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ICEM Conference

EUROPEAN COMPETITION POLICY

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Ladies and Gentlemen,

INTRODUCTION

It is with great pleasure that I accepted to speak to you during my visit in Ireland.

The antitrust rules of the European Community are an increasingly important body of law of which companies doing business in Europe must be fully informed. It therefore seems quite appropriate to me that you should devote some attention to a discussion of the various issues and developments in this field.

I shall hereafter start to explain the European Commission's view on the purpose and function of the European competition policy before subsequently dealing with some of the most recent developments in the framework of this policy.

I. THE PURPOSE AND FUNCTIONS OF EUROPEAN COMPETITION POLICY

It is clear from a reading of the Treaty of Rome (Treaty establishing the European Economic Community), that the European Community is essentially based on a market economy in which fair and undistorted competition has a fundamental role to play. This is already apparent from one of the first articles of that Treaty stating that the European Community shall include the institution of a system ensuring that competition in the Common Market is not distorted. In this context it is necessary to remind you from the start that the competition rules of the European Treaties have a constitutional

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character. The Community authorities can pass legislation influencing the Treaty rules, but they cannot change them.

It is in this framework that the European Commission pursues its competition policy.

Thus the Commission reaffirmed in 1983 the principles of this policy, namely that in a market economy system such as that of the Community it is essential to preserve the stimulus of fair and effective competition in order that the economy can reap the benefits of free trade. The decisions the Commission took hence reflected a continuing determination to rigorously enforce the competition rules, but also a desire to encourage industrial restructuring, to improve the competitiveness ofEuropean industry, to promote research and development and innovation, and to accelerate the progress towards a single Community market.

As this shows, the Commission's work of administering competition policy cannot be encapsulated by the sole objective of removing distortions causes by anti-competitive practices or State aids which are liable to interfere with inter-State trade. Competition policy also contributes to improving the allocation of resources and raising the competitiveness of Community industry, and thanks to this greater competitiveness, secured largely by encouragement of research

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and development, to enabling the Community at length to overcome the economic problems now facing it and in particular to combat structural unemployment. In this way competition policy can play its part, with other Community policies, in securing a lasting economic recovery.

In other words, the European Commission firmly believes that competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active antitrust policy pursued in accordance with the provision of the Treaty makes it easier for the supply and demand structures continually to adjust to technological development.

Through the interplay of decentralized decision-making machinery, competition enables and obliges enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the European Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.

Having pictured the broader objectives of our competition policy, I will now give you a general overview of the recent developments in the Community's competition rules which took place in 1983 as well as a brief sketch about the legislative programme of the European Commission in the antitrust part of this field.

II. RECENT DEVELOPMENTS IN THE ANTITRUST RULES

An important element of the work of administering the competition rules relating both to business practices and State aids consists in trying to create a more certain legal environment for economic behaviour by issuing frameworks showing the patterns of behaviour that are and are not acceptable.

The rules relating to business practices were expanded in 1983 by two block exemption regulations, covering exclusive distribution and exclusive purchasing agreements. The same desire to increase legal certainty prompted the Commission to continue its work on finalizing similar regulations for patent licensing, motor vehicle distribution and research and development cooperation.

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In relation to State aids, too, the Commission in 1983 pursued its policy of making greater efforts to clarify the circumstances in which it can regard an aid scheme that has been notified to it as compatible with the common market.

The Member State governments thus had referred to them for comment a draft framework for aid to research and development projects and will shortly be asked to comment on a similar draft framework for aid to energy and energy-saving projects. The Commission commenced preparatory work on a revised version of the principles of coordination of regional aid, an extension of the Fifth Directive on aid to ship-building and a special new procedure, involving notification, for monitoring certain types of cumulation of aid for different purposes.

The Commission also embarked upon a detailed study of problems of control involved where the authorities in charge of administering an aid scheme are widely dispersed geographically or at different levels of the administration or where the aid itself can assume complex forms or is opaque. This study thus goes into the growing problem of controlling government involvement which can distort competition because of possible aid elements, the acquisition of public share-holdings in firms, was also the subject of a detialed analysis by the Commission with a view to defining the circumstances in which such operations should fall to be scrutinized under Articles 92 and 93 of the EEC Treaty.

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III. THE LEGISLATIVE PROGRAMME

Coming now to our legislative programme aimed at reinforcing and expanding the existing legislative framework in the antitrust field of European Community law. This programme includes both the further pursuit of existing Commission proposals for legislative action by the Council of Ministers as well as new legislation to be adopted by the Commission itself.

