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**CONSUMER WELFARE AND EFFICIENCY –
NEW GUIDING PRINCIPLES OF COMPETITION POLICY?**

Ladies and gentlemen,

The double conference of today is a moment of satisfaction and of importance, because we are celebrating the first half century of a great adventure, that of the European Union. But it is also an opportunity for me to pay tribute to a great competition advocate, by expressing my gratitude to Ulf Böge.

Dear Ulf, we thank you for your outstanding contribution to competition, to competition law and, last but not least, to cooperation between competition enforcers. Your action at the head of the Bundeskartellamt, as Vice-President of the OECD Competition Committee and as President of the ICN will of course be remembered, and will no doubt be considered a standard – and a very high one! – for competition enforcers today and tomorrow. But that is only part of the picture. If you allow me to be more personal, I would like to underline that, in the “competition family”, you have been both a neighbor and a friend of the inner circle, as illustrated by the inauguration of the Franco-German Competition Days. We immediately understood one another! Thanks to you, we can today endorse the witty remark of the great Bavarian comedian Karl Valentin: *heute ist die gute alte Zeit von morgen*. Today is really the good old time of tomorrow!

Coming back now to the title of our panel, one should first admit that efficiency and consumer welfare are not crystal-clear notions, in particular for the public at large. Our duty is therefore to explain again and again why and how they are guiding principles for competition enforcers. And also why they are not really new principles.

I. – Efficiency and consumer welfare: what does it mean?

The terms “efficiency” and “consumer welfare” are nowadays commonly used, at least among competition practitioners. This situation gives rise to two questions:

- first, what is the cause of such a success? Do these words really have an agreed meaning, or are they only convenient because they are vague and flexible?
- second, what is its consequence? Do we all – lawyers, professors, regulators, judges – only mention them, so to speak, ritually in conferences, lectures, documents of procedure, decisions, etc., or do we act accordingly?

Thus the need, first, to reflect upon the meaning of these notions.

In French, the meaning of the term “efficiency”, and the according translation, are twofold:

- “efficacité” is the ability to deliver the expected result: did we do what we wanted to do?
- “efficience” is the ability to best deliver the expected result. Could we have done better what we wanted to do?

Now I turn to “consumer welfare”. At first sight, one could be somewhat uncomfortable with that notion, rendered in French by the expression « bien-être du consommateur ». For lawyers and economists, used to deal with precise notions, this falsely simple notion may sound disconcerting. Its evocative power is however a perfect rendition of what competition is about.

Fifty years ago, Europe made a fundamental choice, that of “promoting an open economy where competition is free” as laid down in the EC Treaty. This fundamental goal reminds us that competition policy is a major public interest. By stimulating, and if necessary by compelling, operators to compete on their merits, competition policy contributes to the efficient allocation of resources, to the benefit of consumers, who will be offered a wider choice of goods and services, of better quality and at a better price.

I do not need to describe further what will certainly be obvious for all of you:

- efficiency and consumer welfare are of course “guiding principles” of competition policy, even if they are not valued in the same respect since efficiency is the means whereas consumer welfare is the goal;
- what is really “new” is not this set of principles as such, but the strength with which they are becoming “the” guiding principles of competition policy, as we can read it from the recent judgement of the European Court of First Instance *GlaxoSmithKline Services v/ Commission* of 27 September 2006.

My purpose will therefore be to think about the consequences of this situation for national competition agencies. We have to consider efficiency and consumer welfare as guiding principles under two aspects:

- first, when analyzing the effects of behavior on the market: we shall not discourage efficient behavior... but on the other hand we shall discourage inefficient behavior, that may well allow a company to increase its profit but will never bring benefits to consumers;
- second, when defining our policy as a whole: our action shall be as efficient as possible, given that it is funded by limited public resources.

II. – Efficiency and consumer welfare: practicable guiding principles for the assessment of unilateral behavior

An effect-based approach of unilateral conduct is in my view fully practicable and should not be thought of as some kind of “suicide mission”, as Professor Basedow expressed the fear a few minutes ago! The French Competition Council is resolutely following this avenue. We have increasingly made room for thorough economic analysis in our procedures, and we include an assessment of the reduction of consumer welfare resulting from anticompetitive

behavior in our evaluation of remedies and sanctions. Therefore, we firmly support the approach followed by the European Commission in its draft guidelines on the application of Article 82 of the EC Treaty.

Thorough and sound economic analysis is absolutely necessary to avoid over-enforcement of competition rules. For this purpose, the suggested guidelines, in their current line, seem to be fully practicable. In fact, we already apply a similar approach in our decisions.

I will take four examples of the way we do so.

