

Speech

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Latest Developments in EC Competition Law

**EU-China Workshop on the Abuse of Dominant Market Position
in China**

Beijing, 14 January 2009

* The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission

Ladies and Gentlemen,

It is an honour for me to address this distinguished audience about the latest developments in EC Competition law.

Compared to the developments in the People's Republic of China in 2008 where you have seen the entry into force of the Anti Monopoly Law, the developments in the EU are not so exciting – I would say that in the EU it is rather a matter of fine tuning of the existing legal and procedural framework and a continued effort in the enforcement of the law.

Among the actions to fine tune the legal and procedural framework for EC Competition Law in 2008 I would like to talk about an initiative to facilitate private action for damages, a new cartel settlement procedure, the new guidelines on non horizontal mergers and finally, the published Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.

In terms of enforcement initiatives, 2008 saw a continued focus on the fight against cartels, sector enquiries into key sectors of the economy, and a significant number of merger and state aid cases as a result of the financial crisis.

The financial crisis

The first issue, which I would therefore like to mention, is the huge challenge which the financial crisis posed to DG Competition during 2008. The financial crisis - which has been dominating the news headlines the past few months as companies' share prices have dropped in parallel with the outside temperature - has had a dramatic impact on the work of DG Competition and it is keeping our staff very busy!

As you know, DG Competition is not only competent to deal with anti-trust and merger cases; it is also competent to review the state subsidies which the EU member states may give to its companies. Under our state aid rules, we saw the first signs of the financial crisis in 2007 when the member states started to give individual assistance and guarantees to certain European banks. Such measures shall be notified to and be approved by the Commission under the state aid rules before they can be carried out.

EU rules allow EU member states to grant aid to companies in difficulty if this may be warranted, for instance, by social, regional or wider macro-economic policy concerns. The EU rules on rescue and restructuring aid aim at limiting the impact of such aid on competition and at ensuring

transparency and equal treatment of individual companies. On the basis of these principles, DG Competition provided a guidance paper indicating how it intended to apply the state aid rules to national support schemes and individual assistance for financial institutions in the context of the current crisis. In the following weeks, the Commission shaped and adopted – in record time - more than 20 decisions approving national rescue measures, which helped to restore confidence in the financial markets.

The role of the Commission in the field of competition policy has not only been to support financial stability by giving legal certainty to the measures taken by Member States, but also to maintain a level playing field and to make sure that national measures would not simply export problems to other Member States. The crisis has actually demonstrated that this is a very real risk, with money flowing to banks benefiting from State guarantees and bringing banks in other countries that did not benefit from State guarantees in trouble.

State aid control has proven to be a real asset for the European financial markets to weather the storm, and it will avoid that we discover a highly distorted situation in this sector once the storm has passed.

Moreover, DG Competition's involvement in the financial crisis is not limited to state aid control. When a financial institution falls victim to the crisis, a solution is sometimes its takeover by a more solid financial institution. Such a takeover solution will, provided the thresholds are met, fall under EC merger control and the normal merger review principles will apply to this situation. In doing so the Commission can and will take into account the evolving market conditions and, where applicable, a failing firm defence.

It is clear that we will be busy with the consequences of the financial crisis well into 2009 in both the control of rescue and restructuring aid as well as merger control. However, DG competition is of course also active on many other fronts. Let me give you some highlights from 2008 in the policy developments:

White Paper on Damages Actions (April 2008)

Due to cartel behaviour, higher prices are paid by businesses and individual consumers. Illegal behaviour by cartelists costs the European economy billions of euros every year and it is rare that the wrong-doer is made to compensate for all the losses he has caused to others. That is not fair.

The Commission therefore published a White Paper on Damages Actions in April last year. The White Paper proposes reforms that make damages claims by victims more effective, whilst ensuring respect for European legal systems and traditions. The Commission suggests a European model that is clearly different from what exists abroad.

We considered this step necessary, as although victims of competition law infringements are entitled to damages, so far very few damages cases were brought in Europe. That is because there are serious obstacles in most EU Member States that discourage victims from claiming compensation.

The White Paper presents a set of recommendations to ensure that victims of competition law infringements have access to truly effective mechanisms for claiming full compensation for the harm they have suffered. These recommendations offer a balanced solution, while avoiding over-incentives that could lead to litigation excesses as perceived in some countries outside Europe.

