

SPEECH

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Preserving and Promoting Competition : a European Response'

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Ladies and Gentlemen,

It is a great honour and pleasure to address you today. Since its creation in 1994, the St. Gallen International Competition Law Forum has justly earned a reputation as one of the world's leading high-level competition conferences. The judiciary, the national competition authorities, legal counsel and of course DG Competition are again well represented among the speakers and the public, bringing together different perspectives on the competition policy world. I am very much looking forward to today's discussions.

As we all know, competition is not an end in itself, but an instrument for achieving public interest objectives, notably consumer welfare. At the same time, competition policy can contribute to other objectives. In the EU context, for example, it can work towards the success of the strategy for growth and jobs, and form part of the public debate about the role of state intervention and regulation in industry. Only competition, and not economic nationalism of whatever overt or covert form, allows the emergence of firms capable of succeeding in global markets. If preserving competition is the letter of competition law enforcement, making markets work better is the leitmotiv of an active competition policy.

HOW CAN COMPETITION POLICY CONTRIBUTE TO THE SUCCESS OF THE STRATEGY FOR GROWTH AND JOBS?

Now how can competition policy contribute to Growth and Jobs?

The Commission proposed a Partnership for Growth and Jobs as the core of the renewed Lisbon Strategy. The renewed strategy is much more focused. The tools are reduced and sharpened: There are 25 national reform programmes and the Community Lisbon programme. There is only one programme per Member State and only one programme at EU level. The division of responsibilities is thus much clearer than before. Everybody can be held accountable for the goals achieved – or not achieved – under their own programme.

Competition policy has a substantial role to play in that process. Effective competition is an important driver of the Lisbon goals of growth and jobs, both statically by removing restrictions and excessive market power and dynamically by fostering innovation. In fact, a recent study by DG ECFIN¹ indicates that competition plays an even greater role in harnessing benefits of globalisation than the well-known effects of increased international division of labour and comparative advantage. Globalisation enhances the level of competition. The increase in competition in turn lowers prices and increases demand for labour and capital. This has especially beneficial effects for the real income of workers both directly and indirectly via higher

¹ THE EU ECONOMY 2005 REVIEW, Rising International Economic Integration, Opportunities and Challenges.

investment. The study estimates the additional income gains at around 8% over the next half century. In absolute terms this would translate into over €2000 annually in 2004 prices for every EU citizen (i.e. over € 5000 per EU household).

Competition policy must therefore use its whole potential for the benefits of growth and jobs. To do so, we need to not only preserve competition through our traditional enforcement action. We must also actively promote competition. This is an extension of the traditional work of a competition agency, but I believe an increasingly important one. Let me take you through some examples of what I mean.

THE CHANGING ROLE OF COMPETITION POLICY: FEEDING COMPETITION POLICY INTO PUBLIC POLICY DEBATE

In order to achieve the best possible result for growth and jobs, it is important but not sufficient to simply enforce anti-trust policy and state aid rules. Aside from merger control, enforcement intervenes *ex post*. It sets important precedents, but it sometimes comes too late; harm has been done, and remedying that harm can be quite difficult. Establishing the liability for harm is laborious. Designing an effective remedy for the future based on the precedent of EU decisions is even more challenging. If companies have exited the market it may be impossible. We sometimes need to intervene much earlier in the process. We need more advocacy of competition approaches and market-based solutions.

At the same time, we have to be aware that in our enthusiasm to find *ex-ante* solutions, we do not stifle competition through overregulation. The concern to deal with potential excessive market power by sector-specific regulation (e.g. in telecoms or energy) has a cost in the medium to long term. What is described as transitory tends to be provisionally forever. Once regulations are in place, will they or the incumbents they are looking after ever be parted from each other?

We have already said that we will undertake a more systematic competition screening of EC legislation. Competition concerns must be part of the balancing exercise when looking at new legislation: other legitimate policy objectives may well require solutions which restrict or limit competition, but the aim is that these are proportionate and the overall balance is weighed.

Let me give you some recent examples in that field.

- DG Competition is currently providing DG MARKT with input on the potential clearing and settlement directive. The aim of the debate is to identify a market-based, demand-driven solution.
- We are working very closely with our colleagues of DG Information Society on Commissioner Reding's proposal to regulate roaming prices in order to minimise any distortive effects of price regulation. We are also sharing our market knowledge to provide the best empirical basis for the upcoming regulation. The upcoming regulation raises an interesting

question: is the threat of regulation, rather than regulation, the more effective instrument for market correction?

