

Competition Law in Times of Crisis

Competition Law in Times of Crisis:

*Case Studies of the Airline Sector
and the Irish Beef Industry*

By

Conor Talbot

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For Constanze.

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CHAPTER ONE

INTRODUCTION

Competition policy is a flexible part of the European Union's regulatory armoury but it is often misunderstood by the general public: a mainstay of the economic order, it has also been used towards social, industrial and political ends over the years. There is therefore a tendency for these disparate goals to clash at crucial times for the European economy, so this book asks the question of how such clashes come about, and how they are dealt with when they arise. The objective of this book is thus to examine the role and utility of competition policy as a forum for modern Europe's legislative and regulatory dialogue, using its response to crisis conditions in the European passenger airline sector and the Irish beef processing industry as litmus tests of its true aims and abilities.

In order to do so, the analysis in this book follows the certain themes explored in the individual chapters, namely: (i) the role of the general economic context in the application of competition law, (ii) the existence of identifiable baselines applicable in crisis conditions, (iii) the role of National Competition Authorities (NCAs) in applying competition law, and (iv) the ways in which the Commission's overarching policy goals can influence the application of competition law. This chapter introduces these themes in turn and outlines the issues arising under each heading.

1. Role of the General Economic Context

As regards the role of the general economic context in the application of competition law, the first task undertaken is to attempt to ascertain the individual goals pursued by the European competition policy-makers, in as much as they can be distinguished from one another. Alongside the courts, much of today's competition policy is written from a rhetorical standpoint in policy statements and reports by the European Commission and certain more active NCAs, so the analysis will begin by charting the evolution of its goals as set down in official sources, before moving on to studying the

practical impacts of the cumulative decisions at the European level on some of the region's most important industries.

The aim of Chapter 3 of this book is to explore the constantly evolving objectives and practices of competition law and policy in the European Union in the hope of demonstrating how, and to what extent, competition rules interact with or learn from general economic conditions. The focus on crises is intended to help pin-point areas where the goals of the Union visibly conflict in order to analyse the methods used to manage such a situation. Behind this approach is the conviction that it is only when forced to make a potentially painful decision between, for example, its rhetorical goals and a more politically amenable course of action, do the decision-makers' true colours shine through.

The incremental development of competition law comes about through policy making and the decisional practice of the EU Commission and Courts. Policy making in competition law is generally studied as a process that occurs through the medium of official public documents charting a dialogue between the main institutional actors of the EU.¹ Significant insight can be taken from the recorded exchanges between the Council, Commission, Parliament and Courts of the European Union; and the first section of this book draws heavily on such documents, as well as the reception they receive from the academic and general populations. However, such analysis is necessarily limited by being largely restricted to the publicised legal acts of the official institutions and thereby incapable of considering the contributions of other stakeholders – such as market

¹ See e.g. on the institutions of European competition governance and the official dialogue between them, Michelle Cini & Lee McGowan, *Competition Policy in the European Union* (New York: Palgrave Macmillan 2008), chapter 3; on the CJEU's role in developing competition policy across the EU through the preliminary reference procedure, see Barry J. Rodger & Manuel Alba Fernández, *Article 234 and Competition Law: An Analysis* (Alphen aan den Rijn, the Netherlands: Kluwer Law International 2008); on EU merger control based on Commission documents, see Morten P. Broberg, *The European Commission's Jurisdiction to Scrutinise Mergers*, (Alphen aan den Rijn, the Netherlands: Kluwer Law International 2006); on State aid and regional policy based on Commission official interventions and public rhetoric, see Fiona Wishlade, *Regional State Aid and Competition Policy* (Alphen aan den Rijn, the Netherlands: Kluwer Law International 2003); on competition policy in an international context by focussing on soft law instruments, Marco Botta, "Competition Policy: the EU and Global Networks", in Gerda Falkner & Patrick Müller (eds), *EU Policies in a Global Perspective: Shaping Or Taking International Regimes?* (London: Routledge 2013).

participants, labour unions, trade associations and consumer representatives – who, despite advances in the transparency of decision-making processes, remain on the fringes of the debates.

In order to also capture the influence of such actors and the economic context on the decisions made, especially in controversial circumstances with the fate of entire industries on the line, it is proposed to conduct detailed case-studies of two important and embedded industries – one at a domestic level and one at a European level. The sectors chosen are the beef processing sector in Ireland and the European passenger airline industry. Both sectors have suffered severe crises in recent years and, due to strategies pursued by the market participants, they have both been the subject of attention of competition law authorities. Both case studies follow a similar pattern beginning with an introduction to the structure of the industry, an historical overview of the issues arising, and an outline of the approach of competition authorities to the sector. In the case of the airline industry, further insight on the influence of the general economic context on the application of competition law to the sector was obtained from questionnaires and interviews with lawyers who acted for some of the major airlines in their dealings with competition authorities; meanwhile, for the Irish beef industry, access to previously unpublished documents provides insight into the dynamic between the market players and government authorities in the formulation of a restructuring plan that was specifically tailored to meet the economic context of the day.

