

THE FUTURE OF THE EUROPEAN COMPETITION NETWORK

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I am grateful to be invited to speak at this Vth Intertic Conference on Antitrust Policy hosted by my Italian colleagues, and especially to be granted the privilege of discussing the forward-thinking, hot issues that give its edge to life in the European Competition Network (ECN).

I would like to thank particularly President Giovanni Pitruzzella, Commissioner Salvatore Rebecchini and Professor Federico Etro for their warm welcome and their hospitality.

The ECN, young as it is, has been so far a splendid success story, and one that is worth telling, since it is an encouragement to regional integration schemes everywhere, notably for Asia, Africa and Latin America. As far as I am concerned, I feel especially attached to this project, since I was appointed as President of the French authority only two months after Regulation 1/2003, the cornerstone of the ECN, came into force and I have been since then in position to observe the development and the achievements of the network.

Looking back, convergence, consistency and cooperation have been the three building blocks of the ECN since its inception in 2004.

Convergence has been its prime achievement. Having decentralised the application of EU competition law, the network set up by Regulation 1/2003 has managed also to ensure its uniform implementation, not only because convergence was a legal requirement, but also because all members have been eager to play by the book and, furthermore, to go for voluntary convergence on procedural issues.

Consistency has been a by-product of the general EU principles of equivalence and effectiveness, which in competition law have materialized in a specific manner. Consistency has established itself not only as a policy objective but as a true requirement, for instance on such prominent issues as the method for the calculation of fines and the ability of competition authorities to defend their decisions before the review courts, and thus has been taken on by the European Commission and National Competition Authorities (NCAs) as a feature of their dialogue.

Cooperation, needless to say, is a key feature of the ECN, in that it has designed a practical, effective scheme for handling individual cases – joint investigations being a striking illustration. It is rather remarkable that cooperation has evolved from an “hub and spoke” logic, with the “hub” role devoted to the European Commission, to horizontal cooperation by member agencies between them.

We now have to go further together by widening and deepening the reach of the ECN.

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This three-fold approach has proven to be highly effective in order to strike the right balance between EU and national responsibilities, to raise awareness among ECN members of the interdependence between them, and to foster project-based solidarity.

Our shared success so far should make us confident that we can avail ourselves of the possibility to explore whereto the ECN could further extend its reach in order to better respond yet to the needs of enforcers, the business community and consumers.

Many of us trust that we can afford to be ambitious without resorting to mere wishful thinking: an “ever closer network” is desirable for agencies and for global and local players alike, and the means to that end are positively within our reach. There is no necessity to wait for some big moment of truth, since a few non-idealistic but effective projects are already underway or can be launched at no extra institutional cost. These I would like to discuss briefly this morning.

1. FOSTERING CONSISTENCY ALL ALONG THE ENFORCEMENT CHAIN, UP TO JUDICIAL REVIEW

1.1. Inclusiveness of the judiciary in the consistency of the enforcement chain

Competition law enforcement in the EU is actually not confined to the experts whose alliance makes up the ECN. We, competition agencies, are the first and foremost, but not the sole, step in the enforcement chain, which on the upstream level includes the review courts, and we should be wary to ensure that our concerns for an even interpretation of Articles 101 and 102 TFEU are shared by them.

I hardly need to remind any of you that the national courts can refer a case to the EU judiciary for a preliminary ruling, in competition law as in every area of European law (this mechanism was recently illustrated in France in the Expedia case, where the ECJ indicated to the French Supreme Court that it is was not bound by the *de minimis* principles when applying article 101 and 102 of the Treaty). This is in no way a minor feature, but it does not, and was not meant to, serve a link between enforcers and the judiciary. Somehow it can be viewed as an extension onto the European scene of the hierarchy of courts that each jurisdiction is accustomed to – one may want to say that it is a new, but still not so new, mechanism, insofar as it is a “vertical” relationship between judges, only beyond, or above, national boundaries.

