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Antitrust in the US and Europe : a History of convergence

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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I wish to thank the ABA, and in particular its Section for Business Law, for giving me the privilege to address such a wide representation of General Counsels of major companies operating here in the US. I am particularly honoured to share this panel discussion with my American colleagues, Federal Trade Commission Chairman Tim Muris and Assistant Attorney General for Antitrust Charles James.

I will present to you a review of the main areas of EU competition policy and attempt to identify the main respects in which our enforcement practice and that of the US antitrust agencies converge, and the main respects in which they diverge.

The result of this review, as you will see, is encouraging. Despite all the noise created by what has indeed been one major divergence – the General Electric/Honeywell merger cleared by the Justice Department and prohibited by the European Commission – a silent process of convergence in competition law and practice has been going on for a number of years and has recently intensified. Of course, further efforts are needed and on both sides of the Atlantic we are deeply committed to this process. Our motivation in this endeavour is enhanced by a common awareness: besides being important in itself, US-EU convergence is a key building bloc for a multilateral co-operation in antitrust towards which our agencies are working closely together.

This trend toward convergence can be traced back to the very origins of EU competition law, and indeed of the EU itself. In his *Mémoires*, Jean Monet (one of the founding fathers of today's Europe) recalls the role played by then Secretary of State Dean Acheson in introducing a competition culture to Europe. He had a marked influence on the discussions that led to the "Schumann Declaration" of 9 May 1950, which lay the groundwork for the European Coal and Steel Community (the precursor of today's European Union), and which clearly stated that such an organisation of markets was to be construed as *"the opposite of an international cartel designed to segment and exploit national markets by means of restrictive practices"*.

The influence of US antitrust law was profound during the early years of the development of competition policy in Europe and has continued ever since. This influence has helped to ensure that today, after almost 50 years of application and development of antitrust rules in Europe, we can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumer interest as its primary concern.

I will focus first on substantive issues, as regards respectively merger control and antitrust policy. I will then turn to procedural issues. Finally, I will briefly refer to the control over State Aid, a distinctive and crucial component of EU competition policy, to which relatively little attention is paid from this side of the Atlantic.

Merger Control Policy

Dominance versus substantial lessening of competition

As you are aware, US and EU merger control laws are phrased in quite different language. In the EU, where the law governing merger control was drafted only in 1990, mergers must be declared unlawful where they "create or strengthen a dominant position". In the US, in the words of a statute dating from 1914, mergers can be enjoined if they result in "a substantial lessening of competition" or "tend to create a monopoly".

It doesn't require any great legal or economic insight to see that these are tests which could, in the hands of creative interpreters, result in widely differing outcomes. This has not happened, however, because the economic rationale underpinning merger control by enforcement authorities and courts in our jurisdictions is very similar. The body of precedent built up by the European Commission and the European Courts over a decade regarding the interpretation of the dominance test has shown a remarkable coincidence of analysis with the wealth of interpretative precedent that has been built up in the US over a much longer period with regard to the Clayton Act. A European practitioner who picks up the US Merger Guidelines, or who delves into one of the US Court's latest merger judgements, will - I think - be struck by the extent to which our respective seemingly different tests are used in similar ways.

Horizontal mergers

As regards the most straightforward type of cases, horizontal mergers, I think it is generally acknowledged that we are reading from the same song sheet. In both of our jurisdictions, we embark on an analytical path which is markedly similar in most respects, though not identical.

When investigating horizontal mergers in the EU, and after defining the relevant market/s, the Commission examines whether the merger would be likely to result in horizontal overlaps which would create or strengthen a dominant position, as a result of which effective competition would be significantly impeded. We do not use any particular concentration ratio to establish presumptions, as it is done in the US Merger Guidelines, but our analysis essentially requires an examination of the same factors that are examined in the US, such as the overall level of concentration, the particular characteristics of the market and the potential for effective market entry.

The *MCI WorldCom/Sprint (2000)* and *Alcoa/Reynolds (2000)* cases are good examples of substantive convergence in relation to major global transactions despite different laws. In the former case, both the DoJ and the Commission concluded that a prohibition was warranted, due to the competition concerns raised by the operation and the difficulty to find appropriate remedies. Regarding the latter transaction, we both agreed there were competition problems that required serious remedial action.

In the two oil mega-mergers, *BP Amoco/Arco (2000)* and *Exxon/Mobil (2000)*, the Commission and the FTC co-operated (and in most respects saw eye to eye) in their respective investigations of the effects of these transactions on competition. For those markets that had a global dimension, this enabled the two agencies to reach similar conclusions and, where relevant, to identify similar remedies to their competition concerns. And just recently, the Commission and the FTC reached similar conclusions about the likely competitive impact of the *Metso/Svedala (2001)* merger - again, a horizontal case involving close transatlantic co-operation.