As part of this assessment of the implementation of the EU's competition rules, it becomes necessary to question the appropriateness of the use to which competition policy has been put, and whether better and more legitimate options could or should have been availed of by the Commission and the EU in general. This book will examine this point in the context of the European airline industry and the Irish beef processing industry, both of which have been heavily influenced by how competition law has interacted with the other political and legal elements at play in that sector. It will be queried whether competition law in the EU has indeed been applied in a normal and predictable manner in that sector, or whether the Commission and Courts – in an attempt to adapt competition law to the specificities of the industry – have ended up compromising the underlying principles of competition law and, therefore, some of the core goals of the European Union in general.

2. Existence of Identifiable Baselines

In this book, it is also explored whether EU competition policy is sufficiently robust and predictable to allow it to provide a comprehensive response to the challenges brought by economic crises. In the course of this discussion, the focus tends to revert to the role of the European Commission because, within the EU, the development and enforcement of competition law, and therefore of the development of the competition law enforcement tools and techniques, is largely entrusted to the Commission.² For instance, in recognition of its role as the dominant driving force behind competition law and regulation, the Commission acknowledged that it had a responsibility to ensure an “effective and coherent public response to the [2007-2009 financial] crisis while at the same time minimizing the risks of distortions of competition”.³ In order to underpin the analysis and empirical research undertaken later in the study, Chapter 3 examines not only the changing goals and baselines of competition law and competition enforcement by the Commission, but also examines the factors that can cause a shift in objectives and the processes required for such changes to come about.

As is to be expected in a contentious area where decisions can have ripple effects on governments, firms and consumers in Europe and beyond, these changes in tack have been the source of considerable debate in academic, industrial and professional circles. Thus, we have a plethora of material from which to judge the acceptance of any such changes by the parties affected by them – and who most likely played an important role in pushing the changes through in the first place. Conducting an ex post study is one way to measure the effectiveness of the implementation of a rule change, but there is a trade-off between the degree of aggregation of subject

² See, e.g., on how the European Courts “take into account” competition law notices and guidelines issued by the European Commission, Oana Andreea Stefan, “European Competition Soft Law in European Courts: A Matter of Hard Principles?,” *European Law Journal* 14, no 6 (2008): 753-772; on the Commission’s historical practice of “regulation by publication”, see Francis Snyder, “Soft Law and Institutional Practice in the European Community,” *EUI Working Papers* 95, no 3 (1993); on the Commission’s use of soft law instruments in State aid, see Michelle Cini, “From Soft Law to Hard Law?: Discretion and Rulemaking in the Commission’s State Aid Regime,” *EUI Working Papers* 35 (2000).

³ European Commission, “Note to OECD Roundtable 3 on Real Economy: The Challenges for Competition Policy in Periods of Retrenchment,” DAF/COMP/WD(2009)12/ADD2.

matters and the clarity of the insights obtained.⁴ Hence, the case studies approach adopted here focusses on two individual industries where the relevant competition authorities has had to balance numerous political, economic and industrial factors in deciding upon and enacting a competition policy. While the decisions and approaches identified in the case studies are, to some extent, sector-specific, more general findings are presented using the themes outlined above. Therefore, in terms of the themes which shape the analysis presented within the book, some lessons and insights can be found which go beyond the sectors examined in the case studies.

3. Role of National Competition Authorities alongside Market Participants, the Commission & Courts

Another element under consideration here is the influence of the shifting balances of power between the relevant actors and how their concerns have shaped the content, interpretation and application of the rules. These different socioeconomic forces and their fluctuating relationships play a special role in the context of competition policy and particular consideration must be given to those who are directly subject to the rules in practice, most notably what are termed “capital actors” in political science literature, i.e. those who represent corporate viewpoints and seek political alignment with regulators.⁵

The other most important players as regards competition rules have traditionally been the Member States, both individually and as represented by the Council, and the Commission. However, there is an ever-increasing emphasis on taking into account the views of previously marginal parties: national competition agencies, consumer groups as well as independent experts from the practice and academic worlds. Each of these parties has their own interpretation of the role competition should play in the European

⁴ Fabienne Ilzkovitz and Adriaan Dierx, “Ex-post economic evaluation of competition policy enforcement: A review of the literature,” DG Competition (June 2015) available at:

http://ec.europa.eu/competition/publications/reports/expost_evaluation_competition_policy_en.pdf (last accessed 15 June 2018).

⁵ R. S. Chari and S. Kritzinger, *Understanding EU Policy Making* (Chicago: Pluto Press 2006), at 54-6. On the influence of transnational capital actors over national economic policies generally, see Rodney Bruce Hall and Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance* (Cambridge: CUP 2002).

economy and society and their interests which translate into a multitude of objectives when it comes to setting and applying competition rules.

