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Keynote speech:

"Competition policy as it has and as it should develop"

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Introduction

It's no secret that change is afoot at the European Commission. Last week President Barroso was voted in for a second term as Commission President by the European Parliament and he is currently consulting on his team of Commissioners. And, of course, here in the US the change of Administration is leading to a new direction or a new impetus in competition policy – I'm looking forward to listening to Christine Varney later today. So this is a good time to take stock of how competition policy has developed in recent years and where it is going.

From a European perspective, in the last few years we have completed a major overhaul of our competition enforcement system – introducing significant changes to policy and procedure. We have brought some major cases and had some memorable battles.

And of course recently we have another major challenge to deal with, namely the financial and economic crisis. The past year has been difficult – not only for the economy and businesses, but also for policy makers. National governments and central banks, financial regulators, are all working to stabilise the financial system and minimise the impact of the crisis on the real economy. The Commission has been in the middle of things in the EU – not least because of our role as a state aid supervisory authority.

There has been pressure on us to set aside the competition rules, both the state aid rules and antitrust and merger rules in general, but we have stood firm on the importance of maintaining the rules and maintaining the integrity of our internal

market. Without the competition rules helping to maintain a level playing-field for business, government action to remedy the crisis could distort competition unduly. These problems could arise both within and between different EU Member States, putting the EU internal market in jeopardy. Equally, if left unchecked, companies might be tempted to implement anti-competitive practices or pursue anticompetitive mergers in an effort to stave off the consequences of the crisis in the short term, without regard to longer term impact on consumers, competition and competitiveness.

In rare circumstances, some forms of collective action by companies to meet the challenges put by the crisis may be justified – with or without government backing - but they would have to satisfy the conditions laid down in the EC Treaty that they should have a positive impact on the market and for consumers, and should not eliminate effective competition (Article 81(3)).

We believe that competition policy is one of the tools that will get us out of the crisis – a modern, economics-based competition policy, which offers companies sufficient predictability, and timely and targeted enforcement action.

More economics

One of our goals in recent years has been to introduce a more economic and effects-based approach to EU competition policy: in relation to anticompetitive agreements – with the exception of naked cartels -, abuse of dominance, mergers, and state aid control.

But having an effects-based approach does not mean we don't need ex ante rules for

an effective enforcement system. Generally the most efficient approach is more upfront guidelines and/or guidance to ensure that companies have sufficient predictability, which allows us to focus our enforcement action on the most problematic cases – I'll say a few more words on prioritisation shortly.

Since I last addressed this conference we have adopted our (December 2008) Guidance on enforcement priorities concerning exclusionary behaviour by dominant companies under **Article 82 of the EC Treaty**, completing a nearly full house of policy documents setting out our effects-based approach in all fields – except cartels.

Of course, we had started to apply the principles underlying the Guidance before it was finally adopted, for instance in **Telefonica** – a margin squeeze case concerning the Spanish broadband market; or in **Microsoft** – a saga which is not yet completely over.

In 2007 we obtained commitments from the Belgian gas supplier **Distrigas**, under investigation for its long-term gas supply contracts that might have been preventing other suppliers from entering the market. In November 2008 we obtained divestiture commitments from the German incumbent electricity company **E.On,** under investigation notably for excluding potential competitors from energy markets. These cases, along with, the **RWE** case and the - still ongoing - **GDF** and **ENI** cases, concerning foreclosure in the German, French and Italian gas markets, are interesting because they came about as a result of our 2007 Energy sector inquiry, which helped us identify bottlenecks to competition in the energy sector in Europe. Also they all look to be resolved by way of voluntary commitments by the companies in question rather than by formal infringement decision.

Most recently of course we adopted our **Intel** decision in May 2009 – a public version is on our website. We are also working with **Rambus**, with a view to agreeing commitments that bring an end to our investigation into their alleged claiming of unreasonable royalties for the use of certain patents for "Dynamic Random Access Memory" chips (DRAMS).

Cases under **Article 81 of the EC Treaty –** prohibiting anti-competitive agreements - include **MasterCard**. In April Commissioner Kroes announced undertakings given by MasterCard following our 2007 infringement decision. Essentially, MasterCard agreed to new cross-border Multilateral Interchange Fees (MIFs) of less than half the previous MIFs for both credit and debit cards – giving Europeans its lowest rates worldwide. MasterCard is also adopting other transparency-enhancing measures. In March 2009 we fined energy companies **E.On** and **GDF Suez** over 550 million euros each for market sharing in the French and German gas markets.

