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CONTINUED FOCUS ON REFORM

RECENT DEVELOPMENTS IN EC COMPETITION POLICY

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1. Introduction

Ladies and gentlemen,

It is really a great pleasure to speak to you this morning in the famous Fordham intellectual and family atmosphere and to speak once again about the reform and modernisation of European competition policy.

Let me first reveal to you a well-kept secret: it was here in Fordham that it all began in 1995. Our participant of that year returned rather depressed, repeating that the Commission had been under attack from everybody, in particular from European competition lawyers, and that even if the critics were in total disagreement over how to change the system, the Commission was in danger of losing its intellectual leadership.

That was the decisive element, which finally allowed us to overcome the natural resistance to change. Today six years later we are in the middle of a dynamic, well-advanced and broadening reform process. With the modernisation of antitrust, the merger review and the reforms in the field of State aid control we are touching

upon the very bases of our existence. We do so with the aim of better protecting competition.

We are looking beyond our own house to develop better instruments for cooperating with our colleagues in the other competition authorities within the European Union and world-wide.

It is my firm belief that we *all* have much to gain from increasing cooperation amongst us. Cooperation is not only important in order to make better use of our resources. It is the key to achieving greater convergence in the application of the law, which in turn leads to better protection of competition and greater predictability for companies. Cooperation, however, can only function if there is mutual respect and trust. That is the lesson of the past, which remains valid for the future.

Convergence is an organic process that grows out of learning from each other's experience, allowing all of us to retain the best elements. In a globalising world it is important to take an open-minded approach and constantly consider whether ones own rules and practices can be improved. This is the reason why the Commission has accepted the suggestion by some of our national

competition authorities to have an open debate on whether the Community should replace the dominance test by the substantial lessening of competition test. Such a debate will no doubt improve our understanding of what may be real differences between the two tests, which in turn will allow us to make an informed choice on that issue.

In addition to the major reform initiatives that I have already mentioned, the Commission is also continuing the substantive reforms in the antitrust field. Having overhauled the rules in the field of vertical restraints and horizontal cooperation agreements, the focus is now on technology licensing and the revision of the car distribution rules. The aim, however, is the same: a more economic approach based on market realities and quite particularly on the power of the parties to harm competition to the detriment of consumers.

2. The review of the Technology Transfer Regulation

Let me first say a few words about technology licensing. Under our existing Technology Transfer Regulation the Commission is obliged to publish a mid-term report on its

functioning. This report is now in preparation and is due to be published by the end of the year. I would like to use the opportunity to provide a brief preview of the broad lines of our current thinking in this field.

The Technology Transfer Regulation is based on the traditional white, grey and black list approach, stipulating what is allowed, what may be allowed and what is not allowed. No account is taken of the market position of the parties. This form-based and legalistic approach is at odds with our new block exemption regulations in the field of vertical restraints and of horizontal cooperation agreements. Subject to a market share threshold, they block exempt all restrictions that are not expressly prohibited. This market power based approach is more flexible and more in line with economic reality. Unless the parties engage in *per se* restrictions enforcement action should be reserved for cases in which the parties have sufficient market power to make a difference.

In addition to the basic approach we also have to revisit the aims pursued by the Technology Transfer Regulation. The main focus of the current Regulation is on encouraging innovation and the dissemination of new technology and on the protection of intrabrand competition

and market integration. As far as the protection of competition is concerned, there is a need to broaden and adapt the perspective. In particular, time has come to draw a clear distinction between licensing involving competitors and licensing between non-competitors.

In the case of non-competitors the licensee would not be on the market without the licence. As a result, the agreement does not restrict competition between the parties compared to the situation without the agreement. On the contrary, it brings a new source of supply onto the market. The licensor should therefore be encouraged to licence his technology by being allowed to determine how and to what extent the licensee is entitled to exploit the licensed technology.

However, once a product has been manufactured under the licence, the licensor should in our view not be allowed to fix the licensee's selling price or control where the product is sold. Moreover, restrictions that go beyond the use of the licensed technology, such as non-compete obligations or tying should also be subject to a normal analysis of their positive and negative effects like for other agreements.

When, on the other hand, the parties to the agreement are competitors, a more stringent analysis is required, taking due account of the risk that the agreement may restrict interbrand competition.

This envisaged change of focus, however, does not imply that the market integration goal, which is a special feature of Community competition law, will be weakened. It is and remains a fundamental principle of Community law that products should be allowed to move freely throughout the internal market and, in particular, that consumers should be able to seek the best deal available. The benefits of market integration and globalisation should not be reserved to suppliers. It would be wrong to neglect intrabrand competition and arbitrage as a source of price pressure. In many instances dealer margins are quite substantial and competition between distributors of the same brand may help to reduce these costs.

