

Studienvereinigung Kartellrecht Conference
1 March 2011, Brussels
Opening address

Doing business in Europe: the review of the rules on co-operation agreements between competitors

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

Alexander ITALIANER
Director General
Directorate General for Competition
European Commission

Introduction

Good morning,

When we first met at the beginning of my mandate at DG Competition one year ago, I spoke to you about the key role of competition policy in helping Europe overcome the crisis and get back on the track of growth.

I already referred then to our work on updating the rules on cooperation agreements between competitors. I presented our plans for revision as a good example of how competition law can be used to promote efficiency and innovation in Europe.

We have now completed that work. We did not completely overturn our rules on horizontal agreements, because the rules that we had put in place a decade ago proved to work well and businesses and their advisors found them useful.

What we did was to update and amend the rules where necessary - and on the basis of our stakeholders' suggestions - so that they reflect business reality better in areas of interest such as information exchange, standard-setting or research and development.

Before I come to the specific changes brought to our rules on horizontal agreements, I would first like to talk about the challenges that DG Competition faced in 2010, how we addressed them and what this means for the future.

1. A bird's eye view of the first year in office

2010 continued to be the year in which we focused on mitigating the impact of the crisis. Indeed, through all our competition law instruments we tried to reduce the cost of the crisis for consumers, businesses and Member States.

We did this first by keeping-up strong enforcement. Our action against cartels remained as high a priority as ever. Second, we continued supporting the financial sector through our state aid policy. We prompted banks to undertake the necessary measures to achieve long-term viability and to share an adequate part of the burden of their rescue, thereby reducing the cost for taxpayers.

Let me take look at each of these in turn.

1.1 Strong enforcement

First, in terms of enforcement, we stayed the course in our fight against cartels – we took 7 decisions in highly complex cases, where the cartels had lasted for many years, and affected millions of consumers across the EU.

We will continue to be tough on cartels. They suffocate innovation, keep efficient companies out and over-burden our economy and consumers. From bathroom fittings, to LCD screens, through to air cargo, we have acted vigorously issuing decisions against 69 groups of companies for cartels lasting from 4 to 35 years (*Animal Feed*). The total amount of fines exceeded €3 billion.

More importantly, we estimate that the direct and observable customer benefits flowing from our action against cartels in 2010 amount to at least €7billion.

Our new cartel settlement tool will help us speed-up those cartel cases where parties acknowledge their participation to the cartel upfront and are willing to leave the cartel episode behind. *DRAMs* and *Animal Feed* were our first settled cases involving 17 undertakings. There are other cases in the pipeline.

We are always open to discuss with parties willing to settle because the sooner we finish a case, the sooner we can allocate resources to other priorities. For example, the *DRAMs* decision remained unchallenged before the General Court and *Animal Feed* was appealed by only one company. In comparison, two other “ordinary” cartel decisions in *Pre-stressing steel* and *Bathroom fittings* have already generated 41 appeals before the General Court.

We have also acted vigorously in sectors with high growth potential in the Internal Market. For example, in the energy sector we took four decisions that ensure that competitors will not be foreclosed and that markets will remain open to competition¹. In the financial sector, we accepted commitments from Visa and agreed on a reduction of interbank fees for debit cards concerning millions of transactions every year². Setting interchange fees at efficient levels will help reduce costs for consumers, including the costs they currently bear without knowing it.

In the merger field, most of our decisions allowed firms to pursue their business projects and to bring innovative products and services to their clients, at better prices. Take Intel/McAfee: we cleared the merger in Phase I a few weeks ago,

¹ *E.ON*, for further details see press release IP/10/494; *EDF*, IP/10/290; *ENI*, IP/10/1197; *Svenska Kraftnät*, IP/10/425.

² Under the commitments, the maximum weighted average MIF applicable to debit card cross border transactions and to national debit transactions in those countries where MIFs are set directly by Visa Europe will be cut to 0.2% of the value of the transaction. This represents a reduction of about 60% on average for domestic MIFs and 30% for cross-border MIFs.

but put in place sound interoperability remedies to ensure that Intel's hardware will remain open to the security solutions that competitors of McAfee will invent.

