EDITED BY
MATEUSZ BŁACHUCKI

INTERNATIONAL COOPERATION OF COMPETITION AUTHORITIES IN EUROPE: FROM BILATERAL AGREEMENTS TO TRANSGOVERNMENTAL NETWORKS

2ND EDITION, REVISED AND UPDATED

LEGAL MONOGRAPHS

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INSTITUTE OF LAW STUDIES
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TABLE OF CONTENTS:

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ABBREVIATIONS

AAG – Assistant Attorney General
ACM – Authority for Consumers & Markets
AdC – Portugal Competition Authority's
AGCM – Autorita' Garante della Concorrenza e del Mercato (Italian competition authority)
BWB – Bundeswettbewerbsbehörde (Austrian Federal Competition Authority)
CAPDC – Portuguese Competition Lawyers Association
CCPA – Competition and Consumer Protection Act
CEE – Central and Eastern European
CEO – chief executive officer
CFO – chief financial officer
CJEU – Court of Justice of the European Union
CMA – UK Competition and Markets Authority
CNC – Comisión Nacional de la Competencia (Spanish National Competition Commission)
CNMC – Spanish Competition Authority
CRP – Constitution of the Portuguese Republic
DG COMP – Competition Directorate-General of the European Commission
DOJ – US Department of Justice
DR – Diário da República (Official Gazette of Portugal)
Dz.U. – Dziennik Urzędowy (Journal of Laws of the Republic of Poland)
EC – European Commission
ECA – European Competition Authorities
ECB – European Central Bank
ECJ – European Court of Justice
ECN – European Competition Network
ECOFIN – Economic and Financial Affairs Council EU
EConHR – European Convention of Human Rights
ECtHR – European Court of Human Rights
EEA – European Economic Area
EFSF – European Financial Stability Facility
EFSM – European Financial Stabilisation Mechanism
EFTA – European Free Trade Association
EHS – Environmental, Health & Safety
EP – European Parliament
ESAME – Portugal Cabinet of the Deputy Secretary of State to the Prime Minister
EU – European Union
EUMR – the EC Merger Regulation
FTC – Federal Trade Commission

GWB – Gesetz gegen Wettbewerbsbeschränkungen (Germany Competition Act)
ICN – International Competition Network
IEL – Inntrepreneur Estates Limited
IMF – International Monetary Fund
KaWeRÄG – Kartell-und Wettbewerbsrechts-Änderungsgesetz (Austrian Cartel and Competition Law Amendment Act)
LPP – legal professional privilege
MEFP – Memorandum of Economic and Financial Policies
MNO – mobile network operators
MoUs – memorandum of understanding
MVNO – mobile virtual network operators
MWG – Merger Working Group
M&A – mergers & acqusitions
NACE – Statistical Classification of Economic Activities in the European Community
NCA – national competition authority
OCCP – Urzad Ochrony Konkurencji i Konsumenta (Polish Office for Competition and Consumer Protection)
OECD – Organisation for Economic Cooperation and Development
OJ – Official Journal of EU
OSG – Spanish Official State Gazette
OWiG – Ordnungswidrigkeitengesetz (German Administrative Offenses Act)
PAEF – Programa de Apoyo al Empleo Formal (Portugal Formal Employment Support Program)
PASI – privilege against self-incrimination
PCA – Portuguese Competition Authority
R&D – Research and Development
SAO – Polish Supreme Audit Office
SIEC – substantial impediment to effective competition
SPK –Stowarzyszenie Prawa Konkurencji (Polish Competition Law Association)
TFEU – Treaty on the Functioning of the European Union
TMU - Technical Memorandum of Understanding
UK – United Kingdom
UNCTAD – United Nations Conference on Trade and Development
US – United States of America
WTO – World Trade Organization

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INTRODUCTION TO THE SECOND EDITION

This second edition of *International cooperation of competition authorities in Europe – from bilateral agreements to transgovernmental networks* builds on the first edition published in 2020. Responding to the positive feedback from readers and the generous support from ILS PAS Publishing House, we decided to prepare a new edition. It contains all the articles published before, which have been updated and corrected by the authors. The second edition also offers one new contribution from Margarida Rosado da Fonseca. She reflects on Troika's recommendations for the development of the competition regime in Portugal. Her article rightly points to those recommendations as a soft tool for enhancing enforcement a decade before ECN+. Anybody interested in the roots of ECN+ Directive should look into this, as it raises interesting insights on the European Commission's agenda for the development of public competition enforcement in the EU. Once again, I would like to thank all the authors for their contributions and I hope that readers will find their papers interesting and helpful in their work and studies.

Mateusz Błachucki

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REFLECTIONS ON INTERNATIONAL COOPERATION – FOREWORD[1]

BY STEPHEN CALKINS

From 2011 to 2015, I had the honor of serving as a Member of the Irish Competition Authority and its successor organization, the Competition and Consumer Protection Commission. For part of that time I served as Director of the Mergers Division, in which capacity I participated in the EU Merger Working Group.[2] This experience was a particular pleasure, so when Mateusz Błachucki invited me to contribute to a book devoted to international cooperation among National Competition Authorities ('NCAs'), with articles by a good number of current and former participants in the Merger Working Group, I was delighted to set out a few thoughts, reactions, and observations.

Although the plan was for me to read two or three of the chapters and offer some reflections, I ended up asking for chapter after chapter, eventually reading them all. And what a delight that was! Different perspectives, different points of emphasis, but all supporting Mateusz's brilliant common theme: 'from networks of authorities to networks of people'. Indeed, my counting so many of the contributors as friends is powerful support for the theme.

Complementing the book's central theme are several subsidiary themes: the intersection with private advising and enforcement; tensions between technocratic and political control; relations between NCAs and the European Commission ('Commission');[3] and – a related point – NCAs learning from and about each other. I will address each sub-theme in turn.

1 All views expressed in this text are in author's individual capacity.

2 EC, *European Competition Network Cooperation in merger control. The EU Merger Working Group*. Available from: https://ec.europa.eu/competition/ecn/mergers.html [Accessed September, 12 2020].

3 See the website for the Directorate-General for Competition. Available from: https://ec.europa.eu/dgs/competition/index_en.htm [Accessed September, 12 2020].

Private Parties

Three chapters focus on private parties, each from a very different perspective. Eduard Paulus sets out a careful chronology of steps taken to encourage private enforcement in Europe. It is hard to overstate the difference made by a vigorous program of private enforcement. It provides for compensation and deterrence, of course. But it also shapes the law and the legal landscape.[4]

Wolfgang Heckenberger points to, among other things, the potential 'enormous amounts' involved in civil damages when he sets out the importance of corporate compliance programs. He reviews the hallmarks of effective programs and also notes that the US Justice Department recently reversed its long-standing refusal to give 'credit' for a compliance program (one that, by definition, did not work to prevent a violation).[5] There has been a long-standing debate about this issue (my own preference, has been to leave it to the business entity to choose the appropriate mix of good hiring, sound incentives, appropriate compensation, and compliance programs, with the reward being the avoidance of liability[6]).

Finally (of these three chapters), Marta Michałek-Gervais addresses the important initiative, ECN+,[7] which is also discussed in some other chapters. Reading analyses of ECN+ is a bit like the story of blind men describing an elephant, since one observer might emphasize the call for additional enforcement tools (an important issue in Ireland), one the call for agency resources and independence, and another the recognition of the importance of due process. Dr. Michałek-Gervais addresses this last issue, which is another issue of importance to the current US Justice Department.[8]

What kind of control?

As noted, one ECN+ theme is agency independence. But what does agency independence mean, and is it necessarily an unqualified virtue?

4 CALKINS, S. (2018) Reflections on Matsushita and 'Equilibrating Tendencies': Lessons for Competition Authorities, *Antitrust Law Journal* 82, p. 201.

5 US Department of Justice. Office of Public Affairs (2019) *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 11, 2019). Available from: https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance [Accessed September, 12 2020].

6 CALKINS, S. (1998) Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties, *Law & Contemporary Problems* 60, p. 127.

7 See EC, *Empowering National Competition Authorities* [Directive (EU) 2019/1 was signed into law 11 Dec. 2018]. Available from: https://ec.europa.eu/competition/antitrust/nca.html [Accessed September, 12 2020].

8 US Department of Justice. Office of Public Affairs (2019) New multilateral framework on procedures approved by the International Competition Network (April, 5 2019). Available from: https://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network [Accessed September 12, 2020].

This is an issue with which the US is awkwardly grappling. It has long been the accepted view among members of the US competition community that competition enforcement is and must be independent and non-political. One of the two agencies, the Federal Trade Commission, *is* an 'independent agency', with five commissioners serving staggered, seven-year terms (longer if necessary to have a successor confirmed), removable only for cause (meaning serious malfeasance), a principle that was upheld in the landmark Supreme Court case, *Humphrey's Executor v. United States.*[9] Although the President nominates all Commissioners for Senate confirmation, no more than three Commissioners may come from the same party; the opposition party effectively controls the selection of the Commissioners who are members of that party; and the agency has long operated in a bi-partisan fashion.[10]

The generally-accepted insistance that enforcement by the other US competition agency, the Antitrust Division of the Department of Justice, also is 'independent' is a bit trickier because the President not only nominates (for Senate confirmation) the Attorney General and the Assistant Attorney General ('AAG') (the head of the Division), but can remove them at will, since they serve at the pleasure of the President. In spite of this, the accepted tradition of US competition enforcement is that it nonetheless is independent and unpolitical. One of the great stories illustrating this principle is of AAG William Baxter, who faced down the opposition of the entire government and pursued the case that led to the breakup of AT&T. (Baxter's position was that he would drop the case only in response to a highly unlikely direct order from the President.)[11]

Now the continued independence of both US agencies is being questioned. In *Seila Law LLC v. Consumer Financial Protection Bureau,*[12] the Supreme Court held that the Constitution mandates that the President be able to remove at will the single head of an agency, and read *Hemphrey's Executor* as protecting for cause removal only for 'multimember expert agencies that do not wield substantial executive power'.[13] Given the FTC's substantial current enforcement powers, there is considerable uncertainty as to whether its for cause removal can survive future attack and what the consequences of eliminating that protection would be.[14] Meanwhile, the competition community has been distressed to witness suggestions that the Trump Antitrust Division has not

9 295 US 602 (1935) (Sutherland, J.) (9-0). A Commissioner may be removed only for 'inefficiency, neglect of duty, or malfeasance in office'. 15 U.S.C. §41.

10 CALKINS, S. (2019) *Remarks Intended for Delivery on the Acceptance of the American Antitrust Institute's 2019 Award for Antitrust Achievement.* Available from: https://www.antitrustinstitute.org/wp-content/uploads/2019/08/Calkins_201-Antitrust-Achievement-Award.pdf [Accessed September, 12 2020].

11 SCHMALENSEE, R. (1999) Bill Baxter in the Antitrust Arena: An Economist's Appreciation, *Stanford Law Review*, 51, pp. 1317, 1326.

12 *Seila Law LLC v. Consumer Financial Protection Bureau* [2020] US Report 591, 140 S. Ct., p. 2183.

13 Ibid, p. 2199-2200.

14 The Supreme Court will be addressing the question of the Constitutionality of protections for heads of agencies again in the forthcoming term. *Collins v. Mnuchin* (2020) Dkt. 19-42 (cert. granted July 9, 2020) (consolidated with Dkt. 19-563).

operated with traditional independence.[15] Whatever the truth of such suggestions, it is worrisome that they are even being made.

It is thus particularly interesting and timely to see related issues being addressed by European authors. Given the ongoing political controversy, we are fortunate to have two chapters written from a Polish perspective. It was fascinating to read Professor Błachucki's account of the Polish NCA directly participating in negotiations over the ECN+ Directive, including agreeing to guarantees of agency independence that are contrary to decisions of the Polish parliament. In contrast, Professor Stankiewicz asks hard questions about how we can achieve both independence and accountability. It is a very delicate balance, made much more challenging in these troubled times.

A related challenge is discussed, with an insider's perspective, in the insightful chapter by Dr. Andreas Bardong. Using helpful illustrations, he points out that the Merger Working Group is a forum for exchanges among experts. That was my experience, too, and as Dr. Bardong explains, the nature of the body has both advantages and limitations. Independent expertise takes one only so far.

Relations Between NCAs and Commission

American competition enforcement features two federal agencies, countless 'private attorneys general', and the public attorneys general of all fifty states, the District of Columbia, and more.[16] States – the original competition enforcers – have seen their roles rise and fall, but in modern times they have been an important part of the competition landscape at least since the Reagan Administration. Today, the National Association of Attorneys General has a standing Antitrust Committee and a Multistate Task Force,[17] both established to help the states play an important role separate from that of the federal enforcers. (When not living in Europe, I have spoken regularly at the Committee's annual training program, and thus have come to know something about the state perspective.)

Both US federal and state enforcers seek to protect competition and consumers, and their efforts are often complementary. Almost inevitably, however, there are occasional tensions and varying perspectives. State enforcers may believe that they have a better understanding of what consumers want and how local markets work; federal enforcers tend to have greater resources and sometimes advanced expertise. Relations are often good, but there can be tensions.

15 GOODMAN, R. (2020) *11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Bar—and Office of Professional Responsibility's Opinion*. Available from: https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibilitys-letter/ [Accessed September 12, 2020].

16 CALKINS, S. (2003) *Perspectives on State and Federal Antitrust Enforcement*. Duke Law Journal 53, p. 673.

17 See website of National Association of Attorneys General. Available from: https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php [Accessed September, 12 2020].

So it is, also, with relations between European NCAs and the Commission. The NCAs and the Commission work together, but also separately – harmoniously or sometimes at odds. (As for the importance of NCAs, Marta Michałek-Gervais reminds us that the vast majority of enforcement actions are brought by NCAs.) When working smoothly, the Merger Working Group can facilitate the best. Ricardo Bayão Horta and Rita Prates do a nice job of reviewing the surprisingly complicated procedures for deciding which mergers are reviewed at which level. Martin Sauermann and Fabian Pape address the same important subject, but add in the tricky question of whether Big Data has exposed flaws in our system of notification thresholds.

David Viros develops one important but sometimes overlooked issue, namely the importance of enforcers being able to share confidential information, which so often involves obtaining waivers from private parties. All too often the issue is dismissed with a casual assertion that parties usually grant waivers. Although that may be true, a waiver-based system has the unfortunate effect of putting the government agency at the mercy of the private party, and it relies upon private parties' acting responsibly. Moreover, if a private party is facing multiple investigations, any normal instinct to cooperate may be put aside, which would serve suddenly to make the need to obtain a waiver more significant.

A key point is that, in the US and in Europe, good personal relations make everything work more smoothly. This is emphasized in many of the chapters, including those by Adriana Meijide Vidal and Marta García Álvarez, and by Erika Lovásová and Daniela Lukáčová. The latter chapter also sets out the important role the Commission can play by serving as an amicus in court proceedings.[18]

Learning From and About One Another

Personal relations really do make a difference. Meetings of the Merger Working Group were invaluable in part because of the substantive learning, but even more because of the building of personal bonds. Dr. Bardong enchantingly captures this with his reference to 'the «lounge» of the NCA merger network.' Erika Lovásová and Daniela Lukáčová elaborate on the benefits that come from exchanging ideas and harmonizing procedures. Everyone has something to learn, and it is so very helpful to be able to talk with another enforcer about what worked (and what did not!), how they accomplished something, or why they proceeded the way they did. Information is also exchanged at meetings of the International Competition Network,[19] but the active participation of lawyers and economists working to influence enforcers, although beneficial in some respects, makes candid communication more challenging.

18 See CALKINS, S. (2016) The Antitrust Conversation (Continued). *European Competition Law Annual*, pp. 231-278.

19 See website of ICN. Available from: https://www.internationalcompetitionnetwork.org/ [Accessed September, 12 2020].

Several other chapters, also emphasize what can be learned by exchanging views. Michele Pacillo (with whom I overlapped at the Irish agency) looks at the way in which mutual trust and established working relationships are key. The benefits of collaboration – and how to facilitate it – also are emphasized by Maarit Taurula.

Cleo Alliston tells a great if bitter-sweet story of the importance of exchanging information and working together. Europe saw a series of 4-3 telecom mergers, usually with controversial commitments often involving mobile virtual network operators. The Austrian experience was not a happy one, and the Irish merger faced significant opposition. Inevitably, participation by unhappy, say, Austrian representatives makes for a sharper review. It should not have surprised anyone that finally enough was enough, and the UK merger was blocked. (The story is bitter-sweet, of course, because presumably after the chapter was written, the General Court annulled the Commission's decision blocking the merger.[20] The Commission is filing an appeal.)

Conclusion

It was a pleasure to read these chapters. They offered information, stimulation and insight. For me personally, however, the greatest benefit was in helping me recall warm memories of interactions with members of the Merger Working Group. Working out the best approach to remedies, minority shareholdings, and referral procedures – to pick three issues referenced in a couple of chapters – was any enforcer's idea of a good time.

Although this book's chapters address in varying ways the benefits of cooperation, I want to close by emphasizing one specific benefit: the ability to make a telephone call. Good relations come from working together and exchanging views. But once agencies *have* good relations, they can check on some fact or learn some background information by a simple telephone call. And that can make all the difference.

My understanding is that the Merger Working Group has not met, even virtually, since the pandemic arrived. Perhaps the Group does not play as vibrant a role as it did only recently. Regardless of the mechanism, there should be no doubt that international cooperation among enforcers is of critical importance. If nothing else, when a score of global law firms have more than a thousand lawyers and at least a dozen law firms have 30 or more offices, enforcers that don't cooperate with each other are at a severe disadvantage. And as the chapters in this book so vividly illustrate, cooperation can mean networks of authorities leading to networks of people.

20 *CK Telecoms UK Investments Ltd. v. Commission* [2020] ECLI:EU:T:2020:217.

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ON THE PHENOMENON OF INTERNATIONAL COOPERATION OF NCAS: FROM NETWORKS OF AUTHORITIES TO NETWORKS OF PEOPLE – INTRODUCTION

BY MATEUSZ BŁACHUCKI

International cooperation between national competition authorities (NCAs) has developed leaps and bounds in recent decades. It takes various forms, depending on the needs and the goals of the participating authorities. It began with bilateral cooperation and often transformed into much more complex structures. The significant propagation of fora devoted to the development of competition law cooperation at an international level – such as the International Competition Network (ICN), OECD or UNCTAD, and at a regional level – such as the European Competition Network (ECN), Merger Working Group (MWG UE), European Competition Authorities (ECA) or Nordic Co-operation, is currently an undeniable fact.

Competition law and the international cooperation of NCAs seem to be a particularly appealing case choice for studying the functioning of international cooperation of public administration. It is emphasised that the expression 'competition law' and the adjective 'international' have never been as closely connected as they are now. Although the implementation of competition rules remains a national matter, substantive competition law reflects an almost unanimous global consensus on the benefits of free and competitive markets. This state of affairs allows for the intensification of the process of harmonisation of substantive and procedural national competition rules. This harmonisation takes various forms and affects different competition law institutions to varying degrees, with international law cooperation being a condition for harmonisation, without which it will

never be full or effective.[1] This cooperation is best developed within the transnational networks of NCAs.

The growing importance of transnational networks reflects the increasing importance and value of international cooperation between NCAs. It can be observed that the development of the networks results in a network effect, i.e. a situation in which the effectiveness of cooperation increases with the number of entities involved in this cooperation. In the past, it was emphasised that the failure of the OECD's efforts to enact an international antitrust cooperation agreement was due to the fact that the OECD was creating a fairly limited network of antitrust authorities under its auspices.[2] The example of the ICN shows, however, that increasing the number of members of this network has led to the fact that, after more than a decade of its existence, virtually all functioning competition authorities in the world are its members.[3] At the same time, it is rightly noted in the literature that an important feature of international administrative cooperation is its evolution, consisting in the transition from soft cooperation or automatic cooperation (e.g. based on data transferred periodically and automatically and available on a common European platform) to cooperation collaboration.[4] Currently, it is not only about obtaining information from a foreign authority, but often about active cooperation and undertaking formal administrative actions.

Neither bilateral cooperation nor networks of competition agencies are static; they evolve together with developments in international cooperation between competition authorities. Some cooperation arrangements or networks are successful, whereas others have ceased to exist. At the same time, cooperation between the competition authorities within networks has now become more intense, which has had a direct impact on other networks and bilateral cooperation. The divergence in international cooperation in antitrust and merger cases is also visible. It is notable that global competition networks have reached their limits. With no prospects for an internationally accepted competition agreement, they will not be able to expand. At the same time, continental networks are becoming stronger and are involving more far-reaching methods of enhanced cooperation. The best example is the ECN. After the adoption of Directive 2019/1,[5] one may expect a new period of strengthened cooperation between European NCAs in antitrust cases.

1 EZRACHI, A. (2012) Setting the scene. The scope and limits of 'international competition law'. In: Ezrachi, A. (ed.) *Research Handbook on International Competition Law*. Cheltenham–Northampton: Edward Elgar, p. 3.

2 LLOYD, P.J., VAUTIER, K.M. (1999) *Promoting Competition in Global Markets. A Multi-National Approach*. Cheltenham–Northampton: Edward Elgar, pp. 49–50.

3 The most notable exception being the competition authority of the People's Republic of China.

4 CISOWSKA-SAKRAJDA, E., WEGNER-KOWALSKA, J. (2015) Współpraca międzynarodowa państw a standardy pomocy w sprawach podatkowych. In: Czarnik, Z., Posłuszny, J., Żukowski L. (eds.), *Internacjonalizacja administracji publicznej*, Warsaw: Wolters Kluwer, p. 389.

5 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33.

Another area that is looked it is the underdevelopment of cooperation in the merger control area (more in the contribution of David Viros in this volume).

It may seem that publishing a book on cooperation in times when national borders are being re-established and restrictions in free movement of goods, people and services are being raised is not the most appropriate. However, I believe that it is precisely the most apt time. Cooperation is needed more than ever in times like this, to prove that retaining mutual confidence and reliance is necessary and beneficial to all. Extraordinary measures undertaken in the recent months will surely change the world as we used to know it, but in order to overcome what Carl Schmitt calls the 'state of exception' and return to normal life, international cooperation based on mutual trust is crucial. Even though cooperation in competition matters is probably not of the of the highest priority for European governments, at the moment of writing, it will be critical in order to secure a smooth transition and the prompt elimination of anticompetitive behaviours or mergers that may seemed to have been justified under the current extraordinary circumstances.

The book begins with a preface prepared by Professor Stephen Calkins. I am very grateful for his reflections upon all the contributions assembled in this volume. He combines extensive experience and knowledge as an academic and enforcer, and his thoughts provide an excellent framework from which to approach the book.

The book consists of fourteen contributions accompanied by a selection of documents. The papers assembled in the book are diverse in nature, there are articles, essays as well as case studies. It should be emphasised that many of the topics covered by the papers have never been presented and analysed in such detail. Thanks to the professional background of all the contributors, readers may expect to apprehend some interesting insights into the international cooperation of NCAs.

In the first contribution, Cleo Alliston presents a case comment showing the Three/O2 UK merger in the context of cooperation between NCAs and the European Commission. This is followed by an essay by Andreas Bardong. This may be especially interesting for readers, as it documents his personal perspective on the establishment and works of the MWG and provides rare insight into the functioning of a closed and informal transnational network of European NCAs. The third contribution analyses the problem of supervision over the international activities of NCAs, taking Poland as a study example. It points to an interesting conclusion, namely that the vivid development of international cooperation between NCAs is not accompanied by a similar expansion of supervisory mechanisms. This condition leads to a situation where an important sphere of the activities of NCAs escapes any effective supervision. The fourth contribution, by Wolfgang Heckenberger, discusses the general requirements for an effective antitrust compliance programme, taking into account the new policy of the US Department of Justice. It also highlights the need for a more common approach to compliance from NCAs and some efforts undertaken by the networks to address this issue. The next paper, prepared by Erika Lovasova and Daniela Lukáčová, summarises the experience of the Antimonopoly Office of the Slovak Republic regarding international cooperation,

identifying existing obstacles to closer cooperation, together with proposing solutions for those hurdles. The sixth article has been written by Adriana Vidal Meijide and Marta García Álvarez. It focuses on trends in merger control in Spain, presenting the position of the Spanish Competition Authority on the current issues in merger control in Europe. It is followed by a paper from Marta Michałek setting out the perspective of undertakings on the new ECN+ Directive with regard to the protection of fundamental rights. The conclusions of the article are not terribly optimistic, as it highlights that EU institutions have missed an excellent opportunity to enforce and unify the protection of the rights of companies involved in competition law investigations and proceedings. The next contributor is Michele Pacillo. The author presents the Italian experience with regard to international cooperation and the role of multilateral organisations. Interestingly, the article concludes that formal and informal cooperation can be viewed as complementary, and that informal cooperation may be a step in the process that ends with formal cooperation. The ninth article has been prepared by Fabian Pape and Martin Sauermann. It is devoted to the very timely issue of merger control thresholds and the need to review potentially problematic transactions that fall outside exclusively turnover-based thresholds. The article expands on the German-Austrian cooperation with regard to the development and understanding of new transaction value thresholds in the context of the EUMR's case referral system and the German-Austrian Guidance Paper. The next author, Eduard Paulus, presents a legal historical analysis on the correlation of public and private enforcement affecting the international cooperation of competition authorities in Europe. It is followed by the paper written by Rita Prates and Ricardo Bayão Horta. They analyse and present the ECA notice mechanism used by European NCAs to cooperate in multijurisdictional merger fillings. This mechanism has hardly ever been discussed in such detail. Then there is a contribution prepared by Rafał Stankiewicz. The author discusses the ECN+ Directive in the context of the compulsory implementation of this act in the Polish legal order. The article focuses on the need to secure the political and jurisdictional independence of the Polish Competition Authority. The next article has been written by Maarit Taurula. It presents the background and benefits of the co-operation agreement between the Nordic competition authorities. This is one of the longest existing forms of cooperation between NCAs, but surprisingly it has hardly ever been analysed. The article presented here will surely help to fill that gap. Last but not least is a contribution by David Viros. The article discusses drivers and instruments of international cooperation of NCAs, together with the evaluation of the existing frameworks governing cooperation between NCAs in the fields of antitrust enforcement and merger control.

The last part of the book provides a selection of documents. There are soft law acts adopted by two networks: Merger Working Group (EU) and its functional predecessor the European Competition Authorities. It is added in the interest of the readers. Many of the articles contained in this book invoke those documents. It therefore enables readers to confront the theoretical background with the actual wording of the soft law

documents. In any case, I believe these documents are not publicised enough and need to be brought to the wider attention of all interested and involved in competition law enforcement.

All the authors of this book were or are still involved in the international cooperation of NCAs, performing various functions in this process: members of transgovernmental networks of competition authorities, non-governmental advisors to those networks, academics advising networks and NCAs, officials conducting proceedings, legal representatives of companies involved in those proceedings or members of other institutions involved in this process. Sometimes, for particular authors, those roles have evolved in time. Thanks to this, their papers benefit extensively from their various professional experience and result in a comprehensive overview of the international cooperation of European NCAs.

The majority of contributors to this book come from former or current members of the EU Merger Working Group. The book also aims to document and appraise the work that has been achieved while they were participating in the MWG. The MWG started as an *ad hoc* solution, but soon turned out to prove the accuracy of the Polish saying that 'temporary solutions are the most permanent ones'. Thanks to support from the all executives of the EU NCAs involved and Commissioner Almunia, the MWG has been officially recognised as the only official network of European NCAs devoted to cooperation in merger control. Even though the status of the MWG is rather informal, it plays a very important yet less conspicuous role in the cooperation in merger cases across Europe. I refer readers to the excellent essay by Andreas Bardong, one of the founding fathers of the MWG, to learn more about the function and achievements of the MWG. Throughout the years, the MWG has proved to have been an excellent forum of close cooperation and the exchange of experience and ideas between all the individuals and authorities involved. Most importantly, it connected people from all NCAs, extending their relations beyond their official roles. This is the best example of the main *leitmotiv* of this book – from networks of authorities to networks of people. It proves that official engagement in cooperation with time extends to personal links and relations.

At the end of these introductory considerations, it is worth pointing to one more important, though often poorly understood source of the success of international cooperation between NCAs. The success of the cooperation, regardless of whether it is bilateral cooperation or through a network, is determined by the human factor. Mutual respect, trust and openness are among the basic conditions for effective cooperation between authorities and institutions, and are crucial for the success of a given network.[6] Although this may seem like a truism, without well-developed relations between the officers of NCAs involved in international cooperation, the latter could not develop

6 HAWK, B., BEYER, J. (2005) Lessons to be Drawn from the Infra-national Network of Competition Authorities in the US. The National Association of Attorneys General (NAAG) as a Case Study. In: Ehlermann, C.-D., Atanasiu, I. (eds.), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*. Oxford: Hart, p. 110.

so well. International cooperation between NCAs is largely deformalised, as networks often operate without a physical dimension, not to mention a secretariat or other permanent structure. Without commitment based on the mutual respect and trust of those responsible for this cooperation in NCAs, neither bilateral cooperation nor transnational networks of NCAs would certainly have developed so much.

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The book is published under the auspices of the President of the Office for Competition and Consumer Protection. I am grateful for this support, which is the clear sign that the importance of international cooperation for the OCCP has been recognised. Let us hope it will contribute to invigorating of international efforts of the Polish NCA.

Last but not least, I would like to thank all the authors for their contributions. I am well aware that it has not always been easy for them to find time to prepare their work. Therefore I am really grateful for their papers and I hope that readers will also appraise and appreciate their efforts.

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BETTER CONNECTED : EUROPEAN CO-OPERATION IN TELECOMS CASES[1]

CLEO ALLISTON

Abstract:

The case study is devoted to the analysis of the European Commission's decision in the Three/O2 UK merger. The case represents a shift in Commission's analysis of telecom mergers. It is also a model example of cooperation between NCAs and the European Commission in merger cases.

Keywords:

merger control, telecom merger, merger prohibition, cooperation between NCAs

Introduction

In 2016 the European Commission took the relatively rare step of blocking a proposed merger – the acquisition of the UK telecom provider O2 UK by CK Hutchison Holdings, the owner of rival telecoms provider in the UK, Three (referred to here as the Three/O2 merger). To be fully understood and appreciated, this decision must be set against the backdrop of several years of consolidation in telecoms markets across Europe, the dissatisfaction of national competition authorities (NCAs) over the Commission's previous decisions in this area and the close co-operation between the Commission, the CMA and other interested NCAs.

1 All views expressed in this article are strictly personal, and should not be construed as reflecting the opinion of the CMA.

This case study explains this backdrop and why the case and the policy changes that ultimately followed it can be seen as a model for co-operation and compromise between regulators.

Telecoms consolidation in Europe – background to the Three/O2 UK merger

The Three/O2 merger came as the latest in a line of mergers between mobile network operators which showed a general trend towards greater consolidation in mobile telecoms markets (already concentrated markets with high barriers to entry) across Europe.

