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COMPETITION POLICY IN THE FINANCIAL SERVICES SECTOR

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I. Introduction

Thank you for inviting me to speak on competition policy in the financial services sector. The timing of this speech could not have been better as a couple of major antitrust developments in this area took place as recently as last week.

But before turning to them, first a caveat as concerns the scope of the speech.

I will *not* examine today the latest measures and proposals for achieving the Single Market[1]. The only exception to this is the Clearing and Settlement investigation where there is a direct link between these measures and competition law enforcement.

Instead I would like (1) to comment on recent antitrust developments in the financial services sector and in light of this, (2) to consider likely future priorities of the Commission.

In doing so, I will assume that you are familiar with the legal tools at the Commission's disposal for antitrust control - i.e., Articles 81 and 82 of the EC Treaty that prohibit restrictive agreements and concerted practices as well as abuse of dominant position.

Finally, as always, my remarks today are my own and do not necessarily reflect the view of the Commission.

II. Recent antitrust developments in the financial services sector

In antitrust, enforcement against hard core **cartels** remains an absolute priority for the Commission. This applies equally to cartels in the financial services sector.

This was seen in the *Lombard Club cartel* decision of 11 June 2002. With this decision the Commission concluded its first full-blown cartel inquiry in the banking sector. It imposed fines totalling € 124,26 million on eight *Austrian banks* for their participation in a wide-ranging price cartel dubbed the "*Lombard Club*".

Following reports in the Austrian press, the Commission had conducted in June 1998 surprise inspections at a number of Austrian banks. The documents found revealed a highly institutionalised price-fixing scheme which covered the whole of Austria

[1] Such as the Collateral directive (May 2002), the Financial Conglomerates Directive (November 2002), the prospectus directive (political agreement by the Council in November 2002) and/or the proposal for a revised Investment Services Directive.

("down to the smallest village", as one bank put it) and all banking products and services as well as advertising, or rather the lack of it.

The CEOs of the banks met every month, except August. In addition, for every banking product there was a separate committee on which the competent employee at the second or third level of management sat. The Commission considered the Austrian banks' behaviour to amount to a very serious infringement of the competition rules laid down in Article 81 of the EU Treaty. The decision has subsequently been appealed to the Court of First Instance by all the Austrian banks participating in the cartel.

The *Aviation war insurance* investigation is another main priority for the Commission within the insurance sector.

Immediately after the first press reports in September 2001 the Commission started to investigate whether the apparent reaction of aviation insurers following the events of September 11 2001 could amount to an infringement of Article 81. As you will understand, I cannot comment in detail on an ongoing investigation. However, its main focus is to establish whether after the attacks on 11 September 2001, insurers met on a regular basis to agree on a range of terms for providing third party liability insurance cover, including setting the level of premiums.

Payment systems is another area in which the Commission is currently concentrating its attention. It gives rise to several problematic aspects for competition policy. In particular it requires competition authorities to strike a balance in order to ensure that restrictions necessary for the provision of payment services should be minimal and should not allow financial operators to earn profits.

The Commission did strike such a balance in its *Visa International* decision of 24 July 2002 concerning multilateral interchange fees (MIFs). A MIF is an interbank payment made for each transaction carried out with a payment card and thus the most important cost element. The decision grants a conditional exemption to MIFs for cross-border payment transactions with Visa consumer cards within the European Economic Area. The exemption is valid until 31 December 2007 and is based on substantial undertakings to which Visa has committed itself.

The main reforms are the following: First, Visa will reduce the level of its MIFs for the different types of consumer cards to a level of 0.7% in 2007. For debit card transactions Visa will introduce immediately a flat-rate MIF of €0.28. Secondly, the MIF will be capped at the level of costs for certain specific services provided. Furthermore, Visa will allow member banks to reveal information about the MIF to retailers, thus ensuring transparency.

I would like to stress that this decision relates to cross-border payments. It does not concern domestic payments, and that distinguishes it from, e.g., the OFT:s (Office of Fair Trading) ongoing investigation of MasterCard's interchange fees in the UK.

