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

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Introduction

Ladies and Gentlemen,

I am delighted to be here today to launch the discussion on the future of European competition law in high-tech industries.

As you know, in Europe much of the last two years have been occupied with crisis-related measures. For the European Commission these have been challenging times. We had to concentrate our efforts on helping to prevent a collapse of the financial sector and then on returning to growth in the real economy.

Although the shadow of the crisis is still here and problems are not yet over, time has come for the EU to move to renewed economic prosperity. This is why high-tech industries are so important. Their growth potential is enormous. They provide open avenues for innovation and creativity and they bring, or should bring, economic benefits to firms and consumers alike.

The Commission as a whole, under the authority of President Barroso, has made it a priority to promote the digital economy through a series of regulatory measures. As a competition authority, as antitrust enforcers, our main job is to complement that and to ensure that markets, platforms and data remain open to innovative firms. We have to make sure that no private or public entity is able to distort competition and limit access to the digital sphere.

This is no easy task as the challenges posed by increased digital convergence are numerous and complex. I would like to briefly focus on these challenges in the second part of my speech today.

But first allow me to start by saying a few words on our antitrust work over these last months.

1. Looking back: antitrust in 2010

In 2010 we have continued to enforce competition rules vigorously.

Vice-President Almunia has said throughout the year that we have been hard on cartels and we will continue to be. We have dealt with several complex and long lasting cartels this year – as long as 35 years in *Animal Feed* – and that affected millions of consumers across the EU. We calculated that our fight against cartels saved customers at least €7 billion in 2010 in sectors as varied as bathroom fittings, LCD screens, air cargo or pre-stressing steel. All I can hope is that the companies involved in these cartels, once the fines are paid, no longer see it as good business to collude.

These are serious infringements and fully deserved the over €3 billion in fines we levied. Of course, and as Mr. Almunia has repeatedly said, our aim is not to put companies out of business. This is why we have taken into account valid claims for inability to pay when calculating the fines. On 10 occasions, we reduced the fines to a level that the companies could afford to pay. But, as economic recovery picks-up, we foresee that such circumstances will be increasingly rare.

In 2010, we have used our cartel settlement tool, where parties acknowledge their cartel involvement upfront. We have achieved promising results in *DRAMs* and *Animal Feed*, our first cases. There are currently other candidates in the pipeline and we hope that the settlement tool will help us speed-up cases.

Important resources will be saved on our side in terms of further litigation before the EU Courts. In *DRAMs* for example none of the parties brought appeals. This means that our resources can be put on other cases. For companies, this means that they pay lower fines – cumulative with leniency – and that they put the whole cartel episode behind them more quickly and (hopefully) for good.

Aside from cartels, we have also concentrated on protecting the Internal Market from the harm done by restrictive agreements and abuse of dominant positions. To take a few examples:

- in the energy sector, we took four decisions¹ that ensured that markets will remain open and that competitors will not be foreclosed;
- in the financial sector, we accepted commitments from Visa and agreed on a reduction of interbank fees for debit cards concerning millions of transactions per year. Consumers will thus benefit from lower costs, including those costs that they pay without knowing it.

Merger control is also key for a competitive economy. Earlier this year we had to prohibit a merger, a rare event.

In the *Aegean/Olympic* case, despite our efforts and dialogue with the parties, no solution could be found to ensure that consumers would not be harmed. The new airline would have had a quasi-monopoly on key routes, no new player could

¹ *E.ON*, IP/10/494; *EDF*, IP/10/290; *ENI*, IP/10/1197; *Svenska Kraftnät*, IP/10/425.

have entered the market and this would have led to higher fares and less choice for passengers.

As you know, the companies have just announced yesterday that they will appeal our decision before the General Court. We have every confidence in the legal and economic analysis underpinning our decision, but it is now for the General Court to decide.

However, we believe that prohibition decisions will remain rare as for that minority of cases where we do find competition problems, we are usually able to find remedies.

We had a recent example in *Intel/McAfee* a few weeks ago where we managed to clear the merger in Phase I. In that case, we were able to put in place sound interoperability remedies that ensure that Intel's hardware will remain open to the security solutions that McAfee's competitors will invent. We are particularly happy with this decision. Please read it carefully...

This is very much linked to the topic of the challenges posed by competition in high-tech industries and I would like to turn to that now.

2. Competition in high-tech industries: the many challenges for competition law practitioners

The next two days will be rich in topics, let me briefly refer to some of them.

