COMPETITION POLICY

NEWSLETTER

European Commission

ISSN 1025-2266

Editors:
Linsey Mc Callum,
Nicola Pesaresi

Special edition

Interview with Mario Monti, Commissioner responsible for competition

The EU gets new competition powers for the 21st century

© European Commission Audiovisual Library

Mario Monti
Commissioner responsible for competition

Besides being the historic date for the accession of 10 new States to the European Union, 1 May 2004 appears to also have a particular significance for European competition policy. Why? What's going to happen?

Indeed, **1 May** will be not only 'Enlargement Day' but also, dare I say, 'Competition Day', for it **will see a revolution in the way competition rules are enforced in the European Union**. A smooth revolution, of course, and one which we have been preparing for five years — but a revolution nevertheless.

The date 1 May will usher in a mature system in which law-abiding companies that do business in Europe will be freed from decade-old legal straightjackets and will benefit from less bureaucracy and a more level playing field in the European single market.

The reform concerns mainly the enforcement of Articles 81 and 82 of the Treaty, which require us to fight cartels and abuses of dominant positions. It profoundly modifies rules which date back to 1962, when the Commission had little or no experience in this field and only one Member State had a competition authority. More than 40 years later we know and, more importantly, the companies also know the Highway Code. They know that meeting secretly in a hotel to fix prices for the vitamins used in everything from cereals to cosmetics and dog food is illegal. They know we can, and do, impose very high fines.

The gist of the new antitrust regulation is that companies will no longer notify their agreements routinely for clearance, freeing the Commission to tackle serious violations, particularly in those cases where cross-border trade is affected. Furthermore, the enforcement will not be done only from the centre, in Brussels. The task of policing anti-competitive behaviour and handling complaints will be better shared by the European family of competition authorities: the national competition authorities and the Commission, linked through the European competition network (ECN).

Never since the birth of the Union in the 1950s has there been such a radical reform in European competition policy.

Are you modernising the rules because of the enlargement?

Yes and no! Working through a pile of mostly innocuous notifications may have made sense 40 years ago: it simply does not make sense now! Any citizen must know whether he/she can park his/her car in the centre of town. He or she shouldn't have to go to the police station to check first. Similarly, the Commission's role, as an antitrust enforcer, is not to give comfort. We will do it if, for example, the issues at stake are new and there is a real need for guidance.

EU enlargement added an element of urgency and greater realisation that our resources, both national and at the Community level, would be better used if cases were handled at the level where it makes most sense. If a Spanish company complains about the behaviour of another company in Spain, it is highly likely that the Spanish competition authority will be better placed to examine the allegations. Or, and this is a relative novelty, the Spanish company could go straight to a national court, if the alleged breaches are well established in existing case-law, and seek compensation for the losses incurred as a result of the illegal conduct.

Do you think the new Member States are ready to shoulder their share of the policing?

Most certainly yes! They have all adopted competition laws and enforcement bodies when they did not have one already. Let me remind you that in the mid-1990s the Netherlands, one of the EU's founding countries, did not have a system of merger control. Neither did Finland. The ECN will ensure a coherent application of the law throughout the Union by maintaining a regular flow of information in all directions.

'Companies will no longer notify their agreements routinely for clearance'

You mentioned the end of notifications. Does this mean companies will no longer need to seek permission before merging?

Mergers will always require prior clearance either by the Commission or the national authorities. But in this field, too, we are introducing reforms and they also come into force in May.

The control of mergers also needed to be adapted to draw on the lessons of 13 years of experience, the judicial control exerted by the European courts and to meet companies' legitimate expectations.

The package of reforms reinforces the principle of the 'one-stop shop' review for mergers that have an impact in more than three Member States, clarifies the Commission's powers, provides better guidance as to those mergers that are likely to be challenged and increases the level of economic analysis and the internal checks necessary to ensure that our decisions are fair, sound and based on solid facts.

There have been reports that the reforms will give the Commission tougher powers.

I would not say that the Commission will become tougher, but rather that it will be given modern and efficient tools that befit a mature authority. In the merger control field, for example, this will mean that we will be able to deal with any form of anti-competitive scenario that could harm our consumers. Dominance was always clearly established as one such scenario, but there are mergers, in highly concentrated industries, where the mere disappearance of one of the few remaining players can result in less choice, less innovation and higher prices for consumers. We needed clarification of our powers in this area and EU Member States unanimously agreed to it.

'Enforcement will not be done only from Brussels'

In the antitrust field, in any case, I would strongly argue that we have been reforming our policy in recent years in order to allow more freedom for businesses to take the commercial decisions they want, while safeguarding competition. We have replaced all the old legalistic block exemption regulations (i.e. regulations granting antitrust immunity to types of agreements or agreements common in a given industry) with a new generation of block exemption regulations and guidelines which embody a more economic approach. Instead of imposing on companies a limited list of what they can and ought to do, the new rules define a limited list of what is specifically prohibited — such as price fixing, market sharing and any such clearly recognisable violations — and create a safe harbour for all other agreements. We have started this reform on the application of Article 81 with a new block exemption regulation and guidelines for distribution agreements, have subsequently revised the rules for cooperation agreements between competitors and for the rules for the car sector and are now in the final phase of replacing the last old-style block exemption regulation — the one for technology transfer agreements — with a new regulation and guidelines which are foreseen to enter into force on 1 May. This completes the substantive reform of the application of Article 81.

