International Forum Competition Law of the Studienvereinigung Kartellrecht

Challenges for European Competition Policy

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Lieber Dr. Montag, sehr geehrte Damen und Herren,

Vergangenes Jahr hat mein Vorgänger, Philip Lowe, der Studienvereinigung Kartellrecht über seine spannenden sieben Jahre an der Spitze der Generaldirektion Wettbewerb berichtet und einige künftige Herausforderungen aufgezeigt.

Ich möchte Ihnen heute einen Überblick über kurz- und mittelfristige Herausforderungen für die Wettbewerbspolitik geben, sowie näher auf die Rolle der Wettbewerbspolitik im Zusammenhang mit der Strategie Europa 2020 eingehen. Wie ich sehe, werden einige dieser Themen im Laufe der Konferenz noch eingehend erörtert werden.

Bevor ich zur strategischen EU Planung, der sogenannten Strategie Europa 2020 für nachhaltiges Wachstum und Beschäftigung und ihr Zusammenspiel mit der Wettbewerbspolitik, übergehe, lassen Sie mich zuerst einige Herausforderungen ansprechen, die im Zusammenhang mit der gegenwärtigen Finanzkrise auf die Wettbewerbspolitik zukommen.

Zu diesem komplexen Thema werde ich jedoch, falls Sie nichts dagegen haben, in die Sprache Shakespeare's überwechseln.

Competition policy and the economic and financial crisis

As you will be aware, competition policy and in particular State aid control, has been a key instrument in helping to stabilise markets after the outbreak of the crisis now almost a year and a half ago. Our key focus was to maintain the integrity of the internal market.

- Not only were the processes put in place to allow for quick approval of rescue measures to ensure financial stability. All of a sudden concepts like recapitalisations, guarantees, impaired assets, subprime mortgages, CDS spreads became part of a new framework for the financial sector.
- In order to address difficulties arising from the credit crunch for the real economy, the so-called temporary framework was put in place, to allow Member States to provide subsidised loans, loan guarantees, and small amounts of direct aid to the actors of the real economy.
- Restructuring plans of financial institutions having received support have been and are still being discussed with Member States. The purpose is to minimize the distortions of competition that might result from the large-scale award of aid to these financial institutions and to ensure their long-term viability without state support.

At the outset of the crisis, there was pressure on the Commission to set aside the State aid rules in the same way as Franklin Roosevelt put aside antitrust laws in the beginning of the New Deal, but then it was recognized that there was a need to enforce common rules to avoid the disintegration of the Internal market.

In this respect, I would like to quote German Chancellor Angela Merkel who earlier this year commented in a speech in Düsseldorf: *"Stellen Sie sich einmal vor, Brüssel und die Wettberwebskommission hätte es während dieser Krise nicht gegeben. Ich möchte mir nicht ausrechnen, wie viel Protektionismus in Europa dann geherrscht hätte. Ich weiß, dass wir manchmal auf die Wettbewerbskommission auch sauer sein; das habe ich schon selbst miterlebt. Aber insgesamt hat sie dafür gesorgt, dass in Europa der freie Handel und der Binnenmarkt einigermaßen funktionieren konnten"*[1].

[1] Speech by Chancellor Merkel entitled "Wirtschaftsgespräch 2010" on 18 January 2010 in Düsseldorf (see www.bunderegierung.de). 'just try to imagine how much protectionism there would have been across Europe in the absence of Brussels and DG Competition. I know that we may sometimes feel angry towards DG Competition; I have experienced that myself. But overall the Commission ensured that free trade and the internal market could function to a fair degree'.

Unfortunately we are not there yet. After having played a role in stabilising market conditions, State aid rules and policy will need to play a key role in the exit from the crisis. As the economy becomes more self-sustaining and financial stability is gradually returning, ensuring a successful phasing out of support measures to financial institutions and the wider economy is of paramount importance. As the recovery is still fragile this will not be easy but I believe that when the crisis comes to an end, the exceptional measures put in place to deal with the crisis, and which were based on an exceptional legal basis, will also need to come to an end.

Trying to find an appropriate exit strategy from the crisis is one thing. But in a sense this is only the beginning. The next challenge is to make Europe emerge from this crisis better equipped for balanced and sustainable growth; and this brings me to the medium-term goals for competition policy and the wider context of the Europe 2020 strategy.

Competition policy challenges in the medium-term and Europe 2020

Last week the European Commission set out its ideas on Europe's vision for a social market economy of the 21st century. It put forward how we believe the European Union and Member States should drive growth and jobs in the future within three mutually reinforcing themes:

-Smart growth (knowledge and innovation);

-Sustainable growth (low-carbon, resource efficient and competitive economy) and

-Inclusive growth (high employment economy delivering social and territorial cohesion).

I believe competition policy has a cross-cutting role to play in this vision.

The link between effective competition and economic growth is particularly important in times of economic recession and when evaluating the strategy for recovery. This is why competition policy should be an integral part of the toolbox on which governments rely; not only for responses to the economic crisis but also as part of making the 2020 vision come true.

