A reformed competition policy: achievements and challenges for the future (1)

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Having reached the last days of my mandate, I take this opportunity to describe what I consider the main achievements of the last five years, characterised by the reforms and the modernisation of European competition policy. I will also elaborate on the challenges ahead, many of which are permanent challenges, since they are inherent in the Commission's function as a competition authority.

I am heartened by the wide acknowledgement that the Commission has enforced competition policy independently from national or specific interests. This recognition of independence and neutrality has been reflected in the recent publication of the CER by Alasdair Murray (2). Despite considerable pressures to influence decisions, this is the most important and long lasting legacy of this mandate. The exercise of an independent and neutral action is a permanent challenge that has to be met with every new decision. Indeed, each intervention entails choices, a careful unbiased analysis and resolute action. If the Commission had been captured by specific interests or if public perception had been such, it would not have been possible to improve the position of competition policy in the draft Constitution or to attain other more specific achievements to which I will refer today.

The role of competition policy in the draft Constitution

The key role of competition policy in the construction of a single market, in guaranteeing a level playing field for firms operating in Europe and in promoting an open market has been acknowledged from the foundation of the European Communities. Nowadays, on the eve of a European Constitution, the draft Treaty preserves and enhances the role of competition policy in various ways:

— First, the draft Constitution is even more resolved than previous Treaties when it stipulates that ‘the Union shall offer its citizens... an internal market where competition is free and undistorted’. This objective constitutes a true guiding principle for the interpretation of specific competition provisions, and to ensure consistency between the different policies and activities of the Union.

— Second, competition rules are listed amongst the select group of six areas of exclusive competence bestowed on the Union. Moreover, competition policy has been portrayed as the ‘fifth freedom’ of the chapter on the internal market.

— Third, the draft Constitution confirms the Commission's direct enforcement powers in the field of competition. This is very relevant taking into account that it constitutes an exception to the generalisation of the co-decision procedure. The draft is now explicit not only on the possibility to issue decisions and European regulations, but also on its powers to investigate infringements and to impose measures, conditions and remedies. Therefore, the

(1) Speech delivered at the Center for European Reform, Brussels, 28 October 2004.
(2) ‘A fair referee? The European Commission and EU competition policy’.
Commission's function as ‘guardian of the Treaty’ has been fully confirmed in the competition field.

**Consumer interest confirmed as the main goal of competition policy**

This mandate has also consolidated consumer interest as the central goal of competition policy. This has been reflected in the policy approach followed in different areas. For instance, appropriate efficiencies may countervail anticompetitive mergers and agreements only if they ultimately benefit consumers. Consumer interest has a bearing in priority setting. Cases that directly affect consumer interests have been given preference. The establishment of bi-annual competition days is the most obvious example of the importance given to consumer interests in public communication. Finally, we have ensured that the views of consumer organisations are heard during investigations by appointing a consumer liaison officer. This has been echoed in the aforementioned CER paper, together with some ideas to further stimulate the involvement of consumer organisations. After a constant effort during this mandate to enforce competition rules for the sake of consumers, I feel entitled to say that only a very poorly informed observer can still resort to the catchphrase that the main goal of competition policy in Europe is a different one, such as protecting competitors.

**Competition policy is now clearly grounded in sound micro-economics**

I have been very conscious of the fact that competition policy influences investment decisions, business acquisitions, pricing policies and economic performance. Therefore, a major trend of this mandate has been to ensure that competition policy is fully compatible with economic learning. Furthermore, competition policy is an instrument to foster economic growth, to promote a good allocation of resources and to strengthen the competitiveness of the European industry for the benefit of the citizens. These objectives would only be randomly achieved, at the expense of numerous errors, if we were to ignore economic thinking and market dynamics.

This approach has inspired new legislation. For example, as regards the new merger test including unilateral effects or the new block exemption regulations. It has also influenced the policy line, as in the case of the vertical and horizontal antitrust guidelines or the merger guidelines, and influences case work. Finally, the appointment of a Chief Economist assisted by a team of industrial economists shows my determination to ensure the quality and the influence of economic advice in enforcement and policy making.

