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Towards A Market-Based Approach:

The Privatization and Micro-Economization of EU Antitrust Law Enforcement

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Abstract

The paper addresses the interface of the recent antitrust reform of the European Union (EU) and the ongoing transformation of the power relations between shareholders and management as one of the key aspects of corporate governance. From the mid-1990s onwards, the EU competition regime has undergone a series of reforms. The 2004 antitrust reform, generally referred to as the 'Modernization', constitutes the focal point of analysis. It fundamentally changes the way in which anticompetitive conduct such as cartels and other restrictive business practices are prosecuted in the EU. With the replacement of Regulation 17 with Regulation 1/2003, the long-standing centralized public *ex ante* market control model was abolished and a decentralized *ex post* private enforcement regime became prevalent. Together with the enhanced emphasis on neo-classical micro-economic theories and econometric modeling in the assessment of anticompetitive behavior, the paper argues that the new regime introduces a more market-based approach of antitrust enforcement, which in addition also heralds a more shareholder value orientated market economy. Under the new regime, the pro-activity of market actors to litigate observed anti-competitive behaviour before the EU or national courts increasingly determines whether or not EU antitrust laws are enforced. The paper demonstrates that the enhanced possibilities to litigate in antitrust matters open up a windows of opportunity for shareholders to increase their voice options vis-à-vis the management and to redistribute economic power into their favour.

INTRODUCTION

An important flanking device of the contemporary transformation of corporate governance regulation is constituted by the developments of EU-level competition or antitrust policy.¹ Consisting of laws and regulations, competition policy generally pertains to the structure of market power and market integration. Situated at the heart of modern capitalist economies, it typically sets the conditions of market concentration and access, the scope of commercial freedom to conclude cooperative ventures with other companies, and more generally the distinction between the public and the private realm. Apart from the genuinely public market interventionist nature, competition policy can come in different shapes and serve a broad range of conflicting interests. Biased by the wider enforcement philosophies and competences of competition authorities, established practices and procedural rules, and most notably, interest group influence, it can both enable and constrain private market power, be more or less market-interventionist, more or less business-friendly or free market-orientated. Consequently, competition policy needs to be understood as ‘a product of the prevailing economic and political thinking of the times’ that is both constituted by and constitutive to the structural power relations in a political economy (Gavil *et al.* 2002: 69).

It might not be immediately obvious, but there is an intimate connection between competition policy and corporate governance. The stringency in which competition laws are interpreted and enforced can have important repercussions on the patterns of ownership and corporate control. It can boost investor sentiments in procuring corporate equity, and influence strategic decision making with regard to mergers and acquisitions (M&A), financing capital, R&D investment, joint ventures and other forms of cooperative business contracts. The interface of competition law enforcement and corporate governance is manifold. A range of studies suggests linkages between announcements of anticipated mergers between listed companies and shareprice increases, filed antitrust lawsuits and negative shareprice reactions of defendant companies, or overall lower shareholder returns, and in the worst case even bankruptcy resulting from financial distress caused by litigation costs and liability payments (Bhagat *et al.* 1994; Bittlingmayer and Hazlett 2000; Alexander 1999; Bhagat *et al.* 1998; Bizjak and Coles 1995). Again other studies attempt to demonstrate how shareholder initiated antitrust class actions can provide a powerful disciplinary tool to achieve boardroom reform and enhance corporate performance and managerial efficiency (cf. Gande and Lewis 2005).

Here the focal point of analysis is the wider significance of the transformation of antitrust regulation at the EU-level with respect to one key aspect within corporate governance, namely the power relations between shareholders and management. Regulatory reforms constitute important signposts for analyzing the *Zeitgeist* of competition policy as they mark the end of certain ideologically held beliefs and the consolidation of new ideas brought forth by dominant political forces in the time before the finalization. What is commonly termed ‘the Modernization’ comprises a package deal of both substantive and procedural reform measures that came into force on 1 May 2004 (European Commission 1999a). According to former Competition Commissioner Mario Monti it is tantamount to ‘a revolution in the way competition rules are enforced in the European Union’ (Monti 2004a). This paper highlights the combined impact of the newly introduced Regulation 1/2003, and the increased reliance on neoclassical microeconomics in the assessment of anticompetitive conduct. The new regulatory framework concerns the enforcement of EU cartel law and the prosecution of other forms of restrictive business behaviour as spelled out in Article 81 (TEC) (hereinafter antitrust law). It brought about a regulatory shift away from a centralized administrative *ex ante* public control model for commercial intercompany agreements towards a decentralized *ex post* private enforcement model, which refers to the ‘application of antitrust law in civil disputes before the courts’ and implies that private actors can litigate observed anticompetitive conduct before the courts as complementary to public antitrust enforcement (European Commission 2005c: 4). The reform seeks in many ways to enhance the levels of private enforcement in the EU. The launch of a Green Paper proposes the introduction of new judicial tools to render private actions more worthwhile for claimants.

The paper demonstrates that behind seemingly technocratic and detailed legal issues in the arcane field of antitrust control lurk important political questions regarding the distribution and concentration of economic power, not only between corporations, but also within the organizational structure of corporations. It attempts to reconstruct the interest constellation and the structural forces in the political economy that informed this process by paying close attention to the question of *cui bono*. This concomitantly helps to explain why it was conducted and how it relates to the power balance within corporate governance. It will be argued that the new regime of private enforcement plays into the hands of a more shareholder-value-orientated market economy by opening up windows of opportunity for groups of shareholders to increase their voice options in the governance of corporations and to redistribute economic power in their favour. Moreover, a range of additional consequences

are identified that come to the fore, such as the withdrawal of public market surveillance in an important field of competition control, and a growing market-reliance on the application of antitrust law. Reinforcing this trend is the institutional anchoring of the use of micro-economic theories and ever more sophisticated econometric techniques to model anticompetitive conduct and market performance – a process that has been ongoing for a couple of years and that finds its consolidation in the reform measures. It will be argued that similar to the transformation of EU corporate governance regulation (see Van Apeldoorn and Horn in this volume), the reform of EU competition policy has been orientated towards a profound neoliberal restructuring – entailing a political predisposition towards more competition, more market-based regulatory approaches and a general inclination towards fostering corporate efficiency.

The paper is organized as follows: the first section introduces the substance of the regulatory shift and locates its importance in the variety of capitalism debate by drawing on the Rhenish and the Anglo--Saxon category as focal points of departure. The following two sections interpret the reform against the backdrop of intersecting and mutually reinforcing features: the growing market-reliance in the application of antitrust law prompted by private enforcement, the consolidation of a process of ‘microeconomization’ and the combined impact of the latter. Section four zooms into the interest constellation that has driven the reform. Next to those directly involved in the reform process, that is, transnational business, the Commission and private practitioners, the particular interests of a diffuse group of shareholders are highlighted, which alongside the antitrust reform lobbied for class action litigation and criminal sanctions as means to gain more corporate control. In conclusion the paper discusses the parallels of the substantive changes of corporate governance and antitrust law and underscores the contradictoriness of the interest motives of the different transnational forces that sought enhanced market-integrating and market-based regulatory solutions.

