

**ICN Cartel Workshop 2011
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Zero tolerance for international cartels

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Introduction

Ladies and Gentlemen,

It is a pleasure to host you here in the beautiful city of Bruges for the ICN Cartel Workshop 2011. My team and I are truly delighted to see so many of you here today.

There is a rich agenda ahead of us for the coming days, so allow me to get straight to the point.

Cartels are unfortunately still a reality. We used to fight them in regional or national markets some years ago. Now, we fight them on the world scene. Cartels were also somewhat easier to pin down in the era of handwritten notes displaying price agreements between competitors – the famous smoking guns. Now, our work has become harder – we deal with recidivists, with instantaneous electronic communications, with ever more complex cases. Our tough line has allowed us to find and sanction many over the last years. But the cartels that are still out there are getting better at keeping a low profile.

This is why these ICN workshops are so important. Enforcers from all over the world discussing in a pragmatic way what they can do to get ahead of cartels, how best to cooperate to uncover them and what tools to employ to make sure they never start again.

It is clear that cooperation between enforcers is key. If we want to become more effective in catching international cartels, we need to have the means to cooperate and the right tools to do so. This includes case-handlers from different agencies talking to each other directly, organising more joint inspections and also more joint training.

Against this background, I would like to address two topics today. First, I would like to tell you about the latest developments concerning the activities of the Commission when it comes to improving the effectiveness of its fight against cartels. I would then like to share a few considerations on what I believe the role of the ICN can be to better fight international cartels.

1. Improving the effectiveness of the fight against cartels: latest developments from the Commission standpoint

1.1. Better detection

To improve our effectiveness, one of the areas we've worked on most at the Commission in recent years is improving our investigative techniques. As a civil enforcer, we are particularly proud of the level of sophistication of our detection methods: for instance, we are now increasingly relying on forensic IT searches.

Since 2006, we have used forensic IT support in about 70 inspections, at 210 sites. Today, we have about 55 in-house trained staff who can proficiently perform such searches. Our inspectors and those of the sister agencies of the European Competition Network, the ECN, who assist us are specifically trained. They are able to retrieve electronic data that has been hidden, whilst respecting the confidentiality that some of that data may have. Our knowledge, as well as that of other agencies, is regularly shared in the ECN Forensic IT Working Group and in the ICN Cartel Working Group. It is also distilled in joint training.

The Commission has also invested important resources into market monitoring as well as *ex-officio* work. There have been numerous cases that were started *ex-officio*, take for instance the *Elevators* and *Pre-stressing steel* cases, or our chocolate investigation which led to a string of national cases. And you will see more such cases in the future.

So companies and their advisors should be aware that we are fully determined to start own initiative inquiries whenever we believe that cartel behaviour occurs.

On top of this determination, our leniency policy is very effective and I will mention it in a few minutes in more detail, and our pipeline is full of cases that you will all soon hear about.

However, my message today is that we are not complacent, we do not merely rely on leniency, we are not just reactive. We are vigilant and will pro-actively pursue the *ex-officio* route.

For example, we have seen in cases such as *Flat Glass*, that bits and pieces collected by different authorities can successfully form a “pattern” that is sufficient for us to launch ex-officio surprise inspections in several countries. In that case, we succeeded in bringing a price-fixing case against the major flat glass producers throughout Europe. This just goes to show how important inter-agency cooperation is in detecting cartels.

Of course, we also receive information from well-informed individuals, such as current or former employees or customers of cartels. They know and trust that we can fully protect their identity and we encourage them to come forward with information that will help us identify and sanction infringers. This type of information also plays its part in allowing us to kick-off an *ex-officio* case. So, better detection continues to be a priority.

1.2 Developing legal tools

Beyond pure detection, we have recently developed legal tools that enable us, when the case is suitable, to offer the settlement route to companies that wish to quickly put the cartel episode behind them and benefit from a 10 % reduction of the fine.

We introduced the settlement tool in EU law to increase efficiency and to enable the Commission to deal with cases faster and redeploy staff on other priorities. The lessons learnt in our first settlement cases, *DRAMs*, *Animal Feed* and *Consumer Detergents*, will allow us to better screen potential new cases and streamline processes further.

In terms of screening whether or not a case is suitable for settlement, our experience has taught us that many elements need to be considered from the outset: number of undertakings involved and their expected interest to settle quickly; number and proportion of successful leniency applicants; foreseeable conflicting positions of undertakings on attribution of liability; potential impact of aggravating circumstances, and so on.

Settlements are not an investigative shortcut. A thorough investigation, before the settlement process starts, is essential. It enables us to better scope the case, focus on the "essentials" and deal efficiently with the issues which are brought up. And then it takes two to tango: both sides, the Commission as well as companies and their legal advisers, need to be committed to

a smooth process because settlements necessitate trust as well as a constant and open communication and cooperation.

