

Speech for the annual conference of the Spanish Antitrust Court

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Recent reforms and future projects for the enforcement of the EU anti-trust system

Ladies and gentlemen,

I am very pleased and honoured to be here this morning and to speak about recent and future reforms for the enforcement of EC antitrust rules. As you know, recent years have seen a number of major reforms: reform of our policy for vertical, reform of our horizontal agreements and the reform of Regulation 17 (“Modernisation”).

Today, I would like to address the three main on-going reforms:

- the reform of our enforcement system for Articles 81 and 82 (Modernisation);
- the reform of the Technology transfer block exemption regulation (TTBE);
- the merger review.

These three projects are at very different stages of maturation:

- concerning the modernisation of our procedural rules for Articles 81 and 82, we are working on implementing measures and on the setting up of the network of competition authorities;
- the TTBE reform is about to be adopted as a draft by the Commission for consultation of third parties;
- the merger review is being discussed in the Council.

Before I go into some details about these projects, let me stress some common features of these three reforms:

- (1) They aim at giving more guidance to industry as well as to national bodies (courts and authorities). This is clearly the aim of the guidelines on IPR and of most of the documents implementing “modernisation”. It is also the purpose of the notice on “horizontal mergers”;
- (2) They involve more national bodies in the protection of competition. The greater involvement of National competition authorities (hereafter NCAs) and national courts was one of the pillars of Regulation No 1. The role of NCAs is, although differently and to a lesser extent, also important for the merger review;
- (3) They streamline procedures and clarify substantive rules in order to allow the Commission to focus on the most severe restrictions of competition and to act efficiently against them.

Modernisation

Now that Regulation 1/2003 is in place our main focus is the creation of the network which is called ECN – European Competition Network, and the adoption of what we call the modernisation package. This package, which will be in place before 1 May 2004, consists of 6 new notices and a new Commission implementing regulation.

We have already made good progress in setting up the network. We have established an implementation working group which discusses important issues such as consistent application, mutual assistance and allocation of work. All members have a common interest in seizing the opportunity of the reform to ensure a more optimal use of resources that will allow us all to set the right priorities. I am delighted to say that so far the experience has been a very positive one. Everybody contributes with the same goal in mind: to create the best possible enforcement system for the future enlarged Community.

The modernisation package is also making good progress. Indeed, the package is currently in consultation within the Commission and will be published for public comment during the course of September. All interested parties will therefore have plenty of opportunity to scrutinise and comment on all these documents in draft form. However, I would like to use this opportunity to give you a flavour of what is in the pipeline.

The six notices that I mentioned will cover cooperation within the network; cooperation between national courts and the Commission; the Commission's treatment of complaints; the possibility for the Commission to issue opinions in individual cases; the effect on trade concept contained in Articles 81 and 82; and finally the application of Article 81(3) of the Treaty.

The network notice will explain the main pillars of the cooperation between the competition authorities inside the ECN. You will probably be particularly interested in the fact that the notice will develop principles for allocating work between the members of the network. These are not rules for the allocation of competence. All members of the network are competent to apply Articles 81 and 82 to cases affecting trade between Member States. The aim, however, is to ensure that in exercising these parallel competencies cases are handled by normally a single authority that is well placed to do so. These principles will guide both complainants and authorities, ensuring that the vast majority of cases are allocated to a well-placed authority from the very beginning.

The notice on cooperation with the national courts will deal with the right for courts to obtain information and opinions from the Commission and the Commission's exercise of its new power to intervene as *amicus curiae* in cases involving the application of Articles 81 and 82. I am aware that some have expressed the fear that by means of this new instrument the Commission would take sides in the litigation. I can assure you that this is not our intention. As expressly stated in Regulation 1/2003, the aim of the instrument is to promote consistent application of Articles 81 and 82. The Commission's brief will be strictly limited to this purpose. This means that the Commission's intervention will be limited to the aspects of the case that raise an important issue of consistency and that the Commission will not seek any contacts with the parties to the litigation. An *amicus curiae* intervention is a matter between the national court and the Commission, which allows us – in the public interest – to draw the court's attention to important issues relating to the application of Articles 81 and 82.

