

KEYNOTE ADDRESS

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Good morning everyone. I should begin by conveying Neelie Kroes' sincere apology for not being here today. Her loss, of course, is my gain in being able to participate in this conference again with you. As far as we are concerned, this has become one of the major annual antitrust events, and it's my pleasure to address such a distinguished audience of experts here.

I'd like to say a few words about the first agenda point, which is also a matter of debate in Europe: the evidentiary standards in merger review. The European courts have subjective competition decisions, and merger decisions have been subjected to an increasingly sophisticated level of review.

This is a welcome, sometimes painful, but also challenging development—challenging for not only the Commission, but also for parties and third parties. I think the Commission is progressively rising to that challenge ever since the merger regulation was enacted in 1989. We've striven for constant improvement in our working methods. This drive to improve has not let up. In fact, it's accentuated and we have—as you know—three years ago appointed for the first time a Chief Competition Economist, Lars-Hendrik Röller, who will be here today. I don't see his happy face, but he will be arriving, and as you may know, 10 days ago his successor, Damien Neven, took up his post and is already operational in our daily work.

That chief economist, together with his team of IO economists reinforces the expertise of our investigations which are based upon multidisciplinary themes. But from the beginning of the reforms in 2002, we also established a number of internal scrutiny procedures, in particular, clear review panels for all significant cases where fresh pairs of eyes look at the facts and analysis before any final, or sometimes any immediate conclusions, are reached. That procedure is alive and well today. For example, we have utilized it on three major cases in the last four days. It is a resource-intensive exercise, but an important exercise to ensure that the internal scrutiny is as strong, if not stronger, than the external scrutiny. Of course, that applies not only on its use of substance, but also on its use of due process.

I'm delighted too that following the departure of one of my eminent colleagues, my Deputy Director General for Mergers Götz Drauz, we now have appointed a successor: Nadia Calviño. As some of you from in-house counsel know, she has been the head of the Spanish Competition Service. She is an outstanding addition to our team. And I must say that the fact that

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I am here today is partly because I have full confidence that Nadia, alongside Mary Cruz, a real regiment of women around me at the moment, are quite able to handle things on the important cases which we're looking at. It's important to remember that in the EU, unlike the US, our system requires each and every merger notification to result in a recent decision. And all these decisions can be challenged in court both by merging parties and by third parties.

A recent judgment on the Sony-BMG decision is a good example. We authorized the creation of the joint venture Sony-BMG, combining the two recording music divisions of Sony in July 2004. Impala, an association representing independent labels, challenged the decision. In its judgment, the court examined the decision in detail and criticized us on a number of points, including the reasoning of the decision and how the Commission used the data submitted by merging companies. And of course the decision stressed that we had entered into a U-turn, compared with our original statement of objections—which we failed to fully justify in the final decision.

The court examined our decision in detail and the judgment confirms, once again, that the weight of the arguments and evidence needed to authorize the merger must be as strong and as convincing as those needed to prohibit it. Put in policy terms, and I'm talking about European policy, this means that under-enforcement of the competition rules is perceived to be just as concerning as over-enforcement. So for the Commission, the challenge is an ongoing one, to collect relevant data and evidence in relation to alternative theories of competition, to market test those theories, and to deliver a sound and reasonable decision—all within the still tight deadlines of the merger regulation. This is a challenge the Commission is committed to meet.

Naturally, when we review the merger regulation again, there will be an opportunity to review the issue of the dissymmetry between the facts and arguments necessary to prohibit, in relation to the facts and arguments necessary to authorize. However, in my view, this is inevitably linked to the more institutional issue of the fundamental nature of the EU process. The alternatives are, in particular, for a prosecutorial system where the Commission acts more as a US prosecutor, and for the decision-making powers to be shared with the courts. Now that is a model which has been rejected so far in Europe and I believe it is a model that doesn't get any consensus among our governments and our business and legal communities. We therefore believe that, for the time being, we should meet the new standards which the court has reminded us of.

Let me turn to another issue in relation to EU merger policy: the recent discussion on protectionism in Europe. Cross-border mergers are increasing common in the EU, particularly in sectors which have recently been liberalized. That's welcome in development, as possible mergers in sectors which are characterized by the presence of large national incumbents tend to be

more procompetitive than mergers between national players in the same sectors. And we expressed our concern of the recent interventions of national governments in relation to some of these transactions. Both our antitrust rules and our internal market rules clearly forbid unjustified measures by national governments to prevent cross-border mergers of a European dimension, and that is mergers which can be notified through are notified through us. In most cases, the Commission is entrusted with the enforcement of the merger regulation, and we do not hesitate to enforce the legal instruments at our disposal—as we are presently doing in relation to the Spanish cases.

