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**Competition Policy and EU Governance**

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# COMPETITION POLICY AND EU GOVERNANCE

by

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## **ABSTRACT / SUMMARY**

This paper focuses on competition policy in the European Union from an economic, micro-governance point of view. It analyses recent developments in economic governance in the field of the common competition policy, which had for a long time been the exclusive competence of the European Commission (Community method), notably the nature and governance implications of recent developments associated with single market integration, the 5<sup>th</sup> EU enlargement, and the workload backlog of the Commission.

The common competition policy has been subject to various changes against the background of increasing market integration and the expansion of the single market (for instance, the European merger regulation and the liberalisation of network industries, regulated at the national level), most recently by the new institutional framework (EC regulation 1/2003 by the EU Council) which entered into force on the day of the EU's fifth enlargement on 1 May 2004 and which implies the direct and parallel application of EU anti-trust laws by national competition authorities (NCA). These developments in terms of the economic governance of competition policy render it important to analyse the competences of NCAs with respect to the European Commission but also in regard to each other and to sectoral national regulators.

The paper concludes that although the single market and competition policy had looked profoundly Europeanised in the Community sphere, single market integration has not led to parallel centralisation at the Community level but to decentralisation and that challenges as to legal uncertainty and consistency of application remain to be resolved.

**JEL classification:** L41, L42, L97, L98.

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# COMPETITION POLICY AND EU GOVERNANCE

BY

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## 1. Common competition policy and the internal market

European Union competition policy is inseparable from the internal market. The foundations of a common competition policy were laid in the Rome Treaty of 1957, along with European economic integration in the form of a customs union and a common market. The common competition policy, applicable when intra-community trade is affected, aims at promoting competition and guaranteeing a level playing field for economic actors in the internal market. In that it has been important for ensuring the sustained political acceptance not only of the European single market but of the broader European integration project, characterised as it is by the primacy given to economic integration and to policy areas related to economics.<sup>2</sup>

From the outset, the objectives of European economic integration in the European Community (EC) / European Union (EU) can be qualified as rather ambitious. They did not resume to the lowest integration level, a free trade area<sup>3</sup>, as in the case of EFTA (European Free Trade Area), but aimed at a customs union (hence with a common external tariff and commercial policy) and a common market with the free movement of goods, services and production factors (capital and labour). The European Commission was given wide-ranging powers in defending the common market, operating as an

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<sup>2</sup> At the time of the Rome Treaty, economic integration was regarded as a politically acceptable way of increasing integration while creating the basis for later political cooperation (see for instance Sbragia, 2004).

<sup>3</sup> Balassa (1961) distinguishes five (in increasing order) stages of economic integration, ranging from a free trade area, customs union, common market, economic policy harmonisation to complete economic integration. The stated aims of European economic integration goals thus stopped short of economic policy harmonisation and complete economic integration. However, as argued by Pelkmans (1980 and 1984), given the reality of mixed European economies in which state intervention is not limited to border controls and macroeconomic policies and in which the state has a pervasive role of regulator, the implementation of the single market could not be achieved without further integration. Against this background, Tsoukalis argues that it has increasingly become apparent in the case of the EU that the realisation of the common market and a customs union implies total economic integration (Tsoukalis, 1997: 61-2).

independent institution in the area of competition policy, for a long time with exclusive competencies. Its decisions can be challenged in the European Court of Justice (ECJ).

