

# How Effective are Competition Interventions?

*Director's letter Catherine Waddams*

The focus of this issue is the efficacy of competition interventions from several different perspectives, reflecting the breadth of research undertaken within CCP.

Davies and Ormosi reflect upon the different, empirical methodologies employed in evaluating competition policy, ranging from simulation, event studies and the 'differences in differences' approach. The authors note the apparent death of studies surrounding the enforcement of Article 102, and the relatively few ex post studies in the merger sphere which chart actual price changes following mergers.

In respect of unintended consequences, Hviid and Waddams' paper questions the wisdom of the energy regulator's recent intervention to prohibit energy suppliers from charging different mark-ups as between geographical markets where firms enjoy market power and those where they do not. While the regulator was motivated by the need to prevent vulnerable consumers, the authors show that, in accordance with the existing economic literature, the likely effect of the prohibition is that prices will rise for all consumers.

Again concerned with remedies, Olczak's paper offers a discussion of competing theories of harm in horizontal merger cases, namely unilateral and coordinated effects (more specifically, tacit collusion). He first argues that in some cases, for example where there is demand uncertainty, a tacitly collusive outcome may produce a

superior outcome to one which results in unilateral effects. In practice a trade-off between the possibility of coordinated and unilateral effects is often implicit in a merger assessment, and once this important trade-off is acknowledged, the otherwise rather surprising *Nestle/Perrier* decision may be seen more positively.

Finally, from a political science perspective, Kassim and Wright reflect upon the European Competition Network (ECN) – the network of national competition authorities (NCAs) and the European Commission through which the enforcement of EU competition law is coordinated and monitored. Drawing upon original research, including a survey of fifteen NCAs, the authors find that few of the original concerns with the network have come into fruition. The Commission's role, for example, far from being one of a 'master among obedient dogs' has actually evolved into one of an equal partner within the network of agencies.

The Centre is delighted to welcome several new colleagues: Catherine Ball, Minyan Zhu and Oindrila De have all joined as Research Associates. Meanwhile Yan Li, Matt Olczak, Felix Mezzanotte and Peter Ormosi have successfully defended their theses. While Yan, Matt and Felix have moved to positions elsewhere, Peter has been appointed to a lectureship in Business Law in Norwich Business School, so will be staying at UEA as a CCP faculty member.

An ESRC Research Centre

**CCP**  
CENTRE FOR  
COMPETITION POLICY

**Newsletter**

Issue Number 19

May 2010

Academic Editor: Michael Harker  
Editor: Leanne Denmark

in this issue.....

How Effective  
are Competition  
Interventions?  
*Director's Letter*  
page 1

Evaluating Competition  
Policies: State of Play  
and Directions for Future  
Research  
*Stephen Davies & Peter Ormosi*  
page 2

Competition and Fairness:  
Non-discrimination  
clauses in the retail  
energy sector  
*Morten Hviid &  
Catherine Waddams*  
page 4

Unilateral versus  
coordinated effects  
*Matthew Olczak*  
page 5

The European  
Competition Network:  
A network with a  
difference  
*Hussein Kassim &  
Kathryn Wright*  
page 6

CCP hosts joint London  
Conference  
*Leanne Denmark*  
page 8

CCP Contact Details:

Tel: +44 (0) 1603 593715  
Web: [www.uea.ac.uk/ccp](http://www.uea.ac.uk/ccp)

**UEA**  
University of East Anglia

**E·S·R·C**  
ECONOMIC  
& SOCIAL  
RESEARCH  
COUNCIL

## COMPETITION POLICY BLOG

CCP's blog is now available at <http://competitionpolicy.wordpress.com/> where you can sign up for e-mail updates.

Our aim is to comment selectively on competition issues in the news, government and agency policies and new academic research that particularly catches our eye. We hope it will be of interest to practitioners, academics, students and journalists.

# Evaluating Competition Policies: State of Play and Directions for Future Research

**Stephen Davies, Professor of Economics and  
Peter Ormosi, Lecturer in Business Law**

## Introduction

Research by academics and competition agencies on evaluating competition policy has grown rapidly in recent years and the Centre for Competition Policy has contributed in a variety of ways. The purpose of this article<sup>1</sup> is to reflect on the progress made and assesses the fitness for purpose of the main empirical methodologies employed, and identifies undeveloped areas and unanswered questions for future research.

