

The focus of DG Competition in 2003-2004

IBA Conference

Barcelona - 27/02/2003

- I. Introduction
 - II. The Modernisation of Antitrust Enforcement
 - III. The Review of the Merger Control System
 - IV. Challenges Ahead for DG Competition
 - V. Concluding Remarks
-

Buenos días, Good morning.

First of all, I would like to express my gratitude for having been invited to address this respectable audience of corporate counsel – as they would say in Spain this “ilustre colegio de abogados”.

I. Introduction

The International Bar Association suggested to discuss with you the focus of DG Competition in the coming years. This subject is less evident than it looks. It is always easier to tell what you are and will be doing than to explain what you are focused on, what your priorities are.

Some people will even argue that priority-setting is not relevant at all for an authority such as DG Competition whose mission it is to enforce the competition rules. They would say that DG Competition’s task is to oversee what is going on in the business community and to react to business activities whenever these would distort competition.

We believe, however, that setting priorities is crucial for an organisation as DG Competition. If you do not set priorities, you may end up spending your resources on secondary issues while being unable to address the primary problems. This knowledge has been one of the driving forces behind the Commission’s proposal to review the rules for the implementation of Articles 81 and 82 of the Treaty. As you know, this proposal for ‘modernisation’ of Regulation n° 17 was adopted by the Council as the first regulation of 2003. Regulation 1/2003 will liberate DG Competition from the

burdensome task of checking notifications so as to concentrate on the investigation of serious antitrust infringements.

The modernisation of the antitrust implementation rules will deeply affect the focus of our competition policy for the next two years. The same goes for the proposed reform of the Merger Regulation, that is now submitted for adoption to the Council of Ministers.

Before entering into those fields, allow me to briefly touch upon two other activities that will not cease to be in the spotlight of DG Competition's activities.

1) First, there is the vast field of **State aid control**. In this field, DG Competition will give priority to a comprehensive programme to reform the rules of procedure, including our internal working methods, and to simplify and update the substantive rules. In order to ensure that the legitimacy of State aid is understood and accepted, the DG will also reinforce its activities of communication. There is also room for increased priority-setting in the field of state aid. Indeed, I believe that tools have to be developed to single out cases which raise substantial competition problems so as not to deal with cases that are less important in terms of distortions of competition.

2) The other activity I wanted to recall is, of course, the **enlargement of the Union**. The negotiations on the Competition Chapter have been concluded with the 10 candidate Countries that are forecast to accede on the 1st of May 2004. The candidate countries are being assisted in the building up of a proper legislative framework, well functioning competition authorities and an efficient enforcement practice. Moreover, the enlargement shall take place at the same time as Regulation 1/2003 will enter into force. Since the new Member States will be participating from day 1 in the decentralised application of EC competition rules, we insisted on having them fully associated from the beginning in the network of European competition authorities in which the implementation of Regulation 1/2003 is now being prepared.

But let's go back to the European Union as it now stands – I carefully avoid the terms New and Old – and to the activities that I identified as main challenges for the near future, that is the modernisation of antitrust enforcement and the review of the merger rules.

II. The Modernisation of Antitrust Enforcement

As I mentioned, Council Regulation 1/2003 has laid the basis for a more efficient application of Articles 81 and 82 EC, known as the antitrust modernisation. The central element of the new system is that it eliminates the present notification and exemption system and introduces the direct application of Article 81 as a whole. This new system will be applied from the 1st of May 2004.

1. The enhanced enforcement of EC competition rules

We believe that the new system will enhance the effective enforcement of the EC competition rules in several ways:

- (1) It will **reduce the bureaucracy for companies** who no longer have to notify agreements to the Commission.
- (2) It will allow the Commission to **focus its enforcement activities** on the most serious infringements like cartels and abusive behaviour by dominant firms, instead of working down a pile of notifications.
- (3) The new system will allow the **national competition authorities to participate in the application of EU competition law**. The national competition authorities together with the Commission form a network of public authorities applying the EC competition rules, the “European Competition Network” (ECN).
- (4) The new system will allow **national courts** to fully adjudicate a competition matter – courts who, up till now, were often blocked in their action because of the notification of agreements to the Commission.

