

Speech at the ICC Commission on Competition

Philip Lowe

New York - 22/10/2003

Convention on the Future of Europe

- I would like to begin with a few remarks on a subject that is less common for us practitioners of competition law and policy, but that will profoundly shape the political and legal environment into which our competition policy is embedded:
- In July of this year, the Convention on the Future of the European Union completed its work and presented a Draft Treaty establishing a Constitution for Europe. The draft Constitution prepared by the Convention has since been presented to the forum that traditionally prepares Treaty amendments in the European Union, the Intergovernmental Conference (IGC). The IGC started its work in October. Despite its great task, it is expected to conclude more rapidly than previous IGCs as it will be able to take over to a large extent the solutions prepared by the Convention.
- So what are the outcomes as far as competition policy specifically is concerned?
- *First*, the draft Constitution maintains the competition chapter essentially unchanged. There are no modifications to the substance of the EU competition rules. Moreover, the Commission's control function as 'guardian of the Treaty' in the competition field has been confirmed.
- *Secondly*, the competition rules including state aid control retain their appropriate place and weight in the text. The draft Constitution groups the competition chapter among the subjects relating to the internal market, in close neighbourhood of the four freedoms. This seems appropriate and an improvement to me. The creation of the internal market and the commitment for a competition policy as a common policy have always gone hand in hand.
- *Thirdly and very importantly*, the objective of free competition is included among the objectives of the Union. In this respect, the Convention has improved the fundamental text of the European Union. Article 3 paragraph 2 of the draft Constitution reads:
The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.
- This is an unequivocal restatement of the commitment to free and undistorted competition as an objective of the Union for its single market. It will help the Court of Justice's interpretation of the Constitution in the future.

- The importance of competition policy as a common policy in the European Union is also reflected in the inclusion of competition among the exclusive competences of the Union. This is without prejudice to more decentralised *enforcement* of the rules as we envisage it for the new enforcement system from 1 May 2004 onwards.
- To conclude on this topic, I think that the Convention supported the fundamental importance of protecting free and undistorted competition in the internal market and produced a satisfactory text that should be maintained by the IGC.

Co-operation between EU and US competition authorities

- Our recent co-operation with the US authorities has been as constructive and intensive as ever, although the number of transatlantic high-profile cases is arguably a bit less now than it was maybe a few years ago.
- On individual merger cases, we had a good co-operation with the US agencies in the analysis of *Bayer's* acquisition of *Aventis Crop Science*. This co-operation covered in particular the question of which remedies proposed by the merging parties would address agencies' concerns in a multiplicity of markets. Also in 2002, we had good discussions across the Atlantic on the cruise line-merger (*Princess/Carnival*). More recently, another example of good co-operation has allowed the Commission to approve, and the FTC not to challenge, the acquisition by *General Electric* of Finnish hospital equipment manufacturer *Instrumentarium* (*2 press releases in annex*).
- On general anti-trust co-operation, you may be interested to hear that this spring, we carried out for the first time unannounced cartel inspections simultaneously in three continents, involving colleagues from the EU, the US, Canada, as well as Japan (with whom, incidentally, we have just concluded a bilateral co-operation agreement). These investigations took place in the market for *heat stabilisers*.
- Finally, moving away from case-specific issues, last year we were able to jointly issue a set of bilateral best practices on co-operation in reviewing mergers that require approval on both sides of the Atlantic, with a view of minimising the risk of divergent outcomes.
- These best practices put in place a more structured basis for co-operation on merger cases. In particular, the best practices recognise that co-operation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting at an early stage with the agencies to discuss timing issues. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation.

WTO

- As you know, the WTO has also been discussing the possibility of international rules on competition, ever since the Doha Development Round in November 2001.

