Interview with Dr. Alexander Italianer, Director General for Competition, European Commission

Editor's Note: *Dr. Alexander Italianer was appointed by the European Commission to the post of Director General for Competition on February 18, 2010. In this interview,* The Antitrust Source *spoke with Dr. Italianer about the many competition law developments that have occurred at the Commission in the short time since he became Director General. These developments include cartel enforcement settlements, revisions to vertical and horizontal block exemption regulations, merger decisions, and public consultations.*

Prior to his current appointment, Dr. Italianer served as Deputy Secretary General in charge of the Better Regulation Agenda and Chairman of the European Commission's Impact Assessment Board. He has worked for a number of years in the European Commission's Directorate-General for Economic and Financial Affairs, including from 2002 to 2004 as the Director for International Economic and Financial Affairs. Additionally, he has served in the Cabinets of European Commission President Jacques Santer, Commissioners Günter Verheugen and Pavel Telicka, and most recently, President José Manuel Barroso.

Dr. Italianer holds a graduate degree in econometrics and a Ph.D. in economics from the University of Groningen in the Netherlands. He was a research associate at the Catholic University of Leuven before he joined the Commission in 1985.

This interview was conducted on March 4, 2011, by Henry C. Su for The Antitrust Source*. We would like to express our thanks not only to Dr. Italianer for his time and his informative remarks, but also to members of his staff, Ms. Alina Burea, Mr. Holger Dieckmann, and Ms. Chris Retore, for facilitating the interview.*

For the convenience of our readers, we have footnoted this interview with references and links to various European Union and Commission documents that provide background and context to the questions that were asked.

ANTITRUST SOURCE: Thank you for agreeing to be interviewed today. You've been the Director General for Competition for a little over a year—since February of 2010, but obviously a lot has happened at the Commission in the last twelve months since you took office.

I'd like to begin with the subject of cartel enforcement. Last year the Commission settled the first few cases under the relatively new settlement procedure.[1] There was one involving producers of DRAM chips[2] and another involving producers of animal feed phosphates.[3]

And one of the things that comes out of the settlement procedure is this concept of a hybrid settlement where one or more firms decides not to settle under that procedure and avails itself of the ordinary procedure for resolving the matter. The question we have is does the Commission consider, before deciding to accept a hybrid settlement, whether and the extent to which it is still able to realize savings in its administrative resources devoted to cartel enforcement?

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[1] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008 O.J. (C 167) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF; Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, 2008 O.J. (L 171) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:EN:PDF.

[2] *See* Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Fines DRAM Producers €331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586&format=HTML&aged=0&language=EN&guiLanguage=en.

[3] *See* Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: European Commission Fines Animal Feed Phosphates Producers €175 647 000 for Price-Fixing and Market-Sharing in First "Hybrid" Cartel Settlement Case (July 20, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/985&format=HTML&aged=0&language=EN&guiLanguage=en.

Dr. Alexander Italianer

DIRECTOR GENERAL ALEXANDER ITALIANER: Let me say first of all that our experience with the settlement procedure is still relatively young. As you were stating, we have only had two such decisions to date. We are now involved in a couple of other cases as well and hope to further develop our experience.

It's undeniable that settlements will realize savings in administrative resources, not only during the process of getting into the settlement—notably because there will be a shorter and more streamlined statement of objections. But one may also hope and expect that once the settlement decision has been taken, there will be fewer appeals before the court and, of course, this also leads to administrative savings. The resources we save can thus be reallocated to other priority cases. Indeed we saw this in our first two cases, and particularly in the DRAM case. There was no appeal to the court so those savings were clearly realized.

[W]e make a very clear distinction between the process of setting the fine and the financial capacity of the company to actually pay the fine.

As to your question on hybrid cases, I would like to make a distinction between settlement cases that start off as a full settlement and then develop into a hybrid, which was the case with the *Animal Feed Phosphates* case, and those cases where it is clear from the outset that one of the parties is not willing to settle. For the first type of case, as seen in the *Animal Feed Phosphates* case, we decided once it became clear that one of the parties was not willing to settle, to nevertheless continue because of the significant investment that had already been made in reaching a settlement and also because of the gains to be achieved in terms of the limited number of appeals envisaged. But it's clear that in such a hybrid case there is also a tradeoff because one has to go the ordinary route for the party that is not willing to settle, and that inevitably does not facilitate the process.

When it comes to hybrid cases where from the outset one of the parties is not willing to settle, I would say that normally we would not pursue a settlement route precisely because of the complications envisaged, unless there is a clear indication that overall the gains in terms of public and administrative resources would point to a benefit. But I would say that the starting point would be that normally we would not pursue the settlement route when one or more parties do not want to settle upfront.

