

Future directions for EU Competition Policy

**Center for European Policy Studies
Brussels, 11 October 2002**

Ladies and Gentlemen,

It is my pleasure to address you today on the development of competition policy in the European Union. I would like to use this lunch talk give you a feel for some of the key issues facing us in the future. I will start with merger control and I will then say a few words about the ongoing reform in the field of antitrust. I will further comment on the new developments regarding State aid policy and round up my intervention with some remarks on international initiatives in the field of competition.

Merger Control

Last December, the Commission started a comprehensive review of its review of merger control policy and it has been comprehensive. There is overwhelming support for the fundamental elements of our merger procedure: the one-stop shop, the tight deadlines, transparent and reasoned decisions providing legal certainty. But there are a number of areas where the responses to the Green Paper review indicated the scope for substantial improvement. The Air Tours decision has also highlighted some of these areas. Mario Monti's and my broad assessment here is clear. We have an efficient, successful and widely supported merger control system which is built on solid foundations. We should therefore be careful to strengthen those foundations and not weaken them. But we will propose radical changes in areas where radical changes are needed.

The timetable we have set ourselves for making proposals for change is a tight one. If we want to produce a final package of proposals for legislative changes and guidelines by the end of the year, we need to have the essential elements of the package clear by mid-October. This will of course not be the end of the story. Next year any legislative proposals will be negotiated on within the EU institutions. In parallel, we expect to begin wide consultations with the business, legal and academic communities on draft guidelines, in particular on assessment of market power and efficiencies.

As far as our internal organisation is concerned, we are increasingly confronted with the need to investigate complex cases which require in-depth fact-finding and rigorous economic and/or econometric analysis. We are therefore examining how we can strengthen our inhouse knowledge of key sectors within DG Competition as well as draw on expertise and knowledge elsewhere in the Commission and within national competition authorities. This is why we are attracted to the proposal for the appointment of a Chief Competition Economist, on temporary secondment to the Commission, directly attached to the Director General.

The weight of opinions submitted in the context of the Merger review favoured retaining the administrative character of the merger control procedure. Contrary to more prosecutorial systems, the procedure leading to a final Commission decision are

after all quite transparent. However ensuring that parties who are faced with a prohibition decision have access to a swift review mechanism before the Courts in Luxembourg is key.

The final category of issues in the review relates to the substantive test in the Merger Regulation itself, as well as to the related issues of market power and of efficiencies. Should we maintain the current test, namely that a merger should not be allowed to proceed if it "*creates or strengthens a dominant position which significantly impedes competition*". Or should we rather prefer the test used in many other jurisdictions (and notably in the US but also in Ireland and soon the UK), namely that mergers should not be allowed to proceed if they engender a "*substantial lessening of competition*". This was the debate launched by the Green Paper. It is an important debate given the desirability of ensuring that the main jurisdictions, which are examining an increasing number of large, cross-border transactions adopt as convergent approaches as possible. Suffice it to say that the case for and against is a finely balanced one, as Commissioner Monti has so diplomatically put it. We'll be discussing the pros and cons of the status quo versus SLC internally and with Member States in the coming weeks. It is after all a key question not just for the EU but also for our international convergence efforts.

What I can, however, say at this stage is that in any case the Commission will shortly issue a draft Notice on the assessment of market power in horizontal merger analysis. It will provide detailed guidelines on our approach to the examination of the competitive impact of such transactions. It is also our intention that guidelines on the treatment of vertical and conglomerate mergers should follow as soon as possible after that.

Finally, the Green Paper also called for comments on the role of efficiencies in the field of merger control. The manner of assessing efficiencies is obviously linked to the question of the substantive test. But in any event our approach to this issue will be articulated in the draft Notice on the assessment of horizontal mergers.

Modernisation

I want now to say a few words about the ongoing reform in the field of antitrust. The updating and modernisation of our antitrust legal framework is one of the most ambitious reforms the Commission has started in the past years.

After two years of work with the European Parliament and EU Member States – resulting in real improvements to the original proposal – I very much hope that the moment of adoption of the new Regulation is nearing. Indeed, after the positive opinion of the European Parliament in September last year, I am confident that the Council will be able to respect the deadline put forward by the European Council in Barcelona and adopt the new Regulation by the end of this year. It should enter into force at the latest by the first EU enlargement and thus most likely early in 2004.

Its adoption will mark a new start for anti-trust enforcement in the EU. Processing notifications – many of which posed no real competition problem – will be a thing of the past. Instead, attention will focus on the most serious violations of competition law. Intensified co-operation with national competition authorities will be a cornerstone of the system. But all of this means that getting the implementation of the

new system right is one of our principal up-coming challenges. And that work clearly needs to be complete before the entry into force of the new system.

That's why the Commission will be adopting a number of accompanying notices. The notices on co-operation with national competition authorities and with national courts will be reviewed in the light of the new Regulation. There will be a notice on the concept of 'effect on trade' in Articles 81 and 82 of the Treaty and another one regarding Commission informal guidance to industry in cases raising genuine uncertainty because they present a novel or unresolved question. It goes without saying that before adopting these notices, the Commission will duly consult the European Parliament, the EU Member States and, of course, the consumers and the industry. Therefore, be ready to make your contributions as well.

State Aid

In contrast to anti-trust or merger control, there is no scope for the decentralisation of aid decisions concerning Member States themselves. Nevertheless, there is scope to simplify, rationalise and modernise State aid rules and procedures for the sake of enlargement and to concentrate our scarce resources on cases presenting the more important competition problems. National competition authorities can also have a very useful role to play in advising government departments on state aid rules, as the Danish experience shows.

As regards procedures, a Council Regulation of 1999 already codified and simplified a complex body of case law and practice. We are currently identifying scope for further simplification. Many of the necessary changes could in principle be brought about by the adoption of detailed implementing provisions by the Commission, or by improvements in working procedures and practices. At this stage, we do not have a final opinion on whether we should also propose amendments to the procedural regulation itself. It is however clear that we have a particular concern to ensure the effective implementation of Commission decisions, in particular as regards the recovery of aid.

As regards the **simplification of the State aid rules themselves**, we have already come a long way by adopting the *de minimis* regulation, and the first block exemption regulations covering aid for SMEs and training aid. We are currently putting the final touches to a new block exemption for employment aid, which should be adopted over the next month or so. In addition, we are considering a further block exemption for research and development aid for SMEs, as well as a tidying-up exercise for the existing regulations. Looking further ahead, it seems likely that we will also propose to establish a block exemption for regional aid when the current guidelines expire in 2005.

In 2003 we will work on identifying the **sensitive sectors** to be subject to restrictions on the granting of investment aid according to the new multi-sectoral framework. We will put in place new arrangements for ship-building in preparation for the expiry of the current regulations at the end of next year. We will also need to begin a detailed review of the guidelines on rescue and restructuring aid which expire in 2004.

Of course, the agenda I have just outlined in the field of State aid policy comes on top of our daily work of assessing aid notifications and complaints. We are also now

entering the final stage of the enlargement negotiations and screening the aid schemes of the applicant countries for compatibility with the State aid rules.

Beyond this, I believe that we have another task, which may in fact be the most important of all: to explain better to policy-makers and the wider European public the objectives of State aid control, and the economic rationale for our decisions.

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.

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.

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 World Trade Organisation is the institution best suited to house such a multilateral framework. 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 5th 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 with Commissioner Monti and, until recently, Alex Schaub, has been one of the driving forces behind this initiative, together with our colleagues in the US. I have every intention to continue this well-established tradition.

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 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.