CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
February 2010 (1)

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I. INTRODUCTION

The entering into force of the Lisbon Treaty which became effective on December 1, 2009 and the new leadership at DG COMP, in particular Joaquín Almunia as Commissioner in charge of competition, provide an excellent opportunity to reflect on the scope for continuity and change in EU competition policy and to provide a number of modest policy suggestions.

Commissioner Almunia succeeds Neelie Kroes who has, over the past five years, built an impressive reputation. After some hesitation at the beginning of her tenure, Commissioner Kroes put her Directorate-General and herself solidly on the map. To start with the obvious, many cartels have been detected and prosecuted, in particular in leniency cases, and record fines have been imposed. As part of her fight against cartels, in 2006 she introduced a more radical leniency notice and new fining guidelines. These initiatives have undoubtedly raised her profile and that of DG COMP as consumer champion. In addition, Commissioner Kroes started major sectoral inquiries in the energy and pharmaceutical sectors and brought the prosecution of Microsoft that Mario Monti had begun to conclusion.

This latter case went hand-in-hand with an increased focus on unilateral conduct cases involving high-tech companies such as Intel, Qualcomm, Rambus, Google, and Apple. However, despite the remaining need to further streamline state aid control procedures, in particular by improving access to the file for potential state aid beneficiaries and better procedural rights for competitors, the previous Commissioner will probably be best remembered for having modernized State aid policy following the State aid action plan of 2005. Moreover, in the face of the financial crisis, Mrs. Kroes has played a pioneering role and has shown a sense of reality coupled with firmness.

History will tell how Commissioner Almunia's legacy will relate to Mrs. Kroes' achievements, the thoroughness and decisiveness of Karel van Miert, and the accomplishments of Mario Monti, who has laid the foundations of the current enforcement system and emphasized the importance of economic rationales in competition law practice.

This contribution includes some modest suggestions for areas where the new Commissioner and his staff may direct their attention. However, it can be expected that, at least initially, DG COMP's activities will for a large part be characterized by a continuation of the present policy. This is certainly likely to apply to the Commission's state aid policy. At his

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confirmation hearing before the European Parliament, Commissioner Almunia made it clear that he is committed to ensuring that competition policy "supports a successful exit from the crisis, while maintaining a level playing field and safeguarding the internal market." In addition, he stated he would continue to work towards legislation in the area of private damage actions and remain focused on the application of the competition rules in such key areas such as energy, information technology, and transport. Incidentally, in relation to fines, he stressed that the current system has "proved its mettle" and that the Commission "...will continue to use fines as a deterrence. So far so good. ..."

The new Commission is to operate under the revised legal regime introduced by the Lisbon Treaty. However, as many commentators have already noted, these changes are unlikely to have a significant impact on competition policy as it has been enforced so far. True, as a result of President Sarkozy's intervention in June 2007, eliminating the language "a system ensuring that competition in the internal market is not distorted" from article 3 g EC Treaty as one of the Treaty objectives and the simultaneous relegation of that objective to Protocol No. 27 may, at first glance, have weakened the enforcement of the competition rules. However, the Commission will not be constrained in the application of its powers as the provisions aimed at companies (articles 101 and 102 TFEU), as well as Member States (articles 106, 107, and 108 TFEU) remain unchanged and are generally applied without reference to article 3 g EC Treaty. Finally, it is unlikely that the competition provisions will lose their public order character merely because the objective of a system of undistorted competition has been moved to a Protocol that, incidentally, forms an integral part of the treaty itself

II. NINE MODEST SUGGESTIONS

The DG COMP agenda and the activities that DG COMP will embark on over the next period are, of course, to a large extent determined by external factors. Indeed, leniency applications, complaints, and merger control notifications, as well as matters relating to the financial crisis will necessarily constrain DG COMP's resources. Besides, to function effectively, institutions like the Commission must be sufficiently flexible to react to unexpected matters that require attention. However, the new DG COMP leadership does have significant room to develop new policy and focus on matters that it has identified as priority areas. The nine modest suggestions set out below are a limited and—highly subjective—selection of the many issues that the new Commissioner and his team may devote attention to.

A. Set Priorities Based on Consumer Benefits

Like any public institution, the new Commission would be well-advised to keep a sustained focus on matters where it can make a significant difference for consumers and to set its priorities accordingly. Accordingly, it is self- evident that the prosecution of hardcore cartels should remain one of its top priorities. Similarly, intervention in sectors such as energy where the Commission's actions may have a direct and significant effect on consumer prices seems equally warranted. But there are many challenges: When identifying its priorities the Commission should avoid being led exclusively by short-term or individual interests, or taking on matters that are highly visible to the public but do not contribute to solving structural competitive problems. And intervention should be premised on a well-defined, robust theory of harm and some quantification of the harm to be eliminated. Sector inquiries may be helpful in identifying the potential areas where intervention is needed and generate support for such action. However, in light of the administrative burden for

businesses these inquiries impose, it is important to limit them to what is necessary to achieve the objectives.