ANTITRUST SOURCE: Another interesting aspect of the new cartel settlement procedure is how it works in tandem with the applications that financially troubled firms can make to the Commission seeking reductions in the fine amount under point 35 of the 2006 Guidelines on setting fines.[4] And in fact there was one such application granted in the *Animal Feed Phosphates* case.

The question here is does the Commission take into account that the firm has already received a 10 percent fine reduction under the settlement procedure when it's deciding whether to grant an inability to pay application and when arriving at an appropriate percentage reduction?

DG ITALIANER: The concrete answer is no because we make a very clear distinction between the process of setting the fine and the financial capacity of the company to actually pay the fine. This means that in the settlement process we apply the 10 percent reduction, and it's only at that point in time when we come near to the decision on the fine that we consider any claims for inability to pay. It's only at that point in time that we start looking at the financial situation of the firm, both today and in the future—in order to assess whether it's able to actually pay the fine. We look at a variety of indicators concerning the firm's financial strength, profitability, solvency, liquidity, and

[4] European Comm'n, Dir. Gen. Competition, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(A) of Regulation No. 1/2003 ¶ 35, 2006 O.J. (C 210) 2, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF.

also relations with a bank or partners and its shareholders because eventually they may need to step in as well. So these are really two separate processes; even though they may occur as part of the same decision, they are analytically distinct.

ANTITRUST SOURCE: You've talked about what factors the Commission does consider in the context of an inability to pay application, which leads me to my next question: does the Commission balance considerations regarding the economic viability of the firm under point 35 against perhaps the fact that the firm may have, as a result of its financial situation, chosen to participate in the cartel in the first place?

DG ITALIANER: No, we do not look at the reasons why a firm actually participates in a cartel. I know that there have been some discussions about crisis cartels and so on but when looking at a cartel we simply look at the facts of the case and not at the possible motivations of why a company decided to enter into a cartel.

Let me give you one example where such an approach would lead us into difficulties. There have been observers who have been saying that sometimes companies may use cartels for a strategic reason. Companies could set up a cartel for strategic reasons by trying to get potential competitors into that cartel. They could then claim immunity or leniency and thereby try to put pressure, financial pressure, on the other participants of the cartel—their competitors. Now if the Commission would have to step into this kind of situation and look at the reasons why companies participate in the cartel, I think we would go far beyond our objectives.

ANTITRUST SOURCE: Point 37 of the Guidelines seems to give the Commission some measure of discretion to depart from the stated fine setting methodology to take into account "the particularities of a given case."[5] To what extent does the Commission take into account the overall fines and penalties that have been levied against cartel members by other enforcement authorities, including the United States, as well as damage recoveries that may have been awarded in private actions?

DG ITALIANER: Well, these are two different issues. So let me start with the first issue, which is the relationship with fines and penalties in other jurisdictions. Here the situation for me is very clear. We exclusively look at the infringement as it has occurred on the European market even if the infringement itself may be broader. The Commission does therefore not take into account fines imposed by other authorities. We impose fines exclusively in view of the European sales affected by an infringement, even if the infringement is worldwide. It regularly happens that firms are being fined both by the U.S. and also by the Commission for the part of their infringement on European territory.

There is no marital relationship between the two because the two aim at two different infringements. In fact we try to avoid double counting. Let me give you one example. In the recent *Air Cargo* case,[6] one may of course have wondered how to take into account relevant sales for an air cargo shipment between Europe and the United States. In order to avoid double counting, we

[5] *Id.* ¶ 37.

[6] *See* Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel (Nov. 9, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en.

have taken the inward and outward bound sales concerned and divided them by two to avoid overlaps between the two infringements. Moreover, I would add that from a legal perspective, the European courts would oblige us to only focus on the part of the infringement as it applies in the European economic area, which is the area of our jurisdiction.

As for your second point, the award of damages, there it must be recalled that damages and fines serve different purposes. The fines serve the purpose of deterrence, whereas potential damages awarded in private actions serve as compensation for the harm done. At least that is a clear distinction because in Europe we separate the two, and the proceedings concerning the two, whereas I understand that in the U.S. through the system of treble damages there is an interaction between the two.

Allow me to add that at the Commission we strongly support the pursuit of private damages. And I do not exclude that if and when there is a more harmonized system in Europe, there could be some form of interaction between the two. But for the time being these are entirely separate, in particular because the situation in the various Member States is very varied.

ANTITRUST SOURCE: I'd like to move on now to developments on the competition front. Let's start with the April 2010 adoption of the new Block Exemption Regulation (BER) and related Guidelines for vertical agreements.[7] One aspect of the new BER that's of interest to us in the United States, particularly as a result of the Supreme Court opinion in the *Leegin* case, is the fact that resale price maintenance or RPM remains a hardcore restriction under the BER,[8] even though the Economic Advisory Group on Competition Policy in the Office of the Chief Economist had proposed that there be a de minimis market share rule for RPM as well.[9] Can you give us a sense of the considerations that went into maintaining RPM as a hardcore restriction under the BER, although with the proviso that a firm could try to prove an efficiency defense under Article 101(3) in an individual case?[10]

DG ITALIANER: Let me start with the last point. Indeed we have defined RPM as a hardcore restriction, which is therefore not a per se restriction. So it is a rebuttable presumption, although it may be hard to rebut in practice—at least we have not seen many cases. Why did we arrive at this conclusion?

