

EDITORIAL COMMENTS

Public enforcement of EU competition law: Why the European antitrust family needs a therapy

It's not all doom and gloom in the EU. Anyone who is in doubt should look no further than the public enforcement of EU competition law. When taking stock of the decentralized enforcement of Articles 101 and 102 TFEU in the European Competition Network (ECN) at the 10th anniversary of Regulation 1/2003 in 2014, the Commission recorded more than 780 cases investigated by the Commission and by Member States' competition authorities (NCAs).¹ While the most prominent cases have obviously been dealt with by the Commission, the scale of the NCAs' enforcement efforts became apparent in the impressive number of 665 envisaged decisions. Unsurprisingly, Margrethe Vestager, the new Commissioner for competition, was initially pleased when getting acquainted with the ECN, as she made clear in a recent speech: "Since taking up my post last November, one of the happiest discoveries has been the remarkable achievements made jointly by the Commission and national competition authorities in the European Competition Network."² However, Ms Vestager also expressed concerns: "How can we make sure that our European family of antitrust authorities stays at the cutting edge of developments?" Referring to the challenges created by new technologies and new markets, she stressed: "We do need to make an extra effort within the antitrust family in these circumstances. To discuss openly and to compare notes. To cooperate pragmatically. And above all, to keep an open mind that it may be one of the other family members that has the best answer to the newest problem."

To be sure, a reminder by the *mater familias* to the members of the antitrust family, including the Commission itself, to cooperate and to listen to each other can't hurt. To mention a recent example: by launching an inquiry into the e-commerce sector in May 2015,³ the Commission has entered a field in which several NCAs have also been active. It would be a waste of public

1. Communication from the Commission to the European Parliament and the Council, "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", COM(2014)453, para 8.

2. Margrethe Vestager, Keynote Speech, Concurrences' New Frontiers of Antitrust, Paris 15 June 2015, <ec.europa.eu/commission/2014-2019/vestager/announcements/state-union-antitrust-eu-2015-2016_en> (28 Aug. 2015).

3. Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003, C(2015)3026 final.

resources as well as an unnecessary burden on e-commerce businesses if future action by the Commission were not informed by the experience NCAs have already gathered in this field. Moreover, in cases where the Commission refrains from initiating proceedings, NCAs should closely coordinate their application of EU competition law, as has been demonstrated by the French, Swedish and Italian competition authorities when dealing with restrictive clauses used by online travel agent Booking.com.⁴

But is a gentle nudge enough to make sure that the ECN is fully functional and effective? It is submitted that more than this is needed. From the beginning, the decentralized enforcement of Articles 101 and 102 TFEU has suffered from fundamental flaws, which have not vanished over time. Remaining with the metaphor of a family, we cannot always rely on family members to sort out all issues on their own. Sometimes outside help from a therapist is called for. In the case of the ECN, this would be a legislative reform dealing with problems that cannot be solved by the members of the network themselves, however good their intentions may be.

National competition authorities: Still (almost) a blank spot in EU legislation

The first problem of decentralized public enforcement of EU competition law stems from a glaring omission in the legal framework established by Regulation 1/2003. If law enforcement is entrusted to public authorities, one would normally expect legislators to make sure that these authorities are fit for purpose. Hence, in the field of sector-specific regulation, EU directives commonly contain substantive requirements regarding national supervisory authorities, such as their independence and their endowment with adequate financial and human resources.⁵ Additionally, procedures, remedies and

4. Autorité de la concurrence, Decision No. 15-D-06 of 21 April 2015, <www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf> (28 Aug. 2015); Autorità Garante della Concorrenza e del Mercato, Press release of 21 April 2015, <www.agcm.it/en/newsroom/press-releases/2207-i779-commitments-offered-by-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html> (28 Aug. 2015); Konkurrensverket, Press release of 21 April 2015, <www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/> (28 Aug. 2015).

5. See Art. 3 of Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, O.J. 2002, L 108/33 as amended by Directive 2009/140 of the European Parliament and of the Council of 25 Nov. 2009, O.J. 2009, L 337/37; Art. 35 of Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54, O.J. 2009, L 211/55; Art. 55 of Directive 2012/34 of the European Parliament and of the Council of 21 Nov. 2012 establishing a single European railway area, O.J. 2012, L 343/32.

sanctions to be applied by national authorities are often prescribed in considerable detail.⁶ Nothing of the sort can be found in Regulation 1/2003. Article 5 of the Regulation merely empowers the NCAs designated by the Member States under Article 35 of the Regulation to apply Articles 101 and 102 TFEU in individual cases, adding a brief definition of the types of decisions NCAs may take. There are neither requirements regarding the NCAs as such nor any provisions setting out with some precision their investigative and decision-making powers. One might imagine that this was unnecessary because at the time the Regulation was enacted reliable NCAs equipped with powerful instruments were already in place, just waiting for the go-ahead to join the enforcement of EU competition law alongside the Commission. But this was not, and still is not, true. NCAs still differ greatly in their institutional set-up, their resources and their enforcement powers, and, consequently, in their ability to contribute to the effective and consistent enforcement of Articles 101 and 102 TFEU.