Understanding their viewpoints and desired outcomes will help put the stated policy objectives of this area of law into context, and an analysis of the changes in strength of their respective bargaining powers over time provides an insight into the thinking behind the rules eventually agreed upon. As one of its key exclusive competences, it could be said that the Commission needs to ensure the continuing legitimacy of the doctrine by responding to market developments, broader policy aims and perceived political preferences of other actors, most importantly member governments.⁶ The working hypothesis in this regard is that it is the Commission's voice which has tended to dominate proceedings here.⁷ In particular, we shall see in the case studies that there is a clear perception of a division of competences between the Commission and the NCAs, with the Commission's leadership role emerging as very pronounced.

In the background, however, it is worth noting that nearly all Member State NCAs have the possibility to accept commitments analogous to those negotiated by the Commission under Article 9 of Regulation 1/2003.⁸ The procedural context of commitment decisions varies from one Member State to another, but the general proliferation of commitment decisions at the national level could lead to policy-driven NCAs using such procedures enter into negotiations with firm in which firms are in an unenviable bargaining position.⁹ Given the emphasis that has been placed on the coordination

⁶ Pinar Akman and Hussein Kassim, "Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy," *Journal of Common Market Studies* 48, no 1 (2010): 111, at 119-120.

⁷ For an alternative view of the 'power politics' interpretation of the struggle for control between the European Commission and the member states, see: H. Kassim and K. Wright, "Bringing regulatory processes back in: The reform of EU antitrust and Merger Control," *West European Politics* 32, no 4 (2009): 738-755.

⁸ See further, Frederic Jenny, "Worst Decision of the EU Court of Justice: the Alrosa Judgment in Context and the Future of Commitment Decisions," *Fordham International Law Journal* 38 (2015): 701, available at: <https://ir.lawnet.fordham.edu/ilj/vol38/iss3/2> (last accessed 15 June 2018).

⁹ On the independence of competition authorities generally, see: William Kovacic, "Competition Agencies, Independence, and the Political Process," available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CO MP/WD\(2014\)86&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CO MP/WD(2014)86&doclanguage=en) (last accessed 15 June 2018); Fabrizio Gilardi, "The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors," *Swiss Political Science Review* 11, no 4 (2005): 139-167, available at:

between the Commission and NCAs in official for a such as the European Competition Network (ECN),¹⁰ the case studies provided here present interesting insight into the other means at the Commission's disposal for providing guidance on the direction and enforcement of competition law at Member State level as well as at European level.

Although the procedures and channels exist for non-governmental and civil society bodies to have input into the development and enforcement of competition law, the case studies devote a certain amount of attention to focusing on the views of the firms to which competition rules have been applied in the first instance. The views of other interested parties certainly play some role in the law making and enforcement policies pursued by the Commission and NCAs, but the tactics and strategies adopted by the firms involved contribute an added dimension which can be studied as part of their reaction to competition law. The incentives driving firms are usually easier to ascertain as well, meaning that there are fewer variables to consider when looking at their actions. Similarly, the public pronouncements of firms are usually followed by a strategic investment, or lack thereof, which allows us to assign a weight to the viewpoint taken by the firm. Lastly, from a practical point of view, the firms most directly involved were the most interested in participating in the empirical section of this book so the quality and quantity of the data far outstripped that which would have been forthcoming from an examination of trade unions or consumer bodies, for instance.

4. Influence of the Commission's Overarching Policy Goals

Important for this project is to consider European antitrust rules in their own context: not only of a centrally decided competition policy, but also that of an over-arching plan for the economic, social, environmental and cultural future of the continent. This requires, in turn, a discussion of the provenance of some of the most common justifications of competition policy, such as economic freedom and integration, as well as the newer concerns that appear to be behind the European Courts' and the

<http://fabriziogilardi.org/resources/papers/Gilardi-SPSR-2005.pdf> (last accessed 15 June 2018).

¹⁰ See also, Mattia Guidi, *Explaining and Assessing Independence: National competition authorities in the EU member states* (European University Institute PhD Thesis 2012), available at:

http://cadmus.eui.eu/bitstream/handle/1814/22688/2012_guidi_authorversion.pdf?sequence=1, (last accessed 15 June 2018).

Commission's thinking – namely consumer welfare, global competitiveness and some non-economic goals like social cohesion, cultural diversity and environmental issues. In this vein, the analysis in this book is heavily influenced by the historical and theoretical background to the development of the competition rules as we know them today. While there has been a sense of continuity in the language and terminology of the official policy pronouncements and judgments, this belies some considerable fluctuations and realignments that become clearer when the individual goals are teased out.

In order to derive the maximum potential value from the historical and theoretical analysis carried out in the opening chapter, the study will move on to examining the application of competition policy and the practices of the private actors concerned in two controversial industries. The choice of which industries to study was made in an attempt to find areas where the diverse goals of European competition policy and general economic policy clash. When forced to make decisions that have political, economic and social consequences the Commission is aware that its activities are under public scrutiny, so such situations provide good insight into the robustness of the rules themselves as well as the ability of the Commission to withstand pressure from national, regional, industrial and populist groups.

