

Interview with Mario Monti, Commissioner responsible for competition

The EU gets new competition powers for the 21st century

Besides being the historic date for the accession of 10 new States to the European Union, 1 May 2004 appears to also have a particular significance for European competition policy. Why? What's going to happen?

Indeed, **1 May** will be not only 'Enlargement Day' but also, dare I say, 'Competition Day', for it **will see a revolution in the way competition rules are enforced in the European Union**. A smooth revolution, of course, and one which we have been preparing for five years — but a revolution nevertheless.

The date 1 May will usher in a mature system in which law-abiding companies that do business in Europe will be freed from decade-old legal straightjackets and will benefit from less bureaucracy and a more level playing field in the European single market.

The reform concerns mainly the enforcement of Articles 81 and 82 of the Treaty, which require us to fight cartels and abuses of dominant positions. It profoundly modifies rules which date back to 1962, when the Commission had little or no experience in this field and only one Member State had a competition authority. More than 40 years later we know and, more importantly, the companies also know the Highway Code. They know that meeting secretly in a hotel to fix prices for the vitamins used in everything from cereals to cosmetics and dog food is illegal. They know we can, and do, impose very high fines.

The gist of the new antitrust regulation is that companies will no longer notify their agreements routinely for clearance, freeing the Commission to tackle serious violations, particularly in those cases where cross-border trade is affected. Furthermore, the enforcement will not be done only from the centre, in Brussels. The task of policing anti-competitive behaviour and handling complaints will be better shared by the European family of competition authorities: the national competition authorities and the Commission, linked through the European competition network (ECN).

Never since the birth of the Union in the 1950s has there been such a radical reform in European competition policy.

Are you modernising the rules because of the enlargement?

Yes and no! Working through a pile of mostly innocuous notifications may have made sense 40 years ago: it simply does not make sense now! Any citizen must know whether he/she can park his/her car in the centre of town. He or she shouldn't have to go to the police station to check first. Similarly, the Commission's role, as an antitrust enforcer, is not to give comfort. We will do it if, for example, the issues at stake are new and there is a real need for guidance.

EU enlargement added an element of urgency and greater realisation that our resources, both national and at the Community level, would be better used if cases were handled at the level where it makes most sense. If a Spanish company complains about the behaviour of another company in Spain, it is highly likely that the Spanish competition authority will be better placed to examine the allegations. Or, and this is a relative novelty, the Spanish company could go straight to a national court, if the alleged breaches are well established in existing case-law, and seek compensation for the losses incurred as a result of the illegal conduct.

Do you think the new Member States are ready to shoulder their share of the policing?

Most certainly yes! They have all adopted competition laws and enforcement bodies when they did not have one already. Let me remind you that in the mid-1990s the Netherlands, one of the EU's founding

countries, did not have a system of merger control. Neither did Finland. The ECN will ensure a coherent application of the law throughout the Union by maintaining a regular flow of information in all directions.

You mentioned the end of notifications. Does this mean companies will no longer need to seek permission before merging?

Mergers will always require prior clearance either by the Commission or the national authorities. But in this field, too, we are introducing reforms and they also come into force in May.

The control of mergers also needed to be adapted to draw on the lessons of 13 years of experience, the judicial control exerted by the European courts and to meet companies' legitimate expectations.

The package of reforms reinforces the principle of the 'one-stop shop' review for mergers that have an impact in more than three Member States, clarifies the Commission's powers, provides better guidance as to those mergers that are likely to be challenged and increases the level of economic analysis and the internal checks necessary to ensure that our decisions are fair, sound and based on solid facts.

There have been reports that the reforms will give the Commission tougher powers.

I would not say that the Commission will become tougher, but rather that it will be given modern and efficient tools that befit a mature authority. In the merger control field, for example, this will mean that we will be able to deal with any form of anti-competitive scenario that could harm our consumers. Dominance was always clearly established as one such scenario, but there are mergers, in highly concentrated industries, where the mere disappearance of one of the few remaining players can result in less choice, less innovation and higher prices for consumers. We needed clarification of our powers in this area and EU Member States unanimously agreed to it.

In the antitrust field, in any case, I would strongly argue that we have been reforming our policy in recent years in order to allow more freedom for businesses to take the commercial decisions they want, while safeguarding competition. We have replaced all the old legalistic block exemption regulations (i.e. regulations granting antitrust immunity to types of agreements or agreements common in a given industry) with a new generation of block exemption regulations and guidelines which embody a more economic approach. Instead of imposing on companies a limited list of what they can and ought to do, the new rules define a limited list of what is specifically prohibited — such as price fixing, market sharing and any such clearly recognisable violations — and create a safe harbour for all other agreements. We have started this reform on the application of Article 81 with a new block exemption regulation and guidelines for distribution agreements, have subsequently revised the rules for cooperation agreements between competitors and for the rules for the car sector and are now in the final phase of replacing the last old-style block exemption regulation — the one for technology transfer agreements — with a new regulation and guidelines which are foreseen to enter into force on 1 May. This completes the substantive reform of the application of Article 81.

Are you also finalising a reform of the rules regarding State bailouts of ailing firms?

The 1999 rescue and restructuring guidelines expire in October 2004. We are launching the draft of revised guidelines and hope that the requisite consultation with interested parties and the Member States will be completed in time for adoption of new guidelines before summer 2004.

Our practice with respect to rescue and restructuring should, even more than before, focus on large enterprises that trade across the EU. These enterprises usually have larger market shares, and State support in their favour affects competition and trade more significantly than other companies.

