Antitrust Enforcement: Deterrence and Leniency in an enlarged European Union

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Ladies and gentlemen,

It is a privilege to make a presentation to this distinguished audience. As you may know, for about six years I served as the first director-general of the new Netherlands Competition Authority. I am most grateful to your President for inviting me to share some of my experiences and opinions in regard to detecting and punishing hard core cartels and the international co-operation.

Compliance and Competition Law

Law enforcers have a dream. The dream is full compliance by undertakings. Full compliance without any intervention on the part of law enforcers being needed. As we all know, this is a dream. To be effective and credible, no law can do without enforcement in whatever way; whether by way of a court case or by way of a governmental agency's intervention, a law should be seen to be enforced.

The effectiveness of a statutory prohibition depends on two conditions. Firstly, the prohibition has to carry with it the appropriate measure of moral conviction within the community. Secondly, there shall be a credible threat of appropriate sanctions. Taking the European continent, and in particular The Netherlands, as an example, there are a number of reasons why competition law, and in particular the prohibition of cartels, is not rooted very deeply.

To begin with, the European continental countries do not have a tradition similar to the tradition in the United States. The protection and furtherance of the forces of the free market touch fundamental chords in the U.S. For more than a century, the U.S. has had a tradition of vigorous enforcement of its cartel prohibition under the Sherman Act. It is only since the

Second World War that competition laws have been enacted in Europe. In contrast it is even fair to say that until that post-war enactment, the laws tended to be pro-cartel; cartels were seen as beneficial to society and its economy. After the Second World War, Germany was the first country to introduce a comprehensive, anti-trust law. By then, it was seen as one of the major economic reforms pressed by the United States on the new German state to de-cartelise the economic structure of Germany. Most other European countries modernised their anti-trust laws only in the 1980's or 1990's; the Netherlands in 1998. The competition provisions in the European Steel and Coal Community Treaty of 1951 and subsequently in the EC treaty of 1957 were thus far ahead of general acceptance. Conceptually, this may all have been revolutionary; in practice there was a low measure of enforcement, let alone of internalisation and acceptance. The situation in The Netherlands is exemplary. For a long time, the Netherlands was seen as a cartel paradise. The Dutch felt that co-operation amongst competitors brought better results than rivalry.

Secondly, it is important to note that the violation of hard core cartels - by their nature secret conspiracies - can be extremely beneficial to the parties to them. Though it is difficult to determine precisely the gains made by employing a cartel, the general opinion amongst expert economists is that a mark-up of at least ten per cent is a safe estimation.

Thirdly, as conducting a cartel successfully seems to bring such beneficial marked up prices to the partners, the abandoning of or refraining from setting up a cartel is largely dependent on the probability of detection. Secret hard core cartels are notoriously difficult to detect. Generally, there are no fingerprints. It is estimated that not more than 10 to 15 per cent are finally exposed.

Fourthly, for deterrence to be effective, it is important to whom the threat of sanctions is directed. As you know, in Europe, generally speaking, in any case in the Netherlands, the sanctions are directed to undertakings and not to individuals. The larger the organisation is, the more likely it is that responsibilities are dissipated and obscured. Top management may turn a blind eye to cartel activities at a lower level; at a lower level people may think they are contributing to the profits of their company by secret cartels.
All in all, no deep roots and a low level of deterrence and enforcement.

In the last decade many countries, in particular the OECD countries, stepped up their efforts to combat hard core cartels. In its important recommendation of 1998 the OECD Council recognised that the effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports and that anti competitive practices may constitute an obstacle to the achievement of economic growth. Recently, the OECD Competition Committee published a survey of prosecuted hard core cartel cases in the last four years; a survey which bears witness to the harmful effects of those hard core cartels. The committee estimated that in sixteen of the largest cases only the affected commerce exceeded the equivalent of U.S. $ 55 billion and it concluded:

"thus taking into account: i) that these reported cases represent only a fraction of all cartels, known and unknown, and ii) that the actual loss to consumers caused by cartels is more than just the gain transferred to the cartel, one can only conclude that the total harm from cartels is significant indeed, surely amounting to many billions of dollars each year."

Keys factors

With a view to this magnitude of damage to the economy and consumers, many of the OECD member states are in the process of improving the enforcement and deterrence of hard core cartels. Three key factors come into play:

- stiff sanctions;
- heightened fear of detection, and
- leniency programs

Stiff sanctions

Starting from the proposition that most corporate crimes are motivated by the desire for pecuniary gain, it follows that to effectively deter those crimes the expected penalty must at least equal, if not exceed the expected gain. The expected penalty is a function of the level of fines and the probability of successful detection and prosecution. As hard core cartels are

conducted secretly, the chance to get caught is low. So, in this line of reasoning, only taking away illegal gains is not sufficient to deter future infringements. Clearly, even if caught, the cartel members would be no worse off than before they started the cartel; and, as long as they could avoid detection, they could profit handsomely. Instead, expected penalties must be significantly higher than the expected rewards of the cartel participation. Only this sanction policy would serve the objective of general deterrence.