Prior to Hutchison announcing its intention to acquire O2 in the UK, the Commission had cleared (conditionally, having accepted remedies offers) notified mergers between mobile network operators (MNO) in Ireland, Germany and Austria, each of which had reduced the number of mobile network operators from four to three in those countries. The acceptance by the Commission of remedies in these mergers had left many NCAs, including the CMA, uneasy about possible perceptions of leniency on the part of the Commission towards fewer mobile telecoms operators in Europe. There were also concerns that the remedies accepted by the Commission did not fulfil the requisite criteria to render an anti-competitive merger compatible with the common market.

Basic conditions for acceptable remedies

While the burden of proof is on the Commission to prove a finding of a substantial impediment to effective competition (SIEC), it is up to the parties to put forward an offer of remedies and all necessary information to show that the offer meets the conditions set out in the EUMR. These conditions are:

a) The remedies eliminate the competition concerns identified in their entirety;
b) The remedies are comprehensive and effective; and
c) The remedies are capable of being implemented effectively within a short period of time.

It is then for the Commission to determine whether the merger can be declared compatible as a result of the remedies.[2]

In the previous telecoms cases, the Commission had accepted remedies which were intended to enhance the offering of, and therefore competition from, mobile virtual network operators (MVNOs). MVNOs, which are a feature of mobile telecom markets across Europe, provide telecoms services by leasing network infrastructure from MNOs. They were a welcome competitive dynamic in often very concentrated markets with barriers to entry such as the need to acquire significant network infrastructure and the

2 Articles 6(2) and 8(2) of the EUMR (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, EU OJ L 24, 29.01.2004, p. 1-22. Available from: https://eur-lex.europa.eu/eli/reg/2004/139/oj) expressly provide that the Commission may decide to declare a concentration compatible with the common market after modification by the parties. Such modifications are more commonly referred to as remedies.

authorisation to use spectrum bands. In addition, in piggybacking on established mobile networks, MVNOs may often offer lower prices to consumers. However, in terms of *eliminating* the competition concerns identified from the merger of two MNOs, many thought that an MVNO by its very nature of being reliant on an MNO could not replace the competition lost.

As noted in the Commission's guidance on remedies,[3] the basic aim of remedies is to ensure competitive market structures. Accordingly, remedies which are structural in nature in that they offer a lasting change to the market are preferable. While the remedies in the Austrian, German and Irish cases did include structural elements through the divestment of spectrum and a degree of network capacity, without a network or other relevant assets of their own, there was criticism that introducing new or even enhanced MVNOs would not bring about the necessary lasting change since they remained dependent on the MNOs and lacked the ability and incentives to compete effectively in the longer term.

Indeed by 2016, four years after the Austrian merger was cleared, the MVNO which was the beneficiary of the remedy had only been operating for two years, the full suite of assets offered to the MVNO had never been utilised and the Austrian telecoms regulator found that prices for mobile services had increased.

The Commission was however showing willingness to listen to the criticism and learn from the outcomes of previous cases. A three-to-two case in Denmark (the then newly appointed Vestager's home turf) in 2015 saw the Commission showing more skepticism about the MVNO-based remedy offered by the parties which ultimately lead to the deal being abandoned. Vestager has subsequently been clear that this case was on a pathway to being blocked had the parties not decided to throw in the towel.[4]

In the same month that the parties in the Danish case announced that they were abandoning the deal, the Three/O2 merger was notified to the Commission.

The Three/O2 case

The parties had entered into an agreement for Hutchison to acquire all of the shares in O2 UK from Telefónica. The result of the acquisition would be that both Three and O2 would be solely controlled by Hutchison. The acquisition was notified to the Commission for review under the EUMR in September 2015.

The investigation was detailed and complex and involved the review of a huge amount of internal documents, hundreds of third party requests for information (RFIs) and submissions from rival operators, NCAs and sector regulators across Europe.

3 Commission Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Council Regulation (EC) No 802/2004 (2008/C 267/01), EU OJ OJ C 267, 22.10.2008, p. 1–27, par. 15. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-:52008XC1022(01).

4 Speech by Vestager 'Competition in Telecom Markets' delivered at 42nd Annual Conference on International Law and Policy, Fordham University, 2 October 2015.

The Commission had multiple meetings with the parties, third parties, Ofcom and the CMA. Relatively rarely for the Commission, the case team also decided to undertake a consumer survey in Phase 2 of the investigation, employing a third party company to interview 1200 retail customers. This is something that was more common in UK merger investigations (both at Phase 1 and Phase 2) and the CMA was able to offer its assistance in procuring a suitable survey provider and designing the questions. In understanding the UK mobile telecom market, the Commission also drew heavily on information from Ofcom, as well as the CMA's investigation into the merger between British Telecoms (BT) and the mobile network operator EE which the CMA had recently cleared.

Concerns identified

The Three/O2 merger was intended to bring together two of the four MNOs active in the UK, which were EE (which by then was owned by BT), O2, Vodafone and Three. At that time, Three was the smallest MNO by number of users, but carried a significant amount of data traffic. It was known for its data-centric and lower cost deals. The CMA and Ofcom, in particular, considered Three an important challenger to the three more established MNOs, and therefore an important competitive constraint that would be lost as a result of the merger.

Particularly concerning was the existence of two network-sharing agreements between the four MNOs. The aim of such agreements is to share some network elements in order to reduce costs and improve coverage and capacity. Three had entered into a network sharing agreement with EE, while O2 had an agreement with Vodafone. The merger would therefore have allowed the merged entity to straddle both agreements with its competitors, which the Commission found would have impacted its incentives to co-operate and given it the ability to frustrate its rivals.

Remedies

Remedies were discussed but, perhaps learning lessons from the previous conditional clearances, the Commission found them inadequate to address the competition concerns identified. The CMA strongly believed (based on the evidence seen thanks to the co-operative nature of the interaction between the authorities) that the only appropriate remedy was the divestment of either the Three or O2 mobile network business either in its entirety or possibly allowing for limited 'carve-outs' from the divested business. The divestment would have needed to include the mobile network infrastructure and sufficient spectrum to ensure a commercially viable fourth MNO in the UK.

The three remedy proposals put forward by the parties did not go this far, failing to include direct divestment of network infrastructure to a new MNO entrant. Instead, the parties offered to agree network access to a new entrant operator.

As set out in a letter the then CEO of the CMA, Alex Chisholm, wrote to Vestager (which was also published), the CMA was of the strong view that the proposed remedies were incapable of eliminating the SIEC:

> *The proposed remedies are materially deficient as they will not lead to the creation of a fourth Mobile Network Operator (MNO) capable of competing effectively and in the long-term with the remaining three MNOs such that it would stem the loss of competition caused by the merger. In addition, they fail to address concerns arising from the presence of the merged entity in both the network sharing arrangements, including the greater risk of coordination that this brings.*[5]

Short of the full divestment Three's or O2's business, the CMA called for the Commission to block the merger. In May 2016 the Commission announced that it had found an SIEC which was not addressed by the remedies proposed by the parties, and it was therefore prohibiting the merger as it was incompatible with the common market. The Commission's press release noted its strong concerns that UK mobile customers would have had less choice and paid higher prices as a result of the merger, and that the merger would have harmed innovation in the mobile sector.

Lessons learnt – the Italian case

The Commission's prohibition in Three/O2 should not be seen as the Commission ruling out four-to-three telecoms mergers in Europe. Rather, it was a clarification of its thinking (and that of the NCAs that supported it) on how to make such mergers work in order to ensure that telecoms networks across Europe receive the investment they need, without sacrificing the effective competition from a rival MNO.

There was also a lesson to be learnt for parties in approaching remedies discussions. The offering and negotiation of remedies is no doubt a difficult question of strategy for businesses. Offer too much and the clearance can reduce the value of the investment or come at the expense of the benefits the merger was designed to bring to the business and hopefully the market. Offer too little and fail to mitigate the concerns of the regulator, risking a rejection and a prohibition. Like any negotiation there is risk and a who blinks first mentality on both sides. The parties in Three/O2, arguably with reason given the remedies accepted in previous cases, perhaps did not believe that the Commission would go as far as to prohibit a merger rather than accept remedies designed to facilitate and incentivise new MNO entry. However, for those engaged in the case at the time, there was a sense that the parties were unwilling or unable to take seriously the universal messages that were coming from the Commission, the CMA and Ofcom on what was necessary to fix the competition concerns identified. Despite three rounds of remedies offers, which on paper were designed to replicate the MNO competition lost, the parties were unwilling to offer a direct divestment of assets to a new entrant.

5 Letter from Alex Chisholm, Chief Executive Competition and Markets Authority United Kingdom to Commissioner Margrethe Vestager, European Commission from 11 April 2016. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/515405/CMA_letter_to_Commissioner_Margrethe_Vestager.pdf#page24.

Despite some publicity, the Danish case had perhaps not provided clarity of the Commission's position. The Three/O2 prohibition certainly did. The next parties to approach the Commission with remedies to fix a SIEC in a four-to-three telecoms merger, this time in Italy, did not misunderstand the Commission (or else were in a better position commercially to offer structural remedies) and achieved a conditional clearance with a remedy offer which included the divestment of individual parts of each party's telecom's networks, including spectrum, mobile base station sites and network access. Unlike in the UK case, the parties also produced executed agreements with remedies takers – a fix it first approach which satisfied the Commission that the entry of a new MNO was likely enough to be implemented.

Co-operation with the European Commission

The Commission's case team on Three/O2 was a model of pro-active engagement and openness with both the CMA and Ofcom, which lasted from pre-notification to final decision.

Counter-intuitively perhaps, the UK's forth coming vote on leaving the European Union may have assisted relations. Uncertainty over which way the vote would go (and ultimately dashed hopes that it would go one way rather than the other) perhaps encouraged the Commission to demonstrate that it takes concerns of Member States seriously. On the CMA's part, it was particularly open and forthright about their concerns over the merger from very early on. The referral request mechanism under Article 9(2)(a) was also used by the CMA as a tool to signify their significant interest in the case, highlight the probable competition concerns and apply a degree of pressure on the Commission to engage with the CMA.

Power of working together – making Member States' opinions matter

The CMA was also able to call on the support of other NCAs, notably Germany, Austria and Italy, to drive home the real risks arising from consolidation in the market. This proved valuable in supporting the Commission's emerging concerns, providing detailed market knowledge from jurisdictions where consolidation had already occurred and presenting a united front at the Advisory Committee stage.

Reflections and conclusion

The Three/O2 investigation demonstrates the coming together of NCAs, national sector regulators and the Commission to clarify thinking on mobile telecom market consolidation in Europe, both in regards to competition concerns and how they may be remedied. Despite the complexities of the market, the well-resourced parties and the large amount of information and data the co-operation was detailed, close, productive and effective and perhaps represented the high point of co-operation between the CMA and the Commission.

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The author notes that since the time of writing, the General Court has annulled the Commission's decision to block the Three/O2 merger. The General Court found that the Commission had not proved the effects of the merger to the sufficient legal standard and had not shown, based on the evidence, that the merger would result in a significant impediment to effective competition. The Commission has appealed the judgment.

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THE EU MERGER WORKING GROUP: LOOKING THROUGH THE REAR VIEW MIRROR

ANDREAS BARDONG

Abstract:

The article provides the author's personal perspective on the establishment and works of the MWG and describing the functions of a closed and informal transnational network of European NCAs in the following aspects: policy development and the guidance document on NCA-cooperation; as a platform for the exchange of experiences between NCAs for current issues regarding the interpretation of EU rules; as a forum for new and sometimes controversial ideas and space for discussions in conflict; and as an incubator for building up mutual trust.

Keywords:

EU Merger Working Group, merger control, cooperation between NCAs

Introduction

The EU Merger Working Group (MWG) was established in January 2010. The idea for such a forum concerning mergers, as an equivalent to the plenary of the European Competition Network (ECN), which only deals with antitrust issues, was initially formulated by several national competition authorities (NCAs) at a break out session of the European Competition Authorities (ECA) and was later taken up by the EU Commission. It started out as an ad hoc group, but was quickly recognised as a permanent working group. Its members were drawn from NCAs and the policy section of the EU Commission.

The working group is presided over and managed by three chairs. A permanent chair held by the EU Commission and two vice-chair positions filled on an alternating basis by NCAs that volunteer for the job. The vice-chair positions usually rotate in a frequency of two to three years. The first two vice-chairs were the Irish and German competition authorities (January 2010 to October 2011).[1] The MWG holds about three meetings a year on average. During the time that the author can report on, the chairs usually had frequent telephone conferences to prepare the meetings. Depending on the projects, there were also intensive exchanges between all the members, or members of particular project teams, to advance the work on particular topics or documents, including best practice documents, papers, and presentations.

The purpose of this article is to set out some of the features of collaboration in the MWG from an inside-perspective. The author was involved in the work of the MWG from its establishment until mid-October 2016. He represented the Bundeskartellamt, the German competition authority, as one of the first two co-chairs of the MWG, remaining an active member until he left his position as head of unit merger control at the Bundeskartellamt's general policy department. The positions and opinions expressed here are his own and do not necessarily reflect the past or current positions of the Bundeskartellamt. The contribution is limited to personal observations. It is not an academic contribution to the subject. Therefore, footnotes are rather limited and a current review of the available literature is not included.

The article focuses on the following aspects of the work of the MWG and provides a glimpse of each topic: (i) policy development and the guidance document on NCA-cooperation; (ii) a platform for the exchange of experiences between NCAs; (iii) the lounge of the NCA merger network; (iv) a platform for current issues regarding the interpretation of EU rules; (v) a laboratory for new and sometimes controversial ideas; (vi) a space for discussions in times of conflict; and (vii) an incubator for building up mutual trust.

Seven aspects regarding the role and work of the MWG

1. Policy development and the guidance document on NCA-cooperation

The MWG's first major project was the development of a guidance document on NCA cooperation.[2] The project started out with the initial idea of complementing existing

1 Then the United Kingdom and Austria, the third couple of vice-chairs came from France and Poland, the fourth from Spain and Italy.

2 MWG, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review* (2011) [adopted November, 8 2011]. Available from: http://www.ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed January, 12 2020]; EC, *European Competition Network Cooperation in Merger Control*. Available from: http://www.ec.europa.eu/competition/ecn/mergers.html [Accessed January, 12 2020].

guidance documents developed by ECA with a lean list of ten learnings regarding NCA cooperation. The project gained momentum, evolved into ever more ambitious drafts and finally resulted in a substantial guidance document whose objective is to enhance cooperation between the NCAs in the EU in order to increase overall efficiency, transparency, effectiveness and timeliness of merger review. In order to reach this objective, it contains guidance for NCAs as well as for merging parties.[3]

The successful achievement of this project proved the value of the MWG both as a think tank for NCA co-operation and as a group that was able to formulate and reach agreement on policy issues and how to implement them in practice. The development of the guidance document relied on very intensive and close co-operation between the two vice-chairs and the EU Commission, with a high frequency of telephone conferences between the meetings of the MWG and a small core group that was able and willing to devote a significant amount of their time to the project. At a second stage of the project, a large number of NCAs provided comments on the draft, offering significant contributions to the document. Not all the positions were compatible or likely to be agreed on by consensus. Finally, after extended discussions, it was possible to find solutions or compromises on all the open issues and to reach an agreement on the document. The guidance document was subsequently subject to public consultation (in April 2011) and was, after further discussions and revisions, agreed on by the heads of the EU national competition authorities and the Commission's Director General for Competition (on 8 November 2011), before being published in its final form.

2. Platform for the exchange of experiences between NCAs

The MWG quickly established itself as a platform for the exchange of experiences in merger control cases and merger policy. In contrast to the plethora of conferences in the area of competition law that also serve this function, the MWG provides added value as a platform because it serves as a closed user group. It allows a frank exchange of opinions within the peer group of competition authorities. This open exchange is important to allow for an environment that enables its participants not only to share success stories, but also to reflect on investigations that did not run smoothly. It is important for enforcers to understand why particular cases ran into problems and how to avoid mistakes. This applies to process and procedure, as well as to results, i.e. the aim is to avoid type I as well as type II errors.

During the author's participation in the work of the MWG, the topics covered included, in particular, merger remedies and gun jumping. Both topics provide a lot of interesting material for success stories and difficult situations.[4] The topics were covered

3 For a summary of the guidance document's substance and a comment on the issues raised during the consultation of the draft document see BARDONG, A. (2012) Cooperation between National Competition Authorities in the EU in Multijurisdictional Merger Cases—the Best Practices of the EU Merger Working Group. *Journal of European Competition Law & Practice*, 3 (2), pp. 126–140, https://doi.org/10.1093/jeclap/lpr091.

4 See, for example, BARDONG, A. (2012) Germany: The Bundeskartellamt's New Merger Guidelines.

in several consecutive sessions of the MWG. Several NCAs as well as the EU Commission presented cases and discussed their experiences and learnings. The discussion also provided an opportunity for the other NCAs to add further examples from their own jurisdiction. The presentations were shared. The MWG did not record and publish the discussions. The results of the discussions were not compiled in a paper. This is an approach that differs from the discussions in the equivalent forums of the OECD. It seems a loss not to go through this process and not to make the results publicly available. However, in my opinion, this approach of the MWG is justified because it allows for a very open exchange of experiences in a forum that includes NCAs from all Member States and the EU Commission.

3. The 'lounge' of the NCA merger network

Merger investigations are dealt with either by the EU Commission or by one or several NCAs in the EU. Case allocation between the EU and the national level is based on the turnover of the merging parties (to be more precise, the 'undertakings concerned'), the sometimes complex rules defining the undertakings concerned, and the definition of concentration. In principle, the rules provide a clear allocation of a case either to the EU or the national level. However, the framework leaves some flexibility to change the case allocation before or after the case has been notified. In this context, there are cases in which close cooperation between the NCAs concerned by a merger case among each other and with the EU Commission is necessary.

A more informal function of the MWG is that it provides a time and place for bilateral discussions on ongoing cases, in particular with regard to case allocation and referrals. During breaks, as well as before and after the formal meetings is usually a good time to initiate or continue discussions with regard to the preparation of applications for case referrals by Member States, or to discuss whether case referral applications by merging parties will be accepted. On occasions, the evenings before MWG meetings were also used for informal exchanges and social meetings of the delegations that arrived in time for the gathering.

4. Platform for current issues regarding the interpretation of EU rules

The meetings of the MWG also function as a platform to discuss issues of interpretation with regard to various provisions in the rules, guidelines, and notices in the area of merger control. Its role can be described as a hybrid of a message board/living wiki. During the author's participation at MWG meetings, some issues were usually raised during a formal item on the agenda closer to the end of the meeting. This slot was explicitly set aside for such questions. Usually, the competition authority that expressed an interest in putting a specific question on the agenda introduced the subject and explained the background,

Journal of European Competition Law & Practice, 4 (3), p. 481-488, https://doi.org/10.1093/jeclap/lps042; BARDONG, A. Market Test in German Merger Control (2013) *Concurrences. Revue des droits de la concurrence*, 1, pp. 17-20. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223173 [Accessed September 12, 2020].

in particular the underlying investigation or procedure in which the issue had presented itself. Most of the time, the issue was identified before the meeting, in order to allow the other participants to check their own practice on the matter. The discussion then allowed the group to share their views and practical experiences on the issue.

It is also worth mentioning that many issues of interpretation were also raised at the sidelines of the meeting in bilateral discussions or smaller groups, for example over a good cup of coffee in the cafeteria of the Commission's conference building, Centre Albert Borschette, or in the open spaces in front of the meeting rooms over a cup of free-of-charge but less-than-in-spiring coffee.

The issues discussed spanned a broader range of topics, but a large number of questions concerned issues of the rather complex rules of jurisdiction. The guidelines on jurisdictional issues already address a fairly comprehensive set of issues. However, the real life situations that arise in business arrangements and corporate structures tend to be even more diverse and dynamic. In addition, it is sometimes difficult to apply the general rules to the facts of a particular case that has to be decided in a merger investigation. Many topics raised concerned issues of jurisdiction, including, if the recollection of the author is correct, issues of the acquisition of control, the calculation of turnover, joint ventures, the attribution of turnover to parent companies, the treatment of state-owned companies, etc. Specific issues concerning the substantive assessment of particular mergers were also discussed. The discussion benefitted from the extensive experience of the members of the group, and from the frank discussions that provided sufficient background without disclosing business secrets.

5. Laboratory for new and sometimes controversial ideas

The MWG sometimes also played the role of a think tank for merger policy, as well as a laboratory for new ideas. This is an important role and the members of the MWG are well equipped to provide insights on their national regimes. This background can be very helpful in order to develop policy, instruments and institutions at an EU level. This is even more true when it comes to the assessment of initial thoughts or projects that consider steps to harmonise certain elements of national merger control throughout the European Union.

One example of this role of the MWG was the intensive discussion on the proper place for public policy considerations in merger control procedures. This project started with a stock-taking exercise that made apparent the differences between the national approaches to this issue. Not all Member States have written rules and procedures on how public interest is taken into account. A number of regimes focus more on the definition of acceptable public interest grounds as an instrument to limit public interest interventions in the assessment of mergers, which is otherwise driven by competition concerns.

By contrast, the German public interest regime reaches a similar result by focusing on procedural and institutional rules that guarantee maximum transparency in the process. If merging parties apply for ministerial authorisation (Ministererlaubnis) after a merger

has been prohibited by the competition authority, there are several procedural steps that make sure a public debate on the application of public interest rules in the particular case is initiated, or at least facilitated. The German model also clearly allocates political responsibility for the balancing of competition goals and other political goals. It provides certain limits to non-competition goals, but the legal provisions do not define them. In the author's opinion, this approach may not be easily transferrable as a model to other Member States, and may not function properly in a different institutional context. This is one example that illustrates that the harmonisation of the national rules on public policy considerations in merger control may not be the best approach. One of the conclusions that the MWG has rightly drawn for the treatment of public policy considerations in merger control is indeed that harmonisation is not put forward as a recommendation. It was coupled with a clear message to continue to design merger regimes in a way that places the emphasis on the competition assessment of mergers and limits public policy considerations to very exceptional cases. The results were published in a MWG document that also provides a detailed overview of the various rules applicable in the EU Member States.[5]

Another project concerned information requirements in national merger control regimes. It took a similar course. It started with a stock-taking exercise of merger notification forms and respectively information requirements. The comparison identified a broad level of convergence, but also a number of similarities and differences with regard to the details, as well as the general approach. A deeper analysis showed that a one-size-fits-all approach would not work in the different Member States. For example, initial information requirements in Germany turned out to be extremely light in comparison to other merger regimes. More detailed information requirements are tailored to the particular case and restricted to cases that require the provision of broader information. This system works in the context of the German competition authority, which has an extremely high retention rate, meaning that its officials can build up a lot of experience over the years and its decision-making structure is lean, which allows for a very speedy completion of investigations. At the same time, this approach is necessary because of the high number of mergers that have to be notified to the German competition authority. Transplanting this system to other Member States may not be workable. By contrast, increasing the information requirements in the German system does not seem to be a good idea either. The MWG was right not to conclude in its report that the harmonisation of merger forms would be the recommended way forward.[6] A very useful result of

5 MWG, Public Interest Regimes in the European Union – differences and similarities in approach. Final Report of the EU Merger Working Group, March, 10 2016. Available from: https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf [Accessed January, 4 2020].

6 MWG, Report: Information requirements for merger notification. Available from: http://www.ec.europa.eu/competition/ecn/mir_report_en.pdf [Accessed January, 5 2020] at the end.

the project was the publication of comparative tables,[7] which were produced as a result of the stock-taking exercise.

A further example of a hot topic discussed at the MWG is the Zivy report, containing far-reaching proposals advanced by the French competition authority ('Making merger control simpler and more consistent in Europe'[8]). This report and its ten recommendations were developed by a high-ranking official of the French competition authority on a mission by the French government. The mission was launched in the aftermath of a politically sensitive merger case on which the French and the UK competition authorities came to different results (Eurotunnel's buyout of Sea France).[9] Quite a number of these proposals were intensively debated and attracted a lot of criticism from other NCAs. The MWG was a very appropriate forum for this debate, because it allowed an open discussion based on arguments and practical experience in these fields. Such discussion provides a solid basis that should be available before a political debate is started, which is subject to different dynamics.

In the author's opinion, most of the proposals were not the most helpful response to the challenges of consistency raised by (a low number of) parallel in-depth investigations of multijurisdictional mergers by two (or infrequently more than two) national competition authorities. However, the MWG was definitely the right place to have a meaningful and informed debate on the proposals. The German competition authority favoured a different remedy to address the issue: introducing a stop-the-clock provision that allows national competition authorities to bring parallel national investigations of multijurisdictional mergers onto the same timeline, in the event that NCAs identify serious competition issues that need to be handled in an in-depth investigation. If there is time and room for intensive cooperation on the basis of the same facts available to the NCA's conducting their investigations in parallel, then the risk of inconsistent decisions is extremely low.

The MWG performs a similar function when legislative proposals are discussed. The MWG debated in detail the Commission's proposals to amend the EU merger control regime. In particular, the treatment of minority shareholdings,[10]

7 See EC, *European Competition Network Cooperation in merger control*. Available from: http://www.ec.europa.eu/competition/ecn/mergers.html [Accessed January, 12 2020].

8 Autorité de la concurrence, Pour un contrôle des concentrations plus simple, cohérent et stratégique en Europe, Une réforme «gagnant-gagnant» au service de la compétitivité, Rapport au Ministre de l'Économie et des Finances, December, 16 2013, Paris (rapporteur, chargé de mission: Fabien Zivy). Available from: http://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres.pdf [Accessed January, 5 2020]; English translation available from: www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf [Accessed January, 5 2020].

9 See, for example, ZIVY F., BOSCO, D., STEENBERGEN, J., BRIGGS, J.D., OAKES, D.K. (2014) Zivy's Report: Diverse Perspectives on the Cross-Borders Mergers. *Concurrences Review*, 1, pp. 10-23.

10 For a discussion of the approach in German competition law on this topic, see BARDONG, A. (2011) Minority Interests in Germany. *Concurrences*, 3, pp. 14-41.

the referral system[11] and foreign-to-foreign mergers[12] were discussed at various stages of the project.

6. Space for discussions in times of conflict

The MWG also provided a forum to discuss issues that arose in the context of advisory committee meetings, notably conflicts that became apparent between the position of Commissioner Almunia's DG Competition and at least the vast majority of Member States with regard to voting rules applicable to the Advisory Committee. The string of four-to-three mergers of mobile network operators in the telecoms industry met with increasing opposition by NCAs (including the UK, Ireland, Austria and Germany). A significant number of NCAs were not convinced that the remedies proposed by the merging parties and accepted by the EU Commission were sufficiently robust to effectively address the competition issues identified by the investigations of the EU Commission.

The Commissioner tried to downplay the NCAs' criticism in his statements to the press.[13] Attempts were made to come up with a requirement of a quorum for the adoption of Advisory Committee opinions. This requirement had no defendable basis and was strongly rejected by the NCAs. Not all the NCAs had been critical of the Commission's position with regard to the mobile telecom network mergers, but almost all the NCAs were critical of the Commission's interpretation of voting rules applicable to the Advisory Committee. At least some authorities saw this approach as an attempt to bend the procedural rules in order to downplay the weight of an Advisory Committee opinion that did not agree with the Commission's assessment of remedies in one of the major mobile network merger cases. The NCAs agreed that what is required for Advisory Committee's opinion is a majority of its members present and voting yes or no. It was clear to them that a majority means that more votes are in favour of the position than against. They were equally clear that abstentions do not effectively count as votes for or against, but that the balance of Yes and No votes is decisive. It was also clear to them that voting on Advisory Committee opinions does not require a majority of

11 See e.g. Statement of the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt (German Competition Authority) on the White Paper published by the European Commission 'Towards More Effective EU Merger Control', October, 31 2014. Available from: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Stellungnahmen_Opinion/Statement%20-%20White_Paper_more_effective_EU_merger_control.html [Accessed January, 12 2020]; Statement of the Federal Ministry of Economics and Technology and the Bundeskartellamt on the Consultation Paper published by DG Competition on possible improvements to some aspects of the EC Merger Regulation (ECMR), ('Towards more effective EU merger control'), September, 17 2013. Available from: http://www.bundeskartellamt.de/EN/AboutUs/Publications/Opinions/opinions_node.html [Accessed: January, 12 2020].

12 The approach on this issue in German competition law is discussed e.g. BARDONG, A. (2015) Foreign-to-Foreign Mergers: the German Guidance as a Blueprint for Reform?. *Journal of European Competition Law & Practice,* 6(7), pp. 477-491, https://doi.org/10.10093/jeclap/lpv029 (which does not include an account of the latest legislative changes on this issue).

13 Compare e.g. Regulators revolt against Telefónica and E-Plus merger. *Financial Times*, 20 June 2014.

the members of the committee. A majority of votes is sufficient, when compared to the sum of yes and no votes.

The example shows that the MWG can also be a useful forum for NCAs to defend their procedural rights in the context of EU merger investigations against interpretations of the procedural rules by the EU Commission, which were seen at least as very biased, in the hopefully unlikely event that such an exceptional situation should arise again. However, in the context of conflicts between the NCAs and the EU Commission, the MWG is a less effective forum because it is chaired by the EU Commission and two NCAs. This puts the Commission in an advantageous position when it comes to fending off criticism against its positions or actions. In addition, the MWG is a forum for the exchange between experts. When it comes to issues that are more of a political nature, the forum can discuss the underlying legal, economic and administrative matters, but it cannot function as a forum to balance out or decide on the political issues. In the end, these issues have to be dealt with at a higher level, e.g. at the level of Commissioner and the Heads of NCAs.

7. Incubator for building up mutual trust

In the author's opinion, a crucial role of the MWG is to serve as an incubator to build up mutual trust between NCAs. Regular meetings, personal contacts, the frequent exchange of opinions and experiences in practical cases, cooperation on positions on policy questions to be commented on or decided on by the MWG – all of these exchanges help to build up mutual trust.

The bridges built up in this process can then be used subsequently, when it comes to cooperation in parallel merger investigations. Cooperation in merger cases often has to be implemented under tight time constraints. Cooperation is not only required in situations in which the burdens and benefits of cooperation are equally shared in the same case. Sometimes, the different timeframes of the investigations mean that investigations are at different stages of the procedure. It is not unusual for one investigation to be more advanced and for cooperation to be more beneficial for the authority going second. The subsequent investigation can build on the results of the investigation that started earlier. In these situations, cooperation requires mutual trust. Cooperation can be facilitated if give and take can be established in a larger context going beyond the individual case, for example, if cooperation can be reciprocated in subsequent cases with an inverse timing.

