

Consumers and competition policy; the Commission's perspective and the example of transport

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Chairman, Ladies and Gentlemen,

Introduction

1. Thank you for the invitation to speak to you about consumers and competition policy.
2. As highlighted by Commissioner Monti in his speech on European Competition Day on 29th April 2004 in Dublin, a number of recent developments in competition enforcement policy demonstrate that the Commission attaches central importance to the consumer. Today, I shall mention those developments and add a number of other recent events and actions that illustrate DG Competition's increased attention for consumers. In doing so, I shall discuss the position of consumers in relation to the different activities of DG Competition and with regard to a number of general developments:
 - 1) Competition law enforcement;
 - 2) Pro-active competition policy and liberalisation ('competition advocacy');
 - 3) Legislation;
 - 4) Merger control;
 - 5) Modernisation of anti trust policy;
 - 6) The Consumer Liaison Officer;
 - 7) Private enforcement.

Since my work at DG Competition concerns competition in the transport sector and, on a wider scale, the services sector, I shall illustrate my observations with examples from these areas.

- 1) Competition law enforcement
3. Consumers benefit from the ultimate aim of competition policy: a vital market process which rewards firms offering lower prices, better quality, new products and services, and a greater choice. In that sense consumers have always been important stakeholders in an effective competition policy and competition enforcement entities and consumers have always been natural allies.
4. Even if consumers are not always actively involved or explicitly targeted in competition enforcement they are at the heart of the Commission's motives to engage in competition

¹ The views expressed are the author's only and do not in any way represent an official position of DG Competition or the European Commission.

enforcement actions. Indeed, one of the final aims of European competition policy is to improve the consumer's position.

5. In some cases the consumer's interest is more obvious than in others. For instance, the investigation currently carried out by the Services Directorate of DG Competition into the existence of a possible secret market sharing agreement on bank payment cards between nine major ***French banking groups and Groupement des Cartes Bancaires (CN)*** is likely, if the Commission's assumptions are proven, to lead directly to lower prices for payment cards charged to French consumers. The Commission carried out unannounced inspections in May 2003 and sent a statement of objections to the parties involved at the beginning of July 2004².
6. The decision adopted in June this year with respect to the ***Belgian architect's fee system*** condemns a recommended minimum fee scale operated by the Belgian Architects' Association³. The fee scale laid down an architects' fee as a percentage of the value realised by the entrepreneur. The Commission established that the recommended fee scale constituted an infringement of the European competition rules because it sought to co-ordinate the pricing behaviour of architects in Belgium, something that was not necessary for the proper practice of the profession. Architect's fees should reflect for instance the architect's skills, efficiency and costs and should not be dependent solely on the value of the works or the price of the entrepreneur. In any event, the architect should determine the fee independently of competitors and in agreement with the client only. As a consequence of the decision, consumers will have more freedom to negotiate fees with their architects.
7. In transport, a landmark case for rail passengers based on Article 82 EC Treaty is the decision adopted in August 2003 concerning the companies ***GVG and FS***⁴. GVG is a small German rail transport operator that wished to offer a new service between a number of German cities and Milan. Since 1995, GVG had been asking the Italian incumbent rail operator Ferrovie della Stato ('FS') about the price and availability of train path. However, FS had refused to provide such information, arguing that on the basis of the current state of liberalisation of European rail passenger transport, railway undertakings only had a right of access to rail infrastructure in other Member States if they formed a so-called 'international grouping' with a railway undertaking established in that Member State. Since FS was the only operator with which GVG could enter into such a grouping and had refused to do so, FS reasoned that it was entitled to refuse access to the infrastructure. It equally refused to provide traction, *i.e.* a locomotive and a driver to haul GVG's wagons on the Italian part of the route. In fact, FS had no interest in accommodating GVG since together with the Swiss national railway operator SBB it offered a transalpine rail passenger services itself in the form of the so-called 'Cisalpino'. In its decision the Commission found that FS had a dominant position in the three area's (infrastructure, grouping and traction) and had abused that position by refusing access, refusing to enter into a grouping arrangement and refusing traction. Before the decision was adopted FS gave important undertakings. In particular, it undertook to enter into an international grouping agreement with any duly licensed train operator with concrete proposals to start an international rail service and to provide traction with regard to cross border services. The Commission therefore saw no reason

² See Press release IP/04/876 of 8 July 2004.