3. The modernisation proposal

Let me now turn to the modernisation proposal. On 27 September of last year the Commission adopted its formal proposal for a new regulation implementing Articles 81 and 82. Since then the proposal has been discussed in a

Council working group and the European Parliament has been consulted. The Parliament adopted a favourable resolution in September. The work in the Council is likely to continue into 2002. We are making good progress, but there are still important and difficult issues to be tackled.

3.1. Article 3

One of the most delicate elements is the proposal to provide for the exclusive application of Community competition law to agreements and abusive practices affecting trade between Member States.

The Commission made this proposal for two reasons: First in order to create a level playing field in the internal market and second, in order to ensure that cases affecting trade between Member States are dealt with in close cooperation between all the competition authorities within a network.

The present system is based on parallel application of Community law and national law. In practice the Commission applies Community law and the national competition authorities apply national law. It is a system based on separate spheres in which companies often

have to check their agreements against potentially a large number of competition laws. With the forthcoming enlargement that number would grow substantially.

In an integrated market, however, it makes great sense to make a fundamental shift from the current separate spheres to a common sphere in which we apply the same law in close cooperation. All players stand to gain from such a change. Companies that conclude agreements with inter-state effects will gain because they only have to check their agreements against a single standard. Consumers and the Community will gain because the rules will be enforced more effectively throughout the Community. The national competition authorities will gain because by joining forces the national competition authorities become fully-fledged partners in the enforcement of the EC rules and they will be involved in the application of these rules not only by the Commission but also by the other Member States. The time has come to develop a common competition culture essentially based on our existing European competition rules, namely Articles 81 and 82 of the EC Treaty.

3.2. The network of competition authorities

This leads me to add a few words about the envisaged network of competition authorities, which forms a central part of the reform. The proposed new enforcement system is based on close cooperation between all the competition authorities in the Community. The network is the infrastructure linking the competition authorities.

The network as we see it should have two main functions: First it should promote effective enforcement by ensuring that available resources are used as effectively as possible. Second, it should contribute to the coherent application of the Community competition rules and the development of Community competition policy. I will come back to this second aspect in a few minutes.

Within the network the competition authorities will inform each other of new cases. This information will allow all authorities to become aware of parallel complaints and other cases of common interest. It should also allow them to make better use of their resources by ensuring that cases are dealt with by the best-placed authority. Multiple action should normally be avoided. In Europe we have no integrated court system. Multiple control therefore

invariably means multiple proceedings, leading to duplication of work for the authorities and companies alike.

The intention, however, is not to turn the network into a clearinghouse that adopts decisions on the allocation of cases. The network will adopt no such decisions. What we will do, however, is to lay down certain qualitative criteria for determining which is the best-placed authority.

In this regard, it would seem rather natural to take account of the geographic scope of the alleged infringement, the likely location of the evidence, and the ability of the authority to bring the infringement to an end and, where appropriate, impose a penalty that takes account of the entire geographical scope of the suspected infringement. Qualitative criteria of this nature will serve to guide complainants in determining where to go with the complaint.

If, however, an authority considers that another member of the network is better placed to deal with a case, the two authorities should discuss the matter bilaterally. If they agree that the case has been misallocated and that the other authority should deal with it, the first authority will

simply *abstain from acting*. The Commission's proposal empowers all the authorities to reject complaints on the ground that another authority is dealing with the case.

In case of serious disagreement between the national competition authorities, the Commission can, where appropriate, solve the conflict by itself opening a procedure in the case. According to Article 11(6) of the proposal the national competition authorities lose their competence when the Commission opens a proceeding in the same case. In other words, under the proposed regulation, and by the way also under the current Regulation 17, there can be no parallel proceedings under Community competition law by the Commission and the national competition authorities in the same case. This instrument effectively prevents conflicting outcomes.

The network will also play an important role once an authority has started actively dealing with a case. The proposed regulation provides for the exchange of confidential information and for mutual assistance in respect of fact-finding. These important aspects of the proposal should, if used effectively, help national competition authorities overcome obstacles caused by the territorial scope of their powers. Although there is no

obligation to assist another member of the network, this should come natural in a network based on partnership and solidarity.

3.3. The network and consistent application

As already mentioned, the network as we see it should also make an important contribution to the consistent application of the law. It is envisaged that the national competition authorities transmit draft negative decisions or statements of objections to the Commission, which in turn passes on the information to the other members of the network.

This information exchange ensures that significant inconsistencies can be detected and addressed in mutual discussions. These discussions will be informal and internal to the network. No decisions will be adopted. In the vast majority of cases any problem of inconsistency will be resolved in this way.