Yet, after almost thirty years of European integration at the time of the White Paper on Completing the Internal Market of 1985, the state of European economic integration had only advanced as far as an incomplete customs union with an internal market in goods (Wallace and Wallace, 2000). The reason was that the abolition of tariff barriers to trade was not sufficient to implement a complete customs union and a common market. Notably, the realisation of a customs union required not only the abolition of intra-EC tariffs and quotas and the implementation of a common external tariff (achieved until 1968), but also the abolition of different national voluntary export restraints<sup>4</sup> (VER) imposed on third countries that segmented national markets and hence impeded price arbitrage. As to the common market, the internal market programme focussed on invisible, non-tariff barriers and within that on the free movement of services and of production factors and to a lesser extent on goods. After the abolition of the visible trade barriers it was different national regulatory frameworks that had come to constitute the most potent barriers to intra-community trade. The abolition and/or harmonisation of these invisible barriers to trade however touched upon the very role of the state in national economies. It was only with the White Paper (containing close to 300 measures)<sup>5</sup> in conjunction with the European Single Act of 1986 (allowing for voting the directives by qualified majority), and after the convergence of views on the economic role of the state and towards liberalisation, that the completion of the single market could finally go ahead.

Product and financial market liberalisation and competition policy are efficiency-enhancing. With trade liberalisation and the creation of a single market the EU embarked on ambitious and wide-ranging policies of market-building nature. The construction of the single market has resulted in wide-spread European regulation (Tsoukalis, 1997). According to Majone (1999), the EU is essentially a regulatory state, regulation being interpreted as addressing market failure with a view to Pareto-efficiency, and competition policy in this context is efficiency-enhancing rather than

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<sup>4</sup> Note that all VERs had to expire until 2000, being against the spirit and the letter of the OMC.

<sup>5</sup> The number of regulations related to the single market has grown significantly thereafter, reaching about 1500 according to Sapir et al. (2004).

redistributive. Competition policy is one of the most important market-building powers that lie with the European Union (Sbragia, 2004).

Hereafter we shall analyse whether and to what extent European economic integration has triggered changes in economic governance in the area of the common competition policy.

## **2. Economic governance of the common competition policy**

The EU's particular characteristics – unlike other international organizations it has political and moreover changing objectives and it is not a federal state either but rather an umbrella organisation that comprises its three pillars – raise the question of governance (defined as established patterns of rule without an overall ruler) in the absence of a government. Governance at the level of the single market, competition and taxation is referred to as micro-governance (Sapir *et al.*, 2004).

In accordance with the theoretical literature on federalism, responsibilities between the EU and Member States should be allocated on the basis of economies of scale, externalities and heterogeneity of preferences: the EU should engage in those policy areas where economies of scale and externalities are large and preferences are rather homogeneous, notably the single market and competition policy (Alesina and Perotti, 2004:32 and 47).<sup>6</sup>

In the European Union governance - the extent to which policies are developed and sustained - is not static. The European Union is a system of governance without a government where most power is transferred to the EU supranational institutions when the Community method is employed. The Community method chiefly focuses on market-building policies (regulation) and is therefore at the centre of the EU policy

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<sup>6</sup> According to Alesina and Perotti (2004), two governance issues, namely overlapping institutions and jurisdictions between the EU and Member States and the clash of different views on government (*dirigiste* versus *laissez-faire*) have created problems for European integration.

process that pursues the objective to make the European economy function as an internal market.<sup>7</sup>

The common competition policy is a case in point of the Community method, characterised by the development of common policies that replace national policies and which are shaped by supranational institutions. The Community method manifests itself in the competition policy arena by turning the European Commission into an independent agency<sup>8</sup>, initially with exclusive competencies, with Treaty-based powers to guarantee a level playing field by preventing cartels and other types of anti-competitive behaviour and by controlling state aids.<sup>9</sup> In terms of governance categories for managing economic policies, Sapir *et al.* argue that (most of) competition policy is managed by delegation to the Commission, while the control of state aids is an example of commitment (by the Member States, controlled by the Commission).<sup>10</sup>

Notwithstanding, Stubbs, Wallace and Peterson (2004:152-3) argue that the EU's need to legitimise itself by delivering outputs of greater good to European citizens (output legitimacy) has led to new debates about governance processes and methods even of those policies that have been sustained at the European level for a long time, such as competition policy where responsibility mainly lies with the Commission and hence the single market looks Europeanized. They put forward that "competition policy is gradually shifting away from an approach centred on supranational governance to a process in which networks of national competition authorities will make more decisions". It is the changes in economic governance in the area of competition policy that will be analysed next.