Liberalisation is another important area for the Commission in the financial services sector. On 31 March 2003 the Commission issued a Statement of Objection concerning Clearstream Banking AG's refusal to supply certain cross-border **clearing**

and settlement services as well as its discriminatory behaviour in relation to one of its clients, Euroclear Bank SA. Clearing and settlement are the processes by which securities market transactions are finalised.

The Commission takes the view that Clearstream Banking AG (Frankfurt) is the dominant supplier of clearing and settlement services for securities issued according to German law. This dominance stems from the fact that in order to trade securities issued in accordance with German law, they must in practice be issued in Clearstream Banking AG, the German Central Securities Depository. The clearing and settlement services provided by the issuer, Central Securities Depository, for the securities that it safekeeps must be distinguished from the process of securities trades by financial intermediaries, such as banks. Intermediaries rely on being able to settle their trades with the Depository where the securities have been issued.

According to the Commission's preliminary findings, Clearstream refused Euroclear Bank SA access to the settlement platform for registered shares in Germany for more than two years, without objective justification. In addition, this behaviour contrasts with the short delay within which other customers received access to the same application. The discrimination also appears to extend to pricing. The available information shows that Clearstream Banking AG has charged (until January 2002) a higher per transaction price to Euroclear than to national Central Securities Depositories outside Germany.

This is the first time that the Commission is taking action regarding the competition law aspects of **financial infrastructure**. As mentioned in the introduction, this is an example where the regulatory and antitrust approaches to the liberalisation of post-trading infrastructure are complementary. Indeed, the Commission has committed itself publicly to competition enforcement action in its May 2002 Communication on clearing and settlement, which is considered a priority objective for the Community.

Finally, the major development with regard to the Commission's **legislative activities** in this area is the entering into force last week (1 April 2003) of the new Commission Regulation block exempting certain types of agreement and concerted practices between insurance undertakings. It will be valid for seven years, i.e., until 31 March 2010. The new exemption Regulation was agreed after an extensive consultation of Member States and interested parties, and improves the previous Regulation of 1992. In keeping with a more economic and less "clause-based" approach, it does not contain lists of approved clauses ("white clauses").

The **insurance block exemption** covers the same four types of agreement in the insurance sector as its predecessor, namely agreements on: (1) the joint *calculations* and studies *of risks*; (2) the establishment of non-binding *standard policy conditions*; (3) the establishment and management of *insurance pools* and (4) the testing and acceptance of *security equipment*.

Briefly, the scope of the exemption is largely unchanged as regards the two first categories, i.e., the joint calculations and studies of risks and non-binding standard policy conditions. However, as concerns insurance pools, the scope of the block exemption has been extended in two ways as compared with the previous regulation. First, the market share thresholds for pools to be exempted have been increased (from

10% to 20% in the case of co-insurance pools, and from 15% to 25% in the case of co-reinsurance pools). Secondly, for pools which are newly created in order to cover a "new risk", a new three -year exemption has been introduced, with no market share threshold[2]. Finally, with regard to security devices, the scope of the new Regulation is now in line with the harmonised single market rules that apply to them.

III. Future priorities for competition law enforcement in the financial services sector

In light of recent antitrust developments, what can be expected of the Commission in the future in this area? Before turning to priorities on the substance, I would like to make a brief comment on the procedure.

A. Procedural aspects

With the entering into force of the new antitrust procedural regulation, Regulation 1/2003[3], on 1 May 2004, the Commission will have to change the way it works. It will have to switch from a reactive attitude to a pro-active manner of enforcing the rules. To compensate for the reduction of sectoral information previously contained in notifications, the Commission will have to actively monitor markets. For such information, it will also depend on well-substantiated complaints, while making sure that resources are spent on those complaints that have the greatest impact on the market. From a casehandler's point of view, I think the work will become more interesting as the Commission will be able to set its own priorities and concentrate on markets where there are real competition problems as opposed to dealing with notifications that rarely revealed severe competition problems.

