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Speech by Mr. Mario Monti

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Effective Private Enforcement of EC Antitrust Law

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I am delighted to present the opening exposé at this important seminar, that has brought together many eminent experts from different backgrounds for an in-depth analysis and discussion of issues related to the enforcement of EC Antitrust Law. This conference is very timely and I am grateful to Professor Ehlermann for his initiative.

The case for more private enforcement

As you are aware, the Commission has proposed a major reform of the way the Community competition rules are applied. One important objective of the reform is to pave the way for more effective private enforcement of the EC competition rules.

Obviously, we do not expect crowds of lawyers to flock in front of the court buildings in order to file lawsuits on the day the new Council Regulation enters into force. However, it is our aim that companies and individuals should increasingly feel encouraged to make use of private action before national courts in order to defend the subjective rights conferred on them by the EC competition rules.

The intentions behind this aspect of the reform are threefold:

First, the combined enforcement action by the Commission, the national competition authorities and the national courts will strengthen the impact of the rules as such. The competition rules are there to ensure that consumers benefit from lower prices and better products as a result of effective competition in markets. Effective remedies must be available to stop infringements and to ensure that parties which suffer from a violation obtain compensation. Consumers should have more access to remedial action in the form of private enforcement in order to protect their rights and to obtain damages in compensation for losses suffered.

Second, the reform, by fostering *decentralised* application, should bring the EC competition rules closer to citizens and undertakings throughout the Internal Market. For a future enlarged Community with 27 or 28 Member States it is not a desirable or even a viable concept that the application of the EC competition rules should largely be reserved to administrations acting as public enforcers. Companies or individuals that suffer from an infringement of the EC competition rules should, as a general rule, be able to seek redress in the locally competent civil or commercial court, possibly before a locally competent specialised court or specialised chamber of a court.

The Commission, for its part, should focus on the functions it is best placed to carry out due to its central position and function. This includes the development of Community competition policy through the legislative framework as well as through individual decisions that can serve as precedent. This also includes a function as resource-centre for the national courts as foreseen in Article 15 of the proposed Regulation. I will come back to this.

Third, the reform should enable us to make the most of the complementary functions of public and private enforcement of the competition rules. Public enforcers are particularly well equipped to investigate serious, typically secret infringements, making use of their investigation powers. In addition, they can be well placed to bring cases in areas where the application of the rules is not yet entirely clarified (and where it is therefore unlikely for private parties to take the risk of litigating), thereby contributing to further clarification of the rules through precedent.

National courts on the other hand are particularly well placed to solve contractual conflicts between the parties to an agreement. So far, this function of the national courts has been hampered by the Commission's monopoly on the application of Article 81(3), as the courts were often obliged to suspend proceedings in accordance with the *Delimitis* case law of the Court of Justice. In addition, national courts have the power to grant damages to a party that is the victim of an infringement in compensation for the losses it has suffered. Action before national courts in this respect should increase.

A range of elements must come together to make private enforcement more effective

As you know, the Commission has proposed to give national courts the power to apply Article 81 as a whole, thereby abolishing the current division of competence under which the national courts can only apply Article 81(1) whereas the Commission has exclusive competence to apply Article 81(3). The reform of the implementing rules for Articles 81 and 82, as proposed by the Commission, is a basic condition for national courts to play their *full* role in the application of the competition rules as they have done for a long time in other areas of Community law.

The abolition of the Commission's monopoly to apply Article 81(3) – however fundamental it is – may however by itself not suffice to boost private enforcement of the competition rules in Europe.

The Commission is proposing a range of other elements – in the text of the draft Regulation or in the wider framework of the overall reform effort. I would like to go over these building blocks envisaged on the Community side.

Facilitating the application of Article 81(3) by national judges

The discussion about the role of national judges after the reform so far has largely focussed around the question of whether judges will be able to apply Article 81(3). I do not want to linger on this aspect today, but would like to recall three points:

Article 81(3) is a legal rule that must be applied when its four conditions are fulfilled. The application of these conditions can require economic analysis and balancing of interests. The provision is however not fundamentally different in nature from other rules applied by judges. The Commission is therefore confident that they will on the whole not face insurmountable problems in this respect.

The proposed new Regulation maintains the instrument of block exemption regulations. They retain their constitutive nature and must be applied by national courts if their conditions are fulfilled, subject to control by the Court of Justice. This is an important element to give orientation to companies that distinguishes the European system from US anti-trust law.

In addition to the block exemption regulations, the Commission has promised to continue working on further elements to provide guidance to companies and judges, such as guidelines and Notices, e.g. the *De minimis*-Notice. The Commission has in particular committed itself to produce guidelines on the methodology for the application of Article 81(3) in order to provide all national courts in the Community with an analytical framework.

Private enforcement raises further questions

When dealing with a case that requires the application of the EC competition rules, the national courts, however, are not only confronted with the task of interpreting Article 81(3) in a legally correct and coherent manner.

They also face a range of questions related to the facts of the case or situated at the borderline between fact-finding and legal analysis.

This aspect takes on particular importance with regard to claims for damages. In this field, expansion of private enforcement is particularly desirable in order to ensure effective remedies for parties that suffer from infringements. At the same time, there is a general impression that there can be problems under national law and procedures with regard to proving the infringement and the causal link between the alleged infringement and the damage suffered as well as with regard to the determination of the extent of the damage to be compensated.