In the first category I should mention the continuing efforts of the Commission to have its implementing regulations for air and sea transport adopted, as well as the fact that the Commission has incorporated most of the proposed amendments of the European Parliament into its proposed regulation on merger control and the announcement that a new attempt would be made in the Council of Ministers to secure its final adoption.

Indeed, the fact remains that the Commission's powers of intervention and control are inadequate to deal effectively with all concentration situations in the EEC capable of harming competition. The Commission is therefore trying to get its powers extended. A draft regulation for merger control has been under discussion by the Community's main law-making body, the Council of Ministers, for several years. It is based on Article 235 of the EEC Treaty. This is a "cover-all" provision which allows the Community law-making bodies to fill in

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for gaps in the Treaty if this is necessary for the Common Market to operate properly or to achieve one of its goals. The European Parliament has recently adopted a resolution calling upon the Council of Ministers to adopt the proposed regulation. It is in this context that the Commission took its renewe initiative.

In this first category one should also mention the fact that the Commission is at present studying the possibility of further legislative action to strengthen the enforcement of the antitrust rules of the EEC Treaty through private damage actions brought before national courts. Even though in the enforcement of Community competition law actions before the national courts have not gained the importance of treble damage actions under US antitrust law, I would like to emphasize that the enforcement of Community competition rules through national courts is of great importance to the proper functioning of the system.

In the second category one should mention the several block exemptions which the Commission proposed to adopt in 1984. In this category are included, not only the draft regulation on R & D which I will comment more in detail, but also the block exemptions on patent licences, on selective distribution in the automobile sector and an enlargement of the existing block exemption on specialization agreements.

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With such block exemptions the Commission attempts to codify its existing practice of individual decisions granting exemptions of the antitrust prohibition under Article 85/3 of the Treaty into regulations, thereby giving the companies who comply with these regulations absolute legal protection.

It is therefore to be expected that the power to grant such exemptions will become one of the major instruments by which the European Commission steers its competition policy in coordination with the other policies of the European Communities. Competition policy thus becomes part of the overall economic policy the Commission is pursuing. This is not surprising since the European Court already indicated in one of its judgments in 1969 that a link exists between the economic objectives of Article 2 of the Treaty and the competition rules, and in particular with Article 85/3. This explains why the European Commission does not limit itself to merely applying the antitrust rules of the Treaty as a prosecution authority would do, but conducts a real policy in this field.

This having been said, let's now turn more specifically to the block exemption on Research & Development cooperations. I would first like to situate it in the broader context and explain why we considered that there was a need for it at this time.

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IV. THE NEW BLOCK EXEMPTION ON R & D COOPERATIONS

The Research & Development of today forms the basis of the products of tomorrow. The world is in the midst of a third industrial revolution. New technologies are growing up and old technologies are declining. Our industry has realised that is future depends on the development of these new technologies. However the complexity of such technologies requires large and steadily increasing resources of capital and expertise resulting in high technical and financial risks for undertakings embarking on the development of such technologies. European industry because of its fragmented nature is at something of a disadvantage here. There has therefore been a growing interest in cooperative Research & Development between undertakings and between countries. The Commission looks favourably on such cooperation where this stimulates progress and reduces costs while allowing competition to continue.

The block exemption would apply to Research and Development cooperation agreements in all sectors of the economy although it is to be expected that it will be of most benefit in those sectors where Research and Development costs are highest and the scope for economies of scale in Research and Development is the greatest. One can cite here as examples pharmaceuticals and the emerging so-called high-technology sectors.

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Since undertakings do not carry out Research and Development purely for the advancement of science but always with a view to producing a marketable new or improved product there is often a close link between Research and Development and production. For this reason the block exemption allows cooperation to be extended into production of products arising out of the Research and Development in cases where the benefits of such cooperation can be presumed to outweigh the disadvantages.

Apart from defining the permitted scope of the cooperation, the block exemption will also make clear that it applies to Research and Development and production agreements whatever form they take. Indeed the cooperation might merely provide for the allocation of Research and Development tasks and the exchange of results or may provide for the setting up of joint Research and Development teams or joint ventures. The exemption will also apply where the whole or part of the Research and Development programme is sub-contracted out to other undertakings or to specialized Research and Development orgnisations or universities. Where the exempted agreement will also be permitted to cover production, the cooperation may take the form of specialisation or joint production within the framework of a joint venture. Joint sub-contracting of the whole or part of the production would also be covered by the exemption.

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It is interesting to note that the US government is also thinking along the same lines in wishing to encourage (or rather not discourage) cooperation in Research and Development.

A number of bills have been presented to Congress for this purpose. The one which seems most likely to succeed in becoming law is the "National Productivity and Innovation Act of 1983" which has the backing of the US administration.