Where we do reach different conclusions about whether a particular transaction should be allowed to go ahead, this is generally because the effects of the merger are likely to be different in the two jurisdictions. This occurs notably when the markets have a more regional scope. For example, while the major competitors in such industries as pharmaceuticals and chemicals are present throughout the world, the competition effects of mergers in these industries have often differed as between the US and EU. This happened, for example, in the recent cases of *AstraZeneca/Novartis (2000)* and *Dow Chemical/UCC (2000)*. As a result, the remedies that were accepted by the Commission and the FTC were customised to meet the specific problems identified in our respective jurisdictions.

In *Air Liquide/BOC (2000)*, another case where US/EU co-operation was extremely close throughout the proceedings, the competitive effects and, as a result, the remedies required were quite different for the EU and US markets. This divergence did not occur because of different laws or different analytical approaches, but because of different competition concerns resulting from different market realities. In the EU, the Commission found that the competition concerns raised by the combination of two competitors – one with a dominant position in France and the other with a dominant position in the UK – could be resolved by a remedy requiring divestiture by BOC in the UK market, thereby immediately introducing a new competitor to outweigh the loss of potential competition. In the US, however, the issue was one of elimination of actual, not potential, competition – and the consequent reduction of market players from 4 to 3 in a highly concentrated market. As a result, the type of remedy that was satisfactory in the EU was not considered to be adequate in the US. Consequently, the FTC sought more far-reaching commitments from the parties, a requirement which ultimately led the parties to abandon the deal.

The EU and US moreover see eye to eye in relation to the assessment of horizontal mergers where the competitive concerns arise from what we term collective or oligopolistic dominance, and where you would have fears that the merger might engender the possibility of what you term "coordinated interaction". In the US, you look at whether a merger is likely to diminish competition by enabling the firms in a given market to engage, more successfully or more completely, in co-ordinated behaviour that harms consumers. Such co-ordinated interaction consists (in the words of your Merger Guidelines) in "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful in itself".

Our attitude toward collective dominance has been developing since the introduction of merger control in 1990, but the words which I have just quoted from your guidelines could not better summarise our current approach. The Merger Regulation does not make explicit reference to such a scenario, but the Commission - from the start - interpreted the dominance test as also applying to such situations. While some earlier commentators expressed doubts as to whether the Regulation could be applied to situations of collective dominance, such application has now been confirmed by the judgments of the European Courts in the *Kali und Salz* and *Gencor* cases.

As in the US, we examine whether it is likely that terms of co-ordination could be reached by the oligopolists, which would - on the one hand - be profitable to them, and would - on the other - enable the detection and punishment of any behaviour deviating from the co-ordination. This necessitates an examination of whether post-merger market conditions are likely to be conducive to co-ordination of this kind. Among other things, we look at such market-specific factors as the extent of product homogeneity, the degree of market-share symmetry between the oligopolists, the types of transactions usually concluded in the industry, the extent of structural links, market transparency in terms of pricing and other marketing parameters, among others. All of these are elements which, I think, are likewise considered by the US agencies in assessing the possibility of co-ordinated post-merger interaction between firms.

Cases involving potential issues of collective dominance do not come to light every day, and there have been few instances of specific cases of this kind which both the EU and US authorities have considered in parallel. Issues of collective dominance and co-ordinated interaction were, however, discussed between the Commission and the FTC in the context of the (ultimately aborted) proposed *TimeWarner/EMI* merger.

That case involved a transaction that would have reduced the number of world-size music publishing companies from five to four, giving rise to concerns about oligopolistic dominance or co-ordinated interaction in the market for recorded music. As I said, the deal collapsed before either of our agencies had taken a decision. So I will go no further than saying that our respective staffs were in constant, indeed intensive, discussions throughout the investigations, and that these discussions focused frequently on the risk of the merger giving rise to oligopolistic dominance.

Oligopolistic dominance is, actually, a subject where we both can learn from each other and, therefore, we have included it as one of the topics to be discussed in the framework of the US-EU Mergers Working Group.

Vertical mergers

Another type of mergers that can lead to concerns in some circumstances are those between companies operating at different levels of the same production or distribution chain. The vertical integration that results from these mergers may erect or aggravate barriers to entry in a market, thereby contributing to a foreclosure of competitors from that market. For example, a vertical merger can harm competition by making it difficult for competitors to gain access to an important component product or to a channel of distribution (the merger may create a so-called 'bottleneck'). I believe that the approach adopted by our respective authorities to date to such potential problems is also very similar.