- Last, but not least, we are helping DG Transport and Energy in their work reviewing the Electricity and Gas Directives. We have detailed knowledge of the market through our ongoing sector inquiry, the preliminary results of which were presented to the public on 16 February. Two issues of particular importance for the legislative process emerged from our investigation. First, joint ownership of supply and network businesses as well as gas storage facilities results in chronic competition problems. Imposing full structural unbundling in the next legislative package is one of the solutions proposed to get the incentives right once and for all. Second the inquiry identified the lack of transparency as one of the main barriers to competition in the sector. This is also an important input for DG TREN and the ongoing review process. At least partly in response to DG Competition's interest in the question, the Florence Forum has discussed the issue and Eurelectric (the electricity suppliers association), the transmission system operators and the regulators have produced detailed proposals to strengthen the transparency obligations. Furthermore from April 2006 the four largest generators in Germany have voluntarily started to publish aggregated generation figures. In relation to concerns about investment in interconnection, some operators have also mentioned plans to extend interconnection capacity.

Competition advocacy is perhaps even more important at the national level. More often than not it is national regulation which introduces or maintains barriers to competition. DG Competition thus tries to engage into a more systematic competition-input into national legislation. This input can be either hard or soft. Liberal professions is probably the best known example of the latter. As you know, we published a report in February 2004 as part of a long running programme of advocacy and reform. The discussions with Member States and professional bodies in order to modernise the applicable rules are ongoing.

But the Commission has also more stringent powers at its disposal if discussions do not seem to be the right way forward:

- Firstly, Article 86 in conjunction with Article 81, 82 or the state aid rules. The Commission has made use of these powers namely in previous state monopoly areas, such as postal services and telecoms. In October 2004, the Commission challenged the German Postal Law which induced the German incumbent Deutsche Post to bar private postal operators from discounts for downstream network access. Good cooperation with the Bundeskartellamt helped us to achieve an almost immediate impact on the market: Very shortly after the Commission's Article 86 decision, the Bundeskartellamt adopted a decision on the basis of Article 82, obliging Deutsche Post to apply the discounts in a non-discriminatory manner.
- Secondly, Article 10 in conjunction with Article 81 and/or 82 is quite a powerful tool. Under the *CIF* case law, national competition authorities are entitled and even obliged to set aside the application of national law

which infringes the EC competition rules. Within the European Competition Network ECN, the Commission encourages the national authorities not to shy away from using this power proactively.

Finally, EC competition policy has also a role to play on the international scene. The Commission is the leading competition law enforcer in the largest trading bloc in the world. We can and should help emerging countries to introduce or improve competition rules. It is also important to promote a shift of emphasis from trade regulation to competition within the WTO. Vis-à-vis the US, it seems that Europe sometimes adopts too defensive an approach. Personally I think that we should be more proactive here in order to grow into a role of intellectual leadership.

Competition law enforcement is increasingly and rightly perceived as one of the major instruments of global governance, ensuring free and fair competition by combating (i) private structures and behaviours (international cartels, market power) which harm consumers; and (ii) public subsidy.

ECONOMIC NATIONALISM DOES NOT FACILITATE THE EMERGENCE OF FIRMS CAPABLE OF SUCCEEDING IN GLOBAL MARKETS

There are many aspects to that leadership, not least that if we are to have credibility abroad, we must have clarity at home. An important message to be conveyed right now both by competition advocacy and enforcement is that protectionism is not the right answer to economic reform challenges. Nor is it a way to create more jobs and growth.

The national champion logic of artificially sheltering European undertakings from competition is, and always has been, flawed. Domestic monopoly power has never helped firms become successful internationally. The often-quoted success of Asian countries essentially relates to catch-up strategies by developing economies and the same logic simply does not apply to an economy that operates at the technology frontier (or aims to do so).

Furthermore, the EU countries trade first and foremost among themselves. The EU-15 in 2003 exported (and imported) only 17% of its goods and services. If we are to have a set of national champions, then 83% of the time, it's the EU consumer that will pay the price of inefficient resource allocation.

We must therefore combat any interference in the process of cross-border restructuring by national governments which is not justified by legitimate interest as foreseen in the Treaties. The Commission has two principal legal instruments at its disposal, the single market rules and Article 21 of the EC Merger Regulation. The recent months have demonstrated that the Commission is ready and willing to use both of these and will continue to use them.

- In the E.ON/Endesa case, DG MARKT first sent a letter to the Spanish authorities requesting information on the newly adopted measures

designed to make the take-over by E.ON more burdensome. On 4 April, it decided to refer Spain to the Court of Justice for restrictions on investment in energy companies. DG Competition has just given its approval to the transaction under the merger control rules. The Commission will also take the necessary steps if specific national authorities search to block mergers in this field in contravention of the legitimate exceptions (i.e. public security, prudential rules, media plurality) contained in Article 21 of the Merger Regulation.

- DG MARKT also sent a letter to the French government to request further information about the process that led to the proposed GdF/Suez concentration.
- In Unicredito/HVB, we launched a procedure against Poland on the basis of Article 21 of the Merger Regulation. The message is clear: The Commission's competence to assess this merger is an exclusive one. The parties settled with the Polish authorities, including commitments to divest branches – something which based on our competition assessment was not necessary to preserve competition. The file is therefore not closed. Any attempt from a national government to put an additional barrier to a transaction cleared by the Commission will not be accepted.

