

Competition Policy in the Recession: industrial crisis and implications for the economic constitution

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The Story so Far

In the twenty years since the passage of the Merger Regulation in 1989 European competition policy has grown in reach, prestige and effectiveness to become the cornerstone of European micro-economic policy. It is one of the Commission's most powerful policy competences, it is arguably the world's most effective competition regime, and it has developed a unique pan-European enforcement mechanism which rests, in part, on a managed policy network (Wilks, 2007). The aim of this opening section is to outline the strengths of this regime at its apogee in summer 2008, before the global recession confronted it with a series of challenges. Earlier research has identified four foundational strengths of the regime. Briefly they are:

i) Treaty powers. The competition rules were incorporated into the Rome Treaty and appear as Articles 81 to 89 of the EC Treaty. Of key importance is also the mention of competition in Articles 2, 3 and 4 setting out the objectives of the Community and especially Art 3(1)(g) of 'a system ensuring that competition in the internal market is not distorted'. The ECJ and the CFI have interpreted these provisions in a teleological fashion that has reinforced and expanded the competition competence.

ii) The mobilisation of law. A classic epistemic community has built up around European competition law which extends from judges to private practitioners and has a transatlantic dimension. It is based on shared normative (legal) understandings, it is enshrined in precedent, narrated through conferences and journals, reinforced by career and material interests, and operates as a powerful vehicle of path dependency. It has been highly influential in expansion of competition legislation at the European level, in US-European dissemination of best practice and in alignment of national regimes with a European model (Drahos and van Waarden, 2002; Wilks, 2004; 2009b).

iii) Agency independence. Competition enforcement agencies typically enjoy a high level of independence (Wilks with Bartle, 2002; Maggetti, 2009). There are multiple reasons for this including the historical examples of the FTC and the BKA, the need

to mobilise professional expertise, to create clarity of purpose, and to inspire trust in the consumer and business communities. A substantial literature has grown up analysing independence in principal-agent terms (Gilardi, 2008) with theories of credible commitment and blame avoidance. This latter perspective has also been analysed in terms of a conscious statecraft of ‘depoliticisation’ (Flinders and Buller, 2006). Both empirically and theoretically independence does appear more fully developed in competition agencies and in DG Comp. The theoretical motivation being based on the importance of expectations in market regulation, the same principle that underpins monetary policy independence for central banks. Earlier research has suggested that agencies have ‘escaped’ from political control and have become powerful in their own right, developing a preoccupation with economic efficiency and a commitment to narrow market solutions (Wilks with Bartle, 2002, Wilks 2005).

iv) European regulatory networks. Partly because of their domestic independence the national competition authorities (NCAs) have developed relationships of cooperation with each other and with DG Comp which have succeeded in avoiding the tensions and conflicts that such a wide range of regulatory agencies and national interests might have predicted. Cooperation has been institutionalised in the ‘modernisation’ process that culminated in the Modernisation Regulation 1/2004 which took the revolutionary step of delegating enforcement of Articles 81 and 82 (prohibiting anticompetitive agreements and abuse of a dominant position) to the national authorities. The modernisation measures also, however, sustained the central dominance of DG Comp and, by establishing the precedence of EU law, marginalised the national legal regimes (Wilks, 2005, 2007). Modernisation created the ECN (European Competition Network) which can be variously interpreted but by common consent is regarded as a powerful and effective regulatory network. The success of the ECN owes much to the construction of a ‘common competition culture’ across Europe and it is this normative agreement on legal, and increasingly on economic, principles that is the key explanation for Network success. The ECN is energised and inspired by a shared mission that embodies a neo-classical commitment to competitive markets and an economic methodology that stresses economic efficiency and consumer welfare. This is an economic consensus that suggests the creation of an economic ‘epistemic community’ to parallel or supplement the legal epistemic community. The whole modernisation project has been described as neoliberal in content and policy effect (Wigger and Nölke, 2007).

These four foundations of the European competition regime are mutually reinforcing but their development and symbiosis has also been fostered by a deeper and more political settlement across Europe in the shape of the triumph of the market and the commitment to a particular form of global capitalism, analysed by Glyn (2008) as ‘capitalism unleashed’ or perhaps more accurately regarded as ‘regulatory capitalism’ (Braithwaite, 2008). In a thoughtful analysis Jabko emphasises the way in which ‘the market’ became the central tool in the highly successful integration of Europe but he also points to the ambiguity of the market rhetoric and the risk that it will get out of control (Jabko, 2006, 185). Nevertheless, competition policy has been the very heart and essence of the market strategy for integration and it therefore enjoyed unambiguous legitimacy and the most favourable conditions for the four foundations of competition policy to develop.