Again, in relative terms, challenges to vertical mergers are quite rare, and there are few instances of specific cases of this kind which both the EU and US authorities have considered in parallel. However, one recent case is - I think - illustrative of our common approach to such mergers: the merger between AOL and Time Warner, which both the Commission and FTC examined last year. The transaction was ultimately approved on both sides of the Atlantic but only following the acceptance of substantial commitments from the merging parties. The key concern identified by our investigation was the combination of Time Warner's presence in "branded content" (music, news, films, etc..) with AOL's uniquely strong position as the only pan-European internet service provider (In the US, AOL was the leading ISP). Time Warner's position in content was further strengthened by its links with Bertelsmann. This vertical concern was also shared by the FTC, and our close collaboration throughout the investigation period contributed substantially to a better understanding of the potential competition problems which the merger gave rise to, and ultimately to a better understanding of the types of remedies that would be necessary to allay those concerns.

Conglomerate mergers

Much has been made in recent weeks of a divergent approach being taken by the Commission and the US antitrust agencies towards conglomerate mergers, in the light of the Commission's decision to block the GE/Honeywell deal, which the DoJ had cleared. I am not convinced that the gap between us is as wide as some would have it - but I can obviously only speak for the Commission, and not for the US agencies. Let me take, however, this opportunity to at least spell out clearly what our policy is in relation to this type of mergers.

It is sometimes claimed that because conglomerate mergers do not result either in direct horizontal overlaps or in vertical relationships, they should be viewed as having a positive or at least neutral effect on competition. Our view is that whilst conglomerate mergers are normally not anti-competitive, under some circumstances they can lead to exclusionary effects and a worsening of competition conditions. The conglomerate aspects of mergers may also constitute an additional factor to existing horizontal and/or vertical effects.

Let me say, however, that in ten years of Merger Control in Europe we have identified only a handful of conglomeral mergers raising competition problems and, therefore, the relevance of this issue for the assessment of the overall US/EU convergence is rather limited.

Conglomerate mergers will raise concerns when they make possible that the merged entity leverages its market power with the effect or object to foreclose one or several markets from effective competition. These foreclosing practices, which are not based on normal business performance or "competition on the merits", may substantially reduce consumers' choice and ultimately lead to higher prices and a loss of welfare.

The existence of pre-merger market power or dominance in at least one of the products concerned is therefore a necessary condition for the likelihood and the profitability of leveraging practices. These practices are even more likely when both merging firms have strong market positions in their respective markets.

A recent case, *TetraLaval/Sidel* (2001), might illustrate the concerns I am referring to. A few weeks ago, the Commission vetoed the acquisition by TetraLaval, a firm dominant in the market for carton packaging equipment (with market share of around 80% in the European Economic Area) of Sidel, the leading French supplier in the neighbouring market for plastic packaging equipment We were concerned that the merger would have allowed TetraLaval to leverage its position in the carton packaging market to the plastic packaging market (for instance through tying of the two products to clients in need of both plastic and carton) and, therefore, to progressively eliminate competition in the later market.

While it is true that conglomerate mergers may have the potential to generate efficiency gains in individual cases – as may be the case with any other type of merger – there can be no presumption that such mergers generally and automatically generate such efficiencies.

In relation to this, I would at once like to refute the assertion that the European Commission, when dealing with conglomerate mergers, is in fact applying what has been dubbed an "efficiency offence". Indeed, we distinguish clearly between - on the one hand -mergers leading to price reductions that are the result of strategic behaviour on the part of a dominant firm, the purpose of which is to eliminate or marginalize competitors with a view to exploiting consumers in the medium term, and - on the other - mergers which will objectively lead to significant and durable efficiency gains that are likely to be passed on to the consumer.

By "efficiency gain" I do not refer to any cost reduction resulting from the merger, but to the types of efficiencies which are relevant for antitrust authorities – that is, a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality.

When the merging parties do not provide a clearly articulated and quantified defence in terms of efficiencies – as they did not, for instance, in the GE/Honeywell case - it is much harder for an antitrust authority to clear a transaction that is likely to lead to foreclosure effects, because if foreclosure takes place and competitors are marginalised, there is no guarantee that prices are going to be maintained, at least over the medium and longer term, at the low level that the merged entity might strategically set them at in order to foreclose competition.

Remedies

Let me now move to another area where, in recent times we have also witnessed a very considerable EU/US convergence. I refer to the approaches taken by our respective agencies toward remedies in merger cases. As you may know, the Commission adopted last December a Notice setting guidelines on remedies, comprehensively outlining for the first time the Commission's policy in relation to commitments in merger cases. As an operational follow-up to the notice, we also decided to create a new unit responsible for the enforcement of remedies within the Merger Task Force.

