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Trends in Cartel Enforcement and Policy

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Ladies and Gentlemen,

It gives me great pleasure to be here today at my first ICN Annual Conference and I would like to thank the Turkish Competition Authority for organising an event which can already be called a great success.

ICN Annual Conferences offer a unique opportunity for exchanging our experiences in various fields but also to benchmark and reflect critically on our own systems. It also offers an excellent occasion for fostering informal contacts between the Agencies, including at operational level. These contacts and exchanges are the glue that holds the ICN together and provides inspiration for many of the projects that come out of it.

The increased integration of the world economy means that we need a multilateral response to anti-competitive practices. That goes for cartels in particular. Bilateral cooperation is of course an indispensable solution to specific instances of anti-competitive behaviour, but the ICN provides a multilateral framework, which is unique, and which has proved its value in the fight against cartels.

The European Commission, more particularly the Directorate-General for Competition, is proud to lead, together with the Hungarian Competition Authority, the ICN Cartel Working Group. It is in this capacity that I will provide a short introduction to this morning's plenary session on Trends and Developments in Cartel enforcement.

Detering cartels and the work of the ICN

In the past decade we have witnessed some remarkable steps forward in the area of anti-cartel enforcement, across the globe. The grounds for the successes in tackling cartels can probably be summarised by one word: dedication. Many jurisdictions have become committed to introducing anti-cartel legislation and to putting that legislation into practice. Others have stepped up their existing efforts and have put more resources to the task. For most agencies, enhanced sanctions, be they on corporations or on individuals, have helped to hammer the message down: cartels inflict serious damage on the economy and enforcers are there to deter, with the overall aim of prevention.

In order to maintain the credibility of our respective enforcement programmes it is key to deploy the necessary resources, enforcement tools and techniques such as the 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 agencies. This is where the multilateral work in the ICN comes in most usefully as many of us have experienced.

The work undertaken in the Cartel Working Group provides an important contribution to furthering the cause of anti-cartel enforcement. I would especially like to highlight the usefulness of the Anti-Cartel Enforcement Manual, the exchanges of experiences that take place by way of the Enforcer Roundtable conference calls as well as the annual Cartel Workshops, which provide a venue for face-to-face contacts and exchanges between anti-cartel enforcers from management to case-officer level.

Some main trends in cartel enforcement

Let me touch upon some of the main trends in cartel enforcement and the challenges before us.

Firstly, a striking development in the past decade has been the multiplication of immunity/leniency programmes around the world. The adoption of such programmes has not taken place without hurdles and doubts.

Introducing and applying an immunity/leniency programme is always a learning experience, for any agency, whether large or small, younger or more experienced. Any programme will require fine-tuning along the way, particularly one that introduces sanctions on individuals, something we don't do at EU level.

Immunity/leniency programmes are of course only useful to the extent that the cooperation provided by applicants actually contributes to proving the violation. It is natural for applicants - and this is a trend we have detected – that applicants want to provide enough to qualify, but also to limit their exposure as much as possible, if only to minimise follow-on civil damages claims.

From the agencies' perspective, the cooperation that applicants are required to offer should be whole-hearted from start to finish. However, if the cooperation is not whole-hearted, an applicant should face a credible risk of losing the lenient treatment which is on offer.

The instances I just highlighted apply to cases where leniency is the trigger for an investigation. But the likelihood of being caught and prosecuted by an enforcement agency without the initial use of the leniency tool remains of fundamental importance. If such ex-officio detection does not exist, the proverbial honour amongst thieves might remain in place. In other words, agencies will be ill-advised to rely predominantly on leniency as a case generator. In turn, ex-officio detection by the authority will serve as a catalyst for leniency, as the perceived risk of detection has increased. We should therefore jointly work on methods to enhance such detection through an exchange of experiences. The achievements of one agency can bring benefits to another. I am therefore glad to see that one of the break-out sessions of today has been dedicated to this topic and that future work in the Cartels Working Group will equally focus on this theme.

The successes in cartel case work, based on leniency or not, brings me to a second trend: more intensive and tougher enforcement by competition agencies.

As will be developed by the panel afterwards, this is highlighted by an increase in the number of cases prosecuted and the increasing level of fines and other sanctions imposed on companies and their executives who are guilty of cartel behaviour. This

holds true for anti-cartel enforcement in the European Union, both at the level of the European Commission and at the level of the EU Member States, which have increasingly considered the fight against cartels as their priority.

As an example, I can point to the fact that in the first half of the past decade (i.e. 2000-2004) the European Commission imposed fines to a total of approximately EUR 3.5 billion in 30 separate cases whereas in the second half of the decade (i.e. 2005-2009) the amount of fines imposed in 33 separate cases was EUR 9.7 billion; this is almost three times as much as in the first period. The increase in our fines is a reflection of the fact the European Commission has increasingly dealt with EEA-wide cartels involving big multinational firms but is also due to a change in our guidelines on the imposition of fines, which now refer to the value of the sales of goods or services to which the cartel behaviour relates and to the need to reflect the full duration of the cartel infringement. Compared to past practice (where we used to divide infringements in different categories, each of which corresponded to a particular starting amount) this methodology is now considered to appropriately reflect the economic importance of the cartel infringement and the weight of each company therein.

An essential feature of all enforcement is a guarantee of due process and the rights of defence. This has been much debated recently, at least within the European Union but I think similar discussions go on elsewhere. I am convinced that we have a sound and robust enforcement system in Europe that compares to the best in the world but we should always look for improvements. The European Commission has recently been working on best practices, amongst others in the field of antitrust, in order to achieve increased transparency and predictability in our proceedings. Operating in a transparent and predictable manner is beneficial to businesses, lawyers and academics alike. This is also one of the key benefits of the projects that are being put together under the umbrella of the ICN, not least through the involvement of NGAs (Non-Governmental Advisers) in our work.

A third trend that I would like to highlight here this morning is the transition experienced by certain jurisdictions. Some have gone from an administrative regime to a dual track administrative/criminal regime, whilst other countries have – also for

understandable reasons - modified their dual criminal/administrative regimes in favour of an administrative only system. The adoption of sanctions on individuals, regardless of their qualification as criminal or administrative, has brought a number of issues to the forefront. Where combinations of regimes are the preferred option, or where agencies operating under different regimes wish to collaborate by exchanging evidence, they may face challenges in making things work. This is in particular because of the potential impact of exchanging information on parties' incentives to apply for leniency. Lessons in this complex area are being learned as we speak – and the upcoming panel of experienced enforcers will hopefully give more insights into this issue - that will no doubt will filter into ICN work as we go forward.

Conclusion – a last trend in cartel enforcement

Finally, dear colleagues, this brings me to a last trend in cartel enforcement, which I would like to mention. That is the ever intensifying cooperation between enforcers. Let me take this opportunity to express my strong support for the continued efforts, both within the framework of the ICN, as well as regionally and bilaterally, to strengthen the cross-border cooperation between enforcement agencies, whether they apply sanctions to corporate entities and/or to individuals. Each agency naturally has to act within the limits of its own jurisdiction's rules and regulations. Cartels, however, often operate across jurisdictional borders across the world and this is why international cooperation is vital to combat and deter them.

Ladies and gentlemen, thank you for your attention. I will now pass over to Scott Hammond and the panel of experts.