## Contexts

Evaluation of competition policy is either directly or indirectly relevant to a variety of constituencies. Most obviously, the Competition Authorities (CA) themselves now routinely conduct assessments of their own performance. Sometimes this is required for accountability purposes, to guide internal resource allocation, and sometimes for quality control and to stimulate future improvements in specific areas (e.g. mergers).<sup>2</sup> Beyond this, the growing contemporary interest in the calculation of private damages necessarily requires one to model the counterfactual or 'but for' – for example, what price would have been in a cartelised market, had the cartel not been in place? In principle, the comparison between actual and counterfactual for damages purposes is very similar, if not identical, to the calculation undertaken by a CA in settling on a fine and in assessing how much it has saved the consumer by busting a cartel. More academically, assessing the impact of a specific policy intervention has attracted the attention of economists who see it as an opportunity to conduct a comparative 'natural' experiment of before and after some exogenous shock to the market - an empirical examination of this sort often provides the best way to test the comparative statics of an economic theory.

## The methodologies

A review of the existing literature reveals that numerous empirical methodologies have been employed in policy evaluation, and that they are often deployed to a high degree of technical sophistication, but also 'back of the envelope' rough and ready equivalents are sometimes used where time and money are short. Simplifying somewhat, they can be grouped into three broad types.

**Simulation** involves the explicit use of economic theory to identify the counterfactual – what would have happened in the absence of a cartel, abuse of

dominance, or had an 'anti-competitive' merger not been blocked or remedied. This typically involves first writing down a specific model of the oligopoly game with specific assumptions about the nature of firms' conduct, before and after, or with and without. The simulation entails comparing the market in two states of equilibrium – say before and after a merger. If this is to be quantified, then the key parameters of the model must be calibrated – sometimes on the basis of full econometric models including complex demand systems, but sometimes on a more ad hoc basis. Simulation has been most widely used in merger assessment, but also for other areas of policy. To an academic, its major attraction is the discipline it imposes on the analyst – one is required to be quite specific, and think hard, about how to model the market concerned. However, the main weaknesses are that it is (i) very sensitive to modelling assumptions, (ii) more suited to some oligopoly models (and therefore markets) than others – the emphasis tends to be on price, while usually ignoring innovation, brand repositioning etc, (iii) full fledged simulation is very data intensive, (iv) a more realistic analysis including the reaction of competitors is very difficult. There is also mixed evidence on how well simulation predicts actual outcomes (where known).

The **Event study** involves comparison of firms' stock market valuations against a counterfactual, the normal return of the firm, defined as the expected return without conditioning on the event taking place. In the case of a merger, 'abnormal' changes in the valuation of firms reveal the capital market's assessment of the impact of the merger (or announcement, or a merger investigation) on the firms' future profitability. When applied to the valuation of the merging parties' rivals, it provides a quantification of the merger's expected impact on the level of competition. Its major strengths are that it is "objective" and quick, and undemanding of data (assuming firms are quoted). On the other hand, it relies on some questionable assumptions: (i) capital market efficiency, (ii) the event was unanticipated, and (3) there were no confounding effects during the event window. There may also be identification worries: does a negative impact on rivals signal a pro-competitive merger or one with exclusionary effects and does a positive impact on the merging firms signal the expectation that the merger will have coordinated effects, or that the market has revised its expectations about future possible takeovers? More practically, there are limits on how widely the methodology can be employed – in markets where rivals are scarce, unquoted and/

or conglomerates. There is also mixed evidence on whether event studies predict actual outcomes well.

The essence of the **differences in differences** approach is to compare econometrically some key variable(s) reflecting the nature of market competition (usually prices) before and after, for example, product prices before and after a merger; or before, during and after a cartel. Here, the counterfactual is provided by including in the estimation, data on another set of firms, before and after the same time periods, but whose prices should not have been affected by the merger, or cartel etc. Cruder equivalents sometimes merely involve comparisons between two points in time; say before/after and during the cartel, i.e. without any control. The advantage of this approach is that it does not require any explicit theoretical modelling or assumptions, but there are often problems in identifying an appropriate control, i.e. a comparator which is genuinely comparable to the market concerned in every respect except for the anti-competitive behaviour or merger concerned.

