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European Competition for the 21st Century

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European Competition for the 21st Century

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Abstract

This speech discusses recent policy developments and future trends in European Competition Policy.

EUROPEAN COMMUNITY COMPETITION LAW

EUROPEAN COMPETITION FOR THE 21ST CENTURY

*Mario Monti**

INTRODUCTION

It is a great pleasure to address this distinguished forum at Fordham University School of Law and to be given the opportunity to share with you some thoughts on recent policy developments and future trends in European Competition Policy.

I. *COMPETITION POLICY IN AN INTEGRATING CONTINENTAL ECONOMY*

A. *Integration and Competition: The Challenges*

Let me start with some reflections on the broad context in which Competition policy operates in Europe.

As you are aware, Competition policy is one of the major pillars on which the action of the European Union ("Union") in the economic field rests. The Union has similarly broad supra-national powers only in trade policy and, more recently, since the creation of the European Central Bank, in monetary policy.

The Union, and in particular the European Commission ("Commission"), has been assigned such broad powers in the competition field in order to ensure application of the principle, enshrined in the European Community Treaty ("EC Treaty"),¹

* Member, European Commission, Brussels. This Essay is the result of a speech given at the Twenty-eighth Annual Conference on International Antitrust Law and Policy, sponsored by the Fordham Corporate Law Institute, New York, New York, U.S.A., Oct. 20, 2000.

1. Treaty establishing the European Community, Feb. 7, 1992, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573, art. 4 [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and the Treaty

of “an open market economy with free competition.” Since its adoption over forty years ago, the EC Treaty acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, encouraging the optimal allocation of resources, and granting economic agents the appropriate incentives to pursue productive efficiency, quality, and innovation.

Personally, I believe that this principle of an open market economy does not imply an attitude of unconditional faith with respect to the operation of market mechanisms. On the contrary, it requires a serious commitment—as well as self-restraint—by public powers, aimed at preserving those mechanisms. An open market economy can only be effectively maintained by preventing collusive agreements between firms or abuses of a dominant position, by ensuring competitive market structures through merger control, and by abolishing unjustified State subsidies that distort competition by artificially keeping non-viable firms in business.

I consider all these legal instruments—antitrust rules, merger control, and State aid provisions—as different tools at our disposal to achieve a single aim: to maintain a vibrant and competitive economy in Europe. The modernization of our economy, as underlined by the European Heads of State and Governments in the Lisbon summit last spring, requires speeding up the processes of liberalization and structural reforms in order to make our markets function smoothly. As Commissioner in charge of Competition Policy, I am determined to contribute to this aim through a strict application of all the legal tools under my responsibility.

The combination of liberalization processes and strict enforcement of competition rules indeed brings benefits to European consumers. For example: thanks to liberalization and competition, residential telephone tariffs for international calls fell, on average, by forty percent between 1997 and 1999 in most Member States. Not only did competition result at lower prices; it also gave rise to a considerable increase in the supply of new and efficient services. I do not believe that these developments are the natural and inevitable consequence of technological development. Rather, I am convinced that without a firm liberaliz-

establishing the European Atomic Energy Community (“Euratom Treaty”) and renumbering articles of TEU and EC Treaty).

ing attitude and the careful scrutiny of these processes, we would not have achieved such downward pressure on tariffs, or such upward growth in quality, variety, and innovation.

Competition policy is also strictly connected with another of the fundamental objectives of the EC Treaty, namely the creation of the Single Market. After having painstakingly dismantled the barriers to trade represented by the national laws and regulations, we must be watchful for them not to be replaced by market segmentations introduced by firms.

In my first term of office, over the last five years, as Commissioner for the Single Market, I have been deeply committed to pursuing State measures that prevented the Single Market from becoming a reality. Now, my attention has turned to the practices of economic operators—or of Member States themselves, in the area of State Aids—that have the same effect or distort the functioning of the single market in those sectors where it already has been or it is being achieved.

To give you a concrete example, having overseen the removal of any of the State barriers that stood in the way of consumers wishing to purchase a motorcar in the Member State of their choice, I am not amused to find that some car producers have been seeking to prevent such transactions by way of agreement with their distributors. The Commission has already imposed substantial fines on car producers engaging in such practices (e.g., Opel, Volkswagen) and is presently investigating several others. The elimination of the practices by firms that prevent the Single Market from becoming a reality continues to be one of my main goals.

