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Concluding Remarks

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Colleagues, Friends,

It would be presumptuous to try in fifteen minutes to summarize the debates we have had in six panels, preceded by the submission of so many papers of high quality, which provided a rich and firm basis for the discussions of the last two days. I think we have to thank Claus Ehlermann and the staff of the Institute sincerely for that.

After the review of Article 82 initiated by the Commission and the hearings on Section 2 in the US, the issues which we have been addressing are now relatively familiar to all of us. At the start of the programme, the first panel tackled the fundamental objectives of competition policy with respect, in particular, to unilateral conduct. I would dare to say that we have reached a substantial degree of transatlantic convergence and consensus on objectives. Within Europe, there is broad agreement that we are protecting competition, not competitors. But there is still some outstanding debate about the ultimate objective of competition policy: principally German traditions retain the concept of the freedom to compete as such; on the other side the majority of other European jurisdictions have, similar to the US tradition, established consumer welfare as the ultimate standard, and they assess unilateral conduct in relation to its effects on consumers.

However, the debate around these two opposing concepts appears, in the end, to be more at the level of theory than of practical investigation and decision-making. Generally speaking, all European jurisdictions are pursuing cases with the same concerns in mind: the acquisition and/or use or abuse of substantial market power which endangers the competition process and ultimately harms consumers. In the longer run, one can argue that even the theoretical divergences between the concept of *Wettbewerbsfreiheit* and welfare standards are reconcilable. It is interesting to observe how even the most traditional and ordoliberal authorities devote so much of their investigation time to the examination of effects. Maybe, as Frédéric Jenny reported, they have no time to look at efficiencies. But in general, effects, long run and short run, draw their close attention.

At the same time, in terms of case investigation, I believe we had good advice from David Gerber and others that economics should be a tool of analysis of the facts, not a normative discipline. There may be many cases where you don't need to model anything to establish a theory of harm. In addition, legal practitioners too often assume that a more economic approach has by definition to be a more complex and sophisticated one. Surely the

objective is to ensure both that *ex ante* rules make broad economic sense and that the story we tell in any decision on a specific case makes broad economic sense. So the messages of economics can be simple.

On the next question, as to precisely how you pursue a policy on unilateral conduct and how you communicate that policy, I think we recognize, as far as Europe is concerned, that the case law we have on unilateral conduct does not provide us with a comprehensive or consistent body of principles and tests which could respectably be called a policy.

In any event, in all other areas of EU competition policy – in merger control and in the field of horizontal and vertical agreements – there has been a perceived need for clarity and predictability of policy. This has been met, with or without a substantial body of case law, by providing upfront guidance, generally in the form of guidelines. This is not to say that more enforcement and more case law would not assist and consolidate policy. But the initiation and prosecution of cases is, unlike policy, not something which is entirely in the hands of a competition authority or court. It is very much dependent on the specific circumstances of the defending and other parties and may or may not offer scope for the identification of principles and tests of more general application.

So there is an argument for guidance, in addition to case law. But guidance for whom and on what?

First of all, I would argue, guidance is necessary for all those working *within* competition authorities in the jurisdiction where the substantive rules on unilateral conduct are to be applied. This means, within the EU, that we need to address guidance to our staff and case teams within the Commission and within all national competition authorities who are applying Article 82. Otherwise, we have little prospect of ensuring the coherent and consistent application of the law, which the business and legal communities in Europe expect us to develop. Imagine too a situation where the Commission alone establishes guidance, without reference to *national* Article 82 policy and case law, and then is left to ensure EU-wide coherence by intervening to take competence for national cases or stay national decisions. So what guidance *is* produced must be of general application by all competition authorities applying EU law and its drafting must involve all of them.

But secondly, guidance must surely be given to courts and other review bodies. How are the courts to review the consistency of policy, without a clear indication from the responsible administrative authorities as to what policy they are trying to pursue? If a court is itself an investigating and decision-making body, the situation would obviously be different. But, in particular with European administrative systems, courts must rely on administrative authorities, not only for detailed investigation and analysis, but also for policy development. At the same time, administrative authorities must obviously defer to courts in the application of legal principles to the execution of policy.

There is an inevitable, and usually constructive, interplay of administrative and judicial activity, provided both sides do what they are expected to do. And on the side of administrative authorities, policy development seems to be one of their essential functions as instruments of wider public policy. So guidance cannot remain within the confines of authorities. It should be accountable to courts and it needs to be adapted to what courts decide.

Can policy guidance contradict what some call “established case law”? In principle, no, but does that mean that policy cannot be educated either by market developments or by better definition of objectives or superior investigation techniques? Surely not. And in addition, we should not be shocked by the inevitable lag which occurs between the initial decisions by an administrative authority and the judgments of courts on them, on the one hand, and the parallel development of policy by the authority on the other. But I would argue here that the provision of regularly updated policy guidance by the administrative authority should *diminish* the significance of this lag rather than increase it.