Arguably, in the light of this complexity, additional elements must come together in order to instil real life into the judges' competence to apply Articles 81 and 82.

Elements in the Regulation

The proposed Commission Regulation essentially contains two very specific elements that address this borderline area of EC competition law and civil procedures: The rule on burden of proof and the rule on cooperation with national courts.

First, the proposed Regulation expressly maintains the repartition of the burden of proof for the two different parts of Article 81: The party that alleges an infringement has to demonstrate that the conditions of the prohibition rule in Article 81(1) are fulfilled. The party that wants to invoke the exception laid down in Article 81(3) has to demonstrate that the conditions of that provision are met with.

Second, the proposal provides for a framework for the Commission (and the national competition authorities) to interact with national courts. The proposed Article 15 formalises the current practice of providing opinions to national courts if they so request. We believe that this instrument can be very useful in the new system. Time has come where more cooperation between courts and administrations is required as a result of the complexity of certain matters to be decided by courts. Administrations can help by providing certain factual information in their possession or by giving expert opinions to judges, always subject to a contradictory debate.

This instrument is not conceived as a substitute for the preliminary reference procedure of Article 234 of the Treaty. Whereas references to the Court of Justice concern questions of legal interpretation, national courts may, in particular, want to address themselves to the Commission with questions on economic issues, e.g. questions related to market definition. Article 15 can therefore typically be of help in the borderline area between facts and law.

The amicus curiae proposal

The Commission has also envisaged that it and the national competition authorities should have the power to make written or oral submissions as *amicus curiae* before national courts. In the case of the Commission this power would be limited to cases presenting a Community public interest. Such an interest would in particular exist in cases raising important issues of coherence as regards competition policy. The Commission would not intervene on behalf of one of the parties but would present its opinion in the interest of a coherent application of the law.

In addition to these elements of our reform proposal, I believe judges can also contribute to enhance private enforcement of competition law.

The potential contribution by judges

In fact it appears that the procedural rules for civil courts – though highly complex – are a flexible tool. Judges generally have a large margin of appreciation as to how they conduct the proceedings in a case. They can adapt the course of the procedures to the varying subject-matters that come before them.

We should explore to which extent and in which ways civil courts can, on the basis of the principles governing their procedures, take account of the specific requirements of cases involving the application of the EC competition rules. The toolbox of national courts presents a potential to tackle the apparent problems, in particular with regard to claims for damages. National courts should make full use of the tools available to them in order to give effect to the competition rules.

When they find themselves blocked from effectively applying the EC competition rules due to aspects of their national procedures, national courts should look carefully into the existing case law of the Court of Justice for guidance. And they should not hesitate to request preliminary rulings from the Court on issues they find unresolved. The answers by the Court of Justice can provide Community-wide solutions for such questions.

National judges also increasingly look outside the confines of their own Member State. Cooperation between judges across borders is an important tool for the collection of evidence. An increase in such cooperation and exchange of ideas may also provide judges with opportunities to inspire themselves from solutions found elsewhere.

In summary, I believe that national judges have some tools to contribute to more effective private enforcement of the EC competition rules. In-depth research of the factors at work in the different national systems can pave the way for a gradual up-take of solutions by the courts of the Member States. We should bear in mind that, as the paper by Prof. Jones shows, also in the US the system of private enforcement in the form of claims for damages has developed gradually.

Is there a need for new Community legislation at the interface between EC competition law and civil procedures ?

We could wonder, however, whether EC legislation on specific issues at the interface between EC competition law, tort law and civil court procedures could help to enhance the effectiveness of private enforcement. The contribution by Prof. van Gerven identifies some areas where such legislation could be possible. I should congratulate him for this excellent paper and for even having made the effort to draft the actual legal articles that would address the issues he identifies.

I should say, however, that this is a delicate question to deal with. Our reform proposal introduces already substantial changes. We should not try to achieve too much at the same time if we want to obtain real progress in reasonable time.

I do not exclude, at a latter stage, to explore this course of action. But before proposing any further legislation we should be very sure of our case and be armed with very good arguments.

This conference and the research effort that it represents as well as the further research that it will certainly inspire can make an important contribution in this respect.

Should there be criminal sanctions for infringements of EC competition law?

Before concluding and inviting the participants to take the floor for today's discussions on private enforcement, I would like to add a few reflections on one of tomorrow's topics: the issue of criminal sanctions.

Let me first say that I welcome this discussion. It is important that academic discussions do not limit themselves to the existing framework but also look beyond it and explore fundamental questions. In addition, this discussion is an expression of the growing awareness of the harm caused to consumers by violations of the competition rules. I am very delighted about that.

I do not think however that, at this stage, the introduction of criminal sanctions is the only way forward in order to render enforcement of the EC competition rules more efficient. Criminal sanctions involve a large range of questions. Where they could help to solve certain specific problems they also risk to create others.

I therefore strongly believe that more efficient enforcement in the EC at this stage can best be achieved by persevering in the course that we have started out on: First, the reform of the implementing rules will permit the Commission as well as the national enforcers to concentrate more on the prosecution of serious infringements. Together with amended investigation powers, this will increase the risk of detection for companies that infringe the law. Second, there is a potential for further adapting fines on companies – at European as well as at national level – to better reflect the harm done by violations of the competition rules. Third, the increasing risk of private claims for damages should contribute to the deterrent effect of the competition rules.

These elements taken together will make an impact on companies in real terms. They will also show that the Commission is serious about combating violations that damage the consumers.