

***“Antitrust law enforcement –
a shared trans-Atlantic vision”***

**Bi-Annual Conference
of the Council
for the United States and Italy**

**New York
25 January 2002**

**Alexander Schaub,
Director-General for Competition,
European Commission**

“

Ladies and Gentlemen,

It is a great honour for me to address this distinguished transatlantic audience. As a non-Italian who has the particular pleasure of working for a highly distinguished Italian, and who is today a key player in the area of this debate, I would like to convey to you the greetings and the warmest wishes of success for your conference, from Mario Monti, the European Commissioner for Competition. Glancing at the programme and the list of attendance for this conference, and having listened last night to our opening speaker Rudi Giuliani, I could not avoid being struck - and particularly as a non-Italian - by the debt which this great city owes to its Italian heritage. It is also a great pleasure to share a panel with my eminent friends, US Deputy Assistant Attorney-General Bill Kolasky and Professor Eleanor Fox.

Introduction - a common vision

The horrific events of September 11th have served as a cruel reminder to all of us how much we, in Europe and in America, share in common. And at a time like this, when we are so poignantly reminded of the value of our democratic freedoms, I think it is timely to recall the importance of the economic freedoms that are at the root of the remarkable prosperity which we enjoy on both sides of the Atlantic at the dawn of this new century. The freedom of firms to compete in open markets, with all the resulting benefits for our consumers in terms of variety and price of goods and services, is an easy thing to take for granted. And yet the vigour, indeed the survival, of that freedom depends upon a complex system of laws and institutions, not least of which are the antitrust, the competition rules, as well as the enforcement authorities and courts which ensure their application.

In America, legislators recognised already in the late 19th century that economic freedom requires a degree of protection from the dangers of excessive industrial concentration and anti-competitive commercial conduct. In Europe, while we have come to recognise the importance of competition rules somewhat more recently, the rationale underpinning those rules is the very same: a recognition of the need to preserve competitive markets.

The purpose of my intervention this morning is a simple one: it is to communicate my conviction that we do share a common fundamental vision of the role and limitations of antitrust - and to demonstrate that this common vision translates into enforcement policies which are, in most respects, remarkably convergent. Our laws may be phrased in quite different language, and our enforcement procedures may contrast in many respects. Yet the underlying purpose and, more importantly, the concrete results of our enforcement activity are very similar, and increasingly so.

What enables us to see eye to eye in this way? The answer - I believe - is a straightforward one: we are both grappling with the same evolving economic realities and are both exposed to the same developments in economic thinking. Indeed, in a practical sense, one of the keys to our convergence has been the fact that the EU and US agencies have, in spite of the different legal instruments at our disposal, been using the same micro-economic analytical tools, and increasingly so in recent years. The far-reaching policy shift which occurred in US antitrust enforcement during the 1980s - namely, the shift towards a focus on the economic welfare of consumers - has been mirrored in Europe during the 1990's. Mario Monti, since the beginning of his mandate as Competition Commissioner, has pursued with determination a competition policy based on sound economics, following in the footsteps of his predecessor,

Karel Van Miert, who had started to launch important reforms to that end.

I would moreover like to correct the impression that European and American conceptions of competition concerns are fundamentally at odds, an impression which some may have acquired in the aftermath of the European Commission's decision to block the GE/Honeywell merger last summer - and following the US DoJ's decision not to challenge it. As I will explain, this divergence was a rare exception to the rule. Indeed it was the first and the only such accident in more than a decade of transatlantic merger control, with hundreds of the very same transactions being examined on both sides, and - ironically – it occurred at a time when antitrust policy and enforcement cooperation on the two sides of the Atlantic had never been closer.

The fight against cartels - top priority for both the EU and US

Let me illustrate our trans-Atlantic common vision by first turning to what both the US Department of Justice and the European Commission regard as their highest enforcement priority: the battle against cartels. Over the past few years, we have witnessed a remarkable acceleration in the uncovering and prosecution of price-fixing, market-sharing and bid-rigging cartel behaviour on both sides of the Atlantic. Indeed, many of these cartels were geographically so far-reaching that they affected consumers in both of our jurisdictions.