The first aim of the Notice is to make sure that the remedies proposed by the parties fully resolve the competition concerns raised by the Commission and thus eliminate the creation or the strengthening of a dominant position. Remedies must be clear-cut and entirely remove our competition concerns. The Notice's second aim is to make sure that the remedies accepted by the Commission can be implemented effectively and within a short period. They should not require additional monitoring once they have been implemented. The commitments offered must moreover contain specific details and procedures relating to their implementation. The Commission has also indicated that, in the majority of cases, it is appropriate to appoint a trustee, who will have the responsibility of overseeing the implementation of the commitments. In cases of divestiture, if the parties do not succeed in finding an acceptable purchaser within the time frame set out in the commitments, the trustee must have an irrevocable mandate to dispose of the business within a given time period at no minimum price.

I have no hesitation in acknowledging that the new EU approach to remedies has been strongly influenced by the FTC study on the divestiture process, which demonstrated that some remedies secured by the FTC had proved less effective than intended. Furthermore, the EU and US antitrust authorities discussed their respective approaches to remedies within the framework of the US-EU working group on merger control. The exchange of expertise in this group proved invaluable to the drafting of our Notice on remedies.

"Failing firm" defence

Finally, let me mention another area of recent convergence in relation to merger control. The US has a well-established "failing firm" defence, which may allow a merger to proceed - in spite of competition concerns - where the acquired firm would otherwise go out of business. The Commission's practice with regard to such situations is still evolving, but in the recent case *BASF/Eurodiol/Pantochim* (2001), the European Commission widened the scope of application of the failing firm defence to one which is now much closer to the US approach than it was before. Indeed, the Commission, for the first time, acknowledged that, like in the US, one of the criteria necessary for the defence to apply is that, absent the merger, the assets of the failing firm would have exited the market. In addition to that, however, our Merger Regulation requires us to establish on a case by case basis that the deterioration of the competitive structure as a consequence of the merger is at least no worse than it would have been in the absence of the merger.

Merger review

Finally, I would like to announce that I will shortly be proposing to the Commission the adoption of a "Green paper" on the review of the Merger Regulation. The "Green paper" will present possible modifications of the present system, both regarding substance and procedure.

It will suggest, for instance, possible changes to the criteria for allocating jurisdiction to the European Commission or to the national competition authorities of EU Member States, and will open a discussion on whether efficiencies should be taken more explicitly into account in our system or whether due process is sufficiently guaranteed by our procedures. Our aim is to launch a wide debate with business and all interested parties.

The Commission will approach this exercise with a very open mind and will be ready to consider any proposal that might enhance the effectiveness of merger control in Europe, after a decade of intensive experience which is widely regarded as largely successful.

Antitrust Policy

Besides merger control, antitrust is another area of increasing convergence in our respective approaches.

Distribution agreements and co-operation between competitors.

One of my main objectives upon taking office two years ago has been to increase the emphasis on sound economics in the application of the EC antitrust rules, in particular to those concerning different types of agreements between companies, a trend that had already been started by my predecessor, Karel Van Miert. The present Commission has devoted a lot of effort to this aim and, in the last two years, we have adopted new legal frameworks for the application of competition rules both to distribution agreements and to co-operation agreements between competitors.

This reform constitutes a radical overhaul of EC competition policy in this area, which will have a much more economic approach while increasing the overall level of legal security for companies.

Now we use market share thresholds to make a first distinction between agreements that do not raise competition concerns and agreements that require a closer scrutiny. The thresholds reflect that for many types of agreements, competition concerns can only arise if there is insufficient inter-brand competition. With these thresholds, "safe harbours" are created for companies with no or only modest market power. The relatively high market share threshold of 30% for vertical agreements acknowledges that they are generally less harmful than horizontal agreements, where the thresholds range between 20 and 15% depending on the type of agreement.

In order to facilitate the assessment of agreements not covered by the thresholds, we have adopted Guidelines, which describe the possible positive and negative effects that the various restraints may have, depending on relevant market conditions like the market position of the parties to the agreement and their competitors, entry barriers, maturity of the market and level of trade. The respective frameworks are subsequently applied to the most important types of vertical and horizontal agreements, such as exclusive dealing, selective distribution, R&D agreements, specialisation agreements, purchasing and commercialisation agreements and agreements on standards. Our guidelines on horizontal agreements are, in fact, very similar to the FTC/DoJ guidelines on co-operation between competitors published last year.

The substance of these new rules represents a very considerable convergence between US and EC law and practice: in adopting an economic approach, we both weight the positive and negative effects of agreements against each other. This increased convergence between the US and EC policies will not only make co-operation between our competition authorities easier.

It will also allow companies to devise world-wide marketing strategies or co-operation agreements with the confident expectation that they will be assessed in the same way in both Europe and the US.

In this field, both the EU and the US practice has identified certain “no-go areas”. For horizontal agreements, these are basically price agreements between competitors, output fixing and market sharing. For vertical agreements, retail price maintenance is the most notable “hardcore" or "per se” infringement we have in common. We have both also ceased to treat maximum retail price maintenance as a hardcore restriction.