1. – Impact on competition

In a recent case concerning advertising in movie theaters, we found that almost all contracts concluded with the dominant advertising sales house included exclusivity provisions for both local and nation-wide commercials. This bundling of contracts covered 80% of all commercials on the two markets concerned.

According to the efficiency defence of the dominant company, customers were to benefit from the financial advantages, the enhanced quality of service and the technical improvements expected from these contracts. Upon examination, however, it appeared that none of these arguments stood up to the analysis. In particular, the alleged financial gains were not likely, since no bundling discount was offered.

Nevertheless, the Conseil de la concurrence dropped the case for the following, simple, reason: the provisions at stake were not implemented by the dominant company and any foreclosure effect was dismissed by the investigation. Actually, the inquiry showed that the dominant company had lost significant market shares to the benefit of a raising competitor during the period of time covered by the contracts.

2. – Economic justification

In a case brought by companies engaged in parallel trade of medicines, the Conseil de la concurrence ruled that pharmaceutical laboratories did not abuse their dominant position when they restricted or refused deliveries of medicines to exporters, who seek to purchase products in France at an administered price in order to then sell them in another country at a higher price.

According to this decision, which was upheld by the Paris Court of Appeal, it is not an abuse for a laboratory to defend its commercial interests by refusing to deliver a product at an administered price, where that product is only sought by a pure exporter on the ground that he can make a profit by reselling it in a foreign market, and where the product will certainly not be sold on the national market for which the administered price has been fixed. The investigation confirmed that the supply restrictions concerned by the complaint constituted reasonable and proportionate measures which, given the limited activity of the exporters, were unlikely to prevent parallel trade. The Conseil de la concurrence also rejected the complainant's suggestion to introduce "quotas" reserved for exporters, since such quotas would have created real competition problems.

In a way, although the legal provision at stake was different (Article 82 EC instead of Article 81 EC), as well as the practice under examination (refusal to supply instead of dual pricing), the Conseil de la Concurrence clearly anticipated, in this case, on the economic analysis and legal solution reached by the European Court of First Instance a few months later.

The decision only covers the case of pure exporters – whose status differs from that of wholesaler-distributors, who are bound by public service obligations.

3. – Exclusionary effects and reduction of consumer welfare

The same approach, based on the analysis of the economic effects, was applied in a third case concerning an allegation of predatory prices, the *GlaxoSmithKline France* decision of 14 March 2007. In France, this is the first abuse of a dominance case in which predatory prices are penalized.

Like in the Akzo Nobel case, the commercial practice of a leading pharmaceuticals producer consisted in low pricing targeted on a small market, of minor importance for the dominant company. The evidence obtained during the market investigation proved that the aim of the dominant company's behavior was to sell its patent-protected drug at a price below cost so as to deter generic drug manufacturers from effectively entering the hospital market after the patent had expired, and before it was able to market a replacing product. The predation policy focused on a relatively small-sized market, of about €1 million, but was clearly part of a global intimidation strategy aimed at discouraging generic drug manufacturers from entering the hospital medicine market.

The Conseil de la concurrence however pursued the case on the basis of an in-depth analysis of the effects of the behavior on this more strategic market, in order to assess them in detail. This was all the more necessary given that low prices are *prima facie* in favor of consumers. The Conseil de la concurrence found that the actual loss accepted by the dominant company during the period of time it applied targeted predatory prices was recouped later through price raises. Moreover, the abusive behavior led to evict the complainant from the hospital market and deterred two potential competitors from developing generic drugs.

Given the seriousness of the eviction practices, which had been implemented by the first supplier of pharmaceutical medicines for hospitals and which had damaged the sector's economy in a difficult context of health expenditure control, the Conseil de la concurrence decided to set the fine at an amount of €10 million.

4. – Efficiency and consumer welfare as part of the global assessment of unilateral conduct

In a case concerning exclusive dealing and refusal to access to essential facilities, the Conseil de la concurrence also assessed accurately the arguments and evidence produced by the parties to justify their behavior. The case was brought by a passenger transport company, who claimed that a congregation established on a small island off the French Riviera and operating the island's sole landing stage was abusing its dominant position by refusing access to this facility.

The reasons why the Conseil de la concurrence ruled that the Cistercian monks of the Isle of Saint Honorat did not violate competition law by restricting passenger transport were the following: first, this monopoly on passenger transport met an objective necessity, justified by the site's peculiar geography, by the private character of the island and by the need to control the flow of visitors. Second, there was no alternative solution. If other private operators had been authorised to land, the only way of regulating visitor numbers would have been to introduce a policy of quotas for each company. Such a system would have been very difficult to implement.