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<sup>7</sup> Market regulation is an arena easily dominated by technicians and private actors and subject to organised interests of various kinds. The European Parliament (EP) provides an important institutional safeguard, in that most EU market-making legislation is co-decided by the Council and the EP, with the possibility of national parliaments to intervene (see Stubb, Wallace and Peterson, 2004).

<sup>8</sup> While the Commission has the primary responsibility for decisions, EU decisions of a purely administrative nature and that regard the implementation of policies in the area of competition policy, are dealt with by a committee procedure (comitology in EU speak) through which national officials can monitor the execution of EU policies (Stubb, Wallace and Peterson, 2004:142).

<sup>9</sup> Note, however, that there is no single EU policy process, but that at least three different variants of the policy making process may be distinguished (see Stubb, Wallace and Peterson (2004), for a characterisation): apart from the above-mentioned Community method ("neo-functional spill-over"), the coordination method ("networked governance") and the intergovernmental method. Wallace and Wallace (2000) distinguish five types of EU policy processes.

<sup>10</sup> See Sapir *et al.* (2004:76-7) for details on the four different arrangements for managing economic policies that they distinguish in the EU: delegation; commitment; coordination and autonomy.

### 3. Market integration and functional spill-over

The Treaty of Rome laid the legal basis for a common competition policy (articles 81-89, EC Treaty), to be conducted by the Commission. Thus the EU had exclusive competence, that is, the primary legal authority to act, in the case of collusive behaviour (article 81) and the abuse of a dominant position (article 82) by firms and the control of state aids<sup>11</sup> (articles 87-88). Its direct powers with respect to firms were initially limited to *ex post* control of behaviour and did not include *ex ante* control of market structure; *ex ante* control of market structure became an area of Community action only with the European Merger Regulation (regulation 4064/89). The liberalisation of sectors that are subject to monopoly, i.e. network industries and natural monopolies became an area of Community action in the wake of the single market programme. It is based on article 86 of the EC Treaty and on directives and decisions by the Commission.<sup>12</sup>

The case of the European merger control regulation illustrates how single market developments trigger the need for Community-level legislation.<sup>13</sup> At the time of the Rome Treaty, the Commission was not given any direct powers for the *ex ante* control of mergers (although provisions for such powers had been made in the Treaty of Paris that created the European Coal and Steel Community). Member governments and the Commission adopted a generally favourable attitude towards national champions and their creation that would supposedly help European firms to create a large enough dimension to become competitive with respect to US multinationals. Moreover, national anti-merger legislation was largely inexistent.<sup>14</sup> With the introduction of anti-merger

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<sup>11</sup> The Treaty forbids state aids independently of the form they take to the extent that they distort intra-community competition (with derogations for those with positive repercussions for the EU).

<sup>12</sup> Article 86(3) grants the Commission a specific surveillance duty of public undertakings and undertakings to which Member States grant special or exclusive rights and empowers the Commission, should it consider it necessary because Member States maintain in force measures contrary to Treaty rules, to address appropriate directives or decisions to Member States. Since its first decision in 1985, the Commission adopted 15 decisions in most of the areas where Member States granted special and exclusive rights, with the exception of energy and railways where the liberalisation process started more recently (<http://europa.eu.int/comm/competition/liberalization/overview/> of 8 November 2004).

<sup>13</sup> This first part of this section draws on Tsoukalis (1997: 81-92).

<sup>14</sup> This time lag in enacting anti-merger legislation at the Community level can be ascribed to the fact that Member States with anti-merger legislation had not been keen on transferring legal powers to the EC, although by 1989 only Britain, France and Germany had effective instruments for merger control while Ireland and the Netherlands had some legislation. Of the other member countries, those with small, open economies could claim to rely on international trade as a substitute for domestic competition rules, an argument less valid in the case of larger and / or more closed economies such as Italy and Spain.

legislation in West Germany in 1973, and the accession of Britain which had enacted anti-merger legislation in 1965, the Commission decided to initiate proposals for similar legislation at the Community level in 1973. However, anti-merger legislation – the European merger control regulation - was only adopted 16 years later, in 1989, when the internal market programme was being implemented and against the background of rising numbers of intra-community mergers and acquisitions.