As argued elsewhere, competition policy in Europe has undergone a paradigmatic transformation since the mid-1990s (Wilks, 2009b). It has moved from an essentially symbolic endorsement of the market economy to become a central supply side economic policy, in fact a meta-policy. Competition policy has been redefined as a basis for national and European competitiveness in globalised markets. This is the policy implication of the marketisation of Europe but there is a more subtle, structural and contentious process at work which concerns the consolidation of competition policy as an ‘economic constitution’ for Europe. The idea of the economic constitution is developed further below but at this point it should be noted that European competition policy is based on a particular variant of economics which incorporates certain biases. It favours free competition, minimal government regulation, short term economic efficiency, consumer welfare and a faith in market outcomes. It has been increasingly Americanised and is therefore likely to suffer collateral damage from the reaction against the under-regulated, freewheeling financial capitalism whose crisis has precipitated the worst recession in Europe since the Second World War.

The effects of the recession.

The recession engulfing Europe is of crisis proportions. There is no space here to dissect its elements but it is clearly spreading from the financial sector to the real economy. It has hit the social market economies just as hard as the Anglo-Saxon members and it has affected the East as much as the West. Measured by negative growth, it is already the worst recession of the post-war era and it is as yet too early to

tell whether it will involve a ‘depression’ of 1930s proportions. It is important to decide whether it also represents a point of inflection, a ‘crisis’ in the technical sense (Boin, ‘t Hart and McConnell, 2009) that provokes major policy change and re-evaluation of prevailing settlements such that entirely new models are created. ‘Crisis’ is certainly the term being employed by the Commission and it involves deterioration in competitive conditions and an attendant shift in political priorities which has impacted on competition policy. Some of the impacts are already obvious or easy to predict, others are more speculative and potentially profound. It is convenient to deal with them under the two categories of enforcement issues and systemic (or constitutional) issues.

A major transformation in competitive conditions affects all aspects of competition enforcement. The key question is whether enforcement policy will simply adapt within existing parameters or whether enforcement will have to be amended or weakened to cope with recessionary conditions. There are a range of issues here which are already the subject of exceptional change or exploration of options. We can consider four of them.

i) Mergers. Defensive mergers will be undertaken and will be more likely to be allowed, partly for quite orthodox reasons because one or more of the parties might become bankrupt (the ‘failing firm defence’) but partly also for non-competition reasons related to social effects or unemployment. This could generate political intervention and administrative conflict. Thus, for the first time, the British Government used public interest powers in the 2002 Enterprise Act to permit the takeover of HBOS by Lloyds in a merger that was opposed by the OFT and would almost certainly have been blocked by the Competition Commission on the grounds that the group has now about 33% of the UK retail banking market. Since this was largely a domestic merger it escaped reference to DG Comp but if it had displayed a ‘community dimension’ the UK government would not have been able to have prevented the Commission from blocking it (Pouncey and Bukovics, 2009). The merger has in fact turned out to be hugely disadvantageous for Lloyds shareholders who, in retrospect, would have been delighted had it been blocked.

ii) Cartels. Historically Europe has had a tolerance of cartels but they have been attacked forcefully by DG Comp over the past fifteen years with some spectacular fines. In the face of recession, however, there will be a tendency to cooperate rather than to compete and to organise markets. This may give rise to pressure for a more

forgiving attitude towards cartels. The extreme would be officially sanctioned recession or crisis cartels.

iii) State aid. The crisis-driven imperative to provide aid first to the banks and then to a series of financially vulnerable companies has necessitated a major relaxation of the state aid rules. With impressive rapidity and flexibility DG Comp gave provisional approval to aid for the failed UK bank Northern Rock in September 2007 but after the Lehman collapse in September 2008 it became clear that exceptional measures were required. In December 2008 the Commission therefore adopted a 'Temporary Community Framework for State Aid Measures' (Commission 2009c) which permits aid of up to €500,000 within a series of conditions and operating up to December 2010. The level of aid approved has been awe-inspiring. Up to March 2009 recapitalisation schemes for banks had been approved totalling €275 billion with a further €400 billion approved on an individual or ad hoc basis (Commission, 2009b). In fact the Commission calculated the total value of all support for the financial sector to the end of March at €3,000 billion (Europa Press Release, 8/4/09). This is equivalent to over twice the total annual public expenditure of the UK government. Commission declarations give a semblance of order and legal propriety to the state aid avalanche. It cites Article 87(3)(b) which allows aid 'to remedy a serious disturbance in the economy of a member state' and effectively extends this to the whole Union. In reality the Commission has weakened the regime, it has been overwhelmed.

iv) National champions and nationalisation. Competition policy has been at its weakest in dealing with large dominant companies. Indeed, the history of competition policy suggests that it has positively encouraged the growth of large corporations and tolerated high levels of oligopoly in many industrial sectors (Galbraith, 1952; Freyer, 1992; 2006). There is an uneasy relationship between the rhetoric of intolerance of national champions and the reality of large influential companies that are de facto national champions. This unease will grow as member states, and perhaps the Union, seek to support large companies capable of competing in global markets but threatened by the recession. State support has, of course, extended to the nationalisation of banks. In the UK the government now owns, Northern Rock, Bradford & Bingley, 70% of the Lloyds Banking Group (including Halifax and the Bank of Scotland) and 68% of RBS (Royal Bank of Scotland which includes the NatWest Bank). For the competition authorities nationalisation creates issues of dealing with the government as the single controlling shareholder in a hybrid

public/private sector. It also invites a competition input into the eventual privatisation decisions to balance privatisation of monopolies against the arguments for breaking up groups into smaller companies to avoid the 'too big to fail' trap.