Are you also finalising a reform of the rules regarding State bailouts of ailing firms?

The 1999 rescue and restructuring guidelines expire in October 2004. We are launching the draft of revised guidelines and hope that the requisite consultation with interested parties and the Member States will be completed in time for adoption of new guidelines before summer 2004.

Our practice with respect to rescue and restructuring should, even more than before, focus on large enterprises that trade across the EU. These enterprises usually have larger market shares, and State support in their favour affects competition and trade more significantly than other companies.

Restructuring operations should ideally be self-financed by the beneficiary. Let me give you one precise example. In a restructuring operation, the aid beneficiary should be obliged to finance a large part of its restructuring cost. Therefore, the new rescue and restructuring guidelines will stress that, in particular, large undertakings that are active throughout the Community and that receive subsidies have to make a significant contribution to their own restructuring — using funds they obtained by selling assets. We will be less strict on SMEs.

What about employment concerns?

Contrary to a widespread suspicion, aid to rescue and restructure companies is not a very socially conscious act. To some extent, it is even antisocial behaviour. This is because one company's problems are simply foisted upon other companies, most often in other Member States. Jobs in one Member State may be saved with public funds, at least for some time, but the labour problem is merely shifted to other Member States.

As long as labour mobility in Europe is very limited, employment is often a zero sum game — jobs temporarily saved in one area translate into jobs lost in another. True, more flexible labour markets and more mobility of labour would help when companies and whole sectors have to restructure, but the European Union is, and wants to remain, culturally and linguistically diverse and we have to confront the current reality in this respect.

Are there any other reforms in the pipeline?

The Commission has one particular project in the pipeline which, I hope, will have a far-reaching impact on the way in which the competition rules are enforced in the Union. We are looking at ways to encourage actions before courts by private parties to punish breach of the competition rules. It is commonly stated that, in the USA, private action accounts for around 90 % of competition enforcement. In Europe, to date, there have been very few successful actions of this kind and the Commission is considering why this is the case and what can be done to improve this situation. This does not mean that we will simply follow the US example 100 %. Rather, we would like to be able to learn from the US experience to put in place an enforcement mechanism which is well suited to the needs of business and the European citizen.

As I said earlier, private actions before courts are a central feature of the modernisation of our competition rules. We want to encourage private parties actively to seek compensation for harm caused to them by anticompetitive behaviour, and for such actions to complement the enforcement activities of the public authorities. I see enhancement of private actions as a key way to help the citizen to help himself to put an end to price fixing cartels, abuses of dominant positions and other anticompetitive behaviour. To this end, I believe that actions by consumers themselves and the groups which represent them can be an effective tool in the fight against anticompetitive behaviour and allow the consumer to be directly compensated for the loss he or she suffers at the hands of companies which break the law.

I should emphasise that our work on this very complex initiative is at a very early stage, but I hope to make good progress on it during the course of this year.

There is also some talk that the Commission is reflecting on the application of Article 82. Can you lift the curtain on this last 'big work'?

I would not speak of firmly defined plans at this stage, but rather of an internal discussion.

Continued on page 4

1 MAY: MAIN COMPETITION REFORMS

- **New antitrust regulation (Reg (EC) No 1/2003):** eliminates notifications; empowers national competition authorities and courts to apply Article 81 in full; increases the Commission's inspection powers
- **New merger control regulation (Reg (EC) No 139/2004):** enables the Commission to intervene against all anticompetitive mergers; reinforces the 'one-stop shop' principle; introduces some flexibility in review timetable
- **Block exemption regulation on technology transfers between firms:** creates safe harbour for agreements licensing new technological breakthroughs between competing companies with market share below 20 % (30 % for agreements between non-competing firms); no presumption of illegality for agreements between companies with higher market shares
- **Regulation on air transport between EU and non-EU airports:** gives the Commission clear and effective powers to review the impact of alliances between EU and non-EU airlines on European consumers

Merger control:

Merger review package in a nutshell

What is the merger review package?

This far-reaching package of reforms is composed of four main elements:

- a revised merger regulation,
- guidelines on the assessment of horizontal mergers,
- a set of best practice guidelines for merger investigations, and
- internal reforms designed to strengthen the objectivity and soundness of the Commission's decisions in merger cases. (This aspect is discussed by Mr Lowe in his interview.)

What are the main changes in the new merger regulation?

The main changes concern substantive, jurisdictional and procedural issues. The substantive test for the assessment of mergers has been reworded. The mechanism for reallocating cases from the Commission to Member States and vice versa has been revamped. Procedural changes have been made to make the regulation more flexible.

Why has the substantive test been changed?

Changes in the wording of the regulation now make it clear that all post-merger scenarios posing a threat to competition, including oligopolies, are covered by the test. The competition test enables the Commission to intervene against all anti-competitive mergers. This is a very welcome development, which brings to an end a long-running debate about the scope of the old 'dominance test'.

So what is the new test and how does it change past practice?

The new text reads:

A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular by the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Although it does not alter the Commission's approach to the analysis of the competitive impact of mergers, the wording of the new test focuses unambiguously on the impact of a merger on competition. At the same time, it is a truly 'European' solution, combining the best of the substantive standards in our various jurisdictions, and preserving existing precedent, in the form of past Commission decisions and past judgments of the European Courts.

What are the new possibilities to refer cases from the Commission to Member States and vice versa?

