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Global Forum on Competition

COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from the EC

-- Session I --

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INDUSTRIAL POLICY, COMPETITION POLICY AND NATIONAL CHAMPIONS

-- European Commission --

1. The Commission's general stance on industrial policy and "national champions"

1. It should be emphasised at the outset that in the view of the European Commission, industrial policy and competition policy are not in conflict with each other.¹ Rather, particularly as a strong industry depends on an open market with free competition, competition policy should form part of industrial policy.² Accordingly, this rather anachronistic term should more suitably be substituted by "competitiveness policy" as the overall notion.³ This view has been frequently stated by the Commission, notably in its 2004 Communication "A pro-active Competition Policy for a Competitive Europe"⁴.

2. The term "national champions" is often used to refer to domestic companies that are strong players in international markets and that are in various ways supported by their governments.⁵ They often contribute to national pride and their success is seen as a benchmark of the state of the national economy.

3. It has to be underlined that the Commission is not against "national champions" per se, as long as their status is achieved in accordance with EC law on competition, mergers and State aid. National champions resulting from the play of competition in an open and competitive market do not raise issues.⁶

4. However, it should also be noted that the Commission does not see a special need to foster "national champions". Every nation can be a winner in the single market⁷, with which the concept of merely "national" champions is somewhat in tension. In contrast, a recent call for the creation of "European Champions"⁸ is more in keeping with the spirit of the internal market. But even regarding "European Champions", the Commission does not see any need to foster them in an interventionist way.

¹ P.A. Geroski, *Competition Policy and National Champions*, p. 6 et seq.

² N. Kroes, *Industrial Policy and Competition Law & Policy*, Speech/06/499, p. 2; N. Kroes, *Competitiveness*, Speech/08/207, p. 2; also Lars Sorgard, *The Economics of National Champions*, p. 63.

³ See N. Kroes, *Industrial Policy and Competition Law & Policy*, Speech/06/499, p. 4 et seq.

⁴ COM(2004) 293 final of 20/4/2004. See the accompanying press release IP/04/501.

⁵ See J. Hayward in J.E. Shalom (ed.), *Industrial Enterprise and European Integration*, p. 10 et seq. on the different notions and M. Motta, *Competition Policy*, p. 10 et seq. on the history.

⁶ COM (2004) 293 final of 20/4/2004, p. 4.

⁷ N. Kroes, *Competitiveness*, Speech/08/207, p. 2.

⁸ D. Strauss-Kahn, *Round Table: Sustainable Project for Europe: Final Report of the Group of Policy Advisors*, 2004; the creation of European Champions has also been an argument of the French Government in the past, see J. Hayward in J.E. Shalom (ed.), *Industrial Enterprise and European Integration*, p. 7.

Moreover, the concept of any kind of "champion" cannot be invoked, explicitly or implicitly, as a justification for setting aside the rules on anti-trust, mergers and State aid.⁹

5. The Commission holds that a competitive market, guaranteed by EC law, is the best instrument to bolster the economy and industry in Europe. It is the central driver for economic growth, and only firms that can stand competition at home (and in Europe) can compete with the entire world. Thus, vigorous competition based on a pro-active competition policy, that intends to improve the regulatory framework for competition as well as the efficiency of enforcement practices,¹⁰ is the best industrial policy.¹¹ EC law does not form an obstacle to creating firms with sufficient dimension to compete in the global marketplace, as long as competition is guaranteed.¹²

6. However, competition is not an end in itself but a means to an end, and in that respect it is connected to the Lisbon Agenda (a ten-year strategy for improving the competitiveness of the EU economy, launched in Lisbon in 2000).¹³ Economic growth should be based on innovation, lead to new knowledge-based jobs, guarantee sustainability, protect the environment and thereby contribute to social welfare and ensure long-term prosperity in Europe.¹⁴ One should bear in mind that also the Lisbon Agenda is a European Agenda, exceeding national borders.

2. Exemptions from competition law for *National Champions*?

2.1 *The "critical mass" or "scale economy"-argument*

7. One common argument invoked in favour of national champions is the "critical mass" or "scale economy"-argument, stating that EC competition law as it is applied by the Commission may prevent companies from reaching the "critical mass" necessary to persist in markets that require undertaking with a special scale to be competitive. Especially, to compete in the global market might require a critical mass, according to the supporters of that view.

