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ANTI-TRUST REFORM IN EUROPE: A YEAR IN PRACTICE

CHAIRMAN'S CLOSING REMARKS

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Check against delivery

Ladies and gentlemen.

This conference has achieved a great deal.

Not only did it allow us, practitioners and enforcers, to evaluate how the new system is working so far, but the roundtables and topical discussions also produced important suggestions for building on last year's antitrust reform and to further its objective of a more efficient enforcement of Articles 81 and 82 EC. I am extremely grateful for the participation of everyone here, and we will look carefully at all of the suggestions made.

Let me summarise what I think were the main points on procedures and substance.

I. Procedure

A. National Competition Authorities

First, the European Competition Network.

During the years while reform was being discussed, imagining the operation of the network was a difficult task. Describing a network in abstract is far from easy, as Samuel Johnson found when - in the first ever dictionary of the English language - he defined a network as “*anything reticulated or decussated at equal distances, with interstices between the intersections*”.

So much for theory.

Discussing a network in practice is rather easier. And, in practice, we can only be impressed with the way that the European Competition Network is functioning.

From everything we’ve heard over the last two days, it’s clear that Regulation 1/2003 has put in place a system which has improved the enforcement of Articles 81 and 82 EC. There is a clear focus on the most serious infringements: almost half of the ECN enforcement decisions concerned cartels and one third concerned abuses of a dominant

position on the European market, in particular by national incumbent operators in the newly liberalised sectors.

But more impressive than the numbers, we have seen the dynamism of the network, and the commitment, the professionalism, and the co-operative spirit of all ECN members.

We have seen extensive co-operation between European competition authorities - exchanges of evidence, sharing of sectoral knowledge, discussions on draft decisions – and this co-operation is bringing about a common understanding as to the application of the EC competition rules and is acting as a catalyst for convergence in the areas where uniform EC law borders on non-harmonised national law. This should be welcomed not only as a viable alternative to more formal harmonisation, but also as a way to provide undertakings with a reasonable degree of predictability as to the treatment of their case, regardless of the authority seised of it.

Changes are not only at the Member State level.

Regulation 1/2003 also changed the way in which the Commission is enforcing the EC competition rules, by moving its culture from re-active to pro-active enforcement. The sector inquiries into energy and financial services which the Commissioner mentioned yesterday provide perhaps the clearest example of this. These sector inquiries also highlight another important point, that in complex areas of the economy, competition

reform requires a long term commitment from enforcement authorities. A sector inquiry is an invaluable tool for analysing the operation of a sector and for focussing proposals for improvements. But a sector inquiry is not an end in itself; the conclusions must be followed up, whether it be through targeted antitrust cases, changes to the legal and regulatory environment or simply greater competition advocacy.

In areas where the Commission does have clear evidence of competition law infringements, ranging from general market information, to substantiated complaints and to detailed leniency applications, then . thanks to the co-operation within the ECN, the Commission can - more than ever before - assure an appropriate follow-up.

Looking in more detail at the ECN co-operation, we were shown that work sharing is a reality that has already led to more effective and efficient case-handling. Where re-allocation of cases within the network happens, it does so at a very early stage: despite some companies' fears, companies are not faced with uncertainty about the acting authority. And finally we were shown that the tools for cooperation have been taken up and are being used in practice where the need arises.

On the delicate topic of reconciling the various leniency programmes with the co-operation within the ECN, one has to recognise that the legal framework of Regulation 1/2003 and the co-operation in the network has

already created a situation that is generally more favourable to leniency applicants than before 1 May 2004. Network members are committed to providing appropriate incentives for leniency applicants, as is demonstrated by the adherence of all Network Members to the safeguards set out in the Network Notice, which implies a *de facto* immunity to applicants where leniency information is exchanged among the enforcers.

I know that some of you consider that still insufficient and would like to have a real solution to the problem of multiple filings.

As Commissioner Kroes said yesterday, we are looking within the ECN at ways to avoid the need for – or at least facilitate - multiple filings within the EU without jeopardising the effectiveness of the existing leniency programmes. The discussions are ongoing and I can only join the Commissioner in her invitation to all of you to take part in this complex debate.

B. Due Process

Participants in this afternoon's roundtable looked into the future when discussing the consequences of the divergence that still exists in the ECN when it comes to procedures and sanctions for the enforcement of the EC competition rules. Particular attention was given to due process, and although I think the consensus was that the existing system does not

infringe any fundamental right of the undertakings involved in a competition case, there were some calls both yesterday and today for greater harmonisation of procedures and sanctions, and maybe even a future harmonising regulation.

I tend to think that the perceived problem lies rather in the expectations which were raised by the Modernisation reform and which are not yet all met by the current system. Greater convergence of the substantive law created a demand for greater convergence in the procedures and sanctions applied by the public enforcers of the Community. This is a very complex matter and it will take time but I have understood the message and I will continue to look - carefully and with thorough discussions with national authorities - at all possible areas of progress.

Finally in this area I think it is important to recognise that parallel application of EC law by national competition authorities and the Commission will tend to widen the application of the most generous due process safeguards which exist, whether in terms of the rights of the parties or of third parties.

C. National courts

This morning's sessions focused on the increased role of the national courts in the enforcement of the EC competition rules. It seems

undeniable that the application by national courts of EC competition law will widen the scope for litigation in reference to both public and private enforcement. The direct interaction in particular of EC competition law with national commercial law is very relevant in this respect.

