The Commission's current thinking on Article 82

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Introduction

Thank you for inviting me to give the keynote speech on Article 82 reform.

I am pleased to see that this is already the 8th Trans-Atlantic Antitrust Dialogue. The continuing success of this initiative is proof of the importance of open, international dialogue between competition authorities, practitioners and economists.

My intention today is to share with you the latest Commission thinking on Article 82.

I will do so partly by setting out the general principles driving our policies, and partly by discussing a small number of high-profile cases chosen to illustrate our enforcement priorities under Article 82, both in terms of the type of infringement we are dealing with and in terms of how our actions can make markets work better.

You will notice that all my examples are drawn from two industries – energy and technology. This is not a coincidence: energy and technology are crucial both to Europe's future productivity and to the every day well-being of Europe's citizens.

They are also areas where the Article 82 debate has been rather heated recently.

This has led us to do a lot of thinking internally and to have many valuable discussions with stakeholders. We have also been influenced by a number of important judgements made by the European courts - not least in the Microsoft case, but also more recently in Deutsche Telekom.

General conditions for applying Article 82

Before I go into detail on specific cases, I would like to run through the general principles the Commission follows when deciding whether to take action under Article 82:

- The firm under investigation must have durable and significant market power; and
- The particular behaviour that is the focus of the Commission's concerns must harm consumers.

The Commission does not have a problem with a dominant company using fair means (such as superior efficiency, higher quality of product, or innovation) to outdo its competitors. That is the essence of the competitive process, and far from leading to consumer harm, leads to direct consumer benefits.

High tech sector

Analysing whether a given behaviour harms or benefits consumers is perhaps never as difficult as when a competition authority has to look at the issue of rebates. In the short term, selling goods at a lower price is clearly beneficial. But the authority has to look at whether consumer welfare is harmed in the longer term. That is what is at stake in the Commission's Intel case.

It is a vexing, if justified, constant in competition work that we cannot speak publicly in any detail while a case is pending. You will forgive me, therefore, if I say only a few words on this important case.

Here the Commission's main allegation in the July 2007 Statement of Objections related to conditional rebates. Our provisional finding was that Intel had given PC manufacturers rebates that were conditional on them buying all or most of their chips from Intel.

Our Statement of Objections alleges that this conduct is part of a broader Intel strategy, targeted at preventing their main rivals AMD from expanding, which would have the effect of denying or delaying for consumers the choice of new and innovative products.

As I said, this is an area where an enforcement authority must be cautious – lower prices are *prima facie* good for consumer welfare. It is only if the prices are so low as to damage the competitive process and thus to damage consumer welfare that we should intervene.

I am not in a position to say much more about the Intel case at this moment.

In contrast, rather a lot of ink has been spilt on the Commission's long-running involvement with a certain company founded in 1975 by someone who decided he had better things to do than graduate from Harvard.

The Commission's **Microsoft** decision, confirmed by the Court of First Instance last September, required Microsoft to provide interoperability information on reasonable terms to third parties who needed that information to compete on the market for work group server operating systems.

This information had been supplied in the past, and it was found that its withdrawal was abusive because it was likely to lead to long-term consumer harm. That finding was upheld in full by the Court of First Instance, and the Court also made short shrift of Microsoft's argument – unsupported, and even contradicted, by evidence – that Microsoft's incentives to innovate would be undermined.

But rather than focus on the nature of the abuse, today I want to say a few words about the remedy, and in particular what Microsoft could legitimately charge for the provision of the information.

The Commission's position was relatively straightforward: Microsoft were entitled to charge for that information to the extent that they could demonstrate that they had made innovations to the interoperability information.

Microsoft's would-be competitors summed up the situation very well: the

interoperability information was not kept secret because it was valuable, it was valuable because it was secret.

Microsoft failed to show any real innovation in the vast majority of the information that it eventually disclosed; it was simply keeping the interoperability information secret to allow it to leverage into other markets.

It is worth remembering that this analysis in relation to the remedy also reinforces the Commission's analysis of the abuse: requiring disclosure could not undermine innovation, because there was none to undermine.

Putting an end to this abuse meant that Microsoft offered the interoperability information that is not covered by patents for a one-off nominal fee, while for the patented information, a running royalty of 0.4% of licensee product revenues applies.

This solution protects any genuine innovation by Microsoft, while at the same time ensuring that the main potential competitor to Microsoft - the open source movement - can access the interoperability information.

As a result of the Commission's intervention, open source developers have been able to license the information, development work has started, and new, innovative products can be expected to come to market.