8. This argument is not convincing: Firstly, if the business idea is actually sustainable and persuasive, investors with rational expectations and interest in future compensation will be found so that the necessary size will be reached even without government support and State aid. Secondly, the merger rules do not preclude companies from growing to a "critical mass", whether organically or by merger and acquisition, as long as this does not lead to a distortion of competition to the disadvantage of consumers, or to a denial of market access. Thus, the Commission acknowledges that a minimal scale might be desirable, especially in high-tech sectors, but this does not remove the rationale for ensuring competition even in those sectors. Thirdly, defining the relevant market in merger cases with respect to their scale (meaning de facto a more lenient approach in the case of smaller local or national markets) would lead to an unacceptable discrimination against consumers in smaller economies.

⁹ N. Kroes, Building a Competitive Europe, Speech/05/78, p. 4.

¹⁰ See COM (2004) 293 final in this respect.

¹¹ N. Kroes, Building a Competitive Europe, Speech/05/78, p. 4.

¹² N. Kroes, Competitiveness, Speech/08/207, p. 4 et seq.

¹³ N. Kroes, Building a Competitive Europe, Speech/05/78, p. 3; N. Kroes, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 7.

¹⁴ COM (2004) 293 final; N. Kroes, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 4.

2.2 "Market failure" and "learning effects"-argument

9. There might be situations in which under the given technology a profitable production is not possible for private producers. This leads to a market failure that a government can address in order to produce a total welfare benefit that exceeds the government's cost. Comparable problems might arise concerning the development of new technology and inventions in general. In some areas (e.g. the aviation sector) the costs and risks are so high and incalculable that private investors may be unwilling to incur them irrespective of the opportunities. Further, one might conceivably envisage government support for national firms during their "learning phase" until they know how to be profitable in highly innovative sectors. But even in those cases, no support should be granted if funds could be achieved from the free market because of expectations of profit in the long-term. In any case, there is a fundamental distinction between a government address market failures and fostering the creation of national champions.

10. EC law provides for mechanisms to address market failures via state aids, e.g. the Community Framework for State aid for Research and Development and Innovation (2006 OJ C 323/1)¹⁵; the Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises (2006 OJ C 194/2)¹⁶ or the Community guidelines on State aid for rescuing and restructuring firms in difficulty (2004 OJ C 244/2)¹⁷.

11. In short, one could say that the Commission accepts "intelligently-targeted support" to fill gaps left by genuine market failures if the support is granted to enhance active competition.¹⁸ The outcome of a national champion does not raise concerns under these circumstances; however, the aim of creation of a national champion does not serve as a justification in itself for state aid or other state intervention.

3. Case-law regarding interventions by Member States

12. In the context of "national champions", an EU member State could be incited to intervene in one of three ways which are pertinent for EU competition law:

- a) It may grant state aid in some form to the undertaking in question. In this case article 87 of the Treaty applies. Unless covered by a block exemption, the aid must be notified to the Commission

¹⁵ See p. 20 under 7.3.1.: "Existence of a market failure: As indicated in Chapter 1, *State aid may be necessary to increase R&D&I in the economy only to the extent that the market, on its own, fails to deliver an optimal outcome.* It is established that certain market failures hamper the overall level of R&D&I in the Community. However, not all undertakings and sectors in the economy are confronted to these market failures to the same extent. Consequently, as regards measures subject to a detailed assessment, the Member State should provide adequate information whether the aid refers to a general market failure regarding R&D&I in the Community, or to a specific market failure."

¹⁶ See p. 5 concerning the balancing test asking inter alia: "(2) Is the aid well designed to deliver the objective of common interest, *that is does the proposed aid address the market failure or other objective?*".