Turning from enforcement to systemic or constitutional issues raised by the recession, they can be assessed in relation to the four foundational strengths outlined in section one. Of these four the legal epistemic community is unlikely to be seriously affected but the other three areas are potentially vulnerable to reappraisal. The question of the Treaty powers is already a matter of controversy following President Sarkozy's revision of the text of the Reform Treaty in 2007. At the Brussels European Council in June 2007 President Sarkozy was openly critical of competition as an ideology or dogma and succeeded in removing from the objectives of the Union the words 'and an internal market where competition is free and undistorted' (Graupner, 2007, 95). The substantive competition articles were not revised, instead this change amended Article 3(1)(g) which enumerates Union objectives. This re-drafting matters for at least three reasons. First, it downgrades competition as a formal purpose of the Union and makes competition judgements more vulnerable to challenge in the ECJ and the CFI. Second, it constitutes criticism of the competition imperative at the very highest level and expresses a Franco-German unease at the Anglo-Saxon economic model. Third, it provides an opportunity for the post-recession critics of a neo-liberal market model to argue for a shift in priorities once the Reform Treaty is adopted (assuming an Irish ratification). The Commission and several member states were horrified by the Sarkozy-inspired amendment. They did not succeed in reinstating the competition objective but instead negotiated a competition commitment in the preamble. Despite Commission protestations lawyers are divided on whether this is sufficiently robust (contrast Whish, 2009 - unconcerned, with Graupner, 2007).

In a recessionary climate it may be that the third foundation, independent agencies, contain the seeds of their own destruction. The recession has provoked greatly intensified state intervention in the economy and all expectations are that the recovery phase will be accompanied by a higher level of economic regulation. This poses challenges for independent competition agencies. Such agencies are deliberately insulated from the state, they operate according to well defined rules and precedents, they find it difficult to innovate rapidly, and they have a limited remit defined by their expertise, their legislative mission and their tools of competition economics. Moreover, their self-belief as trustees of the market economy has led them

deliberately to reject consideration of the non-competition factors that drive governments. Indeed, their status as guardians of an economic constitution has led them in recent years to attack government regulation and to constrain government intervention.

The danger, then, is that impatient governments, beset by critical political choices and assailed by powerful political lobbies will over-ride, ignore, or bring pressure to bear on independent agencies. In this setting the level of independence will be tested and here the European model of DG Comp as a cabinet member in the wider Commission appears helpful. Neelie Kroes and her staff are alive to the economic pressures and the political trade-offs. As with the state aid crisis framework they can adapt policy and adapt the competition rules to accommodate recessionary pressures. The question, of course, is when adaptation becomes transformation and how far the competition rules can be bent before they snap.

The fourth foundation of European success is the network of cooperation across Europe symbolised by the formal activities of the ECN but also involving informal cooperation and lubricated by the common competition culture. Network cooperation could be threatened by reductions in agency independence and by pressures for protectionism. Warnings against protectionism have dominated the speeches of economic leaders across Europe but the salience of the debate simply serves to underline the risks. We cannot yet point to conflict and confrontation within the competition networks and it may be that the ECN can manage disputes in relation to Article 81 and that DG Comp can be sufficiently pragmatic to avoid merger, dominance and utility conflicts.

A more serious challenge revolves around the role played by normative consensus on competition economics embodied in the common competition culture fostered by DG Comp. As noted above, this can be regarded as the key to successful network operation. It rests on a common set of economic principles and the analytical tools that can be derived from them. These principles have been discussed in theory and practice by senior competition economists such as the former Director General of the OFT, Sir John Vickers, and by the two successive DG Comp Chief Economists, Lars-Hendrik Roeller and Damien Neven. They chart the turn to economics in the UK and in Europe following the appointment of Mario Monti as Commissioner in 1999 and highlight the influence of the 'post-Chicago synthesis' of welfare orientated competition economics (Vickers, 2003; 2006; Neven, 2006; Roeller and Stehman,

2006). This theoretical orientation is widely shared by competition economists in Universities, in economic consultancies and in the agencies (for a standard text incorporating this approach see Motta, 2004). It is heavily influenced by US research and emphasises efficient markets and economic efficiency leading to enhanced consumer welfare. Methodologically it is an ‘effects-based’ approach (ie, the effects on competition of an agreement) and is case specific, tending to stress short term price effects. These senior competition economists would not be likely to feel any need to adapt the consensus economic theory and analysis in the light of the recession. As far as the theories are concerned it is ‘business as usual’.