³ See Press releases IP/04/800 and IP/03/1500.

⁴ Decision GVG/FS, http://europa.eu.int/comm/competition/antitrust/cases/decisions/37685/final_en.pdf.

to impose a fine. Railway liberalisation is a complicated process; GVG is still not able to provide the service it proposed because shortly before FS announced it would open its infrastructure, SBB revoked its offer to grant access to infrastructure to GVG in Switzerland. However, the principle has been set; railway undertakings having a dominant position may not abuse that position by prohibiting access to new entrants without objective justification. European passengers stand to benefit from the possibilities for new rail services created by this step forward.

2) Proactive competition policy and liberalisation ('competition advocacy')

8. The foregoing examples illustrate that consumers are central to competition policy. That also applies to sectors where the Commission actively pursues a policy of opening the markets to more competition, like telecommunications, energy, transport or postal services. Comparative studies show that competition brings about productivity gains, consumer welfare gains and long time economic growths. In April this year the Commission adopted a communication on '***A pro-active competition policy for a competitive Europe***', emphasizing the link between a coherent and integrated competition policy to foster the competitiveness of Europe's industries and to attain the goals of the Lisbon strategy. The ultimate objective of productivity growth and global competitiveness is prosperity and increased living standards. Competition policy has an important role to play in that process.
9. An example of proactive competition policy is the launch in 2003 of an ***analysis of the competitiveness of the liberal professions***, for example lawyers, notaries, accountants, architects, engineers and pharmacists. Across the EU the professions are subject to a high degree of regulation, some of which do not appear to be based on an overriding need to protect the public interest. This February, the Commission issued a report⁵ which identified groups of regulatory restrictions which have the most potential to harm competition. The Commission believes the best way to achieve overall change is voluntary action by those responsible for setting the existing restrictions. It has invited regulatory authorities of the Member States and the relevant professional bodies to review the regulations in order to remove anti-competitive restrictions. The Commission also encourages them to develop accompanying mechanisms which increase transparency and enhance consumer empowerment. Such mechanisms should include, for instance, active monitoring by consumer organisations⁶.
10. Another area that is subject to a liberalisation process is rail transport. With international freight transport opened up in 2003 and a commitment of the Member States to open up all rail freight on 1st January 2007, the only area where European rules have not introduced competition, yet is ***rail passenger transport***.
11. On 3 March 2004, the Commission presented a proposal to liberalise international rail passenger transport as from 1 January 2010⁷. On the basis of the proposal, railway undertakings which have a licence and the required safety certificates should be able to operate international services in the Community. For example, existing services rendered by national monopolists such as Thalys and Eurostar could see the arrival of

⁵ Report on liberal professions, 9 February 2004,
http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf.

⁶ See pages 6 and 23 of the report.

⁷ Proposal for a Directive of the European Parliament and of the Council, amending Council Directive 91/440/EEC on the development of the Community's railways, COM(2004)139 final of 3 March 2004.

competitors. Given the fact that by 2010, the length of the European high speed network will almost have doubled with also with the help of substantial European public financing, this would not seem unjustifiable.

12. Rail passengers not only have an interest in seeing competition in rail services, but also in the provision of less profitable services for acceptable prices. It is for that reason that the proposal takes into account the possibility for Member States to establish and protect public services contracts for such services by creating exclusive rights. In order to facilitate competition to the extent possible and desirable regarding such public services contracts the Commission had already presented a separate proposal introducing a system of controlled competition⁸. On the basis thereof, public services contracts will need to be awarded on a competitive basis. The present proposal to liberalise international passenger transport takes into account the complementarity of the two systems, in order to best serve passengers' interests.
13. The *British and Dutch examples* show that controlled competition in public services regarding rail transport produces results. Although not obliged by European legislation the British government introduced controlled competition in passenger transport in 1995. The result has been a 40% increase in the passenger market.
14. The Dutch government also introduced controlled competition along the lines of the European proposal for three concession area's (Friesland, Groningen and de Achterhoek). On 15 August 2003 the Minister for Transport informed Parliament that the competitive award of public services contracts had shown that a better service was provided for the same amount of public money⁹. Therefore the 'total price per unit' had decreased. New, smaller rolling stock was better suited for the demand concerned. Practice showed that the service level was the same or higher, also outside peak times and to 'far out territories' of the concession areas. Also, consumer organisations were involved in the award process. In the three area's involved the number of passengers increased with 15 (1) and 5% (2).