Finally, it is important to communicate the identified priority areas to provide the private sector with a reasonably predictable agenda and to enable it to evaluate the actions taken.

B. Continued Focus on the Financial Sector and Economic Crisis

The economic crisis is not yet over and, as the new Commissioner has stated, it is likely that significant DG COMP (state aid) resources will have to be devoted to manage the crisis and its aftermath. This is particularly true in light of the fact that the temporary state aid support scheme for credit institutions will end at the end of 2010 and financial support received is to be repaid.

But it is equally important to analyze the origins of the crisis and, in particular, to reflect on the relationship among competition, concentration, and financial stability in the financial sector. So far, the evidence seems to point in different directions. Some commentators argue that excessive competition can lead to a fragile financial system and that restraints on competition can help preserve the stability of credit institutions, while others defend the opposite view. On a more general level, the tensions between competition law and financial sector regulation that have arisen are clear and imminent and require urgent attention. However, one suggestion seems particularly unhelpful; the belief that large conglomerate financial institutions would, by definition, pose a threat to financial stability and that this condition should be remedied by antitrust law.

C. Sanctions

Much has been written on the level of fines for violations of EC antitrust law, as well as the methodology for calculating those fines. From the perspective of the prestige of the Commission as a leading antitrust agency and, indeed, the legitimacy of the entire enforcement system, this is a key issue that the new Commission should tackle. There are many aspects related to the EC sanctioning mechanism that require attention. For one thing, because there is no direct relationship between turnover and profit, the use of the base parameter for the calculation of fines—the value of sales to which the infringement relates—may result in unequal treatment between different types (high revenues, low profit; low revenues, high profits) of undertakings. Other focal points of a review of the current fining policy should be the duration criterion, the (quasi) criminal nature of fines and related due process requirements, and the automatic attribution of liability to parent companies of concentrative joint ventures that, by definition, determine their market conduct autonomously. More fundamentally, it would be appropriate if the Commission would undertake a critical assessment of what constitutes an optimal mix of sanctions in relation to the various types of violations. Such an exercise would, of course, not have to be based on a pre-defined objective to arrive at lower fines in all cases.

D. Institutional Reform and Due Process

The unique position that the EC Commission holds in the European enforcement system, the repertoire of sanctions that it can impose, and the Community Courts' inability or reluctance to enter into a detailed analysis of Commission decisions that impose fines put the current enforcement system under considerable and increasing strain. This potentially reduces the prestige of the Commission and reinforces the need to explore institutional reforms and safeguards to guarantee procedural fairness. The recently published draft Best Practices in proceedings concerning articles 101 and 102 TFEU and the Hearing Officers' Guidance Paper are a step in the right direction of improving transparency, fairness, and predictability in article 101 and 102 TFEU

procedures. This applies, in particular, to the suggestion to introduce state-of-play meetings in cartel proceedings. Indeed, similar Best Practices already exist for procedures under the EMCR and have proven useful. However, this does not obviate either the necessity to assess whether the current draft texts can be improved upon, or the need to explore the possibility for real reform, including an independent adjudicatory panel within the Commission or under its auspices.

E. The International Competition Network (ICN)

By encouraging the dissemination of antitrust experience and best practices, the ICN promotes more efficient antitrust enforcement worldwide. Over the past decade the organization has made significant strides towards a more uniform approach in the areas of agency effectiveness, advocacy related subjects, cartels, unilateral conduct, and merger control. In many ICN member agencies jurisdictions, including the EC, the Czech Republic, Mexico, and Korea, the ICN Recommended Practices on Merger Notification and Review Procedures have resulted in legislative and policy changes. Undoubtedly, this has brought greater consistency, efficiency, and effectiveness in multi-jurisdictional merger review procedures, as well as lower administrative costs for business.

The task that lies ahead is to solidify the results to date, and develop a long-term vision for the next decade. In that respect two subjects seem particularly relevant. First, building on its previous work, the ICN should consider establishing Best Practices for the evaluation of unilateral conduct, a task that is particularly complicated in light of the diverging methods of analysis in key jurisdictions. Second, while the ICN has become an authoritative organization, its functioning and success critically depend on voluntary participation and peer pressure; it does not have formal mechanisms to stimulate or enforce compliance with ICN best practices. While it is important to maintain the voluntary character of the ICN, it would be prudent to reflect on mechanisms to at least more systematically monitor the implementation of ICN work products. It is hoped that the new Commissioner and his staff will play an important role in these two respects.

F. Foreclosure and Consumer Harm in Article 102 TFEU Cases

The *Intel* decision of May 13, 2009, the first case in which the Commission explicitly applied the methodology set out in its *Guidance Paper on Exclusionary Conduct by Dominant Undertakings* (and in which the Commission imposed a fine of EUROs 1.06 billion on Intel Corporation for having foreclosed its main rival, AMD, from the market of x86 computer processors) demonstrates that the Commission's policy in the area of article 102 TFEU remains unclear in important respects. To mention a few contested issues: What is the practical value of the Article 102 Guidance Paper when the Commission continues to base its decisions under article 102 TFEU on the *Michelin II* and *British Airways* judgments, as it did in the *Intel* decision? Second, what is the proper method for determining the "contestable share" when applying the "as efficient competitor" test and how do subjective customers' prognoses with regard to the volumes that they might decide to buy relate to the objective nature of that test?

