St Gallen International Competition Law Forum

'Priorities for Competition Policy'

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CHECK AGAINST DELIVERY

Ladies and Gentlemen,

It is a pleasure and honour for me to address such a distinguished audience. I have been asked to introduce today's conference by saying a few words about the priorities for this mandate.

Before I venture into these topics, let me first say a few words about the economic climate in which a new team has taken its new functions in Brussels and the challenges competition policy is facing at the moment in the context of the economic crisis.

Crisis measures and exit strategy

Competition policy has been one of the tools deployed in order to avoid a complete meltdown of the financial systems in the wake of the financial crisis. In the short term, the application of the state aid rules has maintained a level playing field and preserved the achievements of the Single Market. In the longer term, they are helping pave the way for economic restructuring and European recovery.
Drawing lessons from the crisis, which is by no means behind us, we must also think ahead and consider longer term objectives for the economy in Europe. This is what the Europe 2020 strategy recently put forward by the Commission and broadly endorsed by the Heads of State and Government, attempts to do. It is a strategy for rising out of the ashes, figuratively speaking of course, and achieving a new period of growth and dynamism in Europe. I am deeply convinced that Competition policy also has a role to play in this strategy. Let me explain why.

An EU-wide competition policy helps create a level-playing field for business across Europe. It creates opportunities for companies, which have access to a wider market for their goods and services. It also creates challenges for them to improve their performance, as they are competing with companies from across the EU. This has a positive impact on companies to compete globally. If the key word of the 1980's was "Europe", today it is "globalisation". Firms will be in a better position to compete

outside our borders if they are capable of investing, innovating and creating jobs within the internal market.

Let me put the subjects I have just mentioned in perspective in order to better assess the challenges ahead of us.

As regards the financial sector, guarantee schemes, recapitalisation schemes, liquidity interventions or asset relief interventions by the Member States as well as in the individual cases put before us has been totalling over EUR 3.6 trillion or 29% of European GDP. In our assessment, we have applied the following principles:

- ensure fair competition between Member States
- ensure fair competition between banks
- ensure a return to normal market functioning

Regarding the real economy, in December 2008 the Commission adopted a new temporary State aid Framework which provides additional possibilities for Member States to grant State aid. Its objective is to facilitate companies' access to finance and therefore reduce the negative effects of the crisis in the real economy.

We must now think about the phasing out of these exceptional measures that were put into place to answer exceptional circumstances.

On the real economy, the withdrawal of measures should depend on the capacity of financial institutions to supply adequate credit to creditworthy companies. The Commission is currently gathering information on the use of the Temporary Framework by Member States as well as the state of credit supply to creditworthy companies. The Temporary Framework is set to expire at the end of this year. One should also remember that the "normal" State aid rules provide a large variety of possibilities for granting State aid in favour of SMEs, employment, research or environmental protection for example.

On aid to the financial sector there is a general consensus that the exit process should start, in particular for government guarantees. Exit from government guarantees needs to be well coordinated and flexible enough to take into account national specificities and potential new stress to the financial markets.

What we have decided is that the pricing of government guarantees from June to December 2010 should be gradually brought closer to current market conditions. It should also better reflect the banks' current creditworthiness. Banks which still depend heavily on government debt guarantees will also have to undergo a viability review. The idea is that necessary structural adjustments should not be postponed for banks that cannot obtain sufficient liquidity.

The ECOFIN endorsed this approach last Tuesday and the DG Competition staff working paper on these issues is available on our Website.

I thus believe competition policy can contribute to helping European industry emerge from the current financial and economic crisis so that it becomes better equipped for the sustainable growth identified under Europe 2020.

I have just explained how State aid has been instrumental in tackling the crisis and setting Europe on the road to recovery. Let me now turn to the other competition policy instruments we have at our disposal.

Antitrust and cartel enforcement

On antitrust and cartel enforcement, what is absolutely key is that we must not weaken our enforcement because of current economic circumstances.

Cartels, for example, raise the prices of input and intermediate goods that go into the manufacturing of final consumer goods. Most cartels touch intermediate, not final goods. By combating this type of conduct, anti-cartel enforcement in the EU also supports the competitiveness of EU industry.

