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Keynote address

Reflections on the past seven years – "Competition policy challenges in Europe"

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In the conference papers this session is titled "Reflections on the past seven years" but subtitled "Competition policy challenges in Europe". Personally I prefer to look forward rather than back, so I won't spend too much time recapping the past seven years, but will instead try to give you an insight into current issues and challenges.

We have implemented significant reforms to EU competition policy instruments in recent years.

From a substantive point of view, we have gradually consolidated a more economic and effects-based approach to enforcement across the board, i.e. in relation to anticompetitive agreements (with the exception of cartels), abuses of dominance, mergers and State aid control.

From a procedural point of view, there have been changes and improvements brought to procedures and processes in merger control and State aid control, but the most far-reaching reform has been in relation to Articles 81 and 82 of the EC Treaty, with the introduction of Regulation 1/2003.

Overall these substantive and procedural reforms have helped us target our enforcement resources on those infringements that cause the most harm to consumers. Our aim is to achieve a modern, effects-based competition policy that offers companies a sufficient degree of predictability, as well as targeted and timely enforcement action. These tools have been tested in recent months – as we deal with the repercussions of the financial and economic crisis. I'll come to that later.

Our focus on infringements that cause the most harm to consumers obviously includes horizontal cartels to fix prices and share markets. We have in place a successful leniency policy – so that nowadays the majority of the Commission's cartel decisions are the result of leniency applications by parties to cartels – and a dedicated Cartels Directorate at DG Competition. In 2006 we updated our fining policy, so as to better reflect the economic harm caused by cartels and increase the deterrent effect of Commission fines. And, in 2008 we introduced a settlements policy – which aims to reduce the administrative burden on DG Competition and speed up the process in cases where the parties do not dispute liability.

Due process and antitrust fines

What the major reform of our antitrust framework in 2003 did not do was to fundamentally change our institutional structure or set up, or the legal basis for our fining policy. It confirmed the administrative model – whereby the Commission both investigates cases and adopts binding decisions (and where necessary imposing fines). This is in fact the model adopted by the majority of EU Member States.

It is a system that has been tested in the courts and repeatedly found to respect fundamental rights and principles, and due process. But that does not mean that we are complacent. The Commission in general – and DG Competition in particular, as the part of the Commission which carries out investigations – takes issues of procedural fairness and due process extremely seriously. They are an essential priority for us and we regularly review our procedures so as to assure that fairness and due process are complied with. And we are always open to discussions on how to make our procedures more transparent and efficient.

We do believe though, that the administrative model of competition enforcement has significant advantages: it helps avoid duplication of work, and administrative authorities are usually well equipped to handle complex cases that require extensive investigations, elaborate information management (notably helping meet the need to be transparent and provide access to file) and sophisticated economic analyses.

The Commission is subject to a number of internal and external checks and balances. These include:

- regular internal review of whether a case is strong enough to be pursued;
- scrutiny by legal and economic specialists;
- peer review panels.

We have two Hearing officers who report directly to the Competition Commissioner, and whose role is specifically to ensure procedural fairness.

Commission decisions are adopted by the full College of Commissioners – not by DG Competition or by the Competition Commissioner – and the members of the Commission all need to be convinced that each decision is correct.

External checks also include review by the 27 Member States in the Advisory Committee, and most importantly the right to an in-depth review by the European Courts. The Court of First Instance leaves no stone unturned in its examination. It can look at any evidence brought to it, and is not restricted to the facts on the Commission's file. The CFI's Microsoft judgment is a good example of this. The CFI also has unlimited jurisdiction to review Commission fines.

It is true that the level of fines imposed by the Commission has increased considerably in recent years, particularly since our 2006 Guidelines came into force. But it is worth bearing in mind that the Commission enforces the competition rules across the largest integrated economic area in the world – some 490 million consumers – and is pursuing a policy of targeting the most serious infringements. These necessarily attract the highest fines since, under the 2006 Guidelines, fines take account of the size of the market on which the infringement takes place.

The interface between competition and regulation

One change that has come about following the adoption of Regulation 1/2003, is a renewed focus on sector inquiries. In recent years we have carried out major inquiries into energy, financial services and pharmaceuticals. Our final report on competition in pharmaceuticals in Europe was published this summer. We launched these inquiries into sectors of the economy where there were indications that competition was not working as well as it might. They have helped us understand the sectors, identify where the obstacles to competition lie, and decide on the best course of action to resolve those problems.

