute. The questionnaire will take approximately 15 minutes to complete.
4. I have the right not to answer any of the questions. If I feel uncomfortable in any way during the questionnaire, I have the right to withdraw from it.
5. I have been given the explicit guarantees that, if I wish so, the researcher will not identify me by name or function in any reports using information obtained from this questionnaire, and that my confidentiality as a participant in this study will remain secure. In all cases subsequent uses of records and data will be subject to standard data use policies at the EUI (Data Protection Policy).
6. I have been given the guarantee that this research project has been reviewed and approved by Prof. Giorgio Monti and the EUI Ethics Committee. For research problems or any other question regarding the research project, the EUI Ethics Committee may be contacted through Fatma Sayed at the Office of the Dean of Studies by telephone on +39 055 4685 301 or email at fatma.sayed@eui.eu.
7. I have read and understood the points and statements of this form. I have had all my questions answered to my satisfaction, and I voluntarily agree to participate in this study.
8. I have been given a copy of this consent form co-signed by the researcher.

Participant's Signature	Date
	19/4/12
Researcher's Signature	Date

For further information, please contact:

Mr. Conor Talbot, conor.talbot@eui.eu