There will be a more streamlined system for merger referrals, which will smooth the process of referrals to and from the Commission. It will also give companies the possibility of triggering the referral process before they incur the expense and lost time involved in notifying in a jurisdiction or jurisdictions where their deal will not ultimately be scrutinised. This will be a particularly attractive option in an EU of 25 or more Member States.

How will this streamlining of the referrals system be achieved?

Under the improved system of referrals:

- merging parties may request the referral of a case to the Commission or to a Member State (or Member States) prior to its notification at the national or Community level, an option not currently available;
- merging parties may request the referral of a case to the Commission if it is notifiable in at least three Member States; if all competent Member States agree, the Commission acquires exclusive jurisdiction for the case;
- the criteria to be fulfilled for referral have been simplified.

Will parties be able to come earlier to the Commission for approval of a planned transaction?

Yes. Notification is now possible on the basis of good-faith intent to merge, where previously a binding agreement was required. This gives greater flexibility to businesses as regards when to seek regulatory clearance. However, the 'bar on closing' prior to an authorisation remains in place.

And how about the seven-day deadline for the filing of a notification?

In view of the bar on closing, it was concluded that this amounted to an unnecessary regulatory rigidity and so it has been abolished.

Do the changes in the time limits represent an erosion of the Commission's commitment to complete investigations within a short, pre-determined time period?

Certainly not! The changes in the time limits are designed to give flexibility and to ensure that investigations are properly carried out. Additional time will only be added when it is necessary for the conduct of a thorough investigation or for the proper assessment of remedies offered by the parties. Moreover, to avoid confusion and facilitate their calculation, all time limits are now measured in 'working days'.

How has this flexibility been introduced?

The normal Phase 1 deadline now expires after 25 working days. This period is extended by 10 working days when commitments are offered or when a Member State requests the referral of the case. For Phase 2 cases (in-depth investigations), the basic deadline expires after a further 90 working days, extended automatically by 15 working days when commitments are offered towards the end of the investigation. In complex cases, the deadline may also be extended by a maximum of 20 additional days, at the parties' request or with their approval.

When does the new merger regulation come into force?

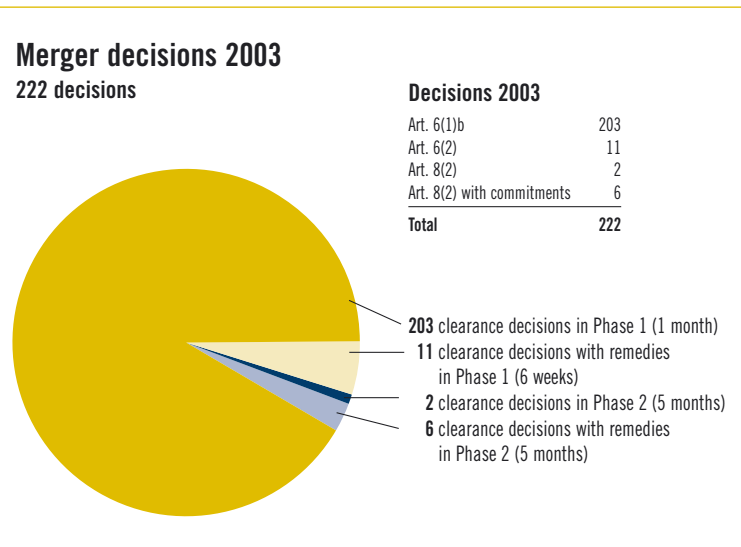
The new regulation will be applicable from 1 May 2004. However, merger agreements reached, or public bids announced, before 1 May 2004 will continue to be assessed under the old regulation.

What are the main features of the best practice guidelines?

As the name implies, the best practice guidelines codify informal practices which the Commission has found to be effective in the conduct of investigations under the merger regulation. The guidelines deal, for example, with pre-notification contacts, 'State of play meetings' where the Commission keeps the merging parties informed of progress in the investigation, and the possibility of organising 'triangular' meetings between the Commission, the merging parties and complainants. They also set out the conditions under which the Commission will allow the parties to comment on key documents and complaints during the course of the investigation.

What is the purpose of the new guidelines on the assessment of horizontal mergers?

These new guidelines explain the circumstances in which the Commission may identify competition concerns but also provide clear quantitative indications as to when it is unlikely to intervene. Different possible anti-competitive scenarios which mergers may engender are illustrated in some detail. At the same time, the guidelines set out the types of mitigating factors which may be capable of removing concerns that a merger might be likely to harm competition. Finally, they set out how the Commission will deal with claims that a merger will result in efficiency gains. For such efficiencies to be taken into account, they must benefit consumers, they must be likely to be realised and they must be verifiable.



Modernisation and the new network of competition authorities

Introduction

On 1 May 2004, a brand new system of application of Articles 81 and 82 enters into force. This is the result of a long process of a reform which started five years ago and has been characterised by a large public consultation at every stage.

It all began in 1999 with the publication of a White Paper on the modernisation of the implementing rules of Articles 81 and 82 of the Treaty, suggesting a deep overhaul of Regulation No 17, which dated back to the 1960s. In 2000, taking into account the results of the public consultation on the White Paper, the Commission made a formal proposal to the Council. It was enacted two years later, under the Danish Presidency, as Regulation (EC) No 1/2003. In order to allow for a smooth transition to the new system, the date of application of the new regulation was set for 1 May 2004, while 2003 was dedicated to the drafting of, and consulting on, the flanking measures at Community level and to the required amendments of several national laws.