The change of attitudes on the part of national governments and firms on EC-level *ex ante* control of mergers can be attributed to the impact of the single market in conjunction with globalisation on the one hand but also the need for (due to rulings by the European Court of Justice (ECJ)) and the capacity to act (due to the gradual convergence of national attitudes towards competition policy) on the other hand. As already noted, in the single European market Community-level legislation became desirable when merger activity began to spill over national boundaries. In addition, decisions by the ECJ (Continental Can in 1973 and Philip Morris-Rothmans in 1987) opened former articles 85 and 86 (now articles 81 and 82, EC Treaty) for an *ex ante* control by the Commission in some narrowly defined cases, thus creating a grey area of legal powers between the national level and the Commission and the desirability of a one-stop-shop to avoid multiple jurisdictions. Furthermore, the negotiation of the European merger regulation proved difficult in practice because of the definition of Commission powers (threshold to activate and demarcation line between EC and national competences) and the criteria to be used for evaluation (complicated by different competition policy traditions and attitudes towards industry policy). In the event the one-stop-shop objective was somewhat weakened by opening the way for joint EC and national decisions in at least some narrowly defined cases and by double control.

In the above case economic integration, fostered by the internal market programme and by other developments in the marketplace and in technology, has led to some functional spill-over and some transfer of powers to the Commission, in particular through the new merger regulation but also through the stricter application of competition rules by the Commission (Tsoukalis, 1997:92). With respect to take-overs, the increase in cross-border merger and acquisition activity in the EU and the importance of financial market integration and performance for competitiveness has resulted, after 14 years, in some



functional spill-over in the form of the European take-over directive, but it is a minimum standards directive that will not result in a uniform set of take-over rules throughout the EU and it is enforced at the national level without transfer of powers to the Commission.<sup>15</sup> Differences in national company law and in industrial traditions (sometimes typified as Rhine capitalism *versus* the Anglo-Saxon model) have led to the definition of minimum standards rather than harmonised rules on take-over bids and substantial opt-outs for Member State level are allowed for. With the transposition process still on-going, it is early to draw final conclusions but the different options taken by Member States so far suggest that the result may well be a tilted playing field between different offerers for the same company. Furthermore, with supervision at the national level, there will be complicated shared supervisory jurisdiction due to which Member State law and take-over rules will be applicable.<sup>16</sup> The fact that the directive contains a provision stating that the Commission must examine the Directive after 7 years and propose revision if necessary points towards some anticipated practical problems with the European take-over directive in the light of the single market objectives.

The liberalisation of sectors subject to monopoly also suggests that market integration does not automatically lead to centralisation in the EU sphere. The implementation of the single market programme triggered directives to liberalise network industries (telecommunications, gas, energy, etc) and raise competitiveness which were not initially contemplated in the White Paper. They did not lead to the transfer of powers to the Community level. Rather, the common legal framework and similar concerns led to the emergence of national regulators that are independent of Member State governments (Sapir *et al.*, 2004).

