



Must EU competition rules be adapted to meet industrial policy priorities?

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Both the practice and the legality of the EU competition rules as applied by the European Commission have been coming under fire. What are the policy objectives that the promised overhaul of the competition rules should aim to meet, and to what extent will the drive to sharpen EU enterprise policies influence the process?

Panelists :

Philip LOWE, Director General for Competition, European Commission
Bruno LIEBHABERG, CEO, Business Environment Europe, Professor of the Solvay Business School (ULB) and Trustee, *Friends of Europe*
Willy BUSCHAK, Director and Confederal Secretary, European Trade Union Confederation (ETUC)
Giles Merritt, Secretary General, *Friends of Europe*

Giles Merritt highlighted that the evening's debate – whether competition rules should be adapted to meet the needs of E.U. industrial policy – was taking place against the background of turbulent times for DG Competition. There was a period when members of the Merger Task Force could do no wrong and a competition commissioner held the “highest cards” in the Brussels Eurocracy. Only a year ago, E.U. Competition Commissioner Mario Monti was lauded by Europeans for knocking down the EUR43 billion GE/Honeywell merger. Monti's staff was declared the defender of the European consumer. But following a series of court defeats, it now seems there's “nothing they can do right.”

Philip Lowe, Monti's No. 2 and the director general for DG Competition, assured the audience that his officials saw themselves as neither “holy nor infallible.” They'd learned lessons from botched merger reviews. The Merger Task Force, or MTF, used to deal with around 100 cases per year. Despite this year's economic slowdown, the MTF had reviewed a total of 270 cases – with little increase in staff. Lowe sought to remind critics that a soaring caseload helped to explain the mistakes they'd committed. Turning to the evening's main theme, Lowe said there had “never been any fundamental contradiction” between DG Competition and DG Enterprise. Both agreed that policing markets is an essential element of E.U. policy. One of the trickiest areas, however,

remained state aids. A key bone of contention is employment. Subsidies often are necessary to ensure social stability, but they must only be used in scenarios that are sustainable. If government handouts are “just a short-run policy when firms are in difficulty, that’s not what we’re supporting,” said Lowe. In merger control, the challenges are different. Merger control is about trying to predict the future and pinpointing what markets may be affected. Investigators must try “to project forward and see how firms will behave in the future. They analyse *ex ante* what could happen to markets and to choice for consumers after the merger has taken place.” Investigators must settle on definitions of product and geographic markets. It’s here that competition analysis often conflicts with industrial policy. Debates over whether markets should be national, European or global are vigorous. Increasingly, said Lowe, the conclusion is that the market is global. But Europe, no matter how broad the market definition, is “relatively cautious” compared with the U.S.A. Americans have no explicit or “active” industrial policy. They also “trust the markets to find a solution.” In cases where there might be foreclosure, American investigators say: “We’ll catch up with you later.” The problem with that permissive approach, said Lowe, is that U.S. regulators rarely do catch up. Lowe could count only one case in the last 30 years where the Americans later remedied the results of an anti-competitive merger. Rigorous vetting by Brussels should continue.

Bruno Liebhaberg, the CEO of Business Environment Europe and professor at Solvay Business School (ULB), said the principles underlying E.U. competition and enterprise policies are sound. What troubles him is how their “interdependent objectives”

are implemented. Sadly, the Commission is one of the “worst places” to reconcile such divergent goals. One key problem is that current E.U. competition policy underestimates the dynamics of the global marketplace. Regulators are fearful of national champions despite evidence that such champions that breed powerful European champions like defence contractor EADS, bio-science giant Aventis and steel powerhouse Arcelor. These are the companies replacing a previous generation of national champions (although world-beating “locals” remain like Germany’s Daimler Chrysler, Italy’s Fiat and France’s Vivendi Universal). Europe should create more world-beating European multinationals if the focus for Europe is an E.U.-U.S rivalry. The E.U.’s Lisbon process was supposed to create a stable, predictable environment for business favouring industrial activity in Europe. Sadly, the Commission “isn’t contributing to this.” A key problem is that regulators in Brussels still define markets on a national level, despite the tearing down of cross-border barriers in Europe. Do regulators in Washington, DC, really pay the same attention to the competitive situations in Arkansas, Wisconsin and Nebraska when assessing a deal’s impact? Another issue is government handouts on both sides of the Atlantic. “State aid isn’t being used to put firms on a par with American competitors,” said Liebhaberg. That’s leaving Europe at a disadvantage, especially when you consider the “significant subsidies from defence procurement in the USA.” In sum, there are “blatant contradictions” between the way the Lisbon process is being implemented and E.U. competition policy. Any assessment of how we are faring in Europe must be done by comparison with U.S. competition and enterprise policy.

Willy Buschak, director and confederal secretary of the European Trade Union Confederation (ETUC), described another shortcoming of E.U. competition policy. A truly European type of regulatory regime must embrace the concerns of Europe's workers. But so far "the debate has been occurring in closed circles." Workers' representatives should visit with E.U. Competition Commissioner Mario Monti "as early and as often" as corporate titans. In fact, enhanced worker access would be a boon to the regulators as much as to the Europeans who work Europe's factory floor. "Workers have precious and intimate knowledge of companies." That knowledge should be put to work when DG Competition assesses a deal's competitive impact. More importantly, Europe's treaties make it a "clear-cut obligation" to integrate concerns about employment into the way big deals are assessed. Workers don't have a "Soviet vision" of Europe's labour markets. Their goals are far more modest. They simply want to be integrated into the existing process. At the minimum, regulators should assess the impact of a deal on workers as part of a distinctly European and socially oriented competition policy.