¹⁷ See para. 19: "Article 87(2) and (3) of the Treaty provide for the possibility that aid falling within the scope of Article 87(1) will be regarded as compatible with the common market. Apart from cases of aid envisaged by Article 87(2), in particular aid to make good the damage caused by natural disasters or exceptional occurrences, which are not covered here, the only basis on which aid for firms in difficulty can be deemed compatible is Article 87(3)(c). Under that provision the Commission has the power to authorise «aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest.» In particular, this could be the case where *the aid is necessary to correct disparities caused by market failures* or to ensure economic and social cohesion."

¹⁸ N. Kroes, Building a Competitive Europe, Speech/05/78, p. 8.

and may not be paid as long as the Commission has not approved it. Any state aid illegally paid out must be reimbursed to the State in question by the beneficiary company.

As an example of the Commission's determined enforcement practice one might refer to the case "Électricité de France (EdF)". The Commission did not accept the State guarantee that France accorded EdF for several years¹⁹ and decided in 2003 that EdF had to reimburse more than €1,2 billion. In another case the Commission decided that Olympic Airlines had to return more than € 700 million in illegal State subsidies it received from Greece.²⁰

- b) It may encourage or foster a merger between two domestic companies which has a Community dimension and therefore falls within the scope of the EU merger regulation. In this case the Commission, under the merger Regulation, assesses only the effect on competition, without taking into account other factors, and where the merger poses problems for competition, it can require remedies or prohibit the merger, regardless of whether it is supported by a Member State.

Accordingly, the Commission was unable to authorise a merger of Scania and Volvo irrespective of the support of the Swedish government for the merger.²¹ The merger of Gaz de France (GdF) and Suez, supported by the French government, could be approved only after various remedies had been accepted to avoid distortions of competition in France and Belgium.²²

- c) It may oppose a takeover of a domestic company by a foreign company, where there is a Community dimension and the EU merger regulation is applicable. In this case, the only legal instrument permitting a member State to intervene is article 21.4 of the merger Regulation, which allows intervention on strictly limited grounds: public security, plurality of the media and prudential rules, and other public interests only if they are communicated to the Commission by the Member State concerned and shall be recognised by the Commission.²³

¹⁹ See press release [IP/03/477](#).

²⁰ See inter alia press releases [IP/02/1853](#), [IP/05/1139](#), [IP/06/425](#), [IP/06/531](#), [IP/06/1424](#).

²¹ [COMP/M.1672 Volvo/Scania](#) and the accompanying press release [IP/00/257](#).

²² See press release [IP/06/1558](#).

²³ Full text of article 21.4 of the merger Regulation:

Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The

Thus, the Real Decreto-Ley 4/2006 of 24th February 2006, an emergency law enacted by the Spanish government to prevent the takeover of national energy firm Endesa by the German firm E.ON., was annulled by the European Court of Justice, on application by the Commission, as being in violation of 21.4 of the merger Regulation.²⁴ Already in 1999 in the Champalimaud case the Commission had rejected the attempt of Portugal to block a bid of Banco Santander Central Hispano (BSCH) for the Champalimaud financial group as incompatible with article 21 of the merger Regulation.²⁵

13. These examples may suffice to prove that national champions do not enjoy a privileged or special status and that the Commission is determined to enforce the competition rules for all undertakings in the EU.

4. Conclusions

- The Commission holds that industrial policy and competition policy are not in contrast to each other but that **industrial policy has to comprise competition policy** and therefore should be called **competitiveness policy**.
- The Commission **believes in open markets and free competition as the best means** to brace Europe's economy for the global market and to maintain and enhance social welfare in Europe. There is **no need for national champions** as all Member States and their economies are winners of the single market.
- However, there is **no per se objection** to *national champions* as long as their status is achieved **in compliance with EC law** and as a result of an open and competitive market.
- The idea of *national champions* itself can **in no case justify the in compliance with EC-law or suffice for an exemption** from it.
- Exemptions might lead to *national champions* but the **wish for national champions does not suffice for an exemption**.

Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

²⁴ Commission press release IP/06/1853. On 6/3/2008, the Court upheld the Commission's position (OJ C-107/9 of 26.4.2008), but E.ON's bid for Endesa had already been withdrawn.

²⁵ See press releases IP/99/774 and IP/00/296. However, the Court of Justice did not rule on that case, as the Portuguese state withdrew the measures in question.

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