

Future directions for EU Competition Policy

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For

The International Bar Association

Fiesole (Italy), 20 September 2002

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Ladies and Gentlemen,

I am delighted to contribute to the 2002 Competition Conference organised by the IBA. The venue of this conference has always contributed to its popularity. But I know too that it derives equal if not more popularity because it has maintained a consistently high standard of discussion and debate, as this morning's session already confirms.

My task during lunch is to give you even more stimulus for future discussion here and for our future work together in the competition sphere. I am naturally enough going to concentrate the key competition policy challenges that we are we are facing in the Commission as this autumn begins.

As a new arrival - or at least a new returnee of DG Competition - I do this with some humility. A substantial part of our policy agenda today is the result of the inspiration and leadership not only of successive European Commissioners for Competition but also of my predecessors as Director general. When I left the merger task Force and DG IV in 1995 for another life in transport policy, Claus Ehlermann was beginning the battle for modernization of our anti-trust rules. Thanks to his efforts and those of Alex Schaub and his counterparts in national competition authorities, the battle to get that modernization on to the statute books is nearly won and the job of making modernization work now begins. At the end of this month many of those here today will attend the first conference of the International Cooperation Network. Here again I am conscious of the groundbreaking work that Claus Ehlermann and Alex Schaub inside

the Commission, and many others outside, have done to get us where we are today.

So as I sit in the Director general's long rectangular office in rue Joseph II, I am very aware of the tradition of excellence and achievement in DG Competition which it is my ambition to maintain. If the task is daunting, I am obviously consoled by the talent, professionalism and commitment of the colleagues around me. Not least those of longstanding colleagues such as Götz Drauz and Emil Paulis who are here with me today. But also those of the many staff who have recently joined DG Competition and with the passing years now look very young indeed. My mind is of course also concentrated on the task by the knowledge that an expectant Mario Monti is sitting only a few metres away in the other long rectangular office next door! I am also aware that if we in the Commission want to do a job well, we need to analyse closely what the situation demands, to launch ideas, to listen, to listen to the ideas of others, to have the drive and determination to carry through what we think are the best plans and policies, again adapting them and improving them as we learn from the way they are working.

To illustrate this clearly I want to start by talking about our review of merger control. Last December, the Commission promised a comprehensive review 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 should give us time for further discussions with national authorities and other interested parties before the Commission adopts formal proposals. 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.

I am obviously not in a position today to detail all the changes we are envisaging. However I hope to be able to give you some indications on the directions in which we are minded to go.

We can broadly categorize possible changes under four main headings: internal organization, the due process, jurisdictional issues and the substantive issues.

As far as our internal organization is concerned, we are increasingly confronted with the need to investigate complex cases which require indepth 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 the new network of national competition authorities. We want to achieve an across-the-board increase in the economic expertise in our case teams and create the capacity for more rigorous testing of the economic models we apply in our investigations. There should be internal checks and balances in our economic assessment with a visibility and a discipline comparable with the independent advice we receive from the Commission's Legal Service. However this economic function needs in our view to be closely associated with the day-to-day work of our case teams, giving guidance on analytical methodology, giving upstream advice on the direction of investigations and direct assistance in the most complex cases. An independent opinion on the economic aspects of a case should also be available to the Commissioner and the Commission and should be in the file. 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 Chief Economist would be assisted by a small team of professional economists who could be seconded to work in case teams on the most sensitive investigations. Obviously this new role will have to be defined carefully. We need to ensure that it serves to strengthen the arm of those who are managing the cases rather than simply acting as another hurdle to climb in the obstacle course towards a final decision.

The improvements we can make to our internal organization go hand in hand with possible improvements in the procedures which could significantly strengthen the due process. As in the field of antitrust, it should be standard practice for us to provide notifying parties with access to submissions which contest their own market definitions or competitive assessment. They should also have the facility to request a formal meeting in advance of the issuing of a Statement of Objections to allow for confrontation of discussion of alternative competitive assessments. Third parties could also be invited to such a meeting. In these circumstances, where in general there is a need for further fact-finding and testing of alternative market models, it would make sense for the notifying parties to be able to obtain an extension of the deadline. We also recognize the case for a limited extension of the deadlines in both Phase 1 and Phase 2 for negotiation of remedies. The work of the Advisory Committee also needs to be better prepared in order for national authorities, where appropriate, to play a more active role in the shaping of a final Commission Decision

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. In our view this means that the deadline for appeal and for a decision by the Court of First Instance should be sufficiently short, in terms of months, to allow the transaction to be maintained as a commercial proposition. We obviously need to discuss these issues closely with the Court before the Commission

and/or the Court makes any proposals. There are clear policy and resource implications for the Courts. However we do not see any insuperable Treaty obstacle here.