THE REFORM OF EU ANTITRUST LAW ENFORCEMENT

The Administrative *ex ante* Notification Regime – A ‘Rhenish’ Peculiarity

For more than 40 years the EU antitrust enforcement operated as a market-correcting regime following the rationale that the Commission’s DG Competition controls the market for

anticompetitive conduct before it actually takes place. Regulation 17 from 1962 provided the interpretative and procedural framework regulating cartels and other restrictive business practices prohibited under Article 81 (TEC), as well as Article 82 (TEC) on the abuse of dominant positions. Its central component was an administrative *ex ante* notification regime according to which companies above a certain turnover threshold could notify envisaged intercompany agreements to the Commission.² Each of these notifications was reviewed on the basis of whether the intended deal had the object or the effect of ‘prevention, restriction or distortion of competition within the common market’ stipulated in Article 81(1). Entrusted with far-reaching executive powers, the Commission could either prohibit or allow a deal, ask for amendments, or grant exemptions. The latter could be done individually, on a case-by-case basis or as block exemptions in the form of regulations specifying whole groups or sector-specific categories of agreements that were not considered anticompetitive, provided that the conditions set out in Article 81(3) were fulfilled. These conditions entailed that the agreement needed ‘to improve the production or distribution of goods, or then promote technical or economic progress that ultimately allows consumers a fair share of the resulting benefit’.

Notifying a proposed transaction provided companies with a safe-harbour mechanism regarding the various forms of agreements that could potentially fall into the category of a cartel or restrictive business practice and ensured legal immunity from prosecution. Apart from crude price-fixing and market-sharing, the agreements under concern could take the form of production and R&D joint ventures, patent licensing, franchising contracts, strategic alliances in marketing and sales, distribution, information exchange and other cooperative activities, concerning either direct competitors (horizontal agreements) or companies involved in the different stages of the production, distribution, or marketing process (vertical agreements).

The wider significance of an administrative *ex ante* notification regime for commercial intercompany agreements in particular, and for the way in which capitalism is organized more generally, often tends to be neglected. Commercial intercompany agreements and strategic alliances are a much more common business practice in modern market economies than the more easily observable concentration developments through M&As, which stand more frequently in the limelight of scholarly and media attention. The boundaries are often blurred: intercompany agreements can integrate major long-term business goals and include far-

reaching equity joint ventures, minority holdings and equity swaps (Ullrich 2003: 211-2). Similar to the wave of mergers during the 1990s, commercial agreements between companies rose considerably in number and often involved a cross-border dimension. Estimates for the OECD indicate an increase from 1050 in 1989 to 8660 in 2000, with a sudden jump to 4000 in 1990 and a temporal peak of 9000 in 1995 (ibid: 210). The vast magnitude of such agreements reveals that the neoclassical notion of atomistic or perfect competition according to which discrete companies with clearly separable interests compete one-by-one is misleading. In the market reality the concentration of economic power through a web of ever more indiscernible linkages of agreements and strategic alliances seems prevailing, in particular in times of harsher competition resulting from an accelerated pace of ongoing liberalization of trade and financial markets as is the case since the 1990s.

The administrative *ex ante* notification and exemption system of controlling commercial intercompany agreements constitutes a peculiar characteristic of the European antitrust model and reflects in many ways the central features of the Rhenish model of capitalist organization (cf. Albert 1993; Hall and Soskice 2001; Crouch and Streeck 1997). It was designed by leading representatives of the ordoliberal school, home-based at the Freiburg University in Germany, which enjoyed a long-standing influence on the institutional design of the EU antitrust regime, enforcement philosophies and attitudes towards anticompetitive conduct (cf. Gerber 1998).³ Central to the ordoliberal idea is that capitalism needs to be organized through the creation of a ‘thoroughly and continuously policed competition order’ (Budzinski 2003: 15), in which many competitors compete on equal and fair terms. Franz Böhm (1980), one of the leading proponents, suggested to understand competition as a cultivated, rather than a naturally grown plant. The establishment of a proactive, powerful and governmentally independent institution of market surveillance protecting and controlling corporations from the harmful and destructive forces of the free market was considered essential. Only by means of a long-term orientated and balanced market interventionist strategy the ordoliberal proviso of ‘complete competition’ could be accomplished – a state of affairs in which no company has the power to coerce the conduct of another (Eucken in Gerber 1998: 245). From this macroeconomic vantage point, an enduring market structure with many equally powerful players was considered more important than the short-term market performance of individual companies.

The ordoliberal legacy of an ideal market structure manifested itself in Article 82 prohibiting the abuse of a dominant position. However, apart from the current prosecution of Microsoft this law remained largely underenforced. Instead, the ordoliberal doctrine of many competitors was translated in the safeguarding of the diversity and entrepreneurial freedom of small- and medium-sized enterprises (SMEs), which received special attention in EU antitrust practice.⁴ Moreover, the notion of strong public market intervention and supervision is reflected in the wide-ranging powers of the Commission in antitrust matters who can act as investigator, prosecutor, judge and jury in antitrust matters. The notification and exemption regime is a case in point, as it provided the Commission with much interpretative leeway. Primarily concerned with the long-term goal of the European economic integration project, the Commission traditionally applied antitrust laws to break up national market barriers in order to provide access to new market entrants and to stimulate the broader project of economic integration. Cross-border cooperation agreements were considered conducive to this goal. As exemption regulations expanded cumulatively, they came to include a broad range of agreements: a few vertical agreements, R&D-, specialization-, and standardization agreements, and technology transfer agreements, as well as specific agreements in the car distribution sector or the insurance sector (Cini and McGowan 1998: 98).

The overwhelmingly administrative character of the notification and exemption regime provided the business community with a high degree of legal certainty and an avenue for lobbying for a *laissez-faire* treatment with regard to transactions that otherwise would have been forbidden. Occasionally exemption rules were even applied to counterbalance the competition focus with wider socio-economic and redistributive goals, such as the alleviation of employment problems of certain regions (Jarman--Williams 2001). Moreover, industry could anticipate on the benevolence of a public actor in the pursuit of long-term orientated restructuring measures in times of economic downfall, such as in the early 1970s when cutthroat economic competition was generally considered a danger for the economy and the social order. Declining industries (i.e. sugar, steel and shipbuilding) were allowed to deal with chronic overcapacities by jointly moderating production levels rather than competing each other to death and drastically reducing employment (Pollack 1998: 230; Fox 1997: 342). Therefore, due to permissive interpretations of the exemption rules, the toleration of the temporary establishment of so-called 'crisis cartels' has been no exception in Europe.