The Commission, as the guardian of the Treaty, “has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency”.¹¹ Part of the thinking behind Regulation 1/2003 was to transform the existing star-like system under Regulation 17/62 into “two-way streets” whereby Member State authorities were in a position to inform the Commission about their cases and seek feedback draft decisions.¹²

¹¹ Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Point 9, available at: http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (last accessed 24 June 2018). See generally, Eleanor Fox and Michael Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: OUP 2012).

¹² Philip Lowe, “Implications of the Recent Reforms in the Antitrust Enforcement in Europe for National Competition Authorities,” (presentation, Italian Competition/Consumers Day, Rome, 9 December 2003), available at: http://ec.europa.eu/competition/speeches/text/sp2003_067_en.pdf (last accessed 15 June 2018). On the significance of the prior procedural framework for the enforcement of competition policy from a practitioner's perspective, see Frank Montag, “The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View”, *Fordham International Law Journal* 22, no 3 (1998): 819.

Notwithstanding its duty to fulfil its responsibilities with regard for the co-operative nature of the ECN, the framework of Regulation 1/2003 appears to have resulted in a situation where the Commission is empowered to act as *primus inter pares*.¹³

The aim behind using the case study approach is to bring an understanding of how and whether the Commission's position of primacy allows or tempts it to apply competition rules in such a way as to pursue a predetermined policy objective. By adding accounts of actual experiences to what is already known through previous research, the case studies presented provide detailed contextual analysis of two particular examples where policy considerations appear to have played a role. As a research method, the empirical inquiry is designed to investigate the application of competition law and policy within a real-life context; when the boundaries between competition policy and other policy imperatives that form the context are not clearly evident.¹⁴

5. Case Studies

A) Passenger Airline Sector

The passenger airline industry has been one of the single most influential elements in the process of European integration and globalisation generally, but its development from a largely state-controlled sector to a privatised and increasingly global industry continues to fascinate and frustrate in equal measures. The structure of the airline industry in the past was characterised by a number of national flag carriers, extensively protected by their governments, operating international networks without necessarily having a sufficient domestic market to do so profitably. A trend of regional liberalisation saw the adoption of the EU Common Aviation Policy in 1987 which opened market access and relaxed price controls to encourage start-

¹³ Pieter van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context* (Leiden, Netherlands: Brill 2014); Mary Catherine Lucey, "Unforeseen Unintended Consequences of Article 3 of EU Regulation 1/2003," *European Competition Law Review*, 27, no 10 (2006): 558-563.

¹⁴ For an alternative approach in the form of an empirical study of 75 domestic merger regimes designed to find whether and how states incorporate policy criteria and the socio-economic factors that influence how this is done, see David Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights," *Centre for Competition Policy Working Paper* 16, no 3 (2016).

ups to challenge the hegemony of the old flag carriers.¹⁵ This has led to a situation where there is intense competition and rivalry between airlines serving short-haul routes within geographic regions. The international long-haul routes are seen as a different market because of the resources and expertise required to operate them. They have tended to be dominated by a small number of large airlines who have traditionally been largely protected from the perils of open market competition.

Mergers and alliances also play an important role in this market because, as competition opens up, industry consolidation is necessary in order to create a smaller number of strong international airlines. Over the past number of years the European Commission has exerted more and more influence over the development of the regional and global airline industry, and Chapters 4 and 5 reflect the emergence of an apparent overarching aim on the part of the Commission to create a market with a handful of ultra-competitive airlines with international reach serviced by an array of smaller feeder airlines on a regional basis.

While the airline industry continues to be subject to standard competition rules in general, the Commission has arguably developed some innovative approaches in applying its rules to the dynamics of the airline market in light of the significant political and economic arguments in favour of increased consolidation in the sector.¹⁶ In this regard former Commissioner Neelie Kroes¹⁷ was consistent in deeming it essential that the economic benefits of any policy are passed on to passengers, and in recent years the Commission has shown itself to be particularly assertive in intervening to impose specifically tailored rigorous conditions on the parties to various types of transactions within the sector.

The airline sector is also interesting in that it presents certain characteristics of a network industry. Network industries require a complex system of governance involving regulators operating at various levels,

¹⁵ D Mernagh and B Quain, “The Changing Nature of the Airline Industry”, *Foresight Business Journal* 6 (2003).

¹⁶ Trevor Soames, Geert Goeteyn, Peter D. Camesasca, and Kristian Hugmark, “EC Competition Law and Aviation: Cautious Optimism Spreading its Wings”, *European Competition Law Review* 27, no 11 (2006): 599-615.