Firms sometimes enter into cartels due to excess capacity in the sector concerned. Arguments have been raised in favour of dealing with such structural problems by a temporary suspension of competition rules. This approach was tried in the US in the 1930s under President Roosevelt's new deal – but the result was lower output, higher prices and reduced purchasing power. The effect of those measures was to prolong the depression by several years. So now is not the time to weaken our fight against cartels and you can expect strict enforcement from us in this regard including through the use of relatively new instruments such as settlements.

As you will have seen, the Commission yesterday reached its first settlement in the DRAM cartel case. This is a milestone in our enforcement against cartels. Settlement procedures allow the Commission to speed up investigations, free up resources to deal with other cases and therefore improve the efficiency of our cartel enforcement.

This first settlement case has proved that the Commission was serious about using this procedure. It also proved that we gained trust from the companies willing to settle, which is a positive sign for the future.

On antitrust more generally, we need to put our money where our mouth is. Enforcement needs to take place where we can make a difference. I would argue that to help meet the objectives of Europe 2020, we need to focus on those sectors which are key to the development of the Single Market.

Energy, for example, is a sector where liberalisation has not yet delivered all the benefits to consumers that it might. Lack of competition in network industries, such as the energy sector, harms EU industry as a whole by driving up input costs, making it globally less competitive.

Following on from the sector inquiry that we conducted, the Commission has brought a number of competition cases in the energy sector, and has achieved significant results. For instance, we have obtained remedies in several cases involving potential abuses of dominance in gas and electricity markets

The remedies or commitments obtained address concrete competition concerns and will result in more competition and better functioning markets for gas and electricity in Europe. In turn this will encourage much-needed investment in the sector. Just last week the Commission made legally binding commitments by E.On to effectively open up access to the German gas market.

In addition to steady enforcement of the rules, what we must also do is ensure that our legal framework for competition is brought in line with market developments and is as clear and predictable as possible. This is essential for the competitiveness of the EU economy and for consumer welfare.

For instance, we have just renewed our regulation and guidelines on distribution - or what we call in our jargon vertical - agreements. This renewed legal framework and guidelines concern hundreds of thousands of distribution agreements in Europe. The updated rules and guidelines in particular take into account the development of sales over the Internet with the consumer's interest in mind. It is therefore important for the security and predictability of the business environment of firms.

On horizontal agreements (that is agreements between competitors on R&D or specialisation agreements for example), we are carrying out a review of our rules and have just launched a public consultation on our proposed adapted guidelines. What is new in these guidelines is that we are proposing to give guidance on two new issues: 1) on information exchanges between competitors and 2) on standards. These information exchanges do not always create competition problems and we should explain when they do, and when they create efficiencies for example. Think for instance of pooling insurance data

This review will also address standards. Standards have become increasingly important in facilitating innovation in our knowledge based economy. Standardisation must take place in an open, transparent and non-discriminatory manner, as this is the basis for fostering innovation. We must therefore seek to deter anticompetitive conduct in connection with standard setting procedures such as patent ambush. This is why in our proposed guidelines we attempt to clarify what is expected from standard setting organisations if their standardisation agreements are to comply with the competition rules.

In addition to our public enforcement, private enforcement is a complementary tool to ensure the effective enforcement of the competition rules.

Collective redress

As you know, the Commission's Green Paper and White Paper on antitrust damages actions sparked a wide and sometimes passionate debate in Europe. More than once, we received various valuable contributions to this debate including here at the St. Gallen International Competition Law Forum. I am happy to see that Professor

Baudenbacher has also this year set up a panel to discuss the topic of damages actions. Such exchanges of views are very important to the Commission.

As the European Parliament rightly emphasised, it is clear that something needs to be done to ensure the full enforcement of Articles 101 and 102. Despite the right to damages guaranteed by the Treaty, the vast majority of victims of competition law infringements in EU Member States does not receive any compensation for the harm suffered. These victims are foregoing up to EUR 20 billion of compensation per year due to obstacles they face under national rules governing actions for damages. At national level some steps forward are to be noted, such as in Hungary where private damage actions start from the rebuttable presumption of a 10% price increase due to the anti-competitive behaviour.