Competition policy is about more than just enforcing the competition rules and pursuing individual cases. It is also about regulation and ensuring that where regulation is necessary it takes account of competition objectives and competition principles. Regulation can be both an instrument that needs to be balanced against competition objectives or an instrument that can be used to pursue competition objectives.

The Commission's energy sector inquiry provides a good example. The results of our 2005-2007 energy sector inquiry showed that in spite of legislation liberalising the sector, there remained bottlenecks to competition. As a result, the Commission proposed changes to the regulatory framework to help lift those obstacles (Third Energy Package) which were adopted in July.

In parallel we have adopted a number of decisions enforcing the competition rules in the energy sector (see for instance the July 2009 decision finding that E.On and GDF Suez had carried out market sharing on the German and French gas markets). We have also adopted several decisions formalising commitments offered by energy companies to resolve identified competition problems, and more are still pending.

More broadly, it is interesting to consider, for different issues, whether it is competition law enforcement or regulation that offers the right solution?

For instance, taking the objective of "greening the economy" – what is important is establishing the right market signals for sustainable economic growth. In order to achieve this, we may need regulation that is compatible with the competition rules – otherwise we will see an increase in State aid and antitrust cases where we are invited to balance on a case-by-case basis the benefits of "green" measures against anticompetitive effects and consumer harm.

In the IP sector, competition cases raising IP issues often occur in complex environments presenting competing issues of IP, regulatory and competition policy. A pan-European patent and a pan-European approach to patent enforcement could help remove obstacles. As might a pan-European approach to licensing systems by for instance European collecting societies. Regulatory improvements to standard-setting processes could also help avoid these systems

being exploited – and help remove the need for ex post competition enforcement.

Finally, in the area of payments systems: we are addressing problems with MasterCard and Visa's multilateral interchange fees under the competition rules. Some argue that these issues would have been better – or at least more simply - dealt with upfront by way of regulation.

The future of financial markets

A further – and very current example – of the interface between competition policy and regulation is of course the financial crisis.

The financial crisis has made us a lot more aware of the interface between our role as competition authority and the rest of government (the rest of the European Commission, national governments, central banks, financial regulators), whose primary objective has, rightly, been to restore stability to the financial sector/the economy.

Because of the Commission's powers to review and approve **State aid**, DG Competition was involved from the outset in the State measures to support the banking industry. What we tried to do was to respond pragmatically to the need for quick responses by setting out our criteria for approval of aid measures in general guidelines and being flexible on procedures (e.g. adopting emergency decisions allowing aid to be granted almost immediately). But at the same time we sought to remain firm on the underlying principles and objectives of the competition rules (keeping distortions of competition to a minimum).

I believe that we have put down a marker that it is possible for governments to respond quickly and effectively to crisis situations without undermining the functioning of the market.

This also holds for **antitrust**: it is not a question of saying that government could never intervene in company behaviour should it be necessary to further a public policy objective, but rather of working with government to ensure that where government does intervene, its action is as pro-competitive as possible.

In the current circumstances people sometimes query whether **merger control** needs an interface with the requirements of other policies. We cannot start to integrate the requirements of other policies into our merger control analysis. That is simply too complicated. However, what we need to envisage is the very real possibility that in the future, a banking merger approved by us could be blocked by a financial supervisory authority for instance on the grounds that the merged entity would be too big or too systemic to fail, and would consequently pose an unacceptable risk to the banking system. With respect to ECMR transactions this possibility is of course already provided for in Article 21 of the Regulation.

Ultimately the crisis highlights the need for competition principles to be implemented not only through our direct enforcement action, but also through the regulatory architecture for any given sector of the economy. Competition objectives should be part and parcel of regulating the financial sector, the energy sector, the communications sector, etc.

Indeed, with a view to preventing any reoccurrence of the current crisis, in the financial sector the regulatory architecture could potentially include rules preventing financial institutions becoming "too big to fail" or "too systemic to

fail". The concern is that otherwise in the event of a crisis or a failed business model, banks could not be wound down but would again have to fall back on state support.