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The ECN, convergence and enforcement of EU competition law: achievements and challenges

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Ladies and Gentlemen,

The national competition authorities are our partners. We meet several times a year, and I think it is safe to say we have got to know each other quite well.

The importance of the national competition authorities cannot be overstated. They operate alongside the Commission, and are to a great extent responsible for the convergence of competition law across the EU. Yet it is almost entirely up to the Member States to decide how they should be set up and operate. And indeed, many of them have additional tasks.

Today is a good occasion to take stock of achievements since the introduction of Regulation 1/2003, and to look ahead and to discuss what can be improved in the area of convergence.

Regulation 1/2003 decentralised the application of EU antitrust rules. It allowed national competition authorities and national courts to apply EU rules in full to anti-competitive practices that can affect trade between Member States.

The regulation gave birth to the European Competition Network (ECN).

It set up a system in which all actors apply the same rules – EU competition rules – in a coherent manner. But it left it to the Member States to determine the institutional set-up of their enforcement systems. They could opt for administrative, judicial, or mixed systems. The regulation also left Member States the freedom to determine their own procedures and sanctions. Apart from a general obligation on Member States to ensure effective enforcement, these matters are not regulated or harmonised by EU law.

Yet convergence is taking place in practice. Basically there are two types: firstly, convergence of the application of substantive European law. And secondly, convergence of the tools required for the enforcement of that law: the fine-tuning of procedures on a voluntary basis by Member States. National competition authorities and the European Competition Network play a key role in both types of convergence, substantive and procedural, which I would now like to discuss in order.

The application of substantive EU competition law

First, let me look at the application of substantive European Law

A single market requires a level playing field. For that, substantive EU competition law has to be applied consistently throughout the EU. Companies doing business in the European Union need to be sure that Member States do not have different attitudes towards the legality of their commercial activities. To ensure a level playing field, the Regulation introduced mechanisms to establish convergence in the application of the law.

Let me give you several examples of these convergence mechanisms. These are well known, but let me repeat them for the sake of clarity. For instance, national competition authorities routinely inform the European Competition Network of any on-going investigations. They also inform the Commission of decisions they intend to take. All competition authorities may formally and informally consult each other in the network, and do so very often. Finally, the Commission even has the option of taking over a case from a national competition authority to ensure coherent application, which so far it has never had to implement in practice.

The European Competition Network can look back on an imposing array of achievements over the last ten years. To begin with, since May 2004 members of the network have informed each other of in a total of 1,650 cases under investigation. In the same period,

national competition authorities have notified the Commission of an impressive number of envisaged decisions: 689 at the most recent count, on 31 August 2013.

In their case work, NCAs have tackled a large variety of illegal agreements and commercial practices, from hard core cartels and other horizontal agreements, to vertical restrictions to abuse of dominant positions.

NCAs have targeted very diverse sectors. The focus lies on Energy, Transport and Food and Retail, which are all very important sectors for the European economy.

Much of this work is discussed in the working groups hosted by the ECN. As a result there is an increasing convergence on how to approach anti-competitive practices in different areas.

Let me give one good example of the key role played by the European Competition Network in bringing about convergence: the work carried out in the payments sector.

In its Green Paper on cards, Internet and mobile payments, the Commission identified a number of obstacles to an integrated European payments market, and identified several key actions needed to improve the situation. On the competition front, the Commission has adopted decisions or is in the process of running proceedings against Mastercard and Visa regarding prices charged between states and, ultimately, their customers and consumers for using debit and credit cards in Europe.

But the Commission is not alone in undertaking this action. National competition authorities in Germany, France, Hungary, Latvia and Greece are also enforcing competition law in this area. Some NCAs are conducting sector enquiries on payments, and are delivering opinions to influence future regulation. To be effective, all these different approaches need to be consistent and need to reinforce each other. And this is where the European Competition Network has proved its relevance.

Let me give another example of an area where the European Competition Network has played a very relevant role: the Agriculture and Food Retail Sector. In this area both the NCAs and the Commission are very active: they are dealing with many cases and they are working hard in the regulatory field. All of this calls for a coordinated approach.

NCAs have also played an important part in advising legislators on laws aimed at opening up markets and fostering competition. Here, the ECN provides a framework of mutual inspiration and support. Sometimes, joint advocacy takes place, as was the case, for example, with the joint resolutions on CAP reform of December 2012.

So in sum, there have been sizeable achievements in the last ten years in terms of the effective and coherent application of substantive EU competition law.

Convergence of procedures and sanctions

I would now like turn my attention to the second type of convergence I mentioned: the way, or rather the ways, in which the law is enforced, i.e. procedural enforcement. This area was largely left to legislators in the Member States.

Competition enforcement concerns fundamental matters such as the ability of authorities to impose fines, the investigative powers of NCAs, and the power of national authorities to adopt decisions, find infringements and impose remedies. After ten years, we see a mixture of convergence and divergence in these fields. And divergence carries the risk that it can negatively affect competition enforcement.