The EC hardcore list for vertical restraints is, however, longer than the US per-se list. This can be mainly explained by the fact that there is a specific market integration goal inherent in EC competition policy, which requires, at least until the internal market has been completed, a little more severity with regard to territorial and customer resale restrictions. This emphasis on market integration in EU competition policy is, indeed, one of the main areas of divergence between our legal systems.

Let me take an example to illustrate the importance of the European competition policy objective of strengthening the European internal market: car distribution systems. Unlike car distribution in the US, which I understand is mainly regulated through franchise laws, car distribution in Europe is governed at European Union level through specific competition rules. Although these rules mainly pursue classic competition aims, they also contain provisions aimed at facilitating citizen’s purchases of cars in other countries in the Union, thereby helping our “Internal Market” function.

Unfortunately car manufacturers do not always comply with these rules, and sometimes they use, or rather abuse, their selective and exclusive distribution networks to try to partition the market along national lines, preventing exports from one country to another, and keeping prices in some countries higher than they might otherwise have been.

This sort of behaviour, along with other abuses, has led us to impose fines on Volkswagen (twice), Opel, and now DaimlerChrysler, for breaching the EC competition rules. To give you an idea of the severity with which we sanction these practices, let me mention that the 1998 decision against Volkswagen involved a fine of 97 million US$ (102 million €, later reduced by the European Court of First Instance to 90 million €) and that in the recent decision against DaimlerChrysler, we imposed a fine of around 67 million US$ (72 million €) for impeding parallel trade in cars and limiting competition on the vehicle sales and leasing markets.

Cartels and leniency policy

Convergence between our authorities also takes place at the level of setting and enforcing priorities. I believe that, for both the Commission and the DoJ, the main priority of our antitrust policy is the prosecution of cartels. In the Commission we have substantially increased the resources which we devote to this task, and the results are starting to become apparent. The number of cartel decisions that we will have adopted by the end of this year will clearly exceed the same figure for many previous years.

An important instrument at the disposal of competition law enforcers for carrying out this priority is an effective leniency programme. In 1996, the European Commission adopted for the first time a Leniency Programme and this has led to a substantial increase in the number of cartels that have been uncovered and punished. It has moreover made the ensuing investigations more efficient and effective.

Five years after its adoption, we are now modifying this instrument. Indeed, I believe that there is scope for giving an even greater incentive to companies to help uncover this kind of collusion. Experience gathered to date shows that the effectiveness of our leniency policy would be improved by an increase in the transparency and certainty of the conditions on which any reduction in fines is to be granted. It would also benefit from a closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement.

In July of this year, we published the draft of a new Notice on leniency and propose to grant complete immunity from fines to the first company to inform the Commission of an undetected cartel. In order to qualify for immunity, the company will have to provide sufficient information to allow the Commission to launch a surprise inspection (a so-called "dawn-raid"). A company fulfilling the conditions for immunity would promptly receive a letter from the Commission confirming that immunity will be granted to the company if the conditions set out in the Notice are observed.

The policy on reduction of fines would be modified to enable the Commission to give adequate rewards to companies which, following the immunity application and/or any inspections, provide 'added value' evidence to the Commission. Successful applicants for reduction of fines will also be provided with a letter indicating the degree of immunity to which they will in principle be entitled. This letter will be sent no later than the day the Statement of Objections is issued. This would not only increase the legal certainty provided to companies but would also enhance the overall transparency and credibility of the system.

In contemplating this reform, we have paid a lot of attention to the success of the US Corporate Leniency Program of 1993. The offering of immunity and the increased transparency and certainty in our draft follow the basic principles of the US program. At the moment we are reviewing the draft in the light of comments received from interested parties. Comments so far have been generally positive. However, some comments have pointed to the need to go even further and to offer a possibility of immunity even after we have conducted an inspection. We are considering that possibility. If we were to finally take it on board, convergence between the two programs will have gone even further.

Abuse of dominance

The increasing convergence between the two leniency programmes brings me to another aspect where we apply the same principles: the ban on the "abuse of dominance" or "monopolisation". In both jurisdictions we focus our enforcement practice on the same type of exclusionary abuses. These include, among others, predatory pricing, fidelity rebates, tying and refusal to access to essential facilities. Indeed, it could be said that in the 90ies the essential facilities doctrine has been one of the US's most successful exports to the European Union!

I don't want to go through all these categories in detail, but let me mention one recent example that may illustrate the types of practices that the Commission is putting more emphasis on preventing.

The recent or on-going process of liberalisation in many European markets, from energy to telecoms or postal services, has lead to market structures where the former monopolist still retains a very substantial position. The Commission is monitoring these markets carefully and preventing these former monopolists from using their strong position, or even their monopolistic position in neighbouring markets not yet liberalised, to hamper and restrict competition by new entrants in these newly liberalised markets.

