



# BUNDESWETTBEWERBSBEHÖRDE

Strategically Managing Competition  
by  
Theodor Thanner

Federal Competition Authority, Austria

Willy Brandt School of Public Policy

Erfurt, May 25<sup>th</sup>, 2010

## **Overview**

### **Chapter I:**

- What is Competition/Antitrust?
- Legal Background
- What are Competition Authorities dealing with?
- Who is at the moment dealing with competition and antitrust in the European Commission?
- Possible change in European Competition Policy?

## **Overview**

### **Chapter II:**

- The Value of Regional Cooperation
- Subsidiary
- Regional Networks in the Competition area
- Example BRIC Competition Conference
- Example Marchfeld Competition Forum

### **Chapter III:**

- Conclusions

## **What is Competition/Antitrust?**

Competition is a basic mechanism of the market economy and encourages companies to provide consumers products that consumers want.

It encourages innovation, and pushes down prices.

In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others.

The antitrust area covers two prohibition rules set out in the Treaty on the Functioning of the European Union.

## **Article 101 (ex Article 81 TEC):**

Agreements between two or more firms which restrict competition are prohibited by Article 101 of the Treaty, subject to some limited exceptions. This provision covers a wide variety of behaviors. The most obvious example of illegal conduct infringing is a cartel between competitors (which may involve price-fixing or market sharing);

## **Article 101 (ex Article 81 TEC):**

- 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*

## **Article 101 (ex Article 81 TEC):**

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
  - (b) limit or control production, markets, technical development, or investment;*
  - (c) share markets or sources of supply;*
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
- 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

## **Article 101 (ex Article 81 TEC):**

3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
- *any agreement or category of agreements between undertakings,*
  - *any decision or category of decisions by associations of undertakings,*
  - *any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
    - (a) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
    - (b) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*



## **Article 102 (ex Article 82 TEC):**

Firms in a dominant position may not abuse that position (Article 102 of the Treaty). This is for example the case for predatory pricing aiming at eliminating competitors from the market.

## **Article 102 (ex Article 82 TEC):**

*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*

## **Article 102 (ex Article 82 TEC):**

*Such abuse may, in particular, consist in:*

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

## What are Competition Authorities dealing with?

There are Competition Authorities established in nearly each country all over the world.

For example:

in Germany: Bundeskartellamt  
[www.bundeskartellamt.de/](http://www.bundeskartellamt.de/)

in Austria: Bundeswettbewerbsbehörde  
[www.bwb.gv.at/BWB/default.htm](http://www.bwb.gv.at/BWB/default.htm)

## **What are Competition Authorities dealing with?**

European Union: There is the European Commission, where the DG Competition is established for Competition (and also state Aid affairs).  
[ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

The job of the Competition Authorities is to ensure a free, fair and transparent competition.

## **Who is at the moment dealing with competition and antitrust in the European Commission?**

The responsible Commissioner is Joaquin Almunia.



Nationality: Spain

Political career:

Since February 2010: Commissioner for competition

## **Who is at the moment dealing with competition and antitrust in the European Commission?**

Since April 2004: Member of the European Commission: (April 2004-

February 2010: Commissioner for economic and monetary affairs)

2000 elections: Socialist candidate for Prime Minister

1997-2000, Leader of the PSOE

1994-1997, Spokesperson of the Socialist Parliamentary Group

1986- 1991, Minister of Public Administration

1982-1986, Minister of Employment and Social Security

1979-2004, Member of the Spanish Parliament

Member of the Federal Committee of the PSOE

# BUNDESWETTBEWERBSBEHÖRDE

Joaquin Almunia:

Professional career:

Founder (2002) and Director of the progressive think tank “Laboratorio de Alternativas”

Director of the research program on “Equality and redistribution of income” at the Fundación Argenteria (1991-1994)

Education

Associate Lecturer at the University of Alcalá de Henares (Madrid) on Employment and Social Security Law

“Senior managers in Government” program at the Kennedy School of Government, Harvard University

Follow-up studies at L'École Pratique des Hautes Études de Paris

Graduated in Law and Economics at the University of Deusto (Bilbao)



# BUNDESWETTBEWERBSBEHÖRDE

The Head of the DG competition is Alexander Italianer.



Nationality: Dutch

Education:

1986: Ph.D. in economics (cum laude), University of Groningen

1980: M.A. in econometrics, University of Groningen

1979: Trainee at the OECD, Economics and Statistics Department

## BUNDESWETTBEWERBSBEHÖRDE

Professional experience in the European Institutions:

February 2010: Director-General for Competition in

2006-2010: Deputy Secretary General charge of the Better Regulation Agenda and Chairman of the Impact Assessment Board from 2006.

2004-2005: Deputy Head of Cabinet of President José Manuel Barroso.