The rather generous stance towards contractual agreements allowing companies to combine their resources and explore new profit opportunities contributed to the development of a variety of capitalism in which (hostile) takeovers were relatively less common (cf. De Jong 1989; Hudson 2002) – arguably together with a range of other important ‘Rhenish’ features: the existence of major banks providing patient capital in form of long-term loans, and the lesser need for stock market quotations as a form of corporate finance rendering the acquisition of shares by potential bidders less of an option, as well as structural barriers for hostile takeovers in most corporate governance regimes, such as the issuance of priority shares with multiple controlling rights, and veto rights by banks, the state, or employee representatives (Cernat 2004: 153--5; Nölke 1999). In marked contrast to the systemic aversion to hostile takeovers in most European countries, the Anglo--Saxon type of capitalism (most notably that of the US and the UK), the per se prohibition and the criminal prosecution of price-fixing and market-sharing agreements, in other words ‘cartels’, encouraged companies to merge instead (Gaughan 2002: 23) – concomitantly alongside the predominance of stock market capitalization, the supremacy of shareholder interests and relatively few limitations for predatory raids in corporate governance regulation.

The Abolition of the Notification Regime – A Step of Convergence Towards the US Model

One of the central components of the 2004 EU antitrust reform package is the replacement of Regulation 17 with Regulation 1/2003, according to which notifications for Article 81-type agreements are no longer possible. In addition, the conditions for block exemptions have been expanded, and the whole of Article 81 and 82 declared directly applicable ‘if trade between the Member States is affected’.⁵ The latter implies that the EU antitrust enforcement regime has become decentralized: national competition authorities (NCAs) and national courts have to apply EU antitrust laws for commercial transactions of Community-dimension in parallel to their own distinct competition laws. The abolition of this long-standing tradition of administrative and supervisory market control for commercial intercompany agreements means that companies cannot rely anymore on the Commission’s official decision prior to concluding an agreement, nor can they seek individual exemption. This reflects a retrenchment of the Commission and marks the introduction of a system of private enforcement. With the removal of a public warranty to proceed with a transaction, companies

have to assess themselves whether a particular cooperative agreement breaches EU antitrust law, or whether it falls under the revised system of block exemptions for Article 81(3). It entails further that companies are increasingly exposed to the risk of being litigated by other market actors, a jeopardy that so far has constituted a relatively alien feature in EU antitrust control. The reform seeks in many ways to enhance the levels of private enforcement, which reflects a major step of convergence towards the Anglo--Saxon antitrust model, in particular towards that of the US. The federal antitrust authorities, the Department of Justice (DoJ) and the Federal Trade Commission (FTC), never played a similar comforting role as the Commission, nor was there an equivalent of the EU notification regime for commercial agreements in the US. Instead, under the US model of *ex post* private enforcement hitherto more than 90 per cent of all formal antitrust actions are brought to the courts by private litigators (James 1999; Kemper 2004: 9; Wils 2003: 477).⁶ Although private entities have always played an important role in the enforcement of EU antitrust law – the Commission received on average more than 100 private complaints per year (Paulis and Smijter 2005: 12) – private litigation as complementary to public enforcement has never become a widely applied practice: in less than five per cent of the cases did private litigators take the initiative to invoke a claim at the European courts (Kemper 2004: 9).

The *ex ante* notification regime provided little ground for private actors to bring legal actions to the courts: once the Commission cleared a case or granted exemption, companies enjoyed legal immunity from further prosecution, leaving for claimants only the option of challenging the Commission's decision before the European courts. Positing a case at the Commission's desk was far more appealing as most civil law schemes plaintiffs needed to collect the relevant evidence and prove that a certain business conduct infringed the law, as well as cover the alleged costs of suing (Pirrung 2004: 97). In addition, most of the legal features that make it attractive to initiate legal proceedings against corporations in the US were absent in the EU system: successful plaintiffs were not awarded three times the damage suffered on top of the costs of suing, nor was there a possibility for class actions in which several plaintiffs group together and sue collectively. Moreover, 'no-win-no-fee' or contingency fees offered by most US law companies – according to which professional litigators representing the plaintiffs in court make their profit dependent on the monetary award – are prohibited in most European legal systems. Hence, the absence of these judicial tools renders the legal landscape of the EU a rather hostile environment for private antitrust action, which is why in the European setting

a claimant's culture with exorbitant compensation payments, like that of the US, is a rather alien feature.

Even though the 2004 reform does not directly touch upon further legal modifications, the current discussion on a range of legal instruments for private plaintiffs is likely to render the reform a stepping-stone in a much broader process of enhanced convergence towards the US model of private enforcement. In particular the creation of stronger incentives for private litigation has achieved high agenda status. Commissioner Kroes is quite overt in this respect: '[...] the comprehensive enforcement of the competition rules is not yet complete – not enough use is made of the courts.' (Kroes 2005c) In December 2005 the Commission presented its ideas on how to 'increase the scope for private enforcement' in a Green Paper promoting the introduction of 'Damages Actions for Breach of the EC Antitrust Rules' (European Commission 2005c). As a point of departure, the current situation of damage claims for antitrust infringements in the EU-25 was noted to present a picture of 'total underdevelopment' and 'astonishing diversity' (ibid). Whether or not a facilitated damage relief system should be introduced at all did not form part of the Commission's 36 options specifying its implementation. Once a system of damage relief is introduced, the Commission expects private parties to go much further in bringing actions to the courts than competition authorities (Monti 2004b). Moreover, the gradual raise in private law suits and facilitated court access is expected to increase the overall level of enforcement and render it at least 'as effective as in the US, if not more so' (Philip Lowe cited in Dombey 2004). The next section highlights why private enforcement unequivocally stimulates a more market-based antitrust regime.

TOWARDS A MORE MARKET-BASED REGIME

With the emphasis on private enforcement the centre of gravity shifted from the Commission's desk to the proactivity of market participants. Companies are not only expected to watch over themselves but also their competitors, distributors and suppliers and to bring antitrust breaches to the courts. The same is expected from consumers, employees and other possible private litigants. Even though competition authorities continue to be entitled to intervene in private market conduct, the system has become more market-based: it attempts to evoke a situation of mutual control by market actors, and henceforth a deterrent to

anticompetitive behaviour: the fear of litigation should prevent companies to engage in unlawful agreements and ensure a better compliance with antitrust laws.