First of all, this decision is very much supported by case law and in a very consistent way. We based our decision on the case handling experience at the level of our Member States because many of these cases occur at the national level and of course on our own case practice. Since we have concurrent jurisdictions for antitrust in the EU system, what is happening at the level of the Member States is very important. We therefore took stock of enforcement as part of the review

[7] Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Commission Adopts Revised Competition Rules for Distribution of Goods and Services (Apr. 20, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/445.

[8] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, art. 4(a), 2010 O.J. (L 102) 1, 5, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF.

[9] European Comm'n, Dir. Gen. Competition, Econ. Advisory Grp. on Competition Pol'y, Vertical Restraints Subgrp., Hardcore Restrictions Under the Block Exemption Regulation on Vertical Agreements: An Economic View (Sept. 2009), *available at* http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf.

[10] European Comm'n, Dir. Gen. Competition, Guidelines on Vertical Restraints ¶¶ 47, 223, 2010 O.J. (C 130) 1, 11–12, 45, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0411:FIN:EN:PDF.

process that led to the adoption of the Regulation and Guidelines. The discussion within the European Competition Network on the many RPM cases dealt with since 2000, mainly handled by the national competition authorities, pointed to the pertinence of a cautious approach towards RPM.

Our experience points out that companies have not been very successful in their attempts to show efficiencies and thereby to justify RPM. And therefore the overall conclusion is that the extensive recourse to RPM in our Member States, many of which have small and concentrated markets, would result in more harm than benefit for European consumers as a whole. And in fact there are some interesting examples that helped to confirm that statement—one of them with the ending of RPM for books in the UK in 1997. It actually turned out that the abolition of RPM led to an increasing number of titles rather than a reduction as was initially feared. Studies on the UK book sector show that the most significant development, after the sector specific laws allowing RPM for books were abolished, has been the accelerated entry and rapid growth of low price Internet sellers and one-stop grocery supermarket chains in the book retail market.

France has also had experience with RPM. The Galland Law, which tried to prevent large retailers from selling below cost, effectively allowed manufacturers and retailers to enforce RPM since 1997. Manufacturers charged a high invoice price to retailers and in return gave retailers an end-of-year discount which, according to the law, could not be used to lower the retail price. This led to an industry-wide use of RPM in the retailing sector in France. Empirical studies show that there is evidence that the RPM led to an important reduction in intrabrand competition and to a softening of interbrand competition. This can explain, at least partially, the sharp increase in prices of groceries that occurred in France after 1997. The negative effects spurred the French Competition Authority to take two prohibition decisions in RPM cases, and subsequently led to two amendments of the law, in 2005 and 2008, to end the unwanted experiment.

So these are two examples of national experiences that I think support our general line on RPM.

ANTITRUST SOURCE: Your reference to the experience of the Member States in the European Union seems to parallel the U.S. experience, where we have of course the federal government and specifically the Supreme Court taking one view about RPM but the individual states here have their own experiences and are continuing to legislate based on their experiences. And I also think your description of the way RPM is analyzed as a hardcore restriction is very similar to what we're calling the "inherently suspect" analysis or the truncated rule reason analysis in the U.S., under which a practice like RPM is subject to an adverse presumption and the parties must come forward with a procompetitive explanation for the practice.

Are there in fact analytical similarities between how RPM is analyzed by the Commission and in the U.S.?

DG ITALIANER: Of course in thinking about our own rules, we have mainly relied on our own experience and that of our Member States. But through the various international networks, like the OECD and the International Competition Network, academic literature, and so on, we have also been looking at the worldwide experience in this field. And there may indeed be more similarity between the situation in the U.S. and our situation than one could expect based only on the outcome in the *Leegin* case.

If I understand it correctly, first of all, the *Leegin* decision was itself a decision where the Supreme Court was not voting with unanimity. And secondly, it also remains to be seen how it will be implemented in practice. It is not yet clear what the new "post-*Leegin*" approach will be in the

U.S. The Supreme Court left it to the lower courts to decide whether a "pure" rule of reason analysis or an analysis circumscribed by presumptions should be applied. So I do not exclude that in practice the situation in the U.S. may not be dissimilar compared to the one in the EU. The EU hardcore approach remains an effects-based approach: companies may bring forward evidence that their agreement brings, or is likely to bring, efficiencies that outweigh the negative effects and therefore meets the conditions set out in Article 101(3). The ball is put first in the camp of the firms. Each agreement that fulfills the conditions of Article 101(3) is exempted from the prohibition laid down in Article 101(1).

