

COMPETITION POLICY CHALLENGES IN EUROPE

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Well, thank you very much for your introduction, Jim. It's my job to propose to Neelie Kroes, European Commissioner for Competition to decide, having listened very carefully to debates about how to apply EU competition rules, and about the historical evolution of our case law, what we do next. Of course, all this is somewhat confused by the fact that case law is usually related to decisions taken some years ago. Apart from the *Energias de Portugal* ("EDP") case, which is going to be decided by the European Court of First Instance ("CFI") tomorrow, and *GE/Honeywell*, which I hope will follow, European case law relates to decisions taken by the Commission some years ago. Therefore, I just want to sound a warning that the references to decisions such as *Michelin II* take the current Commission administration back in time and in their philosophy to a period where policy was different. I think that we have to just accept that. So when *The Financial Times* writes in relation to a recent court decision "this is another stinging defeat for the European Commission's policy," it was again related to a case which was decided four or five years ago and frankly does not reflect what we have been trying to move towards in terms of our organization and our policy since then.

I want to start by briefly going through a series of slides, to explain what our current policy priorities are under Neelie Kroes' leadership. The backdrop for the way in which we are approaching the revision of policies is the need for greater transparency, and predictability through guidelines while at the same time, a more economic approach. There is tension between these objectives as you have all emphasized. The more predictability you want, the less likely it is that you can avoid bright lines and per se rules, which make presumptions about effects which, ultimately, speaking, in an economics approach, you would investigate before you came to a view about them. And one of the frustrating things about a complete rule of reason approach is, of course, that it doesn't help you in terms of you giving predictability to the firms who may be subject to your jurisdiction.

I personally believe, in the area of Article 82, that it should be possible for the European Commission to set down in guidelines, at least the methodology of approach to problems of monopoly abuse, even if it is not in a position to advance precise theories of harm to competition. And the very dangerous thing about per se approaches, which are sometimes restrictive in the sense that they assume there is a problem, is that they are also matched by per se approaches in other areas where it is assumed without

investigation that there is no problem. In an “effects-based” approach, a credible per se rule should mean “this practice or structure is so obviously bad for consumers that we don’t want to investigate it. It’s a waste of time to investigate it.” But sometimes per se rules are adopted to avoid investigations which could lead to unpredictable results. We want to avoid being biased from the beginning in our analysis.

We have oriented the work of DG Competition in the last three years in relation to the objectives, which Jim has quoted from Tim Muris: facts-based standards, with a premium placed on market knowledge and awareness. Applying the antitrust rules is, of course, not necessarily the only answer to a competition problem. In a number of industries and sectors, we have to face the reality that governments have chosen not to use antitrust rules to solve competition problems. Throughout the world, public utilities have been brought into a market economy framework but the newly liberalized companies which have emerged from this process are controlled not only by antitrust agencies but also by sectoral regulators. In Europe, we’ve got twenty-five energy regulators, we’ve got twenty-five financial services regulators, and we’ve got twenty-five telecom regulators. I believe that in the U.S. there are certain agencies also who have jurisdiction on the behavior of dominant incumbent firms—firms with market power. This emphasis on sectoral regulation reflects a fundamental distrust that ex post control of the conduct of large firms in a post-liberalization situation is not enough. That continues to be the reality in many jurisdictions. Antitrust rules are applied alongside ex ante regulation as well as ex ante or ex post intervention of the regulators. That panoply of possibilities is something which we should be conscious of as competition agencies in terms of cost effectiveness of the solutions which we can offer.

In our own jurisdiction we also have the capacity to intervene to control the state aids which some of our companies receive. Debbie Majoras also talked about state impediment this morning. We’ve been very much involved in similar work in the area of liberal professions. But our approach on control of funding from public sources to companies is very much linked, again, to taking a comprehensive view as to how competition can take place on the merits in the best way possible with the least intervention—the least intervention from government and with the least necessity for legislation to regulate the market.

I am making here a long speech about what our objectives are and how we are reorganizing our work to meet them. About why we’ve reorganized ourselves on sectoral lines to develop our market knowledge and our dialogue with each of the business sectors. About why we’ve now got a Chief Economist to intervene in the work of our interdisciplinary teams, to make sure that our theories are robust and that they are very viable. About why

we have installed peer review panels systematically to test the robustness of our legal and economic argumentation. We nevertheless have to decide where our enforcement priorities are, and where our policy should be. Neelie Kroes has, over the last year, put a great deal more weight on the attack on cartels, which you might say is the most obvious area where there should be convergence between the U.S. and the EU, and other jurisdictions. Cartels constitute the greatest potential for harm to the competitive process and to consumer welfare. It is very clear that we are on the same track as the U.S. in this field. However, there are elements of divergence for example, on sanctions policy, which continue to need further study and further work between us.

As to the way in which we should tackle competition problems, notwithstanding enforcement of the antitrust rules, we've taken the new power under our new Regulation 1/2003 to initiate sectoral enquiries. These enquiries do not allow us to impose remedies. But they give us the investigatory powers to examine whether or not regulatory barriers or anti-competitive conduct or structures, need to be addressed. That's what we are doing in the energy and the financial services sectors.

Thirdly, Neelie Kroes has put emphasis on our role inside the Commission in ensuring that when legislation is proposed by other departments of government in transportation or in financial services or elsewhere—that we intervene upfront to ensure that the action proposed by the Commission or national authorities does not result in government failure, but a pro-competitive result.