This relevant trend, as well as the consumer oriented approach mentioned before, has facilitated and established the grounds for even further international convergence with other competition law enforcers, in particular with the US. Examples of this phenomenon are the new merger guidelines or the approach to hardcore cartels and leniency programs to fight cartels.

**Competition policy becomes a tool for structural reform**

Another important evolution has been an increased use and presentation of competition policy as a tool to foster structural reform and to promote the ‘Lisbon agenda’ strategy: to make of the EU ‘the most competitive and dynamic knowledge-based economy in the world’ by 2010. The recent Commission Communication on pro-active competition policy represents a first step to render more visible the role of competition policy as a key instrument to enhance the competitiveness of European industry.

Further to its general contribution to economic growth and competitiveness, competition policy favours the liberalisation of monopolized markets in sectors such as telecommunications, energy, postal services or transport. This has a positive impact on consumers and encourages investments and innovation. In all enforcement areas, competition policy has been a tool for structural reform. Some examples of this function in the field of anti-trust are the Deutsche Post case, several cases on airline alliances or the removal of territorial sales restrictions for gas supplies, while in the field of mergers there are cases such as the Telia/Telenor, the EDF/ENBW or the BSCH/Champalimaud. Clearly, State aid control has also been useful to foster liberalisation and to further cross-border market integration.

**Consolidation of competition policy in Central and Eastern Europe**

The enlargement negotiations led to the creation of competition authorities in all the new Member States and remaining candidates for accession, thereby extending competition policy enforcement throughout Central and Eastern Europe. The significance of this event is easily grasped by noting that some of these States were part of the Soviet Union less than 15 years ago.
Enhanced international co-operation in the area of competition

The Commission has played a leading role amongst competition authorities world-wide to foster international co-operation in this area. It has been a founding member of the ICN. This major multilateral forum has quickly grown into a well consolidated network with 86 members that has been productive in different areas of activity, such as international cartels or procedural and jurisdictional issues in the merger field. The Commission has continued to contribute to the other salient multilateral fora on competition: the OECD and the WTO. It has further engaged in international bilateral co-operation to a level unknown before, in particular with the US.

I would like to devote the last part of my intervention to briefly recall the main achievements of this mandate in each field of competition policy and enforcement. I will also mention what I consider as standing challenges in each of those areas.

Antitrust

— There is now a framework to allow the Commission to concentrate on proper enforcement priorities: Major changes such as the modernisation of procedures, the introduction of an economic approach and a careful priority setting have allowed the Commission to move from being an authority mainly processing notifications to an authority focused on prosecuting cross-border cartels and other antitrust infringements of major economic impact.

— A level playing field across the EU for cross-border agreements has been established. Article 3 of Regulation 1/2003 ensures for the first time that a single set of antitrust rules will apply to agreements that have an impact on cross-border trade. Since all competition authorities and national judges are bound by this provision, companies operating across the EU will only need to respect the EU antitrust standard when concluding their agreements, rather than adding to it 25 national rules, as was the case before May 1st, 2004.

— Another development is the creation of the ECN, the network of competition authorities in the EU: The decentralisation of the application of EU competition rules has been accompanied by an enhanced and institutionalised co-operation amongst all EU competition authorities. We have devised a framework to allocate antitrust cases, provided for the necessary means and guarantees to exchange information between EU enforcers and working groups have been set up for a variety of sectors and issues. This strengthened co-operation leads to more convergence and higher enforcement efficiency across the EU. In my view, the ECN could become a model for other enforcement areas of EU law.

Challenges

— Pro-active enforcement. After the abolishment of the notification system, the Commission will concentrate on the prosecution of infringements on the basis of complaints, leniency applications and ex officio investigations. It is therefore particularly important to be increasingly aware of market dynamics and performance, sector particularities and obstacles to competition. The recent Commission Communication ‘A pro-active competition policy for a competitive Europe’ already portrays what the future may bring as regards sectoral studies, sectoral inquiries and market investigations.

