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The New Shape of European Competition Policy*

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The New Shape of European Competition Policy

By

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"How Should Competition Policy Transform Itself ?"**

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1. Introduction

Ladies and Gentlemen,

it is indeed a great pleasure to address this distinguished audience on the occasion of the inauguration of the Competition Policy Research Center.

First of all, I would like to thank the organisers of this symposium, the Fair Trade Commission, the Competition Policy Research Center, the Economic and Social Research Institute and the newspaper Nihon Keizai Shimbun for having prepared such an interesting programme. In particular, I wish to express my deep appreciation to the Chairman of the Fair Trade Commission, Mr Kazuhiko Takeshima, for his leadership in the crucial process of establishing competition policy as a key element of Japan's structural reforms efforts.

I believe, as has been underlined this morning by Chairman Takeshima and President Kosai that the topic of this conference is indeed a very timely one. It speaks about transformation of competition policy. We know that competition policy must have a key role in the structural reforms of our countries, and therefore it is only coherent that competition policy itself, from time to time, submits itself to structural reform. Indeed, I am going to illustrate to you this afternoon briefly the process of structural reform of EU competition policy so as to make competition policy in the EU a more and more vigorous agent for structural reform in Europe.

2. Increased economic approach

All antitrust authorities are increasingly confronted with the need to investigate complex cases which require rigorous economic or econometric analysis. Therefore, I want to congratulate the Japan Fair Trade Commission for its decision to enhance its ability to carry out economic analysis and to set up the Competition Policy Research Center. Professor Suzumura, the Director of the new center, is a known competition economist and a scholar of welfare economics and social choice theory. I am confident that, under his leadership, the Centre will make an important contribution to the work of the Fair Trade Commission.

When I was appointed Competition Commissioner four years ago, one of my main objectives was an increased economic approach in the interpretation and enforcement of European competition rules.

This approach was first reflected in a new policy on vertical restraints and horizontal cooperation agreements. In order to concentrate on those cases that pose a real threat to competition, we have to analyse the market structure and to assess the economic impact of a particular operation. We have shifted from a more legalistic approach to one based on sound economic principles in line with current economic thinking. Thus, market power is a crucial element to be taken into account when we scrutinise a transaction. Under the new type of rules, companies with little market power, in particular the vast majority of

small- and medium-sized enterprises, are able to act within what we call “safe harbours”. They do not need to worry about the compatibility of their agreements with EU competition law.

In relation to vertical distribution agreements this means that, unless the parties engage in clearly defined hardcore restrictions, we are not going to worry about distribution agreements between companies with a market share of less than 30%.

A similar approach has been introduced with regard to horizontal co-operation agreements. Agreements between competitors to produce a specific component or conduct research in common, have an increasingly important role to play in helping companies respond to the changes in the market place. Again, the aim here is to minimise the regulatory burden and to focus our resources on cases where companies have market power and can therefore harm competition.

We are also currently reviewing our policy in relation to Intellectual Property agreements. We call this the reform of our Technology Transfer Block Exemption Regulation. The new rules which I am proposing will apply to the licensing of patents, know how and software copyright. They will have a clear list of hard core restrictions that are prohibited. Otherwise, below certain market share thresholds licensing agreements should pose no problems. For those cases not covered by the “safe harbour”, a set of guidelines will explain how the competition rules will be applied to individual cases.

Our increasing focus on economic analysis is complemented by a change in our administrative structure. We have reinforced the economic capabilities of the Directorate-General for Competition by creating the new position of Chief Competition Economist. Professor Lars-Hendrik Röller was appointed to this post in July 2003. He is assisted by a team of specialised economists. In antitrust, merger and state aid cases, the Chief Economist has started already offering an independent economic viewpoint for policy development and provides guidance in individual cases throughout the investigation process. In cases requiring sophisticated quantitative analysis, a member of the Chief Economist's team may be seconded to work on the case team.

3. Reforms for a more focused and more effective enforcement of competition policy

Competition policy is going through important times of change. We need to have a modern and effective competition policy able to cope with the new challenges of a globalised economy and an enlarged European Union. We must therefore set our priorities right. As the European Union grows to 25 Member States in May 2004, we will have to guarantee that business and authorities are able to operate under the same competition policy throughout the whole of the European Union. It is against this background that I intend to describe the new shape of European competition policy.