An essential effect of the new regime is that the retrenchment of a public authority creates a whole new avenue for professional services firms specialized in antitrust regulation, also called law companies, to assist other companies in the decision whether a planned business transaction produces anticompetitive effects, or whether it belongs into the category of block exemptions. Although legal experts have played already significant counselling roles under the notification procedure, with the introduction of private enforcement the demand-side for judicial advocacy in antitrust matters increases, in particular as most companies do not possess in-house expertise on complex antitrust matters. Professional service companies find a new market for a whole range of products, such as tailor-made compliance programs, economic analyses on market structures and market shares as a basis for assessment, targeted lobbying activities at the EU and the national regulatory institutions, and in case of litigation, corporate lawyers representing their clients at the courts. Whereas the Commission's decision provided companies with a legal check free of charge, under the new regime specialized legal advice needs to be purchased on the market similar to any other commodity, reflecting a case in point of an overall 'deepening commodification', which started in the late 1970s and is marked by 'expanding market relations and possibilities for private profit pursuit into ever further spheres and dimensions of human activity and existence' (Overbeek 2004a: 4). This development is likely to be reinforced by the ongoing trend towards more 'microeconomics' in antitrust enforcement, which will be addressed in the next section.

THE 'MICROECONOMIZATION' OF EU ANTITRUST ENFORCEMENT

The 2004 reform is concomitant to a steady trend towards the use of ever more sophisticated neoclassical economic principles and econometric evidence in the assessment of anticompetitive conduct. The sheer number of economists and financial analysts that were employed to assist the legal experts in the EU has been growing in the past few years. Arguably it should not surprise that a regulatory field located at the interface of law and economics attracts personnel with an interdisciplinary academic background, including legal experts and lawyers, paralegals, economists, industry specialists and accountants and the like. Traditionally more lawyers and legal experts than economists have occupied the field of

antitrust enforcement in the EU (Cini and McGowan 1998: 50). Correspondingly, judicial interpretations of anticompetitive conduct were predominant. Again, this marks a strong contrast to the US, where economic principles and the collection of quantitative econometric data in the investigation phase forms the epitome of antitrust decision making (Scheffman and Coleman 2001, Katz 2004).

From the from the 1960s onwards, generations of US antitrust practioners were influenced by the maxims and analytical concepts of the Chicago School of Law and Economics, which emerged as a Monetarist response to Keynesianism and celebrated its heyday under the Reagan administration in the 1980s (cf. Gerber 1998, Budzinski 2003). Adherents of the Chicago School propagated neoliberal deregulation and further liberalization of markets by drawing on the neoclassical economic assumption of self-regulating markets, according to which the free interplay of market mechanisms results in an optimal and effective resource allocation, and ultimately benefits consumers with lower prices.⁷ In this view, any regulatory steering of the market should be the exception and antitrust law enforcement restricted to safeguarding price competition and efficiency improvements at the company level. In the Reagan era, mergers were no longer contested. Market concentration was assumed to create a situation of economies of scale, and therefore greater allocative and productive efficiency, and thus, lower prices for consumers – a perspective that ushered in a ‘hands-off’ approach at the federal level (Motta 2004: 4). When some of the leading exponents of the Chicago School were elected as judges at the US Supreme Court and when the Chicago Trainee Program ‘educated’ about half of the federal judges in antitrust law enforcement under Reagan’s presidency, Chicagoan theorems penetrated antitrust jurisprudence and so became a deeply engrained philosophy (Schmidt and Rittaler 1986: 11--2). Although so-called Post-Chicago scholars eventually took a slightly more interventionist stance, the yardsticks of narrow efficiency concerns and the focus on price reductions as a conceptual benchmark for consumer welfare maximisation remain unchallenged until today. This is likely to be fortified by the re-employment of the Chicago-brigade under the presidency of George W. Bush.⁸ Over time the Chicagoan heritage resulted in highly sophisticated economic modelling to measure market efficiency and consumer welfare based on neoclassical economic theories, supported by econometric analyses and specific algorithms for the definition of markets and market boundaries and rational-choice game theories as a foundation for detecting rent-seeking cartel behaviour (Fox 1997: 340). Moreover, the use of price theories and price modelling as a central reference point for determining anticompetitive conduct quintessentially gives

precedence to a microeconomic perspective and to short-termism: the focus on prices limits the perspective to single company behaviour in relation to consumers at a particular point in time and disregards macroeconomic issues like market power concentration and market structure.

Narrowing the Gap: From Freiburg to Chicago

Currently about half of the qualified officials working at the Commission's DG Competition have an academic degree in economics (Röller and Friederiszick 2005). Under the legacy of former Commissioner Mario Monti, an economist himself, the economic sophistication of antitrust law enforcement received a major boost. Also his successor Neelie Kroes repeatedly announced that further reforms facilitating high-quality economic analyses will also be at the top of her agenda (Kroes 2005a, 2005b). As one of the chief architects behind the 2004 'modernization', Monti's role was pivotal in reorganizing the professional nature of the Commission's competition department. As Monti himself noted: 'One of my main objectives upon taking office [...] has been to increase the emphasis on sound economics in the application of the EC antitrust rules, in particular to those concerning different types of agreements between companies [...]' (Monti 2001). Similar to the US model, a post called the 'Chief Competition Economist' was established, which had the mission to scrutinize the Commission's antitrust investigations with a 'fresh pair of eyes' and 'independent economic viewpoints' (Monti 2002). Accompanied by an entourage of experienced economists called the Economic Advisory Group, the Chief Economist guides the work of the regular staff of lawyers and other economists on a case-by-case basis in all fields of competition control, i.e., mergers, antitrust and state-aid cases and advises on the future development of competition policy (Röller 2005: 6).

Apart from the numerical transformation of competition officers with a background in economics, a range of indicators lay bare that the kind of competition economics that made its entry is grounded in microeconomics, analytically premised on methodological individualism, and home-based in the neoliberal free market ideology. The new creed of economists maintains strong transatlantic links indicating that the substance of economic theories that has become prevailing in EU enforcement practice is likely to be streamlined with that dominant in the US. Bilateral meetings where 'past case work' and 'economic methodology' is

discussed with economists working at the FTC and the DoJ take place on a regular basis (Röller 2005: 6). In this vein it seems no coincidence that Professor Lars-hendrik Röller, who was appointed Chief Competition Economist in July 2003, was educated in competition economics in the US.

Although differences in the legal instruments remain, the Commission is increasingly using 'the same micro-economic analytical tools as the US' (Schaub 2002: 3). Monti heralded the silent process of convergence as the 'most important success story in the transatlantic relationship' and argued that EU competition policy is now clearly grounded in 'sound microeconomics' (Monti 2004b). He observed:

[...] (w)e share a common fundamental vision of the role and limitations of public intervention. [...] We are both grappling with the same evolving economic realities and are both exposed to the same evolution in economic thinking. (ibid)⁹

This 'common fundamental vision' entails that the ultimate purpose of public intervention into the marketplace is to ensure that competitive prices are not harmed. The enhanced emphasis on prices together with the declaration of consumer welfare as the predominant task of competition control, indicates that the macroeconomic orientated vision inspired by ordoliberal economic thinking is vanishing in one of its last strongholds. This has a profound impact on the scope and nature of antitrust control in a regime of private enforcement and the overall corporate climate in the EU as the next section will show.