Now let me turn to private enforcement. Private antitrust damages actions are, in our view, an essential compliment to public enforcement by antitrust authorities. Private litigation allows consumers to be compensated for the loss that they suffer as a result of antitrust infringements. In most, if not all of our member states, there have so far been very few decisions in which damages have been awarded. Here in the U.S., there are many who will argue that, on the other extreme, you have too much private enforcement. In our view, in the EU, there is still too little. And in a globalized world, effective private enforcement systems to address antitrust injury should be in place in all major jurisdictions.

In fact, if more countries had effective systems to compensate for antitrust infringements, this would prevent the sort of situation which arose in the *Empagran* case handled here by the Supreme Court. Last year's Green Paper, published by us on damages actions for breach of antitrust rules, offered a general analysis of the key obstacles that exist in Europe. In formulating various options to address these obstacles, the Green Paper showed that it's possible to facilitate actions for damages without stimulating unmeritorious litigation. That's often perceived as a clear drawback of the U.S. system—as shown by ongoing discussions in the Antitrust Modernization Commission. Without pronouncing on that criticism, I can only repeat that the European Commission doesn't intend to introduce the current U.S. antitrust damages regime to Europe.

The Green Paper doesn't, for example, suggest the introduction of contingency fees, wide ranging discovery rules, or class actions by unidentified individuals. The paper we published provoked wide debate on how to facilitate private actions. We've had about 150 written comments from governments, competition authorities, industry and consumer organizations, lawyers and academics. Most commentators seem to accept that the victims of competition or infringement ought to be able to recover their losses effectively. Now, as far as the follow up to that Paper is concerned, it is too early to say what precisely should be done and whether it should be the community, or rather the member states that should take action. It's in that light that we believe that there will be a need for a further, intermediate paper from the Commission which will outline the precise options for any legislation which will be needed at national or community level. But we are

convinced that the EU should at least advocate for more private action. If it can show real added value in producing a community instrument to do so, we will prepare that instrument.

Now let me address unilateral conduct. This is a topic that presents courts and competition authorities throughout the world with a challenging task. On the one hand, we have to ensure that markets remain competitive and that all companies, including the dominant ones, have the opportunity to compete hard and to innovate. On the other hand, we have to ensure any company which has significant market power doesn't overstep the line and damage the competitive process, which ultimately safeguards the consumer welfare. And that's not easy. There are many different opinions on how to best achieve the right balance. There are those who believe that certain kinds of actions should be regarded as, *per se* legal without analysis. There are others who regarded as some types of practices as, *per se* illegal.

The paper which we published in December last year under Article 82 raised a number of issues for debate. We wanted to set out how we could improve our enforcement by better reflecting economic thinking. We have since heard from a wide range of commentators throughout the consultation process. We held a public hearing in June in Brussels and many other conferences have been linked to these same issues. We had a debate in May in the international competition network, the result of which was the creation of a new working group on single firm contact. And on this side of the Atlantic, single firm contact is being discussed extensively in the organization commission as well as in the joint hearings of the FTC and DOJ which I had the privileged to take part in yesterday.

These discussions are vital to ensure a sound framework for the enforcement of Article 82, deeply rooted in economic analysis. Above all, we need to better define the unilateral behavior on which we need to focus. That will give the predictability which the business community needs. We're still digesting the comments received on the discussion paper. It's fair to say that we've had a very widespread support for the general principals behind the paper—the emphasis on protecting the competitive process; not competitors. The emphasis is on an effects-based approach. But nevertheless, when necessary, bright lines and safe harbors may be necessary to give predictability where those bright lines and safe harbors can be based upon sound economic thinking and empirical experience.

We have to, in the next few weeks, take conclusions on how far we go, for example, with the economic assessment: what needs to be proven and who ultimately has the burden of proof for the various stages. My personal view is the following: the plaintiff and the agency have the major task of showing in the first stage at least that the practices concerned are anticompetitive. It is then for the defendant company to advance any objective justification for the practices and to indicate any efficiencies which also are passed on to consumers. The agency must balance the evidence and the argument. On the one hand, there are actual likely anticompetitive effects.

On the other hand, arguments in favor of efficiencies and any other objective justification. If we are to provide guidelines, we must provide guidance which is useful. If we simply defined safe harbors which are too low, we give the impression that anything above a safe harbor is subject to extensive in-depth analysis which could in fact lead to less certainty and less guidance than exists even today on the basis of a rather disparate case law.

We advance in the paper that a reasonable test against which the behavior of the cost and price cost behavior of a firm could be measured would be a firm which was as efficient. We tried to focus on that because we thought already that by focusing on efficiency, the cost of the dominant firm itself could be a benchmark. However, we're quite aware that there are a range of tests which may or may not be applicable and useful in certain situations. The two which are most often referred to here are the "no economic sense" test or the "but for" test. We're all stretching towards the identification of the same problems and the same solutions. This is, to one extent, by intervening where we have to frustrate aggressive competition, to one extent by not intervening when we actually allow government firm unduly to increase its market power and eliminate competition.

