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'Competition and Industrial Policy in Europe'
Address by Sir Philip Lowe

President, Ladies and Gentlemen,

I am very pleased and honoured to be invited to participate in the conference of the association today.

Before I address the specific issue of the interaction between competition and industrial policy, I want to underline the extent to which the economic and political environment in which competition law is enforced and applied has changed. That is certainly the case in the last ten years, if not longer.

Before the 2007-2009 financial crisis, it would be fair to say that there was a general transatlantic and European consensus that effectively functioning and competitive markets were the best, or at least, least worst instrument to deliver the goods and services that consumers need or want. At the same time, it was accepted that rules were needed to ensure free and fair competition, to ensure that businesses competed on a level playing field and that consumers were not exploited or ripped off by a powerful combination of firms acting together.

On this basis, competition law was regarded as the most appropriate way of intervening in markets in a way which was the least intrusive. Cartels were rightly regarded as undermining competition and benefiting producers at the expenses of consumers. They were, and still are, regarded as *per se* anticompetitive and subject to the most severe sanctions. Mergers could harm competition by strengthening the market power of some firms or by leading to the acquisition of significant market power by others. Mergers therefore had to be vetted ex ante because it was very difficult to unscramble mergers which were already promulgated.

As far as other agreements between companies, as well as unilateral conduct by dominant companies, were concerned, there was nevertheless a general acceptance that they should be looked at case by case, without any presumption that they were anticompetitive but with a need for close scrutiny.

It was recognised in parallel that governments could distort markets by favouring some firms with respect to others, whether through subsidies or legislation. Within the EU, state aid disciplines try to deal with this problem. Outside the EU, there are WTO anti-subsidy provisions, even if they are more time-consuming and more difficult to implement.

The consensus on the benefits of competition and free (self-correcting) markets was accompanied by strong scepticism about traditional industrial policy. Government intervention in markets to create national champions and 'pick winners' or to preserve local jobs, was generally derided as ineffective and wasteful. The most that could be done was to create a favourable regulatory environment for innovation and enterprise.

Today's world is different.

In the first place, I think it is fair to say that the concept of an industrial policy has been rehabilitated. Marina Mazzicato has eloquently demonstrated how the economies of countries as neoliberal as the United States of America base their success as much on interventionist public policies as on private enterprise, in particular where new technologies which are developed for military purposes can be put to use in the wider economy. She has pointed to the benefits of transformative public action to promote innovation and industrial change.

Mario Pianta has also set out the case for an active industrial policy at national and European level. Such a policy should necessarily include strong action to correct market failures, such as those related to climate change, and help build the capabilities for industrial development- through strong support to infrastructure investments, research and innovation, as well as education and training. But it should also help ensure that domestic firms benefit from a framework of fiscal, regulatory and public procurement rules that enable them the strength and protection to compete internationally. In globalised, high tech, winner-takes-all markets, expecting the so-called free market to provide all the incentives for success is simply not enough. The state has a role to play. The extent to which this intervention is compatible with state aid rules can be debated. A first reading of any text on EU state aid disciplines always starts with the general Treaty ban on state aids except under certain conditions. Yet if you look more closely at the conditions for state aids to be compatible, there is wide scope for an active industrial policy, especially if some category of aid fall under the General Block Exemption. If, however, an aid needs to be notified to the Commission, there is an inevitable delay necessary before it can be approved, which can be a disadvantage where swift action is needed. Block exemptions should therefore be applied wherever possible.

Secondly, confidence in the ability of markets to produce the right outcomes has been significantly undermined, in particular by the financial crisis itself, but also because markets are increasingly globalised. Globalisation has resulted in unequal outcomes in many of our societies. Whether you are 'gilets jaunes' in France, coal miners in West Virginia, or steelworkers in the North of England, you generally believe free and competitive markets have dealt you a bad hand. And people increasingly expect governments to protect them from firms which they perceive as exploiting them, either by hiking prices or lowering quality and restricting choice, or by using their personal data for financial gain without their knowing it.