Objective of the reform

The objective of the reform was to ensure an efficient protection of competition in an enlarged Community. At the end of the 1990s, it became clear that the system of Regulation No 17/62, based on an administrative control of agreements and in which the Commission bore almost alone the responsibility for enforcing Community competition, would not be appropriate in an enlarged Community of 25 Member States. A new way of enforcing the rules had to be found which would maintain the traditional responsibility of the Commission for defining competition policy and apply the rules in individual cases while involving national bodies more in this process.

Role of national courts and competition authorities

The new regulation creates the conditions for a greater involvement of national courts by making Article 81 as a whole directly applicable. This implies that any undertaking or final consumer suffering from an infringement of that rule can directly take legal action against the authors of the alleged infringement before a national court and obtain damages, without having to wait for the outcome of any administrative proceeding. This will certainly contribute to a better understanding, and therefore respect, of competition rules.

As far as public enforcement is concerned, the new regulation empowers all national competition authorities to apply Articles 81 and 82 in their entirety and makes it compulsory to apply Community law whenever it is applicable, i.e. whenever the agreement or practice at stake may affect trade between Member States. In the new system, not only the Commission but also the national competition authorities will be responsible for enforcing Community competition rules.

New focus and improved legal tools

It is not, however, enough to increase the number of potential enforcers: they must also be able to focus their action on the fight against serious infringements. The Commission, for its part, proposed to the Council abolition of the authorisation and notification system at Community level because it created an unnecessary burden and distracted the authority from the detection and repression of severe violations, which were obviously never notified. This was done by Regulation (EC) No 1/2003. A number of national competition authorities have experienced the same phenomenon and are in the process of either abolishing or at least slimming down substantially their notification system. These reforms will allow the public enforcers to concentrate on the core activity, which is to detect, bring to an end and sanction infringements.

Not only do public authorities have to be able to concentrate on the essentials; they also have to be given the necessary legal tools to perform their activities efficiently. The new regulation has slightly improved the powers of investigation of the Commission, by, for example, giving it the power to affix seals during inspections in companies' premises or to search private homes if there is a legitimate suspicion that business records are kept there.

European competition network

The entry into force of the system will bring about several challenges, the most important of which is to ensure a correct allocation of cases and a consistent application of the rules by all the players. As far as national courts are concerned, rules guiding the allocation of private commercial litigation are already in place. To facilitate coherent application, Regulation (EC) No 1/2003 creates a number of specific instruments such as the power for the Commission and national competition authorities to intervene as amicus curiae before courts applying Articles 81 and 82 of the Treaty. The Commission has also got involved in subsidising the training of national judges in Community competition law.

As far as public enforcement is concerned, a network of competition authorities called the European competition network (ECN) was set up at the end of 2002. It is made up of all competition authorities in charge of the application of Articles 81 and 82. It will be the framework for the intense cooperation required to ensure a correct case allocation and a consistent application of the rules. The legal instruments for the various exchanges within that network are to be found in Regulation (EC) No 1/2003: the authorities have the power to exchange confidential information, to use such information as evidence in their respective proceedings and are subject to various information obligations in their cases. The ECN is a flexible and informal network: it does not take 'decisions' and cannot compel its members to act in a certain way. It is, however, expected that the constructive character of the discussions will help solve most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings.

Since its creation, the ECN has concentrated mainly on the setting-up of the new system by discussing the modalities of the future cooperation, the content of the various implementing measures and transitional issues. The high level of commitment by its members and the openness of their discussions bode well for the effective functioning of the ECN as of 1 May 2004.

The first ECN meeting,
Brussels, 29 October 2002

© Directorate-General for Competition

LINKS

Merger legislation
http://europa.eu.int/comm/competition/mergers/legislation/

'New merger regulation — Frequently asked questions'
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/04/910|RAPID&lg=EN

Modernisation
http://europa.eu.int/comm/competition/antitrust/legislation/

© European Commission Audiovisual Library

Philip Lowe
Director-General for Competition

Interview with Philip Lowe, Director-General for Competition

Promoting competition in the enlarged European Union

Enlargement brings 10 new Member States into the Union on 1 May. Most of these States have very little tradition in the application of competition policy. The State has always played a very active role in their major industries and economies. From a management point of view, will this pose particular problems for you?

The European Union and the new Member States have had a very close relationship for many years, in order to help prepare for enlargement.

In the enlargement negotiations, the Member States and the Commission made clear that not only did the necessary laws and institutions have to be in place, but a good enforcement record should also have been achieved. A judgment was made not just by the Commission but by all the Member States that the new Member States had succeeded in this.

Not only do all of them have a satisfactory record in their antitrust and merger rules, but they have understood that public subsidies should be used in a correct manner. They have been given specific responsibility in State aid control to ensure law enforcement and internal coordination — something existing Member States should perhaps have been given some years ago. They have a strict code on how public money should be used. Over the past 10 years, tremendous progress has been made. Is there more progress to be made? The answer is certainly yes. And not simply as regards the competition authorities themselves or the national administrations, which need to oversee the competition arrangements, but also the national courts, which have a major role in competition law enforcement.

> *'More competition delivers the best deal for consumers'*

Do you think that some new Member States need a transition period?

