

INTERNATIONAL COMPETITION NETWORK

SECOND ANNUAL CONFERENCE

**Mérida, Yucatan
June 23-25, 2003**

ADVOCACY WORKING GROUP

Competition Advocacy: Voices in the Wilderness or Trusted Advisors?

Speaking Notes

Ian S. Forrester

White & Case LLP, Brussels

- Competition advocacy is the promotion by an antitrust authority of fair competition in the economy by developing governmental and public awareness regarding the benefits of competition.
- Advocacy and enforcement are complementary. Businesses in a particular sector subject to first-time enforcement initiatives may seek derogations from governments. Effective advocacy may dissuade legislators from lightly granting such exemptions and may persuade them to liberalise certain sectors of the economy. When combined with robust enforcement, strong advocacy allows a competition authority to tackle both public and private anti-competitive distortions. Advocacy is especially useful in a competition authority's early days.
- Effective competition policy cannot exist in a vacuum. Consumers may be useful allies and should be educated to take advantage of competition law opportunities.

Advocacy Provisions

- Some competition authorities have specific statutory powers to propound the merits of competition in any market. Other enforcement bodies have no such powers. It is not the "legislative competence" attributed to a competition authority that counts but the utility and skill of that authority's intervention. A competition agency, whatever its powers, may be an effective advocate notwithstanding its lack of explicitly ascribed duties.

Advantages of Longevity

- Long-established and well-respected competition authorities will usually have already found a place, a role and a voice in the governmental or political system. Such bodies may influence the development of legislation/policy even without having been granted formal status in the legislative review process. Moreover, enforcement

officials will be likely to have formed personal relationships with policy-makers, where there is scope for institutional and individual advocacy.

- Established competition authorities are known quantities. The market will know (or be able to predict) their likely stance on certain issues. Thus, possible initiatives which are of dubious value will simply be avoided.

Growing Pains

- The main challenge for a newly established competition authority is not its mandate or the precise wording of its statutory powers. More difficult is managing to be heard. Newly created competition authorities are likely to face difficulty in advocacy because they have not earned credibility. A new authority, as it tries to establish its reputation, might be seen as excessively activist.
- Governments, who were obliged to establish competition authorities as part of the process of EU enlargement, may not be keen to listen to advice regarding national legislation or policy from an infant agency. Indeed, no government likes to be told by one of its own agencies that it is doing the wrong thing.
- The willingness of a government to involve the competition authority in the formation of state-owned enterprises might limit the risk of those enterprises themselves raising questions of competition law. It may cost less political capital to argue for competition before such companies are formed. Once these undertakings are active, a new competition authority may find itself politically unable to challenge the alleged anti-competitive activity of state-owned businesses. I will now speak of the jurisdiction with which I am most familiar, the EU.

DG Competition

- Notwithstanding the fact that Article 3(g) of the EC Treaty states that the establishment of a system ensuring that competition in the internal market is not distorted is a key EU objective, there is no specific legal provision giving DG Competition an advocacy role. Nevertheless, there is no doubt that it is, in truth, a powerful advocate.
- In his 10 April 2003 speech to a meeting in Brussels of the International Forum on EC Competition Policy, Commissioner Monti explicitly recognized that last year's ICN conference in Naples caused the Commission to look at its own advocacy efforts. This examination looked at DG Competition's role within the Commission and the Commission's role within the EU institutional structure.
- Against the background of the Lisbon process¹, Commissioner Monti stipulated that the Commission, as an important cog in the EU legislative wheel, is in a privileged position to exercise its mission as a competition policy advocate. Moreover, DG Competition will always take a pro-competitive stance when it is consulted on draft laws by other Commission departments, and has done so consistently.

¹ The Lisbon European Council in March 2000 launched the process in which the EU aims to develop 'the most competitive and dynamic knowledge-based economy' in the world by the end of the decade.