The economic orthodoxy has been challenged from both economic and ideological perspectives. In a recent impressive article Budzinski argues that there are diverse economic theoretical approaches to analysing competition and ‘the claims that post-Chicago industrial economics provides an unambiguous manual to the ‘right’ competition policy cannot be sustained’. He goes on to challenge the presumptive economic hegemony by arguing that ‘the insights from economics can merely provide a knowledge base for a political decision about competition rules according to the preferences of the principal(s)’ (Budzinski, 2008, 304, 318). From an ideological perspective Wigger has criticised what she calls the ‘microeconomization of EU antitrust enforcement’ which imports US-style analysis based on neo classical principles, econometrics, and a narrow concern with efficiency (Wigger, 2007, 106). She goes on to criticise the neoliberal, Anglo-Saxon biases increasingly incorporated into EU policy, a point we come back to below.

The four foundations for the success of European competition policy are therefore under threat. But the \$64,000 question, or more topically, the £24,100,000,000 question (the 2009 loss of RBS, the biggest loss in UK corporate history), is whether the European commitment to the market will be transformed. There are really two questions. First, will the dominant model of Anglo-Saxon financial capitalism be replaced? Second, would a replacement threaten the claims of competition policy to operate as an economic constitution for Europe? For the first question it is as yet unclear what form of capitalism will crystallise after the recession but it will almost certainly involve a rejection of that variety of capitalism which has been variously described as the LME (liberal market economy, Hall and Soskice, 2002) or market capitalism (Schmidt, 2002). The apparent success of this form of capitalism has, of course, created a degree of convergence across Europe and a

process of liberalisation and marketisation that was encouraged by the Commission. As regards the second question, what would rejection of the LME mean for competition policy? Bluntly it would cut the ground from under the regime of competition policy that has developed over the past fifteen years. There are various ways of defining the LME. Hall and Soskice emphasise market coordination; Schmidt stresses arms-length relationships – between firms, between firms and government, and in the labour market; whilst others stress the stock market and the preoccupation with liquidity. These essentially political features have been rationalised and legitimised at the level of economic theory by some very familiar principles which include:

- light touch regulation based on the theory of market failure
- the idea that markets are inherently efficient and, at the extreme, omniscient. This has been termed the EMH (efficient market hypothesis).
- *homo economicus*, individual rational utility maximisation based on the normative assumption that individuals are calculative economic actors who maximise utilities and, in the financial sector, maximise shareholder value.

These principles have been pilloried in debate about the causes of the financial crisis (Kay, 2007; Kaletsky, 2009). They underpin the faith in free markets and also underpin the turn to economics and the consumer welfare focus that has informed the recent enforcement of European competition policy. If these principles are even partially discredited then the basic rationale for modern competition policy will also be called into question. It will no longer be seen as a basis for economic efficiency, competitiveness and growth, and the self-confidence and status of the competition policy community will be moderated. The political settlement that unified the four foundational elements of competition policy success will need to be re-negotiated and in that process the pre-eminence of competition policy as a European economic constitution may be called into question.

So far, then, a picture has been painted of a strong, self-confident economic policy area regarded as highly successful. It has been confronted by the startling and rapid onset of economic recession which threatens the enforcement of policy, calls into question the principles upon which it is based, and therefore has the potential to undermine the foundations for policy success. Those threats have been considered in a schematic way under the two categories of operational or enforcement issues; and systemic or constitutional issues. To assess the weight of these threats the following

two sections look at the enforcement and systemic challenges in more depth by taking first, the example of industrial crisis in the motor industry, then the ‘new constitutionalism’ critique of a neoliberal competition policy.

Déjà-vu, what can competition policy offer to industrial crisis?

We have been here before. Many parallels have been drawn with the recessions (in the UK) of 1990-93, 1980-83 or the great depression of the 1930s, but these have largely been macro-economic parallels. There is an equally interesting contrast to be made with micro-economic policy and how government should deal with crises in the financial and other industrial sectors. The IMF confirms that the advanced industrial economies are suffering the worst recession since the Second World War and predicts 2009 growth at -2.0% for the US; -2.8% for the UK and -1.6% for the Eurozone, with Germany as the worst performer at -2.5% (IMF, 2009). These declines are manifest in horrifying collapses of entire industrial sectors. The parallels with the 1981-83 recession following the second oil shock are fascinating, especially for a UK audience. In the comparative study of industrial crisis published by Dyson and Wilks in 1983 there was barely a mention of competition policy, the emphasis was on industrial policy concepts and instruments. 2009 provides a mirror image, industrial policy has been discredited, what is the role for the dominant, market friendly, competition policy?

