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Introductory Remarks for Panel Session

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I. Considerations on the link between criminalisation and enforcement

The EU enforcement system is an administrative one, focused on companies, not the individual. This system has strong deterrent effects on those responsible for the operation of the company as a whole. When we investigate and sanction a company, it has an impact on share value and immediately attracts the shareholders' attention. Company executives are increasingly aware of this and our fines act as an efficient deterrent.

There has been a lot of debate on the merits of criminalisation over the last years, but there is no clear consensus. The introduction of criminal sanctions on individuals that participated in a cartel can be an efficient tool to increase the effectiveness of enforcement, in addition to the fines imposed on companies. In particular, the possibility of imprisonment can provide strong disincentives for corporate executives to engage in cartel behaviour in the first place. In addition, criminalisation is certainly a good method to publicly reveal how harmful cartels can be for the economy and consumers.

Experience shows however that criminalisation can only be effective if the legislation creating criminal offences is adequately enforced. For that purpose, a number of criteria are essential, such as:

- the need for adequate investigative powers,
- well resourced and dedicated enforcement agencies,
- the willingness of judges to convict,
- the existence of an immunity/leniency programme for individuals.

Indeed, each competition enforcement system, administrative or criminal, is a complex mechanism in which the nature and severity of the sanctions are closely linked to the investigative powers, the standard of proof, the procedural safeguards and the structure of the enforcement agency itself. Regulators must balance all these factors and design their competition enforcement system accordingly.

The complexity of the enforcement design increases as soon as sanctions on individuals are involved and it is exacerbated when custodial sanctions come into play.

Most importantly, there is a strong relationship between effective sanctions and leniency. The success of a system with sanctions on individuals or custodial sanctions depends on a suitable leniency policy. It is therefore crucial that sanctions on individuals are accompanied by an efficient leniency option that applies to those individuals as well. When criminal sanctions are involved, it is through such individual immunity that cartels can be caught and leniency applicants driven to the authorities. If leniency is not available to individuals, corporate applications may be inhibited both in the same and in other jurisdictions affected, with the result that the sanctions on individuals achieve the opposite effect of what was intended, and lead to under-enforcement.

The main underlying issue about enforcement is deterrence. Ultimately, our work as competition law enforcers is to deter companies from entering into cartels. There is no perfect model of enforcement, but I believe that the EU administrative system is combining very well active enforcement with effective deterrence.

II. Considerations on the EU system in practice

The architecture of the EU competition enforcement system is built around financial sanctions on undertakings. It is the companies that pocket the extra profits resulting from the cartel and they must therefore bear responsibility for their actions. We believe that such sanctions are able to ensure a high degree of deterrence and that criminal sanctions are not warranted in our enforcement system.

An important point is that no-one seriously argues that criminalisation of individual behaviour is in itself sufficient. It can always only be complementary to - and supportive of - action against companies. We cannot let any debate about criminalisation distract from the need to take continued and effective enforcement action against companies.

The investigative powers of the Commission and the rights of defence are designed in light of our system of sanctions on undertakings. The introduction of sanctions on individuals in the EU system would therefore entail serious consequences for all the other elements of this system. If no changes would be made to our investigatory powers, the threat of criminal sanctions on individuals may lead in reality to fewer successful cartel investigations.

For example, individuals under threat of sanctions would likely have higher incentives to obstruct our inspections and to destroy evidence. The ensuing loss of effectiveness of inspections would have to be compensated by considerably extending other investigatory powers. Currently no such changes are sought because we consider our EU system to be effective in its current form.

As a complement to sanctions on undertakings under EU law, several Member States have introduced criminal sanctions (UK, Ireland, Estonia). The EU legal framework accommodates this diversity and Member States can, under national law, provide for sanctions on individuals.

It is important to recall that for enforcement to be coherent at EU level, our system provides for appropriate safeguards as for example when information is exchanged between authorities. The Commission cannot – and will not – pass information on to a national authority if this can be used against an individual in a criminal proceeding. For instance DG COMP and the UK OFT have agreed that employees of companies applying for leniency before the Commission will normally obtain protection from criminal prosecutions in the UK by a so-called "no action letter".

I want to make clear that we fully respect the diversity of the legal systems in the EU and around the world. These differences should not prevent competition authorities from cooperating. Differences in the law should instead inspire agencies across jurisdictions to focus on common principles and work together. The ICN Cartel Workshop that DG Competition will host in October this year will be a good opportunity to do so. We invite our sister agencies to recognise the diversity of our legal systems and drive towards a pragmatic convergence of our control of cartels around the world. For example, where several players are involved in an enforcement action, a coordinated approach is necessary to maintain incentives for leniency applicants to come forward.

III. A final note on pecuniary sanctions:

Since the EU system relies on pecuniary sanctions, our fines must of course remain large – over €2.8 billion in 2010. Companies should understand that

setting up a cartel does not make business sense and the fines should be set a sufficiently high level to trigger deterrence.

However the Commission does not seek to impose disproportionate fines, because our aim is not to push firms out of business. As many as 32 of the 69 companies we fined last year claimed inability to pay. We carefully looked into their financial situations and nine of them had their fines reduced, five of which were SMEs. Of course, as the economy recovers, we estimate that such instances where we grant inability-to-pay will be increasingly exceptional.