The reform will bring about a **change of culture for companies and their lawyers**. On the one hand, companies will have more security to enforce their agreements before national courts and less administrative burden. On the other hand, companies will have to carry out more self-assessment of their agreements and practices. They will no longer be able to systematically ask competition authorities to assess ex ante the legality of their transactions.

2. Impact of the reform on the focus of DG Competition

Of course, the antitrust modernisation will not only lead to a change of culture for companies. I would like to discuss with you the shift that modernisation will bring about with respect to the focus of DG Competition’s activities and its working methods.

(1) First of all, the antitrust modernisation will change **the range of instruments** that the DG has at its disposal for the enforcement of the competition rules and policy development. Whereas the Commission will continue to issue decisions finding and terminating antitrust infringements, it will no longer issue exemption decisions. The consequence is that DG Competition will be mainly involved with cases that are liable to result in negative decisions. In the absence of notifications, the DG will have to rely more on complaints and own initiative investigation. In order to find infringements, the DG will have to be further involved in the gathering of market information and the monitoring of markets. DG Competition will thus have to move from a re-active to a **more pro-active attitude**.

If we want to be ready to face this challenge in about a year, we have to prepare as from now by focusing on the most serious violations and by moving towards an investigative and enforcement-oriented culture. Such re-orientation of our focus has already started, as the record of our anti-cartel activity for the past two years shows.

(2) Even more important is the radical change in the **co-operation between the Commission and the national competition authorities**. Each authority is fully competent to apply Articles 81 and 82 of the Treaty: the new Regulation does not allocate tasks between the Commission and national competition authorities in the

application of EC competition law. A joint statement of the Council and the Commission sets out the principles according to which cases will preferably be dealt with by the authority or authorities best placed to restore competition on the market. National competition authorities will inform the Commission before they take formal steps against companies. If national competition authorities have started proceedings, the Commission may intervene and thereby relieve the national authorities of their competence. The Commission may do so, for instance, to ensure the consistent application of EC competition law or when there is a need to develop policy.

The Commission's power to de-seize national competition authorities should not give the impression that modernisation will make national competition authorities subordinate to the Commission. In fact, modernisation is more likely to bring about changes in the opposite direction. Within the network, all European competition authorities will find themselves discussing the application of EC competition rules on the basis of equality, respect and solidarity. The objective to increase the efficient and coherent enforcement of EC competition rules can only be achieved through an attitude of co-operation and co-ordination between the competition authorities.

Here again, we did not intend to quietly wait for 1st May 2004 to come. Last year, we have started working with our colleagues so as to design and implement a network capable of ensuring full co-operation and exchange of information with a view to render our collective fight against unlawful practices as efficient as possible. Since then, the ECN has been meeting on a regular basis to discuss issues such as the division of casework, the exchange of confidential information, joint investigations and the setting up of an intranet between the European competition authorities. As I mentioned before, the competition authorities of the acceding countries are already fully participating in the meetings of the network.

(3) Finally, DG Competition will have more and closer **co-operation with national courts** applying EC competition law. National courts may ask the Commission to transmit information or request the Commission's opinion on questions concerning the application of EC competition law. The new Regulation also creates a right for national competition authorities and the Commission to submit, on their own initiative, observations to the national courts (the so-called "amicus curiae" submissions).

In order to allow for the smooth implementation of Regulation 1/2003 on the 1st May of 2004, the Commission has to adopt a number of flanking measures, such as a new implementing Commission Regulation as well as a series of notices providing guidance on key features of the new enforcement system, such as the concept of affectation of trade between Member States, the principles underlying Article 81(3) EC, the co-operation within the network of competition authorities and the co-operation between the Commission and national courts. Notices are also foreseen on the treatment of complaints and on the opinions which the Commission intends to issue in order to assist companies in the assessment of novel or unresolved questions.