B. Modernizing the Tools

In order to contribute efficiently to achieve the goals I have mentioned—in a nutshell, to ensure competitive and integrated markets in Europe—we need effective tools. The Commission has recently devoted particular efforts to modernize the legal instruments that constitute the basis of our competition policy.

On September 27, 2000, the Commission adopted a proposal for a regulation designed to modernize the rules implementing the antitrust provisions (Articles 81 and 82) of the EC

Treaty.² I consider this to be the most important legislative initiative in Europe in the competition field since the adoption of the Merger Regulation in 1989. It will change radically the way antitrust rules are enforced. It will allow the Commission to focus on the most serious infringements and, in my view, to greatly facilitate the strengthening of a common competition culture in the Union.

I am pleased to note that this proposal is the topic of the following session of this conference and, therefore, I will not devote more time to this matter. I am sure that the presentation of the proposal by Mr. Wils, from our Legal Service, will address all the questions you might have about our ideas in this area.

Clarification and review of the substantive rules is also an essential pillar in the overall reform process. The review is aimed at simplifying the rules and reducing the regulatory burden for companies, especially companies lacking market power, while ensuring a more effective control over agreements implemented by companies holding significant market power. We have recently completed work in the field of vertical agreements with the adoption of a new block exemption regulation and guidelines concerning distribution.

This issue was the subject of a roundtable discussion yesterday afternoon, where Director General Alex Schaub developed in-depth the rationale and aims behind our reforms.

In the area of horizontal agreements, the Commission has proposed revised block exemption regulations for Research and Development ("R&D") agreements and Specialization agreements. These regulations are complemented by draft guidelines on the applicability of Article 81 to horizontal cooperation agreements. The draft horizontal guidelines recognizes that companies need to respond to increasing competitive pressure and a changing market place driven by globalization, the speed of technological progress, and the generally more dynamic nature of markets. Cooperation can often be a way to share risk,

2. Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation Implementing Articles 81 and 82 of the Treaty"), COM(2000)582final, available at http://europa.eu.int/comm/competition/antitrust/others/modernisation/comm_2000_582/en.pdf.

save costs, pool know-how, and launch innovation more quickly. We plan to adopt all these texts before the end of this year.

Antitrust is not the only area where we need to adapt our instruments to the changing environment. Merger control, by now a well-established pillar of competition law, also needs to be kept up to date in order to cope with the ever-increasing number and complexity of cases. It is for this reason that we launched the *Merger Review 2000* in June of this year. The Commission then issued a report on turnover criteria and thresholds that divide the Commission's competence in merger control from that of the national authorities of the Member States. The Commission is currently examining the conclusions to be drawn from this report and widening the reflection to other aspects of our Merger procedures.

I should also mention that last July the Commission approved a notice establishing a simplified procedure for certain categories of merger cases that do not raise material competition problems and can be authorized without an in-depth investigation. This is the case, for example, where the parties' activities do not overlap in the same market or where their combined market share is below fifteen percent. We also plan to publish a notice clarifying our practice in relation to remedies before the end of the year.

In the area of State aids, the entry into force, in 1999, of the procedural regulation was an important achievement. This regulation codifies, for the first time, the procedural rules and makes them transparent, thereby increasing legal certainty. The Commission can now force Member States to require interim recovery of illegally granted aid. It also sets time limits for State aid decisions.

We are also preparing other improvements in State aid rules, such as Block Exemption Regulations, a public register and a Scoreboard, that will trace the performance of each Member State in this field, thus adding peer pressure to the legal enforcement instruments.

Finally, let me also stress that the Commission is paying great attention to the competition aspects of the next enlargement of the Union. We cannot afford an enlargement that would unbalance the equilibrium in terms of State aid or competitiveness. For this reason, we are also devoting substantial ef-

forts to the cooperation with the candidate countries and to make sure that the same rules will apply with equal efficiency all across an enlarged Union.

