SECOND OSLO COMPETITION CONFERENCE

"Competition Policy – A European Perspective On The Way Ahead "

15-16th JUNE 1998

Dr. Alexander Schaub
Director-General of Competition
European Commission, Brussels

INTRODUCTION

There is little disagreement amongst commentators that European Competition policy has, in broad terms, been very successful. It is generally recognised that it has played a key role in the growth and competitiveness of the European Economy and in the creation of a Single Market over the last forty years. In doing so it has developed into one of the central pillars of Community policy and has become a reference model for other regional groupings wishing to adopt a system of competition rules.

However the future of European Competition policy over the next few years has been the focus of much debate recently. There are some who argue that the Commission's policy will have to alter fundamentally to accommodate the monumental changes that are underway in the global economy. Others argue that factors closer to home such as EMU and structural changes attendant on enlargement to the East will inevitably modify the application of the competition rules.

I will begin by considering four of the more important factors which may be expected to affect the future shape and direction of European competition policy. These are globalisation, the rapid pace of technological development, EMU and enlargement to the East. I will go on to argue that, whilst the challenges will be powerful, at its core the policy should remain the same – it will continue to emphasise open markets and vigorous competition as the best means to

ensuring a healthy and successful European economy. I will then go on to outline the various reforms which are being undertaken to ensure that the policy continues to achieve these aims in the most effective and efficient way possible.

GLOBALISATION AND TECHNOLOGICAL DEVELOPMENT

The phenomenon of globalisation, albeit under different guises, has been a constant economic theme for many years. However what has emerged in the recent past has, in fact, been a combination of internationalisation in a number of industrial and service sectors and acceleration in the development of key technological innovations. Although some have questioned the reality of globalisation, there is ample evidence for its existence. For example whilst world GDP has grown by an average of 1.5% per year since 1990, trade has increased annually by 6%. Figures on world foreign direct investments tell a similar story - FDIs are now about 4 times higher than they were in 1980. Within the EU, Member States' exports of goods and services to each other have increased significantly since the beginning of the 1980s, reaching an average of over 60% of total exports in the 1990s. More importantly, from an anti-trust view point, it seems clear that an increasingly common response to greater global competition is for firms to enter alliances or joint ventures in order to gain access to new markets. In fact mergers and alliances such as Boeing / McDonnell Douglas or BA and American Airlines which cross both borders and jurisdictions are becoming almost common place.

In practical terms two main consequences flow from this for DG IV. First, within the Union, an increasing number of new cases fall within the scope of the Commission's competence rather than that of Member States, because more cases meet the test of an 'effect on trade'. Secondly, the potential for conflict between competition authorities is heightened.

Of course, as already noted, globalisation itself is not the only source of the change in the economic environment. The rapid development of high tech markets, and the convergence of the telecommunications, software and media sectors, promise the most spectacular economic transformation seen since the industrial revolution. From a competition perspective the changes will of course be largely positive – they will open up new markets thereby providing a huge potential for firms to exploit or will increase the efficiency with which resources are used.

However, as recent events with Microsoft have shown, they also potentially pose new problems for anti-trust authorities. The key is to prevent monopoly positions being created while still allowing firms to innovate and react quickly to the changing market place. However this is not a simple matter for a competition authority – for example case evaluation can be difficult in dynamic markets where the past is often a poor indictor of likely future developments. These, and other problems

like it, mean that all competition authorities, including the Commission, will have to reassess the effectiveness of some of the tools they have traditionally used when analysing cases. I return to this issue below.

EMU AND ENLARGEMENT

At the same time as dealing with these global phenomena, the Commission, as the European competition authority, will have to deal with a number of "home grown" challenges. These mainly flow from Economic and Monetary Union and the proposed enlargement to the East.

In broad terms both developments will be enormously positive. One of the key benefits of EMU for example is that it is likely to strengthen significantly the Single Market. Both consumers and producers will benefit as exchange rate risks and conversion costs arising from the use of separate national currencies are eliminated. The Euro will therefore lead to higher price transparency and greater competition as firms, both inside and outside the Community who previously feared

the effect of currency fluctuations on profits, enter new markets. Enlargement will have similar effects as firms from east and west freely, and more easily, enter each others markets.

Thus in practical terms, the consequences for DG IV of these two developments will, to some extent, be similar to those of globalisation; we are likely to see more and more cross border alliances and mergers as companies react to a truly pan-European market. However there will also be “new” problems. For example, many East Europe states inherited economies which, due to central planning, were highly concentrated. Most of these sectors have now been largely liberalised through privatisation. However in doing so several East European states chose, for legitimate reasons, approaches to privatisation which did little to reduce the concentration of their markets. The potential competition problems of such economic structures are clear. They are not however enormously different to the ones faced and overcome by the Commission at the inception of the Community.