Effective competition drives companies to innovate and be efficient. But competition enforcement can only be effective if its policy instruments are kept up-to-date and brought in line with market developments.

Let me illustrate this by two of our most important cross-cutting instruments as regards the application of our competition rules, the block exemption regulation for vertical agreements, as well as the review of the guidelines for horizontal agreements. Both these cross-cutting texts are up for review.

The first concerns the one on the block exemption regulation for vertical agreements: as you probably know the project is more advanced, as the current Regulation expires at the end of May and a draft has been put out for consultation. The effects-based approach contained in the current rules has been well received. Companies appreciate the safe harbour provided by the Regulation, while the guidelines provide them with detailed guidance on how to assess the agreements. The changes resulting from the review concern two major developments: the possible consequences of the market power of buyers and the increase in on-line sales.

Buyer power needs our attention because it is now generally recognised that powerful buyers can use their buyer power to impose anticompetitive clauses on

suppliers. As a consequence, these buyers would protect or extend their market power to the detriment of consumers. We therefore propose that for a vertical agreement to benefit from the block exemption, both the supplier's market share and the buyer's market share should not exceed 30%.

A second aspect that is directly linked to the objective of an innovative, knowledge-based economy concerns on-lines sales. In the context of increasing internet sales and the disappearance of traditional national boundaries for sales, the question has come up whether and to which extent suppliers should be able to restrict sales by their distributors through the internet.

The debate has mainly concentrated on (i) the distinction between active and passive online sales, and (ii) whether manufacturers should have the possibility to exclude online-only distributors from their distribution systems by, for instance, requiring that their distributors have a physical ("brick and mortar") presence in the market.

Obviously there are various interests at stake here. Our aim with regard to both of these issues is to allow the internet to continue to contribute to cross-border trade in the internal market while at the same time preserving existing distribution models whose efficiency enhancing nature has been recognised. The way we propose to achieve this aim will be discussed this afternoon with my colleague Luc Peeperkorn.

I believe that the final proposals that will be made contribute to the general Commission policy of fostering the internal market as well as on-line commerce, here again linking this development to the economy of tomorrow.

Another important review with which we will be concerned this year is also topical for the knowledge-based economy, as it concerns cooperation between competitors on matters such as Research and Development, joint production, joint purchasing or commercialization, standardisation and exchange of information.

The review of the horizontal guidelines, which we aim to close by year end, will not modify the broad lines of the existing framework from 10 years ago. But we will attempt to adapt it to market developments and clarify some issues. Let me touch on two issues of particular interest, standard setting and information exchange.

Standards have become increasingly important in facilitating innovation in our knowledge based economy. As a result of a number of cases dealt with by DG Competition, it has become clear that standardisation must take place in an open, transparent and non-discriminatory manner, as this is the basis for fostering innovation. At the same time we have been seeking to deter anti-competitive conduct in connection with standard setting procedures. In particular, we are using the competition rules to avoid anti-competitive behaviour stemming from obscure or insufficiently transparent standardisation processes. The review of the horizontal guidelines is a good opportunity to clarify what is expected from standard setting organisations as regards disclosure obligations on both pending and granted patents if their standardisation agreements are to comply with the provisions of Article 101. It is also a good opportunity to include some guidance on the meaning of what are fair, reasonable and non-discriminatory ("FRAND") terms for companies licensing technology. One possibility would be to include a mention of the benchmarks that could be used to assess whether the licensing terms are actually fair and reasonable.

On information exchange, the new guidelines are a good opportunity to provide legal and economic guidance to companies. Our intention is for the guidelines to specify what is considered to be a clear-cut restriction of competition or for example what are the market characteristics that may lead to an exchange of information having a collusive outcome. The guidelines should also give guidance on economic efficiencies that can be created by an exchange of information such as solving problems of asymmetric information or seeking a more efficient way of meeting of demand. It is also the intention that the guidelines will contain many examples as illustration, which will help companies in their assessment. Here again, more legal certainty will be conducive to a better competitive environment.

While the reviews of the "verticals" and the "horizontals" are obviously relevant for the Europe 2020 objective of smart growth, competition policy also has a role to play in achieving sustainable growth.

Competition has a key role to play when it comes to the efficient allocation and effective use of increasingly scarce resources: for example it can have an incentive effect on investment in energy infrastructure. Enforcement of competition rules against major electricity incumbent companies has contributed to investors undertaking infrastructure investment. This is thanks to more reliable price signals resulting from increased competition. Segmentation of the market along national lines -for example through anticompetitive conduct by incumbents- will blunt price signals and hamper the necessary investments.

In addition to our antitrust rules, targeted State aid can also help Europe reach its climate change targets, for instance by supporting clean energy and energy efficiency. The environmental aid guidelines allow, under certain conditions, state support for environmental objectives, if, on balance, the environmental

benefits of such support outweigh the potential distortions of competition brought about by the aid.

