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The Competition Rules of the European Union and their Enforcement by the European Commission

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Ladies and gentlemen,

I would like to thank the University of International Business and Economics for giving me the opportunity to talk to you about current issues of competition policy in the European Union. Rules on fair and undistorted competition have been an integral part of the EU's economic constitution from the very beginning - and they have been applied very successfully over time. The European Commission has played a key role in this since it is the authority that applies and enforces competition rules for all cases which have an effect beyond the national boundaries of its Member States.

Today, not only do all EU Member states have competition laws, but such rules have been introduced in almost all countries around the world. More than 120 countries work together in the International Competition Network (ICN) in order to exchange views and to work towards a common understanding as to how competition rules should be applied.

Why has the application of competition law been such a success story? The reason is, I believe, that it is a formidable instrument for keeping the economy in shape and for reaping benefits for society as a whole. Competition is obviously not an end in itself, but it sets the framework for well-functioning markets and as such is a powerful organisation principle. It leads notably to a better allocation of resources which in turn produces positive effects – it creates growth and jobs. And, ultimately, it protects consumer welfare – which is the overall objective of the application of European competition law.

Let me say a word about the role of competition policy in times of crisis, such as the banking and sovereign debt crises we are going through in Europe at the moment. Should we listen to those who call for a relaxation of competition rules ?

Based on our vast experience we are convinced that it is competition which drives growth, investment and innovation – and not the absence of competition- even in times of crisis. Keeping the European Single Market open and integrated has never been more important than currently. Competition rules take care of that and form the basis for keeping markets undistorted.

Having thus set the scene let me briefly outline the fundamentals of our competition rules and how they are applied in practise.

EU competition law basically rests on three pillars:

> Rules against anti-competitive conduct of companies (Articles 101 and 102 TFEU)
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> Rules on the control of structural measures (mergers, acquisitions, creation of joint ventures) which may lead to the impediment of effective competition (EU Merger Control Regulation)[1]
>
> Rules on financial interventions of the state that favour certain companies and thereby distort competition (Articles 107 *et seq*. TFEU)

I will not dwell upon the rules against unfair subsidies from the side of public authorities. Financing of companies by the State should be limited to cases of market failure (e.g. financing ferry services to small remote islands which would otherwise be uneconomical) or situations where general public interests are pursued, such as subsidies for R&D or overriding environmental purposes. Financing by the state can otherwise distort competition between companies which

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[1] Regulation 139/2004 (Official Journal L 24 of 29 January 2004, p. 1)

are located in different countries. Such rules against unfair subsidies also exist in the trade environment for very similar reasons.

Restrictive agreements

The first pillar of our competition rules prohibits the anti-competitive conduct of companies in the form of horizontal and vertical agreements.

Such agreements can be classified in two broad categories: restrictions by object and restrictions by effect. Agreements falling under the category of restrictions by object, such as those aiming to fix prices or to divide markets, are considered as illegal in themselves. Such agreements are invariably harmful to competition and there is no need to examine their actual effects on competition. Such agreements do not qualify for an exemption under the EU competition rules since they do not produce any efficiencies, i.e. they do not foster consumer welfare or innovation or result in other beneficial outcomes.

On the other hand, the assessment of the *second* group of agreements, those which may restrict competition only by their effect, but do not have as their object the restriction of competition, is quite different. These practices are not necessarily harmful to competition. The European Commission will normally apply a balancing test to measure the restrictive effects of the agreement against the efficiencies brought about by the agreement. The outcome of this assessment will depend on the nature of the agreement and the market conditions, including the market power of the parties concerned. For example vertical distribution agreements between market players on different level of the economy, such as a franchising agreement, will typically produce pro-competitive effects and qualify for an exemption from the rules prohibiting restrictive agreements.

Cartels

The European Commission considers that "hard core" cartel agreements among competitors to fix prices and share markets are most harmful to downstream companies and to consumers. They represent a direct attack on the functioning of the competitive process. The fight against cartels is therefore a top priority for the European Commission.