2004: Head of Cabinet of Commissioner Pavel Telička, associated to Commissioner Byrne

## BUNDESWETTBEWERBSBEHÖRDE

Alexander Italianer:

2002-2004: Director of DG “Economic and Financial Affairs”, “International Economic and Financial Affairs”

1999-2002: Head of Cabinet to Commissioner Günter Verheugen, responsible for Enlargement

1995-1999: Member of the Cabinet of President Jacques Santer

1985-1995: Administrator, adviser and then head of unit at DG “Economic and Financial Affairs”

Professional experience before joining the European Institutions:

1980-1985: Research associate at the Catholic University of Leuven, Economics faculty

## **Possible change in European Competition Policy?**

Very early for a deep analysis

We have two new leaders in political and administrative area

They are at the moment somehow analyzing their new business environment

But we can already look at some first quotations:

## **Almunia I:**

Competition gives business the tools to succeed on the world stage, by enhancing their competitiveness and encouraging innovation. It helps create viable companies that can offer workers long-term employment prospects. And **it gives consumers the benefit of lower prices, better choice and better quality of goods and services.**

What we have in the EU is a system that requires the European Commission to **review state subsidies** to business and to assess their impact on competition.

## Almunia II:

The EU rules on government subsidies are a key element of EU competition policy in that they help maintain a level playing field for business within Member States and across Europe. They have proved their worth in the context of the financial and economic crisis, helping avoid damaging subsidy races between EU Member States and minimizing the distortions of competition resulting from large-scale government bail-outs for financial institutions. (9th Global Forum on Competition, OECD, Paris, 18 February 2010, "Competition, State aid and Subsidies in the European Union".

The European Commission's first cartel settlement will be scoured by the legal and business communities for signs of what is to come, but the EU's antitrust chief Joaquín Almunia has made two points clear: **there will be more cases, and they will be quicker** - in some instances taking less than six months. (M-Lex, 19, May 2010)

## Italianer I:

The link between effective competition and economic growth is particularly important in times of economic recession and when evaluating the strategy for recovery. This is why competition policy should be an integral part of the toolbox on which governments rely; not only for responses to the economic crisis but also as part of making the 2020 vision come true.

Effective competition drives companies to innovate and be efficient. But competition enforcement can only be effective if its policy instruments are kept up-to-date and brought in line with market developments.

In this context, there is a **clear right of companies and consumers to obtain compensation for the damage caused by infringements to the competition rules**. Victims' right to compensation and effective redress under the Treaty has been recalled by the Court of Justice several times. It is an essential part of ensuring the full effectiveness of the EU competition rules.

**Italianer II:**

On **due process**, my observation is that on the whole we have a robust system, tested by the Courts, that compares favourably internationally. This does not mean that we should sit on our laurels. This is why DG Competition has recently produced a draft document on best practices in antitrust proceedings part of which is of immediate application.

I hope to have highlighted that a robust and dynamic competition policy is a key factor in exiting from the crisis and in creating the best conditions for a prosperous, sustainable and inclusive Europe. (International Forum on Competition Law, Challenges for European Competition Policy, Tuesday 9 March 2010)



**Angela Merkel:**

'just try to imagine how much protectionism there would have been across Europe in the absence of Brussels and DG Competition. I know that we may sometimes feel angry towards DG Competition;

'I have experienced that myself. But overall the **Commission ensured that free trade and the internal market could function to a fair degree**'. (Speech by Chancellor Merkel entitled "Wirtschaftsgespräch 2010" on 18 January 2010 in Düsseldorf):

# BUNDESWETTBEWERBSBEHÖRDE

## Mario Monti I:

Europe needs an industrial policy that does not conflict, rather builds on its competition rules. Competition rules certainly don't stand in the way of the European companies search for the best scale and size to compete globally. European competition rules have not opposed the birth of numerous European champions, from EADS to AirFrance-KLM to mention only two, and even national champions. (p.86)

In parallel, **cooperation between NCAs should be improved**, to ensure procedural and substantive convergence between them and with the EU level. A more radical option would be to revise the mergers regulation's mechanisms for case allocation and re-allocation. This would mean abolishing the so called "two-thirds rule", which requires that mergers in principle eligible for EU review under the merger regulation are nevertheless left to national competition authorities when more than two thirds of the parties turn-over is realized in one and the same Member States. The advantage would be a more consistent treatment of mergers in key areas of the EU economy. (p. 86)

## Mario Monti II:

Private enforcement: The EU legal system empowers citizens and business to stand up for their rights, through litigation before national courts. Thus, private enforcement is a key tool to contribute towards reduction of the compliance deficit and to ensure the effectiveness of the Single Market. (p. 103) (Monti, A new Strategy for the single market at the service of Europe's Economy and Society, 9 May 2010)

## The Value of Regional Cooperation I:

**Small is beautiful**, (Leopold Kohr: Disunion now: A Plea for a Society based upon Small Autonomous Units, The Commonwealth from September 26, 1941)

Idea, that continued growth of economy can solve all the problems. Kohr was against it. He wanted people to go back to the human measure of things.

