

**“The Direction of Competition Policy:
Reconciling National and International Objectives”**

**Alexander Schaub
Director General DG Competition
European Commission**

**Annual Fall Conference on Competition Law
Ottawa, 21 September 2001**

Ladies and Gentlemen,

I am delighted to have been given the opportunity to participate in this panel and to speak to this distinguished audience on the direction of European competition policy.

This topic requires to take a bit of distance from the day to day news and events and present to you a global view of the development of our antitrust and merger policy to show how national and international objectives can be reconciled. The emergence and consolidation of a global economy raise important questions for the design and application of an effective competition policy. This applies as well to policy developments inside the European Union as well as to our international activities.

A. Introduction

Let me start by expressing my firm conviction that European competition policy is a success story. Since its inception in the 1950s, it has been a key factor in ensuring the competitiveness of European industry, in creating the Single market and, most of all, in producing benefits for the

European consumers. However, we must not be complacent. Just as any successful policy, competition rules must evolve and adapt to meet new challenges. To this purpose, we have launched an ambitious program of reforms with the aim of ensuring that our competition rules, whilst building on the past, reflect the needs of today and tomorrow.

B. Reforming the antitrust legal framework

I will start by presenting the most ambitious aspect of our program of reforms: the updating and modernisation of our antitrust legal framework. This involves a very substantial change of the manner in which Articles 81 and 82 of the EC Treaty – the equivalent of Sections 45 and 78 of the Canadian Competition Act – have been interpreted and enforced in the last 40 years.

This reform programme is built on the premises of subsidiarity and decentralisation:

- The Commission must concentrate on those cases which are important and have a clear impact on the functioning of the European Single Market.
- We have to allow an increased participation of national administrations and courts in the implementation of European competition rules.
- We need to ensure a coherent application of the rules and an adequate level of legal security for companies.
- Finally, we must strengthen our economic analysis.

1. The strengthening of economic analysis

The most advanced aspect of this reform concerns the interpretation of Article 81 of the EC Treaty, which prohibits agreements between companies that restrict competition. Our goal is to put a greater weight on the analysis of market structures and the assessment of a transaction's economic impact, in order to concentrate in cases that pose a real threat to competition. An increased economic approach in our enforcement practice is one of the main objectives. Our reform is therefore driven by the desire to bring the interpretation of our rules into line with current economic thinking.

2. New rules on vertical and horizontal agreements

Recognising these imperatives, the Commission undertook the recent radical overhaul of its policy in relation to distribution agreements or, if you prefer, vertical restraints. In June of last year, new rules - a so called "block exemption" Regulation - entered into force covering all categories of vertical agreements except motor vehicle distribution.

The new regulation identifies a number of hardcore restrictions which in principle cannot be exempted from the competition rules. Otherwise, it offers a "safe haven" for all companies which do not possess market power. This means that, unless they engage in a hardcore restriction, we are not going to worry about distribution agreements between companies with a market share of less than 30%. Above this market share threshold there is no presumption of illegality. However, each individual case will need to be assessed on its merits.

At the same time we are also looking at horizontal agreements between competitors. Horizontal co-operation agreements, such as agreements between competitors to produce a specific component or conduct research in common, can play an increasingly important role in helping companies

respond to the changes in the market place. It is therefore important that competition authorities properly recognise the significant efficiencies such agreements can generate. But they must at the same time ensure that vigorous competition is maintained. The aim here is to also minimise the regulatory burden and focus our resources on cases where the undertakings have market power and can therefore harm competition.

3. Reforming the enforcement system

In addition to these changes in the interpretation of our rules, we are proposing wide-ranging procedural changes to our antitrust enforcement system. Last September, the European Commission adopted a proposal to modernise the procedures for implementing Articles 81 and 82 of the Treaty. The main underlying reason for the reform is to bring about more efficient enforcement of the EC competition rules. We hope to make substantial progress in the course of this year and be able to implement the new regulation from 2003.

The current procedural Regulation, which has remained largely unchanged since 1962, establishes a highly centralised authorisation system for all restrictive agreements. The Commission has the exclusive power to grant the exemption foreseen in article 81(3) from the general prohibition of all restrictive agreements contained in article 81(1). This monopoly over the application of Article 81(3) is a significant obstacle to the enforcement activities of national competition authorities and courts.