From our reading of this literature, no one methodology emerges as dominant, and our opinion is that specific cases should be evaluated, where possible, deploying two or more of the above alternatives in the hope that they provide a robust conclusion.

### Evaluation by policy area: challenges and future research agenda

Focusing on the areas of competition policy, rather than the methodologies per se, reveals some thought-provoking contrasts. First, there is a striking contrast between the sheer volume of literature evaluating cartel and merger policies and the apparent inattention to **Article 102/Chapter 2** cases. This begs numerous questions, not least the possibility that CAs have been far less active in this area. If this is the explanation, then what is the cause of this relative inactivity? Is it a sign of good competition law deterring such behaviour, or does it reflect the CAs' relative impotency in identifying and prosecuting abusive behaviour? More mundanely, is it the case that the above methodologies are not so appropriate for Article 102 cases?

In any event, the contrast with **mergers** is marked. The CAs themselves have often produced/commissioned extensive studies evaluating their policy in this area. However, on closer inspection, there are remarkably few studies which chart the distribution of **actual** price rises (or falls) following merger. Thus, there is no widely accepted answer to the seemingly simple questions: how many mergers, if not-intervened by CAs, lead to increased prices? Or, what is the typical price rise associated with non-intervened mergers? Filling this gap is an obvious area for future research – perhaps applying a difference in differences approach to primary sources, but, if not, perhaps in the form of a meta-analysis of previous studies.

Turning to **cartels**, again there is an extensive

literature, but this time there are hundreds of real world cases for which we have estimates of by how much cartels actually overcharge and, by extension, how much the CA saves the consumer by busting a cartel. This is also relevant, of course, to the emerging literature and policy interest in calculating private damages. Here, however, we raise a different question - more to do with exploring whether there are systematic differences between methodologies in the typical estimates of overcharge. A simple hypothetical example illustrates some of the intriguing possibilities. In principle, one can estimate the magnitude of overcharge by comparing price during a cartel with that immediately before its formation, or immediately after (there are also a number of other interesting comparators). Should we interpret the before-during and the during-after comparisons as equally plausible estimates of the impact of the cartel? To answer this question theoretically, one needs to specify a model, or at least a story, of what causes a cartel to form (is it a negative demand shock, or a collapse in previous tacit collusion?), and of how firms behave post-cartel (do they immediately revert to competitive behaviour, or do the 'benefits' of previous cooperation linger on). The obvious answer is that 'it all depends on the case'. But if this is so, then we should turn to empirical work to identify any general empirical tendencies across the population of real world cartels. This is a topic of our ongoing work, and it is relevant not just for policy evaluation purposes, but also deepening our understanding of cartels.

Finally, in spite of the copious information already in the public domain on detected cartels, there is an obvious gap – the cartels which were/are undetected. As with any area of law, one measure of success is how far does it deter? This remains perhaps the biggest of all our areas of ignorance when evaluating competition policy. One practical empirical approach is to ask practitioners for their opinions/knowledge of whether current policy does deter, and, if so, by how much?<sup>3</sup> Harrington (2009)<sup>4</sup> provides another more theoretical avenue. This most difficult of all areas is deserving of more research, and one which we are currently exploring.

<sup>1</sup> This article also anticipates a far more comprehensive review by the authors which will appear as a CCP Working Paper in Summer 2010.

<sup>2</sup> One of the authors has recently reviewed the OFT's own evaluation work (Davies at [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of1164.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of1164.pdf)) See also [http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/evaluation/publications](http://www.of.gov.uk/advice_and_resources/resource_base/evaluation/publications) for a catalogue of OFT's extensive evaluation work.

<sup>3</sup> This was the approach adopted in a study by Deloitte (2007) [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of962.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf)

<sup>4</sup> "Modelling the Birth and Death of Cartels with an Application to Evaluating Antitrust Policy," (with Chang), Journal of the European Economic Association, December 2009.