The European motor industry provides a test case. As an industrial sector it has entered a crisis comparable to that of the banks. This section outlines the scope of the crisis, the policy response and the dilemmas that will be posed for competition and industrial policy. The European motor industry is huge. Taking in the whole supply chain it accounts for an astonishing one third of all manufacturing jobs in the EU27. It generates an EU trade surplus of €42 billion (2005), contributes €360 billion in taxes and invests over €20 billion in research and development. The importance of the industry is variable across Europe. If the UK was uniquely vulnerable to a banking crisis so Germany is uniquely vulnerable to an automotive crisis. Of the 2.3 million people directly employed by the motor manufacturers 834,000 (36%) are employed in Germany, the next biggest is France with 258,000 (8%). Overall, eight member states are particularly exposed, specifically the UK, Italy, Spain, Poland, the Czech Republic and Sweden. Some member states, such as Denmark and Austria are relatively unaffected (IHS, 2009; ACEA, 2009).

The crisis began in June 2008 when sales across Europe fell by 10% and it escalated to the point that in January 2009 sales were down 26% on January 2008. This is the largest and most sudden contraction ever recorded in what has been a highly stable industry and it caught government and producers by surprise. The Commission has warned of a 25% fall in production in the first two quarters of 2009 alone (Commission, 2009a), 4). The decline is global and exports outside Europe are also falling rapidly. This dislocation comes after a surge of investment in the new accession countries which has raised capacity. In 2007 19.1 million vehicles were produced but estimates even at that level put overcapacity at up to 20%. As production falls so overcapacity may reach levels of 30 to 40% which is a recipe for bankruptcy.

The industry embraces 10 major producers, far too many when the optimum efficient scale of production is at least 3 million units (Rhys, 2004). Company production figures are surprisingly hard to come by but Table 1 gives a breakdown of production and sales per manufacturer. It indicates that different companies have different profiles of vulnerability but only VW and PSA (Peugeot/Citroen) are operating at a sufficient scale to secure medium term viability.

Table 1 European Motor Manufacturers

	production	market share	market share
	<u>2002 '000</u>	<u>2003 %</u>	<u>2008 %</u>
VW	3,150	18.1	19.0
PSA	2,444	15.3	13.2
Renault	1,707	10.4	9.5
Fiat	1,221	7.5	9.0
GM	1,586	10.0	9.0
Ford	2,001	9.9	9.9
Daimler	1,318	6.5	6.2
BMW	160*	4.3	4.8
Toyota and Japanese	<u>349</u>	12.4	13.3
	13,936		

Sources:

Rhys, 2004, for production and 2003 market shares
ACEA, 2009, for 2008 market shares

Figures are for the EU 27. The 2008 market share includes commercial and passenger vehicles and includes EFTA as well as the EU.

Note that the production figures are both dated and incomplete. They are intended only to indicate order of magnitude.

* incomplete figure

There are a number of dimensions to the crisis stretching from delayed R&D to bankruptcies in the supply chain and the social cost of unemployment. The most dramatic element is the possibility that if demand does not pick up in 2009 up to ten vehicle assembly plants will have to close (IHS, 2009, 25). Negotiations have already started with General Motors which is under threat of US bankruptcy and appears likely to exit from Europe. It has six assembly plants (in Sweden, Poland, the UK, Spain and Germany) making Saab, Vauxhall and Opel cars. This is the politics of industrial adjustment writ large, how will 'Europe' handle the issues?

The policy statement from the Commission makes no mention of a relaxation of competition policy, or indeed of competition policy at all. It reviews the operation of existing instruments including the 'CARS 21' forum which was created in 2005 to discuss a series of automotive related issues from air quality to safety. It also reviews the role of the EIB and the ESF (European Social Fund) (Commission, 2009a). The response is bland, inadequate and places responsibility with the member states and the companies. It is not clear who in the Commission is taking ownership of the problem. It is not DG Comp and should presumably be DG Enterprise whose Commissioner, the German Vice President, Günter Verheugen, has been speaking on the automotive crisis.

The crisis promises to reignite the tension between competition and industry when DG Comp (IV) argued against intervention in the market and DG Enterprise (III) sought to employ industrial policy instruments. In earlier days Martin Bangeman at DG III famously expressed frustration with the hands-off precepts of 'the Competition Ayatollahs' who had blocked the de Havilland/Alenia/Aerospatiale merger (*Financial Times*, 12/2/1992) but that tension had been resolved in favour of the liberalising, market supporting stance of DG Comp. Neelie Kroes has talked of a convergence between competition policy and industrial policy, in effect a re-definition of industrial policy as the pursuit of competitiveness by reinforcing market disciplines (Kroes, 2006). The traditional tools by which governments tackled industrial crises had therefore been discredited and dismantled. Will it be necessary to reinvent them?