'Microeconomisation' in a System of Private Enforcement

Economic principles and econometric analyses are predicated upon ideologically-held beliefs on how economic reality functions. Recalling that 'theory is always for someone and for some purpose' (Cox 1981: 128) reminds us that there is no such thing as neutral theory. The reduction of real-world complexity into econometric modelling and analyses, the subsequent operationalisation and assessment of empirical data has as a consequence that the parameters excluded, so-called exogenous variables, simply remain unnoticed in the decision making. Mathematical economics merely measures what it can measure. If price calculations to indicate consumer welfare are prioritized, the welfare of employees and employment aspects,

the restructuring of certain industries in times of economic downfall, or the protection of the environment are less likely to be considered as decisive factors in the final decision making. Moreover, there is no such thing as testing against what Joseph Schumpeter (1942) called ‘the cold metal of economic theory’. Assessing a particular business transaction as anticompetitive conduct is always based on a speculative judgment of collected evidence, which derives from paradigmatic beliefs about market realities.

Private enforcement in a decentralized enforcement regime is likely to bring the speculative character of antitrust enforcement to the fore. In the decentralized enforcement regime of the EU, no less than 26 jurisdictions with thousands of tribunals will have to set the yardsticks and evaluate the soundness of technically complex empirical material used in accusations and court defences. In the absence of specialized competition courts, ‘ordinary’ judges will award damage compensation and impose fines, and in Member States where competition law infringements are prosecuted under criminal law, even imprison CEOs for their unlawful activities. The chances for deviant interpretations are very high and the legal forum-shopping for claimants may become common. As competition laws often tend to be formulated in loose and imprecise terms, due process of law according to established rules and principles is difficult to maintain. The frequency of so-called ‘borderline’ cases constitutes part of the reason why the devolution of antitrust enforcement competences to national courts has led to many controversies.¹⁰

In combination with enhanced possibilities of private enforcement, the ‘microeconomization’ of competition law enforcement becomes all-pervasive. Future claimants may relate upon legal precedents, which has the potential effect that the growing body of judge-made case law looks in certain economic data-gathering methods as the standard for decision making. In sum: whereas before a public authority could balance the decision making in antitrust matters according to broader political macroeconomic goals, individual private claimants by definition are more likely to be driven by self-interest when invoking a claim. Similarly, national judges proceed on a case-by-case basis without taking into account the wider political economy. In combination with the trend towards more microeconomics, the new regime is likely to prelude a political bias towards narrower and more short-term conceptions of competition. This then, brings us to the question of who, given this content, benefits from the new antitrust regime, and to what extent those who have an interest also have been driving the reform.

***CUI BONO?* THE DRIVING FORCES AND THEIR AGENDAS**

The Mixed Emotions of ‘Corporate Europe’

The *ex ante* notification regime did not cause widespread public dissatisfaction that would explain why the reform was conducted. On theoretical grounds one could expect companies subject to the reform, including management boards and shareholders alike, to be strong proponents of the reform: with the removal of a burdensome administrative straightjacket, the leeway to make use of the freedom of contract and to engage in all types of commercial agreements without being immediately controlled by the Commission’s interventionist arm. Indeed, the business community represented at the EU-level, the Union of Industrial and Employers’ Confederation of Europe (UNICE), and the European Round Table of Industrialists (ERT), were to some extent in favour of ‘modernizing’ the application of the EC antitrust rules (Union of Industrial and Employers’ Confederation of Europe 1995, 2001, 2002). CEOs in particular repeatedly criticized the Commission’s farreaching powers that themselves were not subject to judicial control (European Round Table of Industrialists 2001: 3). Cumbersome, in-depth antitrust reviews in which the Commission needs to be persuaded that a deal should go through on the basis of elaborate rock-hard economic data and legal analyses is neither in the interest of executive boards nor shareholders.

TNCs are genuinely interested in lifting regulatory barriers that hamper the free flow of capital accumulation, or what in Eurojargon euphemistically came to be translated as ‘creating a level playing field’. Rigid reviews of cross-border intercompany agreements involving several jurisdictions increase transaction costs and the probability of conflicting results. Therefore, the regulatory system offering the most favourable structure tends to be preferred. In this vein, the ERT encouraged the Commission to embody a more economics-based interpretation of antitrust law and ‘to emulate the US more fully’ in this respect, in particular with regard to measuring efficiency improvements in antitrust analyses (European Round Table of Industrialists 2002). A range of reasons account for the strong preference for the US model. In the 1990s, about half of all strategic partnerships had a transatlantic dimension, whereas only a quarter concerned pure intraeuropean deals (Ullrich 2003: 210--1). Moreover, US antitrust officials and business representatives repeatedly criticized the Commission’s weak commitment to sound economic evidence in its decision making and

culminated after a series of divergent rulings by the Commission in high-profile cases between US companies.¹¹ Severe criticism came also from the Court of First Instance (CFI) and the European Court of Justice (ECJ), which overruled three high-profile decisions taken by the DG Competition on the grounds that the economic evidence that underpinned the prohibitions was deemed insufficient and its economic logic not convincing (i.e. *Airtours--First Choice* in 1999, *Schneider--Legrand* and *Tetra Laval--Sidel* in 2002). After these embarrassing court defeats, the hiring of economists and the convergence towards US-style economic thinking received a major boost. Director-general Philip Lowe, an economist himself, concluded that the reliance on economic foundations in competition matters brings ‘comfort on the robustness of the decisions’ (Lowe 2003). A large part of this ‘comfort’, however, can be ascribed to the fact that since 2002 most of the transactions have been cleared anyway.

The use of microeconomics in antitrust matters is also grounded in the vested interest of transnational corporations to keep certain stakeholders away from the negotiating table. The ERT quite overtly argued that the greater involvement of groups like consumers and employees ‘risks diverting the attention from the competition focus of the Commission’s analysis and increasing both uncertainty and delay’ (European Round Table of Industrialists 2001: 4). With the focus on ‘competition only’ building upon short-term orientated econometric evidence more diffuse societal interest are unlikely to be expressed. Additionally, it may bestow a regime an arm’s length basis and provide managers with an avenue for less stringent enforcement. Concepts such as ‘dynamic efficiency improvements’ leave ample room for gerrymandering the decision making in the wished-for direction. Already prior definitions on ‘relevant product markets’ or delimitation of one product *vis-à-vis* another can be used for ‘moulding’ evidence to support a particular claim. Moreover, as one commentator has argued, estimations of future competitive impacts assessed on the basis of defined confidence intervals are tantamount to an ‘intuitive judgment in deciding whether a test is passed or not’ (Dobbs 2002: 3).