The issues raised by the involvement of national authorities in EU competition policy will be analysed hereafter. Note furthermore that EU competition law enforcement not only raises issues of governance as to the borderline between Community and national competencies but also, due to its extra-territorial application, possible problems of

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<sup>15</sup> The European take-over directive came into force on 20 May 2004 and must be transposed into national legislation by 20 May 2006. See

[http://europa.eu.int/eur.lex/pri/en/oj/dat/2004/l\\_142/l\\_14220040430en00120023.pdf](http://europa.eu.int/eur.lex/pri/en/oj/dat/2004/l_142/l_14220040430en00120023.pdf)

<sup>16</sup> Compare <http://www.freshfields.com/practice/corporate/publications/pdfs/12218.pdf>

“system friction” between overlapping legislations with third countries (for instance, the EU and the US, as illustrated by the recent Microsoft case).<sup>17</sup>

#### **4. The micro-governance of EU anti-merger and anti-trust policy**

While the Commission has the primary legal authority to act in the EU in terms of the common competition policy and is as well an international actor, and despite the fact that the implementation of the single market led to the functional identification of new legislative needs in the EU sphere, in terms of economic governance this did not result necessarily in more centralisation of competencies in the Commission.

According to Sapir *et al.* (2004:88), the increasing interpenetration of markets raises questions as to the delimitation of competences between the EU and Member States on the one hand and to the extra-territorial competences of different national regulators in the EU on the other hand. Increasing market integration also illustrates that the appropriate level of regulation follows from the degree of market integration. They point out that there is a trade-off in most cases between national institutions’ proximity to the market and the advantages of centralisation at the Community level (limited assignment uncertainty, avoidance of regulatory capture<sup>18</sup>) and that legal uncertainty should be minimised.

##### *4.1 European Merger Control regulation*

The European merger regulation filled a legislative gap on preventive merger control in the face of the large number of cross-border mergers and acquisitions in the 1980s. In terms of governance it resulted in the transfer of more powers to the Commission. However, this new regulative framework triggered similar responses at the national level and to that extent as well opened the possibility for delegation. The Merger Control Regulation allows for delegation of a merger case to a national competition authority (in many Member States only created in the late 1980s and early 1990s)

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<sup>17</sup> Ostry (1990) already called attention to the possibility of system friction.

<sup>18</sup> According to Moravcsik (2002), regulatory policy makers in EU policy making – by being largely isolated from majoritarian democratic contests – are less easily captured by particular, concentrated interests.

should it apply for it. In practice, delegation happened – although the formal conditions for Community-wide relevance were fulfilled - when the merger concerned mainly a Member State, implying the application of national law by the national competition authority.<sup>19</sup> This was rendered possible because of the existence or creation of identical preventive merger control systems in the Member States to control concentrations of national dimensions.

While the application of the competition rules in the Treaty had been the exclusive domain of the Commission, the Merger Control Regulation brought about a first change, allowing for delegation by the Commission of a case to national competition authorities (NCA) even when a case formally falls under Community rules; note, however, that the NCAs then apply national legislation. As already discussed above, the creation of NCAs and the convergence of attitudes and national policies were a precondition for that to happen.

#### *4.2 New Regime for Community Competition Policy (regulation 1/2003)*

The New Regime for Community Competition Policy (or EC Modernisation Package, discussed in detail in Mateus in this volume) establishes a new institutional framework and clarifies Commission actions, in order to avoid an overstretching of the Commission in the light of the growing number of pending cases and against the background of EU enlargement to ten new Member States. Increasing European market integration on the one hand and the limited resources of the Commission on the other hand to safeguard a level playing field thus prompted further developments in terms of governance. Among others, an end was put to the requirement of prior notification of restrictive agreements as well as to the Commission monopoly in the concession of exemptions, by giving parallel competencies to the Commission and to national authorities.

The new decentralised antitrust regime means that EU antitrust law is applied by 26 antitrust agencies in the European Union. Note that the parallel and direct application of articles 81 and 82 EC Treaty in effect imposes the primacy of Community law over

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<sup>19</sup> Sapir et al. 2004 , box 6.2.

national law. To that extent it ensures a more consistent application than directives that need to be transposed into national law. The Commission will be involved in the big cases, leaving the smaller ones to NCAs, although it can take over cases that it views as of particular relevance (precedent-setting, law-making). Enforcement is parallel not only as far as NCAs but as well as national courts are concerned.

