

Speech

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Introduction to EU Competition Policy:

Past, Present and Future

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

Ladies and Gentlemen,

It is a pleasure to be back here in China and a great honour for me to introduce such a distinguished audience to EU Competition law, giving an overview of its past, present and where it is heading in the future. It is from our past we learn lessons, and we prepare for the challenging future ahead by dealing methodically and forcefully with the present.

Unlike in the People's Republic of China, where you recently witnessed some very exciting developments with the Anti Monopoly Law coming into force, EU Competition Law is at the stage where much of the attention is directed at refinement of existing legal and procedural framework and, of course, at the continued vigorous enforcement of competition rules.

In the last year, DG Competition has been extremely busy in dealing with the financial crisis and its impacts. We have been expected to work twice as fast and we have delivered. Our refinement activities have been many and include private action for damages, introduction of new cartel settlement procedures, new guidelines on non-horizontal mergers and finally the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 82 of the 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 state aid cases as a result of the financial crisis. The agenda for 2009 is as ambitious as previous years, if not more. We are nearing the conclusion of the Pharmaceuticals Sector Inquiry.. In addition, we are reviewing the Merger Regulation and continuing with the Article 82 enforcement priorities, where we are now looking at exploitative abuses.

We recently delivered a report on Regulation 1/2003. The regulation effectively decentralised the enforcement of EC Competition laws by sharing it with National Courts and Competition Authorities. This further increased competition law enforcement within the EU.

Finally, the financial crisis - which has dominated the headlines for the past months and the conclusions derived from the recent G-20 Summit in London, informed us of its magnitude and effects on markets and competition. Suffice to say, the financial crisis has had, and still has a dramatic impact on our work and arguably is one of the greatest challenges presented to DG Competition and to the European Union as a whole.

Past: Overview of a Comprehensive Competition Policy

That competition encourages innovation and technical developments and thus the advancement of markets is an old and well known fact. Competition policies ensure that markets are and remain competitive so as to produce benefits for consumers and to counter monopolistic rents from being imposed. Yet, one may ask why the need for an EU Competition Policy?

The answer is simple; the Single Market and the four fundamental freedoms, i.e. the freedom of movements of persons, goods, services and money within the Common Market, are at the heart of the European Union, without the former, the freedoms would be rendered useless. The Single Market is one of the greatest achievements of the EU; it has removed governmental barriers to create an Internal Market. The Single Market has liberalised markets and increased living standards, and therefore, it is precious and must

be protected and nurtured. A Europe-wide competition policy is one of the essential tools to maintain this barrier-free Single Market, whether these barriers have been imposed by private actors or national legislation.

Citizens across the Union have seen real benefits from the Single Market. To name few successful examples, I will mention the liberalisation of the air transport and telecommunications markets. In air transport, we now have a fiercely competitive market and this has given consumers the benefit of greatly reduced air fares, journeys cost a fraction of what they previously did. The telecommunications' story is very similar.

The EC Competition Rules

In brief, our competition rules can be divided into three categories, the first category seeks to control the behaviour of companies. Article 81 EC prohibits agreements and concerted practices which prevent, restrict or distort competition, insofar as they may affect trade between Member States, unless justified by improvements in production or distribution in accordance with Article 81(3). Article 82 EC prohibits the abuse of a dominant position insofar as it may affect trade between Member States.

The second category safeguards the market structure by ensuring that proposed mergers and acquisitions do not lessen competition in the EU area. The rules are found in the EC Merger Regulation and govern concentrations with an EC dimension. To assess which rules, i.e. national or European, should apply to a proposed concentration, the Regulation provides specific turnover thresholds. Where these are met, the EU Commission has exclusive jurisdiction over mergers with an EC dimension.

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. This brings us to the third category of rules; these seek to prevent undue State intervention. Article 86 EC allows the application of the EC Competition rules to public undertakings to which Member States grant special or exclusive rights. Articles 87-88 EC gives the European Commission the power to control state aids to enterprises that are granted by Member States and that may distort competition in the internal market.

It was under the operation of these state aid rules that 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 rules before they can be carried out.

Who enforces the EC Competition rules?