Nevertheless, the support of ‘Corporate Europe’ is not straightforward. On the contrary, emotions are mixed and certain elements of the reform have been fiercely criticized. The administratively burdensome, but secure way of the notification regime has had its proponents especially among UNICE, which comprises the whole range of European companies including SMEs. With respect to the regime change it argued that ‘the complexity of the rules

requires extensive expert advice' and 'substantial management time' (Union of Industrial and Employers' Confederation of Europe 1999, 2001). This contrast to the argumenation of the Commissioner Monti justifying the reform by saying that the Commission's role, as an antitrust enforcer, was not to give comfort, and that 'after forty years of experience the application of European competition law should be sufficiently clear to business' (Monti 2004a). Elsewhere he compared the notification procedure to parking a car in a town: 'citizens must know where to park a car and shouldn't have to go to the police station to check first' (ibid 2004b). The fact that antitrust law enforcement is far more complex than Monti's car parking allegory suggests forms part of the discontent of the business community, in particular as the fines imposed on cartel cases exceed those of traffic offences. Also among the selected group of transnational companies (TNCs) represented in the ERT the formal safe harbour regime constituted a much cherished good – provided that 'speedy and straightforward processing' was guaranteed (European Round Table of Industrialists 2002). Judicial advocacy by corporate lawyers cannot provide for the wished-for legal certainty in a competitive environment of ever-shorter amortisation periods of new technology products – so the argument. Generous interpretations on corporate alliances such as investment-sharing, R&D partnerships and the like have always been welcomed (ibid).

In marked contrast to enthusiasm for a more microeconomics-based approach, the novel risk of litigation and the exposure to compensation payments alarmed the management boards of companies organized in the UNICE and ERT alike. The reason seems obvious: potential fines, damage compensation payments to private claimants and the costs of defending can cause significant reductions in a company's wealth, and even be detrimental (cf. Bizjak and Coles 1995). Although the 2004 antitrust reform does not immediately mean the advent of an US-style litigation culture, CEOs from the European business community have been very much aware of this scenario. Moreover, the new regime of decentralised private enforcement, which allows private litigants to bring breaches of EU antitrust law to national courts, has been deemed to 'accentuate inconsistency, a lack of transparency and unpredictability' (cf. Union of Industrial and Employers' Confederation of Europe 1999, European Round Table of Industrialists 2002). In a range of position papers during the preparatory stages of the reform, business organizations sought to limit the exposure to law suits by advocating inbuilt legal safety measures in the form of *ex ante* reasoned opinions by competition authorities and national jurisdictions. The issuance of such advices would come close to the reintroduction of the notification regime. In response, the Commission promised merely the occasional

provision of general ‘guidance letters’ published on its web site. Only in ‘genuine cases of uncertainty’, it will grant case-specific informal guidance (cf. Recital 38 of Regulation 1/2003). This loosely defined assent by the Commission has been very much regretted by business, which pleaded for guidance, in particular in cases of commercial agreements that ‘are ancillary to, or involve a financial risk, capital investment, or an effect on shareholder value’ (Union of Industrial and Employers’ Confederation of Europe 2001: 5, European Round Table of Industrialists 2002). The latter is important in the context of the current transformation of corporate governance regulations. The next section addresses private antitrust enforcement in terms of its potential impact on the corporate power balance of management *vis-à-vis* shareholders.

Enhanced Antitrust Litigation to Pursue Corporate Governance Goals?

Commissioner Kroes presents the enhanced antitrust litigation possibilities ‘as a right for consumers and individual businesses in Europe who have lost out as a result of the anticompetitive behaviour of others’ (Kroes 2006). The generalization that society is constituted by either consumers or competitors that might have an interest in rectifying abusive corporate behaviour downplays the existence of other stakeholders, such as labour and environmentalists. Moreover, diffuse groups such as labour, consumers and individual businesses, face high administrative costs to organize claims against corporate fraud. Instead, another category of plaintiffs is more likely to make use of the facilitated antitrust litigation possibilities, namely shareholders, in particular institutional investors and hedge funds prioritising short-term profits. As the reform explicitly hinges upon enhanced private antitrust litigation, so-called ‘voice options’ for shareholders increase (cf. Hirschman 1970). At a first glance, the reform and shareholder activism in antitrust litigation may not appear to be related. However, apart from accounting manipulation or securities fraud in cases of inaccurate disclosure of information, a wide range of other events can account for legal actions induced by shareholders. This include breaches of contract, patent infringements, product failures, bankruptcy issues, slander, marketing, distribution and franchise disputes and notably, also antitrust violations (cf. Bizjak and Coles 1995, Kahan and Rock 2006). As a rule of thumb, the more regulatory fields become subject to private enforcement, the more rent-seeking private investor groups are provided with new windows of opportunity to alter the corporate power balance in their favour and to pursue corporate governance goals.

Challenging mismanagement and fraudulent behaviour of CEOs at the courts may serve as a means for vetoing inauspicious decisions by CEOs and for intervening into decision making in cases of sharevalue loss, altering the composition of the management, allocating monetary awards compensating for past harmful board actions or conducting hostile take-over bids by litigating target companies. Shareholder activism in antitrust matters may expose management boards to new risks regarding long-term investment strategies and in the worst case bankruptcy, which makes an easy prey for hostile take-overs. The institutional anchoring of short-term performance indicators in antitrust assessments provides additional ground for litigation. Already the mere threat of suing may discipline company boards to deliver higher returns on investment in the short-run.

A number of shareholder rights organisations and institutional investors, such as public pension funds, have long urged national governments in Europe to introduce a range of legal modifications in the litigation procedures, such as class actions and criminal sanctions (cf. Hollinger 2005, Allen 2005, Sherwood and Tait 2005). Quests for more 'market justice' have in particular intensified with recent corporate scandals in the accounting sector, such as in the case of Enron, Parmalat and Ahold, or in the turmoil of ABN AMRO's acquisition of controlling stakes in Banca Antonveneta. Investor plaintiffs in Europe have a stake in getting the same leveraging powers as investors in the US (cf. Allen 2005). However, shareholders neither speak with one voice, nor is there a clear-cut interest coalition of shareholders to identify. Different categories of shareholders have different interests: whereas, for instance, hedge funds, may follow an aggressive strategy of short-term profit maximization, (investment) banks, insurance companies and (certain) pension funds may be more inclined to more secure long-term investment. Moreover, the interests of the shareholders of one company are not equivalent to those of another company. The reason seems obvious. The exposure of a company to high damage compensation payments and in the worst-case even bankruptcy or hostile takeovers eventually renders economic life more precarious for all stakeholders involved, including shareholders.