Politicians and governments have not been insensitive to these arguments. In all our countries they have been more than willing to respond to complaints about for example excessive and unfair electricity or petrol prices. They have lambasted competition authorities and sectoral regulators for their lack of action and launched initiatives for more control of retail prices.

This may not be altogether populist or irrational. Excessive pricing and exploitation are abuses which competition law enforcement aims to eliminate. But competition have always had some difficulty in dealing with complaints about excessive pricing. We can certainly bring cartels and abusive dominance cases to an end with cease-and-desist orders. But competition authorities search in vain for benchmarks for fixing what people say should be the 'right' or the 'fair' price. At a European level, in the European Commission, we struggled for many years with abuse of dominance cases on mobile roaming charges and interchange fees. So, the adoption of regulation in these two areas was certainly accompanied by a sigh of relief by many competition lawyers and law enforcers.

These examples highlight the reality that competition law may not always provide the quickest and best solution to a competition problem.

In the first place, pursuing a competition law case can take a long time, and frequently longer than the process of passing legislation or regulation through a national parliament. Sectoral regulators can certainly act more quickly than either of these alternatives.

Secondly, a competition law case results at most in a remedy in a specific case and sets a precedent but doesn't always provide a solution that is of effect on the market as a whole.

Thirdly, competition problems are rarely isolated from other public policy concerns, such as consumer protection, jobs, unfair trade practices, intellectual property protection and data privacy. Frequently it makes sense to prepare legislate to deal with these issues on a holistic and unfragmented way. A competition law case can certainly stimulate discussion on the need for market-wide regulation but cannot necessarily provide the optimal answer to a competition problem, nor to a problem which involves other public policy concerns.

I have begun with this discussion of issues of the public legitimacy and effectiveness of competition policy primarily in order to distinguish the current debate about competition and industrial policies from the general and worrying trend in modern-day politics towards regulating for specific outcomes rather than, through competition law, simply guaranteeing the integrity of the competitive process.

The political concern that competition policy could frustrate the pursuit of industrial policy and other public policies is not new. In the 1970's and 1980's, there were already voices in Europe calling for a much more flexible application of merger control rules. Very few governments have attempted to block mergers in order to protect jobs. Those who have tried have usually found that it can work in the very short term, but it weakens the longer term viability of the firms and the jobs end up being lost anyway.

At the same time, there have been increasing concerns the impact of acquisition of domestic firms by foreign, and sometimes state-owned companies. These acquisitions can lead to a transfer of the headquarters of firms to locations to other countries, with a consequent dilution of the influence of local policies on the merged firm. They can also result in the relocation of assets such as R&D facilities and qualified personnel, which are seen as intrinsic to the comparative advantage of an economy internationally. Some foreign direct investment may in addition place control of infrastructures or activities, which are regarded as critical to national security and the long-term competitiveness of an economy, in foreign hands, even into the hands of foreign governments. Electricity and communication networks, and nuclear power stations are frequently quoted as examples of strategic or critical assets. Yoghurt is not yet in that category, I think.

In response to these concerns, the EU institutions adopted in March this year a new Regulation which provides for closer screening of FDI in relation to national security and public issues, including provisions for exchange of information on transactions between Member states and between them and the Commission. Powers to prevent a transaction, or impose conditions on it, however, remain in the hands of national governments. At present 14 member states have legislation which can be used for this purpose.

I think it is important to emphasise that this additional screening and control implies only that mergers which have been approved on competition grounds may nevertheless be prohibited or amended on other policy grounds.

Article 21 (4) of The EU Merger Regulation leaves some room for this kind of exception in order to take into account issues of national security, media plurality and financial probity. Member states can raise other policy concerns, but it is within the discretion of the European Commission to judge whether they are justified or not. The new Regulation on screening of FDI certainly gives Member state more explicit legitimacy legal security in imposing conditions on transactions.

However, the current debate on industrial and competition policy focuses on the possibility that a merger which should in principle be prohibited on competition grounds could nevertheless be allowed to go ahead. The main argument advanced in favour of more flexibility in merger control at EU level and at national level within Europe is that European firms need to reach attain a ‘critical mass’ and to reap economies of scale in order to compete with large, often state-owned, foreign competitors on global markets. Competition authorities, according to this line of argument, should also anticipate the growing strength and penetration on EU markets of foreign firms.

