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# New challenges in mergers and antitrust



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Ladies and Gentlemen:

I would like to thank the IBA and his chairman Michael Reynolds for the kind invitation to come back to Florence and speak at your conference. Today, I would like to talk about recent developments in merger and antitrust control. In particular, I would like to explore the relations between competition enforcement and the wider efforts of EU policy-makers to create a favourable environment for open markets, innovation and growth in Europe.

But before going into this, I will briefly update you on what we are doing to improve the way competition enforcement is carried out at the European Commission. I will also say a few words on the implications of a recent ruling of the Court of Justice.

When we met last year, I focussed my presentation on due process, on the merits of the administrative system that we have in the EU, and on our work on best practices. At that occasion, I told you that we would introduce changes that would improve our system of enforcement – and we will do so in the coming weeks.

We have revised our Best Practices for our antitrust proceedings and for the submission of economic evidence and we have also strengthened the role of the Hearing Officers as guardians of procedural rights. These measures are included in a package that will be adopted in October.

One innovation introduced by the package is that, in the future, the Statement of Objections will include the set of parameters that we intend to use to calculate the amount of the fines – in case these are eventually imposed – so parties can make relevant arguments before a final decision is reached. Another innovation is that the Hearing Officers will have a role in resolving disputes when legal-privilege issues arise in our work. This is an expression of their expanded role into the investigative phase.

Let me now say a word about the debate on confidentiality and disclosure of information triggered by the Pfleiderer ruling. Here are the facts. In 2008, the German competition authority fined three companies for violating EU competition rules. A short time later, another company – Pfleiderer – asked for access to the file to prepare civil actions for damages. The Bundeskartellamt gave only partial access to it, adding that it could not disclose leniency-related information since that would violate its obligations under EU law.

In June, the Court decided that there was no EU rule that would justify this refusal. The Court said that it was for national courts to decide on a case-by-case basis, balancing the interests protected by EU law. It added that both protecting the leniency programme and enabling antitrust damages actions were interests protected by EU law.

This ruling has been much debated because it has not eliminated the uncertainty as to whether – and to what extent – national competition authorities can protect information received under their leniency regimes. Although the ruling concerns national programmes, it may have an impact on the functioning of the ECN and on the leniency programmes of all its members, including the Commission.

I want to assure you that the Commission is determined to defend its leniency programme and the programmes of our ECN partners. And I have no doubt that we will find the right balance between protecting the effectiveness of our cartel enforcement and allowing the victims of a cartel to pursue their legitimate quest for damages. At any rate, let us not forget that damage claims often follow the decision of a competition authority; as a consequence, if the authority has an effective leniency programme, it will be easier for the victims of a cartel to obtain reparation.

I will now turn to an overview of our main antitrust and merger cases, to the market realities that we meet in our enforcement work, and to the new challenges that they pose to us.

There are two market developments I would like to highlight today: the fast pace of technological change, especially in some industries, and the increasing integration of production and supply chains on a global scale. These developments have a dramatic impact on competition control. They demand that we keep pace with fast-changing and dynamic markets. They also demand that we are always on the lookout for the rise of giant firms or groups of firms that may end up dominating their markets and keeping the door shut for new players.

In addition, our practice shows us that competition patterns are growing in complexity and sophistication; for instance, in certain industries companies are building strategic relations with their partners and competitors which challenge our control. I will give you a few examples of these developments drawing on recent and current cases in the digital industries, the pharmaceutical sector, and the financial services. I will start with the Google case.

As part of our current investigation, we are trying to determine whether the company holds a dominant position in internet search. Google is the browser of choice for very many of us; but dominance is not the same as *abuse* of dominance. Abuse is a conduct that protects or extends dominance by illegitimate means, and we still have to conclude whether this is the case for Google.

To do that, we have to bear in mind that the firm operates in a market that is changing at lightning speed. This is a crucial aspect of our efforts to understand whether and to what extent the company holds an entrenched position.

Among other aspects, we need to consider carefully in our analysis is the fact that company operates a two-sided platform, where advertisers' fees finance a service that users do not have to pay for. This aspect of Google's business is forcing us to take special care as we conduct our assessment of the relevant product and geographic markets, which is an important stage in our assessment.

Another important issue in this case, for instance, is determining whether Google holds a position of gate keeper and is able to influence the behaviour of internet users. Finally, the Google case is also a good example that timely intervention is crucial in fast-moving technology markets, which often feature network and lock-in effects. As the Court of Justice has recently stated in the Telia/Sonera case, action is required "before the anti-competitive effects of a strategy are realised".