When it comes to the third of the Europe 2020 objectives, inclusive growth, let us not forget that a prerequisite for growth is that markets work well, both for the benefit of business and consumers, and should also allow all regions to benefit from growth in a fair manner.

In this context, there is a clear right of companies and consumers to obtain compensation for the damage caused by infringements to the competition rules. Victims' right to compensation and effective redress under the Treaty has been recalled by the Court of Justice several times. It is an essential part of ensuring the full effectiveness of the EU competition rules. Vice-President Almunia already has announced that he would examine closely the different possibilities to improve effective redress, while ensuring that it does not open the door for excesses seen in other parts of the world.

One important component of making Europe 2020 happen has to do with the governance of the process, such as the distribution of responsibilities between the European and the national level.

In fact, I believe that competition policy has also a good story to tell on the subject of governance.

The European Competition Network has been at the vanguard of developments in governance, also compared to other areas. It is a network of public authorities that apply the same substantive law, which is already a remarkable achievement. It is a successful and innovative model of governance. The fostering of leniency programmes in all Member States through the adoption of the model leniency

programme is one example of this. There is always room for improvement of course. For instance, there are still important steps forward that could be made in terms of convergence when it comes to issues such as procedures, sanctions or the analysis of unilateral conduct.

This is something the Commission, together with the National Competition Authorities, needs to reflect on and to further explore. Going beyond the strict framework of enforcing articles 101 and 102, one might for instance consider applying a network approach for mergers as well, and to further enhance cooperation with national courts.

On a global level, the International Competition Network has been a success too in fostering relationships with competition authorities around the world. I would like to mention in particular our strong bilateral relationship with the United States authorities such as the Department of Justice and the Federal Trade Commission. I am happy to see that Phil Weiser is here to share with us the perspective from Washington.

The challenges in due process and fines

Let me close by mentioning two challenges that have attracted quite some attention recently: the questions around due process and regarding the level of fines.

On due process, my observation is that on the whole we have a robust system, tested by the Courts, that compares favourably internationally. This does not mean that we should sit on our laurels. This is why DG Competition has recently produced a draft document on best practices in antitrust proceedings part of which is of immediate application. This draft was accompanied by a draft paper

by the Chief Economist on the best practices on the submission of economic evidence. As a complement to those, the Hearing Officers have for the first time prepared guidance on their current role. The three documents have been published for public consultation which has just ended.

The best practices in antitrust proceedings aim at increasing transparency and predictability of our antitrust procedures while maintaining an efficient enforcement. We hope that, like for mergers, these best practices will contribute to the transparency of our procedures and the predictability of the environment for business having to deal with DG Competition, for instance by an early opening of procedure or through state of play meetings. We will of course examine contributions to the public consultation very carefully.

Of course, best practices operate within a given system. We are striving always to improve our processes and our predictability and we are also learning from jurisdictions which have a different system. Our record, however, must be appreciated in the context of an administrative enforcement system, something we have in common with most Member States. It is in fact the most common system under which competition authorities operate worldwide. There are many checks and balances in our system, internally and externally. From the legal service scrutiny, peer reviews, the Hearing officer's review to the consultation of Member States. And last but not least, our system is also continuously tested in court. Over the last decade it has been found to respect fully the principles of fairness and due process, including with reference to the standards of the European Convention on Human Rights.

On fines, there are basically two issues raised in the public debate. One relates to the legal standard in relation to the level of fines, on which I will not say more than I just said in relation to due process. The other relates to the level of the

fines, including in relation to the current economic juncture. I think we can all agree that the purpose of fines is deterrence. The current guidelines on fines which have been in force for just over three years were revised at the time because under the previous guidelines fines were insufficiently deterrent. Until now, there have been no court judgments on decisions in which the revised guidelines have been applied so it is early stages to draw meaningful lessons from their application. What I can say though is that the 10 per cent ceiling on worldwide turnover already laid down in 1962 is rarely met even under the current guidelines.

And under the current guidelines, due account is taken of the value of the goods or services which are directly concerned by the infringement. So that fines reflect the economic importance of the infringement. The duration of the infringement is also fully taken on board. And this serves not only to deter the companies which have been found to engage in anti-competitive practices from reoffending, but also to deter others from entering into this type of behaviour in the first place.

Whether any call for lower fines in view of the financial crisis should be justified is doubtful. Anticompetitive behaviour in time of crisis brings with it more serious consequences than in normal times and there is therefore no reason to relax the rules. Moreover, the fines relate to past behaviour and the possible rents that were obtained at the time. Of course, when it comes to companies that are in very serious difficulty, we have paid due attention to inability to pay claims from companies in dire financial situations and will continue to do so.

Ladies and gentlemen,

I hope to have highlighted that a robust and dynamic competition policy is a key factor in exiting from the crisis and in creating the best conditions for a prosperous, sustainable and inclusive Europe. I am looking forward to the professional contacts I will undoubtedly have with many in the profession, and count on your support in spreading a healthy competition culture throughout Europe.