The consensus of the discussion was that although the increased use of national courts is as yet limited, it is likely to be simply a matter of time. I was happy to hear national judges and practitioners confirm that there are no structural reasons why judges would not be able to apply Articles 81 and 82 EC. And quite rightly so. In the end, competition law is still law and it needs a legal mind and the common sense of a judge to interpret those rules and to apply them to a concrete set of facts. Moreover, let's not forget that national judges have already been applying Articles 81(1), 82 and 86 EC for decades, and these provisions also require complex economic analysis.

That being said, there may be ways in which the role of judges can be facilitated. Appropriate training, for example, is very important to raise awareness of competition law and economics amongst national judges and I both welcome the appreciation shown for our co-financing of training projects and echo the Commissioner's commitment to continue the programme, but we take note that the resources needed in this area are substantial and the Commission's contribution alone may not be enough.

It is also important to bear in mind that evaluating competition cases does require a mastery of both law and economics, and I found interesting the comments from national judges suggesting that limiting competition matters to a small number of courts or even creating dedicated competition chambers may be useful in allowing judges to build up the necessary expertise.

D. Private Enforcement

Most if not all Member States' legal systems allow for the possibility of injunctions or damages for competition law infringements, but once again the theory departs from the practice, and cases remain relatively rare.

We have had an enriching discussion between Walter Van Gerven and Janet McDavid on the complementary role private enforcement of the competition rules can play in assuring the respect of the competition rules. As the Commissioner mentioned yesterday, the Commission will publish a Green Paper by the end of this year setting out the options for improving private enforcement in Europe, and which will lead, I hope, to a greater role for private enforcement: the final piece of the enforcement jigsaw puzzle will then be in place.

E. DG Competition Reform

Allow me to stop for a while on the internal organisation of DG Competition.

As the Commissioner mentioned yesterday, we are going to step up the fight against cartels through the creation of a dedicated cartel directorate, which will gather together the procedural and forensic expertise important to cartel enforcement. and help us to build on the excellent progress in stamping out cartels that we've made in recent years. It will allow us to build on the success of the leniency programme and to dedicate yet more resources to practices which the Commissioner rightly identified yesterday as one of the most harmful of anti-competitive practices.

However where economic and sectoral experience is important, where a competition law assessment requires forward looking analysis, then a sectoral approach continues to be important. The sectoral reorganisation brings essential industry specific expertise to our antitrust and merger decisions in areas such as telecoms, media, transport, and financial services, and this will continue.

II. Substance

The modernisation package was largely a procedural reform and it is perhaps inevitable that much of the discussion and debate has focused on procedural issues. But in parallel we have continued important

substantive reviews, building on the work of the late 1990s which introduced far more economic analysis into our work.

A. Economics

Yesterday's last roundtable addressed the issue of the role of economics in the enforcement of the EC competition rules. The lively discussions in that roundtable highlighted two important points. First, legal and economic analysis are complements and need to be used as such in every enforcement action. Second, enforcement action does not necessarily need *more* economic input, but rather the *right* economic input – antitrust agencies should not work at the cutting edge of economic theory, but should conduct their analysis within the mainstream of economic thought.

In DG Competition, the Chief Economist has certainly improved our use of economics, but as he generously recognised yesterday, economic analysis in DG Competition did not begin with him, and there are many talented economists throughout the Directorate General, not only in his team.

Finally, I believe further use of economics in national and European courts will have longer term implications for the Commission's contributions to the work of the courts. To the extent that the Commission develops a policy on a sector, and the theories of competition harm to be applied, it seems inevitable that it will be asked to

make its analysis available. A further, more political, implication is that the Commission will be called on more often by national parliaments, as well as courts, to explain policies which impact on national competition law enforcement. In sum, a more economics based sectoral approach will lead to more accountability of the Commission to national as well as European bodies.

B. Article 82 Guidelines

And this discussion of the use of economics brings me to the last point I would like to make today. The revised analysis of Article 81 to bring it more into line with mainstream economic thought began in the 1990s; a similar exercise in respect of Article 82 is perhaps now overdue.

As I believe is already well known, extensive internal discussions have taken place over the last months and are ongoing. We are now approaching the moment to launch external discussions as well.

Over the next months, we will produce working papers on some of the central issues of Article 82 – dominance and some of the major abuses such as predation, bundling, refusals to deal and loyalty rebates. At the end of this year we will issue draft Guidelines on Article 82 for public consultation.

Our colleagues in the ECN will of course be largely involved in the whole process and legal practitioners will be duly consulted. I do want to stress how important your views are. Once again, the difference between theory and practice can be significant, and I want to make sure that the Article 82 guidelines are not only theoretically sound but practically workable. The views of the private sector will therefore be invaluable.

III. Conclusion and Follow Up

This summary shows the richness of the past two days and the great progress we're all making in moving from the theory of modernised enforcement to its day to day practice.

It's clear that much has been achieved, but also that there is much still to be done. And as Commissioner Kroes made clear yesterday, we have her full backing to build on Mario Monti's reforms and to strengthen competition enforcement within the ECN still further.

Ladies and gentlemen. I would like to thank IBA and my services for the organisation of this conference, Michael for co-chairing it with me, the moderators and the speakers for their inspiring contributions and of course all of you for attending this conference and making it a lively event.