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Closing remarks: Convergence in the ECN, the way forward

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Introduction

Chairman Juhász,
Ladies and Gentlemen,

Allow me to start by thanking the Hungarian Presidency and my colleagues from the Hungarian Competition Authority for hosting this edition of the **Competition Day in Budapest** and for dedicating it to the topic of convergence in the European Competition Network (ECN).

Seven years ago, on the 1st of May 2004, the European Union embraced a new wave of enlargement, welcoming new Member States, including Hungary, on board. It is no coincidence that the same day marked a new era of modernisation for EU competition law, with the entry into force of Regulation 1/2003, the most far-reaching innovation in the field in over forty years, as also mentioned by András Tóth.

The ECN has played a leading role in turning this modernisation from an aspiration into reality.

Once granted the power to deal first hand with the public enforcement of EU law, national competition authorities have put their new tools to good use. As a result, since May 2004, more than 1350 investigations have been opened on the basis of the same substantive rules and significantly levelling the playing field for businesses operating in Europe.

1. Where we've come from: convergence at the source with the entry into force of Regulation 1/20003

A. The construction of a coherent system of enforcement

From a substantive point of view, Regulation 1 was indeed a milestone: it conferred powers upon national competition authorities and Courts to directly apply Articles 101 and 102 TFEU and this meant a step change in enforcement across Europe.

The Regulation sought to reconcile the requirements of substantive coherence with the existing procedural diversity of national competition authorities. This implied that competition authorities would apply the same substantive rules but could follow different national procedures. The Regulation thus contained only a few rules on procedures, such as on exchange of information and other cooperation mechanisms.

From the outset, it therefore became evident that the ECN would be the vehicle to drive convergence in order to ensure the coherence of the overall enforcement system. As Bruno Lasserre said it earlier today: convergence is the underlying theme of Regulation 1.

Before turning to the specific details of how we built convergence in practice, I would like to make a brief reference to the very useful guidance that we have received from the Courts during these years, both at European and national level on the relationship between the various actors in the ECN.

This guidance has been instrumental in strengthening the coherence of the overall system.

For example, only three weeks ago, the European Court of Justice (ECJ) ruled in the *Tele2Polska* case on the decisional powers of Member States. Bruno Lasserre and László Zlatarov also referred to the ruling this morning.

- The Court explained that when a national competition authority finds that the conditions for the application of Art. 102 TFEU are not met, it can only adopt a decision declaring that there are no grounds for action. The national authority cannot therefore take a "negative" decision on the merits of the case under EU law and state that Art.102 has not been breached.

- The Court clarified that given that such power is not foreseen by Regulation 1/2003, this type of negative decision could undermine the uniform application of the Treaty rules and could prevent the Commission from finding at a later stage that the practice in question breached EU law.

Since national courts have also often considered issues relating to the implementation the European competition rules, the Commission intervened several times as "*amicus curiae*" in national landmark cases in order to ensure the coherent application of the EU antitrust rules.

- We intervened for example in cases relevant for the application of the substantive competition rules – such as the "*Garage Gremau"* case concerning the interpretation of the concept of quantitative selective distribution with regard to motor vehicles; "*Pierre Fabre*" regarding selective distribution agreements; or the Irish "*BIDS*" case concerning the definition of a restriction by object.

- We also intervened in cases relating to the effectiveness of procedures and sanctions, such as the Dutch *X-BV* case on the "*tax deductibility"* of EU fines. The ECJ held that the Commission could intervene in domestic proceedings concerning the tax deductibility of a fine that it had imposed on an undertaking for its involvement in a cartel. The Court held that the effectiveness of the fines imposed by the national or Community competition authorities is a condition for the coherent application of the EU competition rules.

The guidance provided by the Courts has therefore strengthened the coherence of our enforcement system and facilitated the application of the same substantive rules across Europe.

B. Convergence in practice

It is clear that the success of the ECN derives to a great extent from its pragmatic approach. In addition to case-driven cooperation, the ECN Working Groups have created numerous channels for cooperation. It is indeed at their level that convergence comes to life.