Better procedures and more prioritisation

The procedural changes we have implemented in recent years in Articles 81 and 82 – abolishing our old notification scheme for certain types of agreement and behaviour, giving all 27 EU Member States full powers to enforce EU competition law and fine-tuning some of our procedures - have really enabled us to properly implement an effects-based approach and to focus our enforcement on the most serious infringements and where we can make the most difference to consumers.

We have made an increased use of the **sector inquiry** tool, with major inquiries in

recent years into energy, financial services and pharmaceuticals. Our final report on competition in pharmaceuticals in Europe was published this summer. We've launched these inquiries into sectors of the economy where there were indications that competition was not working as well as it might. They have helped us understand the sectors, identify where the obstacles to competition lie, and decide on the best course of action. For instance in energy, our sector inquiry resulted in both regulatory changes and antitrust enforcement action. One lesson it has taught us is that competition enforcement action is not always the best solution to a competition problem – sometimes regulatory action is preferable.

Our reforms also included a new type of decision – the **"commitments"** decision – where companies under investigation provide with binding commitments to amend their behaviour so as to remove potential competition concerns. The procedure does not involve a formal finding of infringement, which considerably shortens the procedure, so we believe that this is an efficient enforcement instrument, although naturally a commitments decision doesn't have the precedent value of an infringement decision.

We have reformed our **internal processes**, bringing in additional safeguards, such as the Chief Economist Team, peer review panels and enhanced scrutiny by top management at an early stage in an investigation. These help make sure that we pursue the right cases. We are also subject to other levels of internal and external scrutiny: by our Hearing Officers, who are there to ensure procedural fairness during the investigation, by the 27 National Competition Authorities, by the College of Commissioners and, ultimately, by the European Courts. Ensuring the rights of defence of companies under investigation is an absolutely essential part of our job – and while we strongly believe that our processes are sound, we believe it

is important that they should be kept under constant review and continuously improved.

We have faced some criticism recently from companies such as Intel, who are unhappy with our decision finding they had abused a dominant position in relation to x86 microprocessors by using a range of anticompetitive practices to foreclose rival AMD. I can't say much, as there is an appeal pending before the European courts, but I would like to refer you to the published decision, which sets out the evidence against Intel, and to emphasize my belief that we have carried out a full and fair investigation that ultimately very clearly identified the significant harm resulting from Intel's behaviour. We expect – and welcome – a close scrutiny of our action by the European courts.

Antitrust fines is another controversial area. In 2006 we overhauled our **fining policy** to ensure that our fines would act as an effective deterrent and would better reflect the economic harm caused by cartels and other anticompetitive behaviour – and undeniably our antitrust fines are now higher than in previous years. But I would argue strongly that they are not too high – rather, previously they were too low. And, of course, the sheer size of our fines also reflects the size and importance of the companies that we are investigating these days, and the success of our crackdown on cartels.

Where to now?

Times of crisis, such as we have experienced over recent months, can severely challenge the parameters of our activities. Competition authorities are facing specific challenges in relation to the crisis. We can expect – and are seeing -

requests for exemptions from standstill clauses and failing firm defences in merger control, attempts to justify cartels, and calls for more State aid to remedy crisis-related market failures.

There has been pressure on us to set aside the competition rules, but we have stood firm on the importance of maintaining our rules – we believe we have the right rules in place to deal with the crisis. We have for instance been able to show flexibility on procedure – but we have stood firm on the principles.

Merger control is perhaps a good example of an area where reforms in recent years – basing our merger control instruments on sound economics, and providing comprehensive guidance on our policy approach – has stood us in good stead in the crisis. Our rules have been able to withstand what the crisis has thrown at them. Although it is difficult to predict, I think we can expect merger notification figures to remain lower for the time being – even though there are signs of increasing consolidation in certain sectors such as air transport and the financial sector. What is clear is that the mergers we are seeing are complex – and this means that our intervention rate, which has been a steady 6-8 per cent in recent years, does not look likely to decrease.

More generally, what has thankfully remained unchanged – or maybe even grown in its acceptance – in recent months is:

- recognition that markets are the best way to organise the delivery of goods and services at the best conditions, in terms of price, quality, choice and innovation;

- consensus that the aim of competition policy is to make markets work well for the benefit of business and consumers.

But, what is maybe important for us to recognise is that competition law is not always the best solution to every competition problem. One thing the crisis has served to highlight is the importance of good regulation and the need to expand our sphere of influence from beyond the narrow confines of our specialist field.