At the same time, EC merger control does not stop the creation of creation of national or European champions if this enhances competition rather than undermines it. In some cases, size may even lead to efficiencies which are (positively) factored into the assessment. There are numerous examples of mergers approved under the Merger Regulation which resulted in the creation or strengthening of leading European multi-nationals. To name just a few: in 2000, we approved the creation of the nuclear giant AREVA via the merger of Framatome and the nuclear activities of Siemens. In 2000, the Commission approved the creation of the world's largest pharmaceutical company Glaxo-Smithkline from a merger between two UK drugs companies. And indeed, last year, the Commission cleared the merger of Sanofi and Aventis to create yet another pharmaceutical giant. Finally think of the creation of the European consortium EADS from a merger of several smaller European businesses: the result is the emergence of a European giant active in the space and defence sectors. These are all examples of European champions which are leading global players in their respective markets, and whose growth by merger/acquisitions was expressly approved by the Commission.

Despite these clearances, the argument is sometimes made that “narrow market definitions” applied by the Commission have the effect that larger companies in smaller Member States are unable to reach the critical mass required to face competition world-wide. This contention is simply not supported by the facts.

- First, the Commission “takes the markets as it finds them”. So if markets are genuinely global in scope, the Commission will define them as such (e.g. for civil aircrafts). If they are local, because consumers do not have other alternatives to the merging companies than other local suppliers (e.g. retailing), the Commission will conduct an analysis at a local level.

- Secondly, to allow mergers leading to significant market power in some small or local markets would lead to discrimination against customers in smaller Member States. Consumers in smaller economies deserve the same level of protection from dominant suppliers as do those in larger economies. It's disappointing, of course, to find national governments complaining that the Commission is discriminating against "their" industry – when they should be happy that we're not discriminating against "their" citizens.
- Thirdly, remedies for local markets are usually easy to devise if there is sufficient forethought.
- Finally, a merger with the closest competitor in a domestic market is not the only way to reach the necessary scale to compete globally. Cross-border mergers are another, often less restrictive way. Take the mergers between Volvo and Renault (instead of Volvo / Scania) or Abbey Bank / BSCH: these examples show that cross-border consolidation is a real alternative for European companies that want to reach the scale needed to compete more effectively abroad.

THE RIGHT WAY FORWARD

So what is the right way forward?

Innovation, economic growth and jobs are created mainly by the companies, whereas governments (and the Commission) should concentrate on creating the right conditions for this to happen.

What does that mean?

First, where we intervene, we need a balanced approach. An approach whereby the negative but also the positive effects of a behaviour or a merger are taken into account, underpinned by sound economic analysis. The Horizontal Merger Guidelines recognise the positive role of efficiencies. Through the Article 82 review, we open the possibility of efficiency arguments also under Article 82. Some practices under Article 82 are of contractual nature and can thus under certain conditions be exempted under Article 81(3) – why should they not be exempted under Article 82 if the same or similar conditions are fulfilled? In short, most behaviours or mergers have both pro-competitive and anti-competitive aspects and it is our work to assess which prevail on balance.

Secondly, we must concentrate our competition action on the most urgent market failures. Let me give you just a few examples:

- First, sector inquiries. These are a very valuable tool where a flood of complaints or other elements indicate that markets are not functioning properly. The outcome may in some cases lead to immediate enforcement, in other to more medium-term and strategy orientation.

- Secondly, I have already mentioned the various actions taken against national protectionism. Additional barriers created by national government such as in the Unicredito or the Endesa case will not be tolerated. We will use both the competition and the single market rules in order to achieve the best possible in each case.
- Finally, the State Aid Action Plan. In short, the aim of the State Aid Action Plan is less and better aid to tackle real market failures. We want to concentrate the Commission's in-depth scrutiny to the most distortive aid to provide more flexibility to the Member States. How do we do that? Let me raise just a few points. In December the Commission adopted the new Regional Aid Guidelines for the period 2007 to 2013. The Guidelines strike a fair balance and give the Member States additional flexibility. Following our Communication on Innovation, to which we have received over a hundred, largely supportive replies, we are now designing rules on innovation to be included in the new common Framework on state aid to research and development and innovation. We are also revising the Communication on state aid to risk capital, due to expire in August. And of course we will soon launch our first proposal to adapt the *de minimis* threshold, which dates from 1996, to the economic development of the Union.

Ladies and Gentlemen, my overall message is short and simple. Competition and competition policy are key drivers for competitiveness. And competitiveness is key to reach the Lisbon goals. We need to expand the role of a competition agency both practically and culturally - beyond pure enforcement towards a wider role combining advocacy and enforcement. We need to push for greater awareness of the market and competition implications of European and national policies. We need a European response to preserve and promote competition: focused, balanced and resistant to national egoisms.

Thank you for our attention.