We can anticipate that governments and companies in the motor industry will seek to take action that will be contrary to the prevailing enforcement of the competition rules. The pressing need is for restructuring, rationalisation and re-orientation of the industry towards environmentally friendly products. But the immediate crisis is one of rationalisation, it may involve:

- i) Lobbying for state aid. Direct financial aid through loans, loan guarantees and subsidies for investment, employment and R&D. Indirect aid to car purchasers, such as the current car scrappage schemes which offer short term support, are less problematic for competition policy (but expensive and highly dubious).
- ii) Supply chain protection. The thousands of component manufacturers do not have the weight of the big assemblers but will need protection through state aid and organisation of the market. This might involve cartel-like arrangements by which assemblers guarantee orders to suppliers and cooperate with other assemblers to sustain vital suppliers.
- iii) Sales cooperation. There will be temptation to talk to other producers to manage markets and avoid price wars, both domestically and in extra-European export markets. In the past 'crisis cartels' have operated in many countries and many industries to allow the survival of producers during recessions. In Europe crisis cartels were explicitly tolerated and exempted from Article 81 from 1981-85 (Harding and Joshua, 2003, 146-47).
- iv) Mergers. Motor industry executives have suggested that only two to three car makers will be able to survive the crisis. There will certainly be major restructuring. For instance, Fiat is forging a controversial alliance with Chrysler; BMW is likely to merge with VW; there is potential for a PSA/Renault 'French solution'; GM will probably be broken up and absorbed by competitors; Ford may become more vulnerable and the highly efficient Japanese plants in the UK will be dependent on the strategies of their multinational parents. Presumably the mergers involved in restructuring will be facilitated by member states and allowed by DG Comp but the rationalisation, closures and redundancies involved will be painful and politically explosive. The opportunity to make them 'pro-competitive' will be in tension with a desire by governments to create European champions.
- v) Rationalisation and survival plans. If the US government, in that heartland of free enterprise and antitrust, can negotiate a survival plan with GM and Chrysler should the EU be doing the same? Indeed, if President Obama can effectively remove the

head of GM (Rick Wagoner) then the limits of industrial intervention appear to have been redefined. To provide aid without plans and undertakings from the motor manufacturers appears irresponsible, and to evaluate those plans on a European scale appears necessary, but the negotiation of plans smacks of the sort of intervention that competition authorities detest.

vi) Corporate rescues. GM produces cars in five European countries and each government is in the throes of negotiating rescues to avoid closures and massive redundancies. As the country with the most to lose Germany is in the lead and Angela Merkel has been meeting GM's European management team. The US subsidies cannot be used to help GM Europe and it is reported that GM is pressing for a €3.3 billion German rescue package with further support from the UK government. It has threatened simply to withdraw entirely from Saab in Sweden. On a smaller scale the UK Government is considering aid to the Tata Group who own Jaguar/LandRover.

This motor industry example indicates that DG Comp and competition authorities across Europe are going to be faced with difficult choices as the industrial recession plays out. The passive posture would be not to challenge ostensibly anti-competitive agreements and to weaken enforcement for the duration of the recession. The 'constructive' posture would be to evaluate all agreements in the light of current competition rules and seek to negotiate non-discriminatory policy models with companies and with other agencies of government, or to insist upon conditionality and concrete restructuring commitments. The oppositional posture would be to stick to the tests of economic efficiency and consumer welfare and to rule against many agreements, all cartels and high market share mergers. DG Comp is beginning to follow the 'constructive' route but competition authorities have a huge antipathy towards negotiation and have very little experience. Negotiation will also lessen the prestige of competition policy and may set dangerous precedents.

Finally, in relation to the urgent and potentially de-stabilising industrial crises such as that developing in the motor industry it is striking that competition policy has rather little to say or to contribute. It is a policy about frameworks and rules and is enforced retrospectively. In fact it appears as a policy for the good times, best able to channel growth and foster efficiency in growing markets. In a recession it appears far less useful but it remains very influential and clearly inhibits proactive interventionist 'industrial' policies.

Systemic challenges and the new constitutionalism.

Speculation about the impact of the recession on competition policy as a system requires some consideration of the standing and legitimacy of European policy and the principles upon which it is based. It is possible to undertake this analysis using the concept of an 'economic constitution' and considering the circumstances under which economic constitutions are applied and amended.

From the perspective of German ordoliberalism the Community not only *had* an economic constitution, the Treaty *was* in essence an economic constitution and gained legitimacy from its economic purpose. This, writes Joerges (2004, 16),

In the ordo-liberal account, the Community acquires a legitimacy of its own by interpreting its pertinent provision as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions.

But these German intellectual subtleties were not widely appreciated and, like many constitutions, its impact was largely symbolic, providing an abstract commitment to freedom to compete in the common market. The position began to change in the late 1980s when what Jabko (2006, 1) calls a 'quiet revolution' took place in the harnessing of market ideas to pursue European integration, embed neo-liberal principles and build European institutions. The launching of the 1992 Programme by the Delors Commission was at the heart of the revolution but so too was the active enforcement of the competition rules under Peter Sutherland and Leon Brittan. Thus state aid was for the first time vigorously and shockingly attacked, the long negotiated merger regulation was enacted and the first fines were levied against cartels. As competition policy blossomed so it began to fulfil its mission of disciplining governments as well as the private sector (Wilks with McGowan, 1996).