As to jurisdictional issues, achieving sensible merger case allocation between the Commission and Member States is the starting point. As you know, we were looking at ways in which the number of instances requiring companies to file for clearance of a single transaction in a multiplicity of EU jurisdictions might be reduced. Roughly 10% of cases treated at national level throughout the EU are subject to notification in two or more national jurisdictions. Such "multiple filings" generally entail additional costs and delays for merging companies, and may result in an inefficient employment of resources, both by the companies and the authorities concerned.

The Green Paper suggested some ways to tackle this problem. As you will recall, we put forward the idea of providing for automatic Community jurisdiction over transactions subject to notification in 3 or more Member States (the "3+ system"). We further suggested easing the conditions necessary for referrals between the Commission and Member States, and suggested that the Commission should be able to refer cases on its own initiative.

While the feedback on the Green Paper strongly supported the view that something ought to be done about multiple filings, it has not lent support for the so-called "3+ system". We are now looking at alternatives. We are in particular looking at the possibility for parties to request the Commission and national authorities to examine a referral to the Commission on the basis of the Community interest of the case.

However we are proceeding with caution. We do not want to open the door to prolonged and complex prenotification discussions on case allocation which could take precious time away from the merger investigation itself. We should in any event profit from the workings of the network of competition authorities to make a multiple filing case easier for the parties.

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.

We are certainly not wedded to the current wording. We believe the primary concern should be to identify precisely what market structures and behaviours should be targeted and then to decide what is the most effective legal instrument to tackle them. It is also obvious that if we were writing merger control law all over again without reference to existing EU and national jurisprudence, the problem might be easier! However we are where we are and whatever we decide to do, we

have to assess the risks inherent in the two broad options to arrive at or confirm coverage of the intended economic target: either a change of wording and guidelines for the change or no change of wording and guidelines to clarify that the economic target is covered. Some believe that to all intents and purposes the existing dominance test is applied in the same way as the US interpretation of SLC (in its current form I emphasise as the meaning of that particular phrase has been subject to quite some change over the years). But where does that leave the quest for the fabled “gap” in the dominance test that has kept commentators and article-writers busy since the Airtours judgment? Does the current test cover unilateral effects?

First, I would say that while semantic discussions have a value we do risk entering into an extensive debate equivalent to whether the grin of the Cheshire Cat was or was not an essential feature of a cat. What is important from a competition policy point of view is whether we consider the grin to be part of the cat.

Secondly, we shouldn't lose from sight the fact that the Commission has already used a “unilateral effects” analysis in order to determine the expected effects of a merger on prices. This type of analysis has been applied both to mergers concerning differentiated products and to those concerning homogenous products. On the former, I'd point for example to the decision on Philips/Agilent Health Care Solutions of March 2001. On the latter, to Alcoa/Reynolds of May 2000. But even as I say this I can hear some of you wanting to echo Garrett Fitzgerald's famous phrase by saying: *well yes, the dominance test may work in practice, but does it work in theory?*

I'm sorry to disappoint but the answer is for another day! 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.

I want now to say a few words about the ongoing reform in the field of antitrust. I will then 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.

The last morning session has dealt with the new draft Regulation 17. 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.

I also encourage you to follow closely the developments regarding technology transfer and licensing agreements. The Commission mid-term review Report on the Technology Transfer Block Exemption Regulation of December 2001 offered us an opportunity to thoroughly review our policy towards intellectual property licensing agreements. We are developing a more economic approach, consistent with our policy in other fields. The consultation shows that there is an open debate on the assessment of licensing agreements between non-competitors. Other issues refer to the use of market share thresholds, to whether the scope of a new block exemption should stretch beyond patent and know-how licensing and encompass copyrights, and the treatment of multi-party licensing pools. As we are at the beginning of our review, I cannot express any definite statements on this. However, I hope we will be able to propose to the Commission some texts on the application of Article 81 to licensing agreements before the summer of 2003 and have them adopted one year later, after a full consultation.

