

Why does the EU need a policy towards competition and industrial affairs? Outline the main features of the EU's policy in these areas and discuss their effectiveness.

Introduction

The European Community was established to facilitate the free movement of goods and people among the Member States. To accommodate this goal, the EC Treaty has as its policy a free and open market. The EU's goals and policies are well enunciated in Article 2 of the EC Treaty and explains why the implementation of industrial and competition policies are necessary.

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”¹

The discussion that follows examines these policies and their relative effectiveness. This concept is founded on the four pillars of freedom enshrined in Article 3 of the EC Treaty and

¹ Treaty Establishing the European Community. Article 2 http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html Viewed November 14, 2007

include an indefinite market with no barriers to trade between the member states or of “the free movement of goods, persons, services and capital.”²

EC Competition Policies

Specific provision is made for the free movement of goods by virtue of Articles 23-31 of the EC Treaty.³ Article 23 provides for the exemption of customs duties on all imports and exports throughout the Member States⁴ and is obviously designed to ensure that goods are traded without unnecessary financial restraints between Member States. The import and export customs’ duties’ exemptions are also designed to encourage trade within the European Community as opposed to outside of it. Article 28 goes on to forbid the implementation of restrictions based on quantitative values in respect of imports “and all measures having equivalent effect ...between Member States.”⁵

Article 29 makes vastly similar provisions in respect of exports.⁶

Article 30, however, provides that the foregoing Articles 28 and 29 will not be interpreted to prohibit or restrict imports and exports for the purpose of safeguarding:

“public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall

² Ibid Article 3

³ Treaty Establishing the European Community. Articles 23-31

⁴ Ibid Article 23

⁵ Ibid Article 28

⁶ Ibid Article 29

not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”⁷

In the case of *Riseria Luigi Geddo v Ente Nazionale Risi* the European Court discussed the application of EU policies on quantitative restrictions. The court held that the European Community’s treaty and conventions place an obligation on Member States to “take all appropriate measures” to adhere to and enforce their respective obligations.⁸ To this end Member States shall not implement measures that could compromise these objectives.⁹

The European Court went on to explain that the prohibition of quantitative restrictions or like restraints is primarily for the purpose of preventing a Member State implementing singular measures that have the consequence of blocking out exports to “third countries”.¹⁰ Such measures will only be permitted if it is specifically provided for by virtue of an EC Regulation or if it is necessary for the facilitation of “the free movement of goods within the community.”¹¹ The European Court also added that the prohibition on quantitative goods would extend to a partial prohibition and that the rule is an absolute one without exception¹²

The EU courts take the position that policies were made to be adhered and in order for them to have their desired impact they must also be capable of enforcement. Christain Jeorges submits that since the European Community is a “technocratic arrangement” designed to regulate

⁷ Treaty Establishing the European Community. Article 30

⁸ *Riseria Luigi Geddo v Ente Nazionale Risi*. [1973] EUECJ R-2/73

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² *Riseria Luigi Geddo v Ente Nazionale Risi*. [1973] EUECJ R-2/73

and control “specific economic and social policy tasks” also reflects the fact that this ideal largely depends on “the circumstances it was designed to address legally.”¹³

Article 81 of the EC Treaty is more direct in its approach to anti-competition practices by prohibiting unfair trade conduct as follows:

“...all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”¹⁴

Fortifying its position against unfair trade practices EU competition policies are further incorporated in Article 82(a) of the EC Treaty which speaks directly to unfair market prices and prohibits such practices as unfair to common market goals. Article 82(a) provides as follows:-

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in :

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions...”¹⁵

The effectiveness of Article 82(a) was successfully tested in the case of *United Brands Co v EC Commission* [1978] ECR 207. In this case the appellant United Brands were accused of

¹³ The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics. European Integration online Papers (EIoP) Vol. 1 (1997) N° 19 <http://eiop.or.at/eiop/texte/1997-019.htm#I>. Viewed November 14, 2007

¹⁴ Treaty Establishing the European Community. Article 81

¹⁵ Ibid Article 82(a)

abusing a dominant market position within the European Community by setting unfair prices and different pricing standards on banana imports. The European Court defined “dominance” as a strong economic position which permits a practice that effectively truncates fair competition in a specific market. Setting unfair prices, although not proven in the *United Brands* case, was determined to amount to abuse within the meaning of Article 82(a).¹⁶

Moreover in the *United Brands* case the court also ruled that refusing to supply goods to a particular distributor within the European Community is also a contravention of Article 82(a). However, the court did concede that in certain limited circumstances that it might be necessary for a party to adapt this course to protect its economic position within the common market and such measures on those grounds will be justified.¹⁷ Moreover, in *Irish Sugar plc v EC Commission* [2000] All ER EC 198 the European Court found that under-pricing was also a contravention of Article 82(a) of the EC Treaty.¹⁸