ANTITRUST SOURCE: Another aspect of the vertical BER and the Guidelines that's of interest is their treatment of Internet or online sales. They place important safeguards on the freedom of distributors to use the Internet to obtain what you're calling "passive sales" from outside their exclusive territories or exclusive customer groups.[11] Clearly what we see is that the Commission views the Internet as playing a critical role to the development of the Single Market in Europe.[12]

And so in that vein, we're curious as to why the Guidelines would allow a supplier under the block exemption to "require that distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system."[13] Doesn't that approach seem to run counter to the notion that the Internet may be a more efficient and less costly means of distributing goods and services than a traditional brick and mortar shop? And so the requirement of actually requiring that distributors have a brick and mortar shop may actually retard competition rather than promote it?

DG ITALIANER: First of all, I should say that the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition. But that doesn't mean that we should treat online sales differently from offline sales or ignore possible free-riding problems that may occur between offline and online sales. The hardcore resale restrictions relate to market partitioning by territory or by customer group. Since the Internet allows distributors to reach different customers and territories, restrictions of the distributors' use of the Internet and sales over the Internet are generally considered to be hardcore resale restrictions. That is why both the previous and the new Guidelines state that, in principle, every distributor must be allowed to use the Internet to sell products. The new Guidelines only provide a more detailed description of the application of the policy towards online sales.

At the same time suppliers should in most cases, and certainly if below the market share cap of 30 percent, have the possibility to apply exclusive or selective distribution systems and thus appoint the exclusive or authorized distributors of their choice. The supplier may choose not to sell its product to Internet-only distributors for a number of positive reasons. If a supplier requires its distributor to have one or more brick and mortar shops where customers can see, touch, and experience the product, such a requirement is not dealt with as a hardcore restriction of on-line sales.

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[11] Vertical Regulation, *supra* note 8, art. 4(b)(1), 2010 O.J. (L 102) at 5; Vertical Guidelines, *supra* note 10, ¶¶ 51–54, 2010 O.J. (C 130) at 13–14.

[12] *See* Mario Monti, *A New Strategy for the Single Market*, Report to the President of the European Commission (May 9, 2010), *available at* http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

[13] Vertical Guidelines, *supra* note 10, ¶ 54, 2010 O.J. (C 130) at 14.

You were mentioning the issue of passive sales outside exclusive territories or exclusive customer groups. There we have quite some experience in the field of offline sales, for instance with regard to car distribution. It's that experience that we have imported into the online world. So the issue here with the brick and mortar shop requirement is that for some products in terms of branding, customer relations, and so on, brick and mortar shops are a crucial feature.

Let me give a simple example: how would customers be able to experience perfumes if they were only on sale online and could not be tested in a brick and mortar shop? For some products the image that they have is based also on the brick and mortar shops. So there are efficiency arguments why certain products should not be sold exclusively online. We wanted to avoid with our rules the scenario whereby allowing some distributors to exclusively sell online, the fixed costs for these brick and mortar shops would only be imposed on the offline distributors.

That is why we have allowed for this possibility. However, once a distributor meets the conditions on the brick and mortar shop, then it generally cannot be prevented from also having a website and using that website for online sales. We have tried to find a balance between strongly promoting online sales on the one hand, and on the other hand, requirements that are indispensably linked to the branding and the sales of certain products.

ANTITRUST SOURCE: The BER and Guidelines talk about the need for suppliers and manufacturers to maintain quality control, and certainly there is a logical need to require a brick and mortar shop for products such as perfumes where it would be advantageous for consumers to visit and to try it.

DG ITALIANER: Yes, absolutely, and that's only one example. I think there can be objective and justified reasons for some of these restrictions. But the bottom line must be clear. What our Guidelines are doing is vastly promoting online sales.

ANTITRUST SOURCE: In December 2010, the Commission adopted revised competition rules for horizontal cooperation agreements.[14] There are two sets of BERs, one for research and development agreements[15] and another for specialization agreements relating to production.[16] And then there were also some revised horizontal Guidelines issued by the Commission.[17] One of the topics addressed at length in the revised Guidelines concerns the standardization agreements[18] or what we call standard setting in the United States. What has been the reaction from industry and from the public to these new Guidelines particularly as they relate to disclosure policies for intellectual property rights and the licensing of such rights under fair, reasonable and nondiscriminatory (FRAND) terms?

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[14] Press Release, European Comm'n, Dir. Gen. Competition, Competition: Commission Adopts Revised Competition Rules on Horizontal Co-Operation Agreements (Dec. 14, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1702.

[15] Commission Regulation (EU) No. 1217/2010 of 14 December 2010 on the Application Of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Research and Development Agreements, 2010 O.J. (L 335) 36, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0036:0042:EN:PDF.