On the cartel side, I think it's fair to say that the creation of a dedicated cartel directorate with around sixty people in it is a major step forward. Kirti Mehta, one of our present sectoral directors, has been drafted in to take over the new cartels directorate from the first of October. So now it is clear who is the Commission's interlocutor with other agencies in the fight against cartels. We also have to see whether we can improve our cartel procedures. In 2005 we are roughly doubling the number of Statements of Objections ("SO") and decisions adopted compared with last year. We had twenty-nine leniency applications last year and we've had about twenty this year. When I talk about doubling the number of SO's and decisions, I'm not talking for the moment about going out and finding more cartels. I'm talking about simply dealing with the immunity and leniency applications we have on file. We will improve things by the end of the year. But there will still be a backlog, unless we can find further ways to streamline our anti-cartel decision-making, for example by negotiated settlements, broadly along the lines of plea bargaining. We need to move away from the present situation where any cartel decision taken by the Commission is followed immediately by procedures before the Court in Luxembourg. This is a very

lengthy process, which is very heavy on resources and prevents us tackling new cartels.

International cooperation is also essential in this area. It is held up, however, by lack of convergence on sanctions. And the lack of convergence on sanctions influences information exchange. Inside Europe alone, we still haven't got a "one-stop shop" for leniency. We need that. But we can't assume that every cartel which is detected in more than one Member State should be dealt with by the European Commission. Firms should be able to apply to any of the twenty-six competition authorities in the European Union without the need for parallel applications in all other Member States or with the Commission. We aim to come up with proposals in this area. And on the question of sanctions, we are barraged by agencies who tell us that the only way to stop cartels is to lock people up. Now, I am pretty sure that this is a quite an effective way to deter the cartels. However, we have to face the reality that the Commission, as a European institution, and a supranational body would not find it easy to move towards a régime of criminal sanctions. We require a degree of consensus and understanding within Member States about the relationship between antitrust law and the criminal justice system. We also need consensus on the implications which an anti-cartel decision from the Commission would have for the possibility of imposing criminal sanctions at national level. I think we'll get somewhere on these issues but that's going to take us not just into 2006 but also 2007 and 2008.

On the sectoral inquiries, you can imagine that the EU which wanted the benefits of liberalization of the energy sector, has been concerned to discover that fuel prices have been rising and not falling but more worryingly that national energy markets still prevail, because of significant barriers to entry, due either to the way in which networks are managed or to the way in which firms behave on national markets. We are very keen to contribute to the debates at ministerial level on how these problems should be tackled. Some of the answers may come through regulation. Some may come through applying the competition rules. In the area of financial services, the lack of competitiveness in this sector in the EU accounts for half the difference between the overall competitiveness of the U.S. economy and the competitiveness of the European economies. The other half, by the way, is accounted for by retail distribution. Our payments systems are certainly not European and the transparency of charging in our retail banking area is certainly very suspect. In the area of insurance we believe the distribution structures—covering in particular insurance for small business—are very, very rigid and monopolistic.

I said earlier that in applying Article 82 of the EC Treaty we have to find the right balance between providing predictability and guaranteeing

that the analysis we carry out is based upon robust economic theory, which has sufficient evidence behind it to guarantee that we do not fall into type 1 or type 2 error. In that sense, I fully commend the evolution in the thinking of the European Courts. I think previous panels have referred to the *Tetra Laval* judgment of the European Court of Justice. I personally think that the *Tetra Laval* Court of Justice judgment constitutes very, very sound reasoning on the sort of evidence which the Commission should put up and the relation of that evidence to the theories which it advances. The Court's basic tenet is that the more ambitious and complex your theory, the more evidence you need to bring in support of it. That is something, which in Neelie Kroes' view is essential. I do believe that we will have to take a view after the recent consultation process as to whether what we now describe as guidance or discussion papers on Article 82 has found the right balance. Do they actually give us sufficient value-added to call them guidelines? I think we are going to find the answer is probably "yes." We are carrying out extensive consultations, not just with academic advisory groups but also—and this is crucial—within the network of European competition authorities. It is no good us having a control of the conduct of companies in Europe by the twenty-six competition agencies unless we develop a consistent approach across Europe based upon European law. It would not make sense in any case, because so many of the markets concerned are not defined at national but at European level. So we must develop a systematic and transparent framework for treatment of monopoly abuse across Europe. In the end, whether there are guidelines or not is the decision of the college of Commissioners. The same is true, by the way of guidelines on vertical and conglomerate mergers. I think that these latter guidelines are also works-in-progress for 2006. It is a complex subject and it does need to be educated by case law. But the courts are expecting the Commission to develop policy. They are expecting us to come up with a rigorous analysis, legal and economic, of situations and behaviors. And we cannot be prisoners to case law which does not reflect the realities of the market. If case law no longer reflects those realities, we have to try to influence the court to take that into account in future judgments. So my conclusion, Jim, is that we're going on with our development of policy in this area. We are not unaware of the difficulties, but we have to decide what the most appropriate balance in our policy is. I firmly believe that an administration must have the capacity to carry out rigorous analysis of cases and assess what solutions are proportionate to the problems. But it must not be too ambitious about its antitrust role if it believes that there are other ways of achieving the same results through other instruments such as negotiation. It must also be mindful that whatever it proposes it has to be economically and legally robust in front of the Courts. And finally, its action has to be accepted by the business com-

munity itself as the most cost-effective way of dealing with the competition problems concerned. Thank you very much.