However, being the guardian of the Treaty the ultimate responsibility for ensuring consistency within the network must necessarily fall upon the Commission. For that purpose the Commission can, as a last resort, apply the

proposed Article 11(6) to withdraw a case from a national competition authority by itself opening a proceeding with a view to adopting a decision. Any decision on substance adopted by the Commission is subject to challenge before the Community Courts, which have the ultimate power to interpret Community law. The adoption of a Commission decision ensures that the Community Courts can carry out a full assessment of the law and the facts and make a judgement on all aspects of the case before it. It therefore serves to compensate for the absence of an integrated court system in the Community.

The withdrawal mechanism is necessary to ensure coherence in the *exceptional* case where a national competition authority would otherwise adopt a decision that would be in fundamental conflict with Community competition policy.

I would like to stress, however, that Article 11(6) is not, as is sometimes claimed, an instrument that aims at placing the national competition authorities under the Commission's control or at enabling the Commission to cherry pick the most interesting cases.

The proposed new system is based on the clear premise that all members of the network are independent. The system can only function if it is based on mutual respect and adherence to the rules of the game, which have been agreed to by the members of the network. It would be contrary to the self-interest of the Commission to deviate from these rules, as it would cause great harm to the network and to the effective enforcement of our Community competition rules.

There are many other important aspects of the modernisation proposal. However, given the time constraints I will limit myself to referring to my written contribution, which covers some additional points such as the direct application of Article 81(3) and also the Commission's powers of investigation.

3. Lenience

In our efforts to make enforcement more effective we are also re-examining our leniency programme with a view to increasing its efficiency. Experience shows that the effectiveness of the programme could be improved by increasing transparency and certainty as to the conditions on which leniency is granted. There should also be a

closer alignment between the level of reduction in fines and the value of a company's contribution to establishing the infringement.

This review is now possible due to a much greater acceptance in Europe of leniency as an essential instrument in the fight against cartels. When the present programme was discussed and eventually adopted, there was strong opposition in industry and substantial reluctance in the European Parliament and many Member States to the very concept of leniency. It was considered foreign to the traditional European approach to grant immunity to perpetrators in return for disclosing the cartel and their co-conspirators.

Since then there has been a growing understanding that cartels are extremely serious violations that cause great harm to our economies and to consumers. This development has no doubt been assisted by the increased enforcement role of the national competition authorities.

4. Merger review

As I mentioned initially our on-going reform efforts extend beyond the antitrust field. In the field of mergers the

Commission will soon publish a green paper, discussing various ways of improving the Merger Regulation. The Merger Regulation has clearly been one of the success stories of Community competition law, but we do believe that its functioning can be further improved in various ways.

The green paper will address the issue of multiple filings. In spite of the 1997-amendments of the Merger Regulation, there are still a number of cases in which companies have to notify their transaction in several Member States. We have to see whether that number can be further reduced.

At the same time, we will also revisit the mechanisms for re-allocating cases between the Commission and the national competition authorities. The current rules are too complicated. In particular it should be made simpler for the national competition authorities to take over cases where the effects are mainly in their Member State.

We will also use the opportunity to have a debate on a number of other issues, including whether or not we should replace the dominance test by the substantial lessening of competition test. We have no firm view on

this question and therefore look forward to receiving input from the Member States and interested parties.

5. State aid control

Finally, I would like to mention the reforms in the field of State aid that constitutes an essential part of Community competition policy, which, as you know, encompasses a unique system of State aid control, under which Member States must notify and obtain Commission approval in advance for all their plans to grant State aid.

During the last years, the Commission has carried out a broad modernisation process in order to make State aid control more effective, to simplify the control system for less important cases and to increase transparency and legal certainty. In particular, the Commission has adopted a procedural regulation codifying State aid procedures and block exemption regulations covering certain types of horizontal aid.

However, the reform process does not stop there. On the contrary, the Commission is reflecting on further ways to streamline and modernise both the procedures and the substantive rules on State aid. Issues regarding the

acceleration of the decision-making process, further simplification measures for dealing with aid measures that do not seriously threaten competition, the setting of priorities etc., will be tackled in the coming years.

6. Conclusion

Let me conclude here: The Commission has embarked on an extensive reform drive, which when completed will have brought fundamental change to the competition law landscape in Europe. We have done this in the firm conviction that our reforms will substantially enhance the protection of competition in the Community.

It is important to realise, too, that in particular the modernisation proposal will fundamentally change the way in which the national competition authorities and we operate. It truly represents a new beginning, also for the Commission. There will no doubt be many challenges to be overcome, but I am more than ever confident that we will succeed and that the change will be for the benefit of all of us.