The past 10 years have really been the transition period for the new Member States to get accustomed to the rules on competition. The competition rules will now come into force on 1 May for all — there is no further transition. The new Member States had an opportunity, after the signature of the Accession Treaty, to deal with cases of State aid before enlargement — the so-called 'interim mechanism'. This opportunity has not been fully exploited, particularly by those which had problems. We expect a significant increase in the number of cases we have to deal with as a consequence, and we will have to be careful with those sectors which have recently come out of the public sphere.

The judges from the new Member States will have very little experience in applying European competition law. On what basis are competences allocated at national and community level?

In the new system for **antitrust**, which Commissioner Mario Monti has described separately, European competition law will be applied alongside national law at the national level by competition authorities and courts. The Commission is already involved in training programmes for judges — as with the judges in the current Member States, we are giving a lot of guidance to those in the new Member States. We are also organising exchanges of officials with all 25 EU competition authorities, in order to help implement modernisation successfully. The European competition network binds everyone into the new system: this will bring together all 26 competition authorities, including the Commission. And it is not just the Commission helping the new Member States. They are also involved in bilateral schemes with agencies in the existing Member States. The new authorities will therefore get maximum benefit out of what already exists in terms of experience of competition law enforcement.

All 26 authorities will share information about ongoing cases. Through the new system, there are means to ensure that the Commission can intervene at the beginning of a case if it thinks the case merits a decision in Brussels. Alternatively, we can intervene later where it looks as though a decision which might be taken at national level could be in contradiction with case-law.

The way we share competences for **mergers** is different. The Commission handles larger mergers above certain turnover thresholds. National agencies apply national merger laws below the thresholds. The Commission takes a decision — whether it is a clearance or a prohibition — applicable in all the 25 Member States, and within strict legal deadlines. This is a very good system for companies. Those who have to notify their mergers to several national authorities do have a problem, but we have built into the revised merger regulation another innovation: when companies have to notify mergers in three or more national jurisdictions, they can ask for the Commission to take over the case. This will be done if the Commission and the Member States concerned agree. This simplifies procedures for both companies and competition authorities.

Finally, in the area of **State aid**, the Commission has a legal obligation to control Member States' actions which could distort competition and trade between Member States. So it is not possible to delegate to a Member State entire control over its own aid. We are trying to put in place reforms which will limit our intervention to those cases which have a significant economic impact. So far we have had rules which have been pretty strict and which are based on administrative criteria. We are now designing a test which will allow us to consider a subsidy below a certain threshold — even if it is an aid according to European rules — as not having any significant economic impact and therefore rapidly exemptible.

There are cases that have caused a lot of notoriety in the Union, such as grants to Bavarian sports clubs — or Dutch marinas or British piers — complaining against one another because one has had a grant and the other not. These cases should normally be dealt with at national level. Instead, they come to Brussels because complainants argue that the aid affects European trade, which of course it often does not to any significant extent. In the meantime, we have some very important cases to deal with where competition could be distorted on a much wider level. Just as with antitrust, we need to focus our resources on the most important cases.

Will you need to establish new procedures and reorganise the Directorate-General for Competition for the future?

We have looked very carefully at how we should adapt the organisation to the changes of 1 May: the extension to 25 Member States, the new competences for the application of the competition rules, and the revised merger rules. We have also seen a greater role played by the Court of First Instance in recent years. Consequently, we are moving from a competition department organised around the available legal instruments (cartels, antitrust, mergers) to an organisation where five directorates deal with specific sectors. The teams working in each sector need to develop a much better and up-to-date knowledge of what is going on in specific markets and how the structure and behaviour of companies is changing. This should enable them to 'soft land' on cases when they arrive. Of course, their investigation of cases will require more information inquiries, but they will already have the background knowledge that they can pool. So they should be able to develop an informed view on the competitive impact of an agreement or merger more quickly.

We are also strengthening the dialogue we have with the national authorities on individual cases. The sectoral approach means that national authorities who, for example, could be dealing with telecoms in Warsaw or in Tallinn, can talk directly to us here on the sector specific issues, whatever the legal problem. Similarly, when we are dealing with pharmaceuticals, when a number of national authorities have cases brought to them — be they excessive pricing, cartels, or even prevention of imports of cheaper drugs — then we have a set of people here who know what is going on in the sector and can add their expertise to the portfolio of knowledge.

As for other changes, we're seeing a major enrichment of the knowledge which we have on each sector through the network that I mentioned earlier, and this is paying dividends for all. We have appointed a chief competition economist with a team of excellent economists to help us in major cases. We're also expecting another boom in merger activity very soon. That will put a lot of pressure on us in late 2004 and 2005, when we will have at the same time the increased State aid problems in the new Member States. The reorganisation now in progress will help us to deal more flexibly and more effectively with this situation.

Will enlargement stimulate a push for delocalisation of industrial production outside the existing Member States?

It is impossible to generalise. The anticipation of enlargement has certainly led to an increased amount of investment in the new Member States, knowing that they were going to come in. They are still benefiting from very low costs and a highly skilled labour force. In the medium term, there is going to be a lot of investment in the new Member States from the existing ones. The new Member States have a big advantage with enlargement, given the reduction in the political and financial risks it brings with it, compared with the risk of remaining outside.

But we have to accept that there are a number of third countries who offer, particularly for low-grade activity, strong competitive locational advantages. Ultimately, the new Member States will also, after a period of time, need to face the reality of having to develop their own economies with higher value added and more sophisticated activities.

In such circumstances, aren't Member States legitimated to defend their public interest from the increasing pressures of globalisation? In particular, should there be an exclusion of public services from the application of competition rules?