Restructuring operations should ideally be self-financed by the beneficiary. Let me give you one precise example. In a restructuring operation, the aid beneficiary should be obliged to finance a large part of its restructuring cost. Therefore, the new rescue and restructuring guidelines will stress that, in particular, large undertakings that are active throughout the Community and that receive subsidies have to make a significant contribution to their own restructuring — using funds they obtained by selling assets. We will be

less strict on SMEs.

What about employment concerns?

Contrary to a widespread suspicion, aid to rescue and restructure companies is not a very socially conscious act. To some extent, it is even antisocial behaviour. This is because one company's problems are simply foisted upon other companies, most often in other Member States. Jobs in one Member State may be saved with public funds, at least for some time, but the labour problem is merely shifted to other Member States.

As long as labour mobility in Europe is very limited, employment is often a zero sum game — jobs temporarily saved in one area translate into jobs lost in another. True, more flexible labour markets and more mobility of labour would help when companies and whole sectors have to restructure, but the European Union is, and wants to remain, culturally and linguistically diverse and we have to confront the current reality in this respect.

Are there any other reforms in the pipeline?

The Commission has one particular project in the pipeline which, I hope, will have a farreaching impact on the way in which the competition rules are enforced in the Union. We are looking at ways to encourage actions before courts by private parties to punish breach of the competition rules. It is commonly stated that, in the USA, private action accounts for around 90 % of competition enforcement. In Europe, to date, there have been very few successful actions of this kind and the Commission is considering why this is the case and what can be done to improve this situation. This does not mean that we will simply follow the US example 100 %. Rather, we would like to be able to learn from the US experience to put in place an enforcement mechanism which is well suited to the needs of business and the European citizen.

As I said earlier, private actions before courts are a central feature of the modernisation of our competition rules. We want to encourage private parties actively to seek compensation for harm caused to them by anticompetitive behaviour, and for such actions to complement the enforcement activities of the public authorities. I see enhancement of private actions as a key way to help the citizen to help himself to put an end to price fixing cartels, abuses of dominant positions and other anticompetitive behaviour. To this end, I believe that actions by consumers themselves and the groups which represent them can be an effective tool in the fight against anticompetitive behaviour and allow the consumer to be directly compensated for the loss he or she suffers at the hands of companies which break the law.

I should emphasise that our work on this very complex initiative is at a very early stage, but I hope to make good progress on it during the course of this year.

There is also some talk that the Commission is reflecting on the application of Article 82. Can you lift the curtain on this last 'big work'?

I would not speak of firmly defined plans at this stage, but rather of an internal discussion. The idea is that now that we have a modern antitrust enforcement law, reformed merger control and are completing the review of the rescue and restructuring guidelines, we should also take stock of our policy with regard to abuses of market power.

As you know, there have been quite a few decisions by the Court of First Instance in the last couple of years which have confirmed our approach, most notably with regard to the impact on competition of loyalty rebates and other practices which have the effect of excluding competitors from the market place. I am thinking of our decisions with respect to the rebates granted by French tyre maker Michelin, the generous commissions British Airways used to pay travel agents to encourage them to sell only its flights or the confirmation by the CFI, in the Irish freezer cabinets case, that the provision of an ice cream cabinet free of charge by a dominant manufacturer restricts competition.

So we are quite happy that our approach has been endorsed by the Court. But we have been reviewing

the economic approach for Article 81 and it is coherent to do this now also for Article 82. The main idea is to give our officials in the competition department more guidance. Whether we will publish guidelines, similar to what we have done in the merger control field, depends on the results of our review.

How would you describe this Commission's legacy in the competition area?

I am happy that we were able to bring this modernisation programme, in antitrust, in merger control, to a satisfactory conclusion, therefore providing the Commission with mature rules for a mature competition authority. I am proud of leaving a fiercely independent authority that enforces the rules in a fair and objective manner without any consideration for the 'nationality' of the companies concerned or the size of the Member State involved.

I am also proud of another, less well publicised, part of my job, which consisted in closing the loopholes that Member States were quick to use to continue subsidising State-owned companies with little regard to the harm caused to private rivals, including in sectors where they themselves encouraged private enterprise by opening up previously monopolised markets.

In the area of the control of subsidies, I particularly want to stress our long, but successful, fight against State guarantees to the regional banks in Germany, which had the effect of distorting competition with their private rivals by giving them cheaper access to the financial markets.

I have one regret. I regret that consumers do not make their voice heard more loudly and do not make use of their rights more often. We have made some progress. We have increased and improved the channels of communication between them and us and are beginning to see the fruits of our labours, but the real harvest will come later.

1 MAY: MAIN COMPETITION REFORMS

- **New antitrust regulation (Reg (EC) No 1/2003):** eliminates notifications; empowers national competition authorities and courts to apply Article 81 in full; increases the Commission's inspection powers
- **New merger control regulation (Reg (EC) No 139/2004):** enables the Commission to intervene against all anticompetitive mergers; reinforces the 'one-stop shop' principle; introduces some flexibility in review timetable
- **Block exemption regulation on technology transfers between firms:** creates safe harbour for agreements licensing new technological breakthroughs between competing companies with market share below 20 % (30 % for agreements between non-competing firms); no presumption of illegality for agreements between companies with higher market shares
- **Regulation on air transport between EU and non-EU airports:** gives the Commission clear and effective powers to review the impact of alliances between EU and non-EU airlines on European consumers