Unfortunately, we have also had to prohibit a merger for the first time in this mandate in the *Aegean/Olympic* case and since the *Ryanair/AerLingus* prohibition. There, despite our efforts and dialogue with the parties, no solution could be found to avoid consumer harm. The new airline would have been a quasi-monopoly, no new player could have entered the market and this would have led to higher fares and less choice for passengers. Such prohibition decisions will likely remain rare - since 1989 only 20 prohibition decisions in over 4500 cases - but we have a duty under the Treaty to prohibit mergers that would harm consumers and the economy.

1.2 State aid to the financial sector

The other major priority in 2010 related to the Commission's strategy to exit from the crisis.

We had to continue taking swift state aid decisions to help the ailing financial sector, while reducing competition distortions to a minimum and preparing the phase-out of the exceptional regime. We put an enormous effort into preserving a level-playing field for financial markets.

In the last 12 months, the Commission took a total number of 86 decisions in the financial sector including in cases such as Bank of Ireland, Dexia, Ethias, Aegon and so on.

We insisted on sound restructuring measures and are strengthening the conditions. As from January this year, every beneficiary of a recapitalisation or impaired asset measure will be required to submit a restructuring plan.

By the end of the year, we hope to issue new permanent guidelines for the rescue and restructuring of financial institutions. Market conditions permitting, we will ensure that firms do not rely on State support for longer than absolutely necessary. In a healthy economy firms should be able to finance themselves on the market.

1.3 Policy and advocacy

Although we focused on the crisis, we have also looked to the future and updated our rules to match market developments in a number of areas.

We have for instance revised the Motor Vehicle Block Exemption Regulation. The new rules will increase competition in the market for repair and maintenance by improving access to technical information needed for the repairs and by making it easier to use alternative spare parts. By allowing more flexibility for the distribution of vehicles, these changes will restore manufacturers' incentives to invest in their dealer networks and to reduce the cost of selling cars. This should also allow European carmakers to respond to competition from emerging markets.

We have modernised our vertical restraints rules between manufacturers and distributors, in particular to take into account the development of the Internet. These new rules will contribute to boosting e-commerce. Manufacturers remain free to decide how to distribute their products in real shops or online. But in order to benefit from the block exemption, they cannot have a market share

above 30% and their distribution or supply agreements must not contain any hardcore restrictions of competition. Consumers will therefore be able to buy goods and services at the best available prices, no matter where they live in the EU.

We have continued to improve our procedures in respect of due process requirements and in close contact with stakeholders. You have an example in our Best Practices in antitrust proceedings.

As you can see, 2010 has been a challenging first year in office, still marked by the shadow of the crisis. We will now have to create the right environment in Europe for businesses to prosper again.

This is why I would like to turn to the revised rules on cooperation between competitors.

2. Doing business in Europe: the review of the rules on co-operation agreements between competitors ("Horizontal Agreements")

2.1. The importance of better guidance for businesses and their advisors

Most of the time competitors compete, but cooperation can nevertheless be key in developing and marketing existing or new products.

We hear of examples every day: Renault-Nissan and Daimler AG are engineering a new common architecture for small vehicles; Deutsche Telekom and France Télécom are exploring ways to increase the quality of service for

cross-border machine-to-machine communications and Royal Dutch Shell and Schlumberger cooperate on improving the recovery of oil and gas.

Such cooperation ventures require significant upfront commercial investments. Businesses want to be able to assess whether their plans raise competition law concerns before embarking on such costly projects. Clear rules on horizontal agreements are thus important for doing business in Europe and industry welcomed our initiative to update the rules. They called for increased legal certainty, for more guidance on specific types of information exchange between competitors, on "paid-for" research, and on standardisation agreements amongst other things.

The basic approach of the Block Exemption Regulations ("BERs") and Guidelines is to allow competitors to cooperate when this contributes to economic welfare, without the risk of distorting or eliminating competition.

The revised rules make it simpler for companies to perform the assessment themselves and this is very important for industry and their advisors.