# Competition and Fairness: Non-discrimination clauses in the retail energy sector

**Morten Hviid, Professor of Competition Law  
and Catherine Waddams, Professor in Norwich  
Business School**

In September 2009 the energy regulator, Ofgem, imposed a non-discrimination requirement on energy retailers, preventing them from charging different mark-ups in different regions. Up to that point, energy retailers had engaged in spatial price discrimination. Their ability to do so, in a market which one might be forgiven for expecting to be very competitive given the homogeneous nature of the products, can be explained by the origins of the retailers. Of the six current major retail energy suppliers, five are the consolidated remnants of the fourteen original privatised electricity companies, while the sixth traces its history back to the privatised gas supplier. The former publicly owned electricity companies all have well defined regions in which they were the original monopoly incumbent and regions where they have entered. The difference in prices is exactly found between regions in which a firm was originally an incumbent ["in area"] and regions where it was an entrant ["out-of-area"]. Over the last five years until Ofgem's decision, prices in-area have been 10-12% higher than out-of-area.

In the group of consumers who have never switched supplier, and who are hence for sure with a more expensive supplier, relatively more are "vulnerable" based on some measure.<sup>1</sup> This explains the pressure on Ofgem to react. Indeed, Ofgem justified the non-discrimination clause on grounds of fairness, to protect vulnerable consumers who do not switch suppliers from being (relatively) disadvantaged in the market. While we would not dispute that some regulatory intervention may have been needed, we would question the manner of the intervention. As we show more formally elsewhere<sup>2</sup>, Ofgem's intervention will very likely lead to higher prices for all consumers rather than lower prices for some.

Consumer behaviour in the market for energy suggests that there are a significant number of consumers who are very loyal to firms with incumbency status. Despite the much larger mark-up, energy suppliers retain on average around 40% of the market where they were incumbents (as does the gas incumbent). Such consumers evidently need large price differentials to switch, which means heavy discounting by entrants relative to incumbents to attract new customers. Active competition among all six firms should lead these to charge lower prices out-of-area, as we observed. Ofgem's hope must be that by forcing prices together, a firm will react by lowering some and raising others. On

this they are probably wrong. The intuition is simple. A firm clearly makes more profits in regions where it is an incumbent. It has a greater market share and a higher mark-up. Hence if asked to adjust prices to bring them closer together, the natural first step would be to raise the out-of-area price. However, if in a given region, all entrants raise their price, then competitive pressure on the two incumbents [the formerly publicly owned gas and electricity suppliers] lessens, enabling them to raise their price. So both in-area and out-of-area prices would go up.

The intuition is supported by existing economic literature<sup>3</sup> which consistently finds that banning price discrimination may lead to some or all prices increasing. The precise effect depends on the specifics of the market. Essentially there are two broad cases to consider. Where the firms see the same market as their core market, uniform pricing across markets increases competition for the core market and this drives these prices down. Where each firm has its own core market, uniform pricing lead to a "retrenchment" to this market by each firm, leaving each with more market power in their core and hence with the ability to raise prices. Thus in this situation, prices increase everywhere. The UK energy market is much more like the second scenario with each former electricity supplier having their own core market. The only cause for pause is the former gas incumbent, who is an incumbent everywhere. However, the main effect of this firm is to place some restraint on the extent to which the electricity incumbent can raise prices in response to the electricity entrants price increases out-of-area.

The preference for short term 'fairness' in terms of identical prices is not uncommon. For example, campaigns for national pricing to avoid 'post-code lotteries', even if everyone pays more. At the same time consumers have voted with their feet and are happy to patronise the low cost airlines despite many cases where two identical seats have a different price. This raises important and widespread challenges for an appropriate model to capture such preferences, where the primacy of equity issues displayed by politicians and consumer groups often seems contrary to the recommendations of standard economic models and competition concerns.

A more appropriate policy intervention would be to tackle the source of consumer loyalty as the regulator has also done. It is frustrating that as the empowerment of consumers to switch is increased, good offers which provide the necessary motivation to do so are eroded.

<sup>1</sup> The regulator has statutory duties to take account of the needs of those with low income, in rural areas, of pensionable age and those who are long term sick and disabled. In practice the regulator also looked at other groups such as those without access to broadband.

<sup>2</sup> A paper which is forthcoming as a working paper was presented recently at a joint CCP and RPI conference, "The Role of Competition in Public Policy".

<sup>3</sup> For a summary, see Lars Stole, 2007, "Price Discrimination and Competition", in M. Armstrong and R. Porter (Eds.), *Handbook of Industrial Economics* vol. III, North-Holland.