1.2. Dialogue between competition agencies and national judges

What remains to be addressed, and entails a true shift of perspectives, is the necessity of a dialogue between competition agencies and national judges.

This “missing link” was partly made up for in Regulation 1/2003, most notably with Article 15 that enables the European Commission to submit an *amicus curiae* either at the request of a national judge, or upon its own initiative – 9 of those have been issued so far.

This mechanism allows for some degree of interaction between the European competition enforcer and national courts, which is extremely useful in its own right, and has been much contributing to strengthening the overall

consistency of the implementation of competition law throughout the EU².

Still, this is nowhere near any equivalent within the judiciary of the horizontal, collaborative relationship that is at work in the ECN.

To move forward more decisively, one may want to take the word of one of the most widely respected competition judges in Europe, Guy Canivet, a former President of the French Supreme Court (the *Cour de cassation*), and now a member of the French Constitutional Court, who as early as 2004 called for the creation of a network of competition judges, that may be set up from the existing network of civil and commercial judiciary, and would aim at exchanging best practices on a series of topics, including the assessment of economic evidence. A similar opinion was voiced out in 2008 by an equally prominent German Judge, Joachim Bornkamm, former President of the Association of European Competition Law Judges and President of the first civil chamber of the German Federal Court of Justice.

Both suggest the idea of a tighter network of competition judges across Europe, which would reflect the ECN, one step further – or should I say above? – along the chain of enforcement. My feeling is that it would be a real, positive breakthrough, testifying to the

specificities of competition law, and acknowledging the particular and sometimes exacting requirements that its implementation imposes upon the review courts.

Moreover, such a network would serve as a recognized partner for a thorough dialogue with the ECN on selected and strategic issues.

However the national arena is also not to be overlooked as an adequate level for dialogue between courts and competition agencies. The European Commission is clearly not available to bring its expertise in all cases every time the proper interpretation of competition law is at stake; it is the role of NCAs to appear before review courts to defend their decisions – as we know thanks to the *VEBIC* case – and by so doing to allow for the discussion not to be framed solely by the claims of the parties.

2. A FULLY-FLEDGED MERGER CONTROL SYSTEM IN EUROPE

2.1 Including merger review within the remit of the ECN

An area in which the ECN, for historical reasons, has not extended its reach yet is that of mergers. It is slightly puzzling that European agencies have travelled rather rapidly along the road to greater convergence in fighting antitrust infringements, but have remained more cautious in designing a common pattern on merger review. Different tests are still being used by different member States, time limits to complete merger reviews have not been harmonised, and companies have to file applications in several jurisdictions and interact

² The “*Pierre Fabre*” case, whereby the European Commission’s observation, in support of the *Autorité’s* position, that a “general and absolute prohibition” by the manufacturer on its distributors to sell goods to end-users on the internet should be regarded as anti-competitive “by object” was later fully endorsed by the ruling of the ECJ, was a case in point. In the “*Orange Caraïbes*” case, the European Commission also supported the *Autorité’s* position before the Court of appeal regarding the application of article 101 and 102 of the Treaty in this particular case. This position was eventually confirmed by the French Supreme Court (“*Cour de cassation*”).

with as many regulators. There is no equivalent of Articles 101 and 102 TFEU, no substantial law to speak of, no common procedural scheme, and agencies may not even enjoy the same powers. The European legislator has been rather shy and only defined jurisdictional rules to distribute cases.

Still, in view of the cost-effectiveness of offering a more unified landscape for merger review, any initiative to that effect deserves to be identified as a priority for European enforcers.

It is fair enough to say that there has been progress already in terms of voluntary convergence, regarding the substantive test of merger control, the theory of harm, main steps of notification and review. But a lot remains, and ought to be done.

2.2 The options to be considered to deepen the cooperation in the ECN

One may want to go for soft law and to rely on ECN mechanisms to further expand on substantive voluntary convergence. This may be achieved for instance by further voluntary convergence on substantive tests – one is for instance glad to observe that the Finnish, Portuguese and German agencies moved to adopt the SIEC test.