Some of the key recommendations in the White Paper are as follows:

- Firstly, the Commission proposes a system of single damages rather than multiple damages. This means full compensation of the actual loss due to for example an anti-competitive price increase or the loss of profit as a result of any reduction in sales.
- Secondly, the Commission proposes to introduce the possibility for "collective redress". Consumers and small and medium-sized enterprises with relatively small value claims need better access to justice. They should have the possibility to regroup their claims and bring actions via suitable representatives. However, safeguards to avoid that such actions would lead to unfounded claims need to be put in place. In the field of antitrust, the Commission therefore recommends allowing only representative actions led, for example, by recognised consumer groups and actions in which victims can choose to participate, as opposed to class actions run by law firms for an unidentified number of claimants.
- A third element of our proposal relates to disclosure of information. Judges should be allowed to get the full picture of a case; parties should not be permitted to keep relevant evidence to themselves. The disclosure of relevant evidence, under the control of the judge, should help to ensure a fair case, where both parties have equivalent access to evidence.

We are now considering concrete follow-up measures. The concrete follow-up measures will make clear that public and private enforcement are complementary and should not jeopardise each other, e.g. by guaranteeing

the attractiveness of leniency programmes by protecting corporate statements.

A new cartel settlement procedure

In June last year, the European Commission introduced a settlement procedure for cartels which will allow the Commission to settle cartel cases through a simplified procedure. Under this procedure, parties, having seen the evidence in the Commission's file, can choose to acknowledge their involvement in a cartel and their liability for it. In return, the Commission can reduce the fine imposed on the parties by 10%.

Under the new settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction, but can reward the parties' cooperation to attain procedural economies. Such cooperation is different from the voluntary production of evidence to trigger or advance an investigation. This aspect is already covered by the Leniency Notice

We have introduced the settlements procedure with the aim of simplifying the administrative proceedings and of reducing litigation before the European Courts in cartel cases.

This will allow the Commission to settle cartel cases through simplified procedure, thus speeding up the procedure and enabling DG Competition to handle more cases and increase overall deterrence.

The settlements package gives companies a strategic choice when, faced with compelling evidence of their involvement in a cartel, they are ready to admit liability, and in exchange for a 10% reduction of the fine and a shorter procedure. However, parties can always stick to the ordinary procedure and dispute the case by all legal means up to and beyond the final decision.

The settlements package ensures that companies who choose the settlement road act in full knowledge of the issues at stake (our objections, the evidence in our files, and the likely range of the fine).

When all parties to the same case make the same procedural choices, the Commission can follow a simplified procedure and adopt a formal Commission decision earlier.

The Leniency Notice will remain a central investigative tool. The settlement reduction is set at 10% to maintain the overall deterrence of penalties and not to interfere with the incentives to apply for leniency. It also reflects the Commission's confidence on the strength of the cases submitted for settlement after a thorough investigation.

New guidelines on non horizontal mergers

In November 2007, the European Commission adopted Guidelines for the assessment of mergers between companies that are in a so-called vertical or conglomerate relationship (also known as "non-horizontal mergers"). The non-horizontal Merger Guidelines complement the existing Guidelines on horizontal mergers of companies who compete on the same markets.

Non-horizontal mergers include *vertical mergers*, such as the acquisition of a supplier by a customer, for example a steel manufacturer acquiring a supplier of iron ore, and *conglomerate mergers*, which concern companies whose activities are complementary or otherwise related, for example, a company producing razors buying a company producing shaving foam.

Horizontal mergers – i.e. those between competitors on a particular market – can lead to a loss of direct competition between the merging firms. By contrast, vertical and conglomerate mergers do not immediately change the number of competitors active in any given market. As a result, the main potential source of anti-competitive effects in horizontal mergers is absent from vertical and conglomerate mergers. They are thus generally less likely to create competition concerns than horizontal mergers. In addition, vertical and conglomerate mergers may also improve a company's efficiency by better co-ordinating their different production stages.

The Guidelines provide guidance to companies as to how the Commission will analyse the impact of such mergers on competition.

The Guidelines give examples, based on established economic principles, of where vertical and conglomerate mergers may significantly impede effective competition in the markets concerned. For instance, they outline the circumstances under which a vertical merger could be likely to result in competing companies being denied access to an important supplier or facing increased prices for their inputs and thus ultimately lead to higher prices for consumers.

The Guidelines also indicate levels of market share and concentration below which the Commission is unlikely to identify competition concerns (so-called "safe harbours"). This will help interested parties to identify such mergers more easily.

Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings

Let me finally turn to guidance paper published by the Commission on 3 December 2008 on its enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings. This is also the topic of this seminar, so I will not go into detail with the issue but only give the major policy line.