Arguably this call for greater leniency in merger control is not aimed at introducing non-competition criteria into a merger assessment, but at allowing a government, or another politically controlled agency to correct a competition authority’s assessment of the impact of a transaction on competition.

Furthermore, the implied direction of any correction of the merger assessment would not be to impose further constraints on mergers (such as now proposed in the digital economy to prevent killer acquisitions or protect data privacy) but to free them from constraints which competition authorities would normally impose on them.

The current framework for merger control at the EU level excludes this. The dominant view at both European and national level in Europe has been that competition on a firm's home market in Europe strengthens its capacity to compete abroad. In addition, consolidation is always possible provided that there was 'no distortion of competition to the disadvantage of consumers'. Allowing governments to waive through otherwise prohibited mergers would expose merger control to capture by business interests and diminish legal certainty and predictability.

There is admittedly some scope for government intervention of the kind envisaged in the assessment of mergers which are below the European thresholds, but not much. Under German legislation, the so-called '*Ministererlaubnis'* enables the responsible minister to approve mergers on public interest grounds which have in principle been prohibited on competition grounds. However, during the 45 years since the law was adopted, there have been 22 applications for merger approvals under the '*Ministererlaubnis'* of which only 9 have been successful and not all of these are based on a revised assessment of the competitive impact of a merger. Similar provisions exist in French, Italian and UK law but have been used sparingly.

There continues of course to be considerable debate about market definition in merger assessment.

Sometimes mergers can achieve significant efficiencies in most national markets but threaten the strengthen of competition in one national market. If the market is genuinely European-wide or global, an intra-European merger is unlikely to be problematic from a competition point of view. But if markets are defined nationally and narrowly, transactions such as the *Volvo/Scania* truck merger could be prohibited unless there was a remedy which resolved the problem in the specific (in this case Swedish) market where the overlap of the two firm's activities could not be contested by current or potential competitors.

The issue of market definition remains of course a live one and can be controversial. Product, as well as geographical, market definition can crucially determine the outcome of any merger assessment. Some updating of the Commission's 1997 Notice on Market Definition could well be necessary to reflect current and anticipated market structures and conditions.

But are there any grounds to justify a major change in the established international consensus that competition, and in particular merger control policy, poses no major constraint on industrial policy or economic growth?

The French and German governments seem to think so. In the wake of the European Commission's prohibition of the merger of the rail businesses of Siemens and Alstom on 6th February, they published on 19th February a joint manifesto calling for changes in the EU Merger Regulation and/or to Commission Merger Guidelines which would recognise the need for further consolidation in certain sectors given the strong competition which European companies faced from foreign firms which were large and state-owned. They have proposed that mergers which involved foreign state-owned firms should be subject to particular scrutiny. They also argue that the EU needs to develop a more forward-looking and dynamic assessment of competitive pressures in markets where non-European firms were gradually acquiring a global presence. They foresee procedures in which the EU's Council of Ministers could exceptionally approve a merger in the European Interest when the Commission has prohibited on competition grounds. More details are expected from the two governments on these proposals in the coming weeks

I have emphasised earlier that there are strong arguments in favour of an active industrial policy at European and national level. Both state aid control and competition policy need to take account of the international dimension of markets. A dynamic assessment of competitive pressures in markets is essential. However, this assessment cannot be based on hunch or fantasy. It must be rigorous and realistic. And it needs to be carried out by an administrative authority, which is subject to control by the courts, but free from political interference and independent of business interests. Firms should be able to extract efficiencies from a merger. But in any market where there is a competition problem, because there is no realistic prospect of a viable competitor to the merged entity, then every effort should be made to devise a remedy which will allow overall transaction to go ahead but avoid harm to consumers in the specific market concerned. Finally, if firms are faced with unfair and subsidised competition from outside the EU, perhaps the most appropriate response should be provided by trade defence mechanisms and WTO anti-subsidy procedures rather than weakening competition law enforcement.

Ladies and gentlemen,

Thank you for your attention.

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