Our aim is to draft guidelines by the end of this year with a view to the Commission finally adopting them in the first half of 2007. We believe that guidelines of this sort in Europe are not just binding on us, and therefore a discipline which we can follow *vis-à-vis* corporations who deal with us, but are also a focus for convergence and consistency in the work of the twenty-five national competition authorities who are applying European law as well as ourselves. In addition to that, if we are able to produce the text, and I believe we are, which is worthy of adoption and can be called guidance, it is a stepping stone towards wider global convergence of our attitude toward single firm conduct.

I'd like to think between agencies in the world, we have a certain amount of competition in getting better at enforcing and knowing markets. The DOJ and other agencies in the world have shown the lead in advancing work against cartels, and we are in process of reforming our own regime. We have recreated and dedicated cartel department directorate in our agency, and based upon the experience—the positive experience we've had with leniency programs—we're now facing two major challenges which we want to bring forward proposals on. First, however a painful process leniency may be for a company, how can we facilitate it with a maximum degree of legal protection for those involved in the process when in a European Union set of jurisdictions, we have different procedures and different sanctions, criminal and civil? We want to move towards, inside the European competition network, a mobile leniency program in the first instance, which will allow everyone to form the same requirements as whichever agency national competition authority the company turns to in the first place.

I want to move on from that to look at how we can strengthen the cooperation between competition authorities in Europe on leniency work. But, of course, there is another challenge in making the process more effective. We don't, at the moment, have any plea bargaining system. We would like to develop the possibility of direct settlements. You may be aware of certain number of the corporations represented here know that every single cartel decision of the Commission is challenged in the court of first instance, both on substance and on the size of the fine. That is a huge investment, both for the corporations themselves and for the Commission. We would like to develop a direct settlement procedure as an alternative to that. If it is possible to agree with the parties, we will do so, and we hope to do so in the next year.

I want to turn to another difference in approach from the U.S.: the area of investigation on how markets are not working. That is the vehicle of what we call sector inquiry in the EU. Sector inquiry doesn't aim to establish allegations against particular corporations. It is, in fact, an analysis, an investigation, using our own antitrust investigation powers to ask all of us in the marketplace how competition is working or not working. We gather evidence and then produce recommendations for the framework under which firms are acting in that sector, the regulatory framework, and for possible focus of any antitrust action as well as for merger work.

As you know, in 2005, we launched inquiries into two sectors which we believe were extremely important for making markets work better in Europe: the energy sector and financial services sector. Preliminary results in both sectors for both inquiries show that there is malfunctioning. In the payment cause sector, for example, the results have brought about some serious divergences in charging throughout the different jurisdictions of the European Union. And in the electricity and gas sector, the inquiry highlighted the serious lack of competition and outlined main reasons for this situation, not just in terms of concentration but also the use of market power of major competitors to control storage and pipeline capacities, as well as the impact of long-term contracts. As the result of the energy inquiries, we've already launched three major antitrust investigations in order to promote efficiency in this area.

Finally, I want to turn to international corporations. The global marketplace you quote in the title of this conference is increasingly the scene for the good and the bad of business. Multi-jurisdictional mergers and global supply chains may lead to international cartels and anticompetitive conduct across borders. No competition agency can work alone effectively in this context. That's why there is a need for strong cooperation with the U.S. authorities, with the work of the ICN, and other forums where we can act better together than we can do separately. But international cooperation has its problems and its challenges.

We've got to focus increasingly on the fight against international cartels. Corporations often fall short of our expectations. We find perhaps an

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almost absurd situation in which we can coordinate the timing and implementation of a growing rate, but we're not able to talk to each other about the results of our common action. The recent ICN report published in May this year highlighted these shortcomings by referring to the inability of enforcers to exchange confidential information. The reasons lie usually in the limits that domestic boards put on antitrust authorities. We believe the time has come to explore very seriously, and in depth, a way to respect the rights of everyone involved while sharing information that enforcers need.

With the growth in jurisdictions that apply competition rules, another challenge lies in establishing corporation and coordination initiatives on the international level. I've referred already to the work of the ICN and its new group on single firm conduct. I'd like to pay tribute to the work of the ICN merger group in providing, at the last ICN conference, the first merger guidelines workbook. It's the first ICN document addressing principles of substance and not only of procedure. Another is the ICN anticartel enforcement manual.

I'm confident that this kind of initiative is going to promote best practice throughout the world and I can promise you that we will be listening to those who have criticisms or, indeed, have clear ideas about which directions we should go. As always, the Commission will be anxious to keep its act up in the best practice of all the agencies around it. Thank you very much.