A comparison of the approaches being followed on either side of the Atlantic does however show a certain number of differences and in particular that the Commission is prepared to go further in exempting such cooperation from the antitrust rules than are the US authorities.

It is my intention to proceed with preparation of this Regulation as quickly as possible and to present it for adoption by the Commission in the course of this year. The Commission hopes that when adopted its proposed Regulation will remove the obstacles - often more psychological than real - which Article 85 is sometimes considered to pose for transnational cooperation agreements in the field of Research and Development. This would then constitute new and important step in implementing the present legislative programme of the Commission in the antitrust field.

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The last point which does not really belong in our legislative programme but which might be of interest to you, concerns the relations between the various antitrust authorities in the world and in particular with those in the United States.

As became clear already in a very early stage of our policy, some contact with those authorities is necessary in order to avoid conflicts. Taking as an example the present approach on research and development cooperation it is for instance clear that the same cooperation, if carried out by companies on both sides of the Atlantic, could be subject to both legislations.

Although the European Communities are not bound by a formal convention with the United States, as is the case for the Federal Republic of Germany and more recently for Canada and Australia, it must be emphasized that we have formal links with them through the OECD-framework and procedure in Paris. If at any given time this channel would prove to be insufficient, it could of course be enlarged by bilateral conventions to be negociated by the Commission on behalf of the Council of Ministers.

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V. PROCEDURAL QUESTIONS

My last set of comments concerns the actual organization of our antitrust work in the Commission. There are a lot of misconceptions about this among distant observers of the work of the Brussels administration. I will however only deal with one of the aspects of our procedure today.

The Commission is aware of the concern which interested economic and legal circles have expressed with regard to the length of the procedure leading to a formal decision in the competition area.

There are a number of reasons why it is not possible for the Commission to take formal decisions within the period of time desired by these circles : administrative constraints, partly due to the procedural safeguards which have been established to protect the rights of the defence, or the rights of complainants, have made the procedure more cumbersome, and technical problems relating to translations in the seven language versions or to staff shortages are also responsible for slowing down matters.

The Commission nevertheless understands the desire for more rapid action and has sought ways in which procedures can be accelerated without diminishing the legal position of those concerned.

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One of the ways in which acceleration can in general be effected is through a reduction of the number of cases to be dealt with on an individual basis, so that the remaining cases can be dealt with more efficiently and rapidly. In this context, the Commission has pursued its efforts to adopt block exemption regulations with respect to certain categories of agreements. Also, the proposed inclusion of opposition procedures in such block exemption regulations is an important instrument aimed at achieving acceleration.

Indeed, the debate concerning acceleration and simplification of procedures has often touched on the desirability of having a so-called "opposition procedure", that is, a procedure whereby agreements which have been notified to the Commission are automatically deemed to be admissible if the Commission has not raised any objections in their regard within a specific prescribed period.

It must be underlined in this context that the Commission has neither the intention nor the power to turn Article 85's principle of prohibition of restrictive agreements into a principle of the control of abuses.

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Nonetheless, the Commission has proposed the introduction of an opposition procedure as a means of simplifying the application of Article 85 (3) in special cases. Such an approach can already be found in the Council Regulation applying the rules of competition to transport by rail, road and inland waterway as well as in the proposed Regulations applying those rules to the air and sea transport sectors. Accelerated procedures have likewise been introduced in the proposed block exemption regulations regarding patent licensing agreements and research and development agreements, and an amendment of the block exemption regulation on specialization agreements also includes such a procedure.

For cases which do not fall within the scope of block exemption regulations, accelerated individual treatment can be achieved where appropriate by a more widespread use of administrative letters.

Finally, more frequest recourse to national courts for the application of Article 85 (1) and 86 would serve to ease the Commission's burden, thereby allowing more rapid treatment of the cases it must deal with.

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CONCLUSION

After 20 years of application it appears, therefore, that the European Community competition rules, which have had to be implemented in very different economic circumstances - from sustained expansion to marked recession - have stood the test of time. Based on the general principle of prohibition accompanied by possible exemptions, the system of supervision is sufficiently flexible to take account of the economic conditions prevailing at any given time.

Where the European Commission notes that the existing rules are wanting, it puts forward additional measures as required, as in the case of the ECSC Treaty, which needed to be supplemented to make temporary provisions for specific rules for aids to the steel industry. This should also apply to the supervision of significant mergers.

While economic horizons remain hazy, pursuit of a workable competition policy is more necessary than ever. The in-depth sectoral analyses carried out under the Commission's programme of studies have revealed favourable development prospects in the various industries where competition operates effectively. These encouraging signs inspire determination to press on with measures consistently directed towards achievement of a competitive economy.