In the new enforcement system *complaints* constitute a particularly important source of information. We would therefore like to better frame the complaints procedure in a

way that allows us to focus on the complaints that merit priority treatment and ensures that the complainant is informed at an early stage whether or not the Commission intends to pursue a complaint. The achievement of these aims does not require any radical changes to the complaint procedure. Where the Commission rejects a complaint the complainant will remain entitled to a decision that can be challenged before the Community Courts. What we propose is to introduce an obligation to provide certain types of information that should be provided. The aim is to improve the quality of complaints from the outset. The Commission on its part undertakes in the notice to inform the complainant within an indicative time period of four months whether it intends to pursue the complaint.

Let me now turn to the issue of *legal certainty*. When the Commission first made the proposal to abolish the notification system some feared that it would lead to a reduction in legal certainty. We have taken this concern seriously, which is one of the reasons why it has been of paramount importance to us to have the modernisation package ready before the date of application of the new regulation. However, we realise that general guidance may not be capable of solving all problems of unpredictability. The Commission has therefore made a commitment to develop a new instrument whereby it may issue written guidance in individual cases. So far we have used the term opinions to describe this new instrument, which is the topic of one of the new notices. What we have in mind is a system whereby the Commission would be entitled but not obliged to issue opinions in cases that raise unresolved issues concerning the application of Articles 81 and 82. You will understand why it is important that the Commission cannot be obliged to issue opinions upon request. If that were the case it would just be a different name for the current notification system. That being said, we do have an interest in providing guidance where guidance is due and the new notice will explain what are the factors that will be taken into account. I have already mentioned the most important one, namely the existence of an unresolved issue. Where that condition is fulfilled we propose to take account of some additional factors. We thus propose to take account of the economic importance from the point of view of consumers of the products concerned and the importance of the agreement or practice in terms of its prevalence. We also propose to take into account the level of investment made or envisaged by the parties and the extent to which the transaction involves a structural operation. In my view these factors strike a good balance between the public interest in the Commission using its resources to promote the general good and the private interest of the parties in obtaining guidance in their particular case.

The *effect on trade concept*, which is the subject of a further new notice, is of central importance in the new enforcement system given that this concept determines the scope of application of Articles 81 and 82 and of Article 3 of the new Regulation which regulates the relationship between national competition law and Community competition law. The draft notice on the effect on trade concept describes and explains the current case law. We have made clear from the very beginning that there can be no question of reducing the scope of application of Community law. You should therefore not expect any revolutions. What we will do, however, is to propose a *de minimis* rule indicating when trade between Member States is in principle not capable of being appreciably affected. What we have in mind are two cumulative thresholds. One is the 5% market share threshold from the Commission's 1986 *de minimis notice*. The other is a turnover threshold of 40 million Euro calculated on the basis of the products covered by the agreement. In our view product specific turnover

is a better indicator of trade effects than global turnover, which was used in the 1986 notice.

Lastly, there will be a new notice on the application of Article 81(3). Decentralised application of Article 81(3) is one of the main elements of the new system and there is in our view a need for the Commission to explain what is the methodology for applying this exception rule. For instance, it is very important that we explain what are the types of efficiencies that may be created by restrictive agreements and what are the conditions for finding that consumers receive a fair share of these benefits.

Technology transfer

Let me not turn to the reform of the technology transfer block exemption regulation. While the current TTBE is expected to apply until 31 March 2006, Article 12 requires the Commission to carry out regular assessments of the application of this Regulation. To this end, DG Comp prepared an evaluation report (hereafter the 'Report'), which was adopted by the Commission on the 21 December 2001.

Basic findings of the Report

Before adopting its Report, the Commission carried out a preliminary fact-finding that has shown that industry would be favourable to a review of the TTBE and insists on the need to proceed with a simplification and clarification of the current rules.

The Report finds that by using criteria relating more to the form of the agreement than the actual effects on the market, the present TTBE entails four main shortcomings:

- Firstly, the TTBE is too prescriptive and seems to work as a straitjacket, which may discourage efficient transactions and hamper dissemination of new technologies.
- Secondly, the TTBE only covers certain patent and know-how licensing agreements. This narrow scope of application of the TTBE seems increasingly inadequate to deal with the complexity of modern licensing arrangements (e.g. pooling arrangements, software licenses involving copyright).
- Thirdly, a number of restraints are currently presumed illegal or excluded from the block exemption without a good economic justification. This concerns in particular certain restrictions extending beyond the scope of the licensed IPR (e.g. non-compete obligations, tying). In terms of economic analysis, such restraints may be efficiency enhancing or anti-competitive depending on the competitive relationship between the parties, the market structure and the parties' market power.
- Fourthly, by concentrating on the form of the agreement the TTBE extends the benefit of the block exemption to situations which cannot always be presumed to fulfil the conditions of Article 81(3), either because the contracting parties are competitors or because they hold a strong position on the market. For instance, the grant of an exclusive license can have serious foreclosure effects when an exclusive license is granted to a dominant producer which prevents other companies gaining access to technology that might foster their market entry.

