TO THE COMMISSIONER FOR COMPETITION

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Effective enforcement of competition policy benefits the economy as a whole: competition is the spark needed to fire the European economy's engine, and you must resist the pressure from those that believe the Commission's competition decisions should take current economic difficulties more into account

STATE OF AFFAIRS

No other commissioner has the executive power that you do. Fostering and protecting competition promotes the efficient allocation of resources and contributes to making society richer. Competition pushes companies to enhance their productivity, reduce their marginal costs and lower their prices, as otherwise they would succumb to their competitors. It promotes the selection of the best, most efficient firms and the exit of high-cost ones; it favours investment by making it relatively more profitable to stay ahead of the competition through innovation and the development of new products, provided that sufficient rewards are preserved after investments are made. Competition policy brings benefit to citizens in their role as consumers; it can help to regain their trust, in face of increasing scepticism about the European institutions. But effective enforcement of competition policy is also beneficial to the economy as a whole: competition is the spark needed to fire the European economy's engine.

However, the economic context in which you will start your mandate is not favourable. The economy languishes. Fragmentation still haunts the single market. In most sectors, there are high barriers to entry, differences in regulations and high switching costs for consumers. These significantly limit the competition potential of markets.

European Union innovation performance is still way below the levels of the US, Japan and Korea, while emerging economies are catching up. Enduring growth is a mirage and citizens seem to have lost their faith in the EU institutions.

Above all, you take charge in a period of great distress for competition policy. The crisis has put your office under significant pressure. Despite the very high reputation still enjoyed globally by the European Commission Directorate-General for Competition, a growing wave of criticism is coming from those who believe that the difficult economic situation is not being sufficiently taken into account in the Commission's decisions. They argue that competition policy enforcement should be more lenient and allow business the oxygen needed to survive, and that relaxing competitive pressure would funnel enough profits to companies to see them through the downturn, to invest in their production process, and to return to satisfactory productivity levels.

These arguments are undermining the fundamental pillar on which modern antitrust control is based: the independence of antitrust authorities. There are calls for the introduction of more exemptions and exceptions into merger control, antitrust and state aid decisions, and there is a real threat to the ability of DG Competition to act free from political interference.

Merger control

Supporters of a relaxing of competition policy enforcement believe that Commission enforcement of merger control has been too strict in the last few years. According to this view, it prevented the creation of European champions and imposed conditions on merging companies that threatened to make investment too risky or even counterproductive, or that would prevent companies from efficiently rationalising their productive capacity. Market definition[1] has been blamed for being too stiff and anachronistic: merging companies are competing in a global market and some argue that this is not accounted for in merger decisions. Finally, the enforcement of merger control is blamed for not factoring-in socially negative spillovers, such as workforce lay-offs: the Commission might impose remedies that entail the sale of assets from merging companies to actual or potential competitors, to guarantee the same level of competition in the market is kept after the merger, but no consideration is given to the potential effect

that such an industry reshaping might have on employees. During your predecessor's mandate[2], 800 merger attempts were scrutinised, 93 percent of which were cleared with no remedy imposed. Fifty-two mergers were cleared subject to conditions, the majority of which entailed a sale of assets. Only four mergers were prohibited: Olympic/Aegean Airlines (2011), Deutsche Borse/NYSE Euronext (2012), UPS/TNT Express (2013) and Ryanair/AirLingus (2013).

Abuse of dominance

Action against abuse of dominance (sanctioned by Article 102 of the Treaty on the Functioning of the European Union (TFEU)) and anti-competitive agreements (Article 101 TFEU) has been criticised for being not transparent enough. During your predecessor's mandate, just two Article 102 TFEU prohibitions decisions were taken, against Google-Motorola and Telekom Polska (only the latter received a fine), compared to eleven Article 102 investigations that resulted in commitments offered by the investigated company in lieu of a fine. Because of the scant information disclosed, little is known about the strength of the Commission's arguments when a commitment decision is taken. Detractors, therefore, complain that antitrust enforcement is too tough or too soft, depending on where they stand, with little chance for the outside world to assess if the action truly left markets and consumers better off. A number of high-profile investigations (such as Google search engine bias and Gazprom) are currently ongoing.

Cartels

Anti-cartel action has been accused of being ruthless. Sanctions can reach 10 percent of a company's global turnover. It is feared that too-high fines would further hamper the economic viability of companies, and would translate into higher prices for consumers. Since 2010, the Commission uncovered 25 cartels and sanctioned 167 companies, imposing more than €8.6 billion in fines, hitting in particular sectors such as electronics (TV and computer monitor tubes case), automotive (car parts cases) and finance (Libor and Euribor cases). An analysis of the data shows, however, that companies experiencing critical difficulties during the crisis received lower fines to account for their financial situation. Most importantly, the fines imposed appear minimal compared to the degree of harm caused to the European economy by collusion. Fines alone are unlikely to carry enough dissuasive power to significantly deter the formation of future cartels.

