

# **Developments in EC competition policy**

## **Richard Butler's Annual Competition Forum**

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It is my pleasure to address you today on the development of competition policy in the European Union. In my presentation I will of course start with our recent reform in the field of antitrust. This reform is a milestone in competition enforcement in the Community. I will then say a few words about the ongoing reform in the field of merger control and I will round up my intervention with some remarks on international initiatives in the field of competition.

### On Modernisation

This has been a very exiting week. A few days ago, the Council reached a political agreement on the modernisation of our antitrust procedures. This brings an end to the first phase of the « Modernisation » project which started more than three years ago with the publication of a White Paper.

The new system will greatly enhance effective enforcement in several ways:

- It will allow the Commission to focus its enforcement activities on the most serious infringements like cartels instead of working down a pile of notifications;
- it will reduce the bureaucracy for business which does no longer have to notify agreements to the Commission;
- it will allow the National Competition Authorities like, the Office of Fair Trading, to participate in the application of EU competition law because the Commission has no longer a monopoly over the exemption rule
- it will allow national courts to fully adjudicate a competition matter where up till now they were blocked in their action by the exemption monopoly of the Commission.

The reform will fundamentally simplify the way in which the Treaty's antitrust rules are enforced throughout the European Union. Most importantly, the new Regulation abolishes the practice of notifying business agreements to the Commission, therefore ending bureaucracy and legal costs for companies. Its adoption before the historic enlargement of the Union will strengthen vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and national authorities. It considerably reduces bureaucracy as it removes the notification and exemption system established by Regulation No. 17 more than forty years ago. In future, agreements that fulfil the conditions for an exception will be legal without the need to apply for an administrative decision from the Commission.

At the same time, the reform will create a level playing field for companies as regards agreements which affect trade between Member States because national competition authorities and national courts will be obliged to apply EU competition law to all such cases.

This will be a formidable factor of integration for the internal market and will give much more weight to the EU antitrust rules.

Of course, the adoption of this Regulation does not signal the end of the reform process. It is on the contrary the beginning of an important change of culture for all in Europe.

This change of culture for all competition authorities which will be twofold:

- Firstly, all the competition authorities will have to focus more on the detection and the prohibition of serious violations of competition rules. We will abandon the notification and exemption culture and concentrate our activity on the core task of a competition authority which is to detect and punish in particular cartels which cause considerable harm to consumers.
- Secondly, all competition authorities will have to move towards a culture of co-operation. Authorities will have to assist each other in order to achieve a common goal, a better protection of competition in the market. They will not only focus on their own priorities but also contribute to the protection of competition throughout the Community.

We have already created a network of all competition authorities called ECN (**European Competition Network**). We are working very closely with all national competition authorities, including the authorities of the candidate countries, to set up the modalities of the co-operation, such as a common intranet or practicalities of common investigations. This close co-operation in designing the future functioning of the system is the best guarantee of the success of the network.

The reform will also bring about a change of culture for companies and their lawyers. In the new system, they will on the one hand have more security to enforce their agreements before national courts and less administrative burden. They will on the other hand have to carry out more self assessment of their agreements and practices and will no longer be able to ask systematically the competition authorities to assess ex ante the legality of their transactions. More security but also more responsibility will be the consequence of the new system for companies.

The new Regulation will apply as from 1<sup>st</sup> of May 2004. This will allow Member States to adapt smoothly to the new system. It will also give sufficient time to the Commission for adopting the necessary flanking measures, such as a new implementing Commission Regulation as well as a number of notices explaining or clarifying how certain concepts must be understood with a view to provide general guidance and legal certainty.

### On Merger Control

Let me now turn to an area which has received a lot of public attention recently. As you know, the Commission's merger control policy has been the subject of considerable press comment in recent weeks, in the wake of the Court of First Instance's recent annulment of two prohibition decisions in the cases Schneider/Legrand and Tetra Laval/Sidel, in addition to the judgement in Airtours/First Choice in June.

A full discussion of the consequences of these developments for the work of the Commission would require more time than is available today. Allow me nevertheless to make a few remarks.

It cannot be denied that this is a challenging time for the Commission's merger control policy. We are carefully studying the judgements, both with a view to deciding whether or not to

lodge an appeal or appeals to the Court of Justice, and, equally importantly, and with a view to drawing the necessary conclusions for the future.