Conclusion

The MWG is an important platform for cooperation between NCAs, as well as for cooperation between NCAs and the EU Commission. It also plays an important role in the development and formulation of policy. The way the role of the chair has been organised, i.e. by having a permanent chair of the EU Commission and two vice-chair positions filled by two alternating member states, has worked best when the MWG ad

dressed topics on which the NCAs and the EU Commission had common, or at least compatible, interests. It has been less effective in other situations.

In addition to its role as an important platform for discussions on policy, the MWG has also contributed significant work products. The author would like to mention the guidance document on cooperation between NCAs. This was crucial in providing a transparent reference for NCAs and stakeholders with regard to interagency cooperation in merger investigations.

Based on his personal experience, the author would like to underline the high level of commitment of the individuals involved in the work of the MWG. It was a pleasure to work with such a group of interesting and very dedicated people from the NCAs and from the EU Commission. The MWG has established itself as a place for discussions of high quality. The input, based on hands-on experience in a broad range of real life cases, has been instrumental in all the topics dealt with by the group.

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SUPERVISION OVER THE INTERNATIONAL ACTIVITIES OF NATIONAL COMPETITION AUTHORITIES (THE POLISH EXPERIENCE)

MATEUSZ BŁACHUCKI

Abstract:

In recent years, there has been growing international cooperation between national competition authorities (NCAs). This takes various forms – from bilateral cooperation to establishing transnational competition networks. At the same time, this process has not been accompanied by the development of supervisory mechanisms. The article seeks to review the national control mechanisms that may be used to supervise international cooperation between NCAs. They are based on the Polish example and presented in a comprehensive way in order to capture all possible forms of control, such as hierarchical administrative control, control exercised by an ombudsman, a public prosecutor, specialised supervisory administrative authorities and the European Commission, covering judicial (both national and European) supervision, parliamentary and social control. The article supports the view that proper mechanisms of control over the activity of specialised and often independent administration authorities (such as NCAs) are crucial for their accountability. Such mechanisms are also beneficial for the accountability of transnational competition networks.

Keywords:

international cooperation, national competition authority, supervision of public authorities, hierarchical administrative control, parliamentary oversight, social control

Introduction

National public administration traditionally engages in matters that are national by nature. International relations (matters) have generally been reserved for the central government (usually the head of the government supported by the ministry of foreign affairs) or its specialised agencies (such as agencies supporting exports or foreign investments). Hence it is not surprising that existing national supervisory mechanisms generally focus on controlling and reviewing the execution of national administrative jurisdiction. However, this seems to be inadequate in order to capture the new developing sphere of activities of national public administration that is related to international matters. The processes of globalisation and Europeanisation have a deep influence on national public administration systems. However, this impact is not uniform, which is especially visible in relation to the supervision of international activities undertaken by national public administration bodies. An excellent example of this phenomenon is the regulation of supervision over the international activities of national competition authorities (NCAs). As a starting point for the analysis, the Polish legal and administrative system will be taken into account. Although this NCA may not be wholly representative for all European NCAs, the identified issues are universal in nature and may be relevant for other national jurisdictions.

The issue of supervising the international activity of NCAs touches on the very essence of cooperation between NCAs from various countries, and thus its transnational character. For this reason, it is not the activity itself, nor the existence of a network of competition authorities that is becoming a source of problems, but rather the transnational aspect of their activity. Due to this transnational element of the international activities of NCAs, these activities escape national (state) supervision.[1] In this context, the possibilities of effectively controlling transnational competition networks at a global level seem particularly problematic. This issue may also raise doubts in the case of continental organisations. In the EU, there are two basic problems: how to determine the jurisdiction of national and European courts when supervising European networks (this is a derivative of the issue of the division of competences between national authorities and the Commission and other EU institutions in the case of a network applying EU law), and what fundamental rights will apply to network activities.[2] These problems point to the fact that, at EU level, there is a lack of adequate administrative mechanisms for controlling networks and the national authorities operating within them (they are essentially limited to judicial review, plus the very limited role of the European Ombudsman). It is emphasised that complex administrative procedures in the EU do not create a new administrative law order, but are rather a collective descriptive category.

1 HAMANN, A., FABRI H.R. (2008) Transnational Networks and Constitutionalism. *International Journal of Constitutional Law*, 6(3–4), p. 484.

2 BIGNAMI, F. (2010) Individual Rights and Transnational Networks. In: Rose-Ackerman, S., Lindseth P.L. (eds.), *Comparative Administrative Law.* Cheltenham–Northampton: Edward Elgar, p. 636.

The result is that, within the multilevel European administration, there are no specific legal protection measures other than those offered by EU law or national laws.[3]

Taking all this into consideration, the article will examine possible supervisory mechanisms that may be used to review the international activities of the Polish NCA (including within networks). The analysis will be conducted by examining all the existing and available supervisory mechanisms, with a focus on how they may be used to exert control over the international activities of the Polish NCA. First, it is worth analysing whether national (Polish) law has adequate hierarchical administrative control mechanisms in this respect. Then the next level and forms of administrative control, i.e. as exercised by the Polish ombudsman, public prosecutors, specialised supervisory administrative authorities and the European Commission, will be analysed. That is followed by an overview of judicial (both national and European) control that may take place in the analysed respect. In addition, parliamentary oversight will be discussed. Last but not least, various forms of informal, social control will be considered. The article is completed with some conclusions and recommendations.

Hierarchical administrative supervision over the international activities of the Polish NCA

The basic issue emerging in the context of hierarchical administrative supervision in relation to the international activities of the Polish NCA is that this control is often illusory. Traditional public administration relations are hierarchical, whereby authorities with a social mandate exercise control over other official organs. This traditional image of relations has changed significantly in the face of the Europeanisation and globalisation of public administration. Influenced by or obliged by European law, national legislators have given the status of independent authorities to many public administration organs. This has resulted in a significant formal limitation on the possibility of exercising hierarchical administrative control over these independent authorities. At the same time, it meant that these authorities became not only largely independent of national governments, but paradoxically it led to supranational bodies, EU institutions, becoming the guarantors of this independence. This problem has been reinforced by two factors: 1) the membership of national independent administrative authorities in supranational networks, and 2) the transnational nature of many administrative matters requiring international cooperation between national administrative authorities. It is important to realise that, according to some researchers, almost every regulatory issue may now be considered to have an international dimension.[4] In the Polish context, it is not possible for the Ministry of Foreign Affairs to maintain its monopoly on contacts with foreign governments and national authorities of other states or international and

3 CANANEA della G. (2004) The European Union's Mixed Administrative Proceedings. *Law and Contemporary Problems,* 68 (1), p. 215.

4 Warning, M.J. (2009) *Transnational Public Governance. Networks, Law and Legitimacy*. Basingstoke–New York: Palgrave Macmillan, p. 23.

transnational organisations. As a result, the Ministry of Foreign Affairs has effectively limited its functions to providing consular protection and maintaining diplomatic relations. Transnational cooperation in administrative matters has become the domain of ministries and other public administration authorities.[5] Currently, the role of the Ministry of Foreign Affairs in coordinating the international activity of Polish administrative organs is even more limited. The Ministry of Foreign Affairs still takes a leading role whenever binding norms (European or international) are adopted on a European or international forum, or in the event of litigation before European or international tribunals and courts to which Poland is a party. Apart from these situations, however, the Polish NCA (and probably the vast majority of Polish public administration authorities) operates basically independently within the European administrative space. In addition, the Polish NCA operates completely independently of the Ministry of Foreign Affairs in many transnational competition networks. So far, the Ministry of Foreign Affairs has ever formally tried to establish the position of the Polish NCA presented on the forum of transnational networks. In the course of researching this article, no information was found that the Ministry of Foreign Affairs has ever taken any action in connection with the Polish NCA creating or acceding to any supranational network of competition authorities (such as the ECA or ICN). Serious doubts may also be raised about how strongly the Ministry of Foreign Affairs actually supervises the developments in the Polish position on the proposed content of binding European law. One example would be negotiations on the content of the ECN+ Directive,[6] during which the Polish negotiating position was based almost entirely on the position of the Polish NCA. The Ministry of Foreign Affairs did not notice, for example, that the proposed guarantees of the independence of competition authorities are contrary to the decisions of the Polish parliament on limiting the independence of the Polish NCA, and it did not in any way try to influence the position of the Commission in this respect.[7] This demonstrates the illusory nature of the Ministry of Foreign Affairs's control, not only in areas related to administrative international cooperation of the Polish NCA, but even in areas where the Ministry of Foreign Affairs should traditionally play a leading role.

The scope and influence of national hierarchical administrative control mechanisms is naturally restricted as a result of the internationalisation of public administration. The creation of transnational administrative networks (in particular in the European Union) often led to legislative changes. Those changes involved strengthening the national guarantees and procedures for independent exercising administrative jurisdiction. Moreover procedures within a network (e.g. the ECN), which minimise the impact on the network and its members on NCAs, may often constitute a significant barrier

5 Ibid.

6 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33.

7 In the last decade, the Polish Parliament has twice directly deprived the Polish NCA of any formal guarantees of independence.

to ministers and national governments entering the administrative jurisdiction of competition authorities.[8] This shows that national public administration authorities, by relying on standards of European law and enjoying the support of EU institutions, can limit national mechanisms of control.

At the same time, the issue of hierarchical administrative control and the possibility of supervisory interference in the activities of a national public administration organ by another public administration authority (e.g. a higher level (appellate) authority) touches on the essence of international cooperation and the activities of transnational networks. It is only possible for the national administrative authorities to participate in these networks if they enjoy jurisdictional independence. Cooperation at a transnational level is effective only if the cooperating authorities enjoy such independence.[9] A situation where every administrative action requires the approval of another authority, or when the authority cannot make any arrangements with other authorities without prior national consultation, means that the effectiveness of cooperation within the network with that authority decreases significantly. For this reason, a reasonable boundary and appropriate measures should be set out for hierarchical administrative control of the activity of national authorities within transnational networks. At the same time, it is impossible not to notice that neither the Polish NCA nor any other Polish regulators have their own higher level (appellate) authorities or ministries with which they would be obliged to consult before presenting their position on the international or network fora. Moreover, in the case of the Polish competition authority, it would be difficult to find another Polish central authority with which it could consult in order to obtain substantive support in antitrust or merger matters. The Polish NCA has been structurally and organisationally independent from the beginning, and was never part of any ministry.[10] The actual independence of Polish NCA has very broad from the start, which was also due to the specialised matters it dealt with. However, in many countries, competition authorities were once part of ministries, and in these cases control mechanisms seem to have been better developed. In Norway, for example, mechanisms for intra-administrative control exercised by the Minister of the Economy in relation to the competition authority included reporting obligations, the coordination of activities or obtaining a negotiation mandate. The basic instrument of control took the form of periodic reports, and other information provided by the competition authority to the minister, which also covered the Norwegian NCA's activity within transnational

8 DANIELSEN, O.A., YESILKAGUT, K. (2014) The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities. *Public Organization Review,* 14(3), p. 368.

9 EBERLEIN, B. (2005) Policy Coordination without Centralization? Informal Network Governance in EU Single Market Regulation. In: Ehlermann, C.-D., Atanasiu, I. (eds.), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*. Oxford: Hart, p. 148.

10 In the last three years of the communist regime in Poland, it was the ministry of finance that perform the function of the antimonopoly authority. However, since the change of the regime in 1989, the Polish NCA has always been a separate authority.

networks. In this regard, the minister even issued a special instruction giving detailed information on when it was compulsory to provide information. In practice, however, the minister rarely specified the mandate that the Norwegian NCA had to implement in the fora of transnational networks.[11] In addition, in cases where the issues discussed at the network forum concerned issues beyond the sphere of competition law itself, the Norwegian competition authority sometimes asked the opinion of other Norwegian authorities. This meant that the NCA actually had a very high degree of independence in terms of its activity on the fora of transnational networks.[12] Currently, that direct ministerial oversight has been lifted, and the independence of Norwegian NCA has increased. This shows that, even in countries where there were developed mechanisms for hierarchical administrative control, they were not used due to the special perception of the role of the competition authority.

An interesting paradox of supranational networks of competition authorities is that they can be dominated by a technocratic approach to cooperation and adjudicating cases. Transnational networks can behave like cartels. Joining a cartel results from calculations that the joint adoption of rules of conduct and coordinated behaviour are more favourable than undertaking actions individually. At the same time, each member of the cartel acts under the influence of a motivation to maximise its profit in every situation, and subordinates its behaviour to that motive. At a national level, interventions by politicians (national governments) can therefore be seen as an expression of sovereign control. On a transnational basis, on the other hand, the interventions of politicians (national governments) will be seen as egoistic actions aimed at politically neutral activities of the competition network and, above all, of the interests of other NCSs operating within them. As a result, at a transnational level national politicians and governments are synonymous with egoism and particularism, with transnational competition networks and the NCAs operating within them being treated as the highest good.[13] It seems that in some situations also national public administration bodies, especially when they are endowed with broad independence, may approach relations with their national governments in the same way.

Studies of selected NCAs have shown that the position of these authorities has strengthened in relation to the ministries supervising them as a result of the institutionalisation and formalisation of the ECN.[14] There is no doubt that the participation of national authorities in supranational administrative networks strengthens the tendency to harmonise national legal regulations, which is not, as a rule, questioned by nation-

11 Those obligations were partially removed before 2014.

12 LÆGREID, P., STENBY, O.CH. (2010) Europeanization and Transnational Networks. A Study of the Norwegian Competition Authority. *Jerusalem Papers in Regulation & Governance*, 25, p. 22.

13 SHAPIRO, M. (2004) Deliberative, Independent Technocracy v. Democratic Politics. Will the Globe Echo the E.U. *Law & Contemporary Problems,* 68(3–4), p. 349.

14 DANIELSEN, O.A., YESILKAGUT, K. (2014) The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities. *Public Organization Review*, 14(3), p. 367.

al governments. There is a view in the literature that this does not necessarily mean weak government control over independent authorities, but it can be a sign of mutual trust between national governments and national independent administrative bodies.[15] It seems that this thesis formulated in the conditions of developed Scandinavian democracy, while in the conditions of post-communist countries with weakly grounded foundations of a republican state, it does not correspond to real intra-administrative relations, which combine a large dose of systemic anarchy and traditionally understood manual hierarchical control.

An interesting form of control exercised by the Council of Ministers in relation to the Polish NCA is the adoption of the government competition policy and the obligation to report its implementation by the competition authority.[16] It seems that this can be an instrument of long-term control of the implementation of specific public policies, also in the transnational sphere. At the same time, this instrument is not suitable for ongoing or day-to-day control. However, the practice of adopting and reporting the implementation of government competition policies in Poland is not optimistic. An analysis of the reports shows that they are constructed with a high level of generality and do not contain particularly ambitious tasks, with transnational and international issues playing only a marginal role.

Despite the lack of developed mechanisms for hierarchical administrative supervision of the functioning of Polish NCA on national and transnational fora, several instruments can be identified that are available in the system of Polish public administration. First of all, this is supervision exercised by the Prime Minister,[17] which manifests itself in six areas:

- The Prime Minister appoints and dismisses the president of the Polish NCA as well as the vice-presidents;[18]
- The Prime Minister confers the Statute of the Polish NCA, which specifies the organisation of the NCA and, by regulation, the local and substantive jurisdiction of the regional offices in matters related to the activities of the Polish NCA;[19]
- The Prime Minister, executing the policy of the Council of Ministers, issues binding guidelines and instructions to the Polish NCA, with the restriction that they cannot relate to cases concluded by an administrative decision;[20]
- The Prime Minister may conduct or commission an audit of the functioning of the Polish NCA on the basis of the Act on Control in Government Administration;[21]

15 LÆGREID, P., STENBY, O.CH., p. 28.

16 Article 31 points 4 and 9 of the Polish Act on competition and consumer protection (the 'Competition Act'), 16 February 2007, Dz.U. 2019, item 369.

17 Pursuant to Article 29.1 of the Competition Act the Prime Minister exercises supervision over the activity of the Polish NCA.

18 Article 29 recitals 3 and 30 of the Competition Act.

19 Article 33 recitals 3 and 34 of the Competition Act.

20 Article 33c of the Act on Government Administration Divisions, 4 September 1997, Dz.U. 2018, item 762.

21 Article 8 of the Act on Control in Government Administration, 15 July 2011, Dz.U. 2011, No 185, item 1092.

- The Prime Minister is the body competent to deal with complaints regarding the tasks or activities of the Polish NCA;[22]
- The Prime Minister is the head of the civil service corps.[23]

The indicated possibilities of the Prime Minister intervening in relation to the Polish NCA may suggest that there is a strong hierarchical relationship. However, the practice of Polish public administration seems to suggest a slightly different picture of these relations in reality. The Prime Minister oversees many central government administration authorities, as well as performing his many other tasks, which means that the ability to exercise ongoing control of the competition authority is quite illusory. In addition, the appointment and organisational rights of the Prime Minister are incidental rather than ongoing supervision.

The issuing of binding guidelines and instructions by the Prime Minister creates the greatest potential to influence the functioning of the Polish NCA. This instrument may be used to implement the policy of the Council of Ministers and concerns the general administrative policy of the competition authority, but it cannot interfere with how the Polish NCA exercises administrative (competition) jurisdiction. It is assumed that the guidelines are general and the instructions are specific, although their practical distinction may be problematic.[24] Guidelines are a traditional instrument of administrative management in public administration, particularly popular and often abused during the communist regime in Poland.[25] The guidelines and instructions issued to the competition authority by the Prime Minister are binding and the Polish NCA is not entitled to appeal or review them. The subject of the guidelines and instructions may cover all matters falling within the government's scope of interest that also fall under the competence of the competition authority. In practice, these instruments can be used to persuade the Polish NCA to take a closer look at a given sector or a specific type of suspected conduct. Such guidelines could also refer to involvement in international cooperation, e.g. under regional or global initiatives of the Polish government. On the other hand, it should be considered as controversial, and even unacceptable, to specify in the guidelines the meaning of general clauses or other provisions used in the Polish Competition Act, such as the rule of reason or public interest in merger control. Such supervisory interpretations would directly interfere with the exercise of administrative (competition) jurisdiction of the Polish NCA and determine decisions in individual cases, which would be in stark contradiction with the provision of Article 33c of the Government Administration Divisions Act. The issuing of guidelines and instructions is a general system solution appropriate for a hierarchically built public administration.

22 Article 229.8 of the Administrative Procedure Code, 14 June 1960, Dz.U, 2017, item 1257.

23 Article 153.2 of the Constitution of the Republic of Poland, as amended, 2 April 1997, Dz.U. 1997, No 78, item 483.

24 GÓRALCZYK, W. jr (2016) *Kierownictwo w prawie administracyjnym.* Warszawa: Wolters Kluwer, p. 115.

25 They are discussed in detail by HOFF, W. (1987) *Wytyczne w prawie administracyjnym*. Warszawa: PWN.

However, the application of this instrument in relation to independent administrative authorities can raise serious doubts.[26] This solution is in line with the current legal status of the Polish NCA. However, it is inconsistent with the ECN+ Directive and the obligation to restore the independence of the Polish NCA. The issuing of guidelines and instructions is contrary to the ECN+ Directive, which explicitly excludes the possibility of independent competition authorities taking political instructions. This means that strengthening the ECN and its members will further lead to the greater autonomy of NCAs against national governments. This will be a development of the current phenomenon in Polish administration, consisting in the fact that membership of transnational networks of administrative authorities weakens, in practice, the importance of this supervision instrument of the Prime Minister in relation to the bodies reporting to the Prime Minister.[27] A significant difficulty in the empirical verification of this observation was that the Prime Minister has never used this instrument in relation to the Polish NCA. This situation can be explained using various hypotheses. The most optimistic one concerns the desire to respect the position of the Polish NCA and its expert knowledge by the Prime Minister. Another assumes that the Prime Minister does not use this instrument due to a lack of need or lack of practice. The most pessimistic hypothesis assumes that the there is no need to issue formal guidelines and instructions due to the fact that they are issued informally. As assessment of these hypotheses and their veracity goes beyond the scope of this article.

The Act on Control in Government Administration also creates broad possibilities of the Prime Minister controlling the functioning of the Polish NCA. According to Article 6.1 of this Act, the Prime Minister controls government administration organs or units, as well as units subordinate to or supervised by them. The Polish NCA is such a body. The Prime Minister may order an individual audit of the competition authority, but may also order an audit of the entire area of government administration (Article 8.2 of the Act on Control in Government Administration). At the same time, the Prime Minister defines the scope and object of the audit and its methodology. During the audit, the auditors have the right to access documents or receive witness testimony (Article 22). After the audit, a report is prepared and, if necessary, recommendations and post-audit conclusions are formulated. There is no publicly available information on the Prime Minister ever having ordered any individual audit of the competition authority. The Polish NCA was covered by several sectoral (covering all central public administration authorities) audits, though there is also no publicly available data on whether any post-audit conclusions were formulated regarding the Polish NCA, or whether and how the authority implemented them. Furthermore, there is no data on whether such an audit has ever involved international cooperation of the competition

26 HOFF, W. (2008) *Prawny model organu regulacyjnego sektorowej*, Warszawa: Difin, p. 194 et seq.

27 SUPERNAT, J. (2007) Koncepcja sieci organów administracji publicznej. In: Zimmermann, J. (ed.), *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego*, *Zakopane 24–27 września 2006*, Warszawa: Wolters Kluwer, p. 215.

authority, including its involvement in transnational networks. The lack of such data in the public domain may indicate that the control over the functioning of the Polish NCA by the Prime Minister on the basis of the Act on Control in Government Administration has so far been quite limited. There is also no indication that this practice will change in the near future.

The Prime Minister's supervision over the civil service corps, including officials in the Polish NCA, is also rather general. In practice, the use of this controlling instrument is somewhat an exception and has not been exercised in recent years in relation to any of the competition authority officials. A potentially large scope of control may result from the consideration of complaints and motions that any individual may lodge to the Prime Minister if dissatisfied with the functioning of a particular public administration authority, or the behaviour of a civil servant. However, this system is highly inefficient in Poland. There is no publicly available information about any formal activities initiated by the Prime Minister in relation to employees of the Polish NCA. Nor is there any information about any complaints lodged to the Prime Minister concerning the international activity of the Polish competition authority.

At the end of this part of the article, it should be noted that the Minister of Finance exercises specific financial control over the competition authority. The Polish NCA has no budgetary independence, and the budget is proposed by the Minister of Finance and adopted by parliament. The Minister of Finance also controls the observance of budgetary discipline by the competition authority. However, there is no publicly available information as to whether and to what extent the Minister of Finance actually exerts any pressure or influences the competition authority with the leverage of the budget. Certainly, the Minister of Finance is not particularly sensitive to attempts to increase the budget of the Polish NCA, even in a situation where its scope of responsibility has significantly increased. An example is the Act on Combating the Unfair Use of a Contractual Advantage in Trade in Agricultural and Food Products,[28] which imposed new broad obligations on the Polish NCA. In the first accompanying memorandum to the draft of this act, several dozen new positions were envisaged for the Polish NCA in order to implement and apply the new act. In the end, no new posts were created, but the vast numbers of new tasks were attributed to the Polish NCA. Therefore, although the budgetary instrument may potentially be an important mechanism of administrative control, the practice of the Polish competition authority does not confirm this thesis. Despite the fact that the international activity of the authority may burden its budget, there is no publicly available information about any significant restrictions or budget charges being formulated regarding the activity of the Polish NCA in the international sphere.

An analysis of the mechanisms of hierarchical administrative control regarding the international activities of the Polish NCA showed that national administrative law only allows for such supervision by certain authorities (the Prime Minister or the

28 Act on Counteracting unfair use of contractual advantage in agricultural and food products, 15 December 2016, Dz.U. 2017, item 67.

Minister of Finance within the scope of their competences). It is also interesting that the existing supervisory mechanisms are not used at all, or only selectively (mainly limited to nominating and dismissing the President of the Office, or approving the statute and regional organisation of the competition authority). This may be due to many factors, e.g. the low political 'visibility' of the international activity of the Polish NCA, the lack of greater importance in current policy to certain areas of regulation, e.g. antitrust, the lack of substantive preparation of individuals who would carry out these inspections, and finally the existence of informal relations between the supervisory and supervised bodies. However, there is no publicly available data or separate analysis in this regard. For this reason, the question of not applying formal supervisory mechanisms undoubtedly requires further research.

Supervision exercised by the Ombudsman and the public prosecutor

In Poland, the Ombudsman and the prosecutor's office control the functioning of public administration, but their supervision of international activity of the Polish NCA appears to be limited. It is assumed that the prosecutor's control of administration concerns two main forms of administration: administrative decisions and general normative acts adopted by the public administration.[29] This means that the prosecutor's control primarily concerns formalised administrative actions. In particular, pursuant to Article 182 of the Administrative Procedure Code, the prosecutor may participate in administrative proceedings as an entity with the rights of a party to remove an unlawful state. However, with regard to control over the international activity of national authorities in the supranational sphere, it is difficult to find special legal grounds for the intervention of the prosecutor's office. Moreover, any direct intervention by the prosecutor's office in the activities of the supranational network of national authorities is on even shakier legal grounds.

Similarly, the role of the Ombudsman in controlling the international activity of national public administration bodies appears to be very limited. In accordance with Article 14.6 of the Act on the Ombudsman of 15 July 1987,[30] the Ombudsman may request the initiation of administrative proceedings, may lodge complaints with an administrative court, and may participate in these proceedings with the rights of a prosecutor. The premise of the Ombudsman's intervention is a violation of civil rights and freedoms. As a result, the scope of the Ombudsman's potential control will apply to selected formalised administrative actions of the national authorities undertaken in the course of administrative proceedings. Therefore, it is difficult to consider the Ombudsman as a body that could effectively undertake control activities in relation to the activity of administrative authorities (including the Polish NCA) in the supra-

29 HABUDA, A. (2004) *Granice uznania administracyjnego*, Opole: Oficyna Wydawnicza Politechniki Opolskiej, p. 187.

30 Act on the Ombudsman of 15 July 1987, Dz.U. 2017, item 958.

national sphere. Similarly, the role of the Ombudsman in controlling the operation of supranational networks of public administration bodies is more than limited.

SUPERVISION EXERCISED BY INDEPENDENT SPECIALIST PUBLIC AUTHORITIES

National public administration bodies also come under the control of state control authorities. The most important would be the control exercised by the Supreme Audit Office. Pursuant to the Act on the Supreme Audit Office of 23 December 1994,[31] the Supreme Audit Office is the supreme authority of state control and supervises, among other things, the activities of public administration. In particular, it examines the implementation of the state budget and the implementation of laws and other legal acts in the field of financial, economic and organisational-administrative activities of these authorities, including the implementation of internal audit tasks. The audit criteria of the Supreme Audit Office are very broad and include legality, economy and efficiency. The Supreme Audit Office may control public administration bodies on its own initiative or at the request of the Parliament, the President or the government. It should be added that the Supreme Audit Office is independent and reports directly to Parliament. The system and jurisdiction concept of the Supreme Audit Office is derived from the Russian model and is much broader than audit offices in many European and EU countries. The position of the Supreme Audit Office predestines this institution to play an important role in verifying the correct functioning of public administration bodies, including potentially their international activity. However, among the information available on the Supreme Audit Office website and in the annual reports of the Office, there is no information that it has ever audited any national authority in this respect.[32] It should be noted that the effects of the Supreme Audit Office audit are quite limited, especially with regard to the functioning of independent public administration bodies. The basic instrument of the Supreme Audit Office's impact is in the form of audit findings and the possible notification of the relevant authorities of any violations of law. With regard to auditing the activity of administrative bodies in the supranational sphere, it is difficult to find a special legal basis for intervention by the Supreme Audit Office. As noted earlier, this sphere of functioning of administrative bodies is regulated by law in a limited way, most often there are no legally defined goals for this activity, which makes it difficult to create an appropriate control criteria in this respect. In addition, since the basic form of international activity is soft cooperation and adopting soft law, it is rather difficult to imagine how the Supreme Audit Office auditors undertake

31 Act on the Supreme Audit Office of 23 December 1994, Dz.U. 2017, item 524.

32 Such an audit is taking place in 2020 and it concerns how the Polish NCA conducted its administrative proceedings in competition cases. No information about the outcome of this audit is currently available.

their audit, because it is not clear what would be the purpose of such an audit and what control criteria they would use.

Supervision exercised by the European Commission

It is also worth mentioning the issue of administrative control exercised by the European Commission in relation to European administrative networks. An analysis of Regulations 1/2003 and 139/2004 shows that the possibility of the Commission exercising administrative control over NCAs is practically excluded. The Commission may, in limited situations, intervene in ongoing cases. However, the Commission cannot intervene when the NCA does not voluntarily take administrative action, e.g. it fails to initiate proceedings, despite being obliged to do so by European regulations. In a system where proceedings are instituted only ex officio (like in antitrust cases), it is actually the NCA that decides about the initiation of proceedings. Interestingly, this applies equally to national and EU law. It is emphasised that, while the Commission may take over the case, express an opinion and influence the content of the decision, there are no legal instruments preventing the NCA's inaction and non-application of European law by not instituting antitrust proceedings.[33] Information exchange or case allocation mechanisms provided for under the ECN or Regulation 139/2004 in merger cases provide for the powers of the Commission. However, they are not of a controlling nature, but result from the effectiveness of the proceedings conducted by the Commission and a desire for the uniformity of antitrust decisions based on the Treaty provisions. This means that the Commission cannot be treated as a higher-level (appellate) authority or a supreme authority within the meaning of the Administrative Procedure Code, or a state control authority in relation to the Polish NCA. The Commission itself is generally not subject to administrative control,[34] but is subject to extensive judicial review in the area of administrative jurisdiction, where the rules of exercising that jurisdiction have largely been shaped by the case law of European courts. It is also important to remember that the Commission undertakes many of the activities controlled by European courts as a member of European administrative networks and is also subject to judicial jurisdiction in this regard.[35]

33 TESAURO, G. (2005) The Relationship between National Competition Authorities and Their Respective Governments in the Context of the Modernisation Initiative. In: Ehlermann, C.-D., Atanasiu, I. (eds.), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*. Oxford: Hart, p. 272.

34 Some form of administrative control, in relations to financial matters, is exercised by OLAF, though.

35 WIDDERSHOVEN, R.J.G.M., CRAIG, P. (2017) Pertinent Issues of Judicial Accountability in EU Shared Enforcement. In: Scholten, M., Luchtman, M. (eds.), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability.* Cheltenham–Northampton: Edward Elgar, p. 334 et seq.