II. *THE NEW ECONOMY AND COMPETITION: MONITORING A POTENTIAL ALLY*

These processes of modernizing our legislative and interpretative rules aim to keep up with the pace of economic and technological development in the twenty-first century. The basic principles, however, will not change. I believe that the fundamental goals of competition policy are relevant both to the old and new economy: to the “bricks and mortar” as well as to the “clicks and portal” sectors.

Actually, I see the new economy as a strong potential ally for competition. The Internet and other quickly developing information technologies can bring substantial doses of transparency to the markets, thus making them more efficient. They can also contribute to the integration of markets, by facilitating the contracts between suppliers and customers, thus making location of companies a much less relevant factor for competition.

The constant reallocation of resources from the declining firms or sectors to the emerging and fast growing ones is a corollary of a well-functioning market economy. In the realm of the “new economy,” this process has become extremely rapid. It is of paramount importance not to hinder this reallocation and to allow transformation and restructuring to take place in a non-traumatic way, through mergers, acquisitions, and joint ventures.

This process, however, is not without its dangers. Cooperation between companies can sometimes lead to anticompetitive outcomes. Mergers may result in a market structure that is too concentrated with poorer choices for the consumer and greater scope for collusion between the few remaining producers. Our task is to favor the transition towards new and more efficient market equilibrium while, at the same time, preserving the competitive environment. In a nutshell, the role of the competition authorities towards the new economy is to monitor a potential ally.

Some commentators have argued that in high technology markets there are often no real concerns of long-term dominance, due to quickly eroding entry barriers and that, therefore,

competition policy only has a very limited role to play in these markets.

I would caution against such an approach. Even temporary market power can be a serious concern, particularly when it may have a negative impact on the levels of innovation and consumer choice in a given market.

Other commentators consider that the uncertainties surrounding the future developments of new economy markets and the complexities associated with these sectors should discourage competition authorities from even trying to intervene.

I cannot share this approach either. I acknowledge the difficulties linked to the assessment of cases in markets under quick development. But our duty is to foresee as best as we can the consequences of a given operation and to react to it if it is likely to create competition concerns. Complexity or uncertainty should not be reasons not to act when the interests of the consumers are at stake.

Let me turn now to explain some of our recent cases, which will show the type of concerns for competition that can derive from the developments linked to the new economy. I believe they will also illustrate how the basic principles of competition rules adapt to changing markets and industries.

In new economy sectors, where access to networks is essential to be able to provide a wide range of services, "gatekeeper" effects can become a major concern. I refer, by this term, to situations where a company is in control of an infrastructure that is essential for other players to develop their business and to innovate.

Gatekeeper effects can occur as a result of both horizontal and vertical operations. In the first case, normally the merger between two network operators leads, through the addition of their assets, to the creation of a facility of such a nature that cannot be replicated by competitors.

Let me give you some examples of recent cases of this nature: one concerns a European and another a worldwide market.

First, the Vodafone/Mannesmann transaction raised competition concerns on the emerging market for pan-European seamless mobile telephony services. The merged company, with its extensive network, would be in a unique position vis-à-vis its

competitors to roll out such services. In order to remedy these concerns, Vodafone agreed to give competitors non-discriminatory access to its integrated network. However, in order to ensure that competitors would not exclusively rely on the merged company and thereby neglecting the development of their own infrastructure, the Commission limited the undertaking to three years. The Commission considered, *inter alia*, that in this period, Universal Mobile Telecommunications System (“UMTS”) licenses would be awarded in sufficient number to allow competitors to replicate the Vodafone network.

Second, in June of this year, the Commission prohibited the merger between the two U.S. communications companies, MCI WorldCom and Sprint. It found that the combination of the parties’ extensive Internet networks and large customer bases would allow the merged entity to dictate terms and conditions for access to its Internet networks in a manner that could have significant anticompetitive effects and hinder innovation. The Commission’s investigation, which was carried out in close cooperation with antitrust authorities in the United States, showed that, despite liberalization, regional and local providers are still dependent on the largest top-level providers to gain full and effective access to the Internet.

I have indicated that gatekeeper effects can also arise as a result of vertical operations; in other words, performances between companies operating in related upstream or downstream markets. In these cases, foreclosure concerns are likely to arise only where one of the merging parties enjoys significant market power. Mergers in the media sector, between content providers and delivery operators, can lead to such concerns.

Let me comment, in this regard, on two cases in which the Commission has very recently adopted a decision.