In a slightly tougher approach, another idea, in line with a rather bold proposal made earlier by former Commissioner Mario Monti, would be to have NCAs apply EU substantive merger control law to all mergers notified in more than one Member State. Such a mechanism would be useful so as to avoid a risk of discrepancies between the analyses developed by different NCAs in a same affair.

A particularly acute case where more convergence would have been necessary is the Eurotunnel/Sea France case. This case was notified in France and in the UK. On the one hand, in France, the Authority, on the other hand, in the UK, the Competition Commission, which was referred the case by the OFT, have examined the same merger, notified by the same undertakings and have analysed the potential effects on the same relevant markets. However, while the Authority authorised the merger subject to behavioural remedies that addressed vertical and conglomerate effects, the Competition Commission concluded in a preliminary public report, on the basis of a different counterfactual, that it may require additional structural remedies to address possible unilateral effects. In this affair, informal or formal exchanges between competition authorities – the Authority contributed to the market test in the UK pursuant to the current Best practices has not allowed so far the two agencies to reach a fully convergent analysis.

So as to conclude, the approaches mentioned have the advantage of avoiding too radical a shift of jurisdictions between the European and national levels that may stir opposition from Member States, while marking genuine progress for the single market – in the interest of all parties concerned.

3. THE ECN AS A NETWORK OF COMPETITION ADVOCATES

3.1 Advocacy, a fully-functioning tool of competition enforcement

One may not spontaneously think of advocacy as part of the “Issues of corporate interest emanating from the ECN”. Advocacy is about soft power in every form: conducting an assessment of the state of play in a sector, issuing a diagnosis on a competition concern, making recommendations to Government, speaking up in a public debate, helping toward capacity-building, etc. At first glance, such a course of action may be deemed not to fall in the remit of the ECN, which by law is concerned primarily with the implementation of “hard” antitrust rules, and possibly of a lesser interest to businesses.

But I would take a rather different view: competition enforcement is not only about striking a great blow at infringers, on a one-off basis, but works as a continuum, as a policy mix of “soft” and “harsh” actions, that together aim at maintaining or restoring the competitive functioning of market.

3.2 Advocacy, a manifold notion

It may designate a domestic activity, or “inbound advocacy”: this refers to the various missions of competition agencies in terms of market monitoring, promotion of corporate

compliance, and recommendations to government at large.

Advocacy may also designate a set of activities performed in the international arena, that may be referred to as “outbound advocacy” – whether it is the promotion of EU rules in international fora as a model of regional cooperation, or making the most of technical assistance offered to interested recipient countries.

3.3 Strengthening the advocacy pillar within the ECN

So far domestic or inbound advocacy has been of little concern to the ECN, a feature that is at odds with the fact that all of its member agencies have been devoting much effort, on an individual basis, to conducting sector enquiries, often in industries of particular interest to European consumers.

In this context, better coordination of such advocacy activities would offer strong leverage to all members of the antitrust community across Europe. One striking example can be found in the food sector: since 2005, no fewer than 13 agencies have completed market enquiries, leading to the emergence of a pattern of highly interesting common findings. Of course, national agencies took into account each others’ reports, and exchanged on methodological issues, on a case-by-case basis as well as at ECN level. But maybe coordination could take place at an earlier stage, while plans to launch an inquiry on the same topic are being devised by several agencies.

It would also be an upgrade for the standing of “inbound” advocacy in the ECN if joint sector inquiries could be conducted by groups of

NCA's, in industries of particular interest, sharing similar features across borders. There is no doubt that the impact on public authorities and stakeholders would be significantly enhanced and this would contribute to further coordination of public debate within the EU.

4. UPGRADING CONVERGENCE AND CONSISTENCY IN MATTERS OF ANTITRUST

Now that I have ventured on far-off grounds and suggested that the realm of the ECN be enlarged to include judicial review, merger control and even advocacy, it is probably time to somehow retrace my steps and look at how we may also want to consolidate its core subject matter, that is: the implementation of EU antitrust rules.