A good example of Commission action in this area is a case initiated by a complaint by UPS, a US firm. UPS operates in the business parcel sector in Germany, where it competes against the former state-owned monopolist Deutsche Post. UPS claimed that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services, which are open to competition. UPS's complaint was ultimately upheld by the Commission. As a result, Deutsche Post will have to create a separate legal entity for its business parcel services. Furthermore, in light of the foreclosure that resulted from a long-standing scheme of fidelity rebates granted by Deutsche Post to all major customers in the mail-order business, the Commission ordered Deutsche Post to abandon its rebate system and imposed on the firm a fine of more than US$ 20 million (€24 million).

Procedures

Whilst our respective legal systems, as we have seen, increasingly converge in substantive issues, they still present substantial differences with regards to the procedures applicable in antitrust law enforcement generally and merger control specifically. Most of these differences can be explained by the very different institutional and legal frameworks in Europe and in the US which I do not propose to analyse in detail today.

I would like, however, to say a few words in relation to procedures. First, I would like to present to you the main lines of the on-going reform of our antitrust procedures, which will bring to Europe several features of the US enforcement system. Second, I would like to make some reflections with regard to our merger control procedures, particularly in response to some of the criticisms that have been voiced in the aftermath of the GE/Honeywell case.

Antitrust procedures

In September 2000, the Commission put forward to the Council of the European Union a proposal to reform the main procedural Regulation for antitrust law enforcement (Regulation 17 of 1962) which, when approved, will lead to profound changes in our enforcement system. These changes will – among other things – bring the European enforcement system closer to the US model. Indeed:

- The administrative notification mechanism, for which there exists no equivalent in US law, will be removed. The rule that contains the conditions for an agreement to be declared legal, Article 81(3), will become directly applicable. This means that all courts and competition authorities throughout the European Community will be able to conduct a full assessment of agreements brought before them by assessing their anti-competitive as well as their pro-competitive effects. Should the legal conditions be fulfilled, they can rule that an agreement is legal and must be respected by the parties, just like courts in the US.

- The new enforcement system is designed to strengthen the deterrent effect of the EC antitrust rules. It will permit the Commission to focus on serious infringements that do considerable harm to consumers and it will de-block the enforcement potential of the national competition authorities. Companies will have to take the EC antitrust rules more seriously, where that is not already the case. Market entrants, including from across the Atlantic, will benefit.
- The removal of the notification system should – over time – make it more attractive for private complainants to address themselves to civil courts if they are the victim of illegal behaviour under the competition rules.

  Through a gradual increase in private law-suits, the courts in Europe should make an ever greater contribution to the over-all enforcement of the rules, leading to a situation more similar to that already prevailing in the US.
- In order to promote coherent application of the rules, we have also proposed to the Council to introduce the possibility for the competition authorities to appear before courts as *amicus curiae*, on the model of the US enforcement agencies. (To improve the capability of European judges in the introductory phase of the new system, we also envisage contributing totraining efforts for judges.)
- Finally, the Commission is committed to providing opinions, i.e. reasoned and published statements on unresolved issues of fact or law, similar to the Business Review Letters adopted by the US agencies. We have detailed our intentions in papers that have been produced for Member States' delegations but also widely circulated in business circles. The feedback is encouraging and I think that in this respect, we are moving towards a convincing solution that provides us with a tool to enhance legal certainty for companies, but avoids – and that is essential as we must move away from the former 'notification culture' – reintroducing a kind of notification mechanism with all of its drawbacks.

We are confident that all these measures will be relatively quickly approved by the Council and are hopeful that they will be in force before the next enlargement of the EU takes place.

Merger procedures

Turning now to merger control, there are far-reaching procedural differences between the EU and US review systems: while the Commission can approve or prohibit a transaction by taking an administrative decision within strict deadlines, the US anti-trust agencies must prosecute a merger in court if they decide that it is likely to give rise to competition concerns, and within a somewhat more flexible timeframe. In my view, both systems have certain advantages and disadvantages: this question is far from being a "one-way street".

I would like to emphasise that all of our administrative decisions are subject to judicial review. The fact that the Commission has decision-taking powers in the merger area should not lead to an underestimation of the role played by European courts in our merger control process. Indeed, the very possibility of an appeal against our decisions serves as an efficient deterrent in safeguarding the integrity of that process. Since the Merger Regulation came into effect 10 years ago, the Commission has prohibited 18 mergers (accounting for less than 1% of all notified operations), of which 6 have been appealed (and the parties to two recent prohibitions have already announced that they may likewise lodge appeals). In other words, more than one-third of our prohibition decisions (44%, if we include the two still possible appeals) has been - or are likely to be - scrutinised by judges.