State aid control has been under attack by industries and member states

State aid control

State aid control has been under attack by industries and member states. The Treaty prevents countries from cherry-picking companies or sectors and granting them special tax treatments or access to direct subsidy schemes. Without those rules, member states could start flooding the market with subsidies, threatening the single market's integrity. The rules are however sometimes perceived as being at odds with calls for a revamp of industrial policies: member states can feel deprived of tools to help industrial growth. The conflict between EU rules and industrial policy is exacerbated by the context in which European companies toil to compete with global competitors that might benefit from special subsidy regimes at home. In the past, exemptions to the rules were granted. Your predecessor had to navigate through the banking crisis, adopting special measures to stem the drift of the financial sector and ensure that effective restructuring or resolution plans were implemented to prevent similar crises recurring. In 2012, a state aid modernisation plan (COM/2012/0209) was published with the aim of making state aid control more efficient. It did this in two ways: by concentrating investigative efforts on those cases that are most likely to affect competition within the single market and by expanding safe-harbour provisions to approve without the need for lengthy investigation those subsidies that are unlikely to be harmful for the European economy. Since 2010, more than 1800 cases have been scrutinised, 63 of which have been prohibited with mandated aid recovery. New guidelines were adopted (particularly relevant are those for regional state aid, environmental and energy aid, risk finance and broadband). An investigation on tax sweeteners for multinational digital companies is currently ongoing.

From a broad policy perspective, important reforms were proposed by your predecessor. In particular, new guidelines on the antitrust treatment of vertical restraints, horizontal cooperation agreements and

technology-transfer agreements were adopted, and new guidelines on the treatment of the purchase of minority stakes in merger control have been proposed. Most notably, a new framework has been adopted to guarantee a uniform right to seek damages to victims throughout Europe of antitrust abuses.

CHALLENGES

Maintaining independence

The mother of all challenges you will face will be to enforce competition policy as a key instrument for growth and to stand your ground to preserve as much as possible the independence from political interference of your Directorate-General. Only if you keep the interests of consumers at the heart of your merger control and antitrust work, and no other consideration affects your enforcement policy, the beneficial effects of competition policy can truly materialise. Of course this will require a careful (albeit complex) assessment of short- and long-term gains and losses: you should be ready to accept long-term benefits, if sufficient guarantees are provided that they will materialise, in exchange for short-term sacrifices, provided that the overall balance is positive from a consumer perspective.

Quite paradoxically, the need for independent and effective enforcement is greater during economic downturns; that is, exactly when its legitimacy is put in doubt. This applies to merger control (any attempt to stretch the law to foster the creation of national or European champions at the expense of competition would be detrimental to consumers and to the economy as a whole); to antitrust and anti-cartel action (abuses and illegal agreements mostly affect input prices for downstream companies, affecting negatively their competitiveness and, ultimately, their customers); to state aid (states have proved very bad at cherry-picking companies or industries in the past, leading to protracted agonies of ruinous business that have ultimately left markets, consumers and taxpayers worse-off).

You will however not only need to strenuously pursue a consumer welfare standard. You will also need to reinforce a successful communication strategy so that companies and consumers realise the benefits of competition policy enforcement, and to gather enough support to shield your Directorate-General from any attempt to undermine its autonomy or legitimacy.

Your challenge will be to anticipate issues before they arise, and to act accordingly

Monitoring

The other aspect of your number one challenge will be to develop a comprehensive approach that will allow you to identify sectoral issues and intervene to address them without necessarily being prompted by complainants or whistle-blowers. Your challenge will be to *anticipate* issues before they arise, to open your Directorate-General up to different sources of information that could indicate the existence of a potential competition problem, and to shape your strategic action accordingly. Examples are numerous: high concentration levels, stable super-competitive prices or pervasive multi-market contacts between competitors. You must advocate for deeper scrutiny of potential collusive behaviour. Likewise you should be open to learn from past experience: a reduction in supply following the shut-down of production plants, or an increase in consumer prices together with a reduction of a product's quality a few months after a merger was cleared by the Commission, would suggest the need for further investigation to uncover any link between what is happening in the market and the Commission's decision.

