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If there is one area of all our cooperation — United States, European Union, and inside the European Union, where there is certainly not a monopoly of good ideas — it is this one.

We are very grateful to be able to participate in this particular debate for, I think, two main reasons.

First of all, because we see the control of conduct of firms under Article 82 as a key element in our broader efforts to liberalize and make the EU economy more open and competitive I think that a number of you will be familiar with the attempts being made to combine sector-specific ex ante regulation, for example, on third-party access to networks, with control of abusive conduct under Article 82 in the telecommunications area. Ultimately, we would hope, in that area, that we would see progress towards a greater weight for the competition rules and less weight for ex-ante regulation. But for the short term, given the position of the incumbents and the likely economic trends, that appears unlikely in the short term.

The second reason why we are very pleased about this debate is because this is an important area we need to clarify our policy in. We have been strengthening our anti-cartel policies, as we have outlined this morning. We have modernized our rules on vertical and horizontal restraints; we are attempting to move to a new antitrust enforcement system in May next year; and we have recast — hopefully, if the Council agrees — our Merger Regulation at the end of this year. If they take that decision, we will, therefore, have an entirely new legal framework and quite a lot of policy guidance in many areas of antitrust and merger law.

The enforcement of Article 82 still remains, broadly speaking, an area where there is little policy guidance. As you may also know, Commissioner Monti, at this year's Florence Workshop stated that we

had started an internal review of our policy on abuse of dominant position, and he explained that the purpose of that review was to evaluate policy, to assess how it could be made more effective, and to define ways in which we might make it more transparent.

For the moment it is a very internal exercise, but we are nonetheless keen to stimulate a debate within the antitrust community and to learn what others think about this complex topic.

If you look at simply the comparison, as Hew has pointed to, of our statutes and of our practice, perhaps the broad conclusion is that, despite some significant degree of disparity in law, our practice in many categories of abuse is convergent. But there are also some areas where there is divergence and there are equally some areas where we are dependent on pending decisions before courts before we can take further action.

I just want to outline, in the few minutes which are available to me here, how we propose to go about our Article 82 review and what we think the key issues are.

Why do we think that a more systematic approach is not only feasible but desirable in this area? In the first place, unlike under 81 and on mergers, we have never had a comprehensive reassessment of practice under Article 82 in the light of economic thinking. A credible policy on abusive conduct must be compatible with mainstream economics.

Secondly, day-to-day enforcement of Article 82 so far has been to a large extent based upon a few important court judgements. Our objective in the review is to clarify the law so that there is a degree of predictability for firms and consumers adapted to today's circumstances.

Thirdly, the review is connected intimately with the modernization of the antitrust enforcement system. Insofar as Regulation 1/2003 creates a system of parallel competences, which the Commission and the competition authorities at the national level will apply Article 82, then a policy which is clear on the substantive interpretation of the Article is essential to make the system work.

Finally, the review of Article 82, as far as we are concerned, is linked to the broader efforts we are making to improve the quality of our decisions. Our major 82 cases are good candidates in all situations for thorough internal debate and review. And, naturally, through strengthening the economic function in our own department, we will be able to enhance the review.

But there are some limits to this exercise. The first point is that the wording of Article 82 is already different from most other jurisdictions. It applies only if the investigated undertaking is dominant at the material

time of the abuse. At that moment in time, the firm in question must be able to act to an appreciable extent independently of its competitors, customers, and ultimately consumers.

This means that in the present legal context the competition analysis takes place in the context of the assessment of dominance. It also means that 82 EC does not prohibit a firm which is initially not dominant from using unilateral strategic behavior in order to become dominant. Nor does 82 prohibit a firm from attempting to become dominant.

Now, Section 2 of the Sherman Act, in contrast, applies to the willful acquisition of monopoly power. Under U.S. law, it does not therefore seem necessary to be a precondition that the firm possesses monopoly power when the unlawful monopolizing behavior occurs.

A second important legal difference is that Article 82 contains a list of a number of prohibited abusive practices. Even if this list is not exhaustive, it does imply that the types of practices that are expressly mentioned in the Article must, at least in certain circumstances, be regarded as abusive. And this list makes it clear that the concept of abuse in 82 includes, as Hew was pointing out, exploitative abuses. They are referred to in letters A and B of Article 82, which mention “unfair prices” and “limiting production to the detriment of consumers.”

Our approach to the review will be based on three main elements: the case law; economic analysis; and the effectiveness of enforcement.