The main thrust of the Commission's proposal is to give up its monopoly on the application of Article 81(3) and to share this competence with both the national competition authorities and national courts. The new system shall allow the Commission to concentrate on the detection of the most

serious infringements, in particular on hard core cartels, rather than in ruling on what is not prohibited.

C. Increasing the focus on the most serious competition infringements

We are already anticipating these developments and focusing our resources on those anti-competitive agreements and practices that have a particularly negative impact in the European internal market.

1. Anti-cartel policy

This means, in first place, that we are giving a high priority to our fight against cartels, the most pernicious agreements among competitors. I believe that any successful policy towards cartels must rely on

- a solid capacity by the antitrust authorities to detect and prosecute cartels,
- a sufficient deterrent level of sanctions for cartel infringements, and on
- an appropriate leniency policy.

As to the capacity to prosecute cartels, we created in 1998 a specialised anti-cartel unit and this year we are strengthening it substantially, with a serious increase of its human resources. This unit has already made important progress in improving our inspection methods, cartel case handling and in reducing the time necessary to achieve results. The number and importance of decisions on cartels to be adopted this year will clearly show this progress.

With regard to fines, the guidelines we adopted in 1998 consider a cartel case as a very serious infringement and allow us to impose fines to infringing companies ranging from 20 million € to 10% of their world-wide turnover. We will take particular care in applying strictly these guidelines, to ensure that fines have a real deterrent effect towards companies that consider participating in a cartel.

Finally, we are assessing how to improve our leniency policy, which dates back to 1996. I believe that there is scope to give more encouragement to companies that are ready to provide information and more assurance to them about the advantages of their co-operation. We have published a draft for a new notice and propose to grant full amnesty to the first company to come to denounce an undetected cartel. We have learned from the experience in other jurisdictions and we will get much closer to the approach which is used in Canada.

2. Competition infringements in recently liberalised sectors

Another example of our focus on the most relevant infringements is the Commission's application of Article 82, which prohibits abusive behaviour by dominant operators, in sectors which have recently been liberalised, namely telecom and postal services.

In this newly-liberalised world, there is an increasing recognition of the indispensability of pursuing a robust competition policy, so as to ensure that the competitive playing field is not distorted by anti-competitive behaviour. Incumbents, which enjoy a dominant position, are tempted to protect their position by not only competing on the merits.

A few months ago, for instance, we concluded our antitrust investigation into the behaviour of Deutsche Post with a decision finding that Deutsche

Post abused its dominant position in the market for mail order parcel deliveries by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. This procedure was initiated on the basis of a complaint by the American company UPS. This decision proves that the Commission's enforcement policy does not make any difference between EU and non-EU companies and that the Commission does not hesitate to sanction a state controlled company, like Deutsche Post, on the basis of a complaint by a non European company.

3. Merger Control

I will now turn to merger control. The last few years - and this one seems to make no difference - were very rich in merger-related events.

a) Increasing numbers and complexity of merger cases

As to the number of mergers examined, we hit yet another record in 2000, with the number of cases rising by 18% on the year before. And it looks like this year new records will be set again! Already during the first months of 2001 the increase of filings was up by more than 20%.

Of the 345 decisions that the Commission took in the year 2000, 17 followed phase-two investigations, in other words were cases where a detailed investigation had been carried out. Two of these resulted in prohibition decisions (Volvo/Scania; MCI WorldCom/Sprint), six were withdrawn by the parties (among other Alcan/Péchiney and Time Warner/EMI), three were cleared unconditionally, and the remainder cleared subject to conditions. A further 28 cases were cleared conditionally in the initial investigation period. It is important to note that less than 1% (2% including the withdrawals) of the cases examined were finally not implemented due to competition concerns.

Besides the fact that the Commission's traditional 'clients' have continued to merge, new ones such as huge media and internet organisations have unlocked the door of the European merger regulation. Let me simply mention the cases MCI WorldCom/Sprint; AOL/ Time Warner; Time Warner/EMI; and Vivendi/Seagram as examples of the new economy mergers that we assessed last year under the EC Merger Regulation.