— Review in the field of Article 82 EC. Our policy has undergone a substantial review in all fields of our competence in order to identify possible issues ripe for systematisation, improvement, modernisation or refining in the light of economic thinking. The enforcement of Article 82 EC has not been spared to the extent that Regulation 1/2003 also applies to this provision. However, a review of our policy in this field has only started. There might be scope to offer a comprehensive and systematic approach to abuses of dominance, thereby fostering consistency in a context of multiple enforcers, along with transparency for business.

— Private enforcement. The Commission is currently looking at the conditions under which private parties can bring actions before the national courts of the Member States for breach of the Community competition rules. As ruled by the European Court of Justice in Courage v Crehan, the full effectiveness of Article 81 would be at risk if it were not open for individuals to claim damages for losses caused by infringements of EC competition law. A study recently published by the Commission found that private action is ‘totally underdeveloped’ in the EU. Such low levels of private enforcement means there is less incentive for companies to comply with the EC competition rules. To facilitate the consultation of all stakeholders and stimulate debate, the Commission will shortly start work on the drafting of a Green Paper on the private enforcement of EC competition law.
— **More emphasis on government restrictions on competition.** Further to the rules addressed to undertakings and further to the rules on State aid, the Treaty contains some provisions addressed to Member States. In the first place, State measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of such behaviour or delegate regulatory powers to private operators violate Articles 10 and 81/82 EC. Likewise, Article 86 forbids Member States from adopting measures regarding public undertakings or undertakings enjoying special or exclusive rights that would be contrary to the competition rules of the Treaty. The Commission is responsible for the enforcement of these provisions and this is an area where it would seem to be possible to be more active in the future.

**Mergers**

— Consolidation of a world-wide leading merger control system.

The recent reform of the EU merger control regime has transformed a very effective system into an even better one. The Merger Regulation has served Europe well. However, it is in constant revision, so as to ensure that it is fitted to grapple with the evolving challenges which it faces. In designing the reform, we were conscious of the need not to undermine the very real merits inherent in the existing system: it has provided a ‘one stop shop’ for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions in the EU; it has guaranteed that merger investigations will be completed within tight deadlines corresponding to the needs of business; transparency has been maintained in the rendering of decisions — each and every merger notified to the Commission results in the adoption and publication of a reasoned decision. In a nutshell, the key rationale underlying the reform was two-fold. On the one hand, it was designed to enhance the transparency and efficiency of the Commission’s merger control system and policy. And secondly, it sought to guarantee the system’s continuing effectiveness in tackling anti-competitive mergers.

Taking the latter point first, how have we reinforced the effectiveness of our merger control? First, the substantive test has been re-worded so as to make it clear that the Regulation covers all mergers that ‘significantly impede effective competition, ... in particular as a result of the creation or strengthening of a dominant position’ and that there is not some category of post-merger scenario that we would not be able to tackle. The wording of the new test focuses more directly on the effects on competition arising from a concentration than the old ‘dominance test’, but by retaining the notion of dominance it does not ignore the importance of structural factors in analysing post-merger scenarios.

Second, we have improved the Commission’s decision-making process, making sure that our investigations of proposed mergers are firmly grounded in sound economic reasoning. There has been a considerable evolution in economic thinking in recent years, and at the same time we have been facing increasingly rigorous scrutiny in the Community courts — a welcome development, but also a challenging one! To meet these challenges, I have made the enhancement of the Commission’s economic expertise a priority: we have seen the appointment of a new Chief Economist, with a skilled team of industrial economists, whose involvement in the decision-making process has ensured that case-handlers can benefit from this expert resource, while decision-makers can enjoy the benefit of an expert, independent and objective opinion on a case’s merits.

Third, we have — for the first time in the merger control area — adopted comprehensive guidance on the Commission’s approach to the analysis of the competitive impact of mergers between competing firms (horizontal mergers). This guidance, combined with the new test and the enhancement of our economic expertise, should ensure a sounder and more predictable enforcement policy.

How have we improved the transparency and efficiency of the system? First, as I just mentioned, the Commission has adopted comprehensive guidance, thereby providing a clear insight into our enforcement policy. At the same time, the systematic appointment of internal peer review panels for second phase cases, has in my view also reinforced the Commission’s objectivity as a regulator by strengthening the already considerable internal checks on the soundness of the investigators’ preliminary conclusions.

