

**"Setting enforcement priorities at European and national level  
post modernisation"**

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The title of my speech today – the setting of enforcement priorities - may seem dry, but it is at the heart of public competition enforcement in Europe.

Competition authorities have to set enforcement priorities if they want to focus resources and bring the greatest benefit to the greatest number of consumers.

To be effective, we have to be strategic. That means prioritising.

My intention today is to cover both the process and the principles that guide the Commission's choice of enforcement priorities.

**Five key questions**

To do this I will address and attempt to answer the following five questions:

1. Why do we set enforcement priorities?
2. How do we set them?

3. What are our top priorities?
4. How has modernisation improved prioritisation?
5. Are we setting the right priorities?

## **1. Why do we set enforcement priorities?**

European and national competition authorities want to make markets work better, to help consumers and to make Europe more competitive. And we have to do this with finite resources. The better our strategy, the greater our contribution to consumer welfare.

In 2007 we have estimated that the Commission's antitrust, liberalisation and merger cases delivered 13.8 billion euros in future consumer savings, and that is the direct effects only. This is only an estimate, but it is clear that a well-designed and well-enforced competition policy has demonstrable benefits to consumer welfare.

## **2. How do we set enforcement priorities?**

Procedurally, each year the Commission as a whole and the individual Directorates General set out strategic objectives in the Annual Policy Strategy (the APS), and priorities for the coming year in the Annual Management Plan (the AMP). This is an important process.

For DG Competition, a typical AMP will list specific anti-competitive practices or sectors as targets for action.

Given legal expertise in this audience, I will add a brief *caveat* here. The Annual Management Plan and Annual Policy are important and informative documents, but they are *not* legally binding. The world is

constantly changing around us and we have to retain the flexibility to alter our priorities if the circumstances demand it.

More important than the formal procedure, however, are the principles governing the Commission's priority setting.

- (i) the structure, size and geographic scope of the market;
- (ii) the economic importance of the potential anti-competitive practice;
- (iii) the importance of the product for end consumers and the market position of the companies concerned;
- (iv) the relationship with other Commission policies;
- (v) the type of action required and the need for action at Community or national level.

### ***(i) Structure, Size and Geographic Scope of the Market***

First, we need to understand the markets we are dealing with. This means that we have to look at how markets are functioning – or malfunctioning - and study their economic size, and their links with markets up and downstream.

Market information and knowledge is crucial. That is one of the reasons why last summer we reorganised DG Competition on sectoral lines. For the first time, antitrust, merger and State aid units dealing with a particular sector have all been gathered together in sectoral Directorates.

This is also why we are putting an increased focus on data sources: competition authorities are not the only people who study markets – there are a range of analysts who spend a great deal of time and money

putting together reports into companies and sectors. The value of this information has been recognised in merger control for some time, and it is now spreading to antitrust and State aid as well.

***(ii) Economic Importance of the Potential Anti-Competitive Practice, and the market position of the companies concerned***

Next we need to have a clear sense of the type and degree of distortion created by the potentially anti-competitive actions.

Equally, we need to understand the market position of the companies in question. Our concerns about the Spanish broadband were sparked by Telefonica's power to exclude competitors from the domestic broadband market.

***(iii) The importance of the product for end consumers***

We also need to understand how important the product is for end consumers. For example, investigation and enforcement will be less of a priority if consumers can easily replace a given product or set of products with a perfect substitute. In such a case, market forces are very likely to keep market players in line with no need for competition authority interference. In contrast, our role becomes crucial when consumers have little choice about using a product – because they need an elevator to take them to their eleventh-floor office, or because they have to comply with the de facto Windows standard if they are to survive.

***(iv) The relationship with other Commission policies***

Knowledge of the market needs to be complemented with an understanding of how the markets relate to other Commission policies and in particular to strategic priorities, such as energy and climate change.

***(v) The type of action required and the need for action at Community level***

Finally we need to think carefully about which tools are best suited to each situation:

Some market failures require regulation. For example, there is an inherent information asymmetry in the pharmaceutical market. Put bluntly, producers will always know more than consumers about medicines. This makes regulation essential. We can argue about the detail of role played by the European Medicines Agency (EMA) or the Federal Drugs Administration (FDA). But we can also all agree that they have to exist.

At the other extreme, other market failures can be remedied through advocacy. For example, the Sector Inquiry on Business Insurance identified market practices which led to premium alignment in coinsurance and co-reinsurance. The Commission's immediate concerns now seem to have been resolved without formal enforcement action being needed.

This started with the Commission setting out its concerns in the final report of the sector inquiry. The European Federation of Insurance Intermediaries (BIPAR) responded by adopting a set of principles

designed to guide their members on complying with competition law in the placement of subscription business.

Lloyd's then used the BIPAR principles, to remind its managing agents and their underwriters of their obligation to comply with competition law.

One final point: just because enforcement action is justified, that does not mean that it should be the European Commission that does it.

For example, retail sector issues often have a national character and Member States competition authorities can be best placed to tackle them. In contrast, when the anticompetitive practice involves blocking cross-border sales (as in the 2001 Volkswagen case) the Commission has a definite role to play.