You see that the Commission is committed to introduce the necessary changes, -however radical they might be-, in order to keep ensuring an effective and appropriate enforcement of EU antitrust law and to request for this purpose the joint effort of all enforcers concerned. This same attitude is reflected in the other areas of our competence.

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.

In addition to this, there is a continuing need to ensure coherence between the Community's aid rules and the activities of the structural funds. I thus hope to undertake a wide-ranging review of the State aid rules and to have a much simpler system in place ready for the next structural fund programming period, starting in 2006.

Successive European Councils have called on the Commission to bring forward guidelines to clarify the application of the State aid rules to **services of general economic interest** in this area, and to consider the need for a block exemption to exempt compensations for

the cost of providing these services from the State aid rules. Should the Court confirm its position in Ferring, there would be no need for a block exemption, because the compensation of costs for those services would not be considered as aid in the first place. However, whatever the outcome of the current cases, we want to issue further guidelines to explain why the application of the State aid rules should not interfere with the ability of the Member States to provide high-quality public services.

In parallel with this more detailed work in the area of State aids, the Commission is also considering the possibility to present a more general paper, perhaps a Green Paper, on the question of services of general economic interest in the context of Article 16 of the Treaty.

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.

We have heard earlier that another multilateral initiative is increasingly catching the spotlight of the international competition community: 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 will gather 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 will already be discussing the first concrete results. Let me brief you on where we are with these projects.

First of all, the ICN Working Group looking into the control of multi-jurisdictional mergers is pursuing a soft-law approach towards the possible convergence of our merger investigations. To this end, a

number of “Guiding Principles for Merger Notification and Review” have now been elaborated. 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.

As fundamental as these principles undoubtedly are, it is also evident that they need to be supplemented by more concrete rules. Therefore, this ICN Working Group has also begun to draft a number of such more practical guidelines. For the time being, these deal, respectively, with such technicalities as a reviewing jurisdiction’s nexus to the merger, with notification thresholds, and the timing of notifications. More will be added over time, as discussions continue beyond the Naples conference. In short, we are witnessing the gradual emergence of a body of agreed recommendations for international merger investigations. Despite their non-binding nature, I am confident that they will over time contribute to enhance international convergence, and thus facilitate governance.

The second of the ICN’s Merger Working Groups is looking into the substantive standard of merger control, and is making similar good progress. As we in the Commission know quite well, they have a challenging task in front of them indeed. This Working Group will present to the Naples Annual Conference an issues-paper that highlights the most important aspects to be considered in this context. I could imagine that already at the second ICN Annual Conference - that will take place in Mexico in June next year - the first tentative answers to the complex questions at stake will be on the table. I have

to admit that already now I am intrigued to see what will be the final result of this exercise.

The second of the existing ICN Working Groups deals with competition advocacy. Especially for younger market economies, market power organised by the state can give rise to distortions of competition as important as those created by private anticompetitive behaviour. This Working Group, for its part, has just published a study on competition advocacy. Based on a survey among ICN Members, this study for the first time ever provides comprehensive insights into what competition authorities from around the world are actually doing, and how they are doing it. In my view, one of the most surprising conclusions of this report is how little we actually know what other agencies are doing in this respect.

As for the future, the Commission would be interested to give more prominence in ICN's work to the particular need of developing and transition economies. I hope, and expect, that ICN Members in Naples will agree to set up a new Working Group to look into these issues.

II. Bilateral and multilateral co-operation

I guess that a topic of particular interest for the IBA is international co-operation. It is no secret that we attach great importance to **bilateral co-operation** with our main partners, particularly with the US and Canadian authorities. I can announce that we have concluded a bilateral agreement with Japan, which will enter into force in October, after the UE-Japan summit.

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.

Ladies and gentlemen:

During this lunch I have outlined the main reforms and projects we are engaged in. If you combine all of them with day-to-day work on cases, you will agree with me that there is a lot of work on our plate. Be sure that I am looking forward to getting to it.