[16] Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialization Agreements, 2010 O.J. (L 335) 43, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0043:0047:EN:PDF.

[17] European Comm'n, Dir. Gen. Competition, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, 2011 O.J. (C 11) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

[18] *Id.*, ch. 7, 2011 O.J. (C 11) at 55–72.

DG ITALIANER: When we put these BERs and Guidelines up for consultation, the very large majority of the reactions were precisely on the rules concerning standardization agreements. So from that reaction I would say they attracted a huge interest, which is not surprising given the importance of standardization for the growing ICT (information, communications, and telecommunications) sector. I also think it's a good thing that we have updated our rules in this area to reflect market developments and stakeholder input.

Secondly, when preparing the rules we built on the experience that we have gained in certain cases, such as the *Rambus* case. What we tried to do here was not to prescribe any specific scheme of standardization but rather to promote a standard-setting system that is open and transparent. Promoting openness and transparency increases the visibility of licensing costs for intellectual property rights (IPRs) used in standards. This is an important element because licensing costs are ultimately passed on to consumers.

What we tried to do here was not to prescribe any specific scheme of standardization but rather to promote a standard-setting system that is open and transparent.

We tried to find a balance between the various interests at stake, of companies with different business models. On the one hand, one has to maintain the incentives for innovation and therefore proper rewards for IPRs, and on the other hand, ensure that the benefits from the standardization are being passed on to consumers. It's a typical problem you find in general when talking about IPRs. When we put out our first draft, the stakeholders asked us to refine the safe harbor that we set out in the initial draft and also to provide more guidance on what would happen to standardization agreements falling outside of the safe harbor.

So that's what we did and in particular as regards the safe harbor, we clarified that the good faith disclosure of IPRs does not require the company concerned to embark on a patent search, which can be a very costly exercise. We wanted to maintain efficiency and not force the participants to go into costly patent searches. And we also stated that an IPR disclosure would not be required in the context of royalty-free settings, because in such cases the importance of the transparency on the IPRs is of course much less important because the standard is royalty free.

We made clear there is no presumption that any agreement that falls outside the safe harbor is illegal but that it simply has to be assessed, and we gave a number of criteria under which such agreements would need to be assessed—such as whether the members remain free to develop alternative standards or products, how access is given to the standards, whether there are limitations on participation, and so on. I think this is a very good example of where interaction with the stakeholders in an extremely important area in the field of innovation allowed us to improve our Guidelines and bring them as close as possible to the market situation as we could.

ANTITRUST SOURCE: Particularly in the standardization area, where there are multiple stakeholders, you have to try to accommodate different interests—those of the consumers, the customers adopting and using the technology, the participants in the standard-setting process, as well as the organizations themselves.

DG ITALIANER: Yes, absolutely. You asked whether it is too early to tell whether this update has been successful. That is indeed the case. We will have to see how the situation develops in practice before we can reach any definitive conclusions.

However, I should point out that already now, the initial feedback we get from talking to different stakeholders is in general positive. They seem to recognize that we have taken a balanced approach in this review.

ANTITRUST SOURCE: The Commission does a lot of rulemaking, with public input. Good examples

are the Best Practices for antitrust proceedings[19] and the submission of economic evidence,[20] which were provisionally adopted by the Commission in January 2010 and for which public input has been solicited.[21] Does the Commission currently have a timetable for finalizing those Best Practices documents in view of the replies that have been submitted to the consultation?[22]

DG ITALIANER: The package that we put out in January last year of course has already been implemented provisionally. In addition to the public consultation that we have done, the provisional application is of course the best way of actually testing all the new elements that we included. And my impression is that the Best Practices are working very well, and that they are appreciated by the stakeholders. For instance stakeholders welcome that we now use more frequent "state of play" meetings, which is a practice that we have imported from the merger world.

The experience with the recommendations on the submission of economic evidence, economic data, and so on, is also quite positive. We are now digesting both that experience and the reactions from our stakeholder consultation. And I hope that in the course of this year we can put out a final and revised version of the Best Practices.

ANTITRUST SOURCE: Another form of feedback the Commission has received with respect to its Best Practices on the submission of economic evidence would be what the courts have done. And I think that you've expressed the view that the July 2010 judgment of the General Court in the *Ryanair* merger case[23] validates the process that the Commission has been following in terms of confronting and assessing the relevant econometric evidence.[24]

How and to what extent do the Best Practices being applied by the Commission help to ensure that its decision in an antitrust or merger case, particularly with respect to the analysis of the econometric evidence, is accorded the appropriate degree of deference by the courts of the European Union under the case law?[25]

DG ITALIANER: First of all, I should say that over the past years, the use of quantitative data and

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[19] European Comm'n, Dir. Gen. Competition, Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (2010) (provisionally applied), *available at* http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf.

[20] European Comm'n, Dir. Gen. Competition, Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases (2010) (provisionally applied), *available at* http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf.