Judicial control over the transnational activities of NCAs

Judicial control over the activities of NCAs may be initiated when actions undertaken by the authorities have affected the legal situation of third parties. As a result, judicial review cannot, by its very nature, cover most forms of international cooperation. For this reason, the activities of supranational competition networks themselves are not covered by judicial cognition, as no competition network has administrative jurisdiction or can take administrative actions or decisions affecting the legal situation of third parties. At the same time, binding acts of national, transnational and international law determine autonomously which acts and administrative decisions of public administration bodies are subject to the jurisdiction of a given court. It should also be emphasised that there are noticeable differences in the jurisdictions of national courts in competition cases, which means that the addressees of administrative actions undertaken by ECN members must take into account the different level and intensity of judicial review exercised in a given national jurisdiction.[36]

A certain paradox is noticeable that, although the international activity of NCAs or competition networks takes place in a transnational space, the administrative activities of NCAs are undertaken within the framework of the national orders. In this respect, the role and significance of transnational courts, not to mention international ones, is very limited. Obviously, if a transnational authority, e.g. the European Commission, takes administrative action, the court competent to assess its activities will be the European court. Decisions issued by NCAs, even if preceded by international cooperation, are subject to the jurisdiction of national courts. In addition, it is clear from the case law of the European courts that if the Commission carries out dawn raids on national undertakings in accordance with Article 20 of Regulation 1/2003, the Commission must ask the national court for authorization should national law requires so. However the national court has no competence to assess the legality of the inspection itself, but only verifies that the limits for the use of coercive measures have not been exceeded.[37] Decisions by the national authority with transnational effects can sometimes raise jurisdictional problems because administrative pluralism (resulting from the transnational nature of administrative action) is related to the pluralism of potentially competent courts.[38] However, in most cases no such problems occur. The jurisdiction of the court is deter-

36 CSERES, K.J., OUTHUIJSE, A. (2017) Parallel Enforcement and Accountability. The Case of EU Competition Law. In: Scholten, M., Luchtman, M. (eds.), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability.* Cheltenham–Northampton: Edward Elgar, p. 113.

37 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des frauds* [2002] ECLI:EU:C:2002:603.

38 TÜRK, A.H. (2009) Judicial Review of Integrated Administration in the EU. In: Hofmann, H.C.H., Türk, A.H. (eds.), *Legal Challenges in EU Administrative Law*. Cheltenham–Northampton: Edward Elgar, p. 218.

mined by the jurisdiction of the national authority. Therefore, even if the Polish NCA issues decisions on the basis of European law, the Polish court will still be competent to hear legal measures against this administrative decision. In addition, a reference in any decision of the Polish competition authority to the guidelines adopted by a transnational network will not affect the jurisdiction of the courts. In this context, it is also worth noting that supranational soft law norms adopted within the competition networks are not binding on national courts.[39] It is an undisputed rule that soft law acts, whether national or transnational, can never be the basis for any administrative acts issued by any NCA.

The competent courts for reviewing the activities of the Polish NCA are the civil courts (i.e. the Court for Competition and Consumer Protection, the Court of Appeal in Warsaw and the Supreme Court) and the administrative courts. Jurisdiction in matters related to supervising the activities of the Polish NCA undertaken in competition proceedings is based on the jurisdictional dualism of those courts. The legislator assigns fundamental significance to civil courts and the Supreme Court, entrusting them with adjudication on legal actions (appeals) against administrative acts taken by the Polish NCA. The role of administrative courts seems to be smaller, although in the case of international cooperation, the Polish NCA may be visible in some situations.

Jurisdiction of national courts in relation to supervision over the international activities of the Polish NCA

When analysing the jurisdiction of Polish courts[40] and referring to the activities of competition networks and other forms of international cooperation of the Polish NCA, it should be stated that jurisdiction is limited to supervising formal official activities, in particular administrative acts as well as inaction or delayed conduct of the Polish NCA. Due to the fact that civil courts have full jurisdiction in competition cases, they may assess the full course of administrative proceedings and the impact of the individual actions of the authority on the resolution of a case. This also applies to supervision over formal administrative activities undertaken as part of international cooperation between the Polish NCA and its foreign counterparts. Actions undertaken in an informal way, under soft cooperation, if they are non-jurisdictional (i.e. they do not affect the legal position of third parties), in principle remain outside the jurisdiction of the Polish administrative court, let alone the civil courts.

This means that Polish courts do not have legal grounds for a comprehensive audit of the activities of international cooperation of the Polish NCA, but they may inspect

39 LAVRIJSSEN, S., HANCHER, L. (2003) Networks of Regulatory Agencies in Europe. In: Larouche, P., Cserne, P. (eds.), *National Legal Systems and Globalization. New Role, Continuing Relevance*, Hague: T.M.C. Asser Press, p. 208.

40 For a detailed analysis of jurisdiction of civil and administrative courts in competition cases, please refer to BŁACHUCKI, M. (2017) Rola i właściwość sądów powszechnych i administracyjnych w sprawach antymonopolowych w świetle najnowszego orzecznictwa i zmian normatywnych. *Studia Prawnicze*, 3, p. 115 et seq.

certain activities undertaken by NCA, as long as they relate to a pending administrative (competition) case. On the one hand, this should not come as a surprise. Soft cooperation between the NCAs does not affect anyone's rights or obligations, so there is no room for court intervention in this respect. A more complex issue is the ability to supervise soft law acts adopted by competition networks. In this respect, the situation does not differ from the judicial supervision over soft law acts undertaken by the Polish NCA. This means that the Polish courts cannot directly check the legality of these acts, or the views expressed in them, but at the same time, by seeing how the legal norm is applied in a particular case, they can present another interpretation of it, potentially contrary to the interpretation expressed in a given soft law act.[41] A possible difficulty with regard to administrative activities undertaken in the framework of soft cooperation between NCAs is usually the absence of any record of such cooperation in the case file. In terms of recording activities undertaken in the course of administrative proceedings, the provisions of the Administrative Procedure Code are very vague, leaving a very wide margin of interpretation to the Polish NCA. At the same time, there are hardly any public announcements by the Polish NCA admitting that cooperation has taken place in a particular case.

Jurisdiction of transnational and international courts in relation to supervising the international activities of the Polish NCA

The role of supranational and international courts in supervising the activities of competition networks and other forms of international cooperation of NCAs seems even more limited than in the case of national courts. In general, courts exercise jurisdiction over entities that come from their jurisdiction. This means that the European courts will be competent to review the administrative activities of the Commission or other European institutions. The standard judicial control of the Polish NCA is exercised by national courts. European courts do not have jurisdiction in this respect. In principle, European courts may review the compliance of Polish provisions with European ones, e.g. as a result of a question submitted by a Polish court for a preliminary ruling. Alternatively, indirectly, while reviewing administrative activities undertaken in cooperation with the Polish authority, the European court may also find that European law norms have been violated if such administrative activity was carried out incorrectly.

The European Court of Human Rights may also play a role. However, the ECtHR will exercise its jurisdiction should a case involves the imposition of a sanction that, in light of Article 6 of the European Convention on Human Rights may be considered as a criminal sanction. This means that the chances of individual administrative activities undertaken in the framework of international cooperation of NCAs being audited by

41 BŁACHUCKI, M. (2016) Judicial Control of Guidelines on Antimonopoly Fines in Poland, *Revista de Concorrência e Regulação*, 25, p. 53 et seq.

the ECtHR are very limited, are dependent on the imposition of sanctions and can only be implemented after exhausting the jurisdiction of the domestic court.

At the end of this part of the article, it is worth pointing out the possibility of providing judicial protection to the addressees of the activities of NCAs undertaken as part of international cooperation by specialised international bodies of a judicial nature. In this regard, the Appellate Body of the WTO has to be mentioned as an example, as it performs this function within the framework of the World Trade Organization.[42] This institution is quite effective in raising WTO accountability and providing judicial protection to the addressees of WTO activities. However, it should be remembered that the position of this body is quite unique in the international sphere. One should bear in mind that one of the reasons for the failure of talks on the international competition treaty under the aegis of the WTO was the deep reluctance of many countries to submit disputes arising under this treaty to the binding case law of the WTO Appeals Body.[43] This shows that, although specialised international tribunals can be an effective mechanism for judicial protection in the case of activities of transgovernmental competition networks, at the same time they are extremely rare in the practice of international relations and their significance is limited only to selected areas of transnational sectoral regulation.

Parliamentary control in relation to supervision over the international activities of the Polish NCA

Before proceeding to the conclusions, it is also worth considering whether and to what extent parliamentary control over the international activities of Polish NCA is possible. The issue of parliamentary control over the activities of public administration bodies in Poland is heavily neglected. Parliamentary control is the very essence of parliamentarism. It seems that the lack of Polish legal doctrinal reflection in this area results from the inertia of the Polish parliament itself. In developed republican systems, recognising the role of the representative of *demos,* the role of this branch of power may be much greater. Foreign examples, like the US and even the EU, are convincing. As a result of developing the European composite administration, the number of independent specialised national authorities is increasing. These authorities are largely immunised against administrative (governmental) control mechanisms. Interestingly, there is no doubt that subjecting the activities of independent administration authorities to parliamentary control does not constitute a violation of their independence, though is considered a normal mechanism of control in developed republican states. It is, therefore, worth considering how the system of parliamentary control in Poland looks in relation to public administration.

42 ZWART, T. (2010) Would International Courts be Able to Fill the Accountability Gap at the Global Level?. In: Anthony, G., Auby, J.-B., Morison, J., Zwart, T. (eds.), *Values in Global Administrative Law.* Oxford: Hart, p. 213.

43 DABBAH, M.H. (2010) *International and Comparative Competition Law*. Cambridge: CUP, pp. 129-130.

The lower chamber of the Polish parliament (in Polish the *Sejm*)[44] controls public administration. The role of the Senate (the higher chamber) in exercising the control function is limited, although there are voices in the literature for its increase.[45] Parliamentary control can be exercised directly by the Sejm, parliamentary committees or the deputies themselves. Traditionally, parliamentary control includes the right to information, the right to be present and the right to be heard.[46] In addition, the Sejm plays an important creative role. According to Article 95.2 of the Polish Constitution, the Sejm exercises control over the activities of the Council of Ministers within the scope specified in the provisions of the Constitution and statutes. This provision indicates that the control function of the Sejm is implemented primarily in relation to the Council of Ministers. This primarily concerns the possibility of appointing and dismissing the Council of Ministers and individual ministers (Articles 154, 158 and 159 of the Polish Constitution). Interestingly, the number of authorities appointed by the Sejm is expanding. Traditionally, they include constitutionally-authorised authorities, i.e. members of the National Broadcasting Council, the President of the Supreme Audit Office and the President of the National Bank of Poland. In addition, the Sejm participates in the appointment of the presidents of central public administration authorities, i.e. the Chief Labour Inspectorate, the President of the Office for Personal Data Protection or the President of the Office of Electronic Communications. The expansion of the number of central authorities appointed by the Sejm is the result of the impact of European law and the need to strictly observe the independence of some public administration authorities.[47]

In practice, parliamentary control is carried out by parliamentary committees, including inquiry committees. In accordance with Article 17.2 of the Sejm Regulations,[48] they carry out control tasks within the scope specified in the Constitution and statutes. It is emphasised that the Sejm committees exercise control over ministers, organs and state institutions related to the enforcement of laws, and have an influence over the functioning of the Council of Ministers, its members and state organs.[49] Sejm committees may direct 'desiderates' (longer justified opinions) and opinions, or may ask the Supreme Audit Office to carry out an inspection. In addition, the presidium of the commission may oblige ministers and heads of central government administration bodies, as well

44 In Poland, the lower chamber is the most important chamber of the parliament and its position is superior to the (formally) higher chamber.

45 SZYMANEK, J. (2004) *Rola Senatu RP w wykonywaniu kontroli parlamentarnej (uwagi* de lege lata *i* de lege ferenda*). Ruch Prawniczy, Ekonomiczny i Socjologiczny,* 1, p. 15 et seq.

46 GWIŻDŻ, A. (1975) Organizacja i zasady funkcjonowania. In: Burda, A. (ed.), *Sejm Polskiej Rzeczypospolitej Ludowej*, Wrocław–Warszawa–Kraków–Gdańsk: Ossolineum, p. 307.

47 ODROWĄŻ-SYPNIEWSKI, W. (2008) *Funkcja kontrolna Sejmu na tle zagadnienia rozdziału władzy publicznej i zasady nadrzędności konstytucji*. Przegląd Sejmowy, 3(86), pp. 14–15.

48 Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Regulations of the Sejm of the Republic of Poland, MP 2018, item 544.

49 MOJAK, R. (2007) *Parlament a rząd w ustroju Trzeciej Rzeczypospolitej Polskiej*, Lublin: Wydawnictwo UMCS, p. 428.

as heads of other state offices and institutions to present reports, provide information and participate in committee meetings at which matters related to their scope of activity are considered.

The forms of individual parliamentary control vested in deputies are parliamentary interpellations, parliamentary inquiries and questions about current matters. They are often addressed to the Council of Ministers and its individual members. At the same time, MPs often address questions to public administration bodies. In the practice of the Polish NCA, deputies often ask questions and make requests for intervention. In the vast majority of situations, this is generally the result of complaints received from voters in their constituencies. It is difficult to determine the scale of the phenomenon and its effectiveness in this respect, as the Polish NCA does not disclose this in detail. One can, however, consider the practical effectiveness of this form of control in relation to the international activity of the Polish NCA. This type of activity of the authority is generally not in the sphere of interest of the vast majority of Polish voters, and the deputies themselves show quite far-reaching restraint in addressing issues outside the sphere of current politics.

Polish parliamentary practice in relation to exercising supervision over the activities of public administration is rather poor. It is noted that the effectiveness of this supervision in a particular case depends on many conditions, i.e. the involvement of deputies and opposition, the level of their political culture or the actual engagement of the Council of Ministers.[50] The inherently low level of all these factors also affects the quality of parliamentary supervision in Poland. Earlier considerations have shown a profound deficiency in hierarchical administrative supervision, leaving parliamentary supervision as an interesting alternative. To revitalise such supervision, parliament must be made aware of the importance of regulatory diplomacy and the existence of transnational networks of national authorities, and the competences of parliamentary committees must be extended appropriately, as these actions could methodically address these issues in their works. At the same time, it is emphasised that parliamentary scrutiny of supranational networks could be carried out jointly with, or rather coordinated by, national parliaments and the European Parliament.[51]

Parliamentary control seems to have theoretical potential resulting from its association with the development and spread of independent administrative authorities and their international activities. The guarantees of independence of many public administration authorities immunise them from hierarchical administrative supervision. At the same time, judicial review is limited to standard and legally relevant administrative actions. Meanwhile, the entire sphere of administrative policy and international cooperation of public administration remains unsupervised. In addition, parliamentary control cannot concern individual administrative acts. Instead, it consists in reporting on achievements

50 JUCHNIEWICZ, J. (2013) Instrumenty realizacji funkcji kontrolnej Sejmu – próba oceny skuteczności. *Przegląd Prawa Konstytucyjnego,* 1(13), p. 32.

51 WARNING, M.J. (2009) pp. 236–237.

or failures in the sphere of administrative and legal regulation entrusted to a given authority, as well as on the operations of a given office and how public funds are spent. It may, for example, include parliament obtaining information on the directions of administrative policy of a given administrative authority, its actions and an assessment of their effects on the international stage. An interesting issue, especially under Polish conditions, are the possible consequences of parliamentary control for a given public administration authority. These effects should be seen in two dimensions. The formal dimension relates primarily to strengthening the legitimacy and accountability of a given public administration authority, which can certainly translate into an increase in the perception of its position, and perhaps also actual independence. This will be possible if the result of parliamentary scrutiny is positive. However, in the event of a negative result the effects may be different. The second dimension refers to possible effects in the material sphere. Supervision may be regarded as a form of pressure on the authority to achieve results – a lack of it can create even more pressure. However, parliamentary control may not involve personal measures, as the closed catalogue of grounds for dismissal from the office, which is the foundation of independence of many authorities, does not include parliament's non-acceptance of the authority's policy. However, if the policy of a given authority is not accepted, or the achieved results (or if there are no positive effects of the authority's activities), it may lead parliament to limiting the budget of a given authority. It can also result in attempts to keep a closer control over the activities of the authority through more frequent inquiries and listening to the authority. The *ultima ratio* of parliamentary control is to take a legislative initiative to change the legal basis for the functioning of the authority and to influence its functioning by setting new tasks or modifying the existing administrative jurisdiction. Obviously, parliament does not have full freedom in its parliamentary legislative intervention. Both the Constitution of the Republic of Poland and international obligations, especially European law, set out the basic limits of parliamentary power.

Social control of public administration in Poland

Last but not least is the control that citizens and their associations can exercise in relation to public administration. The gist of social control is that any citizen has the right to learn about activities of public authorities and any citizen has the prerogative to demand justification for actions undertaken or a failure to act. There are no specific Polish regulations in this respect that would apply to the international activities of the Polish NCA. This means that citizens and their associations must rely on general regulations on the one hand, and on good will and the developed information practice of public administration bodies on the other. As regards general regulations, the Act on Access to Public Information and the Administrative Procedure Code should be mentioned here. The first of these acts makes it possible to access any public information, and information on the international activities of Polish NCA is certainly public. The significance of this statute results from the fact that it implements a constitution-

al right of access to public information, where obtaining this information does not depend on fulfilling any subjective of objective conditions. The second of these statutes has a narrower application. Pursuant to Article 31 § 1 of the Administrative Procedure Code a social organisation may be admitted to pending proceedings as an entity with the rights of a party where it is justified by the statutory objectives of that organisation, and when there is a public interest in it. In practice, however, admitting social organisations to many administrative proceedings, in particular competition ones, is extremely unusual. Social control is an important element of the accountability of Polish public administration and their international activities, but it still has not revealed even part of its potential. The negative effect of this lack of interest is, unfortunately, the reluctance of many authorities (including the Polish NCA) to comprehensively inform the public about their international activity.

Conclusions

The analysis undertaken showed that the existing forms of supervising the international activities of the Polish NCA are quite limited. In practice, this area of the Polish NCA's activities remains unsupervised. Generally, traditional mechanisms of hierarchical administrative supervision have weakened considerably, which is due to the spread of independent administrative authorities. This is surprising since they should constitute the basic mechanism of supervision over the national and transnational activity of Polish public administration authorities. Even though there are many institutions that may control the Polish NCA, the actual level of supervision is rather low, especially with respect to the international activities of the Polish NCA. Failure to secure the effective supervisory mechanism of the Polish NCA the Polish state resigns to influence informal international lawmaking which takes place at the level of transnational competition networks[52]. This is not a feature that is unique to the Polish legal system – foreign researchers also note that the existence of many institutions and control mechanisms at a national level does not translate into actual supervision, which is actually very low.[53] Significantly, this problem will become even worse due to the implementation of the ECN+ Directive. National competition authorities will need to be guaranteed even broader independence, while their scope of international cooperation obligations will increase. Due to ineffective control mechanisms at the national level, this makes the supervision over the international activities of the Polish NCAs even more illusory.

This draws attention to the hidden potential in parliamentary control, which seems particularly limited in Poland. It also highlights the need to introduce additional legal mechanisms increasing the accountability of public administration in Poland, in particular

52 CASINI, L. (2012) Domestic Public Authorities within Global Networks: Institutional and Procedural Design, Accountability, and Review. In: Pauwelyn, J., Wessel, R.A., Wouters, J. (eds.), *Informal International Lawmaking*, Oxford: OUP, p. 408.

53 BERMAN, A. (2012) *The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks. The Case of the ICH. IRPA Working Paper*, 1, p. 26.

the Polish NCA. This would be done, among other ways, by enhancing parliamentary control, fine tuning the hierarchical administrative control in relation to other authorities conducting international cooperation, and by increasing the transparency of proceedings before the Polish NCA, whether by restoring the category of interested parties or implementing a better information policy at the competition authority. Those ideas and postulates should be treated as a package, as each of them tackles a distinct aspect of transparency and supervision. The implementation process of the ECN+ Directive may be a good occasion to put them into law. Otherwise, there is a good chance that those ideas will be buried for a long time.

Finally, it should be noted that the control mechanisms are not only intended to ensure the supervised authorities function correctly. In the case of independent public administration authorities, which the European NCAs are already or will soon become, the control mechanisms are one of the basic instruments for ensuring the accountability of those authorities. Unfortunately, the ECN+ Directive completely ignores this aspect of the competition authorities' function, focusing only on the effectiveness of cooperation and the uniform application of European competition law. At the same time, strengthening national mechanisms of control over the functioning of NCAs in the international sphere not only strengthens their accountability at the national level, but also, paradoxically, at the transnational level. Better supervision and accountability of NCAs translates into better supervision and accountability of transnational competition networks.

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pp. 67–81.

ELEMENTS OF AN EFFECTIVE ANTITRUST COMPLIANCE PROGRAMME[1]

WOLFGANG HECKENBERGER

Abstract:

Over the last years, hardly any company, and least all of the large and multinational companies, can manage without an individual compliance policy and company-wide compliance programmes, which is also a sign of good corporate citizenship. The implementation of effective antitrust compliance programs plays a significant role in the management of companies. Nowadays, an increasing number of jurisdictions have introduced the possibility to use effective antitrust compliance programmes as a mitigating factor for calculating the fines for antitrust violations. The following article looks at the decisive elements for such a programme. It refers especially to the new and relatively detailed guidance that has been issued by the Antitrust Division of the US Department of Justice, in 2019, when the DOJ gave up its longstanding policy of categorically rejecting any consideration of effective antitrust compliance programmes and announced a landmark policy shift through acknowledging the positive aspects of such programmes. Leniency programmes and antitrust compliance programmes are the cornerstones of preserving the positive impacts of effective competition on social and economic wealth of a society.

Keywords:

antitrust compliance programme, corporate compliance programme, antitrust violation, leniency programme, code of conduct

1 This article is partially based on a German-language contribution In: Engelhart, M., Kudlich H., Vogel B. (ed.), *Festschrift für Ulrich Sieber*. Berlin: Duncker & Humblot, 2021.

Introduction

Over the last 15 to 20 years, compliance in the corporate sector has taken a very dynamic development. Compliance is defined as the aim to abide by all relevant laws, policies, and regulations.[2] Pressure exerted on companies by society overall, the media and, in particular, by the enforcement activities of regulatory authorities to bring about lawful conduct, has led to the situation where hardly any company, and least of all the large and multinational companies, can manage without an individual compliance policy and company-wide compliance programmes. Moreover, company owners and/or board members and managing directors are often obliged by law, directly or indirectly, to implement compliance programmes as part of 'good corporate governance'.[3] A further issue is the enormous increase both in the number and amount of rules and regulations concerned, which in turn has led to an ever growing volume of compliance activities on the corporate side.

These compliance activities usually form an integral part of a comprehensive code of conduct[4] adopted by a large number of companies today.

Corporate Compliance Programmes

Scope of corporate compliance programmes

A company-wide compliance programme, also called Compliance Management System (CMS), covers a wide range of legal fields, the rules and regulations of which need to be complied with in day-to-day operations, in particular. In short, we speak of the entire set of internal policies and procedures that a company has in place to comply with the laws, rules, and regulations in order to avoid any infringements and to uphold its business reputation. Among the risk criteria playing a leading role are the fields of antitrust, corruption, data protection, export control and money laundering, etc., with especially negative consequences for infringements, but also fields such as M&A, environment, health and safety (EHS), sponsoring, relations with business partners etc. Compliance programmes are characterised by the implementation of business processes, though in

2 Compliance is typically defined as observing legal regulations and regulatory standards and meeting further essential ethical standards and requirements usually set by the company itself; see KRÜGLER, E., (2011) Compliance – ein Thema mit vielen Facetten. *Umwelt-Magazin*. 7/8, p. 50

3 In Germany, for example, the senior management is held liable for a legal infringement according to § 130 and § 30 para 1 Ordnungswidrigkeitengesetz (OWiG) if the infringement can be attributed to the management's breach of its organisational and supervisory duties. A violation of these duties can also lead to liability claims by the company towards the individual manager. Through this liability regime, high pressure is thus indirectly exerted on the senior management to implement sufficient compliance measures.

4 A code of conduct, frequently referred to as 'Business Conduct Guidelines', regulates in a more or less detailed way all essential matters of good corporate governance and also includes all obligations to be observed by all employees in day-to-day business. They cover, for example, regulations for the protection of commercial confidentiality, or how to handle gifts and invitations.

substance it is how a company wants its business to be carried out, subject to all applicable legal and ethical aspects.

Regular Elements and Purposes of a Compliance Programme

The typical components and basic purposes of a compliance programme can be summarised under the general terms of: (i) prevent, (ii) detect, (iii) respond and (iv) continuous improvement.

a) Prevent
   This includes all measures and processes related to preventing violations of the applicable laws, such as company-wide communications regarding compliance culture and the observation of relevant rules and regulations, performing training courses, and, depending on the characteristics of the area concerned, even – in a broader sense – adequate legal counselling for day-to-day business.

b) Detect
   In addition to purely preventive measures, risk management processes and procedures need to be implemented in parallel in order to analyse the individual risk exposure of the company, both as a whole and the various business divisions, and to detect infringements, e.g. through audits and internal investigations. Furthermore, channels of communication need to be implemented for infringements to be reported (anonymously).

c) Respond
   Should an infringement have been committed despite the aforementioned measures, the company needs to react appropriately and even to take disciplinary action, including the termination of the employment contract if need be.

d) Continuous Improvement
   Finally, the compliance programme needs to be subjected to potential improvements and adjustments to new situations within the company on a regular basis in order to secure its efficiency.

Antitrust Compliance Programmes

The basic purpose of implementing an antitrust compliance programme is to ensure compliance with all relevant antitrust rules and regulations and to avoid any involvement in any illegal anticompetitive business behaviour. However, beyond the companies' interest to avoid antitrust violations and to do what is necessary to demonstrate that they are good corporate citizens, the implementation of a sophisticated and comprehensive compliance programme has a significant economic dimension due to the heavy investments necessary. Besides the mere running costs for the compliance organisation there are further 'costs' that need to be taken into consideration, such as management attention, staff training, etc. Therefore, the question arises for each company about why to implement an effective antitrust compliance programme at considerable expense at all, rather than trying to make do with minimum requirements.

Incentives for the Implementation of an Antitrust Compliance Programme

In addition to the more general corporate and social reasons already mentioned above, there arises the question in all compliance programmes of which risks are linked to infringements of the relevant laws. This is especially true for the implementation of a thorough antitrust compliance programme, as it requires a high amount of financial expenses and human resources. However, from a company's perspective, antitrust violations are currently among the top ranking potential risks to which a company is exposed in its day-to-day business. This is partly due to the potential drastic consequences and sanctions that a company is threatened with in case of participating in a serious antitrust violation, but to some extent also to the risk of discovery, which has continuously increased over the past years.

e) Risk of Discovery

Virtually all countries around the world have implemented an antitrust regime and established antitrust authorities. This kind of internationalisation and globalisation[5] of prosecuting antitrust infringements again has created its own 'competitive pressure' with regard to the prosecution of antitrust infringements. In addition, all these countries have also implemented leniency programmes that have developed a considerable dynamic and incentive effect. The consequence has been a paradigm shift in cartel prosecution, with numbers of cartels voluntarily disclosed to the authorities significantly on the rise after the introduction of the programme.

f) Sanctions and Other Consequences

The following potential consequences of participating in a serious antitrust violation explain why antitrust legislation falls under the highest risks for companies.

i) Imprisonment

For senior management and other individual employees, imprisonment seems to be the best deterrent against being involved in a hardcore cartel, as more and more jurisdictions are introducing imprisonment as a sanction for individuals. For example, countries like the US have a long history of imprisonment of up to several years for managers involved in a serious infringement of antitrust law.[6]

ii) Fines

The level of monetary fines has increased exponentially over time. To some extent a huge momentum of its own has built up, but in part it has been

5 See also the International Competition Network, an informal global network established in October 2001 by the heads of 16 competition agencies from around the world. This network today comprises almost 140 competition agencies. It aims to address practical antitrust enforcement and policy issues. More details can be found on the ICN website. ICN, *Members*. Available from: https://www.internationalcompetitionnetwork.org/members/ [Accessed April 20, 2021].

6 From 2000 to 2009, the average prison sentence amounted to 20 months; from 2010 to 2019 it was 18 months – see DOJ, *Criminal Enforcement Trends Charts*. Available from: https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts [Accessed April 20, 2021].

due to peer pressure among the competition authorities, based on increased interactions, e.g. via the International Competition Network (ICN) or the European Competition Network (ECN). These days, in the case of a serious violation over a period of time, a fine of more than one billion EUR for a single large company is no longer a rare occurrence.[7]

iii) Civil Damages

In addition to fines, actions for damages must not be underestimated. In particular, antitrust authorities and legislative bodies have taken strong efforts in recent years to facilitate the enforcement of claims for damages by parties that have suffered damages as a consequence of a cartel.[8] Irrespective of the fact that civil damages may cover enormous amounts nowadays, all the other effects on a company resulting from such actions must not be underestimated, e.g. legal costs, management attention, and the negative publicity resulting therefrom.

iv) Reputational Damage

The more a company is in the public eye, the greater the reputational damage that may result from participation in a cartel. This holds especially true if the disclosure of a cartel attracts high media attention, and if the misconduct and severity of the violation is considered particularly reprehensible by the public. Especially for large multinational companies, such severe reputational damage can have a significant negative impact on business success on a global level.

v) Debarment

Last, but definitely not least, antitrust law infringements come with a risk of getting debarred from public tender proceedings. Depending on the company's business model, this risk can be even more dangerous and drastic for the company than simply paying a very high fine. If a large share of its business comes from the public sector, debarment from public tenders for a number of years could significantly impact or even kill business in the countries concerned. It could be even worse if the violation is related to bid-rigging and to projects financed by the World Bank or any other regional development banks.[9] In a worst case scenario, the consequence of a bid-rigging

7 See, for example, the fines in the truck cartel or the fines against large tech companies like Google; see the following EC, *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel* (July, 19 2016). Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582 [Accessed April 20, 2021]; EC, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising* (March 20, 2019). Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 [Accessed April 20, 2021]; EC, *Cartel Statistic*. Available from: https://ec.europa.eu/competition/cartels/statistics/statistics.pdf [Accessed September 2020]

8 At an EU level, at the end of June 2020, the EU institutions agreed on the Directive on representative actions for the protection of the collective interests of consumers. This collective redress directive and the respective possibility of 'class actions' has to be adopted and implemented into national law by the EU Member States within two years.

9 E.g. the African Development Bank or Asian Development Bank.

cartel in one country could lead to exclusion from World Bank financed projects on a regional or even global level.

Effective Compliance Programmes as a Mitigating Factor for the Calculation of Fines

a) Current State of Discussion

The question whether and to what extent existing effective (antitrust) compliance programmes may be considered a mitigating factor for the calculation of fines has been the subject of highly controversial discussions for many years between the corporate community and law firms on the one side, and regulators on the other side. Organisations and companies argue that considering compliance programmes as a mitigating factor would create an additional and reasonable incentive for going ahead with the high expenses and efforts to implement an effective compliance system. One factor here is certainly the fact that companies consider it highly unjust if their substantial compliance efforts are not taken into account in case of an antitrust violation, although these efforts show that they are trying to live up to the requirements for a culture of 'Good Corporate Citizenship' within society, and instead they are treated the same as other participants in a cartel who have not taken any compliance efforts so far.