# Unilateral versus coordinated effects

**Matthew Olczak, Lecturer in the Economics and Strategy Group, Aston Business School**

There are two theories of harm under which competition authorities intervene in horizontal mergers: unilateral and coordinated effects. Unilateral effects arise from an individual incentive for the merged entity to raise prices post-merger whereas coordinated effects arise if the merger results in an increased likelihood of tacit collusion. Recent theoretical advances, by for example, Compte *et al.*,<sup>1</sup> have demonstrated that firm symmetry increases the likelihood of collusion. However, in contrast under unilateral behaviour, high prices can result from asymmetric outcomes, especially if the market leader enjoys a dominant position. Consequently, there is an important trade-off between symmetric outcomes conducive to tacit collusion and single firm dominance. A recent CCP working paper<sup>2</sup> demonstrates that this trade-off has important implications for evaluating merger outcomes and potential structural remedies.

The standard repeated game model of collusive behaviour shows that, as long as firms are sufficiently patient, they can sustain the monopoly price every period. However, in reality tacit collusion may often be unstable i.e. subject to periods of breakdown and/or result in prices below the monopoly level. In order to allow for breakdowns, this paper introduces demand uncertainty to the Compte *et al.* model of collusion between asymmetric firms. This approach follows the literature initiated by Green and Porter<sup>3</sup> in which unobserved demand fluctuations are used as a means to introduce a lack of transparency. With demand uncertainty, it is not always possible for colluding firms to distinguish between low sales resulting from a rival deviation and low sales due to low total industry demand. As was first demonstrated by Green and Porter, under these circumstances collusive behaviour can still occur, but is now subject to periods of breakdown.

Once such breakdowns are taken into account, it is no longer always true that an outcome subject to tacit collusion results in lower consumer welfare than an alternative with unilateral behaviour. It is then possible to make more meaningful comparisons between such alternative outcomes. We illustrate such comparisons by applying our model to the 1992 merger between Nestle and Perrier in the French mineral water market.

This was the first European Commission merger decision in which a remedy was imposed in order to 'prevent' coordinated effects.<sup>4</sup> The proposed merger would have created a post-merger outcome with the merged entities market share over 50% and the nearest rival's share below 25%. In order to avoid single

dominance concerns and encourage early clearance, the parties offered to divest capacity to their main rival (henceforth Remedy 1). Such a divestment would have left just two, highly symmetric, main players in the market. The Commission therefore argued that this outcome would be conducive to tacit collusion. In response, the parties agreed to also divest capacity to a previously fringe firm (Remedy 2).

Compte *et al.* apply their model to this decision and argue that the accepted remedy (Remedy 2) enhanced the likelihood of collusion compared to the un-remedied merger. They criticise the Commission for placing too much emphasis on restoring a third main player and too little attention on the degree of symmetry. We argue that assessing the merger solely in terms of the potential for collusion only captures part of the story.

First, despite leading to an outcome less conducive to collusion, we show that the merger absent remedies would have been likely to harm consumer welfare due to a substantial unilateral effect. Second, even though Remedy 1 and 2 may have enhanced the likelihood of collusive behaviour, we show that it is possible that breakdowns would result in sufficiently frequent/long price wars such that consumer welfare is improved compared to the un-remedied merger. Furthermore, this conclusion is shown to be much more likely after the additional divestment insisted upon by the Commission (Remedy 2). Here, the effectiveness of collusion is reduced because the presence of an additional, smaller player reduces transparency and makes breakdowns more likely. This is in contrast to the Compte *et al.* model where only asymmetries and not directly firm numbers affect the sustainability of collusion. Overall, also taking into account welfare losses from unilateral effects allows the remedies imposed by the Commission to be seen in a more favourable light.

Because the rejected early remedy offer increases the number of possible outcomes, the Nestle/Perrier merger highlights the trade-off between unilateral and coordinated effects particularly starkly. However, this case is illustrative of a far more general trade-off between theories of harm. In order to more effectively evaluate merger outcomes and potential structural remedies, alternative approaches need to be developed which, like the model in this paper, allow comparisons to be made between outcomes where different theories of harm are expected.

<sup>1</sup> Compte, O., Jenny, F., and Rey, P. (2002), Capacity constraints, mergers and collusion, *European Economic Review*, 46(1), 1-29.