First, on October 11, 2000, the Commission approved the proposed merger between America Online Inc. (“AOL”) and Time Warner Inc. (“TW”) after AOL offered to sever all structural links with German media group Bertelsmann AG.

In this case, the Commission was concerned that AOL, because of its merger with TW, who in turn had planned to merge its music recording and publishing activities with EMI, and because of its European joint ventures with Bertelsmann, would have controlled the leading source of music publishing rights in

Europe. The three companies (TW, EMI, and Bertelsmann) together would hold approximately fifty percent of the music publishing rights in Europe. Against this background, AOL could have emerged as the gatekeeper in the emerging market for Internet music delivery on-line.

The proposed undertakings, and the fact that the EMI/TW deal did not take place, will prevent AOL from having access to Europe's leading source of music publishing rights. In view of these facts, the Commission could approve the operation.

Secondly, on October 13, 2000, the Commission approved the acquisition by French telecommunications and media company Vivendi and its subsidiary Canal+ of Canada's Seagram.

The Commission was concerned that the deal would give Vivendi/Canal+ preferential or even exclusive access to Universal films' rights and, therefore, create or strengthen its existing dominant position in pay-television in a substantial number of countries.

The parties offered substantial undertakings to address the competition problems. They agreed not to grant Canal+ first window rights for more than a certain percentage of Universal production. But, most notably, they also agreed to divest their stake in the British pay-TV company BskyB. This will enable BskyB to be an independent competitor to Canal+ and, at the same time, sever any links between Universal and Fox Studios, another major film producer controlled by the BskyB group.

You can see a certain pattern emerging from all these cases. First, the Commission has taken action each time that it has identified that a gatekeeper concern was likely to arise in the short or the medium term. In most cases, however, the problems could be limited in time or scope and solutions have been found through granting access to competitors. When, however, the problem could not be resolved, like in MCI-Worldcom/Sprint, a prohibition was the only possible outcome.

I would also like to point out that the Commission has also insisted on eliminating minority shareholdings or links between competitors that could prevent effective competition in certain markets. We did so in Vivendi/Seagram, by eliminating the shareholding in BskyB, and in AOL/Time Warner, by severing the link with Bertelsmann. This is an issue, however, that goes beyond new economy cases and to which I attach much impor-

tance. Let me also mention the case Generali/INA, where approval was conditioned on the elimination of minority shareholding in competing insurance undertakings and another case, Renault/Volvo, that was cleared only when the latter agreed to sell the minority stake it had bought in Scania, its major competitor in the Nordic Countries.

As I have already said, the new economy is not only a source of new anti-competitive concerns but also creates the conditions for several types of cooperation between companies that can lead to efficiencies and advantages to consumers. Competition policy should also adapt to recognize such advantages and, therefore, not oppose these types of deals.

As a general rule, for instance, the Commission takes a positive approach towards R&D agreements between competitors, provided that they do not have significant market power on existing markets and there is no significant reduction in innovation. The Commission, however, has sometimes also authorized agreements between competitors where considerable market power is created or increased by the cooperation, provided that the parties can demonstrate significant benefits in carrying out the R&D, a quicker launch of new products/technology, or other efficiencies.

Cooperation to create and develop web-based business-to-business ("B2B") trading and B2B electronic market places is also, in principle, expected to be a source of substantial efficiencies. They allow a reduction in transaction costs and they increase market transparency. The fact that these exchanges try to sign up as many industry players as possible does not create a competition problem in itself. As in the case of stock exchanges, the efficiency of a B2B electronic market place may increase with the number of users.

But there are, of course, issues that could raise concerns for a competition authority. These systems, for instance, can be used to exclude individual companies from the virtual market place or to allow some participants to impose joint purchasing or joint selling to others.

The Commission is following closely the current developments in this area. So far, only a few cases have been formally notified to the Commission; others are in informal discussions with my services. We will need to analyze carefully the workings

of any proposed B2B trading system and its effects on the market.

I hope that these few examples have been sufficient to illustrate my firm belief that competition policy remains essential in the new economy and to show how our instruments can adapt to new market situations.

III. *COMPETITION AUTHORITIES AND THE GOVERNANCE OF GLOBALISATION*

Let me turn now to another market development—the increasing internationalization of our economies—that creates very important challenges to antitrust authorities around the world.