The respective legal and enforcement regimes which we resort to in tackling cartels today are quite different: in the US, cartels are prosecuted as criminal conspiracies, and can result in imprisonment as well as the imposition of fines; under EU law, cartels are not criminalised and only fines - albeit high ones - can be imposed. Yet, we have seen substantial convergence in our approaches - and with

similarly successful results. The latter half of the 1990s was truly a "golden age" for cartel busting in America: unprecedentedly large fines were imposed on offending companies. The pattern has been similar in Europe. Indeed, last year saw the Commission imposing record fines for cartel behaviour.

To what can this success be attributed? The answer is the same in Europe as in America: to a policy of leniency, or immunity from prosecution, towards companies willing to cooperate with the enforcement authorities. The US radically revised its amnesty policy in 1993, enhancing the incentives for participating firms to "spill the beans" on their co-conspirators. The EU Commission likewise recognised the effectiveness of leniency programmes of this kind, and in 1996 we followed suit with a policy which has proved its worth. Six years later, we are now proposing to modify our leniency policy, recognising that there is still scope for giving even greater incentives to companies to help uncover this kind of collusion. We have reached the conclusion that an increase in the transparency and certainty of the conditions on which any reduction in fines could be granted is desirable. Indeed, the contemplated changes are likely to render the policy closer still to the US Corporate Leniency Program.

New approaches to agreements on distribution and cooperation between competitors

Let me turn now to antitrust policy more generally, another area of increasing convergence in our respective approaches. Over the past two years, new legal frameworks have been put in place for the application of our competition rules both to distribution agreements and to co-operation agreements between competitors. These reforms constitute a radical overhaul of EU competition policy in these areas and are driven, on the one hand, by a desire to simplify what

were often cumbersome and complicated provisions and, on the other, to bring the legislation into line with current economic thinking.

We now use market share thresholds to make a first distinction between agreements that do not raise competition concerns and agreements that require closer scrutiny. With these thresholds, "safe harbours" are created for companies with little or no market power. The relatively high market share threshold of 30% for vertical (principally distribution) agreements acknowledges that they are generally less harmful than horizontal cooperation agreements, for which the thresholds range from between 15% to 20%, depending on the type of cooperation. In order to facilitate the assessment of agreements not granted "safe havens", we have adopted guidelines which describe the possible positive and negative effects that various restraints may have. These allow industry to predict, with a high degree of certainty, what our enforcement policy is likely to be with respect to the most important types of vertical and horizontal agreements, including exclusive dealing, selective distribution, R&D, specialisation agreements, and so on.

The substance of these new rules represents a very considerable convergence between US and EC law and practice. Indeed, our horizontal cooperation guidelines are very similar to the recently published FTC/DoJ guidelines on competitor collaboration. Indeed, we in Europe are now applying to most agreements a kind of "rule of reason" whereby positive and negative effects are weighed against each other. This will allow companies to devise world-wide marketing strategies or co-operation agreements, with the reasonable expectation that they will be assessed in the same way in both Europe and the US.

Merger Control - a record of increasing convergence

Let me turn to merger control. The substantive legal tests employed by the respective laws in the EU and US are phrased in quite different language. In Europe, where the law governing merger control was drafted only a decade ago, mergers can be declared unlawful where they risk to "create or strengthen a dominant position". In the US, in the words of a statute dating from 1914, mergers can be enjoined if they risk to result in "a substantial lessening of competition" or "tend to create a monopoly".

It doesn't require any great legal or economic insight to see that these are standards which could, in the hands of creative interpreters, result in widely differing outcomes. This has not happened, however, because the economic rationale underpinning merger control by enforcement authorities and courts is very similar in our two jurisdictions. The more-than-10-year-old body of precedent built up by the European Commission and the European courts regarding the interpretation of the dominance test has shown a remarkable coincidence of analysis with the (considerably longer) wealth of interpretative precedent that has been built up here in the US with regard to the Clayton Act. A European practitioner who picks up the US Merger Guidelines, or who delves into one of the US federal courts' recent merger judgements, will - I think - be struck by the extent to which these seemingly different tests are used in such similar ways.