However, this demand has always been categorically rejected, and still is, by the vast majority of antitrust authorities. The argument most frequently heard is that participating in an antitrust violation proves the ineffectiveness of the compliance programme, as it failed to prevent the violation from happening in the first place.[10] Therefore, taking the existing system into consideration in favour of the company must be rejected. Some argue that if companies need such an additional incentive, the fines in place are probably not yet high enough. However, the real reason for the negative attitude on the part of the authorities is probably the fact that the authorities are not overly interested in also checking the effectiveness and robustness of an existing compliance programme in addition to ever more complex investigation proceedings, which are already difficult to handle.

In recent years, a number of countries have decided to consider effective compliance programmes as a mitigation factor within the framework of calculating fines. Among these countries are Australia, Brazil, Canada, Israel, Italy, Spain, Switzerland, and the UK. Most jurisdictions, however, have not yet decided in favour of such recognition.

The most recent fundamental change took place in Germany. Although the Bundeskartellamt has always been a strict opponent to the recognition of already existing compliance programs, the recent 10th amendment to the German Act

10 See e.g. EC, *Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Businesseurope & US Chamber of Commerce. Competition conference Brussels, 25 October 2010.* Available from: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_586 [Accessed April 20, 2021].

against Restraints of Competition also introduced the possibility that antitrust compliance efforts both before and after an infringement can be taken into account for the calculation of fines.[11]

b) Paradigm Shift in the USA

Against this background, the turnaround of the Antitrust Division of the US Department of Justice (DOJ) is particularly noteworthy. In 2019, the DOJ gave up its longstanding policy of categorically rejecting any consideration of effective antitrust compliance programmes and announced a landmark policy shift.[12] Regarding the impact of the DOJ within the community of antitrust authorities, this turnaround could have a broad effect.[13] Based on this guidance, effective antitrust compliance programmes will be considered a mitigating factor in criminal antitrust investigations in the future.[14]

What is particularly interesting here is the underlying justification. The DOJ states that an antitrust violation is, after all, no proof of the ineffectiveness of a compliance programme, because in practice there is no such thing as a perfectly effective compliance programme. On the contrary, the DOJ recognises that 'no compliance programme can ever prevent all criminal activity by a corporation's employees.'[15] This is an honest and realistic assessment of the fact that even the most effective compliance programme cannot prevent violations permanently and reliably. As anywhere, there are also rogue employees in the corporate world who, intentionally and fully aware of all the consequences, violate the law and, for example, participate in a price-fixing cartel.

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11 This law came into force on January 19, 2021, see BGBL. I 2021, p 24. See also STEGER, J., SCHWABACH, J. (2021) Entscheidung in letzter Sekunde: Der lange Weg der Compliance-Defence im deutschen Kartellrecht, Wirtschaft und Wettbewerb 3, p. 138 et seq.

12 See US Department of Justice Antitrust Division, Evaluation of corporate compliance programs in criminal antitrust investigations, July 2019. Available from: https://www.justice.gov/atr/page/file/1182001/download [Accessed April 20, 2021].

13 The guidance of the Antitrust Division of the Department of Justice must not be confused with the different guidance of the Criminal Division of the DOJ. The latter published an update of its guidance on evaluation of eorporate compliance programs in June 2020, to take into account experience made in its application, as well as feedback from other stakeholders, and to give further advice regarding the question of whether the Corporate Compliance Programme concerned is actually implemented and lived in an effective way. See US Department of Justice Criminal Division, Evaluation of corporate compliance programs (updated June 2020). Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed April 20, 2021].

14 The guidance of the DOJ is primarily addressed to prosecutors as serious antitrust violations are subject to criminal prosecution in the US. However, this does not change the fact that the elements of an effective compliance programme, as mentioned here, can also be applied in jurisdictions where such antitrust violations are not yet subject to criminal prosecution.

15 See US Department of Justice Antitrust Division, Evaluation of corporate compliance programs in criminal antitrust investigations, July 2019, p. 3.

In addition, the DOJ has added nine essential elements to its guidance, which typically form part of an effective antitrust compliance programme and must be taken into account in the assessment of its effectiveness.

Essential Elements of an Effective Antitrust Compliance Programme with Particular Reference to the New DOJ Antitrust Division Guidance

General Aims of an Antitrust Compliance Programme

Before discussing the specific elements, one should bear in mind what antitrust compliance programmes are aiming to achieve. As already mentioned above with respect to general corporate compliance programmes, the same four general aims and purposes need to be covered also by antitrust compliance programmes: (i) prevent, (ii) detect, (iii) respond, and (iv) continuous improvement.

DOJ Guidance on the Evaluation of Corporate Compliance Programmes in Criminal Antitrust Investigations

The DOJ Antitrust Division's Guidance is framed around the following three preliminary fundamental questions, which should be the starting point of the assessment and should be asked by the prosecutors in order to carry out a proper evaluation and arrive at an individual determination.

- Does the company's compliance programme address and prohibit criminal antitrust violations?
- Did the antitrust compliance programme detect and facilitate prompt reporting of the violation?
- To what extent was a company's senior management involved in the violation?

These questions aim at the critical factors of any compliance programme evaluation, which are the maximum effectiveness to prevent and detect any misbehaviour, and how seriously the programme is enforced within the company. They also point at the comprehensiveness of the compliance programme (even if individually adjusted), including the required internal processes.

To answer these three questions, the Antitrust Division has identified nine different categories as essential elements for an effective programme that should be taken into consideration when evaluating the effectiveness of an antitrust compliance programme.

a) Design and Comprehensiveness

The first element relates to the overall evaluation of the effectiveness of an antitrust compliance programme. This analysis is aiming at basically distinguishing between effective comprehensive programmes and mere paper tigers that only look good on slides, but are not characterised by a serious commitment behind it. The DOJ states some aspects here that can help evaluate the earnestness of a programme, e.g.

- When was the programme implemented and is a regular periodic update intended?
- Is the material content of the programme updated on a regular basis?
- Do internal controls exist to reinforce the antitrust compliance policies?
- Are there processes in place to track business-related competitor contacts?
- How are employees in sensitive functions trained and guided to make sure they can identify and report antitrust-related critical situations?

Many details regarding the questions listed above are stated in greater substance under the other elements mentioned below. What is fundamental for the assessment of the effectiveness of an antitrust compliance programme is the seriousness based on which the programme is implemented and complied by within the company. Communication by the senior management therefore plays a central role. However, two of the questions mentioned above have to be treated in more detail:

i) Are there Processes in Place to Track Business-Related Competitor Contacts?
This mainly refers to the kind of reporting system based on which employees are required to report each contact with a competitor, indicating certain information details (date, time, location, participants, topics discussed, etc.), via the reporting tool. Initially, a procedure as described sounds reasonable and is likely to raise the employees' awareness regarding the risks linked to competitor contacts. However, the disadvantage in this case is an enormous increase in red tape, which is likely to considerably affect the efficiency of those sales organisations that already today complain about the ever increasing administrative burden.

The amount of effort involved might be among the reasons why it appears that only very few companies have decided to implement reporting systems as described. Ideally, the assessment of a compliance programme should not be made dependent on that.

ii) Is the Company Following a Clearly Communicated Policy and Corresponding Guidelines on Document Destruction and Obstruction of Justice?
This issue is of major significance in those jurisdictions where the destruction of documents and evidence is sanctioned as an obstruction of justice, which is the case in jurisdictions influenced by Anglo-American legal systems in particular. Many other jurisdictions do not know the legal institution of 'obstruction of justice' in this form. Corresponding guidelines, which at the same time are to be appropriately communicated, would not bring about any noteworthy added value.

However, it is in any case absolutely recommendable to have a procedure in place based on which so-called document freeze orders (or freezing injunctions) by a court or a competition authority are handled properly and are implemented promptly upon receipt by the company.

b) Culture of Compliance

The central pillar of each compliance programme is a serious and unexceptional culture of compliance communicated by the senior management. Only if a clear and unambiguous expectation to observe all antitrust rules and regulations is communicated to all employees, and is also emphasised by a 'walk the talk' attitude, can all the other elements of a compliance programme prove their effectiveness. This tone from the top needs to be repeated at regular intervals and needs to clarify that participation, no matter of what kind, in hardcore violations for whatever reasons will not be tolerated ('zero tolerance policy'). As a result, appropriate sanctions need to be imposed for relevant violations. Only then will the underlying culture of compliance be taken seriously by the employees.

From a procedural perspective, the company's compliance culture is not only based on the antitrust-related compliance programme, but also on the overall corporate compliance programme. This includes potential business conduct guidelines and all other policies and procedures that are set out to ensure compliant behaviour in the market. All these rules need to be incorporated into the company's daily operational business and properly communicated to all employees.

c) Responsibility for the Compliance Programme

There has to exist a clear responsibility regime and governance ownership for all compliance issues within the company. Typically, this lies with the compliance department under the lead of a Chief Compliance Officer. The latter needs to be vested with a sufficient degree of authority and, ideally, maintain a direct reporting line to the CEO or CFO of the company, irrespective of whether he or she also reports to the general counsel of the company at the same time.

In any case, the compliance department needs to be equipped with all financial and human resources required to execute all training and communication measures necessary. The employees in the compliance department need to have an appropriate degree of seniority with regard to their hierarchical placement within the overall company structure.

Another criterion refers to the question of whether the members of the compliance department are responsible for nothing else than compliance issues, or whether compliance covers only part (maybe a minor part) of their overall tasks (known as the zebra function). This will most certainly be more critically looked at in large corporations and multinational conglomerates, whereas in smaller enterprises, depending on the size, it cannot be expected that all the employees responsible for compliance will take charge of compliance issues only.

d) Risk Assessment

One of the central elements of each compliance programme refers to the development of company-specific risk management. This second pillar is aimed at detecting potential wrongdoings within a company's line of businesses. Its core is the individual antitrust risk exposure assessment, which, among other things,

is to be evaluated with regard to its methodology and granularity. It also needs to cover all business areas and must be aimed at distinguishing between various levels of risk for the various lines of business at a global level.

The results of the antitrust risk assessment have to be analysed and incorporated into the training programme.

There are two other important issues. Firstly, there is the question whether and to what extent the resources involved are allocated to the various levels of risk. Secondly, there has to be a recurrent risk assessment process, which is not limited to presenting selective snapshots. Rather, this regular process should take into account new technological and other developments within the company's businesses, and should be reflected in updates and other 'lessons learned'.[16]

e) Training and Communication

Another central pillar besides risk management is the overall complex of company-wide antitrust training, which should take place on a periodic basis (typically every two to three years).[17] In this case, each company needs to decide how to most effectively develop its training system based on its individual situation. Generally, one can differentiate between more widespread training measures covering a broad audience and focusing on the basics only. Web-based training sessions, which can be rolled out company-wide, are a good solution here.

Then there is in-person training for specially defined target groups that, for example, are exposed to a higher antitrust risk (in particular, sales and service personnel, employees who have flexibility to set prices or are responsible for tender proceedings, etc.) or who are active in high risk areas. In order to ensure a proper tone-from-the-top communication, in-person training also needs to be provided to all senior management levels on a regular basis.

Depending on the content and, of course, the respective individual situation in the company, the training should be tailored to the employees' duties, their involvement in operational business and the antitrust risks based on the specific nature of the day-to-day business. The content of the training materials should be reviewed and updated according to legal, technological or other developments (e.g. a change of antitrust enforcement practice).

Proper documentation is also an integral element of the training concept, i.e. who the participants were, how the training was perceived by the audience, whether an evaluation was conducted, the extent to which the training had a measurable impact on the audience.

Finally, the DOJ expects senior management to make sure that internal disciplinary

16 See US Department of Justice Criminal Division, Evaluation of corporate compliance programs (updated June 2020), p. 2 ff. Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed April 20, 2021].

17 The DOJ criminal division guidance of June 2020 has even increased the focus on training programmes; see ibid, p. 5.

sanctions for any relevant wrongdoing, e.g. the termination of a labour contract, will be properly communicated, in order to demonstrate that the company does not compromise if it comes to compliance. This aspect also relates to both the corporate compliance culture and the managerial tone from the top.

Multinational corporations have to make sure that the basic elements of their compliance policy are complied with in all the relevant countries. Therefore, in terms of communication, a company has to convey its compliance policy to all employees and across all the countries that the company has subsidiaries in.

Many companies have specific business conduct guidelines that all employees, and especially all newly hired employees, have to take notice of and (ideally) should confirm, in writing, (on a regular basis) that they have read and understood the content and that they comply with these guidelines.

f) Periodic Review, Monitoring and Auditing

As already mentioned above in more specific contexts, an antitrust compliance programme, like any other corporate compliance programme, needs to undergo a continuous evaluation and improvement process that should not only be limited to a snapshot in time. Companies should implement a regular monitoring and auditing process to ensure that the antitrust compliance policy is observed by all employees throughout all hierarchy levels. Periodic auditing measures should contain spot checks and unannounced audits. This should include a review of (nowadays mostly electronic) documents and communications of selected employees.

g) Reporting

Another integral element of an antitrust compliance programme is an information and reporting mechanism to enable employees, as well as persons from outside the company, to report potential antitrust violations on an anonymous and confidential basis. The company has to ensure that reporting a potential antitrust violation does not lead to any kind of retaliation. Such reporting lines can be installed, for example, by implementing internal whistleblower hotlines or by retaining a law firm to serve as an ombudsman.

h) Incentives and Discipline

A system of incentives and discipline is a key element of any antitrust compliance programme in order to demonstrate that the company's management is committed to its compliance policy and that it does not tolerate antitrust violations. If talking about incentives, this usually means negative incentives as a deterrence factor.

The guidelines further ask whether there are incentives for employees to live up to the standards of the compliance programme. However, offering incentives for compliant behaviour may be difficult to implement because it cannot be proved whether an antitrust violation has occurred until it has been discovered. Therefore, negative incentives such as disciplinary measures applied in case of any serious

antitrust violations may be a more effective move. This may include a reduction of bonus payments down to zero due to the fine to be paid by the company, transfer to another position or even the termination of the labour contract.

i) Remediation and Role of the Compliance Programme in the Discovery of the Violation

Although the DOJ acknowledges that even the best compliance programme cannot prevent every violation, it is crucial how the company handles the situation once a violation has been detected. In order to receive credit for an effective antitrust compliance programme, remedial efforts and improvements of the programme should be conducted to at least try to prevent another antitrust violation. This includes a comprehensive review of the various elements of the existing compliance programme following the antitrust violation to find out about potential deficiencies of the programme.

Of special importance for the prosecutors will be the way in which a company reacts to the detection of a violation. Two major aspects relate to whether the company applied for leniency voluntarily and without undue delay, and whether the company was fully cooperative in the event of an official investigation. In that respect, it is recommended to have a corporate policy in place for full and voluntary cooperation and disclosure.

How to Translate the DOJ's Nine Elements into the Antitrust Compliance Programme of a Specific Company

a) General Aspects and Necessary Efforts

The implementation of an antitrust compliance programme that includes all nine elements and criteria mentioned here requires considerable efforts even at first glance. In addition to the implementation and maintenance cost for the required compliance department,[18] there are further material and immaterial costs, such as management attention, time expenditure on the part of employees within the framework of necessary training, etc.

b) One Size Does Not Fit All

Against this background, it becomes obvious that the requirements for an effective compliance programme in a large or multinational company will differ significantly from requirements for small or medium-sized companies.

Therefore, all the elements in the DOJ's updated guidance can be regarded as best practices for an effective antitrust compliance programme. However, the DOJ has rightly pointed out that, in addition to these best practices, the individual situation of the company concerned always has to be taken into account when assessing the effectiveness of the programme. That is why the questions and listed

18 At Siemens, for example, the disclosure of violations of anticorruption laws has led to an expansion of the compliance department to a total of about 650 full-time Compliance Officers during the peak stage. Before that, the department employed roughly 60 people, of which most performed their compliance tasks in addition to their regular business-related responsibilities.

elements must not be considered a stringent checklist. It is much more decisive for each company to be identified through a number of different characteristics that must be assessed individually concerning the respective legal infringement, and also for the requirements of an investigation to be adapted to the individual circumstances in a company.[19]

By applying these criteria in connection with the above mentioned specific elements to the overall assessment, a prosecutor should be able to take the individual specifics of a company into consideration.

Conclusions and Outlook

Leniency Programmes and Rewards for Compliance Programmes as Incentives

The further expansion of antitrust compliance programmes, especially in small and medium-sized undertakings, will also largely depend on whether and to what extent an adequate balance can be found between the general incentives for the implementation of such programmes and the manifold burdens as a result thereof.

For large and, in particular, multinational companies with sufficient financial power, the implementation of not only an antitrust programme but also a corporate compliance programme goes without saying, whereas the situation is entirely different for small and medium-sized undertakings. This holds especially true for companies with limited financial strength. Therefore, rewarding effective compliance programmes in place could be an important factor in finding this balance.

Role and Cooperation of National Competition Authorities

The implementation of leniency programmes initially resulted in a clearly higher number of cartel disclosures. This rise was triggered by the enormous increase in fines on the one hand, and by the possibility to be granted full immunity for the first leniency applicant, and therefore be exempted from paying a fine.

However, the number of leniency applications has been declining recently, especially in Europe. The underlying reasons are the subject of much discussion. One explanation would be a declining number of cartels, since leniency programmes, in combination with stricter international enforcement and prosecution efforts, have led to the settlement of most cartels of the past.

Secondly, it is obvious that the disadvantages linked to a cartel investigation as a result of a leniency application have become ever more complex and difficult to handle over time, even for the leniency applicant. This involves the investigation procedures

19 The US Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020), p. 1. Available from: https://www.justice.gov/criminal-fraud/page/file/937501/download [Accessed September, 12 2020] for example, has listed the following non-exclusive criteria meant to enable an individual case-by-case evaluation: (i) the size of the company, (ii) the industry involved, (iii) the geographic footprint, (iv) the regulatory landscape, (v) and other factors, both internal and external to the company's operation.

as such, which have become more complex and time-consuming, while also being less predictable and controllable, not to mention political implications and instrumentalisations. In addition, considerable management attention is required, to say nothing of the increased cost of legal counsel. Furthermore, the efforts of the legislative as well as of the competition authorities to facilitate claims for damages might play a major role, since there are only limited privileges for the leniency applicant.[20]

Against this background, the reward for an effective antitrust compliance programme has to be seen as a move to better balance out the advantages and disadvantages of how to handle a situation when a company finds itself involved in a serious antitrust violation. Such a reward can also incentivise the implementation of an earnest compliance culture and full cooperation with the regulators in case of an antitrust violation.

The antitrust authorities realised long ago that the aforementioned incentive systems for companies in the area of antitrust compliance should be maintained and, ideally, expanded, as they would form an essential foundation for their own successful work.

It is also of high importance to improve cooperation among antitrust authorities in order to harmonise and align the procedural rules in the area of antitrust enforcement and leniency in order to reduce the complexity and the partial inconsistencies that still make it difficult to handle investigative proceedings on a cross-border level from a company perspective. The ideal platform for this harmonisation would be the International Competition Network on a global level, and the European Competition Network at EU level.

In this respect, an important step has just recently been achieved by the new ICN Guidance on Enhancing Cross-Border Leniency Cooperation.[21] These guidelines are aimed at harmonising the practices of competition authorities in multi-jurisdictional cartel investigations, in order to increase the effectiveness of global enforcement activities and to reduce disincentives for leniency applicants.

20 See the Directive on representative actions for the protection of the collective interests of consumers, as agreed upon by the EU institutions end of June 2020. Legislative train schedule, Area of Justice and Fundamental Rights, *Representative actions for the protection of the collective interests of consumers - a new deal for consumers*. Available from: https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-representative-actions-for-consumers [Accessed April 20, 2021].

21 See ICN Cartel Working Group, *Guidance on enhancing cross-border leniencycooperation*, June 2020. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf [Accessed April 20, 2021].

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MILESTONES AND CHALLENGES FOR EFFECTIVE INTERNATIONAL COOPERATION IN COMPETITION MATTERS: THE EXPERIENCE OF THE SLOVAK NCA

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Abstract:

International cooperation is one of key elements of successfully applying competition rules. As business becomes ever more global, there is an inevitable influence also on the assessment of competition. With increasing numbers of international transactions, powerful multinational companies and international cartels, it is all the more necessary for countries to cooperate with each other. The Antimonopoly Office of the Slovak Republic (hereinafter as the 'Slovak NCA') does not operate in isolation; on the contrary,it needs strong support from partnering agencies in various forms, either at a regional level or a global level. A number of different possible forms of international cooperation have developed during the existence of the Slovak NCA. We have recapped our overall experience with all of these (either positive or unsuccessful) in the article. The ambition of the article is further to review the existing obstacles to closer cooperation, uncover the main reasons behind unsuccessful attempts at cooperation, and at the same time find a way past these obstacles. The new Directive 2019/1, dealing with strengthening the NCAs' powers might be an important step towards more effective cooperation. The Slovak NCA's approach to the amendment of its legislation is described in the article.

Keywords:

bilateral, confidentiality, waiver, international cooperation, ECN, harmonisation, mergers

Introduction

Although the importance of cooperation between European national competition authorities and between the NCAs and the EC, tends to be credited mainly to globalisation trends in business, the roots of the need for international cooperation run deeper, and often with different content and significance depending on the ambient and historic connection in which an individual NCA applies the competition rules. The global nature of business today can be conceived as the tip of the iceberg, which demands cooperation in a broader sense and in the form of a broader forum.

The different historic development within countries and the specific features of the markets have brought forward different bases and forms of cooperation. For Slovakia, together with other CEE countries, due to their historical isolation from the rest of the Europe for almost forty years, it was natural that the main partners for increased cooperation were neighbouring countries with a similar history of political regimes. Due to the long-term common history, the closeness of language and cultural features, the interconnection with the Czech market is almost a rarity. This peculiarity demands a more intensive form of cooperation with our closest neighbour.

At the same time, in the context of the free movement of goods and services and the globalisation mentioned above, it is not sufficient to limit cooperation only to the closest partners. This holds generally for all NCAs, but is especially true for countries such as Slovakia due to the size of the national market in comparison with larger economies and due to the balance of international business flow.

With this in mind, it is obvious that various factors, presumptions, historic connections and specifics of business environment, as well as the membership of Slovakia in EU and the increasing globalisation of the business have resulted in a range of types of cooperation in the practice of the Slovak NCA.

Given, also, the increasing prevalence of digitalisation, technological advances and new types of products and services spread on online platforms, we expect a demand for even more intense cooperation in all areas. This results in a challenge to create prompter, more effective and comprehensive rules in order to be able to react better and faster to the development of new trends.

The engagement of the Slovak NCA in various forms of international cooperation

International cooperation is one of main activities of the Slovak NCA. Depending on the type of cooperation, it is one of its policy priorities, especially in cases where the Slovak NCA is bound by EU law or international agreements. The choice of the proper tool, type and intensity of cooperation depends on the legal possibilities with regard to type of competition enforcement, and is limited by existing forms and various obstacles.

The Slovak NCA is therefore engaged in various types of formal multilateral cooperation on the basis of international agreements or binding regulations. Concerning

this form of cooperation, the Slovak NCA is mainly active in the network of European competition authorities. Due to the unbalanced position of international cooperation with regard to antitrust enforcement on the one hand, and merger enforcement on the other hand, the tools of cooperation vary.

Outside the scope of the two EU regulations mentioned below, the Slovak Republic is not a party to any international agreement that would offer the legal basis for closer formal cooperation concerning specific enforcement measures, such as conducting dawn raids, exchanging information, executing decisions, etc. Other international fora in which the authority is involved include the Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN) and the European Competition Authorities (ECA). However, international cooperation on fora like ICN is limited for the Slovak NCA, due to its limited financial and personal sources (especially when it comes to participation in the workshops and events – depending on the site in which it takes place). These forms of organisational multilateral cooperation can provide added value, mainly from the prospective of providing better methodology to the uniform and effective application of competition rules.

The Slovak NCA is involved in various forms of informal multilateral cooperation. The important one is the tradition of the regular organisation of a conference providing a forum mainly for competition experts from the region to exchange views and experience. At the same time, experts from the Slovak NCA regularly attend similar events across the Central Eastern European region.

Bilateral cooperation, in particular with the countries of the CEE region, is also a significant part of our international activities. We see various forms and attempts to enter into the closer bilateral cooperation, though that is nowadays almost exclusively in the form of informal cooperation.

Another important path of cooperation stems from learning from each other's decisional practice among NCAs (and EC). Due to the obligation to apply Articles 101 and 102 TFEU uniformly, there is a tendency by Slovak courts to review the NCA's decision to accept the reference to the EC decisions. Moreover, in the practice of the Slovak NCA as a small economy, the results of a similar market assessment carried out by a similar country can often be beneficial. Such sources are used in current practice when possible, and only informally.

Institutionally, within the Slovak NCA, the department dedicated to legal matters is also charged with managing foreign relations, namely to set up the whole concept of international cooperation, to secure the participation of experts at various fora, to establish contact points etc., bearing in mind possible capacity issues and financial resources.

The further parts of the article cover mainly the types of most often experienced types of multinational cooperation. The first of these is the ECN platform and multilateral cooperation in antitrust and merger issues based on EU legislation. Secondly we analyse bilateral cooperation, mainly attempts towards more institutionalised bilateral cooperation with our closest neighbour.

Antitrust issues - Cooperation under Reg. 1/2003[1]

Since Regulation 1/2003 entered into force, the national competition authorities of the Member States, including national courts, have the power to apply Articles 101 and 102 TFEU. The role of the EC, the NCAs and the national courts is therefore to apply Community competition law, in particular Articles 101 and 102 TFEU effectively and uniformly. To achieve this, NCAs cooperate with the EC and coordinate their activities in this field within the ECN.

An effective tool in antitrust proceedings, helping to make the application of EU competition law more uniform, is the institution of amicus curiae, within the meaning of Article 15 (3) of Regulation 1/2003. Under this article, the EC has the possibility to submit written observations to the courts of the Member States, and to submit oral observations where Article 101 or 102 TFEU applies. This institution has been used several times, when the Slovak NCA has asked the EC to intervene, and in general with positive results. In cases where the EC has used its intervention, the result has been in favour of the uniform application of EC competition law.

A good example of how this institution is applied is the antitrust case – Decision of Slovak NCA No 2006/DZ/R2/144, 22.12.2006, in which the Slovak NCA applied the economic continuity test and imposed a sanction on the economic successor of an undertaking that abused its dominant position. The Regional Court confirmed the decision in the main proceedings, but reduced the fine substantially, with the justification that, when responsibility is transferred to another entity, the punitive element of the sanction ceases, which was taken into account as a mitigating circumstance. The EC was asked to intervene as the amicus curiae by the Slovak NCA and, due to the EU-wide nature of the disputable question, it agreed to intervene. In its observation sent to the Supreme Court, the EC emphasised that economic continuity is a concept of EU competition law that should be applied in a consistent manner throughout the EU. The aim of this concept is to avoid the effectiveness of EU competition rules being compromised by changes to the legal structure of undertakings. The application of this concept implies not only that the successor company is to be held responsible for the infringement, but also that the successor company is liable for the penalty that would otherwise be imposed on its predecessor. Any reduction of the fine imposed on the successor company solely on the grounds that the infringement was committed by its predecessor would be contrary to the concept of economic continuity under EU law. The Slovak Supreme Court took this observation into account, overturned the judgement of the Regional Court and upheld the fine in the amount that was imposed by the Slovak NCA. Due to other procedural issues, the case was then overturned once again and the final fine

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

was lowered, but not on the basis of the economic continuity test. In that sense, also the final judgment respected the result of the former intervention by the EC.

Another example is the Decision of Slovak NCA No 2010/DZ/R/2/049. Since it was not possible to assign the conduct in question to the specific type of abuse of a dominant position listed in Article 102 TFEU, letters a) to d) or national counterparts, the Slovak NCA prohibited the conduct and imposed the sanction on the basis of general prohibition of abuse. The Regional Court annulled the NCA's decision with the reasoning that the sanctioning of the undertaking should be in line with the *nulla poena sine lege* principle, and therefore only possible when the prohibited conduct was precisely defined by the law. In the absence of such a definition, it was not possible to impose a sanction for the behaviour, although it was possible to state that the behaviour is illegal. The Slovak NCA appealed against this judgement. In its written observations, the EC, as amicus curiae, argued that it was settled case-law that the list of abusive practices set out in the second paragraph of Article 102 TFEU is not exhaustive and that, therefore, bundling or tying may also infringe Article 102 TFEU where it does not correspond to the example given in Article 102(d) TFEU. Finally, once an infringement of Article 102 TFEU is established, the NCA must have the power to impose fines. The Slovak Supreme Court deciding on the appeal overturned the judgement of the Regional Court and accepted the possibility to sanction anticompetitive abusive behaviour pursuant to the general clause prohibiting an abuse of a dominant position.

The other tool that has been used by the Slovak courts when reviewing the NCA's decision was asking a preliminary question to EU courts. The practice of national courts asking a preliminary question in competition matters has been supported by the Slovak NCA in the past, and still appears as a proper tool in the system of cooperation. However, in some cases, due to the lack of knowledge of EC competition law and the decisional practice of EC courts, the national courts tend to ask preliminary questions that had already been resolved, which can slow down the procedure. Slovak courts have used the possibility to submit preliminary questions to the Court of Justice pursuant to Article 267 TFEU regarding a review of the decisions of the Office in just a few cases so far. A good example is case No C-68/12.

The specific nature of the division of powers within EU competition law also means that certain parts of EU law – known as soft law – as well as case law of the European Courts, should be applied by national institutions including national review courts. In view of the above, competition law contains various specific principles and institutions that are not traditional to Slovak law, and which the Slovak NCA is obliged to apply. As was written above, the courts in the Slovak Republic accept and apply those specific institutions of competition law in their judgments, also with the help of both instruments mentioned above. The Slovak NCA also tries to provide comprehensive explanations of specific competition issues with the support of the precedential EU law when defending its case before the courts.

The other forms of cooperation within Regulation 1/2003 and within the ECN, covering not only cooperation with the EC but also between NCAs, are in most formal and most useful areas of antitrust. There are different objectives of such cooperation, mostly it is simply fulfilling obligations stemming from law, sharing experience and knowledge, avoiding conflicting outcomes in similar cases, etc.

Concerning the exchange of information with the NCAs, this primarily takes place on the basis of Regulation 1/2003, which only applies to the exchange of information between EU Member States (between the EC and the competition authorities of the Member States, or between them). Such an exchange may only takes place for the purposes of applying Articles 101 and 102 TFEU, and subject to the conditions set up by Regulation 1/2003 with regard to the confidentiality and to the purpose of sharing such information.