I can easily illustrate this point by referring to the activity of the "Working Group on Cooperation Issues and Due Process", that is chaired by the Hungarian and the German Competition Authorities.

- In 2004, the Working Group was set-up to discuss the "transitional issues" that arose immediately after the coming into force of Regulation 1. ECN Members needed to reflect together on issues that came along with the introduction of the new enforcement rules, such as how to deal with notifications made prior to May 2004 or how to deal with the practical implementation of the information obligations laid down in the Regulation.

- In 2006, the Working Group changed its focus to "cooperation issues" since most of the "transitional" problems had been resolved successfully. The Working Group went on to work on practical cooperation matters relevant for effective enforcement such as the functioning of Advisory Committees, mutual assistance in investigations or early information on leniency applications.

- Recently, "due process" was added to the areas of focus of this Working Group, to mirror the efforts made across the ECN to improve transparency and accountability in antitrust proceedings, in full respect of the rights of parties. In this respect, you have also heard this morning the intiatives announced by Vice President Almunia.

The evolving focus of this Working Group provides an illustration of the road we've travelled together since 2004. It shows the deepening of our cooperation and the way the relationship between ECN Members has developed and adapted to change.

The same type of hands-on cooperation took place in relation to industry sectors, in the "ECN sectoral subgroups". There is now a tremendous pool of expertise in these Subgroups spread over key sectors such as food, energy, banking and payments, pharma and so on. This has allowed ECN competition authorites to get a better grasp of market dynamics, to coordinate their approaches and to take decisions that have the right impact in practice.

The success of the ECN in terms of convergence-building has also come from voluntary and informal cooperation. The sheer number of informal consultation requests that circulate through the ECN's web is an illustration of how much Members have come to rely on the practical support of their peers.

- For example, Members discuss how best to articulate commitment decisions in ways that will ensure that the commitments are well defined and will allow us to monitor that markets remain open to healthy competition. In fact, such informal requests have become a de-facto promoter of best practices on issues of common interest.

- The exchange of information has also proven very useful in the context of advocacy initiatives that Competition Authorities promote with their Governments. ECN Members can leverage each other's advocacy efforts and use the ECN expertise in assisting their Governments to draft legislation that fosters competition and open markets. This has proven to be crucial, particularly in times of economic difficulties, as also mentioned by Bruno Lasserre earlier.

Concluding, we can all be proud of the work done so far, since our cooperation has successfully contributed to the coherent application of Articles 101 and 102 TFEU across Europe.

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In the coming years, we should continue to set ambitious objectives for our Network. The Report on Regulation 1, published in 2009, already emphasised the need for convergence as one of the areas to focus on.

This is why I would now like to say a few words about the challenges ahead.

2. Challenges ahead and way forward

A. Success in addressing "first level" issues

We are far from a general harmonisation of procedures or sanctions at EU level, but through formal and informal cooperation, ECN Members have succeeded in substantially reducing what we could label as "first level" issues. This means that we have come to a broad alignment of the main powers of competition authorities within the ECN over the last years.

For example, an alignment of the investigative powers of the national competition authorities has taken place concerning inspections in business premises; and authorities enjoy the same powers to seal premises and records, or to ask for oral explanations. In practice, the majority of authorities confirm that there are no significant differences with regard to the Commission powers under Article 20 of Regulation 1.

Active cooperation on investigations has become reality: since the entry into force of Regulation 1, all formal requests for assistance for inspection under Article 22(1) have been followed by effective assistance. We have had examples with the inspections by Italian and Spanish NCAs into fruit packaging, by Germany and Austria on fire-fighting vehicles (2006) and so on. Art 22(1) has therefore proved to be a very useful tool for the effective enforcement of Articles 101 and 102 of the EC Treaty.

Similarly, convergence has taken place on the power to adopt commitment decisions, interim measures and to carry out sector inquiries.