Indeed, competition law enforcement is taking on an increasingly international dimension: antitrust agencies all over the world are finding that the consumers whom they are mandated to protect, are being adversely affected by anticompetitive behavior taking place outside of their jurisdiction.

This trend also has practical consequences for companies operating internationally. The burdens (including filing requirements and fees) associated with merger control compliance, particularly on firms seeking clearance for transnational deals, have grown dramatically over the past decade and continue to escalate as more jurisdictions enact merger control legislation. I am also very conscious of the consequently increased risk of inconsistency between the decisions taken in different jurisdictions.

A. *Bilateral Cooperation*

In response to these challenges, the Commission has adopted a dual approach. First, and foremost, we are developing bilateral relations with the competition authorities of the Union's major trading partners.

In this regard, special tribute should be paid to the notable success of cooperation between the Union and the United States, based on the agreements of 1991 and 1998. Indeed, my services are in daily contact with their counterparts at the U.S. Department of Justice and Federal Trade Commission. And I have been enjoying the quality of the cooperative relationship with Assistant Attorney General Joel Klein—and now, I am sure,

with Doug Melamed—as well as with Chairman Robert Pitofsky. As a result, the risk of conflicting or inconsistent rulings has been very much reduced: the approach of the United States and Union authorities in the MCI Worldcom/Sprint case that I mentioned before is one concrete example of this close cooperation.

The Commission intends to further develop its bilateral cooperation with foreign antitrust agencies. Last year, a cooperation agreement between the Union and Canada entered into force. In July of this year, we reached a mutual understanding with Japan on the substantial elements of a similar agreement.

B. Multilateral Cooperation

Secondly, we have always believed that multilateral efforts are necessary to ensure convergence and coordination between the vast numbers of competition enforcement systems around the world. It is widely known that the Commission has been very active in ongoing efforts, in Organization for Economic Cooperation and Development (“OECD”) working parties and other multilateral venues, to achieve cooperation among antitrust enforcement authorities. It was an initiative from my predecessor as Competition Commissioner, Karel Van Miert, which helped the World Trade Organization (“WTO”) to create a Competition Working Group.

Since our first proposals in 1996, we have pioneered this idea and have actively proposed the negotiation of a Multilateral Framework Agreement on Competition Policy in the WTO. Such a framework would include core principles on competition law and would serve to underpin the impressive progress that has been made in trade liberalization over the past few decades, by ensuring that governmental barriers to trade are not replaced by private ones that have the same effect.

On the other hand, it is beyond any doubt very valuable to envisage some kind of international venue to discuss among interested competition authorities—including ones from developing countries and countries in transition—more complex competition issues.

Against this background, I was particularly pleased by the announcement made in Brussels last month by former Assistant Attorney General Joel Klein and the articulated proposal presented yesterday by Acting Assistant Attorney General Doug

Melamed. An opening to multilateralism in competition matters beyond the OECD by such authoritative individuals is a very important development that we appreciate as a constructive step.

We are currently examining a number of different options regarding the best format and venue for such an event, the issues that will be put on the table, and the authorities that will be invited to participate. We welcome constructive ideas from the United States and other like-minded competition authorities and I can assure you that we are prepared to consider them with an open and constructive mind.

CONCLUSION

Consumers and companies alike are increasingly citizens of a globalized economy. We, the competition authorities, have the increasingly difficult mission of ensuring that the integrating markets are made and maintained competitive, thus making the globalization process both economically more efficient and socially more acceptable.

This requires each competition authority, and all of us collectively, to globalize our thinking first, then our basic approaches, and perhaps one day our instruments. In my view, our institutions represent that sort of market friendly strong public powers that are called upon to provide a pragmatic example of effective response of international governance to the integration of markets.

In the Union, the Commission and the national competition authorities are determined to operate more and more as a network, in order to fully achieve this aim in today's and tomorrow's enlarged Union. With this tradition in our genetic code, and with the experience of forging and applying competition rules in a set of integrating economies for over forty years, the Commission can only be a convinced, and I hope, a convincing, advocate of a global effort to meet—or, I would prefer, to anticipate—the challenges ahead of us all.