A nice snapshot of the ECN landscape that illustrates this point is the annual ranking of the world's leading competition authorities by the *Global Competition Review*, which is based on information provided by the authorities as well as on feedback by practitioners and academics. In the most recent GCR survey, authorities from EU Member States are scattered throughout the ranks.⁷ While the French Competition Authority and the German Federal Cartel Office enjoy an "elite" rating in the top tier, leaving even the Commission behind, the Belgian, Czech, Danish and Irish authorities find themselves at the low end of the spectrum with a performance that is just regarded as "fair". One may of course doubt these rankings as they tend to create a false sense of objectivity, while being in fact the outcome of a fairly subjective assessment. But even if we merely take the GCR survey as an indicator for reputation, such large variations between NCAs are a worrying sign. Reputation matters, and it seems somewhat difficult to maintain that everything is going swimmingly for the ECN if, even more than ten years after its foundation, the network's members are still assessed very differently by an informed public.

6. See Arts. 8–13 of Directive 2002/21; Arts. 36–40 of Directive 2009/72; Arts. 56–57 of Directive 2012/34.

7. *Global Competition Review*, Enforcement Rating 2015, June 2015. In total, 36 authorities are rated.

Many divergences between NCAs that lie at the root of this perception are of course well known. In 2012, the ECN published detailed reports on the investigative and the decision-making powers of NCAs, followed by the endorsement of seven recommendations on key enforcement powers in 2013, which served to overcome the divergences that have emerged.⁸ Looking back at ten years of Regulation 1/2003 in 2014, the Commission seized on these findings and aptly summarized the concerns raised by them:

“The fact that virtually all NCAs do not have a complete set of powers at their disposal which are comprehensive in scope and are effective, impinges on their ability to effectively apply the EU competition rules. It also results in costs for undertakings operating cross-border as they have to acquaint themselves with the different procedural rules which apply in different Member States. Divergences in procedures also reduce predictability for such businesses. Another issue of concern is that the level of convergence achieved to date remains fragile, as changes in national laws or practices could result in the roll-back of improvements which have been made at any time.”⁹

Everything that has been done so far in order to address these concerns can be regarded as giving partial solutions at best. First, while providing valuable guideposts, the Court’s case law on the effectiveness of the public enforcement of EU competition law is necessarily restricted to selective adjustments of defective national instruments and procedures.¹⁰ Even if the Commission chose to initiate infringement proceedings against Member States based on violations of their duty to enforce competition law effectively, the outcome would always be limited to the aspects of the particular case and not provide a comprehensive solution. Second, including requirements regarding competition authorities as conditions in the Memorandum of Understanding a Member State has to accept in order to receive financial assistance (as

8. ECN Working Group Cooperation Issues and Due Process, Decision-Making Powers Report, 31 Oct. 2012; Investigative Powers Report, 31 Oct. 2012; ECN Recommendations on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information; on the Power to Collect Digital Evidence, including by Forensic Means; on Assistance in Inspections conducted under Article 22(1) of Regulation (EC) 1/2003; on the Power to Set Priorities; on Interim Measures; on Commitment Procedures; on the Power to Impose Structural Remedies, December 2013; all documents available under <ec.europa.eu/competition/ecn/documents.html> (28 Aug 2015).

9. Commission Staff Working Document, Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues, SWD(2014) 231/2, para 54.

10. See e.g. Case C-429/07, *Inspecteur van de Belastingdienst*, EU:C:2009:359; Case C-439/08, *VEBIC*, EU:C:2010:739; Case C-375/09, *Tele2Polska*, EU:C:2011:270; Case C-681/11, *Schenker*, EU:C:2013:404.