I can assure you that this level of judicial review is sufficient to ensure that the Commission takes the oversight seriously, and consequently that it does not prohibit a merger without being convinced that its decision would withstand a legal challenge. To this regard, the situation in Europe is not so different than in the US, where in a non-insignificant number of cases the parties abandon the deal as soon as the authorities announce they are likely to challenge it before the Courts.

It is of course true that the Courts' procedures, by their nature, are lengthy. But reforms are being made. The European Court of First Instance has already taken an important step at the end of last year when it adopted a "fast track" procedure for hearing urgent cases such as merger appeals, where more emphasis will (as in the US) be on oral proceedings.

Although it is too early to judge how successful this will be, I think it is a very positive step, demonstrating the Courts' willingness to adapt their procedures where the need arises. I think, however, it is unrealistic to imagine the European courts getting involved in merger cases at the stage of the merger investigation itself: that would only make sense if we were to transform our review process into a US-style prosecutorial one, something which would be contrary to our present institutional arrangements.

The existence of these different systems in Europe and the US has also implications in terms of checks and balances and rights of defense for the parties. The possibility for the Commission to take decisions rather than challenging mergers before the Courts requires a much more developed system of internal checks and balances and safeguards for the parties' rights before a decision is taken. Indeed, before the Commission takes a final decision it has to address a motivated Statement of Objections to the parties and the parties have the opportunity to reply in writing to the objections made to the merger as well as the right to be heard orally as a part of their defence. Afterwards, the Directorate-General for Competition drafts a decision based on its findings and taking into account the replies by the parties, but that is not the end of the story. Indeed other services have to be consulted, particularly the Legal Service, which depends directly from the President of the Commission. The draft decision is discussed as well by our Advisory Committee, which is composed by competition experts of our Member States. And, ultimately, it is for the College of Commissioners, and not for the Competition Commissioner alone, to take the final decision in cases involving an in-depth investigation.

Regarding the transparency of the EU merger control system, it is worth pointing out to several features. Firstly, there is a high level of transparency towards the parties during all the process. Indeed, when the Commission opens a second phase investigation (the approximate equivalent of a “second request”) it does so with a decision that motivates its serious doubts. Afterwards, it addresses a Statement of Objections to the parties that indicates which of these doubts are confirmed by the investigation. Moreover, the parties seeking to merge have an opportunity to fully inspect the Commission's file (except for access to information constituting business secrets) before a decision is taken.

The transparency of our procedures, however, not only benefits the parties to the merger. Indeed the Commission adopts and publishes a fully reasoned decision in relation to every transaction notified, whether it is cleared or not - in the US, by contrast, insight is only gained into the agencies' thinking in the limited cases which actually go to court. The decision of the Commission is published together with the opinion of the Advisory Committee as well as with the report of the Hearing Officer, who has the task of ensuring that the rights of defence are respected.

Let me point out, at this regard, that we have recently taken steps to enhance the independence of the Hearing Officer and to extend his functions to guarantee the defence rights throughout all our merger and antitrust procedures.

In identifying the differences between the US and EU Merger Control procedures I should also add that our system provides the parties with a final deadline for our investigation (normally one month; five months for second-phase investigations): if we do not take a decision by then, the merger is automatically approved.

The EU/US Working Group will be looking at ways in which the co-ordination of our respective timetables might in practice be optimised, so as to ensure - to the greatest extent possible - that we are investigating in parallel, and so can discuss and co-operate. This would be in the best interests, I believe, not only of the agencies, but ultimately of the merging parties.

State Aid Control Policy

Finally, let me refer briefly to a major difference between our two legal systems: the existence of State aid control in Europe. I have reserved this issue for the end, not because it is the least relevant, but rather because of its importance. This control, which does not exist in the US, is one of the major aspects of our competition policy: it represents around half of our enforcement activity and, since I took office two years ago, has been one of my main priorities. I feel, however, that our policy in this field is not sufficiently known on this side of the Atlantic.

All efforts under the anti-trust rules to ensure that companies do not distort competition and trade within the Union would be to no avail if Member States were allowed to seek to outbid each other in offering subsidies to save firms in economic difficulties, or to attract investment.

This risk is even stronger today than it was in the past. Indeed, as the European Internal Market has become a reality, a number of governmental trade barriers have been eliminated. This means that the more usual forms of protection of national markets and players by Member States are disappearing. If not properly controlled, state aid may be used to replace the barriers to trade that have been dismantled.

One might of course, at least in theory, advocate a simple ban on State aid, in the interests of achieving maximum competition. However, this would not be realistic: there are valid and legitimate reasons for governments to grant aid to companies, such as favouring regions particularly disadvantaged or suffering from low employment. Even in the US government (at the local, state and federal levels) intervenes with subsidy measures, whether through the Small Business Administration, or via regional incentives, or again in favour of airlines in response to the events of 11 September. The beauty of the EC system is that it provides a legal framework that allows for the anti-competitive effects of such measures to be independently assessed against clear criteria.