The remedy does not mandate outcomes. Rather it creates the opportunity for competition.

It is up to competitors to make the most of this opportunity. It is also up to Microsoft to innovate and build new and better products without artificial protection from its failure to disclose interoperability information.

We are keeping up the pressure on Microsoft to comply with the competition rules and have recently opened proceedings against Microsoft following complaints by ECIS concerning interoperability and by Opera, a rival internet browser vendor, concerning tying.

Energy sector:

I could easily fill the remainder of my allotted time with more examples from the high-tech sector, but in the interests of balance let me now move to the energy sector.

Of late, there have been some worrying price increases in this sector, and there is a lively debate as to whether these are entirely down to market fundamentals or whether there is also an element of profiteering.

To investigate this, the Commission took on the responsibility of an energy sector inquiry followed, in April 2007, by an in-depth study of price formation.

From this we learnt that prices in the electricity sector were higher than they should have been had the market been working well and that there was a possibility that market players were withholding capacity to force prices upwards.

This led the Commission to look more closely at the behaviour of individual companies. One case involves the behaviour of **E.ON** on the German wholesale market since 2002.

We have concerns that E.ON may have withheld significant amounts of capacity to raise electricity prices. We also have concerns that E.ON may have persuaded some of its smaller competitors to cancel or postpone investments in new generation capacity.

In response to this investigation, E.ON has proposed a far-reaching set of remedies. It offered to divest more than one fifth of its generation portfolio, arguing that this would prevent it from withholding capacity.

E.ON also proposed to the Commission to sell its transmission network and related activities to bring to a close a second antitrust case. In that case, which concerns the balancing market, we have concerns that E.ON may have favoured affiliated companies on the German balancing market and would have prevented power producers from other Member States from selling balancing energy into Germany.

E.ON's complete package of commitments will be market tested before the summer.

The electricity markets are not the only part of the energy sector to have drawn our attention.

Inspections carried out in 2006 on RWE premises in Germany led us to open antitrust proceedings against **RWE** in April 2007.

Here the investigation centres on the possibility that RWE abused its dominant position in the regional markets for the transport and wholesale supply of gas in North Rhine-Westphalia by raising rivals' costs and preventing entrants from getting access to capacity on gas transport infrastructure in Germany. We are only at a preliminary stage of this investigation, so I should stress that these are merely concerns that are being investigated, and are not in any way findings, however preliminary.

There are also several more energy cases being examined in the Commission as a follow up to the energy sector inquiry, but these three give a flavour of our approach. In essence these Article 82 cases focus on the classical concerns of exploitation and exclusion, even if the particular behaviour looked at will vary from case to case.

For example, withholding of capacity is specific to the electricity sector: the product (electricity) is not storable, the offer curve is rather steep, demand flexibility is very limited and the single price of short term markets is determined by an auction mechanism and equal to the price of the last Megawatt of electricity offered. So the consumer harm of withholding capacity may be peculiar to this market.

These cases illustrate the main benefit of putting economic analysis at the heart of competition law enforcement. It allows us to focus on the core problem on the market, rather than on a particular form of behaviour.

A more traditional case

That being said, economic analysis is also helpful in fairly classical cases. The Commission has sent a Statement of Objections to **Alcan** in relation to its contracts for the sale of its aluminium smelting technology: these provide that purchasers must also buy handling equipment for aluminium smelters from its subsidiary. As a result of these contractual provisions, Alcan's customers appear to be prevented from using equipment from other suppliers. It is the Commission's preliminary view that Alcan is dominant on the market for aluminium smelting technology and that this contractual tie might significantly harm its customers and ultimately end-users of aluminium, through a reduction in innovation and likely negative impact on the aluminium prices.

Even if the Commission were to focus on the form of behaviour rather than the economic effects, this might be a case where anti-competitive concerns would have nevertheless arisen. But in a world of limited resources for enforcement, how would we be able to decide that this particular case merited priority treatment over other cases. It is only by looking at the economic effects that we can decide where to focus our efforts.

Conclusion

As you can tell, we have some interesting issues currently on the table.
We are drawing the lessons from past cases such as Microsoft, we are actively pursuing several pricing cases (covering both exploitative and exclusionary conduct by potentially dominant firms), and underpinning all this is a strong sense of the

importance of prioritisation: an analysis of the economic effects of each case is therefore key not only in getting past the form of the conduct and identifying the consumer harm, but also in deciding which cases are the most harmful and which we should do.