For example, how does digital convergence affect market definition? What will be the impact of increased convergence on competition? What role should antitrust enforcers play?

I think that for competition law agencies, the greatest challenge is to understand the complexities of high-tech industries and to ensure that competition is respected and fostered. Frankly speaking, I think that we understand this world. Our main task is to preserve a level-playing field, which will ultimately benefit to consumers in terms of new products, increased choice and lower prices.

In order to do this, we must ensure that competition law is flexible enough to address dynamic high tech issues.

- First, we must be able to effectively analyse the relevant competition concerns and swiftly enforce where we detect distortions of competition. In order to do that we must develop sufficient market intelligence to understand the new dynamics that emerge on the market and how they may impact on the level-playing field. In this respect, I think that the sectoral approach that DG Competition follows is particularly useful in understanding how markets operate in practice.
- Second, we need to put in place clear rules that provide legal certainty for businesses and their advisors.

- And third, we must devise adequate remedies to the competition concerns that may arise.

Allow me to look at each of these challenges in turn.

2.1 The need for continued enforcement

Enforcement of the competition rules is our first priority. It is our duty to ensure that anticompetitive foreclosure does not occur. Firms in high-tech sectors, just as in any other, should compete on the basis of their merit in terms of quality, price and innovation and no player should be excluded because of anticompetitive barriers.

The European Court of Justice has recently upheld our decision in the *Deutsche Telekom* margin squeeze case. The judgment confirmed the Commission's well established policy of fighting the temptation by dominant firms in network industries to set wholesale and retail prices at levels that do not allow their competitors to cover their costs. Such a policy, backed through robust enforcement action allows telecoms markets to remain open to competition.

As recently as two weeks ago, the Court also ruled in the *TeliaSonera* case involving unregulated services. The Court stated that when carrying-out a margin-squeeze examination, a competition authority should demonstrate that the abusive practice causes – at least potentially – an anticompetitive effect on the market. Although in such analysis the indispensability of the product for a competitor to enter the market is a relevant factor, there will be margin squeeze cases capable of having anti-competitive effects where access to the supply of the wholesale product is indispensable. And there will be other cases where the wholesale product is not indispensable. This confirms our position that a

dominant undertaking must refrain from adopting pricing practices which have an exclusionary effect on its equally efficient – actual or potential – competitors.

Our decision in the *Telefonica* margin squeeze case also aimed at setting an important precedent for the assessment of similar cases in other sectors, in particular network industries recently liberalised or in the process of being liberalised. But again, due deference towards the General Court makes me stop here my discussion of this case in public.

We will continue to intervene with enforcement where necessary to restore competition in such markets. In such sectors, by combining targeted regulation – and by regulation I also include soft regulation such as the Recommendation on Next generation Access – we have built over time a strong legal environment that promotes both thriving competition and also provides incentives for solid investment.

2.2 The need to provide clear and updated rules

One of our main responsibilities is to provide clarity so that businesses and their advisers know what they need to do to comply with the competition rules. And these rules have to be kept up to date in light of changing market circumstances.

This is one of the reasons behind our review of the rules on cooperation agreements between competitors². Our recent review acknowledged that such cooperation can be key in developing and marketing existing and new products and that such ventures require significant upfront commercial investments.

² Adopted on 14/12/2010, IP/10/1702.

Businesses want to be able to assess whether their plans raise competition law concerns before embarking on expensive projects. This is why clear rules on horizontal agreements are important for doing business in Europe and why industry broadly welcomed our update initiative. The chapter on standardisation attracted particular attention and I would like to say a few words on that.

Stakeholders asked us to refine the safe harbour set out in the initial draft and to provide more guidance on standardisation agreements falling outside it. Many supported the view that there is no "one-size-fits-all" approach to IPRs. Some also insisted that there are other models of standard-setting than the one proposed in our initial draft which advocated advance IPR disclosure.

In terms of standard-setting, our role is not to prescribe a specific scheme, but to promote an open and transparent standard-setting system. This means increasing the visibility of the licensing costs for intellectual property rights ("IPRs"). We worked on finding a balance between the differing interests of companies with differing business models. We also strived to provide sufficient incentives for innovation and to ensure that the benefits deriving from standardisation are passed on to consumers.

In our final text, we clarify that the good faith disclosure of IPR does not require the companies concerned to embark on a patent search which can be a pricey exercise. We also state that an IPR disclosure would not be a condition in the context of royalty-free settings - 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 clarify that all participating 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"). The rationale of the FRAND commitment is 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.