¹⁷ Neelie Kroes, “Competition in the aviation sector: the European Commission’s approach”, (speech, Leiden University, Leiden, 24 April 2006) available at: http://europa.eu/rapid/press-release_SPEECH-06-247_en.htm?locale=en (last accessed 24 June 2018).

themselves networked at European and sometimes global levels.¹⁸ Therefore, studying the relationship between the different regulators that oversee the airline sector also provides ample opportunity to investigate the application of competition policy in an area where there are as many conflicting goals as interested parties: individual Member States often attempting subtly to support their declining flag-carriers, consumer organisations trying to secure cheap and efficient air travel, and the Commission and other regulators with various policy aims. This is the case in many network industries and fields of EU activity, and other academics have examined this inter-relationship question from the perspective of what tasks EU legislation can require such agencies to perform.¹⁹ The role of EU competition policy in the context of network industries was initially that of a crowbar as part of a push towards liberalisation while latterly it has come to be focused on the pursuit of competitive network markets on a case-by-case basis.²⁰ In particular, it becomes clear from the analysis of the airline sector that once the market conditions are such that competition policy has to work hand-in-glove with other types of regulation, regulators find it more difficult to make markets competitive.

¹⁸ Jacques Pelkmans and Giacomo Luchetta, “Enjoying A Single Market For Network Industries?,” *Notre Europe – Jacques Delors Institute* (February 2013) available at:

<http://www.institutdelors.eu/media/singlemarketnetworkindustries-pelkmansluchetta-ne-jdi-feb13.pdf?pdf=ok> (last accessed 24 June 2018).

¹⁹ See, e.g. the “Meroni doctrine” whereby the ECJ prohibited the delegation of powers by an EU institution where that delegation involves “a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy, Case 9/56, *Meroni v. High Authority* [1957 & 1958] ECR 133. For commentary, see S. Griller and A. Oratorn, “Everything under control? The ‘way forward’ for European agencies in the footsteps of the Meroni doctrine”, *European Law Review* 35, no 1 (2010): 5; E. Chiti, “An important part of the EU’s institutional machinery: features, problems and perspective of European Agencies”, *Common Market Law Review* 46 (2009): 1395-1442; and M. Chamon, “EU, Agencies between Meroni and Romano or the devil and the deep blue sea”, *Common Market Law Review* 47, (2011): 1065-1075.

²⁰ See, e.g., Commission Vestager, “Competition in telecom markets”, (speech, 42nd Annual Conference on International Antitrust Law and Policy Fordham University, 2 October 2015), available at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en (last accessed 24 June 2018).

B) Irish Beef

The Irish Competition Authority's long-running case against the Beef Industry Development Society (BIDS) concluded in 2011 with a clear message that any plan to restructure an industry by agreement between competitors is likely to restrict competition and therefore breach national and European competition law. This case is interesting because of the high level of government involvement, in the sense that the Irish Government, through the Ministry for Agriculture and Food, was a strong and active supporter of the BIDS scheme. Interestingly, the strategic thinking behind the BIDS scheme came from the highest levels of the Irish Government, and the economic context appears to have exerted considerably more pressure on the Government and the national court than on the competition authorities involved.²¹

The Irish Beef chapter examines the developments that set the scene for the case study by describing the background to the measures proposed in the beef processing sector around the turn of the century. It then sets out the rules which the actors in the beef sector would appear to have deemed to be applicable to them. As we shall see, this particular area of the law had been characterised by a certain amount of flexibility being afforded to actors in previous economic crises encountered by various industries in the EU. However, as Chapter 6 examines, this sense of flexibility gradually dissipated and the final pronouncements on the beef industry litigation and subsequent clarifications are such that a predictable baseline approach is now arguably in place.

While it showed commendable determination to pursue its case, especially following the glowing terms with which the BIDS restructuring scheme was received in the domestic court of first instance, the chapter questions the role – or lack thereof – played by the Irish NCA in the period leading up to the establishment of BIDS in the first place.²² As regards the evolution of the ability of parties to identify where the baseline for

²¹ On the level independence enjoyed by the Irish NCA relative to the independence of other EU Member State NCAs, see Mattia Guidi, “Delegation and varieties of capitalism: Explaining the independence of national competition agencies in the European Union”, *Comparative European Politics* 12 (2014): 343–365, at 347 where Ireland ranks as the 13th most independent of the 27 NCAs studied.

²² On recent reforms to the Irish NCA, see: Mary Catherine Lucey, “The New Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?”, *Journal of European Competition Law & Practice* 6, no 3 (2015): 185.

permissible conduct lies, Irish Beef represents an important point. Some interesting developments since then are also mentioned, specifically dealing with how the CJEU has distanced itself from the Commission's interpretation of the role of a contextual assessment under Article 101(1).

It is clear from the vigorous application of the competition rules in *Irish Beef* that times of economic recession or declining demand do not grant immunity from the application of competition law.²³ In terms of identifying a baseline for commercial undertakings to understand the practical application of the competition rules, this case shows that national competition agencies are not in a position – especially given the oversight of the European Commission – to follow a flexible approach even in state-endorsed schemes. The *Irish Beef* case also confirms that even extensive government involvement does not legitimise the approach taken to restructuring not does it any way preclude the application of the object restriction contained in Article 101(1) or even significantly influence the interpretation of Article 101(3).