But it is also clear that we need to strike the right balance: whilst the existing obstacles to the compensation of victims should be removed, we must also avoid creating incentives to litigation that would lead to abuses. In this context, we have always carefully been looking at the experience gained elsewhere in the world, including in the US. Maybe today's panel will share some further recent experience with us.

In addition to the need for effective safeguards against abuses, the Commission is currently also looking into ways of achieving a coherent approach at EU level to collective redress in various areas of law including consumer protection. Vice-President Almunia has announced that the European Commission is examining the wider framework for collective redress, with a more general public consultation on this topic in the autumn. The objective of the consultation is to identify common legal principles that should guide any future sector-specific legislation, such as the one on antitrust damages actions.

Due process

Let me now say a few words on a subject which is featured in the programme today in a panel alongside fines and efficiency.

An essential feature of all enforcement is a guarantee of due process and the rights of defence. The basic structure of our administrative enforcement system, in which the Commission has responsibility as decision-maker to enforce the competition rules, under the strict judicial control of the European Courts, has proven to be a legally sound model.

Indeed, when the Commission decides to act, this decision is not only extensively reasoned and subject to the Courts' judicial review, it also comes after a process that fully involves the companies concerned.

During this process, companies can defend themselves against the Commission's concerns: they have the right to be heard both orally and in writing; they have access to the Commission's file; their procedural rights are guarded by the Hearing Officers, who report directly to Vice-President Almunia and the College.

At all times the Commission must act as an impartial and objective public authority, which it does. This is illustrated by the fact that cases are often amended after the parties have been heard on the Commission's concerns. Some cases are even dropped altogether.

The Commission's decision-making process is aimed at ensuring such impartiality. Within DG Competition already, cases involving complex economic analysis gather officials of various profiles: case teams, policy coordinators and members of the Chief Economist Team, on top of the DG's management. Difficult cases are subject to a "peer review" panel and the Commission's Legal Service provides legal advice all along the process.

Additional "safeguards" include a review by national competition experts sitting in the Advisory Committee, and a review by other Commission directorates.

All in all, we have an extensive system of internal checks and balances.

Moreover, at the end of this extensive process, Commission competition decisions are adopted not by DG Competition or Vice-President Almunia, but by the College of Commissioners – 27 appointed Commissioners from across Europe – who have sworn to be and are genuinely independent of national, political and business interests. And cases are not over by then. The Courts of course will hand down their final judgment, if there is an appeal.

We should of course always look for improvements. Within the framework laid down by the Treaty and which is common to many other jurisdictions, we are open to discuss how to render our antitrust procedures more transparent, predictable and efficient. And as you know we have been working on this issue.

In January, the Commission put out to consultation three comprehensive documents on different procedural issues. Best practices for antitrust proceedings, Best practices for the submission of economic evidence and Guidance on the role of the Hearing Officers. The goal of these three papers is to explain how antitrust proceedings in particular take place before the Commission and to improve the transparency and predictability of proceedings. This is beneficial to businesses and to our working relationship with stakeholders more generally.

We have received more than 50 responses to the consultation and are now carefully considering all comments made by stakeholders. Those comments will be made available on our Website shortly.

This process was also conducted in the field of merger control a few years ago and has undoubtedly increased understanding of the merger investigation process. It has enhanced the efficiency of investigations and ensured a high degree of transparency and predictability. For example, the merger best practices introduced state of play meetings with the parties at different key stages of the procedure and provided for an early review of key documents. While there are some differences compared to antitrust proceedings, I believe that the same can now be done in this field and I believe that it can be done while keeping our efficiency. As Vice-President Almunia underlined yesterday when presenting the settlement result in the DRAMs case, it is in everybody's interest if our procedures can be accelerated in a responsible way rather than being drawn out for procedural reasons.

International Cooperation

Finally I would like to say a word about international cooperation. At European level, there is the elaborate cooperation put in place in the European Competition network following the adoption of Regulation 1/2003. At international level, the International Cooperation Network provides a platform for the "silent majority" of competition authorities, now numbering over 100, as well as a fruitful basis for enhanced bilateral cooperation with the major jurisdictions. In this respect, I would like to highlight not only the well-established Transatlantic relationship, but also the cooperation with the Swiss Competition Commission and express the hope that this cooperation can soon be enhanced.

Thank you