Still, in view of the increasingly international scope of mergers, it cannot be denied that an alignment of the wording of the test used by the main competition authorities world-wide might have some attractions. That is one of the reasons why our "Green Paper" on the review of our merger legislation, adopted by the Commission last month, explicitly calls for a public debate on the merits of our dominance test, and in particular on how its effectiveness

compares with the "substantial lessening of competition" standard used in some other jurisdictions.

The "Green paper" covers many other issues, including possible changes to the criteria for allocating jurisdiction to the European Commission, and some possible amendments to our current merger procedures. Our aim is to launch a wide debate with business and all other interested parties. The Commission is approaching this exercise with a very open mind and will be ready to consider any proposal that might enhance the effectiveness of merger control in Europe.

Coming back to the review of our present practice in the EU and US, let's look at the most straightforward category of cases: "horizontal" mergers. In both of our jurisdictions, we embark on an analytical path which is markedly similar in most respects. When investigating horizontal mergers in the EU, we examine whether the merger would be likely to result in a horizontal concentration which would create or strengthen a dominant position, as a result of which effective competition would be significantly impeded. This essentially requires an examination of the same factors as are examined in the US: the overall level of concentration in the market/s, the particular characteristics of the market (for example, is it a market enjoying rapid growth, significant technical innovation?; is it characterised by strong incumbent brands?; and so forth..), and the potential for effective market entry post-merger.

But EU-US convergence is not confined to these straightforward types of merger problems. We also see eye to eye in relation to the assessment of mergers where competitive concerns arise from what we term collective or oligopolistic dominance, that is to say mergers where you have fears that they might engender the possibility of what you term "coordinated interaction". In the US, you look at

whether a merger is likely to diminish competition by enabling the firms in a given market to engage, more successfully or more completely, in coordinated behaviour that harms consumers. Such coordinated interaction consists (in the words of your Merger Guidelines) in "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful in itself".

Our attitude toward collective dominance has been developing since the introduction of merger control in 1990, but the words which I have just quoted from your guidelines could not better summarise our current approach. As in the US, we examine whether it is likely that terms of coordination could be reached by the oligopolists, which would - on the one hand - be profitable to them, and - on the other - would enable the detection and punishment of any behaviour deviating from the coordination. This necessitates an examination whether post-merger market conditions are likely to be conducive to coordination of this kind. Among other things, we look at such market-specific factors as the extent of product homogeneity, the degree of market-share "symmetry" between the oligopolists, the types of transactions usually concluded in the industry, the extent of structural links between the oligopolists, market transparency in terms of pricing and other marketing parameters, and so on. All of these are elements which, I think, are likewise considered by the US agencies in assessing the possibility of coordinated post-merger interaction between firms.

In both of our jurisdictions, vertical mergers can likewise give rise to competition concerns, for essentially the same reasons. The vertical integration that results from a vertical merger may erect or aggravate barriers to entry in a market, thereby contributing to a foreclosure of competitors from

that market. For example, a vertical merger can harm competition by making it difficult for competitors to gain access to an important component product or to a channel of distribution (the merger may create a so-called 'bottleneck'). The approach adopted by our respective authorities to such potential problems is also very similar.

Managing occasional divergence - EU/US cooperation

But, in spite of this comprehensive record of convergence, differences of opinion can occasionally result in divergent outcomes. Much has been made in recent months of the divergent approach being taken by the Commission and the US antitrust agencies towards conglomerate mergers, in the light of the Commission's decision to block the GE/Honeywell deal. I am not convinced that the gap between us is as wide as some would have it. But this is not the occasion to enter into a detailed discussion of the merits of the approach we took in the GE case. Suffice it to say that economics is not a pure science, and merger control necessarily involves a prospective analysis of inherently uncertain future effects. In complex cases, this may involve a difficult "judgment call" - as US FTC Chairman Tim Muris recently put it, "reasonable minds may reach different conclusions on the application of the same law to the same body of evidence". What is indeed remarkable is that divergences have been so extremely rare, even when *different* laws are applied to the same body of evidence.