The harm caused by such cartel agreements is not abstract or negligible – quite to the contrary. The results of pro-active competition enforcement are important not only to protect consumers from unfair prices, but also to preserve competitiveness more generally. For example, our policy in fighting cartels aims at allowing European firms to get efficient access to inputs, since cartels often concern intermediate products (e.g. car parts, metals or chemicals) and they are likely to make finished goods less competitive internationally through overcharges that can often be in the range of 15-20%.

A recent example is the cartel among six producers of LCD panels who in 2010 were fined a total of EUR 648 million for the fixing of prices and the exchange of commercially sensitive information[2]. These anti-competitive agreements had a direct impact on consumers in Europe because the vast majority of television sets, computer monitors and notebooks incorporate such LCD panels. Samsung Electronics of Korea received full immunity from fines under the European Commission's leniency programme, since it was the first to provide information about the cartel.

[2] Press release IP/10/1685 of 8 December 2010

The detection of cartels has been greatly facilitated by our leniency policy which has been applied successfully over a number of years now[3]. Under these rules a company first denouncing a cartel can escape a fine completely and there are various reductions foreseen for companies putting forward evidence against the cartel or cooperating with the EU Commission in other ways. Leniency applications are often put forward in connection with a change in ownership or management of a company. The number of leniency applications has been consistently high and certainly will keep us busy for some time to come.

Another way to improve our fight against cartels is the promotion of so-called private enforcement where parties who were harmed through cartel practises can bring claims for damages before the national courts.

One of the current priorities are investigations in the field of financial services. In this context, the Commission is investigating cases related to benchmark rates, including Libor, Euribor and the Tokyo rate (Tibor) in several currencies. We are looking at the alleged collusive conduct of certain undertakings, banks and brokers active in interest rate derivative products, which form part of the group of financial derivatives linked to these benchmark rates. These investigations are a top priority for the Commission, and will represent a significant part of our work in 2013. If our concerns are confirmed, we will take the necessary action to sanction the participating companies under EU competition rules.

[3] Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C298 of 8 December 2006, p. 17

Unilateral conduct

Article 102 TFEU concerns the unilateral conduct of companies and prohibits the abuse of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is certainly entitled to compete on the merits. However, an undertaking which is dominant on a certain market has a special responsibility not to allow its conduct to impair genuine undistorted competition in a way that would affect the functioning of our internal market.

Where exactly the dividing line lies between competition on the merits and actions which ultimately harm consumers is presently the subject of a lively debate in Europe. It basically comes down to the question of whether there is a “rule of reason”approach also for unilateral conduct, i.e. can unilateral conduct that appears harmful at first sight nevertheless produce efficiencies that outweigh any negative effects.

In 2009, the European Commission provided guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (footnote). Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct. It will thus help undertakings to assess better whether certain behaviour is likely to result in intervention by the Commission under Article 102 TFEU.

On the basis of this guidance the Commission will apply an economic effects based approach also when examining whether certain behaviour should be considered to constitute abuse.

The European Commission has in recent years decided a number of high profile abuse cases in which it applied economic reasoning.

An important example is the European Commission's investigation of Microsoft's use of its near monopoly on the PC operating system market. We came to the conclusion that Microsoft was illegally refusing to provide interoperability information to vendors of competing server operating systems and that it was also illegally tying Windows Media Player to its Windows PC operating system. We therefore imposed a fine of € 497 million[4].

A more recent example is the Intel case of 2009 where the European Commission imposed a fine of EUR 1 billion on Intel[5]. Intel held an 80% market share for the production of the Central Processing Units (CPU) which is often referred to as a computer's "brain". The manufacturing process of CPUs requires high-tech and expensive facilities and there was only one other CPU manufacturer on the market in addition to Intel.

Intel's abuse consisted in awarding major computer manufacturer rebates which were conditioned on these manufacturers' purchasing almost all of their supply needs from Intel. Intel also awarded payments to Europe's largest PC retailer, conditioned on the retailer selling exclusively Intel-based PCs. The European Commission concluded that the conditional rebates granted by Intel were intended

[4] Press release IP/04/382 of 24 March 2004

[5] Press release IP/09/745 of 13 May 2009

to “buy” the loyalty of key manufacturers and of major retailers. These lock-in effects of the fidelity rebates significantly diminished competitors' ability to compete on the merits of their CPUs and thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

Apart from these high profile cases in the digital world art. 102 TFEU has been used in order to accompany and implement the liberalisation of certain sectors that were previously reserved to specific companies, such as energy or telecommunications. Here the ex-monopolists often continued to adopt bad habits and impeded new entrants from competing effectively on the liberalised markets. In a number of instances the Commission stepped in to prevent refusals to supply or anti-competitive margin squeezes.