The new Regulation moreover provides for a number of changes which are aimed at increasing the flexibility of the system while retaining the principle of ex-ante control with clear, legally binding deadlines. In essence, the possibility to extend the deadlines in second phase should enable both the Commission and the parties to better prepare their case, while allowing for greater consultation of third parties and Member States. Moreover, it will be possible to notify a transaction prior to the conclusion of a binding
agreement provided that there is a good faith intent to enter into an agreement. These more flexible rules should allow companies to better organise their transactions without having to fit their planning around unnecessarily rigid rules, and should again facilitate international cooperation in merger cases.

Challenges

The main challenge facing us is, first and foremost, to ensure the determined and consistent implementation of the reforms. The Commission should remain vigilant of the need to constantly guarantee the objectivity of its investigation process, and of the need to re-assure the outside world that it is indeed a regulator of unimpeachable integrity and objectivity. I believe that the internal reforms I have just described should enable us to do so. Other possible challenges are:

— ensuring consistency between the approach to 81/82 and merger control;
— ex-post analysis of the effectiveness of our merger control policy.

State Aid

We can look back with satisfaction on the results of our work in recent years in the field of State aid. We have taken a number of important decisions covering such diverse issues as stranded costs in the energy sector, the competition implications of new market instruments being developed to meet the Kyoto targets, or public banks.

Reduction of the overall level of state aid granted. The edition of the State aid scoreboard adopted in April 2004 shows that there is a continuing downward trend in aid levels, with Member States broadly meeting the commitments they gave in the Stockholm and Barcelona European Councils to reduce overall aid levels, and reorient aid towards horizontal objectives, such as research and development, development of SMEs etc, and away from the more distortive forms of individual aid.

Particularly as a result of the changes following enlargement, we need to try to refocus our efforts so that we can concentrate our time and resources on important cases which present real competition concerns at the Community level. There are three pillars to State aid reform: procedural reform, improvement of the economic underpinning of State aid control and reform of State aid control instruments.

Procedural reform: a series of changes to simplify and modernise procedures have been identified and a Regulation laying down detailed provisions for the implementation of the State aid procedural regulation, including new provisions regarding notification forms, standardised reporting, the interest rate to be used for recovery of illegally granted aid and rules relating to time-limits has been adopted by the Commission and published in the Official Journal. It will be up to the new Commission to consider whether there is a need for other Communications of a procedural nature, in particular as regards the conduct of formal investigations.

The use of enhanced economic methods of investigation, through the reinforcement of the economic resources of the DG, including the contribution of the Chief Economist and the increased recourse to outside consultants, are key elements in improving the economic underpinning of decisions. In order to enable scarce resources to be concentrated on cases which give rise to important competition concerns, new instruments are being developed to allow for the very simplified treatment of cases which do not give rise to significant concerns as regards distortion of competition or effect on trade.

As regards the reform of the State aid instruments, as requested by the European Council, high priority will be given to the adoption of appropriate instruments in order to increase legal certainty regarding the application of the State aid rules to the provision of compensation for the cost of providing services of general economic interest. A package of three instruments has been submitted for consultation with Member States, the European Parliament and other interested parties. New guidelines on rescue and restructuring aid have been adopted recently in order to remedy the weaknesses identified in the current guidelines before their expiry in October 2004.

As regards existing instruments, following the adoption of amendments to the SME and training aid block exemptions, priority will be given to updating and simplifying the State aid frameworks, in particular taking account of the needs for enlargement. This is a complex exercise which will last several years.

Challenges

The Communication on a proactive competition policy already sets out an Agenda of concrete measures for the future development of the State aid rules over the horizon of 2005-2006. In my view, it will remain essential to continue the steady
elimination of incompatible aid and the reorientation of compatible aid towards horizontal objectives that help to develop the Lisbon Agenda.

Final remark

I want to finish by recalling my initial reflection: My action as Commissioner for competition has been guided by the conviction that a strong and independent Commission is crucial wherever the common interest must be protected against national and vested interests. In each intervention during my mandate I devoted my efforts to making independent and neutral assessments having in mind the common European interest and that of consumers. In my view, this is the only way to properly develop the function I have had the privilege to fulfil.