Perfect convergence will never be achieved - a degree of divergence is unavoidable in a multi-polar world composed of sovereign jurisdictions, each with its own laws, enforcement authorities and courts. Even here in the US, there seems to be from time to time disagreement between federal and state antitrust enforcers, and even between federal courts, about the correct interpretation of federal antitrust statutes! That is why cooperation and dialogue are

so important. Indeed, EU/US cooperation in antitrust law enforcement has been a remarkable success story: over the past decade, we have concluded two competition cooperation agreements, and staff level contacts have become a daily reality. The important, practical role played by such cooperation should not be underestimated - in my view, it has substantially reduced the incidence of divergent or incoherent rulings on the two sides of the Atlantic. And this has been particularly remarkable in merger cases, where staff level contacts are most frequent and intensive. Cooperation in merger cases has been increasingly intensive in recent years, with a growing number of operations requiring scrutiny simultaneously on both sides of the Atlantic, and it is gratifying to see that we almost invariably agree with our US counterparts in the assessment of these cases.

But we should not be complacent. When divergences do occur, we must learn to manage them and avoid that they escalate into high-profile transatlantic political disputes. That is why we have agreed to refocus the work of our existing transatlantic Working Group in order to identify areas where more convergence might be possible, and to see if we can narrow the ground that still divides us. Dialogue and cooperation between the Commission and the US antitrust authorities has already made a substantial contribution to the trend toward convergence, and I am confident that - by looking at cases where we may have adopted somewhat different approaches - we will reduce the risk of unnecessary disagreements in the future. I am confident that EU/US cooperation is now sufficiently robust to survive any perceived threats to its continued effectiveness: both the EU and US authorities, realise that it is in our mutual interest - and ultimately in the interest of the world economy's prosperity - that we do so.

ICN - managing the worldwide proliferation of antitrust

Before concluding my remarks, let me cast the net a bit beyond the transatlantic area. The greatest long-term challenge in terms of convergence will be the task of "managing" the worldwide proliferation of antitrust regimes. Many of these regimes are very new, and we - both the EU and US - need to be advocating that competition policy should be used to foster competition, and not as a protectionist instrument, as an instrument of old-fashioned industrial policy, as an instrument of social policy, or whatever. This is crucial to the proper functioning of these countries' economies. But it is also crucial to the health of the global economy, to facilitating trade, ensuring that conditions for business can be optimised: sound antitrust policies should not only mean open markets, but should also mean legal certainty, consistency, predictability, and an absence of regulatory arbitrariness.

That is why we are proud of our joint efforts towards the building of an International Competition Network. As some of you may know already, this consensus-based initiative has only recently come off the drawing board, and was formally "launched" in October last here in New York. Its purpose is to serve as a forum in which antitrust agencies, from developed and developing countries alike, can discuss the whole range of practical competition enforcement and policy issues.

Initially, the International Competition Network is focusing on merger control processes worldwide, particularly as they apply to multinational mergers, and on the competition advocacy role of antitrust agencies. It will encourage the dissemination of antitrust expertise and best practices, as well as facilitating further international cooperation. The Network already has some 40 member authorities, real work has got off the ground, and the first annual conference will

be held in Naples in September. Nor will the Network's deliberations be confined to governmental bodies - it is envisaged that other interested parties, from industry and consumer groups to academia and the legal community, will be closely involved in its work. I am convinced that the ICN will facilitate ever-greater worldwide convergence of competition policy and enforcement practice. As such, it will serve as a valuable building block in a future system of “international governance” which – I believe - is the most effective way in which we can meet the challenge of globalisation.

Thank you very much