It would be very short-sighted for Member States to isolate their markets from competitive forces outside their territories. This normally leads domestically to less innovation, less competitiveness and a worse deal for consumers. Therefore, the trend is more towards open and liberalised markets. However, the Treaty is neutral as to whether any firm is in the public or private sector. And it is clear from what the Court and successive European Councils have said that Member States are in charge of defining what is a private or public company. But economic and business realities have changed over the years. We have discovered that changing technology and further liberalisation of markets has resulted in activities that were previously regarded as basic utilities being offered on a commercial basis quite successfully without damaging the commitment to universal and high-quality service. That is the Commission's view as far as State aid and liberalisation is concerned.

When a Member State defines a public service in a certain way but then includes in it activities which are commercial, we are usually flooded with complaints — quite rightly — from commercial operators who are offering the same services. It is up to us to ensure that Member States, having defined what is a public service, are applying the definition in a proportionate and realistic way and that they are not making an obvious error. We have to draw a line. There are some grey areas, such as in public broadcasting, where commercial operators in activities like distance learning have been wiped off the scene.

> *'We need to focus our resources on the most important cases'*

The other issue is that if you define something as a public service, and you ask a company to provide it, then what is the appropriate level of compensation to be given? If you give too much aid it could distort competition beyond what is necessary for the provision of such a service. We have had to deal with a number of cases of that kind and the Court of Justice has recently taken a decision in the Altmark case which indicates how we should measure the financial compensation. There is no ideology on either privatisation or public services but there is economic reality.

Is there a risk of a logjam in the courts?

Partly for resource reasons, but also for the rights of all those involved, the work is done on a timetable which is not a fast one. People in business have to wait for the courts and not the other way around. The courts obviously need time for reflection and debate before taking decisions. They will definitely have a lot more work at the European level, and we could have a serious problem as regards resources. There should be a rapid procedure for appeals against merger decisions for instance. To do this, the Court of First Instance, in Luxembourg, needs more resources and more chambers, if not a specialised competition chamber.

If it comes to a logjam of our own in State aid and competition law cases, then we can only deal with the cases where we have the resources. We are trying to develop a systematic approach to priority setting, which makes us take a conscious decision in the competition field as to what the effects of a certain problem are on consumer welfare, what is the likelihood that we will achieve a result, in what time period and with what resources. The different challenges we are facing are forcing us, probably rightly, to focus on those areas which have greatest impact on competition.

Is the Commission just reactive rather than proactive?

One of the aims of the reforms that we are putting in place is to give the Commission a greater opportunity to investigate cases on its own initiative where we can see that competition is not working or is working against consumers. There is a margin of manoeuvre there in the future which has not been there in the past. One way we can do that is, rather than taking cases against individual firms, to launch investigations on a sector-wide basis. We are doing this in the liberal professions — architects, dentists, etc. There is concern that the charges in these sectors are very high, and that the agreements between the professions go beyond what is necessary to ensure professional standards.

We may launch investigations in other areas, for example where there is excessive pricing or restrictions. We want consumer groups to help us here and not just by making complaints against individual firms. This is where our more sectoral approach should work. If there has been more emphasis in the past on complaints, and complaints from competitors rather than consumers, we will now be putting the emphasis more on the benefits for consumers. More competition delivers the best deal for consumers.

Is the Commission getting the right message across, e.g. the recent decision on the subsidies to the low-cost airline Ryanair?

On the State aid side, the law is not oriented directly towards consumer welfare but more to removing distortions in competition and trade between Member States. We need to bring the economic thinking and market analysis behind competition policy into our assessment of State aid. This happened very well in the Ryanair case where our colleagues in the Transport and Energy DG associated us with their State aid investigation.

The Ryanair case highlighted the need to have a good look at the way in which public airports, large and small, are run. We know that there has been a lot of pressure on infrastructures. Large airports have not only become saturated but they have become very expensive. Low-cost airlines, by going to smaller airports, such as Charleroi in Belgium, relieve that pressure and they have also 'expanded' the market. They are putting more pressure on the hubs because the market is dictating lower prices to the major carriers.

An effective use of existing transport infrastructure, as well as investment in new facilities, is therefore key for consumers to benefit. There was no general message in the Ryanair decision that airports should not receive aid nor that airports should not be able to enter into promotional relationships with an airline. It was also not about the big carriers against the smaller ones. The case was, after all, brought by one low-cost airline against another. But we have to ensure that the help which is given to airports and airlines is on a fair basis which is generally applicable. As in other areas of life, it is not what you do, it's the way that you do it. I am sure that regional authorities and low-cost airlines can cooperate very successfully in line with the principles set out in the Charleroi decision. Don't forget that most of the aid given to Ryanair was authorised!

But if, for example, Turin or Coventry offered EUR 1 000 off their locally manufactured cars, most people would understand if other car manufacturers complained. Consumers are not yet so ready to accept that same example when it is transferred to the airline sector, because of the traditionally high level of fares of the major carriers. We need to continue with and to advocate competitive solutions across the board. The Commission — don't forget — started the liberalisation of the airline sector some 10 years ago, against the will of governments and the major carriers. We eliminated State aid in the sector. This has made low-cost carriers happy. Our balance sheet in this sector is in fact very positive. And you **can** be a low-cost airline with low fares **without** distorting subsidies.

Who should be your best friends — consumers, lawyers, large business? What is your motto?