happened in the cases of Greece, Ireland and Portugal)¹¹ or as part of country-specific recommendations in the framework of the European Semester (as happened in the cases of Belgium and Slovenia)¹² generally seems a less than perfect way of tackling this issue, not least because such measures cannot be directed at Member States whose budgets are sound, but whose antitrust enforcement may still not be satisfactory. Even Germany, allegedly both a paragon of financial stability and keeper of the faith in competition, has recently revealed remarkable shortcomings in the field of antitrust enforcement, by allowing companies to avoid antitrust fines by restructuring.¹³ However, it would be futile to wait for the chance of getting Germany to submit to a Memorandum that would cure this deficit. Last but not least, “soft” interventions, such as the ECN recommendations on enforcement powers, depend on the Member States’ willingness to implement them, which is not a given. It is therefore quite likely that only a legislative measure (which may take the shape of a Regulation 2)¹⁴ will lead to the convergence that is necessary to make the ECN fully effective. This is nothing undertakings and their legal advisers should be afraid of: convergence of public enforcement at the level of Member States is the only way to protect undertakings from arbitrary differences in the enforcement of Articles 101 and 102 TFEU, depending on whether their case is handled by a “weak” or by a “strong” authority, or whether national rules on enforcement offer loopholes or not.

Decentralization: Just a label or a substantial improvement?

The second problem of decentralized public enforcement of EU competition law is even more fundamental. We simply don’t know for sure whether the reform enacted by Regulation 1/2003 has really led to any substantial improvement of the protection of competition in the internal market. The reason is that Regulation 1/2003 compels NCAs to apply Articles 101 and 102 TFEU whenever they apply their respective national competition laws in cases

11. <ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm>; <ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm>; <ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm> (28 Aug. 2015).

12. <ec.europa.eu/europe2020/index_en.htm> (28 Aug. 2015).

13. This is true even under the recently revised German law on administrative sanctions, which applies to antitrust fines and was meant to prevent undertakings from escaping fines by restructuring, see *Frankfurter Allgemeine Zeitung* of 3 Feb. 2015, “Wurstfabrikant Tönnies führt das Kartellamt vor”.

14. Ost, “From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence”, (2014) *Journal of European Competition Law & Practice*, 125.

where trade between Member States may be affected.¹⁵ If, on this basis, cases that would formerly have been exclusively dealt with under national laws, were merely rebranded as EU cases this would hardly be an achievement worth celebrating. However, it is not clear how many of the 665 envisaged decisions by NCAs recorded by the Commission at the 10th anniversary of Regulation 1/2003 are just national-turned-into-EU cases, and how many of them represent a genuine increase in enforcement activity owed to the advantages of being part of a system of decentralized enforcement. Giving the reform the benefit of the doubt, let us assume that a fair share of the cases taken up by NCAs represent such an increase, and that this increase outweighs any potential decrease of enforcement activities by the Commission due to decentralization. But even then it is legitimate to ask whether the best has been made of the invention of a network structure of EU antitrust enforcement. There is reason to believe that this is not the case if we look at the way the *status quo* evolved.

To put it bluntly, decentralization has never been based on a well thought-out idea of optimal antitrust enforcement. It was introduced as a makeshift solution at a time when it could no longer be denied that the Commission was unable to handle all cases coming under EU competition law, in particular under Article 101 TFEU. National bodies (both courts and authorities) were meant to provide a welcome relief for the Commission, but not more than that. The Commission certainly did not retreat into the role of a policymaker and coordinator of primarily national antitrust enforcement in a fully decentralized system, but has always remained itself at the forefront of enforcement, reserving the right to seize jurisdiction over any case investigated by NCAs.¹⁶ Admittedly, efforts have been made to define the allocation of cases in the Notice on cooperation within the Network of Competition Authorities in order to achieve an efficient division of work and an effective and consistent application of EU competition law.¹⁷ But as far as we can see, this has not led to the development of any hard and fast or even justiciable rules.

Resulting from this is a fairly random allocation of cases that is needlessly burdensome both for the ECN and for the undertakings involved. The treatment of restrictive clauses used by internet platforms such as Booking.com throughout the EU is a fitting example. As has already been mentioned, several NCAs coordinated their respective procedures in this case.

15. Art. 3(1) of Regulation 1/2003.

16. Under Art. 11(6) of Regulation 1/2003.

17. O.J. 2004, C 101/43.

However, similar cases remain where NCAs chose to go it alone.¹⁸ Moreover, even if coordinated, multiple national procedures in a case such as *Booking.com* just seem more costly than a single procedure administered by the Commission, without producing any discernible benefits. Even the additional learning effect that can be expected from the involvement of several NCAs could be realized in a process that leads to a single decision. It is therefore hard to understand for any outsider to the ECN why the Commission did not step in, all the more since the Commission seems to have been “well placed” to deal with this case according to its own criteria published in the Notice on Cooperation.¹⁹