In this respect a few points are to be made.

Firstly, in the EC system (and that of most EC member states) the sanction is directed to the undertaking, not to individual corporate officers. To achieve the objective of general deterrence, as just discussed, impossibly high fines would have to be imposed; in many cases exceeding the statutory maximum of 10 per cent of the undertaking's turnover. Such an extremely high level of fines would normally exceed the undertaking's ability to pay and, in addition, contravene fundamental principles of proportional justice. No wonder that the introduction of personal criminal liability is on the agenda in the EC. It seems that the prospect of spending time in jail is the single most important incentive to deter corporate officers from operating cartels. Indeed, some member states actually introduced this measure recently; the UK is a case in point; in Germany bid rigging has already been criminalized for a long time. However, as a matter of EC competition law, criminal liability will be very difficult to introduce. Member states very much consider criminal law the exclusive prerogative of each individual Member State. As I will point out further on, this haphazard and fragmented plethora of sanctions at EC and national level will constitute major obstacles in the fight against interstate cartels.

Heightened fear of detection

Beyond doubt, the higher the fear of detection the greater the deterrence. Combined with stiff sanctions, fear of detection very well may contribute to deterrence; or - as I will discuss within a few minutes- to stimulate cartel participants to apply for leniency and expose secret cartels.

In elaborating briefly on this theme two aspects are very important. To begin with, improving the investigative expertise and powers are high on the agenda in the EC. The recent Regulation I/2003 introduces new powers:

- in addition to the offices of the undertakings, also private premises of corporate officers may be searched; and
- officers and employees may be required to appear before commission officials and obliged to make a statement.

Also the focus of EC competition authorities is very much on cartel detection. In particular, digital searching of PC's is proving itself a powerful weapon, since cartels are generally smart enough to leave no documentary written evidence behind them and certainly not in their corporate offices.

At the same time, however, the EC investigative powers still fall short of those of its US counterparts. Undercover practices as employed in the US, are even in ordinary criminal investigations in Europe generally considered unlawful.

Secondly, the role of the judiciary is crucial. To be detected - and fear it - is one thing. When courts, however, as a rule, are quashing or mitigating strongly the rulings of the competition authority, the deterrent effect of even the heightened fear of detection is undermined fatally. A competition authority, whatever its results, is toothless if not structurally backed up by its judiciary.

Leniency

In EC and Member States, competition policy employing leniency programs has become an indispensable and highly valued method to detect and destabilize cartels. To be sure, only recently and following up on the impressive results of the US Department of Justice Amnesty Program, the EC and Member States have introduced these programs.

As you know, for many years the Department of Justice employed such a program. A provision of this cartel was that the Department of Justice would consider foregoing all prosecution upon confession and full co-operation of an until then unknown cartel. It was not a success. After 25 years of lukewarm experience, two changes instantly made the program into the success it is today. Firstly, it changed the eligibility ("consider") into automatic applicability of the amnesty program once the applicant uncovered a novel cartel. Secondly, the immunity came to encompass not only the company itself but also its offices and employees and covered any kind of public liability, be it criminal or administrative. Both the predictability and the complete automatic character of the granting of immunity brought the huge successes:

- one application per month, and
- in the period from 1989 to 2002 an amount of US dollars 2.5 billion in fines.

As you will appreciate, the crucial key is: predictability and certainty of immunity once an application is made.

Following up on this apparent success, the EC introduced a new Leniency Notice at the end of 2002. It is, generally speaking, modeled on the US system and its principal features can be summarized as follows:

(i) total immunity, if

- no prior investigation opened
- first applicant
- full disclosure and co-operation
- provided the applicant did not take steps to coerce others to participate in the infringement (the "ringleader");

(ii) reduction of fines for the applicant who is not qualifying for total immunity, if he is producing evidence to establish the infringement. So, even if not the first to disclose, or, though the first, but the "ring leader" of the cartel, or producing evidence while the investigation already is underway, a cartel member may be granted substantial reductions.

Also, the Netherlands introduced a leniency program in 2002. Up to now there already have been a few applications.

Rather then going into detail of the various leniency programs, I would like to discuss briefly a number of fundamental issues and the complexities of enforcement within the EC make-up in regard to interstate cartels.