Giles Merritt said the debaters raised two clear lines of inquiry. One was how much economic damage the Merger Task Force could do if its procedures aren't radically overhauled. A second was whether European economic and industrial streamlining is helped (or hindered) by competition rules. Whatever the answers, the Commission increasingly is seen as a regulatory bully. The Commission has the power to fine or overrule companies but it's often is supine in the face of pressure from national governments. Were companies wrong

to ask if there's "one law for companies and one law for member governments?" Baron Daniel Jansen, the head of Belgium's Solvay, has warned that corporate Europe is 40 percent less competitive compared with its counterparts in the U.S. and Asia. "We're looking at a situation where things are getting worse, not better," said Merritt.

In a lively Q&A, the panel was asked about the Commission's campaign against subsidies and exemptions for the banking and car industries in Germany, and now the gas and electricity markets in France. Will the Commission be mindful of safeguarding employment in these vast industrial sectors? What will be the Commission's position when member states say this campaign is detrimental to social stability?

Philip Lowe acknowledged that the Commission's "state aids policy is not very well articulated." To combat this, the Commission is introducing significant procedural reforms in 2003. Currently, too many investigations were focused on relatively minor, national complaints about unfair subsidies. Those investigations "clog up the system." On the regional level, aid enforcement is an important and delicate tool. But the Commission doesn't want to see regions exploiting fiscal incentives and grants to upset the competitive landscape, or disadvantage employees in other parts of the Union. At the same time, it doesn't want to see investors flee Wales or the South of France for better incentives in, say, Taiwan. Turning again to mergers, Lowe tackled the question of whether employment should be explicitly taken into account in merger control. We've "got to work that out," he said. The problem is the criteria. Should the threshold for a

merger prohibition be 6,000 job losses, to name one figure? What about if those losses came in the future? And then, how far into the future must those losses be? In fact, there already are mechanisms in place for workers. From the date of a merger's notification, employee associations make representations to DG Competition. Merging companies must consult with their employees and be prepared to offer evidence in any investigation. But the Commission's role is a limited one – and that's the way governments want it. "I haven't yet heard national governments say the Commission should take over employment policy," said Lowe. As to recent shortcomings, dramatic changes are underway. Every decision taken by DG Competition will be backed up with far more economic expertise. The newly activist Court of First Instance in Luxembourg has proven an effective check on DG Competition's decision-makers. Finally, a new network of competition authorities throughout Europe should ensure that DG Competition focuses its resources on the most important cases and investigations.

Talk of reform is fine, said **Liebhberg**. But he dismissed DG Competition's new mantra of economic expertise and judicial review. Guidelines for companies on matters like employment remain worryingly fuzzy. "Where can we find clearly actionable principles that provide the business community with predictability? Where do we see that?" Liebhberg demanded. Lowe retorted that companies will get all the guidelines they need – "much more guidance than in any other antitrust jurisdiction in the world." Companies now can argue that the efficiencies and consumer benefits produced by a merger outweigh any possible damage to competition.

Buschak noted that mergers have a singularly poor record of success. Many corporate tie-ups actually erode a company's value and threaten worker security. Given this sorry record, prior consultations with workers provide the Commission with valuable input about whether deals will help or hinder labour and Europe's industrial goals. "Practical companies" realise this, said Buschak. "They have a lot of contact with worker representatives who have deep knowledge and respect confidentiality."

Liebhberg again emphasised the necessity of clarifying positions in the enterprise policy-competition policy debate. Both policies can't always be in harmony – especially when Europe stood on the brink of such immense economic and technological change. "It's so important that the regulatory system doesn't impose unnecessary restrictions on companies ability to adapt and to innovate." State aid and state intervention should be used sparingly – to overcome market failures.

Another question focused on the shortcomings of due process (and the rights of defendants) in Brussels when it comes to defending government handouts. National governments face many of the same problems as private companies when it comes to Brussels. In fact, governments have only 2 months to respond to accusations that they've doled out illegal state aid. Preliminary discussions happen behind closed doors. Governments are at the fate of unaccountable bureaucrats, just as much as the private sector: "When you're a victim of the representations made by an opponent of such aid, that's very difficult to overcome," said Pierre Kirch, member of the International Bar Association (IBA).

Lowe acknowledged shortcomings in state aids investigations. Due process in this area is in need of urgent attention: "Part of our reform is to strengthen the rights of all the intervening parties," said Lowe. But member states also have a role to play in meeting regulators half way. "Member states should be required to co-operate with us a bit more. When you send questions to a national authority, you may not hear back from them for a long, long time," complained Lowe. But being part of Europe's club means willing participation in the system. If a member state drags its heels or "digs divets in the golf course" then it's time to apply moral pressure on governments and get them to behave.