

## **Fordham Competition Law Institute Annual Conference 2008**

### **Enforcers Roundtable - Independence and competition authorities**

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One of the interesting, and challenging, aspects of working on competition policy is that nothing happens in a vacuum. Where biologists can grow cultures in laboratories and mathematicians test equations on computers we have to measure our policies against a constantly changing world. Like the Red Queen in Alice in Wonderland, we have to keep running just to stay still. That makes our job rather interesting.

The world economy has been rather too interesting lately. In the past few months we have seen greater volatility in prices than most of us are used to. And in the past few weeks we have seen greater instability in our financial services companies than anyone is used to.

In 2008 so far I have watched wheat prices double, heard Goldman Sachs warn in March that \$200 a barrel oil was '*quite likely*' if there was a '*major disruption*' and then saw oil hit \$147 a barrel in July. Since then, prices have come down, but, faced with falling house prices in the USA and many EU member states, consumers are nervous, as are investors and governments.

And then of course, we have had the problems in the financial services sector. I will not go through them all, partly because I am sure you are all very familiar with them, but also partly because the list is really quite disturbing.

In summary, we have seen greater government intervention to support individual companies in the last few months than we had previously seen in the last few decades. Financial services companies have proven to be more vulnerable than anyone would have expected. Once confidence in their ability to do deals starts to fall, they enter a downward spiral, creating a vortex that drags the rest of the markets down with them.

It reminds me of the old joke based on the Rudyard Kipling poem. If you can keep your heads when all about you are losing theirs... then you probably do not understand the situation.

Against this background, what should we make of the title of my intervention? "Independence of competition authorities".

At the very least, it is a timely reminder that competition authorities do not – cannot - sit in isolation, in glorious splendour. Our role is to make markets work better, and we can only carry out that role effectively if we understand markets as a whole – we cannot just focus on individual companies.

This has an impact both on what we choose to do, and how we do it. And of course it has an impact on what we choose **NOT** to do as well.

Independence cannot be a synonym for "isolated from reality". It is possible to be aware of reality, and hopefully to be influenced by it, without losing independence.

We have to strive for independence of action, not an ivory tower.

Look at banking. Given the current situation on the markets, we know that we have to give State aid cases in the financial services sector a very high priority. It is not enough to do a rescue and restructuring case well, it has to be done quickly. That is what we have achieved. Rescue aids in the UK, Germany and Denmark were approved in days or weeks. Restructuring aid cases take longer, but are still dealt with quickly, within a timescale meaningful to the problem at hand.

And because we clearly recognised the difficulties and responded to them, our interlocutors in national ministries had more respect for our intervention, for the rules and for what we try to achieve. By listening to our requirements for rescue and restructuring aid, the national ministries realise that they in fact want the same things: taxpayers' money properly spent on a restructuring that will work. That is the objective of the State aid rules, and that is the objective of a national treasury.

By being sensitive to the wider context, we can find common cause without losing independence. We gain a seat at the table.

(And if I might add, in passing, the fact that we have a seat at the table when it comes to the rescue and restructuring of firms in difficulty is a tremendous strength of the EU system. There is of course a role for state intervention, but the State aid rules recognise that intervention has to comply with certain principles. I would be delighted if other jurisdictions were to adapt their own State aid rules, and entrust their competition authorities with their enforcement. )

Even in circumstances less extreme than those we see in the banking sector, we still must strive for independence without isolation.

Look at the energy sector, for example. We chose to do a sector inquiry in light of the many and varied problems of the sector. After extensive investigations we concluded on a course of action that combined support for improvements to the regulatory regime with targeted antitrust enforcement in individual cases. And of course, a little pro-competition advocacy.

By aligning our antitrust priorities with those of the European Commission and the Member States, we have created a consistent and comprehensive policy approach that is already paying off. We have made more progress in the regulatory discussions than would ever have been possible without the evidence of the sector inquiry, and we have had companies agree to settlements that will have real benefits on the market within a relatively short – for the sector - time frame.

So we have pursued an independent competition policy, but we have not pursued it in isolation from wider Commission and Member State priorities.

As a result of this awareness of the world beyond the next market definition or the next econometric study, the Commission is taken more seriously in competition matters. We do not just get a seat at the table; we also get listened to.

This is not to say that all is rosy. Maintaining the distinction between independence and isolation is difficult. We can never lose sight of the need to conduct our core business of enforcement with impartiality and rigour. One consequence is that what can seem like independence to us, charged with carrying out a legal process, can seem like isolation to others, who see competition enforcement as a powerful tool that can be wielded whenever they see a result on a market that is unwanted.

In difficult economic times, consumers – and politicians - are more likely to take notice of rumours about speculation and cartels. I am sure that many, if not all of us, have been questioned as to what we are doing about food or oil prices. What about the buyer power of supermarkets? Or the conduct of OPEC?

Sometimes, however, rumours about speculation and cartels are no more than rumours, and sometimes a cartel is beyond the reach of a competition authority.

There is little to be done about the latter problem, but we have to remain vigilant for the former. A market where cartels and abuses of dominant positions go unpunished is neither fair nor competitive. But it is equally important that law-abiding businesses are not harmed by unjustified suspicions.

Some of you may remember, as I do, the days when the price of an English breakfast was a fetish of inflation discourse in the UK.

(As it happens, that was always a little absurd. My home country may not have the world's healthiest native cuisine but even in the 1970s there were not many men who

actually downed eggs, bacon and fried bread every morning. Still, the price of breakfast made for a powerful rhetorical point.)

Food price inflation has led to a recurrence of that debate. There are discussions about pouvoir d'achat in France, and about the price of pasta in Italy. And just about everywhere there are questions about competition enforcement.

Of course, the very fact that discussions are taking place in a range of different countries is suggestive – suggestive of the fact that food prices rises are global, triggered by rising demand and falling supply. There may be other problems that competition authorities should legitimately highlight: both the British and the Irish competition authorities have concluded that retail planning restrictions are undermining competition in retail markets. But the chances are, we have not suddenly seen an outbreak of national cartels in national markets.

That being said, if wholesale prices fall without corresponding falls in retail prices, then authorities around the world might want to look at these markets just a little closer.

But it would be wrong to conclude that there are "classical" antitrust problems, simply because prices rise. Competition authorities have to remain sufficiently independent to resist calls for intervention where intervention does not appear appropriate.

This is not easy.

It requires enough institutional independence to be able to say "no", and enough people who understand our role for that "no" to be understood.

Creating and maintaining this understanding of our role is difficult.

Competition policy is for most people a remote, abstract thing with tangible punishments but intangible benefits. It can be hard to explain when your proof of success is not "prices going down" - but "prices not going up as much as they might otherwise have done but for the intervention of the competition authority". The economist's counterfactual is not the stuff of pithy soundbites.

And workers in uncompetitive industries kept alive by state subsidies will just about tolerate those subsidies being cut when they feel reasonably confident that they can find acceptable work elsewhere. They are likely to feel more threatened if and when unemployment numbers tick up.

If we are to maintain our independence to do the right thing in these difficult situations, we have to be engaged, and we have to be seen to be engaged. Not in the left/right arguments of party political debate, but in the political realities of the world in which we live.

We have to communicate not only what we do – the 3.3 billion in fines or the 400 merger cases decided – but why we do it. We have to explain when we intervene and when we do not. If we do that well, when times are easy, then that helps us maintain our independence in times like these.