The digital sectors are also the scene of sophisticated strategic interactions among firms; a market reality that we follow closely in merger control. One example is the Intel/McAfee merger.

Security-solutions firms – such as McAfee – need to know how a micro-processor works in great detail to make their products effective. Our concern was that if the merged company kept this information to itself, other security-solution products would not work well on systems based on Intel chips. As you know, we eventually cleared the deal in Phase 1 after we made sure that the products of the new company would remain open to the security solutions of McAfee's competitors. And it seems that the remedies we accepted are working well in practice. There will be more interesting merger cases in this sector, including the proposed deal between Microsoft and Skype.

But the real challenge for us in these markets is separating the potential for innovation from the potentially excessive market power a company can acquire. We are often confronted with this challenge as we observe companies trying to secure control of intellectual property rights. It is totally legitimate for a firm to protect its intellectual property – that goes without saying – but property rights cannot be used to block entry in markets that were not covered by them initially. The digital sector is just the most prominent among the many industries that need an open environment to thrive, and I will continue to promote openness and access to information in all of them.

Another industry where IPRs are of paramount importance is the pharmaceutical sector. We conducted an inquiry of the sector in 2009 and we concluded that a good patent system was needed to protect the innovative efforts of our industries. At the same time, we know from experience that some firms can abuse patents and circumvent the regulatory framework. This means that IPRs are indispensable for dynamic competition, but we need to keep an eye on how they are used.

A good example is the Boehringer case that we closed recently. We were concerned that the company was using its patents to block the entry into the market of an innovative medicine produced by a competitor. We encouraged the companies to find a pro-competitive settlement to their dispute; Boehringer removed its blocking position, and the case could be closed.

Other cases involve anticompetitive agreements between originators and generic companies. After we closed the sector inquiry, we have started formal proceedings involving three companies: Servier, Lundbeck and Cephalon. In these cases, we are establishing whether there was a pay-for-delay agreement with generic companies to keep their products out of the European market. All the participants have something to gain in these agreements, but they are certainly not in the interest of consumers.

Patents and branded products are becoming vital for all players in the pharmaceutical sector. While in recent years, we have seen a number of pharmaceutical companies moving into the generic market, mainly by acquisition, the opposite movement is now happening with generic companies also moving into branded markets. The most recent example of the latter is the proposed merger between Teva and Cephalon, which was notified to us earlier this month.

I will close my presentation with a few words on the financial sector. This is an industry where all the developments that I have talked about today are at play at the same time. Financial services are globally integrated like few other industries; they have been changed beyond recognition by the introduction of digital technologies; and – when it comes to complexity and sophistication – banks and financial firms are second to none.

In addition, capital markets have become so large and prominent that competition distortions may pose serious systemic risks for our economies. In sum, financial markets are an excellent example of markets that need a really close scrutiny. At present we have antitrust investigations opened involving Markit – the leading provider of financial information in the CDS market – and ICE Clear Europe – a clearing house. Two more cases involve Standard & Poor's and Thomson Reuters.

Finally, we are conducting an in-depth review of the proposed merger between Deutsche Börse and NYSE Euronext. In this particular case, we are concerned that a very large player may monopolise the derivatives markets in Europe. Therefore, any outcome that would eliminate the possibility of new entry and user flexibility would be unacceptable to us. I am aware that huge interests revolve around this merger. But I can assure you that our decision will be guided solely by our duty to guarantee the good functioning of financial markets and to protect the interests of the users of financial services.

Today, we have seen a few broad trends in our economies and in the way firms do business in Europe from the vantage point of Europe's competition authority. We have seen a number of cases that illustrate the impact of the twin forces of globalisation and technological development in the enforcement of Europe's competition law. I have also illustrated our upcoming initiatives to improve the way we conduct our business at the EU competition authority.

But, before I close, let me return to the start of my presentation. At the beginning, I told you that competition control is an important factor in the broader efforts of the EU to encourage innovation and boost our economies. Competition policy and enforcement can give us powerful tools to improve the growth potential and the competitiveness of Europe. I don't need to tell you how needed and urgent this boost is for the EU at a time of renewed tensions in the financial markets and uncertain prospects for our economy.

We all have extra responsibilities in this passage; we must set aside our particular interests; we must join forces; and we must quickly take the decisions that the situation calls for. The passage is crucial; we may be at the cusp of a historical turn for Europe. What is at stake is nothing less than our process of integration and – more importantly – the present and future wellbeing of large numbers of Europe's citizens.

Thank you.