With regard to the investigative tools, Regulation 1/2003 gives the power to the NCAs to, in their own territory, carry out any inspection or other fact-finding measure under national law on behalf and for the account of the competition authority of another Member State, in order to establish whether there has been an infringement of Article 101 or Article 102 TFEU.

The relevant corresponding provision in the Slovak Act on Protection of Competition, reflecting those in Regulation 1/2003, is Article 22 according to which:

1) The Slovak NCA will:
   c) conduct investigative actions and other actions of legal aid at the request of the competition authority of another state pursuant to special legislation (Regulation 1/2003) or pursuant to the international treaty by which is the Slovak Republic bound [...]
   i) ensure international relations in the area of protection of competition at the level of authorities having jurisdiction over this area
   j) submit an application to a court for approving an inspection for the EC for the performance of its activities pursuant to special legislation (for example Regulation 1/2003 and Merger Regulation[2]).
2) In connection with the performance of duties pursuant to this Act and special legislation (Regulation 1/2003), the Slovak NCA will have the right to request undertakings (and its employees and bodies), as well as other natural persons and legal persons, to provide information and documents necessary for the NCA's activities, regardless of the medium on which they are recorded, and make copies of and notes of these documents or request their officially certified translations into the Slovak language, request written or oral explanation with the possibility to make its audio record. These entities are obliged to provide the NCA with this information and documents free of charge in the time limit stipulated by

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

the Office; in the case of classified information under the conditions set by the special legislation.

3) When fulfilling the obligations pursuant to this Act or special legislation, (Regulation 1/2003), the Slovak NCA will have the right to request the police department or the authorities involved in criminal proceedings to provide information acquired according to the special legislation; above all, it will have right of access to the files kept within the criminal proceedings, make excerpts and notes from the files and make copies of files or their parts at its own expenses and use them for the purposes pursuant to this Act.

We can evaluate the experience regarding the cooperation in terms of using different investigatory measures under the Regulation 1/2003 (and corresponding Slovak Act provisions) as positive. Very useful and important is cooperation within the ECN network due to the rules on handling the same cases/parallel investigations.

The specifics of the cooperation concerning investigatory measures and tools depends on the case. It might be needed in early or later stages of the investigations/proceedings depending on the measure requested and type of cooperation needed. Within the ECN, the members of the network are informed about first investigatory measures taken in Article 101 or 102 TFEU cases. The form of cooperation within the ECN varies case by case. Most often it has the form of a request for information/gathering information, interviewing witnesses, contribution to conducting the inspection.

The most important fact for cooperation is to have a legal basis and a form of agreement allowing the Slovak NCA to conduct the requested measures. Other factors, such as the forms of cooperation, whether the requested authority is able to handle a request of confidentiality if needed, whether it has powers to handle the request, and any language barriers to conduct the request etc. are also important for successful cooperation.

Multilateral cooperation in Merger issues

Multilateral cooperation concerning mergers is rather different in comparison with antitrust cases. Due to the fact that the competence between the EC and the NCAs is strictly divided and the merger rules across EU are not altogether harmonised, formal cooperation is more limited. The legal basis for more formal cooperation is mainly the Merger Regulation. However, it does not provide the legal basis for the same scope of cooperation and exchange of information among NCAs as Regulation 1/2003.

The only formal instruments in the area of merger control concerning cooperation between the NCAs and the EC is the system of referrals (ruled by the Commission Notice on Case Referral in respect of concentrations) and the participation of the NCAs in the form of Advisory Committees before the Commission adopted certain final merger decisions (governed by the Working Arrangements for the functioning of the Advisory Committee on concentrations).

With regard to the referral system, the Slovak NCA has not been involved in the referral process many times. The main reasons for this are, we believe, the size of the Slovak market as the merger cases assessed by the EC usually cover markets broader

than Slovakia and more countries are involved, meaning that the EC is the best placed authority to resolve merger cases. At the same time, purely national transactions covered by the Slovak NCA are often outside of the competence of the EC. Despite this, we find the system of pre-notification referrals to be particularly useful, due to the indisputable advantages to the parties as well as to the competition authority (time management, possibility for informal discussions etc.)

Although it is not so frequent in recent years, the Slovak NCA has noticed more cases of referrals according to Article 4(4) of the Referral Notice (pre-notification referral of the case made by the parties from the EC to the Slovak NCA). Typically, examples of such Article 4(4) referrals have concerned cases in which joint control is acquired by the acquirers, which are active on a European-wide field (or at least on markets covering several countries), which reach EU notification turnover thresholds, and where the target is a company active only on the local Slovak market. In that sense, the system developed and governed by the Referral Notice works well. It provides enough time and sufficient sources to assess whether the referral in a particular case is the most appropriate tool. We do not see much room for improvement there. The only obstacle the Slovak NCA has met with has been a lack of experience of the parties with the referral procedure, as well as with the preparation of the arguments necessary to ask for a referral. However, this is sufficiently covered by the EC's willingness to discuss the case with the parties, and the Slovak NCA also provides informal consultations to the referral as part of specific pre-notification consultations.

When it comes to the other type of formal cooperation with the EC within the Advisory Committee, the Slovak NCA also has some experience. The system presents a generally good tool by which mutual cooperation between the EC and NCAs can contribute to the better application of competition rules. The Slovak NCA follows carefully all notifications of mergers to the EC, covering also the Slovak market, and especially those concerning Slovakia as an affected market. The decision of the Slovak NCA to enter into active participation at the Advisory Committee is, mainly due to the capacity reasons, limited primarily to those cases where the preliminary results of the EC seem not to be in concert with the views of the Slovak NCA, which then seeks to ask the EC to take into account certain peculiarities of a particular case with regard to the Slovak part of the merger. The recent experience in this field has shown that there is a certain gap and that the established procedure lacks some rules.

More specifically, according to Advisory Committee rules the NCAs are informed about the notifications of mergers (and on all the steps necessary to evaluate the possibility of a referral) and they are informed about the Phase two decision of the EC. The next obligatory step of the EC is to inform the NCAs about the proposal of the final merger decision within not less than ten working days before the Advisory Committee takes place, or about the final remedy proposal made by the parties with the possibility to express views on the remedies proposed. The most recent amendment to the Working Arrangement for the Functioning of the Advisory Committee has allowed, in the

broader sense, access to other documents from the EC file upon the NCA's request. This step was very welcomed by the Slovak NCA (and the request of access has been used with regard to one specific case). However, this seems to be insufficient in a case when the EC changes its preliminary conclusions described in the Phase two decision and the NCAs learns about this change only in the proposal of the final decision in the worst-case scenario, or from the final remedy proposal. This is not sufficient particularly in the scenario where the request for a remedy does not cover a particular part of the transaction, although preliminarily in the Phase two decision the EC expressed its concerns also towards this part. At this stage, it is usually too late to enable an NCA that does not agree with the conclusion to bring forward new arguments supported by new evidence, or to ask the EC to investigate certain aspects of the case from its own national experience of the markets in question. There we see room for improvement in setting up rules governing the EC cooperation with NCAs in a more effective way, for example binding the EC to give an early possible notice to all affected NCAs in each case in which the preliminary conclusions described in the Phase two decision tend to be substantially changed.

Outside of those formal instruments, we see the established Merger Working Group as a very useful tool, both to exchange experience and contribute to the mutual consent in merger rules application, and as a platform with a strong voice to propose changes to the merger legislation. We see as particularly useful the possibility to resolve jurisdictional issues in this platform, which contributes to a more uniform application of merger rules. The Slovak NCA has used the possibility to discuss and to ask for the opinion of other NCAs and the EC in matter of jurisdiction issues several times. Even if the merger legislation is not harmonised across Europe, the principal rules are more less the same, and legal certainty demands a more or less uniform explanation and application of merger institutions and terms. Under the current legislative limits, the Slovak NCA therefore seeks to explain and apply all the possible merger terms uniformly with the EC, which seems similar to the approach of other EU Member States.

Summarising the issues written above, the principal tool used in antitrust cases concerning multilateral cooperation is missing in merger control. Although the current tools are widely used, we feel this area would benefit from international agreement on the purpose of using investigatory measures.

Bilateral cooperation

There are no international bilateral agreements regulating the sharing of information among the Slovak NCA and other NCAs. However, the Slovak Act on the Protection of Competition provides for the possibility to exchange such information on the basis of the consent of the party concerned. Pursuant to Article 22 (4) of the Act on the Protection of Competition, on the basis of an international treaty by which the Slovak Republic is bound, or on the basis of consent from a person who has provided information or to whom information refers, the Slovak NCA will provide information to the

competition authorities of other countries for the purposes necessary to apply competition law in those countries, including information protected pursuant to this act or pursuant to special legislation. The Slovak NCA may provide information according to the first sentence only if reciprocity is ensured. This tool is not limited to EU Member States only. In practice, this provision could be fulfilled given the existence of a bilateral agreement ensuring the same status and rights on both sides, or only with the consent of the relevant undertakings.

Especially for merger cases, where, in the current absence of EU-wide legislation enabling the exchange of information, in the need of closer cooperation, the Slovak NCA can only rely on the provision of such consent (waivers) from the undertakings concerned. However, it should also be noted that, in mergers, unlike in antitrust, the parties are typically cooperative as they have the incentive to close the transaction as expeditiously as possible, and thus have the review finalised quickly. The problem for the Slovak NCA arises when information is needed from third parties. They might be reasonably cooperative, but if such willingness is absent, problems may occur.

A very useful tool in establishing basic cooperation in cases of multijurisdictional merger fillings is the ECA notices system, which provides basic information and early notice among countries (and the EC) on the notification of a particular merger across several jurisdictions. Without other formal instruments for cooperation, this system creates a space where the contact details can be found and the informal contacts, discussion etc. can be introduced. This is often the first knowledge that a particular merger case would be assessed also in Slovakia (as the timing of the notification is not often the same across jurisdictions) and helps to coordinate and discuss the case in case waivers are given, and to coordinate the preliminary outcomes of the assessment in order to avoid conflicting results.

The absence of a formal bilateral agreement between the Slovak NCA and any other competition authority has demanded the creation of other tools and possible platforms for cooperation. This resulted in concluding memoranda of cooperation with several partnering NCAs, or creating more informal contacts. Currently, in the absence of better tools, we see high potential for concluding at least some kind of Memorandum of understanding. We see that an increasing number of competition authorities are entering into agency-to-agency MoUs in order to strengthen their relationship with their counterparts. MoUs are not legally binding, and are, compared to government-to-government cooperation agreements, flexible and easier to conclude or amend because their negotiation does not require the authorisation of legislative bodies or the involvement of other governmental bodies. MoUs may be concluded at the initiative of competition authorities based on their specific needs and are modelled with less detailed and formal provisions focused more on establishing a basic framework to ensure a dialogue between the two competition authorities (provisions on transparency, communication and technical cooperation, participating in conferences, seminars, workshops or training courses, exchange of personnel or study trips, providing assistance in advocacy activities).

MoUs often designate a contact point of each party for the purpose of effective communication. Therefore, the Slovak NCA has entered into informal bilateral cooperation agreement with the Czech NCA and the Moldovan NCA.

In 2014, the chairmen of the Czech and Slovak NCAs signed a memorandum of cooperation[3]. This memorandum is the formal result of long-term cooperation based on good relations of a high standard between these two partnership institutions. With their signatures, both chairmen expressed their wish to develop and strengthen the existing good cooperation into the future. The memorandum creates a platform for broader cooperation regarding exchanges of information and experience in the field of legislation, case law, and methodology, as well as information on market functioning, study visits, and the organisation of conferences and other events. Always with more effective enforcement of competition policy in mind, the memorandum sets out rules for the mutual supply of information in cases of anticompetitive behaviour by undertakings or mergers, as well as in cases of mutual assistance while maintaining the protection of sensitive information. Besides publicly available information, the competition authorities will also exchange other information upon the consent of the supplier of such information. The parties to the memorandum also expressed their interest in organising regular meetings between their representatives, with the aim of discussing issues of mutual interest and cooperation.

On the basis of this, representatives of the Czech and Slovak authorities meet regularly for informal meetings to find out about the day-to-day activities of the authorities, the case-law of the courts and legislative activities. They exchange competitive know-how.

The Slovak NCA has also concluded a cooperation agreement with the Competition Council of the Republic of Moldova. The agreement has a similar nature as the memorandum with the Czech Republic. The different nature of the agreement provisions stems from the fact that Moldova is not a member of the EU. This document contains commitments towards cooperation and support within European Project partnerships. Practical differences will surely also arise with regard to the geographical and linguistic distance or differences of legal systems in comparison with the cooperation with Czech Republic.

Beside the positive aspects of MoUs however, this is a form that does not allow the Slovak NCA to exchange information pursuant to Article 22 (4) of the Act on the Protection of Competition, or to conduct investigatory measures at the request of other NCAs outside the scope of Reg. 1/2003 or 139/2004.

3 Memorandumo spolupráci medzi protimonopolným úradom Slovenskej Republiky a úradom pre ochranu hospodárskej súťaže Českej Republiky (April 16, 2014). Available from: https://www.antimon.gov.sk/data/att/1378.pdf [Accessed September, 12 2020].

The efforts for more formal bilateral cooperation with the Czech NCA

As mentioned above, the main obstacle to closer cooperation between these two historically close partners is the lack of legal basis. The Slovak NCA can only disclose information from the case file on the basis of an international agreement or EU Regulations, and on the basis of reciprocity or with the consent of the relevant company/person. The OECD recommendation has helped the Slovak NCA to better specify the need for closer cooperation. That is why the Act on the Protection of Competition was amended in a way that would allow the Slovak NCA to exchange information with other NCAs and open the way to negotiate a more formal agreement. However, such an agreement, allowing the Slovak NCA to conduct any investigatory measures upon request or exchange information from case files, would have to be approved and signed by either the president or the government, depending on its final wording.

Hence the Slovak NCA started negotiations with the Czech authority, being the most appropriate candidate for such closer bilateral cooperation upon formal agreement.

The Slovak NCA requested and acquired a mandate from the Slovak government to enter into, firstly, informal discussions with the Czech NCA on the content of a future bilateral international agreement. In an amendment to the Act on the Protection of Competition, the Slovak NCA prepared a platform for a future inter-ministerial international agreement and, in consultation with the Ministry of Foreign Affairs of the Slovak Republic, amended the provision of Section 22 of the Act on the Protection of Competition. The Czech Republic introduced a similar provision in 2017, allowing the exchange of information on the basis of an international agreement.

The basic framework that should be covered by an international Czech-Slovak treaty is as follows:

- Exchanging information held by either authority in the form of evidence, as well as the know-how of the authorities.
- Obtaining information for the other authority (which the addressed authority does not have, but will do for the requesting authority by requesting third parties, possibly through inspections).
- Exchanging information with the consent of the parties concerned – waiver.
- Exchanging information without the consent of the parties – including protected information, in particular business secrets, confidential information, as well as information protected by special regulations in the country of a party to the agreement, such as: bank secrets, personal data, etc.
- Providing legal assistance – performing individual acts for the other party, in particular by sending and delivering documents, conducting inspections, withdrawing and transmitting factual evi dence, obtaining expert opinions, questioning participants, witnesses, experts and other persons with possible involvement of the requesting party's staff there where appropriate.

The agreement should cover the exchange of information of any kind, such as oral information, written information and information regardless of the medium on which it is recorded.

One of the aims of the agreement should be to enable the efficiency of the activities of both competition authorities to enforce competition principles and preventing inconsistent outcomes. This should be done bearing in mind the cost savings of authorities, in particular through the coordination of the parties' activities. However, coordination will only be possible and useful in the event of the same or similar related matters (especially in the field of cartel investigations, inspections).

The provisions designed to prevent conflicting situations that could arise if the enforcement of competition rules by one competition authority would have led to obstacles to the enforcement of competition rules by another competition authority should also be included. In order to prevent such conflicts, the agreement should create a mechanism for mutual information on cases of a possible conflict of interest, as well as on the action of both authorities when they identify a possible conflict of interest.

The parties to the agreement should have the right to refuse to provide information if this would be contrary to, or unduly burdensome to, the law of the country of the party to the agreement.

The protection of the information obtained should be ensured by each party to the agreement under its national law, and the use of any information exchanged or transferred between the parties under the agreement should stay under the responsibility of the receiving party.

The agreement has not yet been concluded and the negotiation process is still ongoing. On the basis of the current legal situation, representatives of both authorities regularly meet in informal meetings, where they inform each other about the ordinary activities of the authorities, the case law of the courts, legislative activities and the exchange competitive know-how. The exchange of information concerning the application of European competition law, which the Czech and Slovak authorities are authorised to apply, is governed by Regulation 1/2003. As regards national law, the authorities may not exchange information obtained in the course of their activities that is not publicly available without the consent of the parties concerned. An international treaty should make this possible.

Conclusion and challenges for the future

All the above-mentioned types of cooperation are relevant for the Slovak NCA, as each type of cooperation has its own added value for the effectiveness of the competitive enforcement. At the same time, as was shown above, almost all types of cooperation record some gaps and limitations.

So far, based on the Slovak NCA's experience and practice in antitrust matters, the cooperation pursuant to Regulation 1/2003 works well, especially when the NCAs are applying Articles 101 and 102 TFEU. The area of mergers would benefit from re-

moving legal obstacles, which would mean to create a multilateral legal basis similar to that under Regulation 1/2003. However, under the current legal set up and division of powers between the EU and Member States in the area of mergers, we do not see any real possibility of such a solution.

From a broader point of view, the global nature of the business today requires cooperation that demands a broader consensus and stricter rules of the game. In that sense, in the area of antitrust we expect the new EU Directive 1/2019 will be transposed in all EU Member States, providing room for more effective cooperation, especially in mutual assistance regarding the notification of decisions and other acts, as well as the enforcement of fine cross border, which was lacking so far. From the Slovak NCA's perspective, it is also expected that the new legislation will bring a more EU-consistent approach towards the definition of the undertaking as the economic entity (the economic group as a single economic unit) and the possibility to hold the addressees jointly and severally liable for the illegal conduct.

The other option is to think about more formal bilateral or regional cooperation in the case of mergers and cross-border antitrust cases. The possibility of setting a framework that would facilitate cooperation could be further explored; it would be useful to have a better system of information exchange and administrative assistance. The first step towards this might be the identification of problems and drafting ways forward, and thus inducing a possible improvement of the current legal framework.

The main obstacles that rose from the everyday practice and experience are various by nature, as was seen above. The main formal and legal obstacle is the absence of a legal basis to conduct the measures requested, or to request the measures, or to exchange information. Even under ideal conditions and with the political will to conclude bilateral agreements with the most probable sparring partners, the procedure itself is the challenge, as well as the rules that would be set up by the agreement, which should be consistent with other national rules of each of the NCAs in question.

In particular, a big gap consists in differences in confidentiality rules, which prevents a smooth exchange of information, and using investigative tools in cooperation. Even in the absence of a uniform approach to confidentiality, we think there is still room to create a system on how to deal with shared information, which remains confidential under the legal rules of one country, but not of the country that asked to share the information. The possibilities involve, for example, in making compilations of the information shared in order not to discover any confidential information, treating sharing such information as voluntary, to introduce the principle to return or destroy any confidential information. All those instruments, however, require the same safeguards to be provided in each jurisdiction for the undertaking, as well as its exclusion for use for criminal sanctions. To create an international mechanism of how to identify the confidential information and how to treat them in the event of differences in legal rules could help to improve the cooperation.

It is also necessary to consider, in addition to the limitations on sharing confidential information, the institutional and investigatory impediments (resource constraints and practical difficulties), and lack of trust and confidence in legal systems, the limitations due to differences in legal frameworks (criminal vs. civil enforcement), jurisdictional constraints – differences in legal standards.

Outside the initiative made by the NCAs to exchange information, there is a possibility to push for a better policy towards the increase of the incentives of undertakings to grant confidentiality waivers. Through discussion or soft law, the NCAs can explain the positive effects on the speed of the proceedings and on savings of administrative costs in the proceedings, especially in merger cases, but towards third parties (for example claimants) also in antitrust cases.

Broadly speaking, a general and mutual trust between NCAs that would like to be involved in a more intense mutual cooperation is a key prerequisite. This can only be achieved through regular contacts, greatly facilitated by a forum like ad hoc working groups in order to build co-operative relationships between competition authorities. Therefore, mutual understanding and trust building between agencies through formal and informal mechanisms is essential.

With regard to the use of cooperation tools in connection with a court review of the NCA's decision, given the positive experience with the application of amicus curiae in the judicial review of decisions, we propose to use this institute also in future court proceedings. The Slovak NCA may also contribute to the identification of the relevant decision-making practice of the EC and European Courts' case law by referring to relevant case law in its decisions.

At the same time, it is necessary for the courts themselves to know the specificities of competition law and its institutes. One solution could be the specialization of courts in the SR. However, this seems unlikely given the small number of competition cases compared to the volume of the other courts' agenda. Another obstacle for judges is that most of the competition literature and often the latest EC and European Courts decisions are in a foreign language. Based on previous experience with the participation of the Slovak NCA in the training of judges in Slovakia, as well as the experience of other competition authorities, we feel there is a space for more focused training, taking into account the specialties of competition law and at the same time broader national legislative setting. The training could be covered by experts from the competition authorities of the Slovak Republic, the Czech Republic, EC and covered by judicial training organizations. We believe that such a procedure could eliminate the risk associated with the possible involvement in such training of the Slovak NCA only and would benefit from providing information in Slovak or Czech language. This training could be provided for courts in Slovakia and the Czech Republic, which would also contribute to the exchange of information and relevant know-how between judges from both countries.

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TRENDS IN MERGER CONTROL IN SPAIN

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Abstract:

The aim of this article is to provide an overview of the trends and challenges that the Spanish Competition Authority (the CNMC) is facing in merger control. To achieve this, section one will introduce the main data and statistics of the merger control regime in Spain, as well as the main strengths of the CNMC in merger control. Section two will expand on the main lessons learnt during the substantial merger analysis carried out by the Spanish Competition Authority. Section three will review the challenges ahead for competition authorities and, particularly, the approach and priorities of the Spanish Competition Authority.

Keywords:

competition policy, digital economy, merger control, gun jumping, remedies, market share threshold, up-front buyer, and minority shareholder

THE SPANISH COMPETITION AUTHORITY: STRENGTHS AND OVERALL TREND

Over the last ten years, the Spanish Competition Authority has cleared more than 900 mergers, an average of 90 mergers per year.[1] Our system allows for the rapid clearance of operations that do not raise competition concerns. In fact, the average time for

1 908 mergers between 1 January 2010 and 31 December 2019.

clearance in 2019 was 24 days, and this average is even lower for those cases using short form notification (also known as abbreviated cases).

Achieving such short periods between the notification and clearance of these procedures begins with the informal contacts that the case team maintains with the notifying parties prior to the formal notification. This earlier informal communication with the case team allows the stakeholders to become aware of possible concerns that could arise while assessing concentrations, and thus to include all the required additional information in the notification form. Almost all notifications follow this informal process of pre-notification in Spain.

The percentage of concentrations eligible to use the short form has increased recently. The short form is less burdensome for the parties, as it may include fewer details about the markets than an ordinary one. It is limited to those transactions where no competition concerns are expected, since the activities of the parties do not overlap (or where any overlap is marginal), the JV will not be active in Spain, or the market shares are very small. In the last three years, around two-thirds of the filed mergers followed the abbreviated proceedings.

Even though the duration of proceedings has become shorter, the complexity of the assessment has increased. In fact, after three years with no second phase investigations, one in-depth investigation was opened in 2018 regarding the *Quirón / Clínica Santa Cristina* merger in the health sector (cleared in 2019 with remedies[2]). Two additional in-depth investigations have been opened since then: one in the cement production sector in 2019 (*Cimça / Cemex*[3]) and another in the funeral expenses insurance sector in 2020 (*Santa Lucia / Funespaña*[4]). These last two mergers are still under assessment. In addition, more than 15 mergers have been cleared subject to remedies in the last five years, where it was not necessary to open an in-depth investigation, since the parties offered adequate remedies from the very beginning.

The Spanish Competition Authority shows two main differential features that become clear strengths in the merger analysis in comparison with the majority of the European competition authorities. First, CNMC gathers the competition authority and sector regulators into a single institution. Second, Spanish competition law provides for a notification threshold based on the market share, in addition to the usual one based on turnover.[5]

2 CNMC (2018) C/0966/18: *Quirón / Clínica Santa Cristina. Adquisición control exclusivo.* Available from: https://www.cnmc.es/expedientes/c096618 [Accessed September, 12 2020].

3 CNMC (2019) C/1052/19: *Çimsa / Activos Cemex. Adquisición control exclusivo*. Available from: https://www.cnmc.es/en/node/375908 [Accessed September, 12 2020].

4 CNMC (2019-2020) C/1086/19: *Santa Lucía / Funespaña. Adquisición control exclusive*. Available from: https://www.cnmc.es/expedientes/c108619 [Accessed September, 12 2020].

5 See Article 8 of the Spanish Competition Act 15/2007 of 3 July, OSG 2007, No. 159 (In English available from: https://www.cnmc.es/file/64176/download [Accessed September, 12 2020]). In addition, in order to provide certainty to undertakings, prior to submitting the notification, they can formulate a consultation about whether the thresholds for mandatory notification are met

The former national competition authority (the CNC) was integrated with the pre-existing sector regulators in 2013, creating the current CNMC. Currently, CNMC has 4 investigative divisions: Competition Directorate, Energy Directorate, Telecommunications and Audiovisual Sector Directorate and Transport and Postal Directorate. Although the integration was very challenging initially, and the model received criticism from some sectors, the experience of more than six years has shown that synergies are possible, particularly for merger assessments. The analysis of mergers in energy, telecommunications or the transport sector can benefit from a deeper knowledge of the markets and from a wide range of market data. Thus, the joint work of the various directorates in merger control can be more effective than a simple coordination between regulators. The recent mergers in the fuel sector are a good example of successful merger control, as proven by the in-depth analyses carried out. In fact, since 2017, four mergers have been cleared in the fuel sector (C/1032/19: *Kuwait Petroleum / Saras Red*,[6] cleared in 2019, C/0980/18: *BP / Petrocorner*,[7] cleared in 2018 in the first phase, subject to remedies and C/0890/17: *Disa / Gesa*[8] and C/0835/17: *Cepsa / Villanueva / Paz*,[9] both in 2017 and subject to remedies in the first phase).

All these mergers were assessed mostly on the basis of the data gathered by the CNMC's Directorate for Energy. The sectoral regulation obliges service stations to provide data about final prices and sales volumes to the Directorate for Energy, allowing the merger analysis to be enriched by this input. In fact, the Energy and Competition directorates together with the CNMC`s IT team, have been able to design a new tool to define the relevant markets based on isochrones, using the data provided by the petrol stations themselves. This means that merger decisions are not only more solid, but are also consistent with the sector-specific decisions.

Regarding the notification thresholds, the Spanish Competition Authority has the advantage of having a market share threshold, in addition to the usual one based on the turnover of the parties. When the merger represents an acquisition or increase of more than 30% in a relevant market, the merger must be notified to the CNMC, unless the turnover of the acquired entity or business is less than €10M, in which case the market share threshold increases to 50%.

(Article 55.2 of the Spanish Competition Act). This consultation will be solved within three months. In addition, there is extensive case law regarding the market definition as all decisions are published.

6 CNMC (2019) C/1032/19: *Kuwait Petroleum / Saras Red. Adquisición control exclusive*. Available from: https://www.cnmc.es/node/374933 [Accessed September 12, 2020].

7 CNMC (2018) C/0980/18: *BP / Petrocorner. Adquisición control exclusive*. Available from: https://www.cnmc.es/node/371755 [Accessed September, 12 2020].

8 CNMC (2017) C/0890/17: *Disa / Gesa. Adquisición control exclusive*. Available from: https://www.cnmc.es/node/364906 [Accessed September, 12 2020].

9 CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz. Adquisición control exclusive*. Available from: https://www.cnmc.es/expedientes/c083517 [Accessed September, 12 2020]

More than 50% of the mergers notified in 2019 met the market share threshold. Experience has demonstrated that this threshold is suitable to catch relevant mergers that would otherwise go unnoticed. This is due to the fact that the significance of an economic transaction can be measured not only through its monetary value or the economic value of the enterprises involved, but also through its relevance in the affected markets. In fact, all the mergers that were cleared in 2019 subject to remedies, in both the first and second phase, met the market share threshold.

It has also become a very valuable tool to address many of the challenges posed by digitalisation. Indeed, our market share threshold has allowed the CNMC to catch up to eight digital mergers in Spain in 2019 alone, as well as several other cases that were referred to the European Commission, including the well-known *Facebook / Whatsapp* merger back in 2014, which had to be notified only in Spain, the UK and Cyprus within the EU. In some instances, these referrals resulted in Phase II investigations, such as in the *Apple / Shazam* transaction cleared in 2018.[10]

WHAT EXPERIENCE HAS TAUGHT US

One of the hot topics in discussions surrounding competition enforcement is whether or not it is necessary to adapt current antitrust regulations to address the dynamism of the markets. Although this matter will be fully discussed below in relation to digital markets, it is possible to state here that, indeed, markets evolve and assessments must adapt to them. However, it does not necessarily mean that the legislation must be changed.

In recent years, we have witnessed relevant changes in the way markets work, which we have been able to include in our analyses in merger control, just as it has been equally necessary to integrate the experience from our previous assessments in order to enhance the quality of our output. In essence, the merger control analysis progresses as time goes by, under the same regulatory framework, to accommodate to the evolution of the markets and previous experiences.

We will show hereunder, some of the main experiences that the CNMC has learned during the recent years of merger control, which have influenced the way that assessments are carried out nowadays.

Upfront buyers

In 2009, the CNMC cleared a merger in the energy sector that included, as a remedy, the divestment of several thermal power plants in a short period.[11] The situation of the market changed drastically some months later, so the sale of assets became incredibly

10 EC decision of September, 6 2018 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.8788 *Apple / Shazam*). Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf [Accessed: September, 12 2020].

11 CNMC (2008-2010) C/0098/08: *Gas Natural / Unión Fenosa. Adquisición control exclusive.* Available from: https://www.cnmc.es/expedientes/c009808 [Accessed September, 12 2020].

complicated. Finally, the CNMC had to accept a long-term purchase option as an alternative remedy, so monitoring remained active for ten years, although in the merger decision it was expected to be closed some months after the clearance.

In light of experiences such as this, we have demanded upfront buyers when structural remedies have been included in our decisions, thereby ensuring that the buyer approval process occurs at an earlier point in time. Indeed, a merger was cleared in 2018 with a divestiture commitment of a petrol station to a buyer that was approved together with the merger itself.[12] The effectiveness of this remedy is undoubtedly an improvement on the solution previously adopted in 2009.