We are working to ensure that consumers get the best deal in prices and quality. We are naturally not offering the services but ensuring that we create the level playing field so that companies do this on a fair basis. State aid control does not tackle this problem directly but it tries to create fair competition between firms.

Who are our enemies? Those firms who abuse their market power. Those firms who deliberately restrict competition at the expense of the consumer.

Our friends are those who tell us the truth about what is going on and not simply what their own interest is. As a general rule, consumers will tell us that.

Our motto must be: 'Competition brings consumers better products, better quality and better service at lower prices' …

Interview with Mario Monti

Continued from page 1

The idea is that now that we have a modern antitrust enforcement law, reformed merger control and are completing the review of the rescue and restructuring guidelines, we should also take stock of our policy with regard to abuses of market power.

As you know, there have been quite a few decisions by the Court of First Instance in the last couple of years which have confirmed our approach, most notably with regard to the impact on competition of loyalty rebates and other practices which have the effect of excluding competitors from the market place. I am thinking of our decisions with respect to the rebates granted by French tyre maker Michelin, the generous commissions British Airways used to pay travel agents to encourage them to sell only its flights or the confirmation by the CFI, in the Irish freezer cabinets case, that the provision of an ice cream cabinet free of charge by a dominant manufacturer restricts competition.

So we are quite happy that our approach has been endorsed by the Court. But we have been reviewing the economic approach for Article 81 and it is coherent to do this now also for Article 82. The main idea is to give our officials in the competition department more guidance. Whether we will publish guidelines, similar to what we have done in the merger control field, depends on the results of our review.

How would you describe this Commission's legacy in the competition area?

I am happy that we were able to bring this modernisation programme, in antitrust, in merger control, to a satisfactory conclusion, therefore providing the Commission with mature rules for a mature competition authority. I am proud of leaving a fiercely independent authority that enforces the rules in a fair and objective manner without any consideration for the 'nationality' of the companies concerned or the size of the Member State involved.

I am also proud of another, less well publicised, part of my job, which consisted in closing the loopholes that Member States were quick to use to continue subsidising State-owned companies with little regard to the harm caused to private rivals, including in sectors where they themselves encouraged private enterprise by opening up previously monopolised markets.

In the area of the control of subsidies, I particularly want to stress our long, but successful, fight against State guarantees to the regional banks in Germany, which had the effect of distorting competition with their private rivals by giving them cheaper access to the financial markets.

I have one regret. I regret that consumers do not make their voice heard more loudly and do not make use of their rights more often. We have made some progress. We have increased and improved the channels of communication between them and us and are beginning to see the fruits of our labours, but the real harvest will come later.

State aid control in the growing European Union

State aid control in four questions

What is State aid control?

State aid control aims at preventing that the use of public resources distorts intra-Community competition between firms. Only when the positive effects of aid outweigh the negative ones, may the European Commission allow State aid. For instance, the Commission may approve aid for research and development or for environmental purposes in view of their positive effects.

Why does the Commission deal with some State aid which seems to benefit consumers (e.g. Ryanair) or employees whose job is at stake (e.g. Alstom)?

The Commission's guiding principle is the consumer's overall interest. This requires assessing both the direct and indirect effects of the aid, as well as those immediately apparent and the long-term ones. Often the benefits for consumers are only deceptive or temporary, while harm to EU industry competitiveness and to long-run job creation is permanent, though not always immediately visible. Aid to a company in difficulties may allow it to stay in business, but often at the expenses of competitors who do not benefit from aid and their workers, while the jobs maintained through State aid are often precarious. That is why the Commission will only accept this kind of aid when the long-term viability can be restored. On the other hand, the Commission is very open to aid to help the employees (for example aid for retraining of employees). Aid to develop regional airports and develop new routes can be allowed if it is not excessive so as to hurt other airports and carriers and is applied in a transparent way and is available to all.

Can I as consumer, employee, environmentalist or entrepreneur make my voice heard?

Yes. You can lodge a complaint with the European Commission if you believe that competition is distorted through a State aid measure. A special form and further guidance are available on the website http://europa.eu.int/comm/secretariat_ general/sgb/droit_com/index_en.htm#aides. You can also make your voice heard when the Commission opens a formal investigation procedure. The Commission must always take this procedural step where it has doubts that a State aid can be accepted. A letter will be published in the *Official Journal of the European Union*, explaining the difficulties the Commission has to approve the aid and inviting interested parties to provide comments. The published letters can also be found on the Competition DG website: http://europa.eu.int/comm/competition/state_aid/oj/

My competitor just over the border has to pay a corporate tax which is much lower than what I have to pay. This distorts competition. Can the Commission do something about this?

There are areas where the Commission cannot do anything under State aid rules. For example, differences in the environmental or social requirements across Member States are not considered as State aid — there is no public money involved. The State aid rules are not suited either to address problems of lack of harmonisation at the EU level, such as differences in the corporate tax rates between Member States, if they apply to all enterprises. Sometimes, there may be other possibilities to address this, for example if minimum levels of taxation or environmental standards have been agreed upon at European level, and if that minimum is not respected, the Commission can start an infringement procedure to force the Member State to respect the agreed minimum.