The possibility to adopt a streamlined Statement of Objections and decision is now a reality. The reduced drafting work is shown by a simple comparison with traditional cartel cases, such as *Car Glass* or *Heat Stabilizers*, where the decisions amounted to hundreds of pages, and settlements - where they range on average between 20 and 40 pages. This can make an important difference in the use of resources, especially if added to the speed of approval of decisions and the absence of appeals against the settlement decision. This difference is apparent when compared to decisions such as *Pre-stressing Steel* and *Bathroom Fittings* which generated more than 40 separate appeals.

For all these reasons, we expect settlements to be increasingly efficient and hopefully widespread in the near future.

While speaking of legal tools, and as I said earlier, full credit also must be given to our leniency programme, one of the great successes of competition policy in recent years.

Much has been said recently about the recent *Pfleiderer* judgement in this respect. In that case, in 2008, the German competition authority fined three companies for violating EU competition rules. *Pfleiderer*, another company, asked for access to the file to prepare civil actions for damages. The German authority granted only partial access, stating that it could not disclose leniency-related information since that would violate its obligations under EU law.

In June of this year, the Court of Justice of the EU decided that there was no EU rule that would justify this refusal and that it was for national courts to decide on a case-by-case basis, balancing the interests protected by EU law. It added that both protecting the leniency programme and enabling antitrust damages actions were interests protected by EU law.

So allow me to reiterate our position in this respect: we will protect our leniency programme and those of our European colleagues in the ECN. And we will find the right balance between our desire to facilitate private enforcement and our will to protect leniency.

As Vice President Almunia has indicated, this may include legislative proposals in order to render the existing legal framework more robust and to ensure the effective operation of our leniency programme.

In parallel, we will continue to strongly encourage the convergence of leniency programmes at an international level to strengthen the fight against global cartels. The ECN Model Programme has been very useful and we should continue to explore if there could be similar soft convergence also at a more international level.

1.3. Injecting more transparency into proceedings

In the last months, we have also sought to inject more transparency into our proceedings, so that parties know what to expect and that our dialogue with them follows a clearer procedure.

The Commission will shortly be adopting the Best Practices for Antitrust Proceedings, the result of our discussions with stakeholders for more than a year. Among the changes brought forward, we will for instance include a section on fines in our Statement of Objections which will contain the parameters for the calculation of possible fines. (And in fact we have already started to do this in some recent cases.)

This additional element of transparency will lead to a more open dialogue with parties prior to the decision and will give them a better idea of how we calculate the fines, from the outset. Such exchange of information should therefore help us ensure that the fines we impose are as accurate as possible and that we avoid post-decision corrections.

1.4. The scrutiny of the European Courts

I cannot mention these transparency related arguments, without a word about the review that the Courts carry out of our cartel decisions - about due process.

Last month, the European Court of Human Rights issued a very interesting ruling in which it stated that Italy's system of imposing antitrust fines – consisting of a decision taken by the national agency and appeals to the administrative courts – complied with fundamental rights.

The Court deemed that in this case national courts were sufficiently equipped to review the sanctions, and in fact carried out a full review. In practice, this means that companies have adequate means to challenge their authorities' sanctions and that their right to a fair trial is ensured.

This Italian case echoes the administrative enforcement system that we have at EU level. I would like to refer in this context to the recent remarks of Judge Forwood who said that in light of this ruling, any moves towards a prosecutorial system at EU level are quite unlikely for the foreseeable future. This case confirms that an administrative system where an agency imposes sanctions but where these are subject to full review by an independent court should comply with fundamental rights law.

Indeed, the European Courts engage in an in-depth analysis of our cartel cases. Recent rulings on *Elevators and Escalators*, *Gas insulated switch gear* and rubber case *BR-ESBR* demonstrate that the Courts look in detail at complex issues related to the sufficient proof of the involvement of individual companies, how we apply our fining and leniency policy, or how we attribute liability in case of recidivism.

We are pleased to see that following such a thorough assessment, the General Court has for the first time ruled on the application of our current Fining Guidelines (*Sodium chlorate* and *International Removers* cases). The calculation method of these Fining Guidelines that were significantly changed in 2006, was upheld in full and the Court reiterated that the Commission has to be able to adapt the level of its fines to the needs of its enforcement policy, at any time.

The Court also confirmed that the gravity percentage for most harmful competition infringements such as cartels can start at 15%, that the fine can be increased by 100% for each year of participation and that a recidivism up-lift of 90% can be imposed on repeat infringers.

In another case, *Italian Raw Tobacco*, the Court has confirmed that there is a duty of cooperation under the leniency programme. This underscored once more that the Commission is entitled to ensure that only genuine, sincere and continuous cooperation will be rewarded under its leniency programme.

In a recent string of judgements, the European Courts have also fully confirmed that a shareholding in a subsidiary of almost 100% is sufficient in itself to create a rebuttable presumption that the parent company exercised decisive control over its subsidiary and can therefore be held liable.

However, some of these rulings, including the *Elf Aquitaine* and *Air Liquide* judgements of last month, reiterated the need for the Commission to provide sufficient reasoning to justify its decisions.