3) Consumer consultation in legislative processes

15. As has become customary in many other area's, DG Competition also consults consumer organisations when drafting legislation in the area of competition. For instance, in the on going consultation process concerning the revision on agreements and practices concerning *consultation on passenger tariffs in the air transport sector* the consumer organisations and the Bureau Européen des Unions des Consommateurs (BEUC) and the UK Air Transport User Council were directly consulted¹⁰.
16. Consumers were also consulted regarding the so-called '*maritime review*': the review of Regulation 4056/86 concerning competition in maritime transport. Although the link between competition condition in maritime transport and consumers is relatively remote, they were consulted on the review and made a well appreciated contribution,

⁸ COM (2002) 107, 21.2.2002, OJ C 151 E, 25.06.2002, p. 146-183.

⁹ TK, 2002-2003, 23 645, Nr 56.

¹⁰ See DG Competition Consultation Paper concerning the revision and possible prorogation of Commission Regulation 1617/93 on the application of Article 81 (3) to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports, http://europa.eu.int/comm/competition/antitrust/others/consultation_paper_en.pdf.

especially expressing themselves on the question whether from a consumer's perspective, an exemption for price fixing is justifiable¹¹.

17. Similarly, BEUC, the European Disability Forum and the European Passengers Federation were consulted by DG TREN on the so-called 'extended impact study' that preceded the presentation in March 2004 of the Commission's proposal on the *liberalisation or international passenger transport by rail*¹².

4) Merger control

18. Consumer views are valued not only in relation to the development of legislation but also in relation to the competition enforcement process itself. With a view to the latter, the Commission has made more explicit room for consumers in its recent modernisation of competition policy.
19. First, in the framework of the revision of the merger control rules, the Commission has announced that it will take into account merger-related efficiencies as a mitigating factor. Mergers will not be declared incompatible with the common market when the efficiencies generated by the merger are likely to enhance the ability and incentive for the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition of the merger.
20. Consequently, it is important that consumers make their voice heard. The new procedural rules for mergers enable the Commission to hear consumers who demonstrate a sufficient interest. Consumer organisations can be heard where the proposed concentration concerns products or services used by final consumers¹³.
21. This also used to be the Commission's practice under the old rules. For instance when the French publishing group **Lagardère** proposed to acquire **Vivendi Publishing**, France's biggest publishing house, consumers protested because their choice of books and the price they pay for them were under threat. The Commission was able to authorise this merger once appropriate remedies were offered by Lagardère¹⁴.
22. It is not always easy for the Commission to reach consumers in merger cases. Whereas in mergers concerning typical consumer products, for instance in the retail sector, it is standard practice for the Commission to approach the regular consumer organisations in the first phase of the procedure in order to verify the impact of the proposed merger on the market this may be less appropriate in relation to more specialized consumer products or services. It was for this reason that in the Commission opened a special web site in order to encourage consumer input in the case concerning the intended merger between two large Swedish banks in the case **Forenings Sparebanken**¹⁵. The deal would have brought together two of the leading Swedish full-service banks, creating the largest provider of retail banking services to households and SMEs in

¹¹ See Pars 104 and 105 of the Commission's Discussion Paper on the review of Regulation 4056/86, http://europa.eu.int/comm/competition/antitrust/others/maritime/review_4056.pdf

¹² An oral hearing to consult all stakeholders was held by DG TREN on 18 December 2003.

¹³ Art. 11 (c) of Commission Regulation 802/2004 implementing Council Regulation No 139/2004 on the control of concentrations between undertakings, OJ L 133/1, 2004.

¹⁴ Decision of 7 January 2004 M/2978, OJ L 125 of 28/04/2004 p. 0054 – 0060, Press release <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/15&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁵ Case M/2380 of 2001, Official Journal C175 of 20.06.2001, press release IP/01/993.

Sweden with market shares in a number of markets in the range of 40-60%. The merged entity's large customer base together with its extensive bank branch network (over 1,000 branches) would have placed the merged entity well ahead of its closest competitors on the Swedish market. After the Commission had issued a statement of objections the merger was aborted by the parties¹⁶.