The EC Treaty does this by establishing a general prohibition on State aid that would distort competition, but then listing a number of legitimate objectives that aid policies could be allowed to pursue. However, it is exclusively for the Commission to decide whether a particular type of aid granted by a Member State is compatible with the EC Treaty.

Let me illustrate our policy with one example.

As you may know, the European Commission has questioned State guarantees granted to the public banking sector in Germany. These guarantees are unlimited in time and amount, and the public banks do not have to pay any remuneration for them. The benefits that the banks obtain from such guarantees are highlighted by the evaluations carried out by rating agencies: they normally enjoy a triple-A rating independently of their stand-alone performance and thus more favourable refinancing conditions on the international capital markets.

If you know, even superficially, the role that public banks play in Germany, you will understand how sensitive and politically charged this issue was. However, following a fierce debate with the German federal and regional governments over the last few years, our final negotiations were very constructive and led to a result which contributes substantially to the creation of a level playing field for private and public banks in Europe. The German government last July accepted to abolish these guarantees in 2005 after a transitional period of 4 years.

To conclude, I would like to stress again the unique character of this State aid control system in the EU. There is no other jurisdiction where an independent authority is granted such strong powers to challenge decisions adopted by sovereign States in an area as politically sensitive as the grant of aid to particular companies.

The same Commissioner, the same institutional structure and the same decision making mechanisms put in place for State aid policy apply also to antitrust and merger control. This concentration of tasks in the same authority, apart from bringing benefits in terms of coherence, enhances substantially our capacity to withstand political pressure.

Let me be very frank to you on this issue: compared to the regular legitimate debates and confrontations between the Commission and Member Sates on State aid issues, the undue political pressures that we could receive to approve certain mergers or not to sanction other anti-competitive practices appear relatively inoffensive. Our State Aid control practice, therefore, in addition to its own merits in promoting competition, contributes strongly to create the conditions for the conduct of a fully independent merger and antitrust policy in the EU.

Conclusion

On the basis of the elements reviewed above, I believe you will find it easy to conclude that the media noise which has been sounding so loudly in recent weeks and months is not, by any means, conveying the whole story. The EU and US see eye to eye on virtually all of the most important aspects of antitrust and merger policy. Much of this convergence has been the result of an "organic" process: we are both grappling with the same evolving economic realities and are both exposed to the same evolution in economic thinking. Indeed, I have often said that the real key to this convergence has been the fact that the EU and US agencies have, in spite of the different legal instruments at our disposal, been using the same micro-economic analytical tools, and increasingly so in recent years.

But perfect convergence will never be achieved - a degree of divergence is unavoidable in a multi-polar world composed of sovereign jurisdictions, each with its own laws, enforcement authorities and courts. Incidentally, it appears that even here in the US, with the same legislation, there is from time to time disagreement between federal and state antitrust agencies, and even between federal courts, about the correct interpretation of federal antitrust statutes! And that is why co-operation and dialogue are so important. Indeed, EU/US co-operation in antitrust law enforcement has been a remarkable story in itself: over the past decade we have concluded two competition co-operation agreements, and staff level contacts have become a daily reality. The important, practical role played by such co-operation should not be underestimated - in my view, it has substantially reduced the incidence of divergent or incoherent rulings on the two sides of the Atlantic. And this has been particularly remarkable in merger cases, where staff level contacts are most frequent and intensive.

Co-operation in merger cases has been increasingly intensive in recent years, with a growing number of operations requiring scrutiny simultaneously on both sides of the Atlantic. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested by the merging parties. And it is gratifying to see that we almost invariably agree with our US counterparts in the assessment of these cases.

When divergences do occur, we must learn to manage them and avoid that they escalate into high-profile transatlantic political disputes. I am fully confident that EU/US cooperation is sufficiently robust to survive any such perceived threats to its continued effectiveness: both the EU and US authorities, I think, realise that it is in our mutual interest - and ultimately in the interest of the world economy's prosperity - that we do so.

Before concluding my remarks I would like to say a few words on our joint efforts towards the building of an International Competition Network. As many of you will know, this consensus-based initiative has just come off the drawing board, and was formally "launched" just three weeks ago in New York. It will provide antitrust agencies, from developed and developing countries alike, with a forum in which to address the whole range of practical competition enforcement and policy issues.

Initially, the ICN will focus on the merger control process as it applies to multinational mergers and on the competition advocacy role of antitrust agencies. The ICN will encourage the dissemination of antitrust expertise, experience and best practices, as well as facilitating further international co-operation. I am optimistic about the International Competition Network and sincerely hope that it will in the future be seen as a key milestone in the world-wide convergence of competition enforcement practice and in the further development of cross-boarder co-operation in competition policy.