III. – Competition policies guided by efficiency and consumer welfare now face two major issues

1. – How to share the burden of proof?

Unlike hardcore cartels, which may generally be presumed to have an anticompetitive effect, unilateral conducts often require a thorough economic analysis. It is crucial to clearly show their actual or potential effects on the market. This is rarely easy to achieve, given the information asymmetry which characterizes the procedure.

Sharing the burden of proof between the competition agency and the parties is therefore a well balanced solution: it falls on competition enforcers to prove the anticompetitive impact of a market behavior, whereas only market operators are in a position to demonstrate what possible efficiency gains may result from their commercial strategy. Eventually, the competitive assessment will have to weigh-up argued efficiency gains.

The need to analyze efficiency arguments is not a brand new situation for the Conseil de la concurrence, since the notion of contribution to economic progress also exists for unilateral conducts in French competition law. Developing efficiency defence arguments should therefore not come as something unusual in French antitrust procedures.

However, competition authorities may not only assess efficiencies directly linked with the commercial practices in question, but also integrate all necessary facts into a global assessment of the context in which they take place. Consumer interest may be a central issue for determining unbiased justifications of apparently restrictive practices, as it was found for example in the Saint Honorat Island case.

A well-balanced standard of proof is a safeguard against false positives and over-enforcement. It does however not prevent from imposing appropriate sanctions on violations of competition rules, in particular abuses of market power. To the contrary, it strengthens the demonstration of the actual harm resulting from the infringement and thus the robustness of decisions as regards the amount of the fine or the remedies imposed. For example, in the predatory case mentioned above, the Conseil de la concurrence took into account the harm on the market targeted by the exclusionary practice, which was larger than the market where the pricing practices took place.

Making room for due consideration of efficiency defence arguments does neither prevent to take into account consumer interest. In the French case-law, price elasticity of demand for the goods concerned is in particular considered when assessing the harmfulness of anticompetitive behavior. Anticompetitive practices harming captive customers which cannot

switch elsewhere, or restricting competition on the supply of essential goods, are for instance considered as particularly serious.

2. – how to arbitrate between the need to accurately assess the effect of the practices and the time constraints?

Efficiency also means efficient enforcement by competition authorities. Time constraints are of paramount importance in antitrust proceedings, since the conditions for competition on certain markets may evolve rapidly. An efficient action therefore means avoiding the risk that competition will be applied too late, for example after market players have been driven out of the market, or after a given technological or commercial standard has already prevailed on the market through anticompetitive means, and although it is less efficient than the standard that would have resulted from competition on the merits.

The need to intervene swiftly might therefore conflict with the quality requirements expected from competition authorities.

Fortunately, most of them are equipped with tools allowing them to reconcile the time of regulation with the time of business. The power to adopt interim measures gives in particular the Conseil de la concurrence the possibility of preserving a chance of maintaining competition once a fully-fledged analysis has been carried out.

To this end, the case-law has gradually eased the two conditions needed in order to grant interim measures. The first one relates to the reasonable presumption of an infringement and the second one to the likely existence of a harm. According to the current case-law, interim measures can be granted where the existence of an anticompetitive practice cannot be excluded and where a serious and immediate damage may be caused. Consequently, interim measures can cover an increasing number of situations calling for swift action than it was the case in the past.

IV. – Efficiency and consumer welfare: guiding principles which need to be explained and understood

There is obviously a need to help all stakeholders to better understand why and how efficiency is a good way to increase consumer welfare. Guidelines and notices are certainly good means for this purpose. The Conseil de la concurrence strives as well to thoroughly develop the economic reasoning of its decisions and to clarify the methodological basis of its approach. The recoupment tests used to prove predatory prices in the pharmaceuticals sector were for instance accurately detailed in the decision earlier mentioned.

There will however remain a paradox: consumers are now at the center of the debate on objectives and means of competition policy; yet these market players are physically absent from the stage! Does this call for measures to facilitate the participation of consumer associations to procedures?

In France, competition law provides that four (non permanent) members of the decision-making body of the Conseil de la concurrence may be appointed according to their competence in the field of consumer protection. Currently, one of these non permanent

members is the chairwoman of a consumer association. Consumer associations may also file complaints against suspected antitrust infringements, or request an opinion on the functioning of markets from the competition authority, in which case their request will often deserve top priority.

This kind of measure certainly goes along the right line. However, it might be useful to think about additional ways of reinforcing the partnership with consumers, who must be considered as key stakeholders.

The development of private enforcement is certainly a road along which we want to move in the future. This is a prospect we strongly support, provided that private and public enforcement are well linked together.

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