In our review, we also had in mind the benefits that cooperation agreements can bring to the economy as a whole, notably in the context of the Commission's EU 2020 strategy. We therefore ensured that sufficient incentives are maintained for companies to enter into efficiency-enhancing collaboration. For example, this is why we decided in the context of the Research & Development Regulation, that joint exploitation can go beyond what is possible in other types of agreements, such as production agreements. We wanted our rules to make this difference precisely in order to encourage R&D in Europe.

So the rules bring more legal certainty, they match market developments and respond to the needs of modern businesses. They prevent competition concerns from arising from the outset, rather than only addressing concerns ex-post.

Allow me to get into more detail on the final version of the document.

2.2. Refining the rules to take account of the public consultation: what we took on board

As you are undoubtedly aware, we received in-depth suggestions from our stakeholders and were delighted with the quality of input provided. The public consultation worked very well and we took numerous comments on board – I will come to the details in a second.

Before that, I must give particular credit to the contributions provided by National Competition Authorities ("NCAs") – they too are entitled to feel ownership over the final text. They were closely involved in the drafting process, through the ECN, advisory committees and bilateral contacts. We drew inspiration from numerous national cases - especially on information exchange - of the Bundeskartellamt, the OFT, the French and Italian NCAs to mention a few.

So what did stakeholders suggest and what did we put in the final text?

I will limit myself to information exchange, standard setting and research and development – the most frequently commented topics.

Information exchange

Stakeholders generally found the draft chapter on information exchange very helpful. They mainly asked us to narrow down the category of restrictions of competition *by object*, and some called for safe harbours in the part dealing with potentially restrictive effects of information exchange.

So, upon their suggestions, what did we do?

We gave more guidance on how information exchange can be assessed under Article 101. Even in the absence of a specific agreement, information exchange can amount to a concerted practice when companies share strategic data – that is to say data that reduce strategic uncertainty in the market and consequently reduce the "independence" of competitors.

In terms of restrictions *by object*, we clarified that they are limited to the sharing of *individualised future intentions* on prices and quantities.

In our final text, we emphasized that *future intentions* should not be confused with any *current data*. We also mentioned that in specific situations - where companies are fully committed to sell in the future at the prices that they have previously announced and which they cannot revise - such public announcements would *not be considered as intentions* and would *not normally restrict competition by object*. For example this would normally be the case for catalogues with prices valid as of a certain date. Stakeholders strongly welcomed this approach.

In relation to the call for safe harbours, we had already provided guidance in our draft on where information exchange is not likely to cause a problem, for example:

- Exchanging genuinely public information is unlikely to restrict competition.
- The age of data matters – historic data are unlikely to restrict competition; when data becomes "historic" depends on market characteristics.
- Genuinely aggregated data - where recognition of individual companies' strategies is sufficiently difficult - is also unlikely to restrict competition.

And of course, it should be recalled that where the parties' market share does not exceed 10% on any of the relevant markets affected, they can avail themselves of the safe harbour set out in the Commission's *De Minimis Notice*.

However, it was not possible for us to provide any useful, absolute "safe-harbour" for pure information exchange – for example on the basis of market coverage.

The competitive outcome of information exchange depends on the interaction of the type of data that is exchanged with the market environment in which the exchange takes place. As the degree of market coverage is only one among many relevant variables such as concentration, transparency, stability, complexity etc., an industry wide safe harbour would not be appropriate.

In practice, however, the text does provide substantial guidance on areas where information exchange is not likely to cause a problem. We specified that where

the information exchange takes place in the context of another type of co-operation and does not go beyond what is necessary for it (e.g. R&D or production), the safe harbour that covers this other form of co-operation will also apply to the information exchange. This will actually cover many information exchanges taking place in practice.

Let me now turn to the second important topic – standard setting.

Standard-setting

First, a small illustration: in the same month as we adopted our revised rules on horizontals, the European Standardisation Organisations CEN, CENELEC and ETSI made available a harmonised standard for a new common mobile phone charger. This just shows how much common standards can facilitate innovation in Europe and how much they are part of consumers' daily lives.

On standard-setting, we preferred prevention to cure. Our role was not to prescribe a specific scheme, but to promote a standard-setting system that is open and transparent. This meant increasing the visibility of the licensing costs for intellectual property rights, ("IPRs").