The essence of the legal position in the EU is that under Article 82 EC, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

The guidance paper sets out an economic and effects-based approach to exclusionary conduct under EC antitrust law. Such an approach has already been used in recent Article 82 cases, including Microsoft.

The guidance paper provides for the first time comprehensive guidance to stakeholders, in particular the business community and competition law enforcers at national level, as to how the Commission uses an effects-based approach to establish its enforcement priorities under Article 82 EC in relation to exclusionary conduct.

The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their rivals in an anticompetitive way and thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term "anticompetitive foreclosure" is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.

The Commission will normally intervene under Article 82 EC where, on the basis of convincing evidence, the allegedly abusive conduct is likely to lead to anticompetitive foreclosure.

The Commission considers the following factors to be relevant to such an assessment:

- the strength of the position of the dominant undertaking.

- the conditions on the relevant market.
- the position of the dominant undertaking's competitors.
- the position of the customers or input suppliers.
- the extent of the allegedly abusive conduct.
- possible evidence of actual foreclosure.
- direct evidence of any exclusionary strategy.

In the enforcement of Article 82 EC, the Commission also intends to examine claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

I will not say more about the dominance paper at this point as we will be discussing this for the rest of the workshop.

Ongoing work in anti-trust, cartels and mergers

Before handing over the floor, I would like to mention the ongoing case work in DG Competition.

Cartels

Fighting cartels has been and will remain a priority. We have steadily stepped up our activity in this area. As you may know, eight decisions imposing fines were adopted in 2007 with a record level of EUR 3.3 billion. This is almost half of the total fines imposed in the period 2002-2007. In 2008, the Commission adopted seven decisions.

Anti-trust

In recent years, the Commission has also started to take a more pro-active stance in its enforcement of anti-trust rules. To identify anti-competitive practices, the Commission has launched a number of so-called "sector

inquiries" covering key sectors of the economy. This investigative tool is used when a market does not seem to be working as well as it should (limited trade between Member States, lack of new entrants on the market, price rigidity, or other evidence suggesting restriction or distortion of competition). Information gathered during the inquiry is used to assess whether the Commission needs to open specific investigations to ensure the respect of Community competition rules. The results of sector inquiries are published and interested parties are invited to submit comments.

Our antitrust enforcement action will also continue to focus on the information and communications technologies (ICT). In 2008 we continued our cases against Intel, Rambus and Qualcomm.

Mergers

It is too early to say whether this is a trend, but in the last year there were fewer cases notified than in the previous period. During 2008 we received a total of 347 notifications compared to 402 in 2007.

At the same time there is a clear trend that the cases that are notified to us are increasingly complex, both technically and in the competition issues they raise.

A few cases of particular complexity that should be mentioned are *Google/DoubleClick*, *Tomtom/TeleAtlas* and *IBM/Telelogic*. All these cases involved high tech markets, most of which have never been assessed by the Commission before. In all three cases, extensive market investigations were conducted in phase II proceedings and they illustrate well how we apply the non-horizontal merger guidelines.

1. WHAT WILL 2009 BRING?

It is clear that the financial crisis will continue to have a strong impact on our merger and state aid work and cartels will continue to be a priority action area.

In terms of policy projects, you should not expect major new developments as in previous years where we have introduced the economic approach in all fields of activity.

The future policy work will rather be characterised by stock taking, review and refining of existing instruments.

Our 2009 policy projects include:

- a continuation of the Article 82 Policy Review as work on a draft text on exploitative conducts will commence in the first half of 2009 and it is likely to concentrate on abuses such as discrimination and excessive pricing.
- Review of the Antitrust Policy on Horizontal Cooperation Agreements: The R&D and the Specialisation Block Exemption Regulations will expire at the end of 2010. The horizontals review will assess whether the two block exemption regulations should be renewed, and, if so, what changes should be made. In addition, the Horizontal Guidelines will be analysed with a view to adapt them to the latest economic and legal thinking and to reflect the changes in the business environment since the entry-into-force of the current horizontals regime in late 2000.
- The current Block Exemption Regulation for vertical agreements also expires next year and it will be reviewed with a view to its amendment at the expiry date in May 2010. In parallel we will review the Guidelines on vertical restraints. The related sector specific Block Exemption Regulation on car distribution will also expire on May 2010 and it will accordingly be included in the review. The review is expected to refine the evaluation of what is the most appropriate and workable effects-based approach to assess vertical restraints.

Ladies and gentlemen, with this overview I will terminate my speech so that we can get started with our discussion on unilateral conduct.

I wish you all successful and interesting two days where prominent experts will give their views on the abuse of a dominant market position.

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Beijing, 14 January 2009