But these undoubted setbacks must not be allowed to distort our view of the Community's merger control policy. Indeed, let me reassure you that, if the Commission reaches the conclusion that a merger is likely to give rise to serious competition concerns, it has a duty to intervene and will continue to do so.

That is not to say that our system of merger control would not benefit from some improvement. Like all systems, it needs to be constantly modernised so as ensure it is adapted to evolving realities. As you know, we started a wide-ranging process of reform of the merger control process long before these recent judgements. And, where appropriate, we should transform the lessons from these judgements into an opportunity for still further reform.

Let me give you a short overview of some of the most important elements of that reform. One aspect of the reform that I think deserves particular mention is the new transparency and clarity that we intend to give to the analytical framework employed by the Commission in its assessment of proposed merger transactions. To that end, we are preparing draft guidelines on the assessment of "horizontal" mergers. This will consist in a clear set of guidelines on the interpretation and practical application of the substantive standard in such merger cases, thereby providing more legal certainty and better guidance for all concerned. The draft guidelines would then be published for wider publication, before being adopted definitively by the Commission. As soon as possible thereafter we will prepare further guidance on the assessment of dominance in "vertical" and "conglomerate" mergers, probably during the course of next year.

Another element of the contemplated reform concerns the time-frame for merger investigations. A major advantage of the European system of merger control is its tight time frame. And yet this advantage does carry with it a number of inconveniences which I would characterise as a sometimes high degree of "nervosité" between the parties and the Commission in the closing stages of the procedure. So, while we intend not to renounce the advantage of strict time limitation, we will propose the introduction of a degree of flexibility, with a number of stop-the-clock provisions.

Other improvements of the decision-making process that I will propose include:

- The formalisation and extension of an existing peer review system in all Phase II cases, providing for critical analysis of the case-team's preliminary views by a "second pair of eyes";
- increasing transparency by allowing an earlier access to the Commission's file, as well as by earlier confrontation of opposing views as to the likely impact of a merger.
- enhancing DG Competition's staffing both to deal more properly with the very high evidentiary requirements set by the Court, and to strengthen its capabilities of economic analysis.

Allow me a word or two also on judicial review in merger cases. The recent judgements have demonstrated beyond any doubt that the European Courts provide meticulous and stringent review of the substance of the Commission's analysis in merger cases. However, judicial review should not only be effective in terms of substance - it must also be timely. There is clearly still some scope for improvement in the speed with which judgements are delivered. The new fast-track procedure represents an important step forward, demonstrating that

judicial review can be delivered with relative speed. It would be desirable, however, to further shorten the time it takes for merger appeals to be dealt with. I am ready to advocate strongly for the additional resources that would no doubt be required by the Court for such further improvements.

In contemplating any reform of a successful system, it is, however, important not to lose sight of the many merits inherent in our administrative system. Indeed, few respondents to the Commission's Green Paper advocated an abandonment or a radical overhaul of the current system. If forced to choose between our administrative system and a US prosecutorial-style one, many companies (and that includes many US companies!) have indicated a preference for the EU system. And, I should add, administrative merger control systems like ours are by no means unique to the Commission. Indeed, this is the model employed in most of the EU's Member States. It reflects to a large extent the specific legal traditions on this side of the Atlantic.

### **The international dimension**

Efficient competition policy is not possible without cooperation between competition authorities. It is my firm belief that we all have much to gain from increasing cooperation amongst us.

It is no secret that we attach great importance to **bilateral co-operation** with our main partners, particularly with the US and Canadian authorities. In this respect, cooperation has become an almost daily practice. Of course, this cooperation concerns not only cases but also policy. Day-to-day cooperation undoubtedly brings with it a gradual "soft" convergence, if not in the text of the rules, at least in analysis and the way the rules are implemented. This is an organic process, and it is a trend which I very much welcome and encourage.

I can announce that in addition to the bilateral cooperation agreements we have already with the United States and with Canada we have concluded negotiations on a bilateral agreement with Japan, which is now before the Council and has already received the approval by the European Parliament.

I will not use this presentation to praise at length the necessity of cooperation and to discuss the various instruments of cooperation. I will however mention two issues of substance which enjoy priority, not only in our relations with the United States but also in the multilateral arena: This is the fight against international hard core cartels and the treatment of multijurisdictional mergers.

In this respect, I would like to highlight the intensifying nature of the co-operation with our American counterparts. Over the past few years we have witnessed a remarkable acceleration in the uncovering and sanctioning of price-fixing, market sharing and bidrigging cartels on both sides of the Atlantic. I note that co-operation is working well, and there is a large degree of mutual recognition and respect for each other's work.