[21] *See* Press Release, European Comm'n, Dir. Gen. Competition, Antitrust: Improved Transparency and Predictability of Proceedings (Jan. 6, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en.

[22] *See* European Comm'n, Dir. Gen. Competition, Best Practices in Antitrust Proceedings and Submission of Economic Evidence; Hearing Officers' Guidance Paper, PUBLIC CONSULTATIONS, http://ec.europa.eu/competition/consultations/2010_best_practices/index.html. (The ABA Section of Antitrust Law, jointly with the ABA Section of International Law, were among the organizations that submitted comments. *See* ABA, Sections of Antitrust Law and International Law, Joint Comments to the European Comm'n Regarding Consultation Documents on Improved Transparency and Predictability in Competition Proceedings, http://ec.europa.eu/competition/consultations/2010_best_practices/american_bar_association_en.pdf.)

[23] Case T-342/07, Ryanair Holdings plc v. Comm'n, 2010 ECJ EUR-Lex LEXIS 397 (July 6, 2010), *available at* 2010 O.J. (C 221) 35, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:221:0035:0036:EN:PDF, and at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0342:EN:HTML (full version of the decision).

[24] *See* Alexander Italianer, Dir. Gen. for Competition, European Comm'n, The Interplay Between Law and Economics 5, Opening Address at the Charles River Associates Annual Conference (Dec. 8, 2010), http://ec.europa.eu/competition/speeches/text/sp2010_09_en.pdf.

[25] *See Ryanair*, 2010 ECJ EUR-Lex LEXIS 397, at *12–13, 2010 O.J. (C 221) 35, ¶¶ 29–30 (acknowledging the margin of discretion that the Commission has with respect to economic matters).

analysis has increasingly grown in our merger and antitrust investigations—whether it's used to measure market growth, market share, capacity, bids, or price evolution. So the need for an economic assessment for us to scrutinize and assess the data is increasing. And like you said, it's also playing an increasingly important role in the court proceedings.

What I notice here is that some of the submissions that we received from the parties have become increasingly technical and sophisticated. And that's why we need to very carefully assess all the submissions and dismiss those submissions that do not follow proper methodology or are based on wrong assumptions, and so on. And on top of that we are of course doing our own analysis. We have a very highly qualified Chief Economist team.

In the *Ryanair* case that you mentioned, the General Court explicitly endorsed the transparent and balanced way in which we assessed the various economic submissions. And it also commended the Commission for deciding not to assign weight to part of its own economic analysis, which despite supporting the overall findings, the Commission considered had the same methodological flaws as that of the parties.

I can tell you that the mere possibility or impossibility to replicate submissions can be a very important factor in a case.

So the Best Practices come in here because this is sort of a logical step towards supporting a well-balanced competition enforcement system because they tell the parties what they should do in terms of presenting the content and the substance of their economic and the econometric analysis. In particular this allows us to replicate the empirical results. I can tell you that the mere possibility or impossibility to replicate submissions can be a very important factor in a case.

Secondly, we gave guidance on how to respond to our request for quantitative data in order to get timely and relevant input. So this is for me part of a broader picture. And I think it has been welcomed by all the parties. The Best Practices have already helped in a number of cases to gather quantitative data and to limit the scope of data requests. All this has led to better quality submissions in the context of both merger and antitrust cases, allowing the investigation to focus on the most important elements to determine the likely competitive effects of a merger, practice or agreement.

ANTITRUST SOURCE: Your Office of the Chief Economist has spoken publicly about the need for careful analysis of the economic evidence. Recently, your deputy chief economist Miguel de la Mano acknowledged that "the presentation of economic evidence has to be clear and transparent." He also said "it can be difficult to know how much probative weight to give to something one does not fully understand, especially when the 'experts' on both sides reach completely divergent conclusions based on the same set of facts."[26] And that echoed what your chief economist Damien Neven described, when he said that "apparently sound but contradictory analyses are sometimes generated and submitted by opposing parties."[27] Given your professional education and training in economics and econometrics, do you have a particular perspective on what the Commission needs to do in such a situation where you're trying to reconcile divergent conclusions or contradictory analysis based on the same set of facts or data?

DG ITALIANER: From my professional perspective and educational perspective, analyzing accurate

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[26] *See* David Vascott, *DG Comp Reveals Measured Approach to Economic Analysis*, GLOBAL COMPETITION REV., Feb. 4, 2011, http://www.globalcompetitionreview.com/news/article/29701/dg-comp-reveals-measured-approach-economic-analysis/.