More value for taxpayers' euro

To stimulate less but better targeted State aid, the Commission has introduced new instruments:

- procedural instruments to streamline procedures and simplify the notification process and complaint filing;
- block exemption regulations for employment, training, small and medium-sized enterprises (these greatly reduce the formalities for aid which generally does not pose problems so that more resources can be dedicated to harmful aid measures);
- a scoreboard (this will increase transparency and comparability and you can check how your country is doing): http://europa.eu.int/comm/competition/state_aid/scoreboard/analytical_section.html

Other new or revised instruments in the pipeline comprise a significant impact test for a fast-track assessment of aid measures of lesser concern, a framework on services of general economic interest, the guidelines on rescue and restructuring aid to ailing companies, and the guidelines on regional aid.

Organisational changes have also taken place, to enhance:

- economic analysis, with the appointment of a chief competition economist;
- enforcement of Commission decisions, with the creation of a new specialised unit;
- the role of consumers, with the appointment of a consumer liaison officer (for contact details, please see the box 'Where can I get more information?').

Getting ready for enlargement

The drive for less and better aid also contributes to the preparations for enlargement. In parallel with this drive, the Commission has already taken other steps to get ready for 1 May.

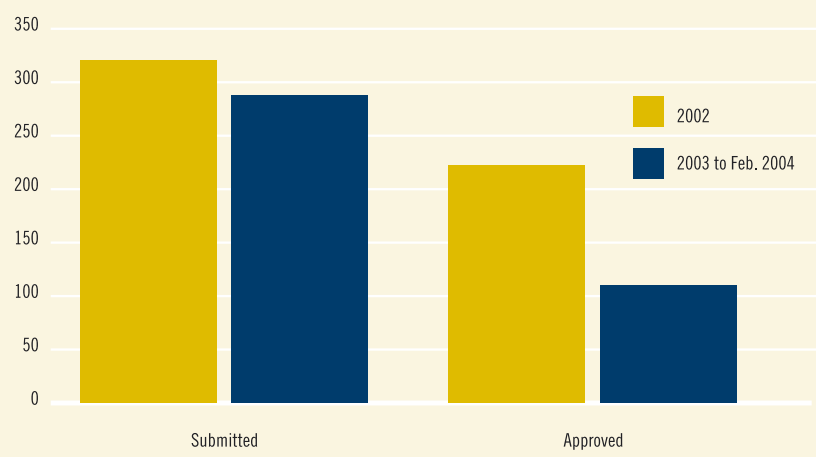
- Special arrangements with the acceding countries have been put in place so that State aid measures are already scrutinised before enlargement (so-called 'existing aid mechanism').
- The Competition DG has also recruited several talented people from the acceding countries to help with the increased workload.

A review of the State aid situation in the new Member States is foreseen for the autumn 2004 edition of the scoreboard.

In order to prevent incompatible aid from being 'imported' into the EU on the date of accession, a system was set up for examining measures which were put into effect in the acceding countries before 1 May 2004 and are still applicable after that date. The mechanism is also aimed at providing the acceding countries with guidance and the economic operators with legal certainty as regards State aid measures that are applicable after the date of accession. If a measure is qualified as 'existing aid', it benefits from a special protection against actions from the Commission.

In a first phase until 2002, 222 measures (representing about 70 % of those submitted) have been accepted by the Commission and the present Member States for inclusion in the Accession Treaty. From the beginning of 2003 until the end of February 2004, the Competition DG received a further 288 measures from the acceding countries. Almost 40 % of them were approved by the Commission, and about 60 % are still under assessment, given their recent submission or because of being modified by the acceding countries. For those measures that will remain incompatible with the EU standards, the Commission will start formal proceedings with a view to deciding whether they need to be halted.

State aid in the acceding countries



WHERE CAN I GET MORE INFORMATION?

On the Internet

On our website (http://europa.eu.int/comm/competition/index_en.html) you will find information about our policy areas as well as addresses of national competition authorities, links to legislation, publications, speeches, press releases and other documents.

Should you wish to contact us, our mailbox is available to you (infocomp@cec.eu.int).

For consumer related queries or questions please send an e-mail to our consumer liaison officer (COMP-CONSUMER-OFFICER@cec.eu.int).

General information on EU policies can be found on the Europa server (http://europa.eu.int/index_en.htm).

For general questions on Community policies and activities, you may contact the Commission's call centre, Europe Direct (http://europa.eu.int/europedirect/index_en.htm).

Publications on paper

Official Journal of the European Union

General Report on the Activities of the European Union

Annual competition policy report

These publications are on sale from the:

Office for Official Publications of the European Communities
L-2985 Luxembourg

The Directorate-General for Competition also publishes free publications, such as the *Competition policy newsletter*, and the brochure *Competition policy in Europe and the citizen*, which are normally available from Info Points and representations.

See also http://europa.eu.int/comm/competition/publications/

Competition policy newsletter

Published three times a year. Contains articles with detailed information about recent events in competition policy
http://europa.eu.int/comm/competition/publications/cpn/

Speeches

http://europa.eu.int/comm/competition/speeches/

Press releases

http://europa.eu.int/comm/competition/press_releases/

Address

European Commission
Directorate-General for Competition
B-1049 Brussels
Tel. (32-2) 29-91111

Our offices are located at:
Rue Joseph II 70/Jozef II straat 70
B-1000 Brussels

National competition authorities

For contact information, see
http://europa.eu.int/comm/competition/national_authorities/

© European Communities, 2004 — Reproduction is authorised, except for commercial purposes, provided the source is acknowledged.

Publications Office
Publications.eu.int

KD-AB-04-S01-EN-C