The starting point is the existing case law. It is still being developed in some areas, notably on essential facilities or refusal to deal. Economic theory needs to be applied to the case law. And we need to be able to at least establish some rules which will provide some useful guidance for effective enforcement both by agencies and by firms.

Effective enforcement requires that we correctly identify the sectors and practices on which we should concentrate our effort, and it requires a correct balance between, on the one hand, establishing clear and simple rules, and, on the other hand, setting rules which establish a balance between different effects and interests.

Our rules on effects and interests are particularly well suited to the economic aspects of antitrust law and help to minimize in individual cases the risks of both clearing abuse which we should have prohibited, or erroneously finding an abuse.

Clear and simple rules, by contrast, provide everyone with a great deal of legal certainty. They signal where to draw the line between illegal and legal behaviour.

There is an important difference to underline here between what is referred to as per se rules in the U.S. context and per se rules in the EU context. First of all, the EU per se rules apply to situations where a firm is already dominant. Secondly, in terms of effective enforcement, one has to ask the question whether in certain circumstances the evidence of certain types of conduct gives such a likelihood of harm to consumer welfare and to competition that a full investigation of all the economic aspects with all the cost it entails, is really not necessary. So there is a question of cost of search in the analysis, not a question simply of saying per se rules as such should be maintained. We, I think as you, were slightly surprised at the Court of First Instance's analysis in *Michelin II*, that it placed so great an emphasis on per se rules and on certain types of conduct and did not go into any further economic analysis of the case.

However, that doesn't mean that we believe, in principle, in this review that there is not a genuine case for application of per se rules when there is conduct which evidently is going to have an effect - whether it has yet had that effect or not - on consumer welfare.

As far as the substantive issues in the area of application of Article 82 is concerned, each one deserves a thesis written on it.

The first is the *relevant market*. We have already given general guidance on market definition in a Notice. This should, in principle, be applicable in the area of Article 82. However, concrete application of those guidelines to abuse cases raises problems.

One is the practical problem of the so-called "*Cellophane* fallacy," which is not a term that we invented in the European Union but through your own case. It refers to the often-encountered problem that an investigated undertaking is already exercising market power when we use, for example, a "snip" test to help us define the market. In markets in which the investigation presumes that one or more undertakings are dominant, the underlying premise of the "snip" test — namely, that prevailing prices are set at competitive levels — is often not tenable, and this could give rise to a wider market definition than would objectively be justified.

A second chapter for a thesis is the concept of *dominance*. As far as dominance is concerned, we need to address the issue, as in all areas of antitrust — mergers of significance, of market shares, and of barriers to entry — and there have been several decisions and several guidelines given, on the presumptions in this area.

In the context of the modernization of antitrust enforcement, a number of bright lines might indeed contribute to a more coherent enforcement. But it could be argued — and we would, I think, at this stage agree on this — that market shares are only an important proxy for market power and that

we are in the end forced to a complete and comprehensive competition analysis in order to arrive at the correct basis for the analysis of abuse.

On the concept of *abuse*, a third major chapter for discussion, Articles 81 and 82 share the same basic objective, to protect competition on the market as a means of enhancing consumer welfare and ensuring efficient allocation of resources. In the pursuit of this objective, Article 82 catches, in the first place, exclusionary abuses. I do not think that we are far apart transatlantically in relation to “exclusionary” abuses. They strengthen or maintain the market power of the dominant undertaking by hindering the maintenance or growth of residual competition, whether it is in terms of predatory pricing or other practices that foreclose the access to the market to competitors. They harm consumers indirectly by artificially distorting the operation of the competitive process.

However, we also have the wording of 82 which refers to “exploitative abuses” by a dominant undertaking of its market power. Examples of abuses in this category include excessive pricing and exploitative price discrimination. Such practices, in principle, harm consumers and customers and suppliers directly.

The Commission’s main enforcement efforts have been so far in the field of exclusion, and that is reflected in the abuse concept developed by the Court of Justice, which clearly places the emphasis in this area. It follows from the definition that the Court has put on exclusion that Article 82 does not prevent dominant undertakings from competing on the merits. The aim is to protect competition on the market, not to protect competitors against competition.

There are several headline issues in this debate. But I think that we would claim, in the areas in which we diverge, the same headline in this area — the aim is to ensure that the remaining competitors in the market are not prevented from competing on the merits.

