

SPEECH COMMISSIONER ANDRIESSEN HELD ON
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Antitrust in the International Sphere

Antitrust - an Endangered Species?

Ladies and Gentlemen:

I am very honoured to speak to you today.

Since I took up my functions as Commissioner responsible for Competition Policy in the European Community early this year, I have sometimes felt that there is an analogy between antitrust and the Bengal tiger. I really ought to speak to you on "Antitrust as an Endangered Species".

The analogy between the Bengal tiger and antitrust is greater than you think. They both seem threatened with extinction and in great need of protection of - at least as far as the Bengal tiger is concerned - the World Wildlife Fund. I sometimes wonder what and whose protection we need in the field of antitrust. I think that at least in Europe it is often a question of political willingness, especially in a period of economic recession, but I will come back to this later.

Before addressing myself to the international side, I will recall some of the objectives of EEC antitrust policy. The internal, national objectives of antitrust policy play an important role in our international trading relations. They must ascertain that the tariff and non-tariff barriers, which have gradually been abolished as a result of our commercial policy, will not be replaced by private agreements or practices of corporations or, indeed, Member States which would distort competition, maintain the separation between national markets inside the Community, or which would shelter the Community against foreign competition. This role is distinct, however, from the role which antitrust plays inside any given national market.

The competition rules of the Treaties of Paris and Rome and of the free trade agreements concluded between the EEC and various third countries would become a dead letter if the hard-won tariff freedoms would be reduced to nothing by cartels or by state aids.

The institution of a system ensuring that competition in the Common Market is not distorted is one (and only one) of the instruments of which the Community disposes under the Treaty of Rome in order to fulfill the main purpose set by the Treaty, i.e. to promote the harmonious development of economic activities throughout the Community by the establishment of a Common Market.

It is essential for the European Community to remain open towards world markets. Essential for the enhancement of the sound economic development of the European Common Market and for the maintenance of adequate competitive capacity.

As a net industrial exporter and as one who is compelled to remain so because of its insufficient resources, the EEC can only take up the terms and challenges presented by the "outside" world.

This basic philosophy is also borne out by the fundamental principles which govern the European Community's competition policy. This policy must contribute to a truly unified and open common market, which ensures that competition will not be distorted.

The establishment and maintenance of a unified market presuppose that inside this market any agreement or practice which leads, directly or indirectly, to market partitioning or to different prices or trading conditions between national markets is prohibited.

The European Community is still quite young, of course, and that it suffers from growth pains cannot be denied. But I think that even the very first decision which the Commission ever adopted under art. 85 of the EEC-Treaty bears out our concern when it comes to free trade with non-EEC countries. The question which was before the Commission in this first decision - and I am

talking of 1964 only - was whether a prohibition to export goods into the Common Market which was imposed on a Swiss corporation could be attacked under the EEC competition rules. In its decision, the Commission held that the export prohibition would be incompatible with the EEC rules if the prohibition would result in a restriction of competition inside the Common Market and if it would affect trade between Member States. (In fact, the Commission decided that this was not the case, given the level of the customs tariff which existed at the time for the product concerned.)

This jurisprudence has been reconfirmed in many later decisions, as well as in the Commission's 1972 Communication on voluntary restraint agreements with Japan: in principle, such self-restraint agreements fall under art. 85, unless the agreements only implement official trade accords or unless the agreements have been imposed by a government on its nationals under the country's commercial policy. The Commission deems in fact that any protective measures which might be necessary for a limited period of time fall within the context of commercial policy and that it is therefore not up to business to substitute itself for the public authorities in this domain. Thus, an unofficial parallelism between certain commercial policy objectives and private restraints of trade is not enough to claim immunity from the Community's antitrust provisions.

A few further points merit special mention here. These concern in particular the non-discriminatory treatment of all corporations operating inside the Common Market. The maintenance of an open Common Market demands that all market participants are required to observe its rules. This basic principle has been expressed in a great number of Commission decisions and has been confirmed by many judgments of the Court of Justice of the European Communities. The determining test in this context is the effect which the agreements or the behaviour have on competition inside the Common Market and on trade between Member States. Any significant interference with the reallocation of productive factors within the Common Market by restrictive agreements comes under the competition rules, irrespective of the place where the interference originates from.

In applying this effects doctrine, which all of you are familiar with in this country, the European Commission acts in line with the practice of most free market countries and also, I believe, in accordance with international law.

As to the principles which the U.S. and EEC authorities apply in assessing the effects on competition, they seem largely identical. If Bill H.R. 2326, the Foreign Trade Anti-Trust Improvements Act, is to make clear that the prohibition of the Sherman Act does not apply unless the conduct involving trade with any foreign nation has a direct and substantial effect on

trade or commerce within the U.S., then I can only welcome the coincidence of views in the approach of this fundamental problem of subject matter jurisdiction.

In distinguishing substance from procedure, I admit that the exercise of jurisdiction may create difficulties. So far, these difficulties have been solved for most of the multinational corporations which do business inside the Community and which operate through local subsidiaries: in these cases the parent and subsidiary corporations are regarded as one single entity for the purpose of establishing jurisdiction. The European Court of Justice has supported this approach as far back as in the Dyestuffs cases in 1972. (The activities of the subsidiary may be imputed to the parent, or in case where the subsidiary directly implements head office instructions or policy, its activities are regarded as those of the parent acting directly through the subsidiary).