<sup>2</sup> Olczak, M., (2010), Unilateral versus coordinated effects: comparing the impact on consumer welfare of alternative merger outcomes, CCP Working Paper, No. 10-3. [http://www.uea.ac.uk/polopoly\\_fs/1.144676!ccp10-3.pdf](http://www.uea.ac.uk/polopoly_fs/1.144676!ccp10-3.pdf)

<sup>3</sup> Green, E. and Porter, R. (1984), Non-cooperative collusion under imperfect price information, *Econometrica*, 52, 87-100.

<sup>4</sup> COMP/M.192 Nestle/Perrier, 1992.

# The European Competition Network: A Network with a Difference

**Hussein Kassim, Professor of Politics and Kathryn Wright, CCP Research Associate**

The European Competition Network (ECN) provides a fascinating case for the study of institutional innovation. Its creation marked a key milestone in the development of the EU's competition policy, bringing into existence a new and important actor in an area of central importance to the European project. However, its significance runs far broader. Not only did the ECN defy the pessimistic predictions about its operation and impact that were made in the wake of the adoption of Regulation 1/2003, but its experience over its first six years contrasts sharply with those of other European networks and challenges the conventional wisdom about such networks in the scholarly literature.

## Background

The ECN came into being on 1 May 2004 as part of the modernisation package, initiated in 1999, that enacted an overhaul of the EU's antitrust regime. The reform abolished the traditional system of centralised notification and gave national competition authorities (NCAs) and national courts the power to exempt anticompetitive behaviour.<sup>1</sup> The ECN was created as a mechanism to minimise the risk of duplication and divergence within the new system, and to ensure the effective enforcement of competition rules throughout the EU. It brings together the Commission and NCAs as members, and imposes on them obligations concerning case allocation, consistent application of rules, and the circulation of information. In most cases, the authority that first receives the complaint or initiates an investigation will be 'well placed to act'. However, cases can be opened and investigated by several authorities at the same time. NCAs are obliged to inform the Commission before or without delay after commencing the first formal investigative procedure (Art 11(3) Reg 1/2003). In cases where three or more Member States are affected, the Commission is most likely to be in a position to handle the case, or under other specified circumstances the Commission may also step in (Art 11(6) Reg 1/2003). NCAs are obliged to apply Community competition law in parallel with national competition law where trade between Member States is affected, and an NCA may not allow a practice which is prohibited by Article 101 or 102 TFEU.

## Defying predictions

The reform of the EU's antitrust regime was radical and unsurprisingly attracted considerable attention,

with some scholars expressing extreme scepticism about the ECN and its prospects. One prediction was that the contrasting outlooks and ideologies of NCAs, and differences in working methods and resources, would make the ECN unworkable. A second concern was that the ECN would stifle innovation. Regulatory competition, it was argued, permits diversity, which is an important source of novelty, while harmonisation would inevitably restrict creativity and limit experimentation. Third, it was alleged that behind the guise of decentralising authority to national agencies, modernisation was a Commission ruse to extend its power (though see Kassim and Wright 2009 2). Proponents of this view interpreted the package as part of 'an extraordinary coup'<sup>3</sup> by the Commission, claiming that 'DG Competition has in fact managed to centralise European competition law even more than under Regulation 17 in its Rue Joseph II headquarters'.<sup>4</sup> A fourth concern relates to the threat posed to consistency by differing interpretations in the rulings of national judges, who fall outside the scope of the ECN.

Original research conducted by the authors, which included a survey of fifteen NCAs, suggests in fact there is little evidence to substantiate any but the last of these four concerns. With respect to the first, respondents did not deny that differences in size, resource and outlook could be important in shaping attitudes. However, they pointed to a consensus-seeking norm within the ECN -- "everyone wants everyone else on board", disputed the view that influence is correlated with size or experience, and stressed the seriousness with which the wishes of small Member States are taken. In regard to the second, the ECN has not put a brake on innovation. In fact, it has become an arena where new ideas emerge and initiatives are launched. Importantly, the ECN has begun to formulate policy rather than simply to implement it,<sup>5</sup> as its action with respect to leniency demonstrates.