As earlier mentioned, Regulation 1/2003 decentralised the enforcement of EC Competition Law. This simply means that since 1 May 2005, National Competition Authorities of the Member States have been able to enforce Article 81 and 82 EC, alongside the European Commission. This has led to wider enforcement of EC Competition rules. Member States are required to apply these provisions in addition to their national competition law. Where an agreement is prohibited by Article 81 EC or conduct is prohibited under Article 82 EC it cannot be permitted under national law. However, it is permitted for national competition law to be stricter on unilateral conduct by a dominant undertaking.

As a result of Regulation 1/2003, resources were freed and DG Competition could focus its enforcement activity on the most serious anti-trust infringements and on cartels.

However, DG Competition remains the focal point for Article 81 and 82 EC cases in the EU. For example, if a novel or unresolved issue arises, where it is in the interest of the European Union, or where a case has an effect on a large number of Member States, DG Competition will be well placed to deal with the case, provided that the agreement or practice has an effect on trade between Member States.

In the area of mergers, criteria have been established to allocate cases between the EU and the national level. If a proposed concentration meets these criteria, it is deemed to have a Community dimension and will be referred to the European Commission, which will have exclusive jurisdiction over the matter. A proposed concentration will have a Community dimension if the combined aggregate worldwide turnover is more than €5 billion; the aggregate Community wide turnover of each of at least two of those undertakings is more than €250 million, and; each of the undertakings of the proposed merger achieves no more than two thirds of its aggregate Community wide turnover within one Member State.

Also resulting from Regulation 1/2003, is the establishment of the European Competition Network, which functions as a forum for discussion and cooperation of European Competition Authorities and DG Competition in cases where Articles 81 and 82 EC are applied. This Network creates an efficient mechanism to counter cross-border infringements. It also ensures consistent application of EU competition rules in each of the 27 Member States. Members inform each other of new cases and anticipated decisions, coordinate investigations and dawn raids in cartel cases, exchange evidence, and share expertise and best practices. Where several Member States are able to investigate a potential infringement, the best placed National Competition Authority will take over or alternatively, it may be referred to DG Competition.

Present: Where are we today?

The financial crisis has increased DG Competition's workload. With the additionally specialist staff that was recruited to deal with the consequences of the crisis, we currently stand at 900 staff – of which ca. 50% are case handlers divided over sectoral Directorates, one Cartels Directorate, one State aid Directorate, one policy Directorate and one Directorate responsible for Human Resources and IT. With many hundreds of investigations completed and an equal number of decisions adopted annually, the efficiency and competence of our staff is evident.

One particular achievement which merits mentioning is the practical benefits we have gained through the European Competition Network; earlier today, I mentioned its purpose and now I turn to its present status. Earlier this month, five years after Regulation 1/2003 came into force, we published the results achieved by the decentralisation. Since this new framework came into being, the enforcement of EC Competition law has significantly increased. Collectively in the ECN, we have opened more than 1 000 cases under Article 81 and 82 EC in those past five years.

On the European cooperation front, we currently are looking into how further improvements can be made to the Network. That said, I now wish to tell you about some of our other activities at DG Competition.

1) White Paper on Damages Actions (April 2008)

Last year, the Commission published a White Paper on Damages Actions in April last year. In brief, the Paper proposed reforms that make damages claims by private parties

more effective, whilst ensuring respect for different national legal systems and traditions in the EU. The Commission's recommendations offer a balanced solution, while avoiding over-incentives that could lead to a floodgate of ill-founded litigation which may have been experienced in some countries outside Europe. Some of the key recommendations were:

- A system of single damages rather than multiple damages. This means full compensation for actual losses suffered due to, for example, an anti-competitive price increase or loss of profits resulting from reduction in sales.
- The possibility to introduce "collective redress". Consumers, small and medium-sized enterprises with relatively small value claims should be able to regroup their claims and bring actions via suitable representatives. In order to avoid unfounded claims, the Commission recommended only representative actions led, for example, by recognised consumer groups and actions in which victims can choose to participate.
- 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 to 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.

2) Review of Vertical Restraints

Alongside the main competition provisions, we have secondary legislation to provide further guidance on agreements and practices. One example is our Verticals Block Exemption Regulation. This regulation effectively creates a "safe harbour" for a large number of vertical agreements under Article 81 (3), so agreements that fall within this regulation are automatically exempted from the application of Article 81 EC.