The new BER and the guidelines

After examination of the submissions to our Evaluation Report, my services have started to work on a new Block exemption regulation as well as on guidelines. Let me describe the main features of the new regime as we see it:

The new rules will be firmly aligned on the new generation of block exemption regulations and guidelines for distribution agreements and horizontal co-operation agreements. This will have the following advantages:

- 1) The block exemption regulation will only have a back list. By doing away with the white and grey lists of the current regulation, the strait jacket is avoided and the scope of the regulation is extended: whatever is not explicitly excluded from the block exemption will be exempted;

2) The scope of the new rules is also likely to be extended by covering all types of technology transfer agreements for the production of goods or services. The new regulation is proposed to cover not only patent and know-how licensing but also software copyright licensing. Where we do not have the powers to adopt a block exemption regulation, as for patent pools and for copyright licensing in general, the guidelines will give a description of our future policy.

3) The new rules will make a clear distinction between licensing between competitors and licensing between non-competitors. For obvious reasons competition policy should distinguish between licensing between competitors and between non-competitors as the treatment and in particular the applicable hardcore list should differ. Competition problems are more likely to arise in licensing between competitors than in licensing between non-competitors.

Licensing between competitors can in principle be distinguished from licensing between non-competitors by asking the question whether or not the licensor and licensee would be actual or likely potential competitors on the relevant technology and/or product market in the absence of the license. It is this principle that is proposed to be applied in the new rules.

4) The new block exemption regulation should have a clear and short hardcore list similar to the list found in the other block exemption regulations. For licensing between competitors it is hardcore to fix prices, limit sales, share markets or customers and to restrict the other party to the agreement to exploit its own technology or to carry out R&D. For licensing between non-competitors it is hardcore to impose a minimum or fixed price when selling the products to third parties. Licensees should also in principle be free to choose the territory into which or the customers to whom they want to sell. Subject to certain exemptions such as restrictions on active selling.

5) There are a number of restrictions which, while not treated as hardcore, are proposed not to be covered by the block exemption. The most important are: (1) exclusive grant back obligations imposed on a licensee for severable improvements, (2) an obligation on the licensee to assign improvements, and (3) no-challenge clauses. These restrictions are proposed not to be covered because of their potential negative impact on innovation.

6) The safe harbour created by the block exemption is likely to be limited by market share thresholds: probably 20% for licensing between competitors and 30% for licensing between non-competitors. The required market share calculation, both for the technology and product market, is kept straightforward by only having to look at the presence of the licensed technology on the product market. In other words, market shares are always calculated in terms of sales of the licensed products.

7) In the guidelines it could be indicated that above these market share thresholds there is no presumption of illegality. The guidelines will describe the general framework of the analysis, the relationship with the other block exemption regulations, the application of Article 81 to the various types of licensing restraints and will contain a chapter on the treatment of patent pools.

To conclude, we expect these new rules will mean an important improvement compared to the current TTBE, in clarity, in scope and in protecting competition and innovation. The new rules will bring about an important degree of convergence between EU and US policy towards licensing agreements, especially where it concerns licensing agreements between competitors and restraints which affect inter-brand competition, such as tying and non-compete. For good legal, economic and political reasons the new rules will however keep a difference from the US where it

concerns intra-technology restraints in licensing agreements between non-competitors.

Merger review

Let me finally briefly touch upon the merger review exercise. The reform package in the field of mergers consists of three main elements:

- (1) a proposal for a new EC Merger Regulation. This proposal is now being discussed in the Council, with a view to replacing the current EC Merger Regulation;
- (2) a draft Commission Notice containing comprehensive guidelines on the assessment of "horizontal" mergers; and
- (3) a series of non-legislative measures designed to improve quality of decision-making and due process. The latter includes Best Practices for the conduct of merger proceedings and a number of other measures relating to the staffing and internal organisation of the Commission's Directorate-General for Competition.