## **Ex Post Evaluation**

Looking back is almost as important as looking forward. I would like to stress here the importance of **ex post evaluation** of our enforcement priorities.

Properly focused ex post evaluation works like GPS. It tells us if we are heading in the right direction or if we have taken a wrong turn. More broadly, it can help foster competition culture by drawing attention to the effects of our actions.

## **3. What are our top priorities**

All of this informs our current priorities. These are set out in some detail in the 2008 Annual Management plan, so I will just set out the highlights here.

First, **cartels**. The changes to our leniency notice are working well. The number of applications is keeping steady at between 20 and 30 a year and the efficiency of the process has increased greatly.

But the leniency procedure has not made ex officio cases redundant.

Ex officio cases remind businesses that competition authorities do not have to wait for them to come forward.

We can take the initiative to uncover cartel behaviour. That is the key message from cases such as *Fasteners*, *Professional Videotape*, *Flat Glass* and *Chloroprene Rubber*.

We are finalising our proposals on direct settlements, and hope to introduce a system this year. Looking at how companies involved in ongoing proceedings are reacting to our published proposals, I wonder if we are moving towards a future where, as in the USA, most cartel cases end in a settlement.

I hope that is the case. Given the increasing integration of the global economy there will be no shortage of incentives and opportunities for cartels in the coming years – so we will need whatever advantage we can harness. Settlements should complement the leniency notice system. They would free further resources that we can use to pursue more cases.

Turning to **antitrust**, the Commission continues to pursue a high priority shortlist of cases.

We have nearly cleared our - relatively small - backlog of non-priority cases.

At the same time, we are happy with the progress we have made on priority cases in recent months:

we have followed up the financial services sector inquiry with prohibition decisions under Article 81 EC in the *Groupeement des Cartes Bancaires*, *Morgan Stanley/Visa* and *MasterCard* cases;

we have kept a close look on the foreclosure risks in the gas, electricity and IT markets through various kinds of abusive behaviours; and

we have opened the pharmaceuticals inquiry.

We have published the White Paper on damages action for breach of EC competition rules. Private enforcement will be the next great leap in antitrust.

We are also reviewing some of our most important rules such as sector-specific exemptions and our verticals block exemption.

Last but not least, we have started to review Regulation 1 and this leads me to my fourth question.

#### **4. How has modernisation improved prioritisation?**

Regulation 1 has radically improved the Commission's ability to set priorities.

First of all, it removed the notification and exemption system that had characterised over forty years of EU competition enforcement.

Before 1 May 2004, our potential to set priorities was limited by the fact that our enforcement activities were mainly reactive.



Since then, national competition authorities are dealing with a plethora of cases that would have previously come under the Commission's aegis.

This is a far more efficient way of doing things and it has allowed us to re-direct our resources towards the areas where our intervention can add the most value.

We increased our cartel units from four to five last year. In 2008 we have already adopted two cartel decisions.

Last but not least, it is already clear that the reforms brought in via Regulation 1 have had a real impact in streamlining our work. For example:

- Article 9 commitment decisions have led to a far quicker and less resource-intensive resolution of our investigations.
- Article 12 has cut down on bureaucracy and duplication of work by giving us access to the valuable information collected by other competition authorities.
- Article 22 has allowed us to call on national authorities to help us with our investigations – and vice versa.

The modernisation brought in by Regulation 1 has not just helped the Commission – it has also helped national competition authorities.

The majority of Member States have abolished national notification systems in the wake of Regulation 1, resulting in greater resources to focus on the most serious infringements.

And while Regulation 1 did not provide for the harmonisation of procedural rules, many Member States have now incorporated the

principal elements of Regulation 1 including new features such as commitment decisions.

Furthermore, information is now far better shared amongst competition authorities. Enforcement priorities and ideas for innovation in one jurisdiction are easily transmitted to other jurisdictions, through discussion and common agreement. To take just a few examples:

Almost all competition authorities today consider the eradication of cartels as one of their top priorities.

ECN members now often share sectoral priorities and pursue similar cases in parallel. A number of competition authorities are currently scrutinizing in parallel sectors such as energy, professional services or financial services. Some are also pursuing parallel cases, for example against payment card systems.

Or take what happened with the *Elevators* case. Here our investigations triggered investigations in other countries. In the *Flat Glass* case the reverse happened and several competition authorities provided us with information that was crucial to start our investigation.

The last question I promised to answer at the beginning of this speech was this.

## **5. Is the Commission setting the right enforcement priorities?**

Unsurprisingly, I think the answer is yes.

We are cracking down on cartels. We are carrying out sector inquiries that deepen our understanding of key markets and we are continuing to pursue important cases in key industries.

We want to continue to deliver more and we are aware that our ability to do this depends on our ability to learn not just from our mistakes but also from experts within and outside the Commission.

With this in mind, I am looking forward to hearing what you think of our progress so far and what we should do in the future.

There is, however, one thing that I am quite certain about. Our ability to make markets work better depends in the end on how intelligently we set our priorities, and how effectively we deliver on them.