At first sight, a natural answer to the confusion created by the present (non-)system of random decentralization and multiplication of enforcement action would be to introduce clear and binding rules for the allocation of cases in order to make decentralized public enforcement more efficient and more predictable. But, unlike mergers, cases caught by Articles 101 and 102 TFEU seem much too varied to be subject to a clear-cut allocation based on abstract criteria. It is therefore not advisable to deprive the Commission of its discretion as to whether alleged cartels or abuses of a dominant position are best investigated by NCAs or by the Commission itself. To be sure, the undertakings involved may feel that their legitimate expectations are hurt if their case ends up with an authority they did not envisage, and which may for example have stricter sanctions at its disposal than the authority that was originally concerned with the case.²⁰ However, the more the enforcement powers of all ECN members converge, the less likely are shifts in the allocation of cases to cause violations of fundamental rights or the rule of law.

But this does not rule out a more modest suggestion. While there should remain some flexibility as to which authority (Commission or NCA) ultimately deals with a case under Articles 101 and 102 TFEU, it seems pointless, if not harmful to accept multiple proceedings by NCAs in which a single case is split up among NCAs, with each of them restricting their decision to the domestic effects of the case. Without addressing the controversial question whether, in the case of fines, such an approach is

18. See e.g. with regard to *Booking.com*, Bundeskartellamt, Bundeskartellamt issues statement of objections regarding *Booking.com*’s “best price” clauses, Press release of 2 April 2015 <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html?nn=3591568> (28 Aug. 2015).

19. Notice on Cooperation, *supra* note 17, para 14.

20. For a discussion of this issue, see Schwarze, “Die Anfechtung der Fallverteilung im europäischen Netzwerk der Kartellbehörden”, in Brinker, Scheuing, Stockmann (Eds.), *Recht und Wettbewerb: Festschrift für Rainer Bechtold zum 65. Geburtstag* (C.H.Beck: München 2006), p. 483.

compatible with the principle of *ne bis in idem*,²¹ it can be said that such a division is neither pleasant for the parties involved nor does it serve the public interest in efficient enforcement. As many NCAs are restricted by their national laws to sanctioning domestic effects of anti-competitive conduct,²² the only way to avoid such a wasteful exercise is at present a proceeding initiated by the Commission. However, apart from the strains this could put on the Commission's resources, this would be inefficient in cases where a particular NCA is better placed than the Commission to handle a case. In such a case, like the Commission, the NCA should be fully equipped with the power to make decisions (including the imposition of fines) that take account of anti-competitive effects throughout the EU, and not be limited to its domestic jurisdiction.²³ This is not a revolutionary proposal, but would only bring the territorial reach of public enforcement by NCAs in line with private enforcement by national courts, whose jurisdiction in multi-state cartel cases extends well beyond awarding damages for harm suffered in the market of the Member State where the court is located.²⁴

Yet again, there is no hope that such a development will occur spontaneously in the Member States. A legislative intervention by the EU is needed, and such a measure should not only ensure the convergence of the structure and of the enforcement powers of NCAs, but also extend their decision-making powers to the whole territory of the EU.

Why should the Commission be interested in reforming the network?

This leaves us with the somewhat delicate question whether there are sufficient reasons for the Commission to initiate legislation that provides for strong and convergent enforcement of EU competition law by the ECN. On the face of it, there is not much to gain for the Commission from strengthening the NCAs. Considering the normal political give-and-take, there may even be fears that the Commission (whose extensive powers under Regulation 1/2003 are not unequivocally appreciated in all Member States) could lose some feathers in the legislative process. So one might suspect that the Commission lacks sufficient incentives to initiate a regulation that will not bolster its own

21. See on this issue Monti, "Managing decentralized antitrust enforcement: *Toshiba*", 51 CML Rev. (2014), 261.

22. See e.g. the effects test limiting the jurisdiction of the German Federal Cartel Office in Article 130(2) of the German Act against Restraints of Competition.

23. Of course, only one NCA would then be allowed to decide the case in order to prevent a violation of *ne bis in idem*.

24. See Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide*, EU:C:2015:335 on the scope of Arts. 6(1) and 5(3) of Regulation No. 44/2001 ("Brussels I").

position as the undisputed centre of the ECN. However, it should not be overlooked that the suggested reform of the public enforcement of Articles 101 and 102 TFEU is not about a renationalization of powers, but serves the proper functioning of a system of undistorted competition as a constitutive part of the internal market. As the papers published by the Commission on the occasion of the 10th anniversary of Regulation 1/2003 show, the Commission is acutely aware of shortcomings of the ECN, mainly the lack of convergence among NCAs.²⁵ It is now necessary to act upon these findings.

25. *Supra*, note 9.