It was also held in *Kerckhaert and another v Belgische Staat* (Case C-513/04) that it was contrary to the harmonization and fair competition principles enunciated in the convention treaties for Member States to permit what amounts to discriminate and disproportionate taxing systems.¹⁹ The European Court ruled that in keeping with the single market concepts of the European Community tax laws were required to be applied consistently throughout the community. The court went onto state that:

‘any distortion of economic activity resulting from such a choice would result from the fact that different tax systems must, in the present state of

¹⁶ *United Brands Co v EC Commission* [1978] ECR 207

¹⁷ *United Brands Co v EC Commission* [1978] ECR 207

¹⁸ *Irish Sugar plc v EC Commission* [2000] All ER EC 198

¹⁹ *Kerckhaert and another v Belgische Staat* (Case C-513/04)

development of Community law, exist side by side, which may mean disadvantages for economic actors in some cases, and advantages in other cases.²⁰

The European Community also requires that mergers and acquisitions do not function to distort fair competition. These kinds of joint ventures cannot have “community dimensions.”²¹ By virtue of Article 81, even if the proposed merger does not have community dimensions it may still be referred to the European Commission.²² Community dimension are determined by the combined annual income of the entities seeking acquisition or merger. In that combined turnover exceeds a certain threshold the propose merger and/or acquisition it is prohibited by the European Community’s fair trade practices.

The calculation of turnover is provided for in Article 5 of the Council Regulation (EC) No 139/2004 which provides as follows:

“Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover.”²³

By virtue of Article 5 of the EC Regulation No 139/2004, the threshold is not met if the combined global turnover of the undertakings exceeds 2,500 million Euro dollars, or if the

²⁰ Kerckhaert and another v Belgische Staat (Case C-513/04)

²¹ Council Regulation (EC) No 139/2004 Article 1

²² Ibid Article 81

²³ EC Regulation No 139/2004 Article 5

combined turn over in at least three Member States is more than 100 million Euro dollars.²⁴ The EC Regulation has as its aim the facilitation of the single market and free enterprise as envisioned in the Treaty Establishing the European Community and the:

“...objective of instituting a system ensuring that competition in the internal market is not distorted.”²⁵

EC Regulation No 139/2004 prohibits what is termed as a “concentration “ of “market dimensions.” A ‘concentration’ is defined by EC Regulation NO. 139/2004 as a merger of at least two “independent undertakings or the acquisition of an entity that already controls “at least one undertaking”:

“...whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.”²⁶

Obviously the European Commission’s primary concern is the prevention of mergers that are inconsistent with the common market policies and that such mergers to not distort fair competition throughout the Member States..²⁷

For the purpose of ensuring the effectiveness of EU’s anti-fair policies Article 85 of the European Treaty confers wide discretionary powers of investigation on Community officials for the purpose of investigating suspicious anti-competition policies contrary to Articles 81 and 82

²⁴ EC Regulation No 139/2004 Article 5

²⁵ Ibid (1)

²⁶ Ibid Article 3

²⁷ EC Regulation No 139/2004 Article 2.2

of the Treaty. The European Commission is also at liberty to take such steps and measures as it deems fit to circumvent any such practices found upon the conclusion of an investigation.²⁸

In *NV Samenwerkende Elektriciteits-Productiebedrijven v Commission of the European Communities* [1991] ECR II-1497 the European Court held that the role of the European Commission under Article 85 is twofold. One role is to ensure the effective enforcement of anti-competition practices as provided for in Articles 81 and 82. The second role is to ensure that the party suspected of anti-competition practices has an opportunity to respond to the claim and the investigation and to cooperate with any decision made by the Commission.²⁹

More investigative powers are conferred on the European Commission by virtue of Article 11(1) of EC Regulation 17 which grants the EU authority to obtain all “necessary information” necessary for the purpose of conducting an investigation under Article 85.³⁰ By virtue of the ruling in *National Panasonic (UK) Limited v Commission of the European Communities* [1980] ECR 2033 the Commission is at liberty to make the request for relevant documents and records directly from the entity under suspicion. Moreover Article 14 of EC Regulation permits EC officials to conduct onsite investigations.³¹

Industrial Affairs/Free Movement of People

As previously noted Article 3 of the EU Treaty makes provision for the free movement of people as well as goods. Additionally, Regulation 1612/68 - Directive 68/360 Members States