3.1. Antitrust modernisation

Let me start with what we call the modernisation of our

antitrust enforcement. Our current rules, which have remained largely unchanged since 1962, establish a highly centralised authorisation system for all restrictive agreements. Companies must notify their agreements to the European Commission in order to obtain antitrust approval. In the future, the law itself will be directly applicable. Agreements which fulfil the conditions of European competition law will be deemed legal without the need for notification and a prior administrative decision. The new regime will come into force on the 1st of May 2004, coinciding with the enlargement of the European Union.

The direct application will also allow the competition authorities of the Member States and national courts to apply the European competition rules fully. We will have a system of parallel competences in which the European Commission and the national competition authorities of the Member States will have the power to apply the European competition rules. Together, the national competition authorities and the Commission will form a network of public authorities acting in the public interest and co-operating closely together. The network will also be the basis for the development and maintenance of a common competition culture in Europe.

We expect that one of the key results of this reform will be the ability of the Commission to focus its enforcement activities better. The new system shall allow the Commission to concentrate on the detection of the most serious infringements, in particular hard core cartels, rather than on ruling on a high number of agreements which are not harmful to competition.

3.2. Stepping up the fight against cartels

Cartels, the most pernicious agreements among competitors, are an obvious area of increased focus. They are particularly harmful to industry and consumers alike, diminish social welfare, create inefficiency and transfer wealth from the consumers to the participants in the cartel. Such restraints are also harmful in the long run. The use of cartels to avoid the rigours of competition can result in the creation of artificial, uneconomic and unstable industry structures, lower productivity gains or technological improvements and sustained higher prices.

I believe that any successful policy towards cartels must rely on

- a solid capacity by the antitrust authorities to detect and prosecute cartels,
- a sufficiently deterrent level of sanctions for cartel infringements, and
- an appropriate leniency policy.

A cornerstone of our anti-cartel policy is the leniency programme. The leniency programme has proved to be a formidable tool for encouraging firms to cooperate with the Commission. Not only does it allow specific cartels to be uncovered, but more generally the mere concern that a member of a cartel might go to the authorities and secure immunity tends to destabilise the activity of the cartel itself.

In 1996, the Commission introduced its first leniency notice. This notice was revised in February 2002. We gave greater encouragement to companies to provide information and more assurance about the advantages of their cooperation. The first company which comes and denounces an undetected cartel will now receive full immunity from fines. The revised leniency programme is indeed proving quite effective: in the 21 months since the adoption of the new Notice, the Commission has received 54 applications.

The record of our cartel enforcement activity for the past two years reflects the priority we attach to this field of antitrust enforcement. In 2001 the Commission adopted 10 cartel decisions, imposing total fines of almost 2 billion euro. This amount is higher than the sum of all the fines imposed in the previous 42 years of EU anti cartel enforcement. In 2002, this level of cartel-hunting activity continued with 9 cartel decisions adopted with total fines nearing 1 billion euro. The Commission is determined to maintain this emphasis in the future.

I have cited these figures in order to underline that the Commission not only has a policy of stepping up its activity against cartels but also, at the same time has increased the level of fines in order to achieve a genuine deterrent effect. The purpose of substantial fines of this kind is to ensure that firms have an incentive to avoid joining any kind of unlawful agreement.

In this context I was very interested to note the suggestions

made by the Study Group on the reform of the Japanese antimonopoly law. The report suggests that the surcharge system should be reviewed, that the surcharges should be increased, and that a leniency programme should be introduced. I strongly support the finding that the effectiveness of competition law enforcement depends on the sanctions for a violation and that the introduction of a leniency programme creates a strong incentive for companies to quit cartel activities.

Finally, I should mention that an essential element in the fight against cartels has also been the intensified co-operation between competition authorities. The fight against a global cartel requires international cooperation and I am very pleased to note that our cooperation with the Fair Trade Commission is increasing in this respect. This year, for the very first time, we were able to coordinate a surprise inspection with our Japanese colleagues in our investigations concerning an alleged cartel in the market for impact modifiers and heat stabilisers.

3.3. Ensuring the benefits of liberalisation

Another example of our focus on the most important infringements is the Commission's application of Article 82 against abuses of a dominant position. This is particularly important in sectors which have recently been liberalised, namely telecommunications, postal services and energy.