I am aware, of course, of the fact that problems may also arise with respect to discovery, the gathering of data, the service of process and communication of decisions abroad. These problems may be accentuated if a country prohibits a corporation within its jurisdiction from furnishing information to the authorities of another country. In cases where the subject matter jurisdiction of the intervening foreign authority is beyond question, no country should make it possible

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for a corporation located in its territory to escape that jurisdiction by prohibiting the submission of information. In carrying this a little further, I can only agree with what Donald Turner recently said in a speech, i.e. that there is simply no persuasive basis under the rule of non-interference (or comity) for concluding that one state has a legal duty to give way completely to the other; or by the same token, that one state would be compelled to abandon control over conduct within its jurisdiction which runs counter to its laws and its interests.

Wouldn't it seem presumptuous if the Government of West-Germany, e.g. were to try to preclude the U.S. Government from investigating Volkswagen's practices in the USA , simply on the ground that these practices are similar or identical to Volkswagen's European practices which the German authorities may or may not investigate? Most of you here would, in my view, reply in the affirmative.

This, in my opinion, underscores the necessity of cooperation between countries concerning restrictive business practices which affect international trade. On the one hand, many of these practices are beyond the powers of control of national antitrust authorities and indeed the national courts. On the other hand, investigations into certain business practices and proceedings by some antitrust authorities may in given cases affect important interests of other countries. Antitrust

authorities should therefore cooperate when it comes to the implementation of their respective legislation and policies.

I believe that the Recommendations of the OECD Council of September 1979 constitute a valuable instrument in dealing effectively with restrictive business practices which have a harmful effect on international trade.

Before terminating I would like to draw your attention to a couple of problem areas which I am currently dealing with.

Much of my time in Brussels is taken up by state subsidies. The EEC Treaty declares any subsidy granted by a Member State to be incompatible with the Common Market if it distorts or threatens to distort competition by favouring certain corporations or the production of certain goods. I will not say more than that the Commission's policy is aimed at the prevention of a proliferation of state subsidies. In our lethargic Europe (and maybe even in the United States) we should do much more to promote the creative restructuring and retooling of our industry. The Japanese challenge will remain unanswered if we would simply keep on subsidising dying industries with short-term objectives in mind.

Another problem area concerns the antitrust enforcement in crisis-stricken industries. Some temporary moderation of the rigours of our rules may indeed be necessary, but only as a corollary to an adequate restructuring of the industry to

re-establish its viability in a competitive climate both inside and outside the Common Market. Article 85 (3) provides the main avenue in this respect. If it were found to be inadequate, additional rules will have to be defined. I will not shy away from that issue either.

And then our antitrust policy with respect to vertical restrictions on the one hand and mergers and take-overs on the other. These topics have been and still are hotly debated on this side of the Atlantic and I believe that a remark on the Commission's thinking might interest you.

The realisation and maintenance of the unity of the Common Market must be given top priority. You will understand, therefore, that most vertical restrictions, such as grants of territorial protection which are tied in with exclusive dealing arrangements or with systems of so-called selective distribution or with patent or copyright licenses are (-unless there are exceptional circumstances and here I am thinking of the introduction of a new product on the market, e.g. -) incompatible with the very principle of the establishment of a Common Market. The Commission does not believe that absolute territorial protection is absolutely necessary in order to permit the exclusive patentee or license holder to exploit his exclusive right efficiently, given the legitimate interest which consumers have in obtaining a fair share of the benefit which results from the exclusive concession or from the license agreement.

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You should realise that the Commission is still struggling for the abolishment of existing national frontiers and for the prevention of new national barriers from being erected. Even though the Commission may sometimes look like Don Quixote fighting the windmills, its position on vertical restrictions cannot really be separated from the structure and origin of the European Economic Community.

With respect to mergers and take-overs the Commission and the Court of Justice have never considered that EEC merger control or the control of the behaviour of corporations which are in a dominant position should exclusively or even principally be judged by the absolute size of the corporations concerned. Effective competition depends in fact at the same time on the structure of the market, the behaviour of the market participants and the reactions of that market. (Even the French nationalisations are being examined in this light). And yet, a strong degree of concentration encourages the convergency of interests when it comes to profit maximalisation for the leading corporate conglomerate in a given market. This is why the Commission has proposed to the Council of Ministers, which is the legislative body in the European Community, that the market share test only be used as a threshold criterion. Only if the corporations involved in a merger or take-over have a combined market share which is equal to or exceeds that threshold, will it be necessary to verify on a case by case basis what the repercussions of the concentration will be for the competitive situation on the market. In making such a

verification a whole series of other criteria will be used, such as, for example, the choice which users and suppliers have, the evolution of offer and demand for the products concerned, and the effects of international competition. I believe that this pragmatic approach to merger control goes very much in the same direction as the evolution which is currently taking place in the United States.

I should add, however, and this brings me back to "antitrust as an endangered species" that it is not yet certain that the European Community will obtain an instrument for controlling mergers effectively in the near future. In 1973 a basic proposal was made by the Commission to the Council of Ministers. It has since then been blocked by the Council for various political and national reasons, in spite of repeated insistence and pressure from the European Parliament. In a hybrid organisation such as the European Community, the legislative and decision-making process leaves much to be desired (except, maybe, for those who hope to make the Guinness Book of World Records for legislative slowness). I intend to give a new impetus to the work on this proposal and put greater political pressure behind it than has been the case in the intervening years. The same applies to the recent Commission proposals for regulations applying the competition rules to air and sea transport. These proposals are not - as was said in the IATA meeting two weeks ago - forms of "extreme consumerism and political opportunism". They are simply an attempt - and a reasonable one on top of that - to lay down detailed provisions

for some of the last branches of the economy for which this has not yet been done; an attempt, in other words, to extend Regulation 17 to the two last economic activities which were not covered by it. So far, the Council has not reacted very enthusiastically. And, if you have read about the great Panda's difficulties in multiplying itself, then you will readily understand why I see this analogy with endangered species.

Thank you.