- However, you are well aware of the outcome of the recent Ministerial conference in Cancún. At this stage, I cannot but say a few words about the future of competition in the WTO. This question has now become just one aspect - and in the global scheme of things, not necessarily the most important one - of the wider question of the future of the Doha Round following the failure of Cancún.
- The EU has always been a proponent of the idea of a multilateral agreement on competition in the WTO. However, given the reactions received at Cancún from a number of WTO members (including, it must be said, not just developing countries but also certain developed ones, including the USA), we have to consider within the EU how best to take this forward. No decisions have been taken on that point, and it is probably best to let the dust settle for a while before taking them.

International Competition Network (ICN)

- But luckily, our wisdom on international competition policy does not end with the collapse of the Cancun talks. As you know, the competition authorities themselves – under the joint leadership of the European Commission and our colleagues in the US agencies - have been pushing hard over the last two years to make progress at the level of another, and the more informal venue, namely the International Competition Network, or ICN.
- The vast majority of the relevant competition authorities of the world have already joined the ICN [*membership is now at 80 agencies from 71 jurisdictions*]. The underlying theme that brings all these authorities together is that we recognise that merely national or regional answers to increasingly global competition problems can sometimes be insufficient. Otherwise, we would fail to deliver on our mandate to protect consumers on the basis of open, competitive and efficient markets. It is only through convergence and international co-operation among agencies that we can provide the sort of governance that is rightly expected of us.
- It is true that the ICN – in contrast to the WTO which usually aspires to draw up *binding* rules – is an informal venue and as such lacks any formal legislative power. However, both Commissioner Monti and myself are convinced that over time, the persuasive force of the recommendations put forward by ICN members will gradually convince national competition regimes to align themselves with these standards. And we should not underestimate the fact that it has precisely been this flexibility that has allowed the ICN to make such sweeping progress.
- In fact, the European Commission has been one of the first to advocate, at the end of last year, changes to its merger regime [*concretely: allowing more flexibility as to when to notify*] with a view to achieving full compliance with the ICN recommendations in this field. More and more agencies are now coming forward by announcing their intentions to do likewise. For example, just last week the Brazilian competition authority CADE (***See annex!***) announced their intention to align their legislation next year.
- What is then major achievement of the ICN to date? I would clearly highlight the progressive elaboration of Guiding Principles and Recommended Practices for the review of multi-jurisdictional mergers as an outstanding result. (*ICN's first*

conference in Naples agreed on 3 initial sets of practices covering: (i) nexus between the transaction and the reviewing jurisdiction; (ii) clear and objective notification thresholds; and (iii) timing of merger notifications.

This was then followed up by an additional 4 Recommended Practices that were adopted at the Mérida Conference in June of 2003: (i) Review Periods (i.e the duration of investigations); (ii) Requirements for Initial Notification (i.e what information notifying parties are required to provide to agencies "up front"); (iii) Transparency (i.e how an agency communicates the reasons for its enforcement action/non-action); and (iv) Review of Merger Control Provisions (i.e. periodic review of merger control legislation, procedures etc.)

- All in all, I think what we are witnessing here is the gradual building up a detailed and comprehensive body of – albeit non-binding – standards of international competition policy. Once implemented by a critical number of agencies, this should, in my view, enhance the transparency and the predictability for businesses when engaging in major international transactions, and help to reduce the risk and regulatory burden associated with such transactions.
- But any governance mechanism can only be as strong as its weakest link. Therefore, we are currently reflecting how we can help the young competition agencies in developing and transition economies in their capacity building process.
- I think that it is in the well-understood interest of businesses in Europe and the US that they are not unnecessarily hindered in their activities by far-flung competition regimes which on occasion may be plagued by insufficiency such as lack of resources, lack of know-how, or otherwise.
- By the same token, however, it is also important to me that the development progress – and ultimately the stability - that these countries will achieve in the future depends to a significant extent on their ability to create and protect effective markets. I think that the national competition authorities deserve our support when taking cartels to task, or when advocating pro-competitive policies when national governments plan to privatise or deregulate. The European Commission is currently co-chairing this ICN project, together with our Mexican colleagues.