So, thirty years after the Rome Treaty the competition rules began to be taken seriously and competition moved from a symbolic to a substantive role in the European polity. The remorseless process of liberalisation began to squeeze out the old industrial policy assumptions and tools of state ownership, sectoral planning, subsidy, selective intervention and the creation of national champions. The process had some similarity to the ordo-liberal vision. It was very much a rule of law relying on the support of the ECJ. It created and sustained a considerable degree of agency independence such that DG Comp began to discipline the rest of the Commission as well as the member states. The process was energised by a vision of economic

freedoms to compete across Europe, and the economy as a vehicle of integration. The emphasis was therefore legal rather than economic and displayed a concern with market structure and longer term support for several competitors in every market rather than with economic efficiency and short term consumer benefits. With the internal market completed and protected by the competition rules Europe's economic constitution had moved from the aspirational to the enforced.

Of course constitutions are not neutral. They institutionalise a political settlement that consolidates the gains of the victors. Neither are constitutions fixed, they can be redefined by practice and by ideological shifts to alter the balance of advantage and this, it can be suggested, is what has happened to the competition elements within the European economic constitution.

Change in competition policy was informed by the free market policy prescriptions that came into the ascendancy in the US and the UK under Reagan and Thatcher and which went on to gain remarkable and global purchase. This was not, of course, 'the end of history' but the market paradigm and the competitiveness discourse took on an intellectual dominance. As Cerny (2008, 2) observes, 'embedded neoliberalism has become the common sense of the 21st Century' and is an underpinning of 'the Washington consensus' (Stiglitz, 2002). Work on the history of comparative capitalism has affirmed the persistence of national models of industrial adjustment. As Hall (2007, 78) remarks, 'we need to disaggregate the concept of 'liberalization', lest we overstate its impact. Despite important common trends, the political economies of Europe are not converging rapidly on a common liberal model'. Nevertheless, Hall accepts a degree of liberal adaptation, even in the CMEs, and Schmidt (2002, 139) agrees that state capitalist countries such as France 'have been transforming themselves'. Among the common trends towards transformation has been the steadily increasing role of the EU through liberalising initiatives, the internal market, the EMU and the projection of a competitiveness agenda embodied in the Lisbon programme. Sarkozy and the French are not deluded when they react against a neoliberal, Anglo-Saxon prescription emerging from Brussels. Hall (2007, 65) argues that,

A Union once inspired by the ideal of political integration has become an agency dedicated to market liberalization, its member states now face a supranational agency that puts continuous pressure on them to deregulate

protected markets, eliminate industrial subsidies, and promote free flow of capital’.

DG Comp has played a prominent part in this liberalisation project and has been exceptionally well placed to do so by virtue of its mastery of market theory and its supranational enforcement network.

The neoliberalism being purveyed by the European institutions has been heavily criticised by national governments, especially France, and by critical academics. The fierce ideological attacks on neoliberalism tend to be couched at a high level of generality (Harvey, 2007; Cerny, 2008) although Cerny and Evans have presented a far more grounded critique in their analysis of the UK ‘competition state’ in which state structures are adapted to exploit and even promote global market forces (Cerny and Evans, 2004). In reality, of course, neoliberalism is a misleading concept. This is not pure free markets or complete *laissez-faire*, what we are seeing is the forced opening of markets by state power and the re-regulation of open markets by the state in alliance with networks of companies and private associations. Under this perspective markets are not spontaneous, they are constructed (Gamble, 1992; Vogel, 1996). Levi-Faur (2005) and Braithwaite have captured this paradox of free markets but intensified regulation in the idea of ‘regulatory capitalism’ in which the regulation is undertaken in partnership with large companies and is respectful of their interests. For Braithwaite neoliberalism is ‘a fairytale’ and he argues that ‘the neoliberal programme ... had retreated in the face of a regulatory capitalist reality of hybridity between the privatization of the public and the publicization of the private’ (Braithwaite, 2008, 8)

Another way of capturing the paradox of free market regulation is through the lens of ‘the new constitutionalism’ championed by the neo-Gramscian scholar Stephen Gill. His highly critical thesis is based on the argument that the principles associated with neoliberalism such as property rights, free competition, unrestricted markets and global capital mobility have been built in to legal structures in order to ‘lock in’ market values and disciplines (Gill, 2002; 2005; Parker, 2008). His argument is directed at the international institutions of the Washington consensus but it can also be applied to the legally embedded market liberalisation pursued by the EU. Here we have a far more critical treatment of the idea of an economic constitution as one which does not so much empower market participants. as define and protect a sphere of market freedoms and property rights in the interests of large corporate capital. The

new constitutionalism expresses the idea that the regulatory basis of regulatory capitalism has been institutionalised in legislated rules, judicial safeguards, and independent agencies so that,

a central objective of new constitutionalism is to prevent *future governments* from undoing commitments to a disciplinary neoliberal pattern of accumulation. Thus a central purpose of new constitutionalism is to redefine the relationship between the “political” and the “economic” (Gill, 2002, 48).