It goes without saying that all these new tasks and responsibilities require DG Competition to devote permanent resources to the contacts with the national competition authorities and the national courts. DG Competition staff will have to deal with the various tasks of operating the network, monitoring the information send

by national authorities, replying to consultations from national competition authorities on draft Statements of Objections and draft Decisions, issuing formal opinions to national courts and preparing ‘amicus curiae’-briefs.

All this shows that, while modernisation reinforces DG Competition’s role as investigator, it will increase even more the central role of DG Competition with respect to policy development. Definitively, DG Competition will have to meet a growing demand for policy guidance, as not only the business community but also competition authorities and courts of the Member States and the candidate countries will need guidance on the application of EC competition rules. Moreover, I believe that modernisation will also create a healthy competition between competition enforcers: if DG Competition wants to take the lead, it will have to perform in each policy area as good as the most advanced among the national competition authorities.

III. The Review of the Merger Control System

The other reform that will shape future competition policy is the review of the EC’s system of merger control, laid down in the EC Merger Regulation. The **aim of this review** is to build on what is generally regarded as a successful record, by ensuring that the Merger Regulation remains adapted to the economic realities of today and tomorrow.

The reform package proposed by the Commission consists of a **proposal for a new Council Regulation** on the control of concentrations between undertakings, draft **notice on the appraisal of horizontal mergers** and draft **best practice guidelines on the conduct of EC merger control proceedings**. In the notice on horizontal mergers the Commission intends to clarify the concept of dominance (including the scenarios of “unilateral effects” and “co-ordinated effects”) and the application of this test in mergers between competing firms. Similar guidelines could thereafter be developed for the assessment of ‘vertical’ and ‘conglomerate’ mergers. The draft ‘best practice guidelines’ cover the day-to-day handling of merger cases and the Commission’s relationship with the merging parties and interested third parties, in particular concerning the timing of meetings, transparency and due process in merger proceedings.

Let me briefly highlight some aspects of the reform that will affect the focus of DG Competition’s merger control. But first some words on the substantive test to assess the competitive impact of mergers.

1. The substantive test to assess the competitive impact of mergers

The current Merger Regulation requires the Commission to prohibit mergers that create or strengthen a **dominant position** as a result of which effective competition would be significantly impeded in the common market or in a substantial part of the common market.

The Commission’s Green Paper launched a reflection on the merits of this substantive test, which is based on ‘**dominance**’. The Green Paper invited comments on how the effectiveness of this test compares with a test based on the “**substantial lessening of**

competition" (SLC) as used in national jurisdictions such as the UK and Ireland (and also in the US).

Based on our experience to date, however, the potential drawbacks that would plead *against* keeping the dominance test appear to be more theoretical than real. Indeed, I believe that the dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios that mergers may engender. Still, in view of the *potential* "gap" in the scope of our current test, the Commission has proposed to clarify the dominance test so as to make it clear that the test applies to situations of oligopoly which may give rise to competition problems (so-called "unilateral effects"). This might be done by the insertion of an additional paragraph in Article 2 and of additional considerations in the preamble of the new Regulation.

2. The treatment of efficiencies

As regards the proper treatment of efficiencies in merger analysis, our draft Notice on the appraisal of horizontal mergers points out that the Commission will carefully consider any **efficiency claim** in the context of the overall assessment of a merger, and may ultimately decide to **clear** the merger on the basis of convincing efficiency claims.

I believe that efficiency claims should only be accepted when the Commission is in a position to conclude with sufficient confidence that the efficiencies generated by the merger will **enhance the incentive of the merged entity to act pro-competitively** for the benefit of consumers. Therefore, the efficiencies will have to be of direct benefit to consumers, as well as being merger-specific, substantial, timely, and verifiable. The burden of proof should rest on the parties.