6. Overall Objectives of the Book

Overall, as described above, the objective of this book is to examine the role and utility of competition policy within modern Europe's legislative and regulatory dialogue. The different goals pursued, and capable of being pursued, by competition law has been the subject of many fine academic contributions surveyed in Chapter 3. However, as competition law and policy evolves, so do its goals. This book will assess some of the objectives which previously have been recognised as driving competition law in Europe by the Commission, the Luxembourg courts and some important commentators. In light of this discussion of the goals of competition law in the EU over the years, there will be an attempt to analyse how competition law has been applied in practice to two strategic industries.

Feeding into this discussion is an exploration of the relationship between different enforcement agencies, especially when it comes to deciding how best to deal with aggressive or defensive consolidation or cooperation during a period of crisis in a given industry. This question is all the more interesting because there is a certain degree of tension in the background: a tension which emerges, for example, in the submissions to an OECD

²³ Andreas Stephan, "Will the Recession Make Cartels More Likely and Cartel Enforcement More Difficult?", *CCP Newsletter* 19, (2009): 5.

Roundtable on the issue in the airline sector in particular,²⁴ stemming perhaps from the different strategies being pursued by the favoured national players of the States in question. As the integrated economy sees more and more deals take on a global significance, the need for cooperation between policy enforcers becomes more acute and the studies undertaken indicate that market participants will not hesitate to tailor their arrangements to find the most sympathetic institutional audience. By focussing on the effects of competition rules on different arrangements from an industry point of view, this research aims to be of interest not only to industry players but also to government officers, competition authorities and academics involved in the drafting or enforcing of competition rules.

From a methodological point of view, as set out in more detail in the next chapter, this approach allows us to study the relevant competition rules themselves, to gauge the reaction of the interested parties to the policymakers' initiatives and also to get an insight into the effectiveness of the rules on the ground. By building on an examination of the aims, methods and outcomes of competition policy, the book aims to contribute to the understanding of the hierarchy of the EU's economic and social norms. The next chapter introduces the approach taken in the rest of the work, and highlights the value of focussing on specific crises and individual industries as analytical tools capable of granting fresh insight into the field of competition law today.

²⁴ OECD Policy Roundtables, "Airline Mergers and Alliances (1999)", available at: <http://www.oecd.org/dataoecd/1/15/2379233.pdf> (last accessed 24 June 2018).

CHAPTER TWO

METHODOLOGY: CASE STUDIES AND RESEARCH THEMES

1. Using Case Studies to Explore the Research Questions

The analysis in the case studies of this book explores the following questions in order to pursue the overall research question of asking what is the role and utility of competition law during times of economic distress: (i) what is the role played by the general economic context in the application of competition law, (ii) are guiding baselines identifiable in crisis conditions, (iii) whether and how the role of National Competition Authorities (NCAs) in applying competition law changes depending on the sector and the economic context, and (iv) do the Commission's overarching policy goals influence the application of competition law.

The decision to take an empirical approach to this research project stems from a conviction that an investigation into the real world situations faced by firms and consumers should underpin the evaluation of the applicable legal rules. For the purposes of this work, the type of empirical research attempted involves “the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have”.¹ Rather than completely focussing on the postulations of academics and the rhetoric of governing authorities, this work is designed in light of the vital importance of the effectiveness of any given element of law – and one way of measuring this is to examine how the parties concerned respond to various legal rules and standards.² Overall, thus, this style of approach was

¹ John Baldwin and Gwynn Davis, “Empirical Research in Law”, in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies* (Oxford: OUP 2003), 880-881.

² Thomas S. Ulen, “A Nobel Prize In Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law”, *University of Illinois Law Review* 4 (2002), available at http://papers.ssrn.com/pape.tar?abstract_id=419823 (last accessed 24 June 2018).

chosen due to its potential to shed light on the inner workings of the system of competition law rules, to reveal their shortcomings and successes, and to highlight some unintended consequences of the law or ways in which the legal processes are affected by external factors such as the economic climate or by other social pressures.³

Due to the array of dynamics and counter-veiling factors at play in the two industries selected for closer examination here, a socio-legal method will be followed in order to encompass a wide range of theoretical perspectives. The choice of socio-legal methodology embraces the discipline of competition law as a social institution, and aims to shed more light on the effect of law, the law- and decision-making processes, as well as the institutions behind them. This path was also chosen in order to reflect the influence of social, political and economic factors on competition law and institutions. Furthermore, the qualitative research undertaken as part of this examination forms part of an inductive approach to the relationship between competition, economic theory and the real world conditions faced by the market players. One interesting work which inspired the research undertaken in this book looked at the effect that announcements of strategic partnerships had on the stock price of the airlines involved and found that shareholders reacted much more strongly to deals that increased cooperation in key areas rather than pure equity arrangements.⁴ From this we can see that investors are very interested in the potential practical efficiencies to be gained from alignment with former rivals, and in light of the clear competition-related problems such moves cause to arise, this serves as an interesting starting point for the analysis of the dynamics at play in the firms' decision-making processes.