This 'sectoral' approach is not free from difficulties. It would mean that additional resources are needed on top of those dedicated to actual investigations in specific cases. It might also open the door to unwanted attempts to bring into your assessment elements that are not of a concern from a consumer-welfare perspective. But a sectoral approach would be most useful. *Ex-ante* monitoring speeds up intervention and mitigates the harmful effects of anti-competitive behaviour. *Ex-post* monitoring gives useful feedback on the effects of antitrust intervention; such feedback crucially helps improve future intervention.

Emerging economies

Meanwhile, the competition authorities in developing economies have increased their enforcement activity. For example, in 2008, Chinese

competition authorities scrutinised fewer than 10 merger applications. In 2012 this number ramped up to more than 200. This poses a number of challenges to European companies that go global, but it also offers the opportunity to establish links between antitrust authorities across the world to share information, collaborate and enhance global antitrust enforcement. DG Competition has recently increased its collaborative efforts by signing up a number of agreements with other antitrust authorities.

Global coordination

You will more and more need to deal with issues pertaining to the global coordination of state subsidy policies, merger control and antitrust law design and enforcement. Global markets require consistent competition policy frameworks. It will be up to you, in your leadership of one of the world's leading antitrust authorities, to help countries converge on an optimal equilibrium without yielding to the temptation of a race to the bottom, in which countries free-ride on the stricter regulation in other jurisdictions by backing their national champions with subsidies or favourable merger or antitrust rules. Convergence is feasible and should hinge on the consideration that the correct enforcement of competition policy yields long-term benefits, regardless of an economy's level of development, provided that dynamic effects are duly accounted for when decisions are taken. Protectionism and 'economic patriotism' instead yields only fictitious short-term benefits to the companies that are shielded by competition, harming domestic consumers and limiting domestic industries' long-term growth prospects. But your challenge will also be to ensure full uniformity of competition regimes within the European Union. Nowadays, differences in assessments by national competition authorities imply that companies *de facto* face different rules depending where most of their turnover is located. However, most decisions by antitrust authorities in Europe are enforcement decisions: anti-competitive practice decisions by the European Commission are just one fifth of the total. The realisation of a truly harmonised framework is therefore of utmost importance.

Another broad challenge will be to expand further the use of economics and effect-based analysis while pursuing competition policy cases. The Chief Economist's Office was established in 2003 in response to the identification by the European courts of serious flaws in the economic analysis of previous Commission decisions.

Since then, your Directorate-General has increasingly relied on economics in the course of its investigations. However, there are still significant margins for improvement. Antitrust intervention should entail a refined analysis of dynamic effects, particularly of incentives to innovate. Interventions against exploitative (or 'unfair pricing') abuses should be rare and carried out only if no other alternative tools (such as regulation) can address the identified issues. You should not look at successful companies with suspicion for the sake of it. The risk otherwise is to send dissuasive signals to companies willing to outperform rivals on their merits through more innovation, for example. These companies should expect to be rewarded, not punished through increased exposure to antitrust action. It does not really matter whether they hold part or the totality of the market. It matters only whether they abuse their power to pursue anti-competitive objectives.

Procedural reform

Finally, your challenge will be to enhance the internal processes of your Directorate-General through a broad procedural reform. The executive power you hold makes it essential that you ensure that decision-making processes, which lead to the adoption of legally binding decisions, achieve the maximum accuracy in terms of outcomes. There is a general need to increase transparency while granting the necessary protection to the development of free internal thinking and the implementation of checks-and-balances within the walls of your DG. Long investigations (these are the norm in antitrust, for example) might result in the officials involved being locked-in to the assessment they made at an early stage of the process. This 'cognitive dissonance' can result in a (not necessarily conscious) biased selection of the evidence and ultimately lead to erroneous findings, if no proper precautionary measures are taken. Moreover, an accurate distribution of career incentives could lead to significant improvements in the results of investigations. Promotions and rewards should be determined through careful performance assessments and should be de-linked from the media impact of investigations. Fair rewards for an antitrust case dropped after years of investigation might be wholly justified, though the decision to drop the case might be not fully appreciated by the outside world.

RECOMMENDATIONS

Using competition policy as a pro-growth tool, protecting competition and maximising consumer welfare means that you must not hesitate to take a strong active stance, stepping-up enforcement of antitrust, merger and state-aid control when needed. For example you should not refrain from blocking a merger if no benefits are foreseen and no remedies to preserve competition are available. Your ultimate objective should be to increase and refine deterrence: companies should anticipate that violating the rules will bear consequences serious enough to make the prospect of an infringement unprofitable to begin with. Conversely, companies should be confident enough that implementing pro-competitive behaviour, such as competing aggressively on prices to acquire a bigger market share, or engaging in collaborative efforts to develop R&D projects with significant positive social spill-overs, will not be mistakenly sanctioned as a violation of EU competition law. You should therefore implement a rigorous economic approach, estimating the ultimate effects on consumers. Refined quantification techniques should be used to measure the costs and benefits and the likelihood that they materialise after measures that you propose (such a merger clearance or prohibition) are implemented.

