Searching For The Long-Lost Soul Of Article 82EC

An ESRC Research Centre
CCP CENTRE FOR COMPETITION POLICY

May 2007

Searching for the Long-Lost Soul of Article 82EC

CCP Policy Briefing

BACKGROUND

- A legal provision can only be properly understood once there is an understanding of the circumstances of its adoption, since only that can explain why the provision was needed in the first instance. This paper has endeavoured to do this with Article 82EC, examining the *travaux préparatoires*, or preparatory documents, leading to the final Article 82EC, which have so far been largely ignored.
- Traditional interpretation has suggested that the foundation for Article 82EC was strongly influenced by ordoliberalism. This paper shows that 82EC was not envisaged as an ordoliberal proposition at its inception and seeks to fill a gap in the study of antitrust law by examining the original intentions of the drafters. It shows that the predominant issue was increasing efficiency and "increasing the size of the pie" rather than preventing an accumulation of power *per se*.
- Ordoliberalism has its origins in German competition policy of the 1930s and 1940s and involved the use of law to protect market processes from distortion, either by the public power of the state or the private power of large firms. The goal of competition policy for ordoliberals was the protection of individual economic freedom and the restraint of undue economic power. Efficiency was an outcome of the realisation of individual freedom of action in a market system. It also meant that monopolies should be prohibited – avoidable ones should be broken up and unavoidable ones regulated.

METHODOLOGY

- The paper examined ordoliberalism and ordoliberal competition policy to provide a basis for the comparison with the position of the drafters of the Treaty of Rome. It examined the working papers in the lead up to Treaty and the proposals for Regulation 17 which implemented its antitrust proposals. It also studied early Commission interpretation of the legislation.

KEY FINDINGS

- The issue of efficiency and especially productive efficiency had influenced the development of 82EC so profoundly that it is impossible to argue that it has ordoliberal origins, despite the traditional interpretation. The Spaak Report, which has been described as the most significant of the *Travaux Préparatoires*, consistently emphasises that the purpose of a common market was to create industries which could gain strength which would lead to a rise in living standards and the development of harmonious relations between member states. This meant that markets should be merged to avoid wasteful use of resources. A wider market would allow large-scale production without the necessity for monopolies – in other terms it would allow the development of the minimum efficient scale of production.
- This ultimate concern with efficiency is reinforced by the lack of a merger control provision in the treaty and the positive attitude towards mergers in the early years. This indicates that drafters were not against the accumulation of power *per se* and in fact, to the contrary, believed that larger undertakings were necessary to enable the EU to compete more effectively. This view was certainly present also in the early years of the Treaty. For example a speech by von der Groeben to the European Parliament in 1965 illustrated the positive take on mergers and the paradox that they were necessary to increase Europe's competitiveness while abuse of a dominant position was prohibited by Article 82EC.

W: www.ccp.uea.ac.uk
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

UEA NORWICH
E·S·R·C ECONOMIC & SOCIAL RESEARCH COUNCIL

- It is clear that the drafters intended only to prohibit "exploitative" abuses by dominant undertakings and not "exclusionary" abuses and that their concern was principally with end customers rather than competing undertakings. There was discussion in the first draft of the competition rules after the Spaak Report as to whether or not dominance *per se* or only its abuse should be rejected. The French delegation was in favour of the proposal that both dominance and discrimination should be subject to the same test. Since ordoliberalism of the treaty was meant to have its roots in the German delegation, one would have expected their opposition to monopoly of any form. In fact it was the German delegation which proposed that outright prohibition should not be adopted and rather that monopolies and oligopolies should be subject to the control of abuse. The concern with the superiority of financially strong, large undertakings from third countries that merge into larger undertakings was considered a requirement and required the abolition of all artificial constraints for mergers.
- This analysis helps to inform and understand what the objective and welfare standard was and, importantly, is important to current discussions about the guiding principles for competition policy. Based on the evidence examined for this paper, the drafters' position was closer to total, rather than consumer, welfare since their main concern and objective was to expand the "size of the pie".

POLICY ISSUES

- Article 82EC clearly does not prohibit dominance and it is apparent that the drafters never had any intention of preventing undertakings from becoming more efficient even if this led to larger and more dominant undertakings. It was necessary to increase the wealth of Europe after World War II and this was the priority for the Common Market. Improving efficiency therefore was a principle aim for the drafters, which is evidence that there was limited, if any, ordoliberal influence or intention to Article 82EC.
- The provisions of 82EC were not designed to protect the competitors of the dominant undertakings or their economic freedoms. Rather it was designed to protect those who had to deal with these dominant undertakings, namely their customers, from an abuse of power. The drafters clearly believed that harming rivals was not synonymous with harming competition, again a view that would not be supported by ordoliberal views.
- There is evidence however that ordoliberalism has influenced the implementation of Article 82EC. Early in the life of the Treaty there was dispute over whether Article 82EC applied to only exploitative abuses or included exclusionary abuses as well. The final judgement in the *Continental Can* case applied to both forms of abuse which appears contrary to the intention of the drafters.
- What is important for the current application and possible modernisation of Article 82EC is that efficiency is already embedded in it. It would be a very late recognition if the application of the provision now considered the efficiency effects of allegedly abusive conduct.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 07-5) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

ABOUT THE AUTHORS

- **Pinar Akman** is a PhD student whose research interest is the interface between competition and fairness, focusing on Article 82EC.

W: www.ccp.uea.ac.uk
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

An ESRC Research Centre
CCP CENTRE FOR COMPETITION POLICY
May 2007

Searching for the Long-Lost Soul of Article 82EC

CCP Policy Briefing