The *Intel* decision suggests that the Commission still relies primarily on the same old case law that has prompted the Article 82 review and, in addition, seeks to stretch the limits of that case law. For companies potentially faced with Article 102 TFEU allegations this situation is highly undesirable. It is hoped that the new Commission will self-impose more rigorous standards when applying article 102 TFEU and, in particular, concentrate more directly on the effects on competition and the quantification thereof that the conduct is thought to bring about.

G. The Importance of Innovation in Article 101 and 102 TFEU cases

Nowadays, it is common wisdom that innovation is the key driver of long-term consumer welfare. This implies that unwarranted restraints on desirable innovative activity as a result of antitrust intervention may significantly damage society. However, it is submitted that the EC framework of analysis is biased in favor of static gains and losses and that the importance of the various types of innovation is poorly articulated, if not misunderstood. For instance, in the *Microsoft* case, the Commission and the General Court seem to implicitly prefer a system of (follow-on) incremental innovation involving more industry participants to a system of single-firm breakthrough innovation, without articulating the reasons. Similarly, the *Intel* decision is in part based on the mere presumption that consumers were deprived of innovative AMD products because Intel was found to have diminished its rival's revenues and innovative capabilities.

In light of the growing trend to intervene on the basis of article 102 TFEU in technology-related sectors, companies would benefit from a clearer articulation of the role of innovation and the framework for the evaluation thereof.

H. Resale Price Maintenance

One of the most contested issues in the review of Regulation 2790/1999 on vertical restraints is the treatment of resale price maintenance agreed upon by parties with little or no market power. While the U.S. *Leegin* judgment strongly militates in favor of abandoning resale price maintenance as a hardcore restriction within the meaning of article 4 of the regulation, the Commission has so far proved unwilling to do so. Indeed, while recognizing the efficiency-enhancing potential of resale price maintenance in specific, isolated cases, it attaches far greater importance to the potential harm to interbrand competition that resale price maintenance may bring about, similar to Justice Breyer's dissenting opinion in the *Leegin* judgment. This approach is problematic in light of the high evidentiary hurdles under article 101(3) TFEU.

In light of the fact that resale price maintenance arrangements involving parties with little or no market power will only very exceptionally raise interbrand concerns, it makes sense for the Commission to either reverse its course and treat resale price maintenance as any other non-hardcore vertical restraint or, at least, to significantly widen the scope for efficiency defenses relating to this particular type of restraint. A more rational treatment of resale price maintenance may also entail the modification of Section 11(2)a of the 2001 De Minimis Notice.

I. The Exchange of Commercially Sensitive Information

Finally, it would be highly desirable for the Commission to clarify its position with regard to the circumstances under which it considers the exchange of commercially sensitive information between competitors as a restriction "by object" under article 101 TFEU. While the exchange of commercially sensitive information may, in some cases, be anticompetitive because it dampens or eliminates competition between competitors, it may also lead to significant efficiencies by, for example, disseminating technological information. It is important that the standard of analysis takes account of this dual character of information exchanges.

The recent *T-Mobile* judgment of June 4, 2009 has been interpreted by some commentators to imply that the exchange of commercially sensitive information is a restriction "by object" merely because it is "capable" of removing uncertainty between competitors. Clearly, as the main attribute of information exchange is to reduce uncertainty among market participants, such

an interpretation implies a radical departure from current Commission practice under its Horizontal Cooperation Guidelines, as well as settled case law.

The correct view appears to be that, for the exchange of information to be illegal by object, a careful consideration of the precise objective of the agreement or concerted practice in the context in which it is applied is required, and that the mere possibility that the conduct reduces uncertainty is not in and of itself decisive to attract liability. Since the exchange of information among market participants is important in many areas, ranging from benchmarking to standard setting activities, it is essential that the Commission in its future guidelines on horizontal cooperation lays down a clear but nuanced view on the standard it applies to this type of business conduct.

III. CONCLUSION

In conclusion, even if the observations above are merely illustrative of the type of activities that lie ahead, it is clear that Commissioner Almunia and his team face a number of important (policy) issues in the next period in addition to the already ambitious agenda item to simply continue enforcing the competition rules. These tasks cover the entire range of competition policy; from the aftermath of the financial crisis, procedural safeguards in article 101 and 102 proceedings to resale price maintenance, information exchange, innovation, and the ICN. The wide variety of tasks calls for a transparent set of priorities. And inter-agency consultation, as well as frequent communication with the private sector will help the new Commission accomplish its goals. Time will tell how the Commission will fare.