"COMPETITION LAW AS A REGULATIVE FACTOR IN THE GLOBALISED MARKET ECONOMY"

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"Competition Policy at the Crossroads"

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- When we discuss the challenges posed by international dimension of competition policy, then we need to address **two key issues**:
  - which are the challenges, and where do they originate from? and
  - which are the policy responses from the European Commission?
- I do not want to dwell much on the forces that are effectively driving this trend. We are all aware of the changes that globlization has brought to the economies of the world.
- Suffice it to mention the three key elements that I see at the **origins of globalization**:
- *First* of all, a number of technological break throughs have substantially eased the way in which goods and in particular services can cross large distances. For example, the cost of shipping large amounts of digitised information around the globe is today negligible.
- *Second*, several rounds of trade liberalization have significantly reduced or even eliminated many inter-state barriers to trade. This applies to both tariff barriers, and increasingly also to non-tariff barriers.
- *Last but not least*, an increasing number of markets are being opened up. This is certainly the case in our home markets in the EU – just think of the utilities. However, on a much more dramatic scale in many markets outside the present Community. In the wake of the fall of the Berlin Wall, many economies around the world are being opened up, deregulated, and former state monopolies are being privatised. In many instances, this has only created 'markets' properly speaking. And in order to safeguard the benefits that these markets were expected to generate, the introduction of market mechanisms needed to be flanked by the introduction of a competition policy. And there we are today, with some 90 or so competition regimes around the world. Just a few weeks ago, for example, India

adopted a competition regime, and also China has made reforms in this area recently.

- With the new opportunities opening up before their eyes, companies increasingly become active abroad. In doing so, they easily transcend the boundaries of a given jurisdiction. However, the reach of competition authorities does not. We are still national, or, as with the Commission, regional. This inevitably creates **challenging issues of governance** that we need to address.

- For example, we cannot search ourselves for evidence against international cartels when this evidence is located outside the EU. Another example relates to the review of multi-jurisdictional mergers: we have to ensure that the remedies proposed by the competition authorities are mutually compatible, and that their combined effects do not frustrate each other.

- So what are our **policy responses** to these challenges? – From a theoretical point of view there are, as far as I can seen, **three possible answers**:

  - first of all, one could think of a *centralised enforcement* on an international level. People often think of a hypothetical international competition authority in this context.
  - Secondly, one could envisage that several agencies involved in a given case *cooperate and act jointly*, based on a consensus about the right policy. Effectively, this would require some sort of network of agencies.
  - Thirdly, I believe that for many cases - and especially those that are not 'global' in the true sense of the word – a *regional solution* could be envisaged.

- I would like to say a few words on each of these theoretical models.

- Let me begin with the **centralised model**. To say it right from the start: an international competition authority is not on our agenda. Not only would I see, for the foreseeable future, insurmountable difficulties in political terms. I would also question that it would be the most efficient solution. *[And this is without even mentioning the host of complex technical issues that we have not even started to discuss. - e.g.: (i) would the necessary international treaty directly create rights and obligations for private undertakings? (ii) how would cases be allocated between the central body, and remaining national/regional authorities?]*.

- This being said, there are however currently some tendencies that – very modestly - go in a somewhat comparable direction. I am referring here to the developments at the level of the WTO. The Doha Development Agenda set on track a series of discussions on the merit and feasibility of a multilateral competition agreement. We have been a long time supporter of such agreement, and we hope that the forthcoming WTO Ministerial in Cancun will decide to open formal negotiations on such a framework.

- If these discussions were eventually to succeed, such a multilateral agreement would indeed for the first time create a set of binding international standards in the competition field. As for enforcement, the EU and many others however strongly believe that the rather cumbersome WTO dispute settling mechanism should only

be applied to one jurisdiction's competition legislation; it has no role to play in the review of individual cases.

- As encouraging as these trends are, we however also need to recognise that the mandate from Doha is rather limited in terms of the scope of issues under discussion. Apart from such subject as the modalities of co-operation and capacity building, the only substantive anti-trust issues under discussion are the 3 core principles (non-discrimination, transparency, procedural fairness), as well as the prohibition of hard core cartels. So whatever the outcome of Cancun - a multilateral agreement on competition would in itself not be sufficient to address all issues that globalisation is putting onto our agenda.