²⁸ EC Treaty Article 85

²⁹ *NV Samenwerkende Elektriciteits-Productiebedrijven v Commission of the European Communities* [1991] ECR II-1497

³⁰ EC Regulation 17 Article 11(1)

³¹ *Ibid* Article 14

are required to permit the free movement of persons among the Member States.³² In the event a citizen of one Member State works in another Member State, he or she is permitted to have family members live with him.³³ The European Court ruled in *Netherlands v. Reed* [1986] ECR 1283 that the right to a “social advantage” within the Regulation was broad enough to encompass other family members including a partner.³⁴

According to the ruling in *Van Duyn* (1974) a Member State can only refuse entry of a citizen from another of the Member States on the same grounds that it will deny entry of its own nationals.³⁵ Since a Member State must permit entry of all of its nationals it cannot legitimately deny entry of a citizen of another Member State. Once a national of one Member State is present in another Member State, he or she is at liberty to remain there for six months while seeking employment.³⁶

Further securing and promoting its policies toward the fostering of fair and open industries the European Union has implemented a number of Employment Directives since 1975. These directives strictly prohibit discriminatory practices on the part of employers with the intent that all persons employed within the European Community are treated fairly and equally with no disparity based on race, gender, color or nationality. Any discrimination in the workplace is unlawful.

In an article written by Andrea C. Loux she discusses the directive and its implications for English Employment Law. Loux maintains that the European Courts have consistently found

³² Regulation 1612/68-Directive 68/360

³³ Ibid

³⁴ *Netherlands v. Reed* [1986] ECR 1283

³⁵ *Van Duyn* (1974) <http://www.ena.lu/europe/european-union/judgment-court-justice-van-duyn-case-1974.htm>
Viewed November 14 2007

³⁶ *R v Immigration Appeal Tribunal ex parte Antonissen* [1991] ECR 1145

that the Equal Treatment directive is desirous of cementing the equal treatment of all employees without reference to their gender or sexual orientation. An employee's characterization should only be determined by his or her actual abilities.³⁷ The general concept is no different from the competition policies in principle. Persons in the trade industry are to be afforded fair treatment and opportunities in much the same manner as goods.

Conclusion

The single most important goal of the European Union is the creation of a single market. In order to achieve this aim the EU Competition and Industrial laws are based on a policy of fairness and transparency. Moreover, these policies as encapsulated in the European Conventions, Treaties, Regulations and Directives are framed to ensure consistency in respect of the fair and free movement of goods and persons within the European Community. This objective not only takes into consideration actual transactions but also potential business transactions.

Uniformity is the key to enforcement of these goals and policies. By implementing and enacting Treaties, Conventions, Directives and Regulations that are equally binding on each Member State, the European Union has assured itself not only of predictability, but of consistency and enforceability. Comity of nations is what makes this consistency and enforceability possible. The European Union has placed upon each Member State the obligation to regard European Law as the Supreme Law. In the event a provision in domestic law is inconsistent with a European instrument, the latter will prevail. This supremacy is what binds

³⁷ Loux, Andrea C *Is He Our Sister? Sex, Gender, and Transsexuals Under European Law* Web Journal of Current Legal Issues <http://www.workplacebullying.co.uk/sister.html> Viewed November 14, 2007

the Member States to a common interest for the effective pursuit of the Community's policies in respect of competition and industrial affairs.

Works Cited

EC Regulation No 139/2004 Article 5

EC Regulation 17

Kerckhaert and another v Belgische Staat (Case C-513/04)

Loux, Andrea C *Is He Our Sister? Sex, Gender, and Transsexuals Under European Law* Web Journal of Current Legal Issues <http://www.workplacebullying.co.uk/sister.html> Viewed November 14, 2007

Netherlands v. Reed [1986] ECR 1283

NV Samenwerkende Elektriciteits-Productiebedrijven v Commission of the European Communities [1991] ECR II-1497

Irish Sugar plc v EC Commission [2000] All ER EC 198

National Panasonic (UK) Limited v Commission of the European Communities [1980] ECR 2033

Riseria Luigi Geddo v Ente Nazionale Risi. [1973] EUECJ R-2/73

R v Immigration Appeal Tribunal ex parte Antonissen [1991] ECR 1145

The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics. European Integration online Papers (EIoP) Vol. 1 (1997) N° 19 <http://eiop.or.at/eiop/texte/1997-019.htm#I>. Viewed November 14, 2007

Treaty Establishing the European Community. Article 2 http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html Viewed November 14, 2007

United Brands Co v EC Commission [1978] ECR 207

Van Duyn (1974) <http://www.ena.lu/europe/european-union/judgment-court-justice-van-duyn-case-1974.htm> Viewed November 14 2007