In view of the current proposals for facilitated shareholder litigation in the EU Member States, one is tempted to conclude that those shareholder demands opting for the Anglo--Saxon litigation practice find themselves on the winning side: while Sweden and the UK have already introduced the possibility for class action lawsuits in general, Germany specifically included a range of measures that facilitate private actions into its 7th amendment of

competition law. As a part of the attempt to make Germany a global financial centre with ‘a stock market as a viable avenue for investment’, two government proposals have been launched on 14 March including a bill on shareholder class actions and a bill on shareholder derivative lawsuits (Kamar 2005: 17--18). Similarly, in Italy shareholder rights have been strengthened and made conceptually reminiscent of US corporate legislation to attract US investors (ibid: 22). Also in Finland, the Netherlands and France, the issue of facilitated shareholder litigation has reached agenda status. For instance in France President Chirac has recently instructed his government to put forward initiatives for the introduction of class actions against abusive market practices – an incremental move which fits into the political landscape of the competition law overhaul.

Professional Service Companies – The Beneficiaries of the Reform?

Private antitrust practitioners working at professional services companies, commonly termed law companies, are often underrated as a political force in antitrust matters (cf. the contribution to this volume by Nölke and Perry on the role of coordination service firms, of which law firms may be considered an example). They form part of the epistemic community surrounding the DG Competition, which is marked by a dense fabric of professional linkages: private practitioners work on the same antitrust cases as public officials, although representing antagonistic positions when defending a client, and they gather at the same conferences. Hence, they are socialized to speak, write and think about antitrust technicalities in the same idiosyncratic way (Slaughter 2004: 253). Moreover, they provide for a source of staff recruitment and inspiration with regard to the future development of competition policy.

Professional service companies will always profit from private antitrust enforcement as it increases the demand for judicial advocacy. The contemporary legal services landscape in the EU demonstrates that the phenomenon of law companies with a specialization in antitrust issues is no longer a phenomenon restricted to the Anglo--Saxon type of capitalism. Countless law companies with ever expanding numbers of lawyers and economists have established offices throughout Europe and in particular in Brussels – all tuned to profit from the booming market of antitrust counselling in Europe. Not to be underestimated is the sheer number of law companies originating from across the Atlantic. As an US antitrust lawyer observed: ‘Some firms think Brussels will be the next Washington.’ (cited in Henning 2003).¹²

As regular and influential guests in the preparatory stages of the reform, private law companies displayed their expertise in the form of advisory reports to Commission officials: their share of official comments on the 'White Paper on the Modernisation' and on the 2005 Green Paper outnumbered that of business and labour organisations, or national competition authorities (NCAs) (European Commission 2006). Again, a significant share of commentators originated from the US, which is illustrative of a strong interest from across the Atlantic to create similar market conditions in Europe. Professional service companies also took the lead in the formulation of possible avenues to promote enhanced private litigation in the EU. A comparative study conducted by Ashurst – a transnational law company specialized in EC competition law provided the intellectual basis for the Green Paper, which apart from a detailed account on the possibilities for damage actions in the EU covered a wide range of other litigation-related measures, such as the introduction of class actions (cf. Waelbroeck *et al.* 2004).

While the business community in Europe is expected to keep watch over itself and its competitors by seeking counselling support of professional law companies, the Commission has embarked on its own agenda as the next section will illustrate.

The Stakes of the European Commission

The political ideas and the steadfast commitment of the DG Competition were an essential driving force of the reform. The Commission's agenda comes to the fore through the decentralisation of antitrust enforcement, which implies that now also NCAs and courts have to apply Article 81 and 82 for cases with a Community-dimension, something that previously was the exclusive prerogative of the Commission. Although it initially may sound counterintuitive, the decentralisation was deliberately shaped to expand the DG Competition's status quo of antitrust competences. Following Wilks (2004) the reform is exemplary of an 'audacious coup' by the Commission to 'extend its powers and to marginalize national competition laws' or, what George Orwell in his seminal book *1984* expressed with 'decentralization is centralization' (Wilks 2004: 12).

As a part of the decentralization endeavor the European Competition Network (ECN) was established to provide a forum for NCAs and courts to cooperate and warrant legal

consistency when enforcing Article 81 and 82. As the nodal point within the ECN, the Commission reserved for itself far-reaching supervisory powers: the opening of every new case needs to be reported to the Commission and in the event of conflicting decisions the Commission can retrieve cases again (i.e. Article 11(6) and 16 of Regulation 1/2003). These provisions allude that there is only one reference point for the interpretation of EC antitrust law, namely that of the Commission. The ongoing discussions on the introducing facilitating legal features in a decentralized private enforcement regime leave the tentative conclusion that the harmonization of litigation systems may reach high on the Commission's future agenda. Although inconsistency in the enforcement of EU antitrust law is likely to be the order of the day for the reasons outlined earlier, the ECN as a mode of governance to cope with decentralization needs to be understood as an attempt at diluting the significance of the diverse national competition laws and practices in the long run. Thereby the project of an 'ever-closer Union' intruded into a policy domain in which a harmonization never was politically feasible due to the strong resistance of the Member States to give up one of the last bastions of national market intervention (cf. Pollack 1998; Nugent *et al.* 2001). In the light of the tolerant stance of the Commission with regard to the freedom to cooperate, a harmonization towards the EU antitrust model fully complies with the free movement interests of companies and capital.

However, rather than making itself obsolete, the Commission hopes to refocus its staff resources on cracking down cartels more vigorously on a global level (eventually it can impose fines that amount to ten per cent of a company's annual turnover) and leave smaller cases to private trustbusters and national jurisdictions. The incentive to patrol the globe for hard-core cartels needs to be placed in the context of a range of prominent price-fixing cases in the late 1990s that marked a 'golden age' of US cartel prosecution, which resulted in highest fines ever and the imprisonment of CEOs (Litan and Shapiro 2001: 27). In the absence of a 'world competition authority', the Commission tries to expand its powers beyond the borders of the EU and fight transnational cartels in duopoly with the US agencies. The impetus goes further than the prestige- and competence-seeking of a regulatory body that long suffered from the image of being the junior partner of the US agencies. Instead, the antitrust reform was announced to convey 'a world class regulatory system' (European Commission, 2002), which forms part of expediting and fostering the broader European project of neoliberal market integration that takes places against the background of the reinvigorated discourse surrounding the Lisbon Agenda of 2000 (on the latter see Van Apeldoorn and Horn

in this volume). The aim to make the EU ‘the most dynamic knowledge-based and competitive economy by 2010’, in other words, to economically outperform the US and the rest of the world, is according to the dominant neoliberal view best achieved by downsizing Brussels’ ‘regulatory jungle’. With the privatisation and decentralisation of important aspects of EU antitrust enforcement, the reform seems no longer deviant from the prevailing tenet.

CONCLUSIONS

The paper demonstrated that the 2004 reform exposes antitrust law enforcement to market mechanisms and introduces a more microeconomic reasoning in the assessment of anticompetitive conduct. With the abolition of the administrative public control model and the concomitant decentralization of Article 81 and 82, the primacy of enforcement has shifted to the proactivity of private parties who are expected to bring observed antitrust breaches to the national courts. Private enforcement together with the institutional anchoring of enhanced microeconomics narrows the scope of antitrust enforcement to short-term efficiency criteria and price indicators, which can be construed as a considerable step of regulatory convergence towards the Anglo--Saxon style of organizing private market conduct, and the erosion of what has commonly been termed the Rhenish model of a coordinated market economy (on the latter see also in particular Nölke and Perry in this volume).