[27] Damien Neven & Raphael de Coninck, Best Practices on the Submission of Economic Evidence and Data Collection, European Comm'n, Dir. Gen. for Competition, Office of the Chief Economist Discussion Paper 2 (2010), *available at* http://ec.europa.eu/dgs/competition/economist/neven_deconinck_best_practices.pdf.

and reliable data can be a very efficient and varied way to validate or refute contradictory claims and opinions that are put forth by parties with opposite interests, who may put forth data and analysis suited to their own needs. Having done a lot of econometrics myself, I'm the first one to recognize that there's no such thing as an ideal economic model or a perfect econometric model.

But I know two things. The first is that an econometric model or an economic model is simply a mathematical representation of a line of argumentation. And what that means is that whatever your argument is, it will be presented in a logical way and the outcome of such models will be consistent with the underlying logic of the assumption. So it's a very handy tool to structure your thoughts and your arguments. And that's why if your arguments are flawed and they are used as an input in a model, of course then the outcome of the model will also be flawed. And that's the kind of thing that we try to detect when we analyze the submissions of the parties.

And the second thing is that with econometric models, they are based on statistical techniques, and statistical techniques generally rely on the law of large numbers. And what happens with the law of large numbers is that imperfections usually disappear. So it's a useful way to get to the core of the issue while being able to disregard the noise. So I would say that the use of models and techniques on balance are useful provided that one knows what one can do and what one cannot do with these models. In particular, they are extremely useful to detect inconsistencies in the reasoning of various parties, so I'm not at all surprised that on the basis of exactly the same data, two parties may arrive at contradictory conclusions using different models because they probably put in assumptions that are to their benefit. And it's precisely by looking at these models and by replicating them that one can try to spot the flaws and the inconsistencies in the argument. Our Best Practices are indeed very helpful. They ensure that economic analysis meets certain minimum standards at the outset, they facilitate the efficient gathering and exchange of facts and evidence, in particular any underlying quantitative data, and they aim to use in an efficient way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.

ANTITRUST SOURCE: In addition to the need for transparency and clear analysis, you've also spoken publicly about the importance of due process in Commission proceedings relating to antitrust and merger cases,[28] which I think was echoed by the General Court in the *Ryanair* merger case.[29] Now, it's understood that the Best Practices documents put out by the Commission further this goal of due process. Another aspect of the due process safeguards seems to be the constitution and use of what you're calling "peer review" panels for complex cases. Can you tell us how this works?

DG ITALIANER: Yes, there is of course debate about due process, which is mainly about the interaction of the Commission with the parties. The extent to which a case is submitted to internal scrutiny before the Commission reaches a decision is sometimes underestimated. In fact, there are var-

[28] *See, e.g.*, Alexander Italianer, Dir. Gen. for Competition, European Comm'n, Safeguarding Due Process in Antitrust Proceedings, Session on Enforcers' Perspectives in International Antitrust, Fordham Competition L. Inst. Annual Conf. on Int'l Antitrust L. & Pol'y (Sept. 23, 2010), http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf; Alexander Italianer, Dir. Gen. for Competition, European Comm'n, Priorities for Competition Policy, St. Gallen Int'l Competition L. Forum (May 20, 2010), http://ec.europa.eu/competition/speeches/text/sp2010_04_en.pdf.

[29] *See, e.g.*, *Ryanair*, 2010 ECJ EUR-Lex LEXIS 397, at *13 & *107–09, 2010 O.J. (C 221) 35, ¶¶ 31, 192, 194.

ious actors in that process and numerous checks and balances that I will not describe to you at length.

In any case, one of the elements in this internal process of scrutiny is the use of peer review panels. These panels are organized for major antitrust or merger cases, especially the complex ones, and where a statement of objections is either envisaged, or has already been adopted. The peer review panel may cover either all the aspects of the case, or a specific aspect, which is controversial or complex, where we want to have a fresh pair of eyes to look at all the relevant aspects. The practical objectives of this panel exercise are twofold: first, to provide assistance to the case team with a view to ensuring that the basic foundations of the case are strong, and second, to help all those involved in the decision making process with respect to the further orientation of the case. It's part of our internal scrutiny—like many other elements—before we take a position. The way this works is that these teams are set up by officials who are, of course, completely detached from the case at hand. We try to find a balanced composition in any peer review panel. We try to have at least an economist on the panel, a lawyer, and a Head of Unit. I appoint qualified officials based on a proposition made by the scrutiny officer who also chairs the peer review panel. It's a powerful instrument, and it's a purely internal tool, that plays an important role in our internal checks and balances.

ANTITRUST SOURCE: You gave a speech in December 2010 on the interplay between law and economics.[30] In that speech, I believe, you responded to an attempt by some members of the competition bar to distinguish the General Court's September 2010 decision in *Tomra Systems*[31] as a departure from the Commission's economic effects-based approach to abuse of dominance cases under Article 102, as reflected in its 2009 Guidance paper.[32]

When one reads the *Tomra* decision from the General Court, it's clear that the General Court acknowledged that the Commission, in fact, analyzed the actual effects of Tomra's practices.[33] But it also seemed to have gone out of its way to emphasize that the Commission isn't required to do so under the relevant Article 102 case law.[34] So my question is, does *Tomra* presage a relaxation at the Commission with respect to applying a rigorous effects-based approach to abusive dominance cases?