Minority shareholding

In recent years, we have observed that international investment funds are acquiring stakes in the capital of European firms. Most of these mergers are usually cleared through abbreviated proceedings, since there are regularly no overlaps among the activities of the parties. However, intense debate may arise when the same investment funds already have minority shareholdings in several companies operating in related markets or, in the most extreme case, in competitors on a single relevant market. Even when the fund is a minority shareholder, the likelihood of gaining access to confidential and sensible information about the activity of the company may be high. Under these circumstances, there is a risk of coordinated effects, since commercial information from one company can be used by a fund when participating in its competitor.

This was the case in a merger cleared with remedies in 2019 in Spain in the food delivery sector. In this case, we analysed the implications of having an indirect minority shareholding in a competitor.[13] The acquiring company had a minority shareholding in a company, which, in turn, also had a minority shareholding in the target's closest competitor on the Spanish market for online food delivery platforms, where both companies had significant market shares.

This would lead to the resulting entity being present on the board of directors of competing companies. There was a risk of exchanging sensitive information, which created an incentive for the acquirer to prevent the expansion of this competitor's business.

The merger was finally cleared, subject to commitments aimed at preventing the flow of sensitive information between both companies and limiting the participation of the acquirer in decision-making that may influence the strategy of the company with a minority share.

Internal company documentation

Finally, we have learned how relevant internal company documentation is to achieving a true understanding of the purpose, effects and scope of a given merger. There is no doubt about the asymmetry of information that competition authorities face when assessing mergers. With few exceptions, the knowledge of the competition authority about the

12 CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz.*.

13 CNMC (2019) C/1072/19: *MIH Food Delivery Holdings / Just Eat. Adquisición control exclusive.* Available from: https://www.cnmc.es/expedientes/c107219 [Accessed September, 12 2020].

affected markets in a concentration is lower than that of the stakeholders. This is precisely why market tests are so necessary in order to correctly assess many cases. Experience has shown us that, when a merger raises concerns regarding the maintenance of effective competition on the relevant markets, in additional to the market tests, the internal company documentation about the operation can give the authority valuable clues.

In 2017, the analysis of a merger in the fuel sector raised competition concerns regarding the area of influence of a specific petrol station.[14] The case team decided to ask the parties for the due diligence investigation of the acquisition. Information about the price policy that the acquirer intended to apply after the acquisition confirmed the competition concerns, leading to the merger being cleared subject to the disinvestment of this petrol station.

The experience with the aforementioned merger in the healthcare sector, which was cleared with remedies in 2019, was similar. It concerned a private hospitals Group acquiring the only private clinic in the affected area (the province of Albacete).[15] The assessment raised concerns about the maintenance of some of the medical services after the merger, so the case team asked the company for the internal report to their parent company regarding the acquisition. The concerns were fully confirmed through these internal documents, meaning that the vast majority of the commitments presented were aimed at avoiding a reduction in services and in service quality.

WHAT'S NEXT? NATIONAL AND GLOBAL CHALLENGES

This section provides a brief overview of some hot topics that merger control rules are facing globally, and that competition authorities, including the Spanish Competition Authority, are dealing with. In particular, it deals with how the Spanish Competition Authority is reacting to these trends, and how Spanish merger control rules continue to be suitable for what lies ahead.

Digital Economy

As explained in Section 1, the Spanish merger control rules set out two alternative thresholds: the first one regarding the market share acquired as a result of the merger, and the second one dealing with the aggregate turnover of the parties participating in the transaction. Although these types of alternative thresholds do exist in some other jurisdictions, most jurisdictions only have a merger notification threshold based on the annual turnover of the undertakings involved in the merger. Such a turnover threshold efficiently catches relevant transactions in many sectors. However, when dealing with digital markets, many nascent firms or start-ups do not yet generate enough turnover to trigger those thresholds, meaning that some potentially problematic transactions cannot be investigated or analysed by the relevant competition authorities.[16] The solutions that

14 CNMC (2017) C/0835/17: *Cepsa / Villanueva / Paz.*.

15 CNMC (2018-2019) *C/0966/18.*.

16 See written contribution from Spain to the OCDE Roundtable on 'Start-ups, Killer Acquisitions and Merger Control'. Start-ups, Killer Acquisitions and Merger Control – Note by Spain (June, 11 2020)

have been proposed as ways of avoiding this outcome and ensuring that all relevant transactions are caught, mainly suggest either lowering the existing turnover thresholds, and/or (ii) creating additional thresholds based on transaction value. In fact, jurisdictions such as Germany or Austria have amended their rules to introduce transaction value-based thresholds.

In Spain, the latter was also discussed, but it was generally considered that, due to the additional threshold (the market share threshold), the conclusions differ from those jurisdictions where the merger rules only include a turnover threshold. The Spanish Competition Authority takes the opinion that its current notification threshold efficiently captures relevant mergers in the digital economy, including killer acquisitions, and that there is no need to amend the notification system in this regard.

This conclusion rests on the fact that the Spanish Competition Authority has been able to analyse several mergers in digital markets, a context where the transactions would not have been reviewed if the Spanish Competition Authority did not have the market share threshold in place. In particular, during 2019, six mergers concerning the digital sector[17] were reviewed by the Spanish Competition Authority thanks to the market share thresholds. Without this threshold, these mergers would have not been notified to CNMC for assessment.

Furthermore, this threshold has been useful not only to capture relevant transactions in digital markets in Spain, but also to refer to the European Commission significant transactions that were caught under the Spanish notification system, and that of some other Member States, but did not meet the European Commission thresholds and therefore did not have a community dimension. This was the case of the already mentioned mergers of *Facebook / Whatsapp* (referred under Article 4(5) of the Merger Regulation) and *Apple / Shazam* (referred to under Article 22 of the Merger Regulation).

It is worth mentioning in more detail the *Just Eat / Canary* case[18] among those six digital mergers that were analysed by the Spanish Competition Authority in 2019. The interest in this merger, which was preceded by another merger involving the company Just Eat, also cleared by CNMC in 2016,[19] lies in the analysis of the innovative capacity

JT03461710 [DAF/COMP/WD(2020)22]. Available from: https://one.oecd.org/document/DAF/COMP/WD(2020)22/en/pdf [Accessed Sepetember, 12 2020].

17 See cases CMNC (2019) C/1015/19: *Bauer / Clabere Negocios -Credimarket. Adquisición control exclusivo*. Available from: https://www.cnmc.es/en/node/373964 [Accessed September, 12 2020]; CMNC (2019) C/1061/19: *Takeaway / Just Eat. Adquisición control exclusive*. Available from: https://www.cnmc.es/en/node/376815 [Accessed September, 12 2020]; CMNC (2019) C/1046/19: *Just Eat / Canary. Adquisición control exclusivo*. Available from: https://www.cnmc.es/expedientes/c104619 [Accessed September, 12 2020]; CMNC (2019) C/1072/19: *MIH Food Delivery Holdings / Just Eat*; CMNC (2019) C/1076/19: *Easypark / Negocio Sistemas Aparcamiento Ivial. Adquisición control exclusive*. Available from: https://www.cnmc.es/expedientes/c107619 [Accessed September, 12 2020]; CMNC (2019) C/1023/19: *Wishbone / Palladian. Adquisición control exclusivo*. Available from: https://www.cnmc.es/en/node/374279 [Accessed September, 12 2020].

18 Case C/1046/19 *Just Eat / Canary.*

19 See, in this sense, the Preliminary Report and Draft Decision: CMNC (2016) C/0730/16: *Just Eat / La*

of the company that was being acquired (i.e. Canary). As the transaction would result in very high market shares and eliminated a competitor, it was necessary to determine whether it could fall under the so-called "killer acquisitions" category. However, the analysis performed by the Spanish Competition Authority concluded that Canary was neither an innovative nor an aggressive competitor. Therefore, the merger was cleared with no commitments.

Infringements: gun jumping and remedy violation

Gun jumping includes a number of serious infringements regarding merger control obligations, including (i) when merging parties fail to notify a reportable merger to the competition authority; (ii) the implementation of part or all of a merger during mandatory waiting periods (known as a violation of the standstill obligation); and (iii) the co-ordination of competitive behaviour before closing. Although this topic is not new, it has received a lot of attention recently, as competition authorities are devoting more enforcement resources to these violations and the amounts of fines for such infringements are increasing.[20] According to the OCDE Roundtable on the Suspensory Effects of Merger Notifications and Gun Jumping, enforcement against a failure to notify a transaction has increased significantly in the last decade, on a global scale.

The Spanish Competition Authority is no exception and has imposed 14 sanctions over the last decade regarding both violations of the obligation to notify and violations of the standstill obligation. However, the two most recent decisions adopted by the Spanish Competition Authority relate to violations to the obligation to notify.

In the *Grupo Nufri* case (2019),[21] the notifying party was fined for failing to notify a merger that met the market share threshold. It was the notifying party who voluntarily approached the authority and acknowledged that it had committed an infringement. Therefore, although the board of the Spanish Competition Authority qualified the infringement as a serious one,[22] it also reduced the fine in view of the company's cooperation, in line with the possibilities foreseen in the Spanish Competition Act.[23]

Nevera Roja. Adquisición control exclusive. Available from: https://www.cnmc.es/expedientes/c073016 [Accessed September, 12 2020] and GARCÍA GARCIA, J.M., IBÁÑEZ COLOMO, P. (2020) *Competition Law and Policy in the Digital Economy: Report From Spain (28 January 2020)*. [Proceedings of the XXIX FIDE Congress (The Hague, 20-23 May 2020)]. Available from: https://ssrn.com/abstract=3527032 [Accessed September, 12 2020].

20 See OECD (2018) Executive Summary of the Roundtable on Suspensory Effects of Merger Notifications and Gun Jumping. Available from: https://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.html [Accessed September, 12 2020].

21 CMNC (2019) SNC/DC/093/19: *Grupo Nufri DC - SNC.* Available from: https://www.cnmc.es/expedientes/sncdc09319 [Accessed September, 12 2020].

22 Following Article 62.3.d of the Spanish Competition Act.

23 See Article 64.3 of the Spanish Competition Act.

In the *Consenur / Cathisa* case (2017),[24] the notifying party was also fined for failing to notify a merger that met the market share threshold. In this case it was the Spanish Competition Authority that, following a number of requests for information, asked the parties to notify the transaction after its effective execution, which was subsequently cleared.[25]

As for standstill obligations, it is worth mentioning the *Gestamp/ Essa Bonmor* case,[26] which illustrates the legal difficulties that these cases may highlight. In this case, the transaction was structured in two distinct stages. In stage one, a minority shareholding of 10% was acquired, along with veto rights over certain decisions, such as the approval of the Annual Accounts or of additional debt. In stage two, an additional 30% of the target was acquired. Only stage two was subject to the standstill obligation.

After the merger was cleared, the Council of the CNMC found the acquirer to have breached the standstill obligation, as control had been acquired not at stage two but at stage one. It therefore imposed a fine. However, the Spanish Court of First Instance annulled this decision on two grounds. Firstly, it questioned whether the scope of decisions covered by the veto rights actually affected the strategic decisions or commercial policy and thus amounted to control.[27] Secondly, according to the Court's view, there was no lasting change of control, as the agreement included in stage one only lasted 48 days and was linked to the second stage, which in fact included a standstill obligation. The ruling of the court sets a high standard for the interpretation of the concept of "lasting change".

Besides gun jumping cases, the Spanish Competition Authority is particularly vigilant on the fulfilment of the commitments that it imposes, and for that purpose there is a specific unit in charge of monitoring all the commitments imposed. In a jurisdiction such as the Spanish one, where behavioural commitments are not atypical, this monitoring role is of special relevance. Over the past decade, the CNMC has monitored more than 35 mergers that were cleared with commitments.

The monitoring of commitments has led to various sanctioning proceedings resulting from breaching or not fully complying with the commitments imposed. In its most recent case (2019), the CNMC imposed a fine of 1.5 million euros on Telefónica de España, S.A.U. for violating one of the commitments of a resolution from 22 April 2015 of the Council of the CNMC stemming from case C/0612/14 *Telefónica / DTS*.[28] The decision

24 CMNC (2016-2017) SNC/DC/074/16: *Consenur. DC - SNC.* Available from: https://www.cnmc.es/expedientes/sncdc07416 [Accessed September, 12 2020].

25 This decision is currently under appeal.

26 See CNMC (2011-2012) SNC/0015/11: *Gestamp / Essa Bonmor. DC – SNC*. Available from: https://www.cnmc.es/en/node/344511 [Accessed September, 12 2020]; DE (2018) Executive Summary of the Roundtable on Suspensory Effects of Merger Notifications and Gun Jumping.

27 The meaning of control will be interpreted in the sense of the Commission consolidated jurisdictional notice under Council regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.04.2008, pp. 1–48.

28 The press release is available in English here: CNMC (2019) *The CNMC fines Telefónica 1.5 million*

was part of the monitoring work carried out by the CNMC to verify that Telefónica is complying with its commitments pursuant to its purchase of DTS, when it acquired the 56% stake in DTS owned by the Prisa Group. Further to this, more ongoing proceedings for violating commitments were opened in 2019.[29] These proceedings relate to case C-0550/14 *Repsol / Petrocat*, involving the acquisition by Repsol of a company active in the fuel distribution sector (Petrocat). This merger was cleared in 2014 with a variety of behavioural commitments. The ongoing proceedings analyse the potential violation of two of the remedies imposed.

The trends of 2019 reveal how important it is that the Spanish Competition Authority ensures, and will continue to ensure, compliance with the remedies imposed. In fact, the reinforcement of the monitoring is included as one of the priorities of the authority's work plan for 2020.[30]

Merger control vs industrial policy

It seems obvious that, for Competition Authorities, being able to prevent certain transactions from evading the notification systems is fundamental. However, it is only the initial step of the process. For a notification system to be effective, it is of the utmost importance that the effects of the transaction in markets are adequately and effectively analysed, and that remedies, if required, are implemented correctly.

On this basis, there has been much discussion regarding the appropriate role of merger control and the role of competition authorities when intervening in markets. The present situation, often with globalised and interrelated markets, has proven to be extremely complex, in particular when weighing the right balance between public and economic interest. The ongoing pandemic will only stress the difficulties of this exercise, as certain transactions will, more than ever, be subject to various interests worth defending. As a result, prudent analysis is seen as the best alternative by CNMC.

The so-called "national champions" are at the centre of this discussion. In Europe, this debate has been ongoing over the last decade, as governments of Member States have opposed some of the decisions adopted by the Competition Directorate of the European Commission.[31]

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euros for violating one of the conditions of its merger with DTS. Available from: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191022_NP_VC_TELEFO%CC%81NICA-DTS_def.ENG.pdf [Accessed September, 12 2020].

29 See CNMC (2019) *SNC/DC/044/19: Repsol / Petrocat DC – SNC*. Available from: https://www.cnmc.es/en/node/377384 [Accessed September, 12 2020].

30 See 2020 CNMC's work plan: CNMC, Plan de Actuación (2020). Available from: https://www.cnmc.es/sobre-la-cnmc/plan-de-actuacion [Accessed September, 12 2020].

31 See MOTTA, M., RUTA, M. (2011) Mergers and National Champions. In: Falck, O., Gollier, C., Woessmann, L. (eds.) *Industrial Policy for National Champions*. Cambridge: MIT Press, pp. 91-117. Available from http://doi.org/10.7551/mitpress/9780262016018.003.0005 .

In particular, the recent decision of the European Commission in the *Siemens / Alstom* case[32] has once again brought this debate to the forefront. This is a consequence, among other things, not of the decision itself, but of the geopolitical context that we are currently facing, and which, as mentioned, will probably be even more complex as a result of the pandemic.

Nevertheless, we should not forget that industrial policy has its own effective tools to achieve its objectives, which include, among other things, a level playing field between companies. However, this does not include, and should be kept apart from, antitrust and merger control rules. Indeed, the very nature of merger control rules rests on the basis of an objective and rigorous assessment that must, above all, be impartial and not subject to policy interests. The success of the merger control systems applied by the European Commission results from its enforcement of the law and the absence of arbitrary or discretionary decisions.

The *Siemens / Alstom* case has been discussed at length internationally, and has been both criticised and supported. Some of the most significant critics came precisely from the Member States whose companies where involved in the merger, i.e. France and Germany. While the aim of achieving a strong European industry is understandable and desirable, it cannot come at the expense of perverting the merger control systems.

Against this backdrop, the CNMC issued a press release[33] defending the stance of the European Commission, seeing as its decision was exclusively based on technical reasons, and the commitments submitted by the parties were deemed to be insufficient to counteract the obstacles to competition identified during the course of the investigation. Furthermore, before the decision was adopted, the Spanish Competition Authority had already submitted a letter to the European Commission, together with the competition authorities of Belgium, the Netherlands and the United Kingdom, expressing concerns about the proposed merger of the mobility business of Siemens AG with Alstom SA.[34]

Hence, the CNMC not only agrees with the need to keep competition policy separate from industrial policy, but also, in this particular case, took the view that, if approved, the transaction would have caused a significant loss of competition. This would have caused severe harm to Spanish markets and companies, as Spain has the largest high-speed railroad network in Europe, and would most likely have led to a substantial increase in the cost of installing and maintaining the extensive high-speed network, as well as to an increase in the retail prices charged to travellers using this railroad network.

32 EC (2019) Case M.8677 *Siemens / Alstom*. Available from: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8677 [Accessed September, 12 2020]

33 See CNMC (2019) *La CNMC respalda la decisión técnica de la Comisión Europea de prohibir la adquisición de la entidad francesa Alstom, S.A. por parte de la alemana Siemens, A.G*. Available from: https://www.cnmc.es/node/373389 [Accessed September, 12 2020].

34 See ACM (2019) *Correspondence: Letter from national competition authorities on the Siemens – Alstom merger (December, 21 2018).* Available from: https://www.acm.nl/en/publications/letter-national-competition-authorities-siemens-alstom-merger [Accessed September, 12 2020].

It is worth mentioning the close collaboration between the European Commission and the competition authorities throughout the case. The CNMC considers this to be of the utmost value in ensuring the interests of consumers, not only in Spain, but across the EEA. Additionally, it provided further proof of the effectiveness and necessity of merger control systems. It is essential that international cooperation among competition authorities continues to strengthen, in order to understand economic structural changes, and how best to address together the new challenges in an effective way. It is also desirable to have a level playing field in terms of merger control regimes, which could and should be part of the requirements of reciprocity included in international trade negotiations.

BŁACHUCKI, M., ed., (2021)
International Cooperation of Competition Authorities in Europe: from Bilateral Agreements to Transgovernmental Networks.
Warsaw: Publishing House of ILS PAS
DOI: 10.5281/zenodo.5011970
pp. 111–123.

PROTECTION OF THE FUNDAMENTAL RIGHTS OF COMPANIES UNDER THE ECN+ DIRECTIVE: A MILESTONE OR A MISSED OPPORTUNITY?

MARTA MICHAŁEK-GERVAIS

Abstract:

The main aim of the ECN+ Directive consists in ensuring a more effective and uniform enforcement of Articles 101 and 102 TFEU by providing the national competition authorities with a minimum common toolkit and enforcement powers, as well as improving cooperation between the NCAs. This article focuses on the question that appeared somewhere on the margins of the adoption of the ECN+ Directive, namely the protection of companies' fundamental rights in the ECN+ Directive. The text presents the background of the adoption of the ECN +Directive, the evolution of the wording of the regulation regarding the protection of fundamental rights in the course of the legislative procedure, and a brief analysis of the scope of protection eventually introduced in the ECN+ Directive. As the regulation is too laconic and fails to deal with several important issues, it is concluded that the EU institutions have actually missed an excellent opportunity to enforce and unify the protection of the rights of companies involved in competition law investigations and proceedings.

Keywords:

ECN+ Directive, striking a balance, fundamental rights, right to a defence

INTRODUCTION

The ECN+ Directive[1] was adopted on 14 December 2018 and published in the Official Journal on 14 January 2019. The main aim of the ECN+ Directive consists in ensuring a more effective and uniform enforcement of Articles 101 and 102 TFEU by providing the national competition authorities (the NCAs) with a minimum common toolkit and enforcement powers,[2] as well as improving cooperation between the NCAs.[3]

This article focuses on the question of protecting companies' fundamental rights through the ECN+ Directive. The author considers, in particular, whether the shape and scope of this protection, as introduced in the ECN+ Directive, might be regarded as sufficient and progressive in light of the current status quo, or whether it should be considered incomplete and lacking significant progress. Having presented the background of the adoption of the ECN+ Directive, the text concentrates on provisions regarding the companies' safeguards, in particular Article 3 and Recital 14. The evolution of the wording of the regulation regarding the protection of fundamental rights in the course of legislative procedure is followed by a brief analysis of the scope of protection eventually introduced in the ECN+ Directive. The author will address the insufficiencies of the adopted regulation using the example of the legal professional privilege ('the LPP') and the privilege against self-incrimination ('the PASI').

As the regulation is too laconic and fails to deal with several important issues, it is concluded that the EU institutions have actually missed an excellent opportunity to enforce and unify the protection of the rights of companies involved in competition law investigations and proceedings.

BACKGROUND OF THE ADOPTION OF THE ECN+ DIRECTIVE

Over 15 years ago, a ground-breaking modification of EU competition law took place. Namely, the decentralisation of the application of EU rules on substantive competition law was introduced by Regulation 1/2003,[4] becoming effective from 1 May 2004. This reform led to a transformation of the competition enforcement landscape, since

1 Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published on 14 January 2019, OJ 2019 L 11, p. 3–33.

2 MALINAUSKAITE, J. (2019) *Harmonisation of EU Competition Law Enforcement*. Cham: Springer, p. 187.

3 For more on cooperation between the Member States and the European Competition Network ('the ECN'), see, for instance, BŁACHUCKI, M. (2019) Nowe formy współpracy międzynarodowej członków Europejskiej Sieci Konkurencji w świetle dyrektywy ECN+. *Europejski Przegląd Sądowy,* 10, pp. 11-18 and BŁACHUCKI, M. (2019) *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)*. Warszawa: INP PAN. Available from: http://www.doi.org/10.5281/zenodo.1494958.

4 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1, 4.1.2003, p. 1.

Regulation 1/2003 provided for an obligation for NCAs to directly apply Articles 101 and 102 TFEU whenever an investigated practice affects trade between the Member States.[5] In practice, the European Commission generally conducts antitrust proceedings when the contested practice involves three or more Member States. Practices involving one or two countries that affect trade between Member States, and which therefore require the application of EU law, are conducted by the NCAs, which have expertise on how markets work in their own Member State.[6] Therefore, following the introduction of the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, most antitrust decisions based on EU law are issued by NCAs[7] and "EU competition rules are being applied on a scale that the Commission could never have achieved on its own."[8]

In addition to the increase in the number of cases with an EU element, the decentralisation also resulted in most agreements between companies being treated in a similar way throughout the European Union. The Commission considered, however, that there was 'untapped potential' for the more effective enforcement of EU competition rules by the NCAs.[9] In particular, the consistent application of substantive antitrust rules in Member States has revealed the need to introduce consistency in procedural rules as well.

Therefore, in order to further improve the enforcement of competition law within the EU Member States, the Commission prepared the Communication on Ten Years of Regulation 1/2003[10] and subsequently held a public consultation.[11] This consultation

5 Other important changes consisted in (i) putting an end to the previous notification system under which companies notified agreements to the Commission for approval under the antitrust rules, and (ii) creating the ECN, in order to allow a better coordination of the EU antitrust rules between Commission and national competition authorities.

6 EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels. Available at: https://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf [Accessed: September, 12 2020]; KOWALIK-BAŃCZYK, K. (2019) Dyrektywa ECN+ – sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych?. *Europejski Przegląd Sądowy*, 10, pp. 4-10.

7 As indicated in the Proposal: 'Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%.' EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 50.

8 The Commission's press release: EC (2015) *Antitrust: Commission consults on boosting enforcement powers of national competition authorities,* Brussels November, 4 2015. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5998 [Accessed September, 12 2020].

9 EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 2

10 The Commission's EC, Communication from the Commission to the European Parliament and the Council, COM(2014) 453. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives {SWD(2014) 230}_{SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020].

11 The consultation was held from 4 November 2015 until 12 February 2016 in the form of an EU

identified a number of areas of action to boost the powers of the NCAs in order to better enforce EU competition rules.[12]

It was stressed, in particular, that many NCAs do not have all the tools they need to effectively detect and tackle competition law infringements or to impose effective fines. Such gaps and limitations in the NCAs' powers and guarantees undermine the system of parallel powers, as they lead to divergences in the outcomes of proceedings depending on the Member States in which companies engaging in anti-competitive practices are active.[13]

The matter of protecting companies' fundamental rights (the significant divergences, the need to increase and unify such protection) was never included in the central points of the envisaged new regulation, always appearing only somewhere on the margin.[14]

Nevertheless, the question of striking a fair balance between the NCAs' powers and the companies' safeguards, and in particular providing adequate protection for companies involved in antitrust investigations and proceedings should be considered of the utmost importance.

THE EVOLUTION OF THE REGULATION REGARDING PROTECTION OF THE COMPANIES' FUNDAMENTAL RIGHTS IN THE COURSE OF THE LEGISLATIVE PROCESS

Initial Proposal of the Commission

The Commission's initial proposal of the ECN+ Directive ('the Proposal') contained only a single-paragraphed extremely laconic provision (Article 3) whereby: "

> *The exercise of the powers referred to in this Directive by national competition authorities shall be subject to appropriate safeguards, including respect of*

Survey, split into two parts: the first part with general questions seeking input from non-specialised stakeholders, and the second part for stakeholders with a deeper knowledge/experience of competition matters. In addition to the public consultation, on 19 April 2016, the European Parliament's Committee on Economic and Monetary Affairs (ECON) and the Commission co-organised a public hearing in order to provide experts and stakeholders with an additional opportunity to share their views.

12 The Commission identified the following four key issues: (i) the resources and independence of the NCAs; (ii) the enforcement toolbox of the NCAs; (iii) the powers of NCAs to fine undertakings; and (iv) leniency programmes.

13 Companies may even be subject to no enforcement at all under Articles 101 or 102 TFEU, or to ineffective enforcement, for example, because evidence of anti-competitive practices cannot be collected, or because undertakings can escape liability for fines.

14 For instance by adding at the end of a press release a phrase like: "The Commission's proposal underlines the importance of companies' fundamental rights and requires authorities to respect appropriate safeguards for the exercise of their powers, in accordance with the EU Charter of Fundamental Rights". See the Commission's press release, *Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth*, Brussels, 22 March 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_685.

undertakings' rights of defence and the right to an effective remedy before a tribunal, in accordance with general principles of Union law and the Charter of Fundamental Rights of the European Union.[15]

Article 3 was accompanied by Recital 12 of the Preamble, which provided a brief explanation of the right to be heard (considered an essential component of the right to a defence) as well as the right to an effective remedy before a tribunal. Namely, the right to be informed[16] and the right to access the case file[17] were indicated as relevant elements of the right to be heard. With regard to the right to an effective remedy before a tribunal, it was further stated that final decisions of NCAs applying Article 101 or Article 102 TFEU require justification that would allow their addressees to first ascertain the reasons for the decision, and second exercise their right to an effective remedy. Finally, it was stressed that "the design of those safeguards should strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced."[18]

The Commission's lenient approach to the question of protecting the companies' fundamental rights met with criticism and was in particular incomprehensible since – as stressed in the Proposal, "during the public consultation process, there was a clear demand from lawyers, businesses and business organisations to ensure that NCAs have effective enforcement powers to be counter-balanced by increased procedural guarantees."[19]

Nevertheless, despite this demand, the proposed regulation of the question of protecting the companies' rights did not bring any added value to the status quo. Indeed, the recognition of the EU's general principles and the Charter of Fundamental Rights of the European Union ('the Charter') were derived in particular from Article 6 of the Treaty on the EU.[20] Moreover, this fact was directly acknowledged in the Commission

15 EC proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM/2017/0142 final - 2017/063 (COD). Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0142 [Accessed: September, 12 2020].

16 "In particular, NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU prior to taking a decision which adversely affects their interests and those parties should have an opportunity to effectively make their views known on these objections before such a decision is taken." Ibid, Recital 12.

17 "Parties to whom preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU have been notified should have the right to access the relevant case file of NCAs to be able to effectively exercise their rights of defence This is subject to the legitimate interest of undertakings in the protection of their business secrets and does not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission." Ibid.

18 EC, *Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 13.

19 Ibid, Recital 15

20 As introduced by the Treaty of Lisbon.

staff working document 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues' (accompanying the Commission's Communication on Ten Years of Regulation 1/2003). It was namely stated that procedures and sanctions for the application of EU competition rules in the Member States "are only subject to general principles of EU law [...] as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable."[21]

Significant modifications introduced by the European Parliament

In March 2018, the Committee on Economic and Monetary Affairs (being the lead committee on the Commission's proposal) adopted the report on the proposal for a directive.[22] It recommended that the Parliament approve the Proposal, with certain amendments. In the context of fundamental rights in addition to the regulation proposed by the Commission, the committee members considered it particularly essential to modify Article 3 by expanding its wording into three points. In point 2, the right to be heard was indicated as component of the right to a defence. In point 3, it was stated that NCAs should conduct proceedings within a reasonable timeframe and that, prior to taking a decision, they should adopt a statement of objections.

In relation to the Preamble, the following further complements were recommended:

- Adding a reference also to the case law of the Court of Justice of the European Union ('the CJEU') stating that powers conferred on NCAs should be subject to appropriate safeguards;
- with regard to the right to an effective remedy before a tribunal – adding a reference also to Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('the EConHR').[23]

Moreover, one other recommendation of high importance for the protection of companies' rights has to be stressed as well. Namely, introducing in Article 8 an obligation to respect the PASI and principle of proportionality when making requests for information.[24]

21 EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues accompanying the document 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 final} {SWD(2014) 230 final}, point 43. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0231&from=EN [Accessed September, 12 2020].

22 Prepared by rapporteur Andreas Schwab (EPP, DE).

23 In addition to the reference to Article 47 of the Charter of Fundamental Rights.

24 As well as in Recital 26 "Whilst the right to require information is crucial for the detection of infringements, such requests should be appropriate in scope. Such requests should not compel an undertaking to admit that it has committed an infringement, which is incumbent upon the NCAs to prove." Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers

The European Parliament's position on the Commission's Proposal[25] included most of the amendments recommended by the Committee.[26]

SCOPE OF THE PROTECTION OF THE COMPANIES' FUNDAMENTAL RIGHTS – REGULATION INTRODUCED IN THE ECN+ DIRECTIVE

Wording of the regulation

In the end, the final wording of Article 3 is as follows:

Article 3

Safeguards

1. Proceedings concerning infringements of Article 101 or 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union.

2. Member States shall ensure that the exercise of the powers referred to in paragraph 1 is subject to appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.

3. Member States shall ensure that enforcement proceedings of national competition authorities are conducted within a reasonable timeframe. Member States shall ensure that, prior to taking a decision pursuant to Article 10 of this Directive, national competition authorities adopt a statement of objections.[27]

This provision is accompanied by Recital 14 of the Preamble setting out more details.