The liberalisation processes that the European Union has launched in recent years can only be successfully achieved if former monopolists, who usually retain powerful market

positions, are prevented from engaging in exclusionary practices that create obstacles to effective competition. Experience shows that incumbents are tempted to protect their position by not only competing on the merits.

Some time ago we concluded our antitrust investigation into the behaviour of the German postal operator Deutsche Post with a decision imposing a fine. The decision found that this state-controlled company abused its dominant position by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. This procedure was initiated on the basis of a complaint by the American company UPS.

This decision is one of the many cases showing both that the Commission's enforcement policy does not make any distinction between EU and non-EU companies and that the Commission does not hesitate to sanction state-controlled companies.

Another illustration of the Commission's actions in this respect is in the energy sector. At the end of June 2003, the Council of Ministers of the European Union and the European Parliament finally approved legislation to achieve full liberalisation of gas and electricity markets. However, this legislative progress will require increased monitoring activity by the competition authorities to ensure that new market opportunities are not undermined by abusive behaviour on the part of companies - in particular vertically integrated incumbents.

Liberalisation policies, supported by competition rules, bring

clear long-term benefits to industry and ultimately to the consumer, particularly in terms of price reductions. The liberalisation of the telecommunications industry is a good example. Today, we see the results: over the past five years (1998-2002) prices of long-distance and international phone calls have fallen by over 45% across the European Union. However, local phone call prices fell only marginally over the same period in the EU Member States. This difference between these price trends reflects the fact that, even today, the local loop is still controlled by the incumbent operators.

Tackling this type of problems is one of the main aims of the new EU regulatory framework for electronic communications adopted last year. Under the new framework, regulation still remains in place for such areas where competition most probably cannot be safeguarded by the mere application of competition rules, for example to guarantee effective and speedy access to facilities which are crucial for the development of competition. However, as soon as a market becomes effectively competitive and regulation is no longer necessary to sustain competition, the regulatory mechanism will be phased out.

The importance of the telecommunications industry to the European economy calls also for an increased antitrust scrutiny in order to ensure that growth and innovation are not obstructed by market power abuses or other anti-competitive practices. It is worth mentioning two examples in this respect. We have recently acted against exclusionary pricing strategies by the German operator Deutsche Telekom and imposed a fine

when it squeezed the margin for local loop access. We also acted against France Télécom's internet subsidiary Wanadoo for predatory pricing of retail internet services and imposed a fine.

3.4. Merger review

Merger control is another priority in our enforcement activities; as we wish to safeguard competitive market structures by preventing the creation or strengthening of dominant market positions through concentrations. The thorough review process carried out over the last two years has touched upon both procedure and substance. It should soon result in another major reform contributing decisively to better enforcement of our competition policy.

In the draft of the new Merger Regulation the Commission has proposed to clarify the substantive test to assess the competitive impact of mergers so as to eliminate any uncertainty as to its scope. Discussion on this subject is ongoing in the Council of Ministers of the European Union and we are confident to achieve a consensus before the end of the year. During this discussion, the Commission has been committed to ensure that, whatever specific wording for the substantive test is agreed by the Council, legal certainty is enhanced and the relevance of the existing jurisprudence is maintained.

At the end of last year, as a part of the merger reform, the Commission also adopted a draft Commission Notice for public consultation on the assessment of mergers between competing firms, so-called "horizontal" mergers.

In the Notice we intend to set out two main ways in which such mergers may give rise to competition concerns:

- By eliminating important competitive constraints on one or more sellers, who consequently would be able to increase their prices significantly without resorting to co-ordination with other firms.
- By changing the nature of competition such that sellers, who were not previously co-ordinating their behaviour, now are able to co-ordinate and therefore raise prices. A merger may also make co-ordinating easier or more successful for sellers who were co-ordinating prior to the merger.

The notice also explains in detail the circumstances in which these types of concerns will not lead to a prohibition, because entry in the market is easy, or there is countervailing buyer power, or the merger produces efficiencies, or the failing firm defence applies. Let me stress, in particular, the fact that the notice describes in detail the elements that the Commission will take into account to assess efficiencies positively in the framework of merger investigations.

This new framework should strengthen the soundness of our analysis of mergers and, at the same time, contribute significantly to enhance the transparency of our policy in this field.