Let me first say a few words about the content of the reform in terms of substance. As you know, the Commission's Green Paper launched a reflection on the merits of the substantive test enshrined in the Merger Regulation (the dominance test). In particular, it invited comment on how the effectiveness of this test compares with the "substantial lessening of competition" (SLC) test used in several other jurisdictions (and notably in the US). While there may be some differences in approach, the dominance and SLC standards have in my view produced broadly convergent outcomes, especially in the EU and US in recent years. Moreover, it is our view that the dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios which mergers may engender. However, some are of the view that there may be a "gap" in the coverage of the test, notably regarding its applicability to some situations of oligopoly. So, with a view to ensuring a maximum of legal certainty regarding the scope of the current standard, the Commission is proposing that the substantive test should be clarified so as to ensure that the Commission can intervene in relation to all anti-competitive mergers.

The Commission has also adopted a draft Notice on the assessment of mergers between competing firms (so-called "horizontal" mergers). This draft Notice seeks to clearly and comprehensively articulate the substance of the Commission's approach to the appraisal of such operations, thereby providing transparency and predictability regarding the Commission's merger analysis, including how efficiencies should be taken into account.

The analytical framework provided by the draft Notice is also part of our efforts to focus on the relevant economic issues and to improve our economic capabilities. These on-going efforts will be given new impetus when the Chief Economist assumes his functions. The Chief Economist will have the staff necessary to provide both an independent economic viewpoint to decision-makers at all levels, and expert guidance to investigating staff. At the same time we intend to accelerate recruitment of industrial economists, and to have greater resort to outside economic expertise.

Let me briefly now turn to matters of procedure and process.

The Commission is opposed to a general erosion of the tight timetable inherent in the current regime under the Merger Regulation. However, we do consider that it is important to introduce a degree of flexibility with regard to the timeframe for merger investigations, in particular in complex Phase 2 cases. To that end, the Commission is proposing that a number of changes be made to the timing provisions in the

Regulation, allowing more time for the proper consideration of remedy proposals, and for the purpose of ensuring a thorough investigation in complex cases.

A series of further non-legislative measures designed to improve the quality of the Commission's decision-making in merger cases will also be introduced, while at the same time enhancing the opportunity for merging companies' views to be taken into account throughout the investigative process. The Best Practices for the conduct of merger proceedings will, I believe, enhance the transparency of our decision-making process. The document covers the day-to-day handling of merger cases by DG Competition, and the Commission's relationship with the merging parties and interested third parties; it proposes to systematise so called State of Play meetings at key stages of the procedure, to increase transparency and enhance fact-finding by allowing the parties to review documents in the Commission's file earlier and by envisaging triangular meetings between DG Competition, the notifying parties, and third party complainants. Other internal measures designed to improve quality of decision-making include, for example, the appointment, for in-depth merger investigations, of a peer review panel composed of experienced officials, whose task it is to scrutinise the investigating team's conclusions with a "fresh pair of eyes" at key points of the enquiry.

And finally a word about the jurisdictional scope of the ECMR. One of the main objectives of the review is to optimise the allocation of merger cases between the Commission and national competition authorities. The Commission is therefore proposing to simplify and render more flexible the Merger Regulation's provisions concerning referral of cases for investigation from the Commission to Member States and vice versa, including the possibility of referrals being made prior to notification. What we propose is to enhance cooperation between the Commission and the national competition authorities at the pre-notification stage. Notifying parties would make a reasoned request for a pre-notification referral of the case in either direction. The request would have to be acceded to by both the Commission and the national competition authorities concerned. This is where the network that I mentioned initially would come in. The network would allow the Commission and the national competition authorities to communicate swiftly and come to a quick understanding on the issue of referral. It is proposed that, if a minimum number of Member States agree to a case being referred to the Commission, the case should be deemed to fall under exclusive Community jurisdiction. It is also proposed to make it possible for the Commission to invite Member States to make referrals, and for the Commission to invite Member States to request the Commission to refer cases to them; currently the Commission has no such "right of initiative". This more flexible approach to referrals based on networking aims at ensuring that cases are dealt with by the best placed authority. While the details differ there is thus a common underlying philosophy underlying our reform efforts in the merger field and the antitrust field.

Conclusion

Ladies and Gentlemen,

I have now come full circle and it is time for me to conclude. Both the modernisation reform and the merger review will represent new challenges for all interested parties including the Commission. As you will know DG Competition has embarked on a far-reaching programme of internal restructuring. The very purpose is to adapt to these challenges. I am convinced that all the changes will be for the better and that in particular they will enhance the protection of competition in the enlarged Community. I thank you for your attention.