Merger control

An improved balance between cases that are by default considered anti-competitive ('infringements by object') and those instead that require the application of a rule of reason ('infringements by effect') should also be promoted. Likewise, merger control should duly account for dynamic effects and benefits that may spill-over onto markets that are not necessarily the same as those in which the merger take place. Short- and long-term efficiencies can balance reduction of competition if the merger is indispensable in order to secure them, and if the companies involved are able to provide enough reassurance that those efficiencies will ultimately be passed on to consumers in the form of lower prices or better products.

The clarity, accuracy and predictability of your actions are therefore extremely important, together with a strong commitment to enforce significant sanctions when infringements are detected.

Cartels

During your mandate you could increase deterrence of collusive behaviour by complementing cartel fines with personal sanctions aimed at company decision makers. Individual penalties for those employees

responsible for actually leading their company to commit a violation of competition law have proved very effective in other jurisdictions such as the United States. Legislative initiatives could be undertaken to empower the Commission to impose measures such as director disqualifications or personal pecuniary sanctions. Finding the political support to back such initiatives would certainly not be an easy task, but it is technically feasible and worth pursuing. Any improvement in this area could potentially be very effective in preventing future harm to consumers. Another good way to increase deterrence is to speed up investigations: the faster the sanction is applied, the greater its dissuasive power.

Monitoring

Enhancing the mechanisms designed to detect infringements is the other leverage you could use to further reduce the likelihood of anti-competitive behaviour. Within your directorate-general you could create special monitoring offices in charge of aggregating and scrutinising market information gathered by the Commission in the course of merger, antitrust or state-aid investigations. Such an office would prompt *ex-officio* action if, for example, evidence collected during a merger review suggests the existence of ongoing collusive behaviour in the same market. Likewise, tools already used to monitor markets (such as sector inquiries) could be reshaped to make them more practical: their duration could be reduced to allow for their more frequent use for a wider set of different product markets. Beyond the walls of DG Competition, collaboration with other directorates-general is essential. Special cross-DG taskforces could be envisaged to monitor sectors in which structural features (such as high barriers to entry or high customer switching costs) make antitrust violations more likely. For example, a task force drawing expertise from DG Competition, DG Transport and DG Internal Market and Services could investigate the level of cross-border competition in railway services. Likewise DG Health and Consumers could be involved in analysis of health sectors.

Sectoral issues can be identified also through more extensive collaboration with EU national antitrust authorities. For example, an institutional mechanism could be envisaged so that each time that a national authority takes an antitrust decision, an automatic follow-up check by the Commission would survey if similar issues affect different geographic markets throughout Europe where the sanctioned companies are also active. A national cartel uncovered in Italy could very well

You should promote the adoption of a common legislative framework for merger control

be a symptom of a much wider cartel affecting other EU countries, for example. Likewise, product markets might have very similar features in different geographic areas: signals of concern from national authorities should automatically prompt wider enquiries at supra-national level.

Importantly, to ensure uniform approaches in different member states, you should promote the adoption of a common legislative framework for merger control, in which national competition authorities would apply exactly the same substantive control as mandated by EU competition rules. This idea was proposed by former commissioner Mario Monti[3].

Coordination

Additional coordination with other competition authorities outside the EU should also be sought, similarly to the ongoing cooperation between the European Commission and the US antitrust authorities. This particularly applies to emerging economies, and above all to the BRIC countries. Progress has been made: Memorandums of Understanding for cooperation were signed with Brazil (2009), Russia (2011) China (2012) and India (2013). But coordination can be deeper and go beyond information sharing and collaboration on violations of competition law that reach global scale. Coordination could help to reduce compliance costs for companies, for example. An initiative from your side for the promotion of standardised merger filing rules in multiple jurisdictions would be particularly welcomed by markets. If successful, it would significantly increase efficiency and speed up merger procedures.

In terms of substantive assessment, the current approach could be improved or clarified, particularly through the use of new or refined guidelines that would address:

— The treatment in merger control of dynamic and 'out-of-market' efficiencies (ie efficiencies that are not necessarily passed on to those consumers who are adversely affected by the reduction in competition);
— The application of Article 102 TFEU to excessive price cases and the role of economic analysis in such investigations;
— Best practices for uniform EU-wide enforcement of antitrust rules by national authorities;
— Enhanced filtering tools to select state aid awards begging for deeper scrutiny based on prima facie economic analysis (for example: a set of conditions might indicate that a state aid award is unlikely to introduce market distortion – in those cases, no further investigation would be needed);
— A well-defined methodology for the application of 'commitment decisions' under Article 9 of Regulation 1/2003.