European reforms concern the fight against anti-competitive behaviours. There are two other aspects to competition agencies' efforts. One is fighting anti-competitive behaviours by

governments and the other one is the advocacy role. In the case of the European Union, as far as governments are concerned, we proceed against anti-competitive regulations introduced by governments, particularly in the area of liberal professions. We also have the task of monitoring what governments do in the market place through subsidies to companies. That is our state aid control activity. We have to authorise or to prohibit, on the basis of certain rules, state aids to companies. If a state aid has been paid out to a company and found to be not in conformity with those rules, we order the reimbursement.

Of course this activity of the Commission as a competition agency reflects two peculiarities. One is the institutional possibility of doing so. Why? Because the European Commission has, in this respect, a supranational role relative to the governments and parliaments of the Member States, and secondly the economic rationale of it since we are an institutional component of a single market. It would not make sense if the single market was protected from the threat of anti-competitive behaviour of companies while governments were free to distort, through financial subsidies, the functioning of the market. That is why there is since the 50ies already the state aid control by the Commission. I believe that, as the world economy integrates further, we will have our successors in the decades to come to consider the equivalent at the world scale in regard to state aids.

The other point is advocacy. This has to be done vis-a-vis the

public opinion at large but also by way of preventive persuasion of governments and parliaments. Now, in the European Union, we have another peculiar institutional arrangement in the sense that the competition agency is an integral part of the European Commission, i.e. the executive body of the European Union. This does not, in the least, limit the independence of the competition decisions. Quite on the contrary, it has the advantage that the Competition Commissioner is there among twenty Commissioners of the European Union and that the Directorate-General for Competition participates in all inter-service consultations. So that we can exercise not only preventive persuasion but actually preventive participation in the decision-making concerning the directives and regulations in other areas decided by the European Commission which may have unintended anti-competitive side effects. This stresses the importance of institutional arrangement for effective enforcement and advocacy.

4. International cooperation

Let me conclude my remarks with a few words on the “external” component of European competition policy. As the process of globalisation intensifies, more and more cases are likely to fall within the jurisdiction of several competition authorities. Many merger operations and cartels truly have a global dimension. Co-operation between competition authorities is therefore essential and a key element of an efficient competition policy.

I have already referred to the growing bilateral co-operation in

cartel enforcement and we all know that co-operation in merger enforcement has become part of our daily routine. However, with the growth in the jurisdictions that apply competition rules, it became evident a few years ago that the main challenge lies in establishing co-operation and co-ordination initiatives on the multilateral level. In this respect, the last year has seen significant progress as well as set-backs.

The failure of the WTO Cancun ministerial meeting was clearly a disappointment. The future of the discussions on competition in the WTO has now become just one aspect and not necessarily the most important one of the wider question of the future of the Doha Round. For many years, the European Union, like Japan, has been a proponent of the idea of a multilateral agreement on competition in the WTO. Now, given the cold reactions expressed in Cancun by a relevant number of WTO members, we have to consider within the EU how best to take this forward. No decisions have yet been taken on this point.

On the positive side, everyone acknowledges that the International Competition Network (ICN) is being a successful initiative. The ICN second annual conference in June of this year saw further progress in global convergence and co-operation through a result-oriented agenda.

I am particularly satisfied about the progress achieved in relation to merger control, notably through the set of "Guiding Principles" and "Recommended Practices" for the control of multi-jurisdictional mergers. Although these principles and

practices are entirely non-binding, all ICN member agencies are invited to check whether their domestic competition regimes are in compliance with these provisions.

I see the ICN as a useful tool to enhance co-operation and convergence in the years ahead. I am aware, though, that some of the world's competition authorities may not yet feel well equipped to employ such common standards. Therefore, I am particularly pleased that we were able to put forward a comprehensive report on Capacity Building. The report addresses the many challenges that competition authorities in the developing world have to face. Supporting the capacity building process of authorities in developing and transition countries will become an essential element to ensure the success of the ICN in the years to come. In this context I can only support the laudable efforts in this field undertaken by the Japanese authorities.

5. Concluding remarks

The European Commission is committed to develop a modern and efficient competition policy. A policy which reflects a realistic economic analysis of the market place. A policy that takes into account the concerns of the business world in terms of transparency, certainty and predictability. But above all, a policy which ensures that the market functions in such a way as to maximise the benefits for the consumer.