A) Using Empirics in Competition Law Research

Part of this book is based on empirical research – that is, research that aims to learn about the world using quantitative data or qualitative information.⁵ The choice of an empirical methodology to undertake part of

³ Julius G. Getman, “Contributions of Empirical Data to Legal Research”, *Journal of Legal Education* 35 (1985): 485.

⁴ T.H. Oum, J.H. Park and A. Zhang, *Globalization and Strategic Alliances: The Case of the Airline Industry* (New York: Pergamon 2000).

⁵ See, for example, Michael Heise, “The Importance of Being Empirical”, *Pepperdine Law Review* 26, (1999): 807; Craig A. Nard, “Empirical Legal Scholarship: Reestablishing a Dialogue between the Academy and the Profession”, *Wake Forest Law Review* 30, (1995): 347, at 349: “[Empirical] scholarship [is] based on a detailed

the research in this book was made in order to ensure that this work challenges some of the major implicit beliefs and assumptions present in modern day competition law scholarship and to avoid that the analysis would overly rely on the traditional—official—sources. The need for a balance between the use of empirical and theoretical studies to inform legal analyses is supported by Roger Brownsword, who maintains that any “theoretical work without any empirical content is hollow and that empirical work without supporting theory is shallow”.⁶ Thus, this work aims to look beyond the legislation, precedents and official statements to consider real-world instances of the law’s impact on firms and their corporate strategies, especially for obtaining growth. One of the key advantages of empirical studies identified by Brownsword is the potential for highlighting situations where the law-in-action deviates from the law-in-the-books. For example, these “gaps” can be found to exist due to the particular enforcement practices of regulators or, as Ellickson’s famous investigation into Californian ranchers found, the law being under-used by the groups that it was designed to help.⁷ Without carrying out a wider project, however, this project is not in a position to conclude whether the findings of the empirical research undertaken here apply across the board, or whether it just happens to be the case for the chosen case studies. This is a noted limitation of these types of research projects, but should not prevent the emergence of interesting findings which contribute to the debate.⁸

The interesting added-value supplied by empirical work is that it has the potential to reveal the legal phenomena or particular circumstances involved which have impeded the law’s functioning or made it more costly to

statistical study and analysis from which one could draw conclusions and formulate or reformulate policy”.

⁶ Rob van Gestel, Hans-Wolfgang Micklitz and Miguel Poiars Maduro, “Methodology in the New Legal World”, *EUI Working Papers* (2012), available at: http://cadmus.eui.eu/bitstream/handle/1814/22016/LAW_2012_13_VanGestelMicklitzMaduro.pdf?sequence=1 (last accessed 24 June 2018); Rob Van Gestel and Hans-Wolfgang Micklitz, “Revitalizing Doctrinal Legal Research in Europe: What About Methodology?”, *EUI Working Papers* (2011), available at: <http://hdl.handle.net/1814/16825> (last accessed 24 June 2018).

⁷ Robert Ellickson, “Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County”, *Stanford Law Review* 38, (1986): 623.

⁸ Amelia Fletcher and Bruce Lyons, *Geographic Market Definition in European Commission Merger Control A Study for DG Competition* (January 2016), available at: http://ec.europa.eu/competition/publications/reports/study_gmd.pdf (last accessed 24 June 2018).

achieve.⁹ Although empirical studies can be highly specific and for a limited audience, the choice of two controversial industries and the presentation of the results using more universal themes should render the findings of more general application, and of interest beyond the chosen sectors. Put very simply, this study will provide a practical model for competition policy makers and enforcers by showing, in a defined context, what kind of intervention or framework has led to what kinds of outcomes and why. By understanding more about the effect of particular rules in practice, lawmakers can avoid unintended consequences and keep better control of volatile sectors where necessary.

As detailed below, the transatlantic market for airline services, in particular, has come to be dominated by what have been termed “virtual mergers” in the form of “metal neutral” joint ventures created on the basis of the three well-known global alliances. Under such arrangements, the performance of the joint ventures for consumers and markets in general are largely kept from public view as the terms deals themselves demand utmost commercial secrecy. Thus, any quantification of the overall benefits—both to the companies and their customers—can only really be based upon the opinions and insight of management figures.

Many scholars divide empirical research into two types or styles: *quantitative*, which uses numbers and statistical methods, and *qualitative*, which does not rely on numbers but on historical materials and intensive interviews.¹⁰ Each approach poses its own challenges, however.¹¹ Given the difficulties encountered in obtaining responses industry actors, it was important for this project to combine the two in order to preserve the representativeness of the sample and guard against the potential for response biases. Similarly, surveys and even in-depth interviews can suffer because of the time that has elapsed since the event being recalled by the expert. To

⁹ Thomas S. Ulen, “A Nobel Prize In Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law”, *University of Illinois Law Review* 4 (2002), available at http://papers.ssrn.com/pape.tar?abstract_id=419823 (last accessed 24 June 2018).