The basic approach and the level of proof required for finding an exclusionary abuse, however, are critical issues, and it seems to us, given the mixture of economic and legal aspects to investigations here, that it is very difficult to develop a methodology and approach for all abuses together. We have to tackle each abuse in its specific context, and we have to also look at the particular motivation and context of abuses.

On exploitative abuses, there is widespread criticism, some of which we concur with. For example, it is extremely difficult to measure what constitutes an “unfair” or “excessive” price. And there are many who say, “Well, exploitative practices are self-correcting because the exercise of market power to raise prices will normally attract new entrants.” We do not disagree with that either, except that the intervention which is

going to be corrective must be, in our view, timely and relevant to the competition problem which is created by the original exploitation.

What are the objective justifications for any type of conduct which we might say is abusive? It follows from the case law which we have at the moment that there could be certain types of defence, but so far they have not had a great deal of success with our courts.

First, defendants might argue that in the circumstances of a particular case their conduct was in fact legitimate because it was competition on the merits. The Court of First Instance has stated that a discount granted in exchange for a service may be legal. In *Irish Sugar* the Court of First Instance accepted, in principle, a meeting-competition defence, but finally came to the conclusion that Irish Sugar's border rebates could not be justified at the level proposed.

And then, secondly, a defendant undertaking might try to argue that its practice pursues a legitimate public interest objective, such as health for consumers. In the *Hilti* case and in others, the Court of First Instance has said it is for public bodies to take that decision and not for a dominant firm to substitute itself for public authorities in protecting public interest.

A dominant undertaking may also argue that, on balance, its conduct is not abusive because it is necessary to produce efficiency gains that outweigh the alleged anticompetitive effects. Now, one problem with that is we don't actually legally have an exemption rule under 82. And also, from the point of view of the consumer, short-term efficiency gains may be outweighed by long-term harm to the competitive process. On the other hand, as we have clearly recognized in our Merger Guidelines, efficiencies may be taken into account in the merger area, and we have to look again very closely at the examination of these arguments under 82.

Now, there is a range of specific issues related to the types of abuses which we need to tackle.

As to *predatory pricing*, one is clearly recoupment, which we have not addressed directly, but the Court of Justice rejected it in principle in *Tetra Pak II*. In the *Wanadoo* case recently, we investigated the possibility of recoupment, without using it as a key element in the final decision.

Another important issue in this type of abuse is when it would be appropriate to find predation in circumstances other than those covered by the *AKZO* test, which only covers pricing below average variable cost. The Court of Justice upheld, in *Compagnie Maritime Belge*, the Commission's finding of an abuse in a case where collectively dominant undertakings employed a strategy in the shipping sector to cut prices on selected departures to match the prices of their only competitor. In

Deutsche Post as well, we found abuse in a case where the prices charged did not cover the incremental cost of carrying out the activity in question.

I have already referred to *excessive pricing*. In principle, we have to look at allegations in this area, but we still have to develop a methodology for doing it in a successful way. That could be developed through the comparison of prices charged by the dominant undertaking against those of its competitors and those charged by the dominant undertaking with prices it charges in other markets, for example.

The Commission's treatment of *loyalty rebates* is sometimes criticized as being unduly strict. Seen in isolation, rebates produce benefits for consumers, in that they obtain a price reduction, and pure quantity rebates may be a reflection of efficiency gains. Here the approach has been relatively positive.

But there are a number of other conditions where the type of rebate has been questioned. *Hoffmann-LaRoche* remains the major case in this area, and in *Michelin I* the Court also condemned the exclusionary effects of rebates based on individualized volume targets.

In the area of *essential facilities*, we have learned from US doctrine, although the vocabulary of "refusal to deal" has dominated our cases. Refusal to deal must, however, be combined with its effects. Refusal to deal alone is not sufficient to guarantee the finding of an abuse.

In the pharmaceuticals area, we have been looking also very closely at the way in which firms have *abused patent procedures* in order to foreclose competition from generic products.

Tying and bundling is clearly one area where we hope that we will be able to arrive at some degree of predictable guideline, at least for our internal work. We were comforted today with the Court of First Instance on the *Unilever* ice cream case related to Ireland and the question of freezer exclusivity, where the case was based both on Article 81 and 82. On the 82 part, it was related to the inducement to retailers to enter into exclusive contracts.

So, broadly speaking, there are substantive issues covering all abuses, but also specific issues relating to each type of abuse. We would hope that the discussion we are having now and we are about to have could clarify at least a little further an area which is as complex to deal with as running in the dark in Central Park, as I did this morning, with its confusing number of exits and entrances

Thank you very much.