DG ITALIANER: I would say that effects-based analysis, including the one in our 2009 Guidance paper, does not always require proof of actual negative effect. For instance, it is often necessary to intervene before the conduct actually distorts competition, otherwise we would undermine the effectiveness of Article 102. That's one thing.

Secondly, actual effects may reinforce the conclusion that the conduct is anticompetitive. And in the *Tomra* ruling of the Court, I don't think that this is negated. In fact, what the Court said was

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[30] Italianer, *supra* note 24, at 9–10.

[31] Case T-155/06, Tomra Sys. ASA v. Comm'n, 2010 ECJ EUR-Lex LEXIS 751 (Sept. 9, 2010), *available at* 2010 O.J. (C 288) 31, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:288:0030:0031:EN:PDF, *and at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0155:EN:HTML (full version of the decision).

[32] European Comm'n, Dir. Gen. Competition, Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

[33] *Tomra*, 2010 ECJ EUR-Lex LEXIS 751, at *82, 2010 O.J. (C 288) 31, ¶ 219.

[34] *Id.* at *105–07, 2010 O.J. (C 288) 31, ¶¶ 287–290.

that although the Commission's analysis of the actual effects was not necessary, it has a complementary role.

Now, I should say that the *Tomra* case actually predates the Guidance paper,[35] so if my understanding of the court case is correct, what *Tomra* actually tried to do was to invoke the Guidance paper post hoc, after the case had actually been decided by the Commission. So that is also an important reason why I think that the ruling of the Court cannot be interpreted as a kind of definitive view on effects-based analysis. Actually, if you read the judgment of the Court, it focused quite a lot on the facts and the arguments that the Commission used to make its case.

So I think we have to wait a little bit. I would say the jury is still out. We have to see how the use of the analysis in the Guidance Paper in cases like Intel plays out before the Court. So we need to be patient.

What is important for us in general in the near future is to continue with our vigorous enforcement and to continue on the fight against cartels, which will remain a priority . . . .

ANTITRUST SOURCE: We'd like to wrap up the interview by asking you to say a few words about the Commission's priorities for 2011. In particular, we note that there's another public consultation on a coherent European approach to collective redress for infringements of EU law.[36] Do you have any preliminary views on what can be accomplished through the consultation process?

DG ITALIANER: Yes. Before answering that particular question, let me say that collective redress is only one of our many activities. It's an important policy issue, of course. What is important for us in general in the near future is to continue with our vigorous enforcement and to continue on the fight against cartels, which will remain a priority and where we have been taking some extremely important decisions last year, including the settlement cases that we discussed.

And, also, for the benefit of economic growth and jobs in Europe, it's very important that we continue to focus on those sectors which are the most important for that growth potential—the network sectors, services, IT, and so on. So our enforcement practice remains, first and foremost, a priority.

Now, when it comes to collective redress, as I mentioned earlier, this is one of the two important legs, when it comes to antitrust enforcement. As the public authority, we work on the deterrence side of the case, but the other leg, which is the compensation for the harm done, is still missing. This is an issue that is particularly important in the field of antitrust, but it is also important in other areas of law, and where, in some of our Member States, it is possible to seek damages for either antitrust, or other types of infringement, but not in all of them. So it is very important that when we reflect on things like collective redress, we take a broader perspective on this, and that is precisely what we are doing by putting out a general consultation. I very much hope that this type of consultation will lead to an understanding of what the type of problem is, what the possible remedies are, and what we want and what we do not want in Europe. Once we have held the consultation, the Commission will hopefully take a general view on this, and this will then allow us to move forward with proposals in the specific area of damages in the antitrust area.

ANTITRUST SOURCE: Is it correct that the public consultation document indicates that the issue of

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[35] The Commission's challenged decision in Tomra was adopted on March 29, 2006 (C 734) in Case COMP/E-1/38.113, Prokent-Tomra, 2008 O.J. (C 219) 11, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:219:0011:0015:EN:PDF (summary decision) *and at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38113/38113_250_8.pdf (full decision).

[36] *See* Press Release, European Comm'n, Commission Seeks Opinions on the Future for Collective Actions in Europe (Feb. 4, 2011), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/132&format=HTML&aged=0&language=EN&guiLanguage=en.

collective redress is not limited simply to infringements of competition law?

DG ITALIANER: That's correct. It takes a broader scope. It could affect consumers through unfair commercial practices, for example. There are many areas where this may be a relevant issue. You see damage claims in the financial services field, environmental protection, and so on.

ANTITRUST SOURCE: You've been very generous with your time with us today, and we certainly thank you.

DG ITALIANER: It was a pleasure talking to you. ●