5) Modernisation of anti trust policy

23. Modernisation of the anti trust enforcement system will allow the Commission to focus its resources on what competition authorities should be doing. Consumers can play an increased role in the new antitrust enforcement regime and the Commission encourages them to do so. Public awareness of the importance of vigorous competition policy is a valuable ally. Also, consumers have information that can help competition authorities in their enforcement activities. Competition authorities should therefore take account of input from consumers. This will help the Commission and the National Competition Authorities to work effectively to enhance consumer welfare and the efficiency of the European economy.
24. Under the new system, consumers will continue to be an important source of information to the Commission. As under Article 3 of Regulation 17, consumer associations and individual consumers with a legitimate interest can lodge a complaint with the Commission. The Commission holds the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest. However, the Commission does not consider as a legitimate interest the interest of persons and organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be directly and adversely affected by the infringement¹⁷.
25. An example of a case in which the Commission based an investigation solely on a complaint of an individual consumer is the Commission's decision of 9 December 1998 in the *Greek ferry-case*. In this case, in which the Commission's substantial analysis was recently fully confirmed by the Court of First Instance¹⁸ the Commission imposed fines of between € 260.000 and € 3,260.000 on Greek and Italian ferry companies for price agreements. The case started in 1992 with a complaint from a customer that ferry prices were very similar on routes between Greece and Italy.
26. Under the new system consumers and consumer associations can submit a complaint on the basis of the new Form C. The 'premium' for using the form is that, provided the complainant has a legitimate interest, the complaint is considered as a 'formal' complaint¹⁹. Formal complainants have a series of rights granted in the new procedural Regulation. For instance, they are entitled to receive a non-confidential version of the statement of objections, make known their views in writing and may be afforded the opportunity of expressing their views at an oral hearing²⁰. Also, in the new Notice on

¹⁶ See press release IP/01/1290.

¹⁷ See Par. 38 of the Notice on complaints.

¹⁸ Case IV/D-2/34.466, Greek Ferries, OJ L 109/24 of 27 April 1999, para 1, CFI Joined Cases T-133/95 and T-204/95.

¹⁹ See Art. 5 Regulation 773/2004 relating to the conduct of procedures by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123/8, 27.4.2004.

²⁰ Art. 6 Regulation 773/2004.

Complaints the Commission has undertaken to inform formal complainants within an indicative time period of four months whether it intends to pursue the complaint in view of a full investigation of the case.

27. Form C requires complainants to submit relatively comprehensive information. They should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Commission.
28. In particular cases, the Commission may dispense with the obligation to provide information in relation to part of the information required by Form C²¹. The Commission holds the view that this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of²².
29. Correspondence to the Commission of persons who do not have a 'legitimate interest' or who have not used the Form C does not constitute a complaint within the meaning of the procedural Regulation. Such correspondence will be considered by the Commission as general information that, where useful, may lead to an 'own initiative investigation'. The Commission has created a special website to collect information from citizens and undertakings and their associations who wish to inform the Commission about suspected infringements of Articles 81 and 82.
30. Persons who do not have a 'legitimate interest' or who have not used the Form C may apply to be heard. If they show a sufficient interest, the Commission informs them in writing of the subject matter and the procedure and sets a time limit within which they may make known their views in writing. The Commission may also invite such persons to develop their arguments at the oral hearing, if they request so in their written comments²³.
31. Finally, the new regulatory framework in force as of 1st May 2004 will bring the decision-making process closer to consumers. More specifically, the decentralised enforcement of the anti-trust rules will allow consumers to address their grievances to national competition authorities, which will be fully involved in the application of the EU competition rules.

6) Consumer liaison officer

32. In December 2003 the Commission appointed a **Consumer Liaison Officer**, Juan Riviere y Marti. The role of the Consumer Liaison Officer ('CLO') is to ensure a permanent dialogue with European consumers. His tasks include
 - acting as a primary contact point for consumer organisations and individual consumers;

²¹ Article 5(1) of Regulation 773/2004.

²² See Par. 31 of the Commission's Notice on complaints, Official Journal C 101, 27.04.2004, pages 54-64.

²³ Article 13 Regulation 773/2004.