Fundamental issues

The full acceptance by the EC and member states of the US system is surprising. The legitimacy of plea bargaining by a suspect of culpable acts is rather alien to the European criminal prosecutorial practice. To be sure, with a few exceptions - I mentioned Germany and the UK- sanctions in competition law are administrative, not criminal. Nevertheless, to grant immunity or reduction of fines to a culpable perpetrator, even to the instigator of the cartel, raises the issue whether such a policy does not contravene the fundamental principle that the law should punish each culpable suspect equally, irrespective of his co-operation after his

actual misdeeds have come to light. For this very reason, Scotland, for instance, declined to adopt the system of granting immunity automatically. Clearly, there is a difficult balance to strike between on the one hand the objective of the leniency system to deter the continuation of cartels and on the other hand the fundamental deterrence objective of each law that the perpetrator should not go with impunity. Law should be seen to be enforced. It is very well arguable that the law is enforced, because, except for the immune applicant, the other parties to the cartel are indeed sanctioned.

A second issue concerns the question whether the systems of automatic immunity may not, in the final analysis, undermine the deterrent effect of the cartel prohibition itself. Is this automatic character not stimulating a practice first to fix prices and then, in due time, confess and go unpunished? Time will tell, for now it is clear that the US and EC put more weight on improving the chances that existing cartels are dismantled than on abiding by the principle that the law should punish those who infringe it. And up to now the US success makes it difficult to take into account possible long term effects.

Thirdly, there is a fundamental issue of a sociological nature. I take the example of the construction industry in the Netherlands. Though the new Competition Act (providing for an outright prohibition of bid rigging practices) was introduced in 1998 and the new competition authority in fact prohibited vigorously certain bid rigging regulations, a parliamentary investigation was needed to expose a deep rooted and secret practice within the construction industry to rigging governmental tender procedures. What appeared was that to the undertakings in the construction industry the loyalty to each other in conducting this practice was much stronger than their willingness to abide by the cartel prohibition. There was not much fear of being detected (the competition authority was mainly occupied with dealing with

mergers and exemption requests), no leniency program was in place and there was no established record of sanctions. Right now, the competition authority is dealing with about 60 big cases of bid rigging and already fines of about 25 million euro have been imposed. In the Netherlands one may wonder in how many other trades this group loyalty is still stronger.

Complexities in the EC system

As you all know, the enforcement of EC competition law (i.e. interstate cases) is entrusted to the EC Commission and, with the exception of granting exemption from the cartel prohibition, to the national competition authorities of the member states. In addition, national authorities also enforce their national competition laws; national laws which are -generally speaking- modeled on the EC systems.

In a major overhaul of the system, Regulation I/2003 introduces the full decentralisation of the enforcement of the EC cartel prohibition. Under this Regulation it will be, in principle, a single national competition authority which will be in charge of dealing with infringements which have their point of gravity in its own territory. The Commission has the right to demand to handle the case exclusively. Only in truly major cases, addressing new issues, or in interstate cases where more than three countries are seriously involved may the Commission choose to handle the case itself exclusively. The Regulation projects enhanced co-operation amongst the Commission and national authorities, both vertically and horizontally. For instance, it provides for the transfer of all information between authorities in regard of an impending or ongoing investigation of cartels with interstate effect.

This new system of cumulative application of the EC cartel prohibition and its enforcement give rise to difficult problems when it comes to employing leniency programs. To understand

these problems it is important to bear in mind that the enforcement of EC cartel prohibition by national authorities is governed by their national procedural criminal laws. Also, they employ their own national leniency program.

Under this system of decentralized enforcement by national authorities the first problem to arise is that cartel members will try to find the most lenient program or the competition authority which appears to be the most willing to “condone” infringements.

A second problem concerns double jeopardy. Undertakings may come to face a situation wherein in the one member state they qualify for leniency while in the other it is declined. This discrepancy may very well undermine the willingness of cartel members of an interstate cartel to come forward at all as long as they face this risk.

Finally, the gravest problem lies in the cumulative applicability of both criminal and administrative sanctions. As you will remember, some member states have already introduced criminal sanctions; others are considering it. This poses a serious threat to the effectiveness of leniency programs in interstate cases. Since the granting of immunity from criminal sanctions under national laws is the prerogative of the Office of the Public Prosecutor and not of the competition authority, the very risk of criminal sanctions in one country will severely discourage undertakings from applying for immunity at a competition authority. In that country or, for that matter, in any other EC country.

Clearly, to the extent possible under the present legislation (EC and national), it will be for the enforcement authorities to step up their cooperation and to take into account and anticipate the

interrelations between the actions (or suspension thereof) of each other. It goes without saying that such cooperation may not violate the rights of the defendants.

Summing up

To sum up:

- Leniency programs will contribute to deter hard core cartels; particularly when shored up by stiff sanctions and vigorous enforcement strategies;
- However, how high the expectations in the EC may be of the employment of leniency programs, their effectiveness will be seriously impeded by the complexity of EC and national law;
- The only solution in the end is (formal or soft) harmonisation of procedural and criminal laws in regard of (criminal and administrative) sanctions.

Thank you very much.