Currently, we are reviewing this area of regulation. The current Block Exemption Regulation for vertical agreements expires next year and it will be reviewed with a view to make amendments to it by the expiry date in May 2010. In parallel we are reviewing 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.

3) Financial Crisis & Competition Policy

It is now apparent that the financial crisis continues to have significant impact on our state aid work. While State Aid has proved to be a useful instrument to temporary "salvage" the severely hit banking market, its use should be thoroughly controlled. Indeed, it helped restoring confidence in our banking markets across Europe. For instance, the UK government's rescue package which assisted the Royal Bank of Scotland, a core financial institution whose failure could have destabilised the entire UK economy, ensured the stabilisation of the system and restored lending to the real

economy and all of this whilst ensuring that distortion of competition within the internal market was kept to the minimum.

However, instruments such as the EC state aid rules should be limited in use; while some may become happy that it is giving us “instant lifts” its impact on future markets may be devastating. Once we ride out the storm of this financial crisis, we risk being left with markets with distorted competition, therefore, respecting competition policies in such times will help us ride out the storm in the right manner.

Therefore, DG Competition does not take a soft approach to government bail-outs and various rescue packages, proposed state intervention needs to be properly scrutinised and adhere to the EC State Aid rules. Maintaining the integrity of the internal market is paramount, measures introduced by one government must not destabilise markets in other Member States. Anything falling below the set standard may cause further damages and risk prolonging the crisis instead of ending it.

Proposed mergers must be assessed properly. Sound economics and past experiences inform us that during an economic recession inefficient market players are largely driven out from markets, thus markets are left with the strongest players, these survivors possess good innovation potential and can therefore increase growth in the future, post-recession. So, for the sake of our markets and future economic growth, in particular, DG Competition must apply any "failing-firm defence" with greatest thoroughness.

In the midst of the financial crisis and being busy with rescue packages and controlling state intervention, we must not forget our core business of anti-trust enforcement; companies should not see this time as an opportunity to engage in cartels or other anticompetitive practices, in the hope that they will be forgotten or allowed to continue.

III. Future: Where are we going?

Core Business

1) 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 at 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 and the Commission's determination to show its "zero tolerance" to cartel continues this year.

2) 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 be (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 should open specific investigations to ensure Community competition rules are being respected. The results of sector inquiries are published and interested parties are invited to submit comments. One particularly important and indeed greatly anticipated inquiry due for publication later this year is the Pharmaceuticals Inquiry. Other ongoing sector inquiries include the energy market and the finance sector.

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

3) 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.

Future Legislation and Procedural Refinement

1) Enforcement Priorities for Article 82 EC

Towards the end of last year, the Commission published its guidance paper on enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings. The 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 and Telefonica.

The paper provided a 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. This year, we will continue reviewing the enforcement priorities for Article 82 EC to exploitative abuses.

2) Merger Control

We will continue our work on the Merger Regulation. The current system entered into force on 1 May 2004 and endorsed a new test by which to assess proposed concentration, the Significant Impediment to Effective Competition test, and it also introduced a new referral mechanism which made it easier to allocate cases between Member States and DG Competition. Although the operation of the regulation has been very good, we are currently reviewing the regulation and will result in a report due to be published later this year.

Having tried to give you an overview of the EC Competition rules and the European cooperation, and a modest sample of our current work and future projects, I wish to conclude my speech with a brief conclusion.

At DG Competition and in the European Community, we are strongly committed to continuing our fight against cartels and will impose high fines for such illegal behaviour, vigorous approach to abusive market behaviours under article 81 and 82 EC, thorough investigations for mergers with an EC dimension, a strong emphasis and encouragement of private enforcement and finally, a strong control over state intervention. This will ensure our successful departure from the financial crisis.

Our past is behind us, it gave us a strong foundation, we learn from it. Our present is here, we must deal with it appropriately and not be afraid to show strong commitment to Competition Policy, in particular in the midst of the ongoing financial crisis, one must not submit to the desire of adopting “quick fixes”; it is only in this way we ensure our future. We will be prepared for it no matter what it brings.

Ladies and gentlemen, with this overview I will terminate my speech.

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

Torben TOFT

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