Moreover, we have increased our co-operation in investigating individual cases. We have already co-ordinated our dawn raids and the actions taken by the US authorities, in order to avoid that action by one authority jeopardise the other's investigation.

Cooperation with the US authorities 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. However, cooperation does not stop at case related issues. The transatlantic EU/US merger working group studies several areas where more convergence might be possible. The group consists of several sub groups, one is dealing with procedural issues and the others with issues of substance. The group on conglomerate issues has already started

work, other groups will focus on efficiencies and collective dominance. We are achieving concrete and effective results.

I am very pleased that we have already achieved a first concrete work product: The Commission and the antitrust authorities of the United States have agreed on "Best Practices" on cooperation in merger investigations. In these guidelines we set forth practices to be followed by our respective agencies when they review the same transaction. These include coordination of time tables if possible, collection and evaluation of evidence, and communication between the reviewing authorities.

They introduce a certain discipline into what is already a successful cooperative relationship. In particular, they should ensure that we are always apprised of the stage our respective investigations have reached, and - more importantly - how we are both thinking in terms of substantive competition analysis at any given point. This should serve to avoid misunderstandings, or surprises in cases that we are both dealing with. It should be noted that we are able to achieve this in the existing procedural framework. In merger cases the parties usually grant waivers to permit the exchange of information between the enforcement agencies as they recognise the importance to share the available information and evidence - the merging parties want clearance and they need it in both jurisdictions.

I am very content with the very useful work that has been done. Not only have we reached agreement on a comprehensive set of best practices for cooperation in merger cases but, in the process, we have - I think - both learned more about our respective systems. That is a valuable achievement, which will have a positive impact well beyond the working group: it helps us to better understand the context in which we both are operating.

We are also convinced of the need to co-operate in a **multilateral framework** and to promote a "competition culture" amongst emerging antitrust authorities. Over 90 member countries of the WTO have, or are in the process of establishing, antitrust authorities.

The Commission has been at the forefront of efforts to persuade others to include competition policy in the Doha Development Agenda for the new phase of WTO negotiations. This result has been achieved. From now till the 5<sup>th</sup> WTO Ministerial in Cancun in 2003 we will try to make sure that we can soon proceed with the formal negotiation of the envisaged agreement. In our view, the agreement should map out core principles forming the backbone of converging competition laws: the commitment to ban hard core cartels, the principles of transparency and non-discrimination, the enhancement of voluntary co-operation and of technical assistance and capacity building aid for developing countries.

I will finish my remarks with some comments on the International Competition Network. As you know, the European Commission has been one of the driving forces behind this initiative, together with our colleagues in the US.

I am still marvelled at the long way the ICN has already gone since its inception last year in New York. Within less than a year, the ICN has already attracted more than 70 anti-trust agencies from five continents. Amongst the ICN members, we find many younger anti-trust authorities, especially from emerging and transition economies.

As you will know, the leaders of most of these agencies have gathered in September for the first ICN Annual Conference in Naples, upon invitation by the Italian anti-trust authority. I could rarely image a clearer signal from the side of the authorities involved that they are prepared to enter into a direct international dialogue.

It is one of ICN's hallmarks that it is strictly project-orientated, and in Naples we have been discussing the first concrete results. Since its inception the ICN has focussed on two main

areas, multi-jurisdictional merger control and the role of competition advocacy. In Naples a number of “Guiding Principles for Merger Notification and Review” have now been endorsed. This document encourages competition authorities to respect such underlying principles such as sovereignty, transparency, non-discrimination on the basis of nationality as well as procedural fairness in their merger investigations. In addition, the Guiding Principles highlight the need to conduct a merger review in an efficient, timely and effective manner.

I am also glad to announce that the Commission will be co-chairing, in collaboration with our South African counterparts, a new Working Group that will discuss issues related to capacity building. This Working Group is intended to specifically address the needs of younger competition authorities from developing and transition economies. These authorities often operate under particular conditions, and the ICN will be an ideal forum to share the experiences of the more mature competition agencies. However, at the same time, I would like to point out that also the well-established competition authorities stand to benefit from the experiences of the younger authorities. I am thus convinced that this is an equally challenging and fascinating task. We expect to report the first results of this Working Group already to the Second ICN Annual Conference that will take place in Mexico in June 2003.