From very early on, the ECN has recognized the benefits of increased convergence, not only regarding application of the law, but also regarding procedures and the sanctioning of infringements. In parallel to its efforts in bringing about convergence in the

application of the law, the ECN has been working on a purely voluntary basis to align procedures and sanctions.

So, why is the convergence of procedural tools important for effective enforcement? Let me give you some examples.

A key achievement of this type of convergence is the adoption of leniency programmes throughout the EU. To be successful in fighting cartels, it is important to have a leniency programme allowing companies to denounce cartels and to cooperate with competition enforcers in exchange for immunity from fines or a reduction in fines. By far not all of the Member States' competition authorities operated leniency programmes ten years ago. The ECN prepared a blueprint for an effective leniency programme (appropriately called the 'ECN Model Programme') which has been very successful in inspiring policy in the Member States. All national jurisdictions now have leniency programmes.

Another good example of convergence is the voluntary adoption by Member States of new powers given to the Commission in Regulation 1/2003. Take, for instance, the power to adopt instruments similar to commitment decisions, which was introduced in Article 9 of Regulation 1/2003. Companies can offer commitments to meet concerns expressed by the Commission. If the Commission finds the commitments adequate, it may accept them and make them binding by formal decision. The main advantage is that these commitment decisions can be taken relatively quickly, so that competition concerns can be resolved speedily. A commitment decision avoids a prohibition decision and a fine. But if companies breach their commitments, they can be fined up to ten per cent of worldwide turnover for that breach as a violation of the law in its own right. Earlier this year, this type of fine was imposed for the first time on Microsoft, to the amount of €561 million.

Virtually all competition regimes in Europe have now introduced the possibility for commitment decisions. Almost twenty-five per cent of decisions by national competition authorities applying EU competition law have been commitment decisions. The trend is towards further increase.

Other examples of adoption of new powers given to the Commission under regulation 1/2003 include the power to affix seals to secure evidence during inspections, and the power to search homes of directors for incriminating documentation.

The Commission itself has also encouraged Member States to streamline procedures. It has, for instance, promoted reforms aimed at enhancing the effectiveness of competition enforcement in the context of the economic adjustment programs for the programme countries: Greece, Cyprus, Ireland, Portugal and Romania.

As a result of all these different efforts, there has been a sustained trend over the years towards convergence through changes in legislation and policy initiatives in practically all Member States. This includes – but is not limited to – recently adopted laws and proposed draft legislation in Austria, Belgium, Cyprus, Finland, Germany, Greece, Luxembourg, Malta, Poland and Portugal.

The Commission considers it particularly important that Member States have independent authorities capable of enforcing competition rules. As part of the European Semester, the Commission has presented a number of recommendations to Member States, asking them to remain vigilant and to pay special attention to the independence and effectiveness of their competition authorities. We have also been closely examining the resources of NCAs, and have been looking at whether they have sufficient staff and budget to carry out their duties. This is always important, but keeping up the tools for an

efficient enforcement of competition rules is especially crucial at times of budgetary constraints.

Convergence: the road ahead

The more or less spontaneous, voluntary convergence of procedures has its limits, however. Effective enforcement and convergence not only depends on the good will, integrity and hard work that national competition authorities have shown. They also depend on review courts, governments and law-makers, stakeholders, and the general public.

Fortunately, as a general rule, governments, politicians and many stakeholders and citizens in the EU nowadays are aware of the fact that independent and effective competition authorities are necessary for the economy to function properly.

Even so, for various, sometimes understandable reasons, divergences continue to exist. For instance, there is a jurisdiction where sanctions can never be imposed in a civil procedure, but only in criminal proceedings. A certain number of Member States have not introduced the possibility for home searches or the possibility for structural remedies. Unfortunately, we also see some situations where convergence is rolled back, for instance to comply with court rulings. We also see existing and well-used powers of national competition authorities being scrutinised in the context of a restructuring exercise. In one case the advocacy powers of the national competition authority came up for discussion, even though they were ultimately retained.

In conclusion: though we are levelling the playing field, bumps remain where procedures and sanctions are concerned. As long as voluntary convergence can be questioned and even rolled back at any time by national legislators and national courts, it will remain a fragile process.

In spite of all the progress, we see in some instances the limits of the natural convergence process. So the question is how we can ensure, or continue to ensure, that NCAs are equipped with a minimum standard of investigative and decision making tools. How can we ensure that EU competition rules are applied effectively throughout Europe, which is, after all, the requirement laid down in Regulation 1/2003, so that undistorted competition can take place anywhere in Europe in a level playing field, irrespective of the authority dealing with the case?

Closing remarks

The issue of substantive and procedural convergence is an important, but not the only challenge lying in front of us when it comes to creating a level playing field in Europe that will allow us to profit fully from its internal market in overcoming the crisis downturn that has been going on for far too long. I hope that the European Competition days such as the one today here in Vilnius will contribute to giving the answer to those challenges.