One example is the case concerning Telekomunikacja Polska where the Commission imposed a fine of EUR 127.5 million on the Polish incumbent telecoms operator for an abuse of a dominant position in the Polish broadband market[6]. The decision found that Telekomunikacja Polska had unlawfully refused to grant alternative operators access to its wholesale products for more than four years. Such abusive behaviour was likely to harm consumers by causing low broadband penetration, high retail prices and low broadband speeds.

The European Competition Network

The fight against cartels, anti-competitive agreements or abuses of dominance is not only a priority for the European Commission but it is also shared with the competition authorities of the EU Member States with whom DG Competition

[6] Press release IP/11/771 of 22 June 2011

works very closely in the framework of the European Competition Network – the ECN. The ECN was established in 2004 as a forum for cooperation between the Commission and national competition authorities. It ensures an efficient division of work and an effective and consistent enforcement of EU competition rules throughout the EU. The ECN is a forum which allows the European competition authorities to cooperate with each other through the coordination of investigations and sharing of information about new cases and envisaged enforcement decisions.

The ECN was established as a result of a 2004 reform of the rules implementing the EU competition rules. The reform changed the EU enforcement system for restrictive agreements under art. 101 TFEU. It moved from a centralised authorisation based system run by the European Commission to a legal exception system based on a decentralised application of EU competition rules. Under the modernised system Member States' competition authorities and courts were given the power to apply the EU competition rules directly and in parallel with the European Commission.

The reform allowed the European Commission to concentrate on large cases with a significant impact on the EU markets while at the same time the national competition authorities were empowered to deal with smaller but still important cases affecting trade between EU Member States.

At the same time, there has been a movement of reform of the national legislations of the EU Member States in the direction of harmonisation of competition legislation towards common standards. The overall experience with the decentralisation reform is that the EU as a whole has found a more efficient model for the effective enforcement of it competition rules.

Merger review

In addition to the control of anti-competitive behaviour by companies the European Commission also has an instrument to address the harmful effects of structural changes to the market, i.e. merger control.

The legal basis for merger control is not found in any specific Treaty provision but in a regulation of 1989 laying down the modalities for EU Merger Review[7]. The objective of examining proposed mergers is to prevent harmful effects on competition that will work to the detriment of consumers. Such harm can arise, e.g. from the elimination of important competitors or the creation or strengthening of a dominant position on the market concerned.

Mergers, acquisitions or the formation of Joint Ventures can expand markets and will often bring benefits to the economy. Combining the activities of different companies may , for example, allow the companies to develop new products more efficiently or to reduce production or distribution costs. Through their increased efficiency, the market becomes more competitive and consumers benefit from higher-quality goods at better prices. Increased competition within the European single market and globalisation are among the factors which make it attractive for companies to join forces. Such reorganisations are welcome to the extent that they do not impede effective competition. However, some mergers may reduce competition in a market, usually by creating or strengthening a dominant player or through further tightening an already narrow oligopoly. This is likely to harm consumers through higher prices, reduced choice or less innovation.

[7] The Merger Regulation was originally adopted on 21 December 1989 and substantially amended in 2004. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22

We adjusted the substantive threshold for intervention in merger reviews in 2004 by introducing the so-called significant impediment to effective competition ("SIEC") test. We did this to emphasise an already on-going move towards an "effects-based approach" in merger control. This means that we put greater emphasis on economic analysis and rely less on structural factors such as concentration levels and market shares. Thus we look typically at factors such as: Are the products of the merging parties close substitutes? What would happen when you eliminate the competitive constraint which one party exercises on the other or on the whole market in question? Could companies not-currently active in the relevant market enter or reposition sufficiently quickly and at a sufficient scale to take on the role of a competitive constraint?

These are just a few, but very important issues we examine and many others are relevant depending on the kind of competitive harm we examine (e.g. horizontal or vertical effects of mergers). We also increasingly examine likely price effects and compare them to any efficiency gains that may be brought about by the transaction in question.

