

E.C. competition law: How fair is it?

June 30, 2010

Many a company has felt the sharp end of the European Commission's competition law. But how fair and consistent is the commission's application of competition law?

Competition law is considered an essential element in the creation of a market free from trade restraints. The world's largest and most influential systems of regulation are the United States' antitrust law and the European Commission's competition law.

In its application of anti-trust regulation, the European Commission draws on articles 81 and 82 of the Treaty of the European Union. Article 81 targets "hard-core" restrictive practices, such as price fixing or market sharing. However, there are exemptions, such as if the collusion is for distributional or technological innovation, if it gives consumers a "fair share" of the benefit, or if it does not impose unreasonable restraints that risk reducing competition.

Article 82 deals with monopolies, or more precisely, firms that enjoy a dominant market share and abuse that position. Unlike U.S. antitrust law, E.C. law has never been used to prohibit the existence of dominant firms, but merely imposes a special obligation to conduct oneself appropriately. Specific categories of abuse listed in Article 82 include price discrimination, exclusive dealing, tying and bundling, and resale price maintenance.

Cartels judged more harshly

In their study, "[European Commission Decisions on Anti-Competitive Behavior](#)," IESE professors [Jordi Gual](#) and [Núria Mas](#) review all E.C. decisions on antitrust cases affecting the manufacturing, financial and telecommunications sectors between January 1999 and February 2004. Their data set contained not just the cases on which the E.C. passed decision,

but also those cases that were never fully pursued.

The authors aimed to identify bias in the E.C. process, and reveal to what extent the commission based its decisions on the criteria for anti-competitive behavior set out by established economic models.

On the whole, their research vindicates the E.C. competition policy, confirming that the approach adopted by the commission was not random. In fact, the commission focused on cases where infringement was most likely or could have had a negative impact on consumers.

The commission was more inclined to judge against a case if it affected a large industry or involved horizontal practices, i.e., between retailers, such as cartels, trade associations and market-sharing agreements. Vertical practices, i.e., between retailers and suppliers, were generally viewed more favorably.

Also likely to attract E.C. ire were practices that involved a highly concentrated industry or an industry with high demand growth, where the economic incentives for collusion were that much greater, and the effects on consumer welfare that much more detrimental.

Got off lightly, if consumers benefited

The authors showed that the commission was less disposed to act against sectors with a lot of advertising, or in cases where there were significant efficiency justifications, i.e., when a particular anti-competitive practice offered significant consumer benefits. In fact, the commission was seven times more likely to decide in favor of a horizontal practice if it had a potential efficiency justification.

It is also worth noting that an abuse was more easily tolerated in the telecommunications and financial sectors. To account for this anomaly, the authors pointed to factors such as the size, structure and regulation history of those industries. In the telecommunications sector, for instance, certain firms are able to play a dominant role in the market as a result of the sector's extremely high entry barriers.

While the findings lend credibility to the commission's overall approach, urgent work still needs to be done. After all, as long as companies can derive enormous benefits from colluding with competitors, anti-competitive behavior will always remain a threat to the smooth functioning of markets.

As post-crisis market conditions lead to the inevitable shake out and consolidation of industries, detecting and punishing such abuses will be more essential than ever.

www.iese.edu/insight