¹⁰ See, for example, Earl Babbie, *The Basics of Social Research* (Belmont, California, USA: Wadsworth/Thomson Learning 1999); William J. Dixon, “Research on Research Revisited: Another Half Decade of Quantitative and Field Research on International Organizations”, *International Organization* 31, (1977): 65.

¹¹ Hervé Dumez, “What Is a Case, and What Is a Case Study?”, *Bulletin of Sociological Methodology/Bulletin de Methodologie Sociologique* 127, no 1 (2015): 43-57.

some extent, these problems can be addressed through careful survey design and analysis, but any evidence obtained in this way still needs to be approached with the appropriate caveats.¹² Furthermore, the research undertaken generated a large amount of data from multiple sources. By establishing clear protocols and procedures in advance of the field work, it was possible to losing sight of the original research purpose and questions.

Competition authorities and litigants worldwide have increased the use of economic quantitative methods and economic expert witnesses as a means to produce and support evidence in merger and antitrust cases.¹³ Quantitative techniques are those designed to test a hypothesis formulated based on economic theory. These techniques can range from simple statistical tests to complex structural econometric estimation models of demand and supply (e.g. demand system estimation). Quantitative analyses can complement the conclusions from qualitative or theory-based analyses, and provide an empirical basis to choose between competing conceptual or theoretical conclusions.¹⁴ However, these techniques are never definitive since the weighting and sifting of evidence will always involve expert judgment on the part of the competition authorities and a policy-driven choice as regards where, when and what type of data is sought out.

¹² Carmen Suarez, “Evaluation of Competition Advocacy to Government Assessing the Impact of Influencing Policy-Makers”, *Competition Law International* 7, no 1 (2011): 56-61.

¹³ For a description of the main aspects of the most commonly used quantitative techniques in antitrust analysis, see: Ioannis Lianos and Christos Genakos, “Econometric Evidence in EU competition law: an empirical and theoretical analysis”, *CLES Working Paper Series* 6 (2012). See also: Peter Davis and Eliana Garcés, *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton, New Jersey, USA: Princeton University Press 2009); Daniel L. Rubinfeld, “Quantitative Methods in Antitrust”, *Issues In Competition Law and Policy* 1, (2008): 723; Jonathan B. Baker and Daniel L. Rubinfeld, “Empirical Methods in Antitrust Litigation: Review and Critique”, *American Law and Economics Review* 1, (1999): 386.

¹⁴ Kostis Hatzitaskos, David Card and Vandy Howell, *Guidelines on Quantitative Techniques for Competition Analysis*, *Regional Competition Center for Latin America* (2012), available at:

<https://www.cornerstone.com/Publications/Articles/Guidelines-Quantitative-Techniques-for-Competition> (last accessed 24 June 2018).

B) “New and Important”: Lessons That Can Be Learned Using the Chosen Approach

The in-depth studies of two controversial sectors provide insight into the Commission’s approach to industries undergoing rapid change and can, in turn, help clarify the role which competition law and policy has developed for itself in the overall governance of the region’s economy. Competition policy’s constant interaction with the rest of the bloc’s industrial policy was clear when, at the height of the 2009 financial crisis, Commissioner Kroes publicly stated that the Commission as a body needed to learn the lessons of the 1970s “disaster”, meaning that Brussels’ responses needed to be better tailored to the surrounding economic conditions than the crisis cartel approach adopted during the oil crises which appeared to act as a drag on the region’s overall economic recovery.¹⁵ Building on the historical account and background provided by Chapter 3, the case studies provide insight into whether and how EU competition law’s application to industries faced with crises has changed since the 1970s, the clarity with which the baselines are perceived by market participants and how the modern-day approach has been received by the parties involved.

The relevance of this study may also go beyond the realm of competition law and policy, as its findings go to the heart of how the European integration project defines itself and the role which it can legitimately play in the restoration of the regional economy and beyond.¹⁶ The two industries chosen for the bulk of this research have both been subject to some of the most controversial European-level policy agendas, and by looking at them in-depth we can chart, for example, the escalation in tensions between those decision-makers in favour of nurturing Euro-champions and those promoting free trade where the market forces reign supreme.

In a similar vein, the practical approach taken by this study aims to highlight the influence of some of the less visible forces at play in the European competition policy-making and enforcement processes. While the input of lobbies has long been recognised as a factor, especially since the emergence of the European Roundtable of Industrialists as a highly

¹⁵ Neelie Kroes, “Tackling cartels – a never-ending task”, (speech, Brasilia, 8 October 2009) available at: http://europa.eu/rapid/press-release_SPEECH-09-454_en.pdf (last accessed 24 June 2018).

¹⁶ On the role of the EU in the globalised economy, see Nicole Gnesotto, “Europe and Globalisation: the dangers and the assets”, *Fondation Robert Schuman Policy Papers* 296, (December 2013), available at: <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-296-en.pdf> (last accessed 24 June 2018).