Even more importantly, alongside active enforcement for the effectiveness of a policy, policy guidance has its greatest value in relation to those by whom it may eventually be applied – the business and legal community. Guidance should in principle allow businesses and their legal advisers to distinguish situations where conduct could be judged to be anticompetitive from those which are pro-competitive. In that sense, it should enable competition authorities to deter relatively clear-cut anticompetitive behaviour and, as a result, to concentrate enforcement action on those cases where there is a genuine need for investigation of situations where the effects on competition and consumers are not so obvious.

Will published guidance bind the competition authority which issues it? This must be the case, otherwise the authority is not delivering on its obligation to apply the law in a consistent and coherent way, with the necessary level of predictability for firms. But guidance cannot be assumed to provide the same predictability as law (whether in the form of legislation or case law). The facts of any specific case – in particular the market characteristics around it – may not have been foreseen by the guidance. And in these specific circumstances, it would be normal for a court not to condemn an authority for deviating from its guidelines, but to expect from the authority a reasoned argumentation where it finds it necessary to deviate from the guidance originally given. And, of course, subject to any subsequent court decision, it would be normal for guidance to be updated in the light of market developments and of specific case decisions by the authority.

Another objection made to providing upfront guidance is that it is supposedly adding further “regulation” to markets at a time where everyone is looking for opportunities for better, if not less, regulation. This reaction does not reflect the widespread perception in the business and legal community that the lack of guidance from the Commission on what unilateral conduct will be regarded as anticompetitive creates an unacceptable degree of uncertainty. This uncertainty engages the time and resources of firms in the Kremlinology of

working out what conduct may or may not be acceptable to European competition authorities. Far from increasing the administrative burden on companies, useful guidance on unilateral conduct can have no other effect than to reduce it, while avoiding further regulation. Formal guidance offers an adequate degree of legal certainty. On the other hand, it is flexible enough to allow the administrative authority to adapt it to market developments and specific case situations.

Turning now to the issue of precisely what level of guidance can and should be given in the area of unilateral conduct, I believe we have reached the conclusion that it is possible to draft useful guidance on the overall policy objectives and the general framework for analysis of substantial and durable market power (dominance) and of the parameters which may determine whether conduct has the actual or likely effect of anticompetitive foreclosure (that is, foreclosure that brings harm to consumers).

To provide useful guidance, I think we can go on to say that, where possible, guidance should provide safe harbours, rebuttable presumptions and perhaps some tests. This simplifies compliance issues. It also reduces the administrative burden of investigation and wider scope for more cases to be brought – which would certainly please Mario Siragusa and Ian Forrester, after the remarks they made about our enforcement record. However we have to ensure that any test is going to allow us to arrive at the correct result on a repetitive basis to a high degree of probability. That is not always easy. It may be more advisable, in particular when looking at specific practices, to refrain from being too presumptive. In that respect, we can probably be more confident of specific bright-line tests, in the area of, for example, predatory pricing, and some forms of rebates.

But we should be much more cautious establishing upfront tests and rules for practices such as tying and bundling or refusal to deal. In the development of formal policy guidance, we would perhaps be well advised to adopt a progressive approach, starting off with an emphasis on principles and methodology and then developing more precise precepts on the basis of case experience. However, we should equally be conscious not to confuse the need for caution on some implicit or explicit presumption of *per se* legality, just as in establishing bright lines we should be careful to avoid a presumption of illegality without any empirical evidence to justify it.

In making transatlantic comparisons, a number of interventions reminded us that public enforcement of Section 2 in the US is strongly complemented by private action. So it is probably incorrect to jump to the conclusion that the level of overall enforcement is very different between Europe and the US. We also need to take into account the fact that a great deal of national enforcement within Europe in relation to unilateral conduct relates to issues of vertical economic dependence and to unfair trade practices, and not to an exclusive application of Article 82.

In addition, another significant aspect of national European enforcement relates to exploitative abuses. In that context, we had an illuminating discussion on the advantages and

disadvantages of using competition law instruments or relying on the intervention of regulators. There was a strong consensus on the relatively limited conditions under which Article 82 could be used for exploitative conduct. That would seem to offer a solid basis for inclusion of policy towards exploitative conduct in any guidance. There was equally a recognition on both the EU and the US side that sectoral regulation can sometimes be quicker and more effective than long, drawn-out antitrust investigations. Regulators are often perceived as doing something somehow “better” than competition authorities for consumers, especially on price. Maybe the overall conclusion here is that competition authorities cannot function too independently from the market and the public policy environment around them.

If there is a perceived competition problem, we should surely be looking at what is the appropriate instrument to tackle it (legislation, sector regulation, action of regulators, application of Article 82) rather than leaping to use the instrument which competition authorities have in their own competence.

In our last Panel VI of this Workshop, we looked at price regulation in the energy sector. I think our speeches rightly warned against the dangers of competition authorities attempting to control of outcomes rather than market processes, especially when it is done on the basis of some false economic premises.

Finally, we all agreed that the protection of intellectual property rights on the one hand, and competition on the other could be mutually reinforcing if there was a better dialogue between competition authorities and patent offices.