In order to make this self-assessment easier, we also explain 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.

These are all important clarifications for how competitive dynamics will unfold in standard-setting in high-tech industries. Standards can reduce production costs in a number of sectors, they can enable interoperability among products and they can allow products to reach consumers more quickly. Clear antitrust rules will therefore increase the ability of stakeholders to know upfront where they stand.

You will hear more on the subject during today's first panel. But I wanted to mention this area from the outset since I think it is an excellent example of how well competition law can adapt to the challenges of high-tech industries.

2.3 Devising adequate remedies

I would now like to mention the need for devising adequate remedies, that are suitable for the concerns that we have in high-tech industries. And remedies that do not arrive too late.

We do not for instance want that by the time our remedies are in place, the market has already moved past the problems that we had identified. In our antitrust cases, this is sometimes a challenge given the lifespan of a case. However, recent experience has shown that commitment decisions can be a very effective way to achieve timely remedies in antitrust cases. And I think that we have numerous good examples of remedies that effectively open-up markets to competition.

For example, following our decision in the *Microsoft* browser case, computer users with the Microsoft Windows PC operating system are now shown a Choice Screen which gives them a choice between the most widely-used web browsers that run on Windows. They can therefore choose to download as many of the browsers as they like. Or they can chose to continue using Microsoft's web browser. In addition, computer manufacturers and users are able to turn Microsoft's web browser off and set other browsers as their default browser. And Microsoft is also prohibited from circumventing free and effective browser choice by any contractual, technical or other means.

We have also had examples of best practice in our merger cases. Remedies are an essential element of our merger control system because they allow for the modification of transactions that would negatively alter market structures. Consequently such transactions can be cleared and companies can proceed with their business plans.

In *Cisco/Tandberg* we had identified horizontal competition concerns arising due to the strong position of the merged entity in the market for Video Conferencing Solutions ("VCS") and high barriers to entry in this market. In order to address our concerns, Cisco committed, *inter alia*, to divest the rights attached to its proprietary Telepresence Interoperability Protocol ("TIP") to an independent industry body, ensuring interoperability between the merged entity's products and those of actual and potential competitors. Within this framework competitors would also be able to participate in the development of the protocol. These remedies will foster competition far beyond Europe.

This is why we intensely cooperated with the DoJ in this case. We discussed the assessment of the case, the possible remedies and we ensured consistency in the timelines of our respective decisions. On the day of the decision in Europe, the DoJ announced that it would not challenge the transaction in the US, taking into account the commitments that Cisco made to the European Commission.

I mentioned earlier *Intel/ McAfee*. There too we cooperated very well with the FTC, and the interoperability remedies will play a key role on the market. We managed to ensure a balance in these commitments, preserving both competition and the beneficial effects of the merger. Intel committed to ensure that vendors of rival security solutions will have access to all the necessary information to use the functionalities of Intel's CPUs and chipsets in the same way as those used by McAfee. And Intel cannot impede competitors' security solutions from running on Intel CPUs or chipsets. These interoperability remedies will ensure competition on an equal footing between the new entity and competitors. And of course we will monitor how this works in practice through the trustee.

Throughout the years, the Commission has taken a strong stand in favour of open models and interoperable solutions. We deem that these favour market

entry by a greater number of players and that they stimulate competition in high-tech industries. We also believe that such systems attract innovation and bring costs down. The Internet has undoubtedly become such a success-story thanks to interoperable standards and protocols.

We cannot and should not predict which business models will prevail tomorrow. It is for the markets to decide. However, we have fought in favour of interoperability in complex antitrust cases such as the *Microsoft* 2004 case and ex-post enforcement has paid-off. Going forward, access will continue to be crucial in developing new generation technologies. This is why we will continue to promote interoperability whenever access is so restricted that it can foreclose competition, harming consumers.

Conclusion

Wrapping-up, I believe that competition law is a flexible tool that we have strived to modernise constantly. The Commission is able to analyse complex high-tech markets in a dynamic way.

Our competition law tools have served us well and they will continue to do so, even in this new digital, instantaneous communication era.

Our mission as competition remains the same: to foster competition, innovation and growth to the benefit of consumers and businesses. The intertwining of clear and modern rules with targeted antitrust enforcement and adequate remedies will be altogether rewarding for creativity and innovation.