- alerting consumer groups to competition cases where their input might be useful and advising them on the way they can provide input and express their views;
 - maintaining contacts with national Competition Authorities regarding consumer protection matters.
23. Obviously, the CLO is still in the process of setting up his activities. However, important first steps to take up his tasks have been set.
24. Within DG COMP, the CLO has set up a **Group of Consumer Correspondents**, case handlers from each Unit or Directorate who meet regularly to develop awareness of consumer welfare in all cases examined in DG COMP. Also, in order to improve quality control a *fiche* concerning the consumer impact already has to be filled out for each case studied.
25. Furthermore, the CLO has set up a co-operation between DG COMP and **DG SANCO** (consumer protection). He also established a link with the co-operation network of consumer protection authorities set up by DG SANCO (a similar, but less formalised network as the ECN set up by DG COMP) and with the **European Consumer Consultative Group**, a group of consumer associations established by DG SANCO.
26. One of the topics discussed with DG SANCO is the consultation of consumers by the recently set up **European Regulators Group for Electricity and Gas (ERGEG)**. This Group was set up to facilitate consultation, co-ordination and co-operation between the regulatory bodies for the electricity and gas sectors in Member States and between these bodies and the Commission, with a view to consolidating the internal market and ensuring consistent application in all member States of the Electricity and Gas Directives. The decision setting up the Group provides that the Group shall consult extensively and at an early stage with consumers and end users in an open and transparent manner²⁴.
27. In addition, the CLO has established relationships with **BEUC** and a number of other European representative organisations of consumers. He has started a series of meetings with BEUC that discuss a list of issues related to particular economic sectors which will be followed up and monitored by DG COMP and BEUC together in order to avoid new problems for consumers. In this framework liberalised network industries and new policy initiatives have especial attention from BEUC.
28. Finally, a separate **mailbox**²⁵ was opened for information addressed to the Consumer Liaison Officer.

7) Private enforcement

33. Another aspect of importance for consumers, which is complementary to the enforcement of the EU competition rules by the public authorities, is the possibility for private parties to ask national courts to grant damages resulting from illegal behaviour or to order the termination of illegal behaviour. As ruled by the European Court of Justice, the full effectiveness of Article 81 would be at risk if it were not open for an individual to claim damages for losses caused by an infringement of competition law²⁶. It is well established that private enforcement of the EU competition rules is currently

²⁴ Decision 2003/796/ECD, OJ L 296/34, 14.11.2003.

²⁵ COMP-CONSUMER-OFFICER@cec.eu.int.

²⁶ Court of Justice of the EC 20 September 2000, Case C-453/99, Courage/ Crehan.

lagging behind public enforcement. This negatively impacts on compliance incentives and the efficiency of the EU competition rules.

34. Under the new regulatory framework, national courts can fully adjudicate competition matters. Moreover, national courts will no longer have their proceedings blocked because of the notification of agreements to the Commission. The Commission is now reflecting on how to further improve the situation for victims of infringements of the EU competition rules.
35. Two weeks ago, the results of a *Study on the conditions under national law of claims for damages in case of infringement of EU competition rules* have been published on the Commission's web-site²⁷. The study indicates that private enforcement is extremely under-developed, with very few awards of damages being made.
36. The study paints a picture of (in its own words) 'astonishing diversity and total underdevelopment of damages actions for breach of competition law'. Among the obstacles to a wider use of such private enforcement actions are:
 - the fact that non-specialized courts, often without the necessary expertise, are competent to hear such claims;
 - restrictions on the use of collective claims, class actions and public interest litigation,
 - limitations on forms of compensation available;
 - the need to prove negligence or intention;
 - high standards of proof;
 - the fact that in many cases, parties are not able to obtain the documents proving the infringement;
 - the fact that in most Member States decisions of National Competition Authorities or the Commission do not formally have a binding effect on courts.

The report presents a number of proposals to take away such obstacles.

37. Private enforcement will also be one of the two topics to be discussed on European Competition Day in Amsterdam on 22nd October 2004.
38. Based on the final results of the study and its own research, the Commission has decided to start work on the drafting of a Green Paper in the second half of 2004. The goal of the Commission is to identify potential ways forward for the encouragement of private enforcement of EU competition law. The threat of such litigation can have a strong deterrent effect and result in a higher level of compliance with the competition rules.

²⁷ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan: Study on the conditions of claims for damages in case of infringement of EC competition rules, 31 August 2004
http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

39. The foregoing shows that the Commission is committed to a proactive, modern and effective competition policy. Not only will this ensure that the market functions in such a way as to maximise benefits for consumers, but it also gives consumers an unparalleled opportunity to participate in the fight against violations of the competition rules. Let us hope that they will make ample use of it.

Thank you for your attention.