FUTURE IMPLICATIONS FOR POLICY

I have briefly touched upon a range of developments that are likely to have a major impact on DG IV’s work. So how should a competition authority like the Commission react to these changes?

The first point to be made is that in general it is widely agreed that the competition rules should continue to be applied vigorously. For example today few argue that policy should be loosened to help national champions build up the resources they need to compete on the global market. Indeed most commentators now accept the logic that competition in home markets is one of the key elements to success in international markets. This is a view shared by

the Commission. Similarly the Commission believes that the competition rules must ultimately be applied in the normal way to East European economies to encourage their transition to more competitive market structures.

Therefore it can be said that our first response to the challenges outlined at the outset is to apply our competition laws, including those relating to state aids, as vigorously as ever.

However we will also be looking for ways to improve our instruments to ensure that we are able to respond to these potential problems as effectively as possible. Our aim is to ensure that our policy framework remains up to date and relevant to the new economic conditions we will face.

To help us in this, we have recently launched several projects with the aim of ensuring that our competition rules, whilst building on the past, reflect the needs of today and tomorrow. In doing so we intend to ensure that any new policy which emerges reduces bureaucracy to an absolute minimum and allows the Commission to focus on the most important cases from an EU perspective. In broad terms this means a number of changes to the framework within which Article 85 is applied; to the way in which state aid is controlled; and the extent to which we co-operate with other competition authorities. On the other hand, our policies on mergers and article 90 cases are unlikely to alter significantly in the near future.

Article 85

In principle the criteria of Article 85 are broad enough to enable us to cope with the challenges I have described above. For example Article 85 (3) allows us fully to take account of efficiencies when deciding whether or not to exempt an agreement caught by 85(1). Thus any review of the rules we undertake will focus on the application, in practice, of Article 85. To get a better understanding of the changes that need to be made, it may be useful to consider how Article 85 was applied in the past.

When the Community started to apply competition law more than 30 years ago, its markets were not integrated due to a variety of barriers such as tariffs, technical standards and national regulation. In fact, looking back, we can see that the markets within the Community were quite fragmented. The focus of our attention was therefore market integration, with competition policy concentrating on regulating agreements and contractual clauses which were considered as contrary to this aim. This form-based approach was reflected in the emergence of block exemptions which were predominantly concerned with the form agreements took.

However as has been noted, times have changed. New problems have arrived whilst some of the concerns of yesteryear are fading in importance. In view of these developments, it is clear that the analysis of market structures and the assessment of a transaction's potential economic impact must now play a greater role than they have sometimes done in the past.

In fact this emphasis on economics and greater market analysis in competition cases, can be described as the underlying ethos behind much of our reform programme. Of these, perhaps the most important change will come in our treatment of vertical restraints.

Our initial ideas for change in this field were launched in January 1997 when the Commission adopted a Green Paper on vertical restraints. During the consultation process which followed, 227 written submissions were received and public hearings were held in October last year. Drawing on the information gathered during this process, DG IV has now prepared a draft Communication which sets out proposals for reform in this area.

In line with the general philosophy outlined above, the new policy will focus more on the economic effects an agreement can have than the form it takes. Once adopted by the Commission, the numerous different block exemptions in this field will be replaced by one comprehensive regulation which will cover all vertical restraints. Unlike the current ones, this block exemption will be based on a black clause approach, i.e. it defines what is not permitted instead of dictating what is allowed. Perhaps more importantly, unlike the current regulations, this new block exemption will be limited by market share caps. Broadly speaking this will mean that firms without market power will be far freer than they are now to decide what form their distribution activities should take. On the other hand, it

will prevent those with significant market power from getting an automatic exemption by simply drawing up contracts which conform with the model the Commission prescribes. In this way the new approach will minimise the regulatory burden, whilst catching more of the agreements which pose a significant threat to competition.

Of course the application of Article 85 is not restricted to vertical agreements. We are also looking at the horizontal field. In my view, horizontal co-operation agreements will have an increasingly important role to play in helping companies respond to new competitive pressures and changes in the market place. It is therefore important that competition authorities properly recognise the significant efficiencies such agreements can generate, whilst at the same time ensuring that vigorous competition is maintained.

However our notices and regulations in this field are somewhat fragmented and dated. Although it is too early to give details of possible changes, our aim will be similar to that for verticals; that is to focus our resources on cases where the undertakings have market power and can therefore harm competition. It is also interesting to note that in the US the FTC, with whom we are in close contact, are also considering their policy in this area.