3. The timeframe for investigation

The current Merger Regulation ensures that mergers are examined within tight deadlines. We firmly oppose any general erosion of the tight timetable. However, we propose to introduce a degree of flexibility into the timeframe, in particular for complex cases in Phase 2. To that end, we propose that an additional week be accorded to merging parties extending the time during which they may offer commitments in Phase I, and an additional 3 weeks in Phase 2. We propose that, if the merging parties so request, an additional time period of up to 4 weeks could be added to Phase 2 in order to allow for more investigation time in complex cases.

IV. Challenges Ahead for DG Competition

Both the antitrust modernisation and the reformed merger control will allow DG Competition to be more effective in terms of enforcement. With respect to antitrust, I already referred to the fact that cartel enforcement will thus remain one of the top priorities for DG Competition. [When looking at this conference's program for tomorrow, I identified myself at least one workshop that may therefore remain highly relevant in competition lawyers' practice. (PM: *On Friday, there is a workshop on 'Preparing and Responding to a Dawn Raid'*)]

As I mentioned before, the antitrust modernisation will allow DG Competition to dedicate its resources to the investigation of serious antitrust violations. Undoubtedly, this will involve DG Competition in **more contentious and complex procedures**, both at the level of the administrative proceedings and at the level of the judicial review of Commission decisions before the Court of First Instance and the Court of Justice. The experience of some recent high-profile merger cases has moreover made clear that there is a greater willingness from the side of the Court to undertake an **in-depth assessment of the Commission's fact finding and economic analysis**. These are important challenges that both the modernised antitrust enforcement and the merger control must remain capable to deal with.

In this perspective, we have introduced measures that should enable DG Competition to deal with complicated cases with the same vigour and robustness as has been expected from it up till now. Allow me to mention some of the most recent instruments.

First, DG Competition has created an **internal system of peer review**. In complex and high-profile cases, a panel composed of experienced officials will scrutinise a case team's conclusions with a "fresh pair of eyes" at key points of the investigation. This will result in a second opinion as to the strengths and weaknesses of a case, independent from the position of the case team, which should increase the legal and economic solidity of the final decision. It is my intention to deploy this panel system throughout the Directorate-General so as to make merger, antitrust and state aid cases benefit from internal scrutiny.

Second, we envisage to create a **pool of para-legals** to assist case-handlers in reviewing facts and documents submitted by parties and Member States. These para-legals could concentrate in particular on basic research and administrative tasks, such as preparing for access of the file, allowing case-handlers to focus on the substance of the case.

In the merger field, the best practice guidelines have spelled out **additional measures to strengthen the existing due process guarantees**, such as the so-called "State-of-Play" meetings between the Commission and the merging parties at decisive points in the procedure, the enhancement of access to the Commission's file and the opportunity for third parties to confront the merging parties to discuss any conflicting views of the market ("triangular meetings").

Finally, we believe that the increasing complexity and global scale of competition cases justifies the reinforcement of the Competition DG's economic capabilities at all levels of decision-making. Accordingly, we published last week a call for candidates for a **new position of Chief Competition Economist**. In merger control, antitrust and state aid cases, the Chief Economist will offer an independent economic viewpoint for policy development and provide guidance in individual cases throughout the investigation process. In cases requiring sophisticated quantitative analysis, a member of his or her staff of economists may be seconded to work in the case team. As announced on DG Competition's website, the post will be assigned for a three year, non-renewable period. We also intend to accelerate the Competition D-G's recruitment of industrial economists and that greater use be made of outside economic expertise.

V. Concluding remarks

I have tried to explain that DG Competition will face important challenges in the coming years, as the very grounds for the enforcement of antitrust and merger control rules are in full transformation. These transformations will force all staff within DG Competition to adapt to new working methods while keeping up the high standards of performance that the business community rightly expects from us.

The one parameter that will remain constant is our overall objective to ensure that competition is not distorted in the internal market. And I would even go further and recall that competition in itself is not our goal: we value competition as it contributes to the competitiveness of the European economy and to the welfare of consumers. I could have saved you this entire speech, as consumer welfare ultimately remains the focus of DG Competition in all the years to come.