Ad-hoc guidelines on all these subjects would be widely welcomed.

Finally, a number of process improvements could be made. Survey techniques used during market investigations and market tests could be significantly enhanced by promoting the adoption of standardised forms and dedicated digital tools such as web-survey forms. A horizontal team in charge of the design of market investigations with officials who are competent in survey techniques could also be set up. This would ensure higher quality surveys and a greater probability that statistically significant results are retrieved from respondents. In order to increase the quality of the outcomes of investigations, moreover, internal checks-and-balances tools should be increasingly used. Economists from the Chief Economist's Team should be systematically involved in investigations at an early stage, and the use of panels (ie internal peer-reviews of ongoing cases) should be systematic in antitrust and should precede the issuing of Statements of Objections. Blind *post-mortem* case reviews should be done frequently and should contribute to staff performance assessment.

NOTES

01 EU PRESIDENTS

1. 'Strategic agenda for the Union in times of change', European Council conclusions, 26-27 June 2014.

2. Also, the President of the European Parliament should accept that national parliaments use the subsidiarity review more often.

04 COMPETITION

1. The antitrust definition of a market is conventionally based on tests that identify the boundaries of a market by measuring the degree of competition that different products exert on each other. If two products are very good substitutes – such that a significant proportion of demand and/or of supply would shift to one product if the price of the other is changed – then the products are considered to belong to the same market.

2. All figures quotes are up to April 2014.

3. See Mario Monti (2010) *A new strategy for the single market*, report to the president of the European Commission José Manuel Barroso, available at http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

05 SINGLE MARKET

1. The European House – *Ambrosetti, 2014 European Business Leaders Survey*, June.

2. Eyal Dvir and Georg Strasser (2014) 'Does Marketing Widen Borders? Cross-Country Price Dispersion in the European Car Market', mimeo, available at http://fmwww.bc.edu/EC-P/wp831.pdf.

3. Trade integration of goods (or services) as a share of GDP is defined as the average of imports and exports of goods (or services) divided by GDP.

4. See for instance the series of reports accompanying the 2007 Single Market Review exercise http://ec.europa.eu/citizens_agenda/single_market_review/index_en.htm

5. Some initial steps towards a framework for implementing a market monitoring exercise in the Commission were already developed in 2008, laid down in Commission Staff Working Document SEC(2008) 3074.

06 DIGITAL AGENDA

1. Sources: Domo.com: onesecond.designly.com/; and Intel: http://www.intel.com/content/www/us/en/communications/internet-minute-infographic.html.

2. Scott Marcus, J., I. Godlovitch, P. Nooren, D. Elixmann, B. van der Ende, and J. Cave (2013) *Entertainment x.0 to boost broadband deployment*, ISBN: 978-92-823-4760-7.

08 MIGRATION

1. This memo is written to a European Commissioner responsible for EU mobility, international migration, border management and asylum. In the past, these competences were divided between DG Home, DG Justice and DG Employment. A few points raised in this memo cut across other portfolios (European External Action Service, DG Development and Cooperation). The author would like to thank Elizabeth Collett, Robert Holzmann, Khalid Koser and André Sapir for their helpful comments.

09 TRADE

1. Global trade in goods fell by 12.2 percent in 2009, by far the largest decline since 1950.

2. The direction of trade and ordering of trade partners varies for exports and imports. In 2013, the EU28's top three import sources were (in descending order) China, Russia and the US, while the top three export destinations were the US, Switzerland and China. All the data in this Memo excludes intra-EU trade.

3. As of 31 January 2014, 435 physical RTAs (counting goods, services and accessions together) were notified to the GATT/WTO, of which 248 are currently in force. The overall number of RTAs in force has increased steadily since the 1990s, a trend likely to be buttressed by the many RTAs currently under negotiation.

4. US domestic law permits targeted energy exports only to countries with which the US has free-trade agreements.

10 ENERGY

1. That is, it should discuss the schemes to remunerate electricity, the roll-out of renewables, networks, demand response, capacity, system services, etc, and assign the responsibility for the development and operation of networks, renewables, etc.

2. There is some legal issue with delegating powers from the Council and the Commission to community agencies ('Meroni Doctrine') that has been widely discussed in the context of the institutions of the 'banking union'.