The new regime produces a whole range of cross-purposes. In the absence of significant political opposition, private antitrust enforcement is likely to be further strengthened by subsequent reform steps as the 2005 Green Paper indicates. The costs of suing may be unaffordable for certain potential plaintiffs, in particular SMEs, employees, consumers, or more diffuse interests of society at large, which has as a consequence that the new regime is likely to be predisposed towards those who can afford ‘sound’ economic analyses and are willing to take the effort of suing. Shareholder interest groups, most notably large institutional investors or hedge funds with a strong interest in short-term payoff rather than long-term profitability, constitute one category of actors that is likely to profit from the new antitrust litigation possibilities. Although their agency cannot be derived from the actual reform in a minutely detailed way – their presence is merely confined to lobbying efforts regarding the introduction of criminal sanctions and class action litigation – and even though there is no transparent common agenda of shareholders to identify – the paper maintains that the EU

antitrust reform opens up a window of opportunity for powerful shareholder interests to gain more corporate control. Antitrust litigation may serve as a means to alter the power constellation of the internal corporate governance structure, in particular to influence the business strategies of the management or the ouster of underperforming board members, as well as to facilitate predatory take-overs. Thereby the antitrust reform parallels in many ways the regulatory reforms of corporate governance regulation in Europe designed to strengthen the position of shareholders vis-à-vis the management, as well as other corporate stakeholders.

The political forces that dominated the reform process - the DG Competition and its wider epistemic community of private practitioners from the professional services sector - are also expected to benefit from the new regime, albeit for different reasons. The heightened demand for antitrust counselling and litigation services resulting from the retrenchment of a public authority provides intermediary law companies with a lucrative business. The Commission, in contrast, embodies a broader agenda of enhanced neoliberal market integration, which reflects the view of 'less regulation is better regulation' and market-based solutions are superior to the interventionist arm of a public authority. The involvement of private market actors as complementary controlling instances of the competitive process has been intended as an encouragement to tougher competition, which is believed to feed back on overall economic welfare and the goals defined in the Lisbon Agenda. Furthermore, those subject to antitrust control, the transnational business community, have a strong stake in legal certainty and a high degree of economic freedom, which implies uniform laws and practices in a common market. However, whereas the increased emphasis on microeconomic instruments in the assessment of anticompetitive conduct can work to their advantage, the increased private litigation activity at the expense of the secure notification procedure poses severe risks; in the worst case the advent of a claimants culture similar to that of the US with significant consequences regarding the distribution of corporate wealth.

NOTES

¹ The term ‘antitrust policy’ is generally used among US practioners and academics, whereas in Europe the generic analogue ‘competition policy’ is more widespread. Here, the term ‘antitrust’ is used to specifically refer to the fight against cartels and restrictive business practices.

² The requirement to notify the Commission excluded SMEs anticipating an inter-firm agreement as their actions were considered of minor importance to trade and competition within the Internal Market.

³ Whereas the overall influence of German ordoliberal scholars in other economic regulatory policies has waned since the 1960s, it continued to have a remarkable stronghold in EU competition policy (cf. Budzinski 2003; Hölscher and Stephan 2004). Officials of German origin and trained in German competition law have traditionally held strategic positions in the DG Competition (cf. Hooghe and Nugent 2002).

⁴ The Commission repeatedly emphasized that ‘[...] [it] takes a favourable view of aid to small and medium-sized enterprises, given their structural handicaps as compared with large undertakings and their potential for innovation, job creation and growth.’ (European Commission 1996a: 34)

⁵ The following preconditions need to be fulfilled: ‘the agreement must lead to an improvement in the production or the distribution of goods, or the promotion of technical or economic progress; it must allow consumers a fair share of the resulting benefit; restrictions should be indispensable to the attainment of these objectives; and the agreement must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’. These rather elastic notions are further clarified by lengthy

guidelines issued by the Commission (*see* for more: Communication of the Commission, Guidelines on Vertical Restraints, 2000/C291/01, JOCE n° C 291/1, 13/10/2000).

⁶ The high level of private enforcement in the US is also due to the fact that all cases of infringements with US antitrust law have to be prosecuted in the courts, including those initiated by US authorities. However, as this is a timely and costly procedure, more than 80 per cent of the US government cases are either abandoned, or modified through voluntary settlements prior to involving the courts (Venit and Kolasky 2000).

⁷ The artificial situation of perfect competition is taken as a benchmark and the premises underpinning methodological individualism extrapolated to company boards: rationally behaving managers are assumed to generate economies of scale and scope in order to achieve efficiency gains and to maximize profits. Once efficiency gains are achieved, marginal production costs are expected to decrease, and - due to the competitive environment in which rival companies offer similar products - passed on to consumers.

⁸ For example, Mr. Muris, Chairman of the FTC since 2001 had already served under Reagan in the early 1980s where he became famous for his *laissez-faire* view according to which, not corporations, but governments were considered a threat to competition. He particularly displayed the Chicagoan attitude in the lax enforcement of the Microsoft monopolization case (Tomand and Lister 2001)

⁹ Elsewhere Monti concluded: “[i]t is fair to say that the far-reaching policy shift which occurred in US antitrust enforcement during the 1980s - namely, the shift towards a focus on the economic welfare of consumers - has been mirrored in the policy priorities of the European Commission during the 1990's.” (Monti 2004c) The heightened emphasis on consumers is attested by the creation of a post within the Commission's DG Competition called ‘Consumer Liaison Officer’ in December 2003. The task ascribed to this new institution is to ensure a permanent dialogue with European consumers and alert consumer

groups to competition cases ‘where their input might be useful’ (European Commission 2003b).

¹⁰ Mr. Justice Ferris, an English judge specialized in antitrust law expressed his concerns as follows: ‘[Judges] cannot make value judgments, except in a very limited field, certainly not in relation to general economic questions [...]. The Court should not have any part to play [...] in deciding whether an agreement or course of conduct contributes to improving the production or distribution of goods or promoting technical or economic progress [...] I cannot see any court as we know it making a satisfactory job of that task.’ (cited in Forwood 2003: 2).

¹¹ The divergent rulings in 2001 on the GE-Honeywell merger fuelled the controversies. According to Charles James, former Assistant General of the US DoJ, the contradictory rulings are due to a ‘fundamental, doctrinal disagreement over the economic purposes and scope of antitrust enforcement’ (James 2001).

¹² Compare the observations made by Nölke and Perry (this volume) on the growing role of Anglo--Saxon credit-rating agencies and accounting firms in Europe.

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