In order to do that, we had to find a balance between the contradictory interests of companies with different business models, which explains the high interest of stakeholders in this area. We also had to provide sufficient incentives for vital innovation in Europe and to ensure that the benefits deriving from standardisation are passed on to consumers.

Stakeholders asked us to refine the safe harbour set out in the initial draft and to provide more guidance on standardisation agreements falling outside the safe

harbour. Many brought to our attention the fact that there is no "one-size-fits-all" approach to IPRs. A number of them also insisted that there are other models of standard-setting than the one proposed in our initial draft and which advocated advance IPR disclosure.

We therefore substantially redrafted the chapter on standards.

We kept the safe harbour concept in order to incentivise a system where competition and transparency is front-loaded. We also further "refined" certain aspects of the safe harbour. In particular, we clarified that the good faith disclosure of IPR does not require the companies concerned to embark on a patent search which can be a costly exercise. We also stated that an IPR disclosure would not be a condition in the context of royalty-free settings (since, in most cases, the importance of full transparency of IPRs is less important where the parties agree not to charge for their essential IPRs).

We also clarified that all IPR holders that wish to have their technology included in the standard have to provide an irrevocable commitment to license their IPR on fair, reasonable, and non-discriminatory terms ("FRAND"). Certain stakeholders' had read our previous draft as implying that the standard setting organisation would also need to have FRAND commitments from non-members before adopting a standard. We therefore removed this ambiguity in the final text.

We retained in the safe harbour the important principle of the FRAND commitment as a precondition for inclusion of IPR. Our rationale was to allow companies to invest in developing standard-complying products with the comfort that implementation of the standard will not be prevented by IPR

holders who would either not wish to license or would only license on prohibitive terms.

We also provided more guidance for situations when standard-setting agreements fall outside the safe harbour.

We stated that competition problems may only arise when the standard in question will have market power. And we clearly set out that standard-setting bodies are free to put in place different rules. If your agreement falls outside the safe-harbour, there is no presumption of illegality; but you have to perform a self-assessment as with any other potentially restrictive agreement.

In order to make this self-assessment easier, we explained when standardisation agreements may give rise to restrictive effects on competition. This depends on whether the members remain free to develop alternative standards or products; how access is given to the standard; whether participation is limited or not; or on the market shares of the participants etc. We also acknowledged that in specific situations, having a restricted number of participants when setting the standard could be efficient.

Finally, a few words on research and development.

Research and development

There, our prime aim was to facilitate innovation in Europe and this is why we considerably extended the scope of the R&D Block Exemption Regulation.

Stakeholders asked for more flexibility for the parties when engaging in joint exploitation of the results of their joint R&D activities.

In particular, it was asked that the parties could, subject to the thresholds and conditions set out in the Regulation, decide that *only one* of them would *actively market* the products in the EU while the other parties focus on other geographic areas. The public consultation showed that such scenarios are common industry practice and that in some cases they are an indispensable condition for companies to engage in R&D agreements.

We therefore allowed parties more flexibility in terms of the joint exploitation of the results of their common R&D. We acknowledged that joint exploitation, in particular the allocation of territories or customers between the parties, increases their incentives to enter into the R&D co-operation in the first place.

Furthermore, stakeholders asked for the scope of the R&D BER to be extended to cover "paid-for research", that is to say, agreements where one party carries out the research and the other party merely finances it.

As this type of agreement did not appear in our first draft, the industry felt that we conveyed a negative message on the legality of such agreements that are frequent in practice. We understood the validity of this point and therefore paid-for research is now covered in the final document.

Conclusion

As you can see, the public consultation led to an extremely fruitful debate with stakeholders on all aspects of the horizontals package. This led to a much improved final version. I am grateful that so many of you took the time to comment on the proposals.

The revision of the rules is the fruit of our cooperation with National Competition Authorities, with the industry and with their legal advisors. Now that the new rules are in place, I strongly believe that they will directly contribute to improving the business environment in Europe.

If I dwelled somewhat longer on the way in which we adjusted our rules in light of stakeholder comments, it is because I wanted to illustrate how important contacts with stakeholders, including those present, are.

Thank you.