Following this approach, we have developed a stable framework for a predictable assessment of mergers on the basis of our substantive guidance notices, such as the Horizontal Guidelines of 2004[8] as well as the Non-Horizontal Guidelines[9] and the Remedies Notice[10], both enacted 2007/2008.

[8] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. OJ C 31, 05.02.2004, p. 5-18.

[9]. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6-25

[10] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27.

As we have gradually improved our analytical tools and refined our substantive test, we do not identify more cases of concern today compared to the past. Our so-called intervention rate has remained stable at about 6-8% of the notified cases per year. Since the Merger Regulation came into force in 1990, the Commission has cleared more than 4,600 deals and blocked only 24. This means about one prohibition decision for every two hundred cases. In more than 300 cases we could solve competition problems on the basis of suitable remedies.

Last year – to give you fresher figures – we received 283 notifications, approved as many as 254 of them in Phase I and blocked only one transaction.

At the beginning of 2012, the European Commission prohibited the proposed merger between Deutsche Börse and NYSE Euronext, as it would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges[11]. Together, the two exchanges control more than 90% of global trade in these products. The Commission's investigation showed that new competitors would be unlikely to enter the market successfully enough to pose a credible competitive threat to the merged company. Although the companies offered to sell certain assets and to provide access to their clearinghouse for some categories of new contracts, overall, the commitments were inadequate to solve the identified competition concerns.

This year has already seen two prohibitions, when the European Commission first blocked the planned logistics merger between UPS and TNT[12] and shortly afterwards prohibited the proposed takeover of the Irish flag carrier Aer Lingus by

[11] Case No COMP/M. 6166 - *Deutsche Borse/NYSE Euronext*, Commission Decision dated 1 February 2012. Press release IP/12/94 of 01 February 2012.

[12] Case No COMP/M.6570 – *UPS/TNT Express*, Commission Decision dated 30 January 2013. Press release IP/13/68 of 30 January2013.

Ryanair[13]. The latter acquisition would have combined the two leading airlines operating from Ireland. The Commission concluded that the merger would have harmed consumers by creating a monopoly or a dominant position on more than 40 routes where, currently, Aer Lingus and Ryanair compete vigorously against each other. This would have reduced choice and, most likely, would have led to price increases for consumers travelling on these routes. Although Ryanair offered remedies, they fell short of addressing the competition concerns raised by the Commission.

The same was true for the remedies offered by UPS in their take-over attempt of the Dutch logistics company TNT. Here the Commission was concerned that the loss of competition in the market for express parcel deliveries in the EU caused by the combination of two of the strongest players would not be sufficiently compensated by the potential buyer of the assets that were offered for divestment. The Commission's analysis put in particular into question whether the purchaser would actually use the assets for entering the international express market and whether it would build up the necessary own air capacity.

But such prohibitions of mergers are very rare and we resolve almost all problematic cases with remedies proposed by the parties. Such remedies need to be proportionate and to be designed in such a way as to solve the competition problem identified. Remedies cannot be used in order to achieve other "desirable" outcomes or to pursue objectives other than those of competition policy.

[13] Case No COMP/M.6663 – *Ryanair/Aer Lingus III*, Commission Decision dated 27 February 2013. Press release IP/13/167 of 27 February 2013.

For example, when Panasonic planned to take over Sanyo to create the largest maker of portable (PC and GSM etc.) batteries in the world, the European Commission identified competition concerns as Panasonic and Sanyo are strong players, close competitors and face limited competition from other battery manufacturers[14]. As result, the Parties offered to divest certain battery production facilities in markets where the Commission identified competition concerns allowing the European Commission to approve the transaction I understand that Mofcom's Anti-Monopoly Bureau came to a similar conclusion of the case.

Another example, where the European Commission accepted remedies proposed by the parties is the Cisco/Tandberg deal concerning videoconferencing equipment[15].The concerns the Commission found were that the combined Cisco/Tandberg would become so strong after the merger that it would no longer share its interoperability protocol with its competitors. In this case we accepted as a remedy the transfer of the interoperability protocol to an independent industry body, making sure that also in the future the customers of competitors could have a connection to the Cisco/Tandberg equipment. This ensured that competitors would not be foreclosed from the market. We also cleared the Western Digital/Hitachi transaction in the hard disc drive market on condition that the parties would sell certain assets to preserve sufficient competition in an already concentrated market contestable. Since these are fast moving markets, we also required that the buyer of the divested assets would maintain a sufficient innovation capability.