The (EC) Regulation 01/2003, applicable since 1 May 2004, effectively decentralises the application of common competition rules through delegation to NCAs at the level of articles 81<sup>20</sup> and 82, EC Treaty, on restrictive agreements and the abuse of a dominant position. NCAs apply them fully (including article 81, section 3 which implies a political evaluation of costs and benefits of the effect of a restriction on efficiency and consumer well-being) in parallel with the Commission. The Commission only retains exclusive control over state aids and Community-wide concentrations (with the possibility to delegate) but comes to share competencies as far as cartels and dominant positions are concerned. The Commission however has the right to call cases to itself (recall the recent merger control case EDP/ENI/GDP, DG COMP M3440, which constituted the central part of Portugal's energy restructuring plan). Moreover, it has seen its investigation and enforcement powers increased.

Sapir *et al.* (2004:87-8) argue that regulation 01/2003 raises serious issues in terms of the governance of European competition policy. In particular, they put forward that there is a conflict under the new regime that will be recurrent, namely between the avoidance of extra-territorial effects of decisions by NCAs on the one hand and the need to avoid multiple procedures on the other. The mechanisms to ensure consistency of decisions across jurisdictions (notably with respect to article 81 section 3), are, apart from cases taken by the Commission, the European Competition Network (ECN)<sup>21</sup> with

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<sup>20</sup> With EC Regulation 1/2003, the requirement of prior notification of restrictive agreements to the Commission was scrapped and the impact on economic balance only subject to an *ex post* analysis by competition authorities, along the lines of US practice. With no direct clearance by the Commission, it becomes the firms' responsibility to conduct a self-assessment (and anti-trust audits) of the impact of their behaviour on the market. Note that the Commission is given more powers and resources to combat cartels (for instance, to raid the homes of executives of firms under suspect).

<sup>21</sup> There are several mechanisms in place to foster the consistency of the application of competition law in the EU: The ECN (see Mateus, 2005) aims to foster the efficient and coherent application of Community law across the EU, consolidate the same competition policy culture and manage the interfaces. The involvement of NCAs in the Consultative Committee on Mergers (regulation 4064/89) allows for the discussion of individual cases and of the adequacy of existing instruments and the necessity to create new

exchange of information and mutual assistance between NCAs and the Commission, and the issuance of Commission notes and opinion letters (not legally binding in general and on courts in particular) on a variety of issues. Mateus (2005) clarifies that national court decisions may not go against the practice of Commission decisions. The creation of the same competition culture in Europe, one of the stated aims of the ECN, seems thus vital. Braz (2005) defends that economic principles on the one hand and actions such as workshops for judges at the national level contribute to the consistency of application in the context of regulation 1/2003.

#### 4.3 Governance issues

Sapir *et al.* (2004) caution that NCAs and courts, in particular as far as article 81, section 3 is concerned, are not acting as agents of the EU but are independent in their decisions, so that their assessment as to the overall benefits might vary across Member States and result in a major challenge to consistency across jurisdictions when cases involve several Member States. Unless the Commission takes those cases which might be difficult in practice, there will be multiple proceedings (with possible different outcomes), given that national constitutional law provides for the delegation to Community institutions but not to other Member State institutions.

The 2004 EU enlargement implied the extension of the reach of EU antitrust law to the 10 accession states in conjunction with the entering in force of the reform of EU antitrust rules. The entering in force of the new decentralised regime in those countries was facilitated by the fact that NCAs were already well established since the new Member States had been required to set up EU compatible antitrust agencies and antitrust rules well before entering the EU.<sup>22</sup> Their NCAs however are confronted with specific practical difficulties of enforcement due to an over-burden of work related to the after-effects of monopolisation under communist regimes, the increase in foreign

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ones. Furthermore, there is an informal working group on Trade and Competition (with a view to the OMC negotiations) and to state aids.

