

FINANCIAL TIMES
November 12, 2002

COMMENT & ANALYSIS

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MONTI MUST NOT BE AFRAID TO TACKLE MICROSOFT

Europe's Court of First Instance overruled, in June and October, Commission decisions prohibiting a series of mergers between European companies. For the general public, the judgments paint a picture of a poorly organised merger review process, where evidence was not carefully gathered and decisions were hastily put together without sufficient factual basis. These annulments have been seen as a serious setback for Commissioner Mario Monti, and European competition law enforcement in general. However, far more important than the sensationalism surrounding the annulments are two challenges they pose for the future of competition enforcement.

The first challenge is reform of merger review procedures. The second is to maintain the vigorous enforcement of competition law. In confronting these challenges, Mr Monti must demonstrate that, while learning from past mistakes, the Commission will not allow public criticism to distract it from protecting European consumers.

The merger review process is clearly broken and needs fixing. The primary source of concern has been the lack of checks and balances on the Merger Task Force's case teams. Last week Mr Monti announced the first reform proposals, including the appointment of a chief economist and a peer review team to test the MTF's case before a final decision is reached.

These proposals head in the right direction. However, no check can be effective without three critical ingredients: access to the facts of the case, access to the parties, and the authority to influence the case team's decision. Those currently doing the checking either lack the power to challenge the MTF or familiarity with the facts of these extraordinarily complex cases. This must change in order to restore public faith in the Commission's review of mergers.

The second and more important challenge is for Mr Monti and his staff to persevere in the rigorous enforcement of EC competition rules. Annulments are a fact of life in a just and effective regulatory regime. They are the ultimate check and balance upon which the EU system relies. Indeed, the occasional error, remedied by effective judicial review, is far less damaging for the European consumer and the Commission's credibility than a general retreat from antitrust enforcement.

Unfortunately, many have interpreted the Commission's unconditional clearance of the Carnival/P&O Princess merger - after it initially voiced strong reservations - as evidence

that it was backing away from its enforcement responsibilities for fear of further censure. Were this true, it would be a far more serious criticism of the Commission than any number of annulments.

The Commission will shortly conclude a number of investigations - most prominently, one into Microsoft's alleged abuse of its dominant position in personal computer operating systems. The recent court judgments should not unsettle the Commission. They do not question the theoretical foundation of its case against Microsoft. Indeed, in the Tetra Laval/Sidel case, the court explicitly backed the leveraging theory, where competitive harm can be inflicted if a company uses its dominant position in one market as a lever to gain dominance in a second. While rejecting the Commission's speculative application of theory, the court made clear that if Tetra Laval engaged in leveraging in the future, such behaviour would be illegal and the Commission would be expected to use its powers to prevent it.

The way forward in the Microsoft case must be a scrupulous review of the facts and Microsoft's alleged leveraging behaviour to determine whether a violation of European competition rules has occurred. The US appeal court's approval of the Microsoft settlement in no way prejudged the Commission's case under European law. Indeed, the European case addresses an entirely different set of facts. In the end, the Commission must take a decision that is proportionate to the antitrust violation, not one designed to avoid criticism.

Competition law is a cornerstone of the European Union's political and economic framework. Its enforcement is undoubtedly one of the EU's greatest success stories. Competition commissioners rank among the EU's most respected figures.

Mr Monti should continue his dogged pursuit of consumer interests. The recent decision to impose hefty fines on Nintendo and some of its distributors for operating an illegal distribution cartel for video games, and confirmation that he will continue the cases against Microsoft and others, are encouraging signs.

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