Third, the proposition that the ECN is an instrument of Commission domination was roundly repudiated by respondents. No lesser figure than the President of the French Competition Council declared in September 2004 that: 'The Commission has not at all, as some had feared, used the network ... to become a "master among obedient dogs"<sup>6</sup> while a majority of our respondents considered 'a partnership of equals' the most apt description of the network. Although under Article 11 (6) the Commission can relieve an NCA of its competence, this power can only be mobilised under certain circumstances. It has not been used so far. Nor is there evidence to suggest that the Commission is continually looking for opportunities to intervene. Indeed, the Commission has shown considerable reluctance to do so.<sup>7</sup> One national official whom we interviewed noted that they "almost had to persuade the Commission to take over a case" even though at least three Member State markets were involved. More

broadly, in structural terms the ECN is too complex and too open to allow dominance by a single actor. At the highest level, meetings of Directors General bring together “robust individuals” unlikely to agree to something that they cannot defend within their national jurisdiction, while at working group level the agenda is open, organisation fluid, and the running can be made by any NCA. Indeed, the evidence points to a strengthening of competition agencies (and national courts), where NCAs have been empowered, individually and collectively.

It is the fourth reservation that offers the most ground for concern. Competition claims may not be neatly packaged, but arise in a variety of other disputes, and are not necessarily heard by specialist competition judges. Tools to minimise divergence are built into Regulation 1/2003: in addition to the existing *Masterfoods* jurisprudence (itself codified in Article 16),<sup>8</sup> Article 15 provides for national judges to request the Commission’s opinion, or for the Commission and NCAs to intervene at their own initiative as *amicus curiae*. The Commission has only intervened in four cases to date, and the admissibility of one intervention was recently the subject of a preliminary ruling by the European Court of Justice.<sup>9</sup> In its five-year report on the functioning of Regulation 1/2003, the Commission states that stakeholders have encouraged it to have greater recourse to these *amicus curiae* interventions. At this point it is difficult to observe the impact and legal effect of the Commission’s observations on the decisions of national judges. However, the proposal to allow the binding effect of NCA infringement decisions on courts throughout all Member States contained in the European Commission’s 2008 White Paper on damages actions could contribute to the alignment of national court decisional practice with that of national competition authorities linked through the ECN, and minimise divergent application between public and private competition enforcers.<sup>10</sup>

### The ECN and other networks

More broadly, the ECN provides an instance of networked governance that stands apart from the experience of other networks. According to the existing literature, networks were created as a second-best solution to the increasingly pressing problem of ensuring that EU rules are applied uniformly across the territory of the Union. Given that the creation of strong, centralised EU-level regulators with far-reaching enforcement powers is not politically acceptable networks have emerged as a second-best option. They offer a way of reconciling the demand for consistency with respect for the autonomy of national authorities, including regulatory agencies. Accordingly, networks have proliferated since the 1990s, but they tend to have limited powers and weak structures.

The ECN diverges from other networks in key respects. First, the circumstances in which it was

designed were very different from the post facto improvisation that has characterised the creation of networks in other sectors.<sup>11</sup> Second, whereas most networks are loosely articulated and based on soft law, the ECN has major responsibilities, exercises important powers, and is strongly juridified. Third, the ECN is more complex and multi-tiered than other networks, offering greater possibilities for the exchange of ideas, productive interaction, and buy-in on the part of its members.<sup>12</sup>

### Conclusion

The ECN has proved to be a remarkable success. However, the circumstances of its creation, which have been a key factor in enabling it to achieve institutionalisation in a relatively short period, limit the extent to which its experience might hold lessons for others.

<sup>1</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [now Articles 101 and 102] of the Treaty, OJ L 1, 4.1.2003, p. 1-25

<sup>2</sup> Hussein Kassim and Kathryn Wright, ‘Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control’, special issue: ‘The Politics of Conflict Management in EU Regulation’, (2009) 32 *West European Politics*, 738-755

<sup>3</sup> Stephen Wilks, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’ (2005) 8 *Governance*, 431-452, 437

<sup>4</sup> Alan Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 1: Regulation 1 and the Notification Burden’(2003) 24 *European Competition Law Review*, 604-615, 604

<sup>5</sup> Kris Dekeyser and Maria Jaspers, ‘A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on Work in the Leniency Field’ (2007) 30 *World Competition* 3-24

<sup>6</sup> Bruno Lasserre cited by Sven Norberg ‘...How the White Paper on the Modernisation Reform Came About’ in Monti et al (eds) *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Nomos, Baden Baden 2007) 523-541, 541,

<sup>7</sup> H F Koeck and M M Karollus (eds) *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003*, FIDE Congress XXII Vol 2 (Nomos, Vienna 2008)

<sup>8</sup> Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 established that national courts may not take a decision running counter to an existing Commission decision on Article 81 or 82EC (now Article 101 or 102 TFEU), and if the Commission is contemplating a decision, the national court should avoid adopting one that would conflict with it, for example by staying the proceedings.