It is true that the so-called new economy is characterised by a rapidly changing environment, creating new and positive opportunities to compete. However, the mainstays of competition analysis remain in place in order to ensure that these opportunities are not stifled by anti-competitive concentrations.

Large horizontal overlaps, particularly in the provision of infrastructure to these new markets, remain a serious concern. The merger between MCI WorldCom and Sprint would have resulted in horizontal integration between the two largest providers of universal connectivity on the internet. This would have created a dominant network that would have had both the incentives and the ability to discipline the market and impose its own conditions to downstream operators. This analysis, that was developed in close co-operation with our US counterparts, led to an eventual prohibition of the operation.

When talking about merger control I can of course not avoid mentioning the GE/Honeywell case. The Commission prohibited the deal as the combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and

large regional jets. This was the result of horizontal overlaps in some markets as well as of the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products in addition to the merged entity's incentive and ability to bundle their complementary products and services.

In the US post-closing merger enforcement is a possibility, a merger that went unchallenged at the level of the merger review procedure can still be attacked later on. Contrary to the US system, the European system of merger control is a preventive one. The Commission has only a one-shot possibility to approve or block a notified merger – that is, at the time of its review. After the Commission has decided, no further action can possibly be taken with regard to a merger. As a consequence, the Commission has to ensure that the competitive structure on the relevant markets is not harmed as a result of the merger.

The fact that the US and European antitrust authorities differed in the assessment of does not mean that one authority is doing a technical analysis and the other pursuing a political goal, as some like to think from time to time. Each authority has to perform its own assessment of the cases notified and, sometimes, even if co-operation works well, we might not coincide in the assessment we make. My key message is that such differences of approach are very rare indeed. When they do appear we must learn to manage them and avoid that they escalate into political disputes.

b) Merger Review

To conclude on Merger Control, let me simply mention that in June 2000 the Commission launched a review of the EU Merger Regulation and that we plan to make good progress this year in this exercise.

The Regulation itself obliges us to review periodically the operation of the quantitative turnover thresholds that determine the "Community dimension" of a concentration and, ultimately, its jurisdiction. The review is meant to re-examine, therefore, the current work allocation system between the Commission and the National Competition Authorities.

We plan, however, to enlarge this revision to other legal and procedural aspects of the Regulation. This is an instrument that functions very well but that might require some fine tunings. In the second half of this year we will launch a public consultation on the basis of a document presenting an analysis of the topics to be reviewed and of the different options available. We are sure it will lead to a wide debate on how to make our policy towards merger even more efficient.

D. International Cooperation

Thus far I have focused on describing the development of our "internal" policies. However, I believe the challenges identified earlier can only be successfully tackled if we also adapt our "external" policy. As the process of globalisation intensifies, more and more cases are likely to fall within the jurisdiction of several competition authorities, with the risk of contradicting decisions. Increased co-operation between competition authorities will therefore become essential.

1. Bilateral Cooperation

Bilateral cooperation constitutes an obvious, indeed indispensable, response to these challenges. As you know, we have concluded two

competition law enforcement cooperation agreements with the United States and in 1999 we concluded our Cooperation Agreement with Canada.

Our experience with bilateral cooperation has been that it works very effectively - and particularly so in merger cases, substantially reducing the risk of divergent or incoherent rulings. I would like to emphasise that this remarkable level of cooperation and convergence is made possible by the fact that we share the same and unique goal, which is the promotion of competition in the interest of consumers. In this context, the allegations, sometimes voiced that the Commission discriminates against non European firms, are clearly without foundation. The appraisal of merger cases under EC law must only be based on a transaction's likely competitive impact, and there is simply no scope under the EC Merger Regulation to promote the commercial interests of European firms or use merger review as a trade weapon.

I believe that we should continue to strive towards increasing convergence in the application of our respective merger rules, given in particular that more than just one jurisdiction are increasingly being called upon to assess the same transactions.