B. Future priorities

As regards the substance, I would like to draw your attention to three areas where, in my view, the Commission is likely to focus in the near future:

First, the **securities clearing and settlement** is and remains a priority. As we have seen, the Commission has so far focused on **access** to Central Securities Depositories and **pricing issues**, in particular where dominant players may charge discriminatory or otherwise anti-competitive prices. In the future, the Commission is also likely to look into **exclusive arrangements** between exchanges and clearing and settlement systems.

Secondly, competition issues associated with **payment systems** are likely to continue to attract the attention of the Commission. The investigations so far have focused on **pricing issues** arising from network rules of the Visa system such as the multilateral

[2] The rationale is that co-operation resulting in the creation of new commercial products can be exempted without a market share threshold for a limited start-up period.

[3] There are in particular two major changes: First, the regulation abolishes the Commission's exclusive competence to exempt restrictive agreements from the prohibition of Article 81. Secondly, the regulation basically declares Community competition law, Articles 81 and 82, applicable whenever an agreement or practice has cross-border effects.

interchange fees ("MIF") and the no discrimination rule ("NDR")[4]. However, given that the card payment industry is a network industry, with limited choice between networks, in the future, the Commission is likely to look into issues that typically arise in such industries, such as the possibility of joining a network (**membership**) and/or to using it under reasonable and non-discriminatory conditions (**access to the network**).

The Commission is also attentively following the pending US Court case, Wal-Mart, on Visa's and MasterCard's' alleged collective abusive behaviour by bundling debit and credit card services. The attention of most competition authorities such as the European Commission, OFT and the Australian Reserve Bank[5] has so far been directed to the four-party[6] payment systems model, i.e., the credit and debit card point-of-sale transactions. However, similar issues may arise in three-party[7] payment systems such as **ATM networks and cash withdrawals**. For instance, the recent development of ATMs offering advanced functionality in the form of new products and services, including the selling of movie tickets and postage stamps[8], may raise **tying** concerns, provided the relevant network enjoys market power.

This brings me to my final point: **new technologies**. In the future, I think that we will see more interaction between **new technologies** and the financial services sector, which hopefully will make the latter more competitive and integrated.

In previous case practice, new technologies such as the Internet and telephone banking have been found to be complementary rather than substitutes to branch based banking services. However, new substitutes may develop with time such as the new ATM development outlined above. For instance, in the UK a nation-wide building society has recently introduced 141 intelligent deposit ATMs in 81 branches. During the first six months, 30% of members moved from using the teller to depositing cash and cheques at the ATM[9].

In the future, it should also be possible to transfer the low cost of transmitting e-mails and text messages around the world to automated clearing and settlement systems and SWIFT (The Society for World-wide Interbank Financial Telecommunication) instead of using a combination of single country transfer systems, each with different rules, data formats and timetables, linked by another different structure to send money from a banking institution in one country to another.

However, new technologies may bring certain competition concerns such as access to essential facilities (e.g., trading places, systems, and platforms) to RAND (reasonable and non-discriminatory) terms, foreclosure of competitors through non-transparent standardisation and lack of interoperability. Last year the Commission investigated

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[4] The no-discrimination rule prohibits merchants from surcharging cardholders from paying with the card. The Commission took a negative clearance decision on 9 August 2001. This decision is currently the subject of an appeal by Eurocommerce.

[5] The Australian Reserve Bank's standard on interchange fees will come into force on 1 July 2003.

[6] The four participants are the cardholder, the card issuer, the merchant acquirer (retailer's bank) and the merchant/retailer.

[7] The three participants are the cardholder, the card issuer and the ATM owner or bank.

[8] For instance in Spain one ATM network offers passbook updates, barcode reading for bill payment and ticketing (The Banker, March 2003, p. 111).

[9] The Banker, March 2003, p. 112.

and cleared a number of B2B (business to business) electronic trading platforms, for instance for forex trading and in the re-insurance field. These cases set out some rules for the more and more frequent financial B2B platforms. In particular, the Commission required safeguards to prevent these platforms from being used to exchange sensitive commercial information between their parent companies

IV Conclusions

As you have seen there have been some interesting antitrust developments in the financial services sector lately and the Commission is faced with even more interesting challenges in the near future. I thank you for your attention and now open the floor for questions and comments.