Of course once implemented these reforms will probably mean that the Commission will deal with fewer cases than it has done so in the past. Some of

these will then have to be dealt with by national authorities. This development is to be welcomed and indeed has been encouraged in recent years by the Commission.

However this process must be tempered with mechanisms to ensure consistency in the treatment of cases. The first steps to putting in place a system which helps ensure this have already been taken by the Commission, through the publication of a notice on co-operation with national authorities. However I recognise that this is just the start and more will need to be done.

State Aid

The second area of our policy which is currently under review is one that is not classically regarded as part of competition policy, but plays a crucial role in Europe - namely control of state aid. As a general rule, the Commission takes the view that state aid contributes very little to lasting economic well-being. On the contrary enforcement experience has shown that it leads to unfair competition between firms, to market distortions and to an inefficient allocation of resources. It also puts at risk the achievement of the Single Market when its effect is to increase barriers to trade. The only benefits of state aid are to remedy market imperfections. For example, small firms are an important and dynamic part of the European economy, as well as a key source of job creation. Yet their access to capital markets is limited. We therefore permit various aid programmes to SMEs, in order to 'level the playing field' and help them

compete. Similarly regional aid and support for R&D and environmental programmes can, in certain circumstances, be useful in remedying market imbalances and achieving other policy objectives, such as economic cohesion.

Despite its political sensitivity, we have enjoyed some success in this field. Provisional figures for the period 1994-96 suggest that state aid represents just 3% of industrial value added in Europe. More importantly these figures tend to indicate that there has in fact been a slight downward trend in the global volume of aid given to industry over the last few years: for example, excluding aviation and the financial sector, aid to industry fell by around 10% between 92/94 and 94/96. Although the figures for 1997 have yet to be collated, I believe that once calculated they will show that the downward trend continued last year.

However, as with Article 85, we recognise that some of our rules may not be entirely suitable in the changing environment we will face. Indeed factors such as enlargement and globalisation are likely to increase the demand for aid. To ensure that we can cope with the challenges we will face, the Commission has set itself the objective of designing a stricter, but more fine-tuned policy of state aid control. As in other areas, in broad terms the aim will be to focus resources on control of the most important cases. The first steps in this have already been taken. The Council recently adopted a regulation which will enable the Commission to adopt group exemption regulations that exempt Member States from the obligation of prior notification to the Commission of certain categories

of aid. We have also re-examined the regional aid rules and have reduced the aid ceilings in assisted areas.

International Co-operation

Thus far I have focused on describing the likely future changes to our “internal” policies. However I believe the challenges identified in the introduction to this paper will also affect our “external” policy. For example, as the process of globalisation intensifies more and more cases are likely fall within the jurisdiction of several competition authorities. Increased co-operation between competition authorities will therefore become essential.

However while trade barriers across the globe have continued to fall, the international laws to cope with anti-trust violations have not kept pace. In response to this, the Commission has adopted a dual approach. First, and foremost, we are developing formal bilateral relations with our major trading partners such as the US and Canada. For example, the 1991 EC/US co-operation agreement in the field of anti-trust provides an excellent model for this type of co-operation. This agreement allows for close collaboration and exchange of non-confidential information in cases falling under both EU and US jurisdiction.

Despite occasional difficulties, the agreement has had the beneficial effect of developing mutual understanding and respect between the EU and US authorities. It has also paved the way for the recent positive comity agreement with the US. This is a major step forward in our bilateral relations with the US authorities. The new agreement provides for one anti-trust authority to leave investigation of a case to the other when the 'centre of gravity' of the case lies within its jurisdiction.

However whilst bilateral agreements will play an important part in solving problems, we do not expect them to resolve all disputes or be appropriate in all circumstances. We are therefore also pursuing a complementary approach of helping the development of a multilateral framework of competition rules - indeed it was following an initiative from the EU that the WTO set up its working group to look at what might be included in such a multilateral framework.

While we await the outcome of the group with interest there are certain points which I should like to clarify. These discussions are not about creating an overarching competition authority; rather the discussions are focused much more at the level of ensuring Member Countries have appropriate rules and that they apply them correctly. Based on these rules, competition authorities would have a margin of discretion to reach their own conclusions and act accordingly.

CONCLUDING REMARK

The next few years are likely to be exciting ones for competition authorities world-wide as the economic and political environment continues to evolve and change. In Europe we believe that competition is the key to ensuring that we adapt successfully to these changes. The Commission will therefore continue to apply competition law vigorously. However in doing so we will ensure that our policies remain up to date and are as effective as possible. I believe the projects I have outlined will go a long way towards achieving these aims.