<sup>9</sup> Kathryn Wright, ‘European Commission Interventions as Amicus Curiae in National Competition Cases: the Preliminary Reference in X BV’ (2009) 30 *European Competition Law Review*, 309-313, and Kathryn Wright, ‘The European Commission’s Own “Preliminary Reference Procedure” in Competition Cases’ (2010) *European Law Journal*, forthcoming

<sup>10</sup> Kathryn Wright, ‘Binding the Judicial with the Administrative: Some Aspects of the European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Rules’ (2008) *European Current Law*, November 2008, xi-xv

<sup>11</sup> David Coen and Mark Thatcher, ‘Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies’ (2008) 28 *Journal of Public Policy* 49-71

<sup>12</sup> Hussein Kassim and Kathryn Wright, ‘Network Governance and the European Union: The case of the European Competition Network’, presented at ‘The Transformation of the Executive Branch of the EU’ workshop, ARENA Centre for European Studies, Oslo, 4-6 June 2009, and at the European Union Studies Association (EUSA) 11th Biennial Conference, Los Angeles, 23-25 April 2009

# CCP hosts joint London Conference

**Leanne Denmark,**  
**CCP Communications Coordinator**

The issue of Competition in Public Policy was discussed by over a hundred policymakers, practitioners and academics at a joint conference hosted by the CCP and Regulatory Policy Institute, an independent charitable organisation based at Oxford University, on 8th March at the One Great George Street centre in Westminster.

Speaking about the purpose of the conference, Centre Director Catherine Waddams said "It is important to be clear about the role of competition within the more general portfolio of economic policies, and about what competitive markets can reasonably be expected to achieve. Following the financial crunch, and in the context of the increasing importance of climate change policy, there has been a tendency toward greater scepticism about the virtues of the competitive markets."

Distinguished contributors delivered talks on competitive and regulatory processes, UK competition law and the next decade in competitive markets.

The day began with an introduction from the Chairman of the Regulatory Policy Institute Professor George Yarrow entitled 'Why Competition? 250 years of learning and forgetting in political economy'.

From an international perspective, Professor Carl Shapiro, Chief Economist in the Antitrust Division of the US Department of Justice spoke on the US perspectives on the role of antitrust policy and Chief Economist at DG Comp, Damien Neven went on to discuss competition policy in the EU.

The Chair of the UK Competition Commission Peter Freeman, the CEO of the Office of Fair Trading John Fingleton and Professor Sir John Vickers from the University of Oxford also presented as part of the programme.

Professor Waddams chaired two of the sessions and delivered her own presentation on competition and consumer protection issues in retail energy markets. Delegates took part in roundtable discussions following the sessions.

"The conference brought together leading thinkers and practitioners in the area to consider and discuss the role of competition in public policy, both generally and in more specific contexts" Professor Waddams added.

For full programme of the day and to view presentation slides visit the CCP website [www.uea.ac.uk/ccp](http://www.uea.ac.uk/ccp) or the Regulatory Policy Institute at [www.rpieurope.org](http://www.rpieurope.org).

*Professor Carl Shapiro delivers lecture*



## CCP 6th Annual Conference Vertical Restraints

**17th-18th June 2010**

UEA Drama Studio

Understanding why firms adopt vertical restraints and what their competitive effects are is an active area of scholarly research. As is evident from decisions in recent cases as well as enacted or proposed legislative changes both in the EU and the US, it is also an area of increasing relevance and importance to policy makers. Academics, economists and lawyers will discuss recent research findings and their policy relevance, by bringing together academics the conference is both timely and exciting.

For more information, a list of confirmed speakers and to book a place visit [www.uea.ac.uk/ccp/summerconference2010](http://www.uea.ac.uk/ccp/summerconference2010) or contact

Leanne Denmark, Communications Coordinator, on +44 (0) 1603 591616 or [l.denmark@uea.ac.uk](mailto:l.denmark@uea.ac.uk)