4.1 The Model Leniency Programme

The first topic that comes to mind is leniency. This instrument is being increasingly used to prompt antitrust investigations at the national and, to an even greater extent, the European level. The ECN has much encouraged the adoption of leniency programmes throughout Europe – all ECN members have one by now, which is quite remarkable since only 4 of them had one only a decade ago!

Voluntary convergence on the main elements of such programmes was also made possible thanks to the ECN Model Leniency programme, issued in 2006, and co-drafted by the French and British authorities and the work which was done since 2010 so as to improve this model.

Indeed, the heads of the ECN competition authorities have approved in November 2012 several amendments to the Model Leniency Programme which all together contribute towards strengthening the attractiveness of the leniency procedure.

So now would be time to try and meet further, secondary objectives, such as the prevention of forum shopping and boosting confidence between NCA's when exchanging confidential information.

4.2 A strengthened cooperation as regards sanctions

The other main issue I would like to touch upon in terms of improved convergence in antitrust sits at the other end, so to speak, of the enforcement process, and that would be the calculation of fines.

To put it more bluntly, the issue I would like to raise is: how can we belong to one network when we have different practices in terms of fines?

The fact is, quite simply, that all ECN members enforce the same substantive rules, but still depart when they apply financial sanction to the same facts. This is a not insignificant hindrance to our efforts to achieve greater consistency of our enforcement policies – not to mention the blurred message sent out to the business community as well as consumers.

This is why the fining guidelines adopted in 2011 by the Authority were drafted so as to be in line with European standards set forth by the ECA in its "Principles for convergence on pecuniary sanctions". To us, this was a fundamental requirement – and not only because we had co-drafted these ECA principles with the Italian Competition

Authority. It is the case that at least a dozen other NCAs took into account these same principles when drafting their own guidelines. Incidentally, it is worth noting that competition agencies are the only regulators who take such great care to provide reasons for their decisions and publish guidelines on how they proceed! It is now being acknowledged by all ECN members as a subject matter of utmost importance, which ought to be looked at and advanced.

The way to proceed might be through, at first, a stock-taking exercise, so as to review existing national policies and undertake a benchmark based on the ECA principles; then we may move forward in the convergent implementation of these principles on a number of issues: the value of sales, upon which the calculation of fines is based, or the notion of the inability to pay and the management of the related cases.

This would be a substantial new development for the ECN, and one that can only be called for in consideration of the benefit to be accrued for the consistency, effectiveness and predictability of EU competition law enforcement.

4.3 Collective action: the major gap of EU enforcement

I will end by mentioning the question of collective actions.

In the US, private enforcement is the standard antitrust enforcement tool: 90 to 95 % of antitrust cases in federal courts are privately initiated.

The EU is in a somewhat mirror-inverted situation: public enforcement by the European

Commission and by NCAs is and will remain the main pillar of antitrust enforcement.

While not embracing the US litigation style, the EU should address the enforcement gap and do it in its own way by (i) building on the success of public enforcement, (ii) fostering follow-on actions and (iii) pursuing a compensatory aim.

This would also boost the support to competition regulation on the part of the general public: end-consumers should be compensated when they are harmed by anticompetitive practices, especially cartels in consumer goods.

But the European way is also effective in preventing abusive litigation.

The French Authority has been a strong supporter of this move since 2006 and has been an active advocate with the French government since then. Indeed, unlike other countries such as Italy, until now French law did not allow collective actions. However this topic is particularly of interest now in France since a draft bill will be presented to Parliament regarding the introduction of collective redress (the project allows follow-on class actions brought by consumer associations and it is based on the opt-in system), convergence has still to be built on this topic at EU level.

The European Competition Network has kept its ambitious promises and greatly enriched antitrust enforcement. It must now live up to the expectations that have been placed in it, and rightly so. But there is indeed every reason to think, and I hope to have contributed to demonstrate, that the treasure trove of imagination and goodwill that its membership can put together will not disappoint!