Competition Law and Enforcement- a Global Issue

Questions of competition law and enforcement are not limited by geographical borders

Economies interconnected (e.g. financial crisis)

Facing a well informed business community

## **The Value of Regional Cooperation II:**

Regional Issues need regional solutions

Need for cross-border cooperation & coordination

Looking for common positions on common problems

→ Therefore need to look at subsidiary as a principle

## **Subsidiary:**

Subsidiary in the historical context (Synod of Emden 1571):

Decisions to be taken at the lowest possible level

Article 5 TEU:

The limits of Union competences are governed by the principle of conferral. The use of Union competences governed by the principles of **subsidiary** and proportionality.

## **Subsidiary:**

Under the principle of subsidiary, in areas which do not fall within its exclusive competence, the **Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States**, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiary as laid down in the Protocol on the application of the principles of subsidiary and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

Protocol (No 2) “On the application of the principles of subsidiary and proportionality”

Therefore it is useful to look at the European Regional Network

## **Regional Networks in the Competition area I:**

- European Competition Network (ECN)
- International Competition Network (ICN)
- Marchfeld Competition Forum (MCF)
- European Competition Authorities (ECA)
- Organization for Economic Co-operation and Development (OECD)
- United Nations Conference on Trade and Development (UNCTAD)
- Baltic Competition Conference



## **Regional Networks in the Competition area II:**

- BRIC (Brazil, Russia, India, China)
- Commonwealth of Independent States (CIS)-Interstate
- Council on Antimonopoly Policy (ICAP)
- Cooperation agreements of the EU with 3rd states
- International Chamber of Commerce (ICC)
- World Trade Organization(WTO)
- Nordic Competition Authorities
- Central European Competition Initiative (CECI)

## **Example BRIC Competition Conference I:**

BRIC in general:

Russian President Medwedew wrote an interesting comment in the newspaper Handelsblatt on 15 April 2010.

"Russia sees in BRIC-countries partners for multiple forms of cooperation. BRIC will play an active role in building a new system concerning the financial sector.

**We have got more voting rights in Worldbank and International Monetary Fund."**

The word BRIC was first used in 2003 by the Investmentbank Goldman Sachs "Dreaming with BRIC´s - the path to 2050" .

The BRIC-states started already in 2006 with their cooperation.

## **Example BRIC Competition Conference II:**

Now the meetings have a regular character. Also, there was a "mini-summit" of the Leaders of the BRIC states and two meetings of BRIC Ministers of Finance, including their last meeting in London in March 2009 on the eve of the London G20. First "big" summit of the Leaders of the BRIC countries and Governments was held in Yekaterinburg, Russia, on July 16, 2009, the second one in Brasilia on April 15, 2010.

Thus, we can define BRIC as a semiformal organization. Alongside with economic issues, financial recovery, food and energy security are on the agenda today. From development issues, the BRIC countries have to promote principles of competition policy for further steps on their way of economic progress.

## **Example BRIC Competition Conference III:**

Examples for Meetings:

The Meeting of Ministers of Agriculture and Agrarian Development;  
The Meetings of Ministers of Finance and Governors of Central Banks;  
The Meetings of High Representatives for Security Issues;  
The Exchange Program for Magistrates and Judges,  
The first Meeting of Development Banks;  
The first Meeting of the Heads of the National Statistical Institutions;  
The Conference of Competition Authorities;  
The first Meeting of Cooperatives;  
The first Business Forum;  
The Conference of think tanks

## **Example BRIC Competition Conference IV:**

BRIC und Competition:

The Heads of the competition authorities of BRIC recognize that strong and effective enforcement of their respective competition laws is impossible without expanding cooperation and, where applicable, coordination between their competition policies. They also see the necessity of exchanging opinions on different aspects of competition policy and enforcement through four-way dialogue and within international events. (Strategy paper)

The first deputy Prime Minister of the Russian Federation, Igor Shuvalov mentioned:

Encouragement of competition is and will be the key direction of our economic policy, the most important factor of modernization of our economy. And we know that competition needs a defense - a defense against not only private monopolies, but from the monopolistic efforts from the state itself.

**Finally almost a half of earth population is behind us.** And development of competition is the main term for growth of its prosperity.

## **Example Marchfeld Competition Forum I:**

**Marchfeld Competition Forum:** Austria, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia, Switzerland, DG Competition

Strengthening regional cooperation/coordination with regard to cross-border issues of common concern

Exchange of Information; best practices; know-how flow

Defining common positions

## **Example Marchfeld Competition Forum II:**

The Merger Information Exchange Platform: Unique Feature of Marchfeld Regional Cooperation

Electronic Database for exchange of information between Members

Facilitate the information exchange on mergers and concentrations concerning more than one country

Participating Members of the MCF update their data on mergers on a daily basis

Benefits:

Valuable Tool for Case Handlers in their daily work

Overview of developments in the markets

Statistics

**Conclusions:**

Competition Law: Becoming more international

Cooperation based on partnership should be strengthened

Emphasis should be put on regional cooperation, being a best practice to enhance efficiency.



# BUNDESWETTBEWERBSBEHÖRDE

Thank you for your attention!

[www.bwb.gv.at](http://www.bwb.gv.at)