My presentation would not be complete if I did not mention our joint efforts to address the issue of **hard core cartels**, probably the most obvious harmful anticompetitive practice. Our task, in this area, is a bit more difficult than in the case of mergers, since there are legal impediments for us to exchange confidential information. Yet, cooperation can take place with the view of coordinating our respective inquiries into suspected cartels, and in particular, of carrying out on-the-spot inspections simultaneously. Such coordinated inspections offer the

advantage of maintaining the “element of surprise” thus increasing the likelihood of a successful outcome.

2. Multilateral cooperation

However, my description of the competition aspect of the Transatlantic Agenda would not be complete if I were not to describe our efforts to associate our partners to our initiatives at the multilateral level: this includes our efforts to start negotiations on a WTO competition agreement, and our idea for the creation of a Global Competition Forum. We are therefore also pursuing a complementary approach of helping the development of a multilateral framework of competition rules.

a) WTO

I am convinced of the need to put in place a WTO framework agreement ensuring the respect of certain basic competition principles. As you know, the Commission (with the whole-hearted support of all the member states of the European Union) has been the principal advocate of such an initiative, and has, through the deliberations of the WTO Working Group on Trade and Competition, been attempting to persuade member countries of its merits. We are convinced that a framework agreement would serve to underpin the impressive progress which has been made in trade liberalisation over the past few decades, by ensuring that governmental barriers to trade are not replaced by private ones which have the same effect.

A WTO agreement on competition would be firmly premised on a commitment by member countries to have in place, and to enforce, domestic competition laws. The EU is suggesting that these laws be based on “core principles” reflecting what we believe already represents a

consensus between WTO members: the principles consist in a set of systemic guarantees, coupled with a commitment to outlaw the most economically harmful forms of anti-competitive behaviour.

As regards substantive commitments, the EU is proposing that all WTO members should outlaw cartels. We are convinced that this reflects a common view among members, not just among developed countries but in the developing world as well, as to the economic harm that such behaviour engenders. Building consensus about the need to regulate other anti-competitive practices will be an ongoing process and the WTO agreement would evolve to accommodate such common views.

A WTO agreement on competition would rest on a commitment by member countries to establish and enforce domestic competition laws. We believe these laws should be based on “core principles” like non-discrimination, transparency, and due process reflecting a consensus between WTO members. Furthermore, WTO members should commit themselves to take all necessary measures to stamp out hard core cartels.

But I should be clear about one thing: in calling for a WTO agreement, we are not seeking to establish by stealth a global competition authority which would erode the sovereignty of national authorities. On the contrary, strong national enforcement agencies are indispensable to the success of a framework agreement. Nor is the EU proposing a harmonisation of substantive competition laws or that individual decisions of national competition authorities should be subject to dispute settlement under the WTO.

b) Global Competition Forum

The second pillar of multilateral cooperation would be the “Global Competition Forum”, which has been the object of considerable talk over the past year. I am convinced that the creation of such a forum would put in place a focal point for discussion between those responsible for the development and management of competition policy world-wide and would seriously contribute to the convergent application of these policies.

There are today over 80 countries that have enacted some form of competition law regime, many of which have only been introduced during the past decade - and more are in the pipeline. There is a clear need for a place in which the whole range of competition policy issues - substantive, systemic and enforcement-related - can be debated. The end-objective should be to achieve a maximum of convergence and consensus between participants through dialogue, and an exchange of experiences on enforcement policy and practice.

The forum is not being proposed as an alternative to existing fora or the multilateral competition law framework at the WTO. Rather, the two should be regarded as **complementary**. The agenda that we propose for the WTO reflects an existing consensus about what should be the central features of a sound competition policy. The work of the global forum will, in my view, reinforce that consensus and extend it to other aspects of antitrust policy. So the two avenues can be followed in parallel, and be mutually reinforcing in their pursuit of the same ultimate competition policy objectives.

E. Concluding remarks

The European Commission is committed to develop a modern and efficient competition policy. A policy which reflects a realistic economic analysis of the market place. A policy which is enforced independently

and equally to all companies, no matter whether they are located in the EU or outside of it. A policy that takes into account the concerns of the business world in terms of transparency, certainty and predictability. A policy that reconciles national and international objectives. But above all, a policy which ensures that the market functions in a way to deliver the most benefits for the consumer.