We of course duly acknowledge such rulings and we constantly analyse the case law in order to increase the quality of our decisions. Where legally possible and appropriate, we will consider the re-adoption of a decision to avoid that companies which infringed competition rules get away without paying a fine.

Overall, our cartel cases do well in court – last year the European Courts ruled on 19 cartel cases and nearly all of these rulings were wholly or very substantially successful for the Commission. Of course, in some cases the Court requested modifications of the fine, but in general our cases withstood the Courts' scrutiny. Needless to say that we intend to maintain this high record.

So, in a nutshell, the Commission has been working mostly on devising smarter tools to catch cartels and on improving the way we deal with companies that are parties in our cartel cases. We have proved that we listen to our stakeholders and have increased the transparency of our fight against cartels. Our action has also been broadly supported by the Courts.

Our number one priority remains enforcement, strong enforcement, because that is what is needed in order for our number one stakeholder, the consumers, to choose freely among the most competitive prices and innovative products.

2. International fight against cartels

2.1. Work in progress and Second Decade challenges

Allow me to now turn to the role of the ICN and to the direction in which I think it should be going in coming years.

The work of the ICN Cartel Working Group has already been instrumental in strengthening cross-border cooperation between enforcement agencies.

The Anti-Cartel Enforcement Manual provides a pragmatic reference for agencies to evaluate and benchmark their own approaches to cartels. We will soon add to it a new chapter on "awareness, outreach and compliance". This is work in progress and it's on good track.

Beyond our many achievements, we need to think ahead to the challenges of this Second Decade of the ICN: for instance, how can we best assist the youngest competition agencies in tackling cartels, how can we cooperate more efficiently and faster in individual cases, how can we coordinate our deterrence work more successfully? We will discuss these and other issues over the coming days.

Let me shortly elaborate on the issue of support to younger agencies as this is one of the main objectives for the Second Decade of the ICN.

Following the feedback from last year's Workshop and together with the Cartel Working Group co-chairs, we have included in this year's programme two sessions specifically tailored to younger agencies – one on using Forensic IT during inspections and another on what makes leniency policy successful. I am convinced that these discussions will receive the necessary follow-up.

A personal suggestion that might merit further consideration by the ICN Cartel Working Group would be to explore setting-up a framework for joint training among ICN member agencies on inspection methods.

In addition, I would also invite the Chairs of the Cartel Working Group to consider how to involve over time younger agencies more in the governance of this Group. And I hope to have the support of all our Members for this initiative. Our experience so far shows that the sharing of experience leads to greater convergence in anti-cartel policies, with more practical results.

On a more tangible note, we have also committed to produce a leniency video in the coming months as part of the ICN curriculum project. I would already like to thank the colleagues from a number of agencies who have kindly agreed to help us develop and realise this project. As we have seen at the annual meeting in The Hague, such videos can be a very powerful communication tool.

In the coming ICN decade, a key challenge will be to deploy the right resources, enforcement tools and techniques, such as the widespread introduction of immunity/leniency programmes or the use of digital evidence-gathering techniques. The growing sophistication of cartelists needs to be matched by an equally refined response from all agencies.

Naturally, every competition authority operates in the context of its own market conditions, competition laws and procedures. In terms of substantive assessment, each case is necessarily shaped by these specificities. However, following the fundamental principles of agency solidarity and respect, what matters is that the different procedures do not prevent real cooperation and effective enforcement.

This is where the multilateral cooperation developed through the activities of the ICN Cartel Working Group comes into play. These activities help us preserve the continued effectiveness of our respective enforcement programmes, by exploring concrete issues such as the interaction between different leniency programmes and ways to further improve coordination on the timing of international investigations.

2.2 Enforcement cooperation

One last note on the issue of enforcement cooperation. When the ICN Steering Group met last in June, we decided to examine as one of three substantive topics to be pursued this year the ICN role in facilitating effective enforcement cooperation.

This could for instance include ways to facilitate experience sharing on cooperation, developing tools to facilitate agency contacts and identify matters suitable for cooperation.

We are very pleased that the US DOJ and the Turkish Competition Authority have kindly volunteered to chair this discussion. They have also agreed to draw up an issues paper for dissemination in the ICN ahead of the 2012 Annual Conference in Rio, including recommendations for possible further joint work in this area.

Close

Before closing, I would like to thank Mr. József Sáradi (Hungarian Competition Authority) and Mr. Toshiyuki Nambu (Japan Fair Trade Commission) for their excellent cooperation with us as Co-Chairs of the ICN Cartel Working Group, as well as Mr. Scott Hammond (US Department of Justice), Mr. Vinicius Carvalho (Brazilian Ministry of Justice), Mr. John Pecman (Canadian Competition Bureau) and Mr. Marcus Bezzi (Australian Competition and Consumer Commission) for their work as Co-Chairs of the two Subgroups.

Thank you.