<sup>22</sup> See Riley, 2005. Riley moreover puts forward that many Eastern NCAs are better prepared to apply the new decentralised anti-trust regime than some of the Western NCAs, given that some of them (in particular Hungary, the Czech Republic and Poland) have been applying EU style antitrust law for longer than some of the Western Member States.

direct investment as a consequence of business opportunities and hence increased merger activity, and their involvement in draft legislation assessment.<sup>23</sup>

Both Gonçalves (2005) and Braz (2005) call the attention to the fact that the liberalisation of sectors subject to monopoly in the EU brings with it the danger of overlap within national jurisdictions. A two-folded approach is adopted, that is, the regulation of the underlying infrastructure, overseen by the (national) regulator, and the liberalisation of the services, overseen by the (national) competition authority. Some overlap is possible due to specific knowledge required for creating the adequate competition conditions (sectoral regulator) and for dealing with infringements (competition authority). Braz adds that competition for the market is a solution for situation when competition in the market is constrained.

#### *4.4 Extra-territorial effects on third countries*

As to the danger of increasing system friction as a consequence of the extra-territorial application of EU competition rules, the recent Microsoft case has illustrated that this danger exists with respect to the US. However, bilateral cooperation, the emphasis on anti-trust policy and its economic foundations which brings the EU closer to US practice (see Martin, 2005) and more similar approaches (the EU merger analysis now focuses on a major impact in terms of the reduction of competition, as in the US – see Mateu, 2005) might reduce the potential for system friction between the EU and the US. As far as the European Economic Area (EEA), entered into force in 1994, is concerned and which comprises the EU plus Iceland, Liechtenstein and Norway, the EEA agreement features specific competition provisions (articles 53-64) which mirror those of the EC Treaty. The European Commission and the EFTA Surveillance Authority have joint jurisdiction to apply the agreement (with the division of competencies laid down in articles 57-8 and its protocols) and the Commission having exclusive jurisdiction in the EEA to deal with all concentrations with a Community dimension, as defined in the European Merger Regulation.<sup>24</sup>

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<sup>23</sup> Riley, 2005.

<sup>24</sup>See [http://europa.eu.int/comm/competition/international/bilateral/background/efal\\_en.html](http://europa.eu.int/comm/competition/international/bilateral/background/efal_en.html), of 8 November 2004. Two separate legal systems are thus applied in parallel, with the EEA agreement being applicable whenever trade with one or more EFTA states (except Switzerland) and one or more EU Member States is affected or when trade between EFTA states is affected. Cooperation in competition

## 5. Conclusion

The EU has been acting as a catalyst for economic liberalisation, in line with an international trend, taking advantage of the convergence of national attitudes (homogeneity of preferences) and policies and liberalisation as a smallest common denominator. The result has been market integration in the single market and the question is whether and what kind of impact that had in terms of the micro-governance of competition policy. To the extent that the degree of market integration determines the level of centralisation, and in line with the Community method, market integration should have led to more centralisation at the EU level. However, there has been increasing decentralisation, with the exception of state aids, to the extent that NCAs have come to be involved in European anti-trust and anti-merger policy. This is true for the practice of the EU Merger Regulation and, in particular, for (EC) Regulation 1/2003 of the EU Council on the parallel application of articles 81 and 82 TEC, which establishes a new institutional framework for anti-trust policy.

The problem, not yet solved, is one of legal uncertainty that is not low in the case of the New Regime for Community Competition Policy, given that the problem of consistency of national decisions and/or jurisdictions is not resolved: First, the NCAs do not function as agents of the Commission, so that the Commission's power to impose solutions is limited, although the primacy of EU law applies, with the ECJ as a safeguard. Second, the convergence of policies and the creation of the ECN might not be sufficient to achieve and guarantee consistency, especially since the latter one does not include national courts and given that the extra-territorial effects of national decisions on other Member States are not resolved. The problem is aggravated by the accession last May of ten new Member States with diverging competition cultures and capacities.

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matters between the European Commission and the EFTA Surveillance Authority is governed by protocols 23 and 24. Community law is applicable whenever trade between EU Member States is affected.

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