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[14] Case No COMP/M.5421 – *Panasonic/Sanyo*, Commission Decision dated 29 September 2009. Press release IP/09/1383, of 29 September 2009.

[15] Case No COMP/M.5669 – *Cisco/Tandberg*, Commission Decision dated 29 March 2010. Press release IP/10/377 of 29 March 2010.

The case concerning hard disc drives was also a particular case in that the European Commission cooperated constructively with Mofcom's Anti-Monopoly Bureau as well as a number of other competition authorities. International cooperation is fundamental in cases of this type which involve global players and global markets. Without cooperation we run a very high risk of adopting contradictory decisions – which would undermine our credibility – or decisions imposing remedies for companies that are not consistent – which could pose insurmountable obstacles for the merging parties.

Decision-making powers of the European Commission

In order for a competition authority to be successful in implementing effective competition policy there need to be sufficient enforcement powers. Unlike some other competition authorities the EU Commission is vested with the direct power to adopt binding decisions to block a merger or to sanction an undertaking for anti-competitive conduct. This power includes, of course, the possibility to adopt less stringent measures – such as the clearance of a merger subject to the fulfilment of certain conditions (normally divestitures) or the agreed settlement of an anti-trust case (as, e.g. in the recent e-books case). All decisions by the EU Commission are subject to judicial review by the European Court of Justice in Luxembourg. There is a strict obligation for the Commission to respect the rights of all undertakings concerned and of third parties – and there is a far reaching requirement to set out a clear reasoning of any decision. This is communicated to the parties as well as to third parties and the public, the latter, of course, in a form that respects confidentiality and business secrets. The EU's competition enforcement system is thus characterised by transparency and the respect of procedural rights. In addition, Competition Authorities must also be allowed to act and adopt decisions in an impartial and independent manner. They should have a strong mandate which gives them the power, for example, to base their decisions on competition grounds without undue interference by other policy considerations. This does not mean that other policies may not be important or legitimate. But they should be pursued through other instruments, as appropriate, and in a transparent manner. Otherwise competition decisions become unpredictable which will create a climate of uncertainty and affect business activities and investments.

International aspects of competition enforcement

Let me finish by looking at the international aspects of competition law enforcement and the challenges encountered when our cases involve large and global companies and markets. For example cases related to raw materials, aircraft parts or the digital world are no longer imaginable in purely national or regional terms.

Merger cases like the ones concerning hard disc drives involved global markets and the cooperation between several competition authorities around the globe. Without such cooperation our respective merger review would be less efficient and companies would be faced with the risk of divergent outcomes.

The same is true for the fight against cartels. In 2010, the European Commission fined 11 air cargo carriers a total of nearly 800 million € for operating a worldwide cartel which affected cargo services in the EU and in other jurisdictions.[16]. Several known airlines are among the 11 undertakings fined, namely Air Canada, Air

[16] Press release IP/10/1487 of 9 November 2010

France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas. The case involved the coordination of investigative steps and there was cooperation between a number of competition authorities in Asia, Australia, Europe and North America.

In order to face effectively the challenges posed by global markets and the activities of global market players, competition authorities must develop good relations and procedures for cooperating. Otherwise an effective combat against international cartels will not be possible. Also the review of global mergers requires that the reviewing authorities come to coherent conclusions including the imposition of proportionate remedies in problematic cases.

It is against this background that we have been cooperating with the Chinese authorities since before the adoption of the Anti-Monopoly Law in 2007. We signed Terms of Reference for a competition policy dialogue with Mofcom already in 2004. In the same vein we would like to expand our cooperation with the NDRC and SAIC as testified through the recent Memorandum of Understanding between DG Competition and the NDRC and SAIC. This Memorandum of Understanding creates a dedicated framework to strengthen cooperation also with these authorities.

We are confident that these initiatives will give new impetus to ever closer enforcement cooperation between the Chinese competition authorities and the European Commission.

Thank you