- Secondly, I would like to comment upon how **co-operation between enforcement agencies** can go already a long way in addressing these challenges posed by globalisation. As you know, in the Community we are currently undertaking a decisive movement towards a more decentralised enforcement of our anti-trust rules. We believe that the most efficient system of enforcement is one where the authorities best placed to deal with a certain case should be the ones responsible for handling it. In a future common market of 25 or more member states, an exclusive reliance on central enforcement does not any more look like an adequate framework. That is why we are creating the European Competition Network. In order to avoid distortions of competition from one jurisdiction to the next, however, it is imperative we all rely on one common substantive standard.

- Now turning to the international level, it has indeed to some extent been a similar rationale that has lead us to create the International Competition Network, some 20 months ago. As far as anti-trust issues are concerned, we are currently concentrating on multi-jurisdictional mergers. The idea is to develop best practices in this field that we invite all ICN Members – already 79 agencies have joined the ICN – to implement in their domestic regimes. If this succeeds - and I am very positive in this respect – this should lead over time to substantive convergence. This convergence should both greatly facilitate our co-operation between agencies, and also significantly ease the regulatory burden created by the requirements of multiple filings. As for as I can see, this soft-law approach has been by far the most successful, even if we have to be a little patient with full implementation at the domestic level. Let me just mention here in passing that the Commission, as part of last year's merger review, has already taken active steps to bring our merger regulation fully into line with the ICN standards.

- Looking at where we are with the ICN at this moment, I think that it is fair to say that a lot has been accomplished in a remarkably short period of time. In my view the ICN is delivering on its pledge to bring added value to the practical work of agencies. More concretely, I hope that by the time the forthcoming Second ICN Annual Conference in Mérida is completed, we will have adopted a total of 7 very detailed "Recommended Practices" in the field of international merger control, in addition to the set of "Guiding Principles" that were already approved by ICN Members at last year's Naples Conference.

- In this context, it may be useful to make one additional point. An effective co-operation of agencies pre-supposes that effective agencies exist in many parts of the world. This is not yet the case everywhere, although many countries are

currently undertaking great efforts to build up such capacities. In order to support this capacity building process, the ICN last year decided to set up a new working group, and asked me to co-chair that project. We are currently looking into which challenges typically need to be addressed when setting up competition authorities in developing and transition economies. We are also discussing how best to support this process from the outside with technical assistance.

- Finally, let me turn to the issue of **regional integration**. This is an interesting aspect for a number of reasons.

- First of all, we have to admit that not all transactions that the press easily labels as 'global' are really global in the true sense of the term. More often than not, their effects will rather be concentrated on one or two continents. Regional entities, acting alone or in co-operation, will often be well-placed to deal with these transactions appropriately.

- Secondly, regional competition bodies are currently mushrooming around the world. Ten years ago, the Commission was alone in this field. Today, we not only have the *EFTA Surveillance Authority*, but efforts are underway in such diverse places as the *Andean Community*, the *Caribbean Community*, *the Common Market for Southern and Eastern Africa* and the *MERCOSUR* to set up regional enforcement agencies. It is probably a little known fact that the Commission, through its development assistance, is supporting most these bodies with finance and expertise. Who knows, one day other regions may decide to follow suit. Looking a bit further ahead, we may even see the creation of a Free Trade Agreement of the Americas, spanning the whole American continent.

- These regional authorities, once functioning, play a double function. One the one hand, they will be able control themselves transactions that are trans-national, but still regional in scope. On the other hand, they will make co-operation between the various regions of the world much easier, since they provide a one stop shop for anti-trust enforcement in several jurisdictions. Maybe one day in the future we will see something resembling a patchwork of regional authorities.

- Finally, it is interesting to note that the discussions about setting up a regional authority with an appropriate legal framework in themselves contribute to the gradual emergence of convergence.

- To **conclude**, I think that the winning formula will be not be one of "either – or" between the approaches highlighted above. In my view, the best policy mix that we can offer is one combining regional, decentralised and centralised approaches. This is indeed what we have been modestly trying to achieve over the last couple of years.