European Cartel Office

- Some commentators have argued for the abolition of DG Competition as the principal enforcer of EC competition law and the creation of an independent European Cartel office.² It is claimed that competition enforcement should not be entrusted to a political institution. One powerful argument against the creation of a European Cartel office is that the Commission benefits from having DG Competition as its ‘in-house’ competition advocate.³
- A European Cartel Office would be restricted to the antitrust sphere, and would run the risk of being cut off from the development of other aspects of competition policy, notably state aids and other state-driven distortions. Compartmentalization of what has hitherto been a single system would ultimately weaken European competition policy.

EU Member States

- Competition agencies in Europe are quite un-homogeneous. The Italian Competition Authority has had some notable victories. Its counterpart in Belgium is chronically under-funded and seems modestly esteemed by the government. There are big discrepancies.

Priorities

- Once the need for advocacy is accepted, authorities must focus on what areas of the economy should be targeted. A competition agency must choose its enemies wisely. It should identify a legislatively well-protected target and attack it persistently.
- State monopolies such as utilities (energy, telecommunications), where there is little public interest in retaining anti-competitive restrictions. Next on the list are often areas like liquor licensing, retail groceries, taxi licensing and other bottlenecks to small businesses. The third wave might include the liberal professions, banks, insurance and others where there will often be a worthwhile genuine policy objective behind the restriction, the key question being whether the legislative norm is proportionate. It is interesting to note the complex and perhaps surprising judgments of the European Court in 2002 concerning bar regulations, upholding the legality of a national prohibition on multi-disciplinary partnerships between lawyers and accountants (Wouters⁴) and a national fee tariff (Arduino⁵).

² Barry J. Rodger – Competition Policy, Liberalism and Globalization, Columbia Journal of European Law (2000).

³ The creation of the European Cartel office may also fall prey to many of the difficulties of newly established competition authorities. Even though many of the officials involved would have a long history in competition enforcement, the organization itself would still be new, and would lack a track record on which it could base its credibility.

⁴ Case C-309/99 *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, ECR [2002] I-1577.

⁵ Case C-35/99 *Arduino v Compagnia Assicuratrice RAS SpA*, ECR [2002] I-1529.

Not just a luxury, a necessity

- A competition authority should have a clear voice describing what is not good for consumers, and should take the initiative in voicing comments even if its input is not sought or required or welcome. Entrenched incumbents will speak of employment, public safety, difficult transitional periods, and all the other persuasive reasons produced by those who defend the economic status quo.
- As discussed, a perfect set of advocacy provisions cannot create effective competition advocacy. Moreover, good advocacy can occur without any powers being explicitly conferred. The efforts of some countries' competition authorities are weakened by the lack of governmental support and, indeed, sometimes government opposition. (Such a situation may be more prevalent in transition economies). The efforts of these competition authorities are worthy of international support. Ultimately international advocacy by competition authorities for competition authorities and by competition authorities for competition may bolster the advocacy and enforcement efforts of all competition authorities.

Conclusion

- Ultimately, as Karel Van Miert has said, “competition policy is not something neutral, it is politics.” And the public voice of inconvenient conscience is never welcome. Henry II appointed his Chancellor to the post of Archbishop, and was very disappointed with the results. The Archbishop said too much, too loudly, and was murdered in his own Cathedral. (There is not much in the political process that is wholly new.)
- This means that national competition agencies may need support from the ICN.
- Good advocacy from an impartial source is highly desirable, especially in economies that are emerging from heavy regulation.
- However, effective advocacy does not require legislation. It also does not require government goodwill, and indeed can often be most unwelcome. It does, however, require support from some corner of the political landscape. Consumers are potential allies. Forceful advocacy, as with enforcement, may depend on a number of factors. Political will, timing, consumer awareness, international trends, all may play their part. The one certainty is that no competition authority should concentrate exclusively on enforcement. Governments will only rarely be enthusiastic about an agency's advocacy efforts, but the penalties for voicing ideas unwelcome to the government authorities are at least sometimes less severe today than for Archbishop Beckett in 1170.