This presents a critical reading of the credible commitment argument of principal-agent theory of economic regulation (Thatcher and Stone Sweet, 2002). Is it a helpful analysis to apply to European competition policy? Has the ordoliberal constitutionalism which inspired the competition rules evolved away from its social market origins to be captured by a neoliberal economic constitutionalism?

Curiously none of the analysts of European liberalisation and the new constitutionalism have used competition policy as an example (this applies to Jabko; Cerny; Cerny and Evans; Gill and Parker). Instead they have analysed macro-economic (monetary) policy, EMU, the internal market, sectoral regulation and even social policy, including the open method of coordination. Perhaps the nearest we come is the work of Angela Wigger (2007) who does emphasise the systemic neo-liberalism incorporated into the competition rules. Yet a less ideological, less strident application of the theory of new constitutionalism appears to capture the position of contemporary European competition policy in three respects.

First, the transformation in European competition policy includes a ‘turn to economics’ which emphasises market virtues and is at least neo-classical and, in effect, neo-liberal. Second, the competition rules enjoy constitutional status enshrined in the Treaty, defined by case law and enforced by the ECJ as the constitutional court of the Union. Third, policy operates in the interest of large corporations. This is not to argue that all companies always benefit, in respect of cartels in particular some companies have been reined in and fined severely, but it is to argue that a clear, predictable and malleable competitive framework serves corporations long term interests in national, European and global markets. What this new constitutionalism argument implies for the impact of the recession on competition policy is a question for the conclusion.

Conclusion

The conclusion seeks to summarise the argument above in the form of five points which have a rather speculative flavour. First, the recession presents a clear threat to the operation of European and national competition policy. Policy will have to be adapted and will be weakened. One central question is whether the independence of the competition agencies will be renegotiated and whether political interventions by governments will override agency preferences. This is in fact very likely. If agency independence is reduced that would open the door for more nationalism, if not protectionism, and might threaten the integrity of cooperation between the agencies in the ECN.

Second, the recession threatens competition enforcement but, equally, competition enforcement threatens crisis management. The motor industry example illustrates the scale and urgency of the industrial problems and it is virtually inconceivable that member states will not resort to some of the traditional tools of industrial policy. These could be challenged by the competition agencies themselves or by private actors employing competition law. The scale of confrontation, and the political will to over-ride competition law, will depend on the level of social dislocation in the form of strikes, labour mobilisation or outright civil unrest.

Third, is the question of how resistant the competition regime will be to change. The legacy of agency independence and the standing of competition policy as an economic constitution makes change, by definition, very difficult. The new constitutionalism argument is premised on the very idea that neoliberal principles have been locked in to the legal apparatus precisely to prevent change. The prospects for change are difficult to evaluate. It is highly likely that the legal, economic and administrative communities that cohere around competition policy will be very reluctant indeed to consider radical change and redesign. Major change in the system will have to come from outside in the form of political re-design of policy.

Fourth, what will be the likely drivers and directions for change? The argument advanced above stresses the common roots of the economics that underpinned both the free market capitalist model that is now discredited and the economic basis of modern competition policy. There is therefore the risk that discrediting financial capitalism will equally discredit competition economics. This is a high risk but it is not inevitable. It will be argued that it is not the economics that is at fault but the way in which it has been used and abused. Nonetheless, it is very likely that the dominance of economics in competition enforcement will be moderated

and that enforcement itself will feature less prominently in the mix of economic policies. As to what alternative model will emerge from the financial crisis one can only speculate (Mulgan, 2009). Will there be a swing back to the CME models of continental capitalism? Will there a transcending model which stresses stakeholder capitalism or a decentralised or community or trustee model? Is it possible to design a more sustainable, less growth orientated model for the century of climate change? Whichever revision emerges competition policy will be a far less central element.

Finally, to end on a slightly parochial note, the timing is either very poor (for defenders of the competition regime) or rather good (for those who seek change). At the European level there will be a new Commission later this year ready, presumably to depart from past certainties. There will also be a new competition commissioner and a new director general (probably from Spain and Holland respectively). In the UK the architect of the UK's competition regime and enthusiast for its liberalising mission is Gordon Brown. The May 2010 election is very likely to see him removed from office and a Conservative or coalition government is likely to pursue reform of UK competition law. One adviser to David Cameron, the Conservative leader, has been arguing that 'regulators have created a model of competition that eliminates competitors. Conservatives need new models of antitrust law to encourage genuine competition across the economy' (Blond, 2009). The leaders of the competition agencies are worried, and they are right to be.

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