Leniency is another area where considerable convergence has also taken place: 26 Member States now operate a leniency programme and have largely these programmes to the ECN Model adopted in 2006.

"First level" convergence has also taken place with regard to fines. All Member States provide for pecuniary sanctions on undertakings. As to the level and the method for the calculation of fines a certain alignment has also taken place as highlighted by the ECA Report on convergence of sanctions or the recent publication of fining guidelines in France.

B. "Second level" issues to be tackled

Nevertheless, although we have achieved a remarkable level of convergence over the last years with regard to "first level" procedures, we should not underestimate the differences that still exist.

These differences relate to important procedural issues that may impact on the effectiveness of enforcement actions.

It is therefore understandable that our stakeholders call upon us to work towards a further harmonisation of procedures within the ECN.

For instance, although important steps have been taken, leniency procedures still differ in certain aspects. This is why, after the adoption of the Leniency Model Programme in 2006 and the evaluation report of the state of convergence of 2009, we have now engaged in in-depth discussions on whether and how more could be done in this area.

Similarly, the modalities for initiating cases and the exact nature and pace of procedural steps leading to enforcement decisions differ between authorities, to a certain extent. For instance, whereas virtually all competition authorities have the power to adopt commitment decisions, the procedures and the practice vary on issues such as preliminary assessments or market tests. In this area as well, we are already holding further discussions at ECN level to see what needs and what can be done.

Although based on a different legal framework, I would also like to highlight our joint efforts in the area of mergers.

In the merger area, there has been no harmonisation per se, although national merger laws share many similarities. Nevertheless, we have started working together and a Merger Working Group was set-up in January 2010 to foster more convergence and cooperation. This work is important since there are still many multijurisdictional mergers in the EU. In 2007 alone for example, 240 transactions in the EU fell outside the Commission's competence and had to be notified with two national authorities and about a hundred of these were notified in three or more Member States, which required 360 parallel proceedings.

The Working Group has now published draft Best Practices for cooperation among EU national competition authorities. The public consultation closed last week. The purpose of these Best

practices is to facilitate cooperation and information sharing between national competition authorities and to avoid inconsitent outcomes.

Going forward, in the fields where further convergence is desirable, the policy discussions within the ECN should explore the means by which such procedural convergence can be achieved.

Is it enough to use soft harmonisation via Model Programmes, Recommendations and Best Practices as mentioned by panelists this morning?

We are discussing such issues at the meetings of the Directors General of the ECN, where we reflect together on the strategic steer of our Network, and also in the various Working Groups.

At the same time, we have to be realistic about convergence. There are certain areas of law that are deeply rooted in the national legislation of Member States and which may for instance relate to these countries' constitutional law. In such areas, it is difficult to envisage full convergence.

It is more likely that a certain degree of divergence will persist in a system of decentralised application of EU antitrust rules, at least in the short term, as also pointed out by Frédéric Jenny earlier. But that should not stop us from working together in those areas where convergence can further contribute to the effectiveness of competition enforcement and policy. This is not only in the interest of ECN Members, but will also benefit to businesses operating in Europe and the consumers to which these businesses sell.

With this in mind, comprehensive fact-finding projects with regard to decision-making powers, investigative powers and leniency have been recently launched within the ECN. In-depth discussions on whether and how more could be done in these areas are currently ongoing and we will jointly evaluate the need for further convergence. The views of the business community on what areas of procedural alignement would be desirable are also very important.

Conclusion

The ECN is one of the success stories of the last years. Together, national competition authorities and the Commission have created an efficient Network that is flexible enough to adapt to change and to take on new challenges.

Through formal cooperation, informal exchanges of information and with the support of the European Courts, we have succeeded in building a coherent system for enforcing EU competition rules. Together, we have tackled the first and most pressing challenges that arose after the entry into force of Regulation 1.

The next challenges relate to more complex areas that touch upon some of the procedural differences that exist at national level. I am confident that through an open dialogue and a pragmatic approach, we will be able to address these issues too.