Firstly, in relation to Article 3 (1), it is stated therein that the exercise of the powers conferred by this directive on NCAs, including investigative powers, besides complying with the general principles of Union law and the Charter of Fundamental Rights of the European Union, should also be in accordance with the case law of the Court of Justice of the European Union, in particular in the context of proceedings that could lead to penalties being imposed.

Secondly, regarding Article 3 (2), indicated examples of the relevant safeguards include the right to good administration and the respect of an undertaking's rights of a defence, together with its 'essential component' – the right to be heard. As for the right to be informed and the right to be heard, it is clarified that

and to ensure the proper functioning of the internal market, published on 14 January 2019.

25 Adopted at first reading on 14 November 2018 under the ordinary legislative procedure.

26 The reference to the EConHR was nevertheless rejected.

27 Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published on 14 January 2019.

> *NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU in the form of a statement of objections or a similar measure prior to taking a decision finding an infringement, and those parties should have an opportunity to make their views on those objections known effectively before such a decision is taken.*[28]

Consequently, undertakings that are the addressees of preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU should have the right to access the relevant case file of the NCAs,[29] in order to be able to exercise their rights of defence effectively.

Furthermore, the protection of the right to an effective remedy before a tribunal should be in accordance with Article 47 of the Charter of Fundamental Rights of the European Union, and is in particular important in relation to decisions finding an infringement of competition rules and imposing remedies or fines. It is also added that, for this right to be effectively exercised, such decisions should be justified.

With regard to Article 3 (3), it is further clarified that the obligation of Member States to ensure that NCAs conduct proceedings within a reasonable timeframe should be subject to the specifics of each case and stems from the right to good administration.

As in the Proposal, Recital 14 ends by stressing the requirement to strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure the effective enforcement of competition rules.

Moreover, with regard to PASI and the principle of proportionality it is stated in Article 8 that "requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU."[30] However, according to Recital 35 the so-called Orkem rule[31] applies. This means the right to be silent is limited to a direct admission of wrongdoing since it "should be without prejudice to the obligations of undertakings or associations of undertakings to answer factual questions and to provide documents."[32]

28 Ibid, Recital 14.

29 This right must, however, be "subject to the legitimate interest of undertakings in the protection of their business secrets and should not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission." Ibid.

30 Ibid, Art. 8.

31 The protection of the right to silence applies merely to direct self-incriminating admissions and does not cover compelling undertakings to give answers of a factual nature. The CJEU consequently refused to acknowledge the existence of an absolute right to silence. Its approach, focusing mainly on the effectiveness of the Commission's powers of investigation in the context of the privilege against self-incrimination may be subject to criticism. It is commonly argued that the criminal or quasi-criminal nature of competition law proceedings requires the full application of the privilege against self-incrimination, even if this may lead to potential hindrances to the effectiveness of conducted inspections. The protection afforded by Article 6 EConHR goes appreciably beyond the 'Orkem' rule and it should also apply without any limitation to competition law proceedings.

32 See also Recital 23 of Preamble to Regulation No 1/2003 of 16 December 2002: "Undertakings

Assessment of the regulation

An assessment of the ECN+ Directive in the context of protection for companies' fundamental rights is quite a controversial issue.

On the one hand, according to the co-authors of the final wording of the ECN+ Directive, the regulation strikes a good balance between effectively empowering NCAs and protecting the companies' right of a defence.[33] Some commentators have refrained from criticising the ECN+ Directive and point towards its added value. As K. Kowalik-Bańczyk has stressed, "by the introduction of a general rule concerning application of fundamental rights acquis of the EU to both European and national antitrust proceedings, the Directive allows the undertakings concerned to use a whole new set of arguments in antitrust proceedings, regardless of whether a link to EU law is present."[34] The General Court's judge notes further that, since the solutions adopted in the ECN+ Directive should, among other things, ensure that the same guarantees and instruments exist irrespective of which law is applied (i.e. EU or national), the ECN+ Directive will actually lead to a partial harmonisation of national antitrust procedures, regardless of whether or not EU law applies.

On the other hand, the ECN+ Directive has met with disappointment and strong criticism, in particular due to the incompleteness and vagueness of Article 3.[35] The majority of the opinions underline the 'rather generic' or even 'laconic' character of the provisions relating to the company safeguards.[36] It has been argued that the ECN+ Directive had not gone beyond the current level of the protection of the companies' fundamental rights, in particular the right to a defence and to due process.[37] For instance,

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cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement."

33 See, for instance, the statement of A. Schwab, rapporteur of the report of the Committee on Economic and Monetary Affairs on the proposal for a directive in the European Parliament's press release *Deal struck on protecting the internal market against secret cartels and law breaching firms*, 30.05.2018, EP, *Legislative train schedule. Deeper and fairer internal market with a strengthened industrial base / Services including transport. Empowerment of national competition authorities (NCAs)*. Available from: https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-empowerment-nca [Accessed September, 12 2020].

34 KOWALIK-BAŃCZYK, K. (2019), pp. 4-10.

35 BOTTA, M. (2018) *The right of defence in ECN+ Directive.* [Presentation at Advanced Competition Seminar of the Florence Competition Programme, ECN+ Directive. Consequences for National Competition Law Enforcement, September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/2_BOTTA-seminar-ECN-13.8.2017.pdf [Accessed September, 12 2020].

36 KELLERBAUER, M., KLAMERT, M., TOMKIN J. (eds.) (2019) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford: OUP, p. 1082

37 MIRCEA, V. (2018) *The competition enforcement design in the EU at crossroads*. [Presentation at Advanced Competition Seminar of the Florence Competition Programme, ECN+ Directive. Consequences for National Competition Law Enforcement, September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/4_Presentation-Valentin-Mircea-

the reference to the Charter only confirmed the current status quo.[38] As stressed by W. Wils, Article 3(1) of the ECN+ Directive merely repeats what already follows from the case-law of the EU Court of Justice[39] and from Article 51(1)[40] of the Charter.[41]

Some authors doubt whether the new regulation would actually lead to any stronger convergence of company safeguards in antitrust proceedings since the state of non-uniformity of the protection of the right of defence risks remaining unchanged.[42]

Even though the ECN+ Directive has made an explicit reference to the right to be heard (the right to be informed and right to access files), as well as the right to an effective remedy before a tribunal,[43] and has eventually introduced the protection of the PASI (albeit in a very limited scope), at least one other extremely significant component of the right to a defence is visibly missing, namely the LPP.

Due to the introduction of the regulation of rights of companies to such a limited extent, there is a serious risk of failure, or the merely illusory nature of the awaited result of greater consistency in this regard.

It should be further noted that the LPP and the PASI are, in particular, of utmost importance in the context of antitrust proceedings, since they constitute two main sets of limitations of the powers of investigation.[44] Moreover, the lack of convergence of company procedural guarantees in Member States is particularly visible in the case of these two privileges.[45]

FCP-15.09.2018.pdf [Accessed September, 12 2020].

38 The Charter became legally binding with the entry of the Lisbon Treaty in 2009, and since then it is regarded as the core element of the protection of fundamental rights in the EU.

39 "The requirements flowing the protection of fundamental rights in the [EU] legal order are also binding on the Member States when they implement [EU] rules", see instance *Karlsson and Others*, C-292/97, EU:C:2000:202, para. 37 or *Eturas and Others*, C-74/14, EU:C:2016:42, para. 38.

40 "The provisions of this Charter are addressed to [...] the Member States [...] when they are implementing Union law." Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

41 WILS, W. (2020) Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network. *World Competition*, 43 (1), p. 5-34.

42 See, for instance, REA, M. (2019) New Scenarios of the Right of Defence Following Directive 1/2019. *Yearbook of Antitrust and Regulatory Studies*, 12(20), pp. 111, 122.

43 However, the right to an effective remedy should relate not only to the NCAs' decisions, but also to measures undertaken during the inspections. For more on this issue see, for instance, MICHAŁEK, M. (2014a) *Right to Defence in EU Competition Law: The Case of Inspections*, Warsaw: University of Warsaw Faculty of Management Press, pp. 328-337; MICHAŁEK, M. (2014b) Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe, *Yearbook of Antitrust and Regulatory Studies*, 7(10), pp. 129–158.

44 WILS, W. (2003) Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition*, 26 (4), p. 574.

45 BERNATT, M., BOTTA, M., SVETLICINII, A. (2018) The Right of Defence in the Decentralized System of EU Competition Law Enforcement. A Call for Harmonization from Central and Eastern Europe. *World Competition,* 41(3)*,* pp. 309 – 334; WILS, W. (2020).

LPP

The unfettered ability to communicate with a lawyer on a confidential basis is a fundamental right that exists in many legal systems around the world. According to the CJEU, the protection of the confidentiality of communications between a lawyer and a client is an essential corollary to the full exercise of the rights to a defence.[46] Thus, the LPP (deriving from Article 6 of the EConHR[47]) has to be respected already from the preliminary inquiry stage of proceedings.[48] Indeed, the LPP relates mostly to the investigative phase of the competition authorities' enforcement proceedings. It namely limits the Commission's/NCAs' powers of inspection by preventing any documents covered by the LPP from being examined or seized by the inspectors. Furthermore, the premises of an undertaking's external lawyer cannot be inspected by officials.

Given that the scope of protection of the LPP granted by the CJEU remains subject to criticism,[49] the author believes that the explicit introduction of at least a minimum

46 The exclusion of certain communications between lawyers and clients from the Commission's powers of enquiry derives from the general principles of law common to the laws of the Member States as clarified by the Court of Justice of the European Union: judgment of the CJEU (former the European Court of Justice) of May, 18 1982, Case 155/79 *AM&S Europe Limited v. Commission*, ECLI:EU:C:1982:157; order of the General Court (former the Court of First Instance) of April, 4 1990, Case T-30/89 *Hilti v. Commission*, ECLI:EU:T:1990:27; judgment of the CJEU of September, 17 2007, Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECLI:EU:T:2007:287, as confirmed by the CJEU in its judgment of September, 14 2010, Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECLI:EU:C:2010:512.

47 At an EU level, the LPP can only be deduced from Article 28 of the Regulation 1/2003 and Article 48(2) of the Charter.

48 Judgment of the CJEU of September, 21 1989 in joined cases 46/87 and 227/88 *Hoechst vs Commission*, E.C.R. 1989, 02859, see also TURNO, B., ZAWŁOCKA-TURNO, A. (2012) Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?, *Yearbook of Antitrust and Regulatory Studies,* 5(6), p. 195

49 The CJEU should, in principle, follow the reasoning of the European Court of Human Rights and be fully in line with Strasbourg's approach. In order to adjust to the EConHR standards, the expected modifications of the LPP within the EU would require, for example, establishing a more extensive and generous level of lawyer-client communication confidentiality. In particular, expanding the scope of the EU LPP has been suggested, so that it would also at least include those in-house lawyers who, while being employed by an undertaking, are members of the Bar or the Law Society. The LPP should be further granted to lawyers who are members of the Bar in non-EU countries. It seems important that the scope of the LPP also cover those communications that were prepared, exchanged or originated under competition law compliance programmes. See, for instance, MICHALEK, M. (2014b), p. 272; ANDREANGELI, A. (2008) *EU Competition Enforcement and Human Rights.* Cheltenham: Edward Elgar Publishing, pp. 115–120, ANDREANGELI, A. (2005) The Protection of Legal Professional Privilege in EU Law and Impact of the rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back. *Competition Law Review*, 2(1), pp. 53–54*;* TURNO, B., ZAWŁOCKA-TURNO, A. (2012)*,* p. 205.

level of protection of the LPP[50] in antitrust proceedings would be crucial in order to strike a fair balance between the powers of NCAs and the safeguards of companies.

PASI

The privilege against self-incrimination (*nemo tenetur*) is certainly 'an indispensable bulwark of the rights of an accused in any modern system of criminal justice. [51] It aims at 'avoiding miscarriages of justice and securing the aims of Article 6' EConHR.[52] However, this privilege plays a significant role within competition law proceedings (acknowledged as having a repressive and quasi-criminal nature). It namely constitutes important grounds upon which the production and disclosure of documents requested by the Commission/NCAs, as well as the production of oral explanations during inspections may be resisted.

The lack of any regulation of the PASI in the Commission's initial Proposal was even more surprising, given that the Commission itself had used the PASI as an explicit example when pointing out differences that existed in relation to the procedural rights of companies under investigation[53.]

Even though the obligation to respect the PASI was eventually introduced in Article 8, the scope of this protection is far too limited, since it relates only to requests for information. The protection of the PASI should have been placed in Chapter 2 on Fundamental Rights, in order to underline that this privilege is to be respected throughout antitrust proceedings, including the investigative phase (in particular during inspections and oral explanations).

CONCLUSIONS

The successful enforcement of EU competition law, in particular rules introduced in Articles 101 and 102 TfEU, means granting effective instruments to the NCAs in order to improve such matters as the detection of competition law infringements. The ECN+ Directive will undoubtedly contribute to improving the enforcement of competition law by NCAs, and will make it more difficult for companies to resort to anti-competitive practices.[54]

50 Including, however, the so-called 'envelope procedure'.

51 GARDNER, P., WARD, T. (2003) The Privilege Against Self-Incrimination: In Search of Legal Certainty. *European Human Rights Law Review*, 4, p. 388.

52 Judgment of the ECtHR of 3 May 2001 in case *JB v Switzerland*, Appl. No. 31827/96, para. 64, HUDOC.

53 "Differences also exist with regard to the procedural rights of parties under investigation, e.g. different scope of the privilege against self-incrimination for undertakings". EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final, point 46.

54 DENKERS, M. (2018) *ECN+ and the Dutch practice, A NCA perspective on ECN+.* [Presentation at Advanced Competition Seminar of the Florence Competition Programme, *ECN+ Directive. Consequences for National Competition Law Enforcement,* September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/5_ Denkers_180915-Florence-ECN-and-the-Dutch-practice-1.pdf [Accessed September, 12 2020].

Nevertheless, the extensive powers of investigation must be balanced by the enhanced protection of the companies' fundamental rights, in particular the right to a defence. This is particularly important since the standards for protecting the rights of companies differ within the EU Member States. In some cases, the EU standard is higher than the national one.[55]

Although the aim of the ECN+ Directive is to improve convergence of the powers of the authorities and the guarantees of companies, due to the insufficiencies in the provisions on the latter, as indicated above, the new regulation may lead to a paradox, namely of NCAs being granted equal and enforced investigative and sanctioning powers on the one hand, and the companies still facing a state of disparity of the level of protection of their rights in antitrust proceedings between the various Member States.[56]
Member States have to implement the directive by 4 February 2021, and are free to introduce a greater level of protection of companies' rights in their national legal order.[57] The hope is that, in practice, Member States will compensate for the deficiencies in the regulation by effectively basing the interpretation of the provisions of the ECN+ Directive on the relevant developments in jurisprudence of the CJEU (as well as the ECtHR, which provides for a greater level of protection than provided under EU standards), and that they will take the opportunity to transpose at least the most crucial principles of the protection of a company's right to a defence into the national provisions.

Nevertheless, in the author's opinion, the ECN+ Directive should be considered a missed opportunity since, even at the stage of public consultations, many commentators were calling for the ECN+ Directive to pay greater attention to the question of fundamental rights. The insufficiency of convergence through soft tools is one of the main reasons for the adoption of the ECN+ Directive,[58] and the EU institutions could have done much more to prevent the uneven protection of companies' rights throughout the EU. All in all, a phrase from the period of preparing the ECN+ Directive still remains valid and may serve as a good conclusion: "But there is still room for improvement.[59]" The author would add that there is the strong need for improvement as well.

55 BERNATT, M., BOTTA, M., SVETLICINII, A. (2018); WILS, W. (2020).

56 REA, M. (2019), p. 115

57 The ECN+ Directive sets only a minimal standard of such protection.

58 The Commission's document, Regional competition agreements: benefits and challenges - contribution from the European Commission, 29 November 2018, DAF/COMP/GF/WD(2018)6, para. 22, p. 6. Available at https://one.oecd.org/document/DAF/COMP/GF/WD(2018)6/en/pdf [Accessed September, 12 2020]

59 EC (2015) *Antitrust: Commission consults on boosting enforcement powers of national competition authorities,* Brussels November, 4 2015. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5998 [Accessed September, 12 2020].

BŁACHUCKI, M., ed., (2021)
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Warsaw: Publishing House of ILS PAS
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pp. 125–132.

INTERNATIONAL COOPERATION AND THE ROLE OF MULTILATERAL ORGANISATIONS: THE ITALIAN EXPERIENCE[1]

MICHELE PACILLO

Abstract:

In the 2013-2019 period, opportunities for cooperation among competition authorities, both within regional networks and internationally, have increased considerably, involving even those authorities that were not exposed to this type of activity. In the author's view, and from his experience at the Italian Competition Authority, mutual trust and familiarity are necessary ingredients for successful coordination and cooperation, even in the presence of legal instruments facilitating the exchange of information with, and/or investigatory assistance from, other cooperating authorities. Therefore, it is argued that, in a world where regional networks and bilateral agreements are of growing importance, multilateral organisations such as the ICN can still play an important role in boosting confidence and trust among competition authorities and developing tailored and cost-effective tools for cooperation.

Keywords:

international cooperation, multilateral organisations, ECN, ICN, OECD, UNCTAD, AGCM

1 The article expresses the views and the opinions of the author only; the usual disclaimer applies.

INTRODUCTION

In the 2013-2019 period, opportunities for cooperation among competition authorities, both within regional networks and internationally, have increased considerably, involving even those authorities that were not exposed to this type of activity. This increase may be attributed to several factors, including the internationalisation and digitalisation of businesses, the rise of competition law regimes and enforcers around the world, the increased availability of information and news of other authorities' enforcement activities (due to the internet and the development of specialised media services), thus expanding the awareness of cooperation opportunities, the development of cooperation tools (including ad-hoc legal instruments) and the increase in familiarity and mutual trust among competition authorities, also thanks to their participation in regional or international networks.

Indeed, cooperation is at the top of the agenda of the main multilateral organisations such as the ICN, the OECD and the UNCTAD. In 2019, the ICN and the OECD launched a joint project to study international cooperation between 2012-2018, and to draw up suggestions for potential amendments to their respective recommendations.[2] In July 2019, the UNCTAD published its first guidelines on international cooperation, after a two-year discussion among its members.[3]

In January 2021, the ICN and the OECD published, for the first time, a Joint Report on International Enforcement Co-operation. The Joint Report outlines key aspects of the state of international enforcement co-operation between competition authorities over the period 2012-2018, based on a survey of 62 competition agencies, and it represents an important achievement for both organizations as it lays out possible area of focus and development for future work, to be carried out in close collaboration between the two organizations. The Joint Report is enriched by case studies of successful cooperation, examples of cooperation agreements and provisions, ICN and OECD resources and tools for cooperation, as well as an overview of several regional cooperation networks.

This article is organised as follows. Starting from a description of the experience in cooperation of the Italian Competition Authority within its regional network and internationally (section 2), the article discusses the main benefits and challenges of cooperation, distinguishing between formal and informal cooperation (section 3) and

2 See ICN MWG (2015) *Practical Guide to International Enforcement Cooperation in Mergers*. Available from: https://www.internationalcompetitionnetwork.org/portfolio/merger-cooperation-guide/ [Accessed September, 12 2020]; ICN (2018), Recommended practices for merger notification & review procedures. Available from: https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices/ [Accessed September, 12 2020]; OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*. Available from: https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm [Accessed September, 12 2020].

3 See UNCTAD (2019) *Guiding Policies and Procedures under Section F of the UN Set on Competition*. Available from: https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf [Accessed September, 12 2020].

highlights the role of multilateral organisations in fostering cooperation (section 4) by concluding for the importance of mutual trust.

THE EXPERIENCE OF THE ITALIAN COMPETITION AUTHORITY

Cooperation within the regional network

The experience in cooperation of the Italian Competition Authority (hereafter the AGCM) started and developed mainly at a regional level, in the context of the European Competition Network (the ECN), the main platform for cooperation in Europe, established among the Member States of the European Union through the Council Regulation 1/2003 of December 2002.

Indeed, according to the Joint Report of ICN-OECD (see chapter 19), regional enforcement cooperation is one of the most significant and successful type of cooperation for competition authorities, including for those outside ECN which is considered the most developed and mature regional arrangement.

The growing, albeit still limited, experience of the AGCM confirms that the ECN provides a platform for extensive cooperation in cartel and abuse of dominance cases, as well as the discussion of general policy issues. The ECN facilitates the exchange of both confidential and non-confidential information that can be helpful in conducting investigations. ECN agencies exchange views and foster the coherent application of EU antitrust rules in horizontal working groups (e.g. leniency) and sector-specific subgroups (e.g. energy, financial services). In the case of inspections on the premises of a company located within the EU, a competition authority of the ECN can ask for the assistance of the competition agency of the Member State in which the company is located, so that the latter can carry out the inspections on behalf of the requesting competition agency: the AGCM has recently used of this type of assistance on two occasions (2016 and 2019).

Within the ECN, cooperation usually takes place before opening an investigation, in order to (i) share information (e.g. complaints) and preliminary views, and (ii) allow for an efficient case allocation (by selecting the best placed authority) as well as for the coordination of investigative measures (e.g. parallel inspections). Cooperation is generally carried out through meetings, emails or phone calls, according to an alerting mechanism developed within the network.

Outside of Regulation 1/2003, ECN agencies share their experiences in merger cases too, and the best practices for merger cooperation approved by the ECN in 2011 are increasingly becoming a reference point for several network agencies due to the increase in multijurisdictional mergers that do not fall within the jurisdiction of the European Commission.[4]

Cooperation served as a way to improve the effectiveness of the AGCM enforcement action in investigations concerning online parity clauses of booking platforms for

4 See MWG (2011) Practices on cooperation between EU National Competition Authorities in merger review (adopted 8 November 2011). Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed September, 12 2020].

accommodation, which took place in 2015-2016.[5] For the AGCM, this case represented the first example of extensive cooperation conducted in parallel with other agencies. In this case, the ECN and its rules on cooperation provided a very useful framework allowing the competition authorities of France, Italy and Sweden to have very useful discussions on the issues at stake, ultimately paving the way for the alignment of their final commitment decisions.

On the procedural side of this case, the AGCM considered it important to align its investigation timetable to ensure the continued coordination with the other agencies involved. The domestic deadline for submitting the final commitments package (three months from the launch of antitrust proceedings) was extended to allow the continuation of discussions among the cooperating agencies and drafting a common commitment package by the undertaking concerned.

The importance of the ECN framework in this case may be appreciated if one considers that the Italian legal system does not contain specific provisions concerning international cooperation with competition agencies, and no bilateral or multilateral agreements have been concluded. Therefore, the AGCM has used, and continues to use, the legal basis provided by Regulation No 1/2003 for cooperation within the regional network.

In another instance, the AGCM was able to coordinate with other two ECN agencies in order to define the scope of their respective cartel investigations and conduct simultaneous inspections stemming from a common leniency applicant.

The recent investigations[6] launched by the AGCM against some digital platforms, such as Amazon and Google, will likely entail some forms of coordination with the European Commission and other ECN authorities.

In area of mergers, apart from the regular activity of case allocation based on the referral mechanisms envisaged by the European Commission Merger Regulation (the ECMR), the scope of cooperation in multi-jurisdictional filings falling outside the ECMR might increase in the future. It will be interesting to see whether and to what extent the wider differences in the national merger review regimes within the EU will impact on the feasibility and success of cooperation.

Cooperation outside the regional network

Outside the ECN, case-specific cooperation opportunities are still limited, though they are likely to increase, especially in the area of an abuse of a dominant position involving global digital companies active on numerous national markets.

So far, the AGCM's cooperation has consisted of sharing experience and practices with other agencies via participation in multilateral organisations such as the ICN and

5 Resolution of AGCM No 25940 in case No. I779 [2016] *Mercato Dei Servizi Turistici-Prenotazioni Alberghiere On Line* (commitment decision). *AGCM Bulletin,* 11.

6 Resolution of AGCM No 27623 [2019] in case No. A528 - *Fba Amazon/AGCM* (opening decision). *AGM Bulletin,* 16; Resolution of AGCM No 27771 [2019] in case No. A529 - *Google/Compatibilità App Enel X Italia Con Sistema Android Auto* (decision opening investigation). *AGCM Bulletin,* 20.

the OECD, or through bilateral relationships.

Participation in multilateral organisations has always been considered important by the AGCM, as they expanded with the objective of achieving convergence towards best practices and fostering efficient and effective cooperation.

The AGCM is one of the 14 founding members of the ICN and a member of its Steering Group; it is also very active on transgovernmental forums such as the OECD and the UNCTAD.

In the AGCM's experience, international cooperation is generally initiated during the investigation, or after its conclusion. For instance, AGCM cartel or abuse investigations against undertakings with an international profile have led to informal consultations with agencies that were about to launch investigations on similar conduct by the same or other undertakings. Such consultations typically involve the sharing of non-confidential information or documents, such as the publicly available version of the AGCM's final decisions, or the provision of courtesy translations.

The most interesting cooperation occurred in the area of mergers, where the AGCM reviewed a transaction in parallel with another non-EU agency. Cooperation started in phase 1 and continued in phase 2, involving an exchange of views and a discussion on theories of harm and potential remedies. Cooperation occurred through regular phone calls between the cooperating agencies, and was made possible thanks to confidentiality waivers obtained by the merging parties.

The main challenge for cooperation in this case was not so much the absence of a legal basis, but the misalignment of investigative timetables, due to the timing of notifications chosen by the parties, as well as different statutory review periods, with the Italian phase 2 being particularly short compared to international standards (only 45 calendar days with possibility of a 30-day extension). The result was that the AGCM's decision to authorise the merger with remedies occurred eight months earlier than the decision of the other cooperating agency.

BENEFITS AND CHALLENGES FOR INTERNATIONAL COOPERATION

In the experience of the AGCM, the most beneficial activity of cooperation in general is the sharing of non-confidential information regarding the status of investigations, the substantive theories of harm as well as the timing of the investigations.

Within the ECN framework, other beneficial aspects of cooperation include the possibility of coordinating the timing of antitrust investigations, sharing business information and documents absent waivers (as it was in the online booking investigation), and obtaining investigative assistance from other agencies.

Outside the ECN, and in the absence of a legal basis for cooperation, confidentiality waivers have proven to be useful to discuss more freely the theories of harm and types of evidence with other cooperating agencies. More generally, cooperation has been useful to the AGCM enforcement, in that it helped with learning from similar experiences in other countries and enhancing the AGCM's investigative strategies.

However, cooperation made a difference in those instances where the AGCM's ability to investigate and prosecute cases are where confidential information can legally be shared and investigatory assistance can legally be provided, as it happens in the EU framework of Regulation No 1/2003.

In the area of mergers, the main challenge has so far been the alignment of investigative timetables, mainly due to the relatively short review period for phase 2, while there have not been obstacles in obtaining a waiver for sharing confidential information from the merging parties.

THE ROLE OF MULTILATERAL ORGANISATIONS IN FOSTERING EFFECTIVE COOPERATION

International organisations have long recognised that the development of international cooperation in competition enforcement requires competition authorities to overcome challenges faced in cross-border investigations, such as the differences between legal systems, the special procedures for gathering evidence and the varied leniency and immunity programmes. More recently, enforcement cooperation has become one of the priorities in the agenda of international organisations.

The recommendations and guiding principles are based on the idea that informal cooperation, i.e. cooperation that is possible without any formal cooperation agreements, is just as important as formal cooperation, which generally helps overcome one of the main obstacles to cooperation – the legal obstacle to the exchange of confidential information. The discussions around these best practices have highlighted that, while overcoming legal obstacles might be the ultimate goal of such best practices, as it would require changes in legislation, which in turn entails a gradual process, informal cooperation may represent a good starting point as it enables the most relevant areas of interest to be identified, along with the most effective tools, which may differ according to the characteristics of competition agencies and their legal frameworks. This is true especially when the competition agencies concerned have no history of cooperation and are relatively new to each other.

Multilateral organisations like the ICN and the OECD have contributed significantly by laying out a pathway for competition agencies to become familiar with each other's systems, establish working relationships and develop tailored solutions in order to maximise the benefits of informal cooperation.

Firstly, the ICN and the OECD have created a list of contact points, which are updated regularly, recognising that competition authorities often do not know whom to approach when they wish to contact another competition agency. Secondly, the ICN has developed a wide range of tools to foster effective cooperation, such as templates for confidentiality waivers, for requests of information and, in order to ensure the mutual understanding of each other's legal framework, a template setting out the main features of the ICN members' competition regimes. Lastly, multilateral organisations provide

a privileged context in which competition authorities can develop mutual trust and a network of contacts that ensures a mutual understanding of each other's competition policy and practices. Indeed, workshops and roundtables regularly organised by the ICN and the OECD help to build a working relationship at staff level.

More recently, the Joint Report of ICN-OECD represents a key achievement for both organizations because it sets the stage for future joint efforts aimed at tacking the most critical challenges to international cooperation, by improving transparency and trust and removing substantive and legal barriers to co-operation (see chapter 21).

In the author's view, and from his experience as a liaison officer for cooperation matters, mutual trust and established working relationships are one of the most important factors for successful cooperation. Even when no confidential information can be provided, due to the absence of formal cooperation agreements, the engagement and the resources devoted to the exchange of non-confidential information might be higher if the request comes in the context of a well-established relationship between the agencies. The incentive to cooperate will be all the more elevated if there is a perception that it will be crucial for the other agency to come up with a more informed decision (effectiveness) and that the counterpart might reciprocate the favour in a future case (reciprocity).

In practice, the level of accuracy and responsiveness of the exchange might vary significantly according to the quality of interaction between the two agencies. Even the best designed request for information might fail to achieve its objectives if the respondent agency does not have at least a general knowledge of the legal end economic environment in which the requiring agency operates. In addition, the possibility for officers on both sides to discuss the background and the national issues underlying the request in detail enables the reply to be framed better.

In the AGCM's experience, multilateral cooperation, notably in the context of international forums such as the ICN, the OECD and the UNCTAD, appears to be very relevant as it provides an opportunity to discuss and share competition issues in light of the respective legal and economic frameworks. On top of enhancing mutual understanding, these meetings favour direct interaction among the competition executives and officers that may set the foundation for bilateral and regional cooperation.

Participation in multilateral organisations may encourage informal case-specific cooperation, also thanks to cooperation toolkits that have been developed. In the AGCM's experience, informal case-specific cooperation may be very valuable in the form of discussions on theories of harm and legal and economic framework, and exchanges of non-confidential information may prove to be sufficient for an effective investigation in most cases.

Multilateral meetings might also trigger initial forms of bilateral cooperation, such as study visits, which in turn lead to more structured capacity building projects. The increased contacts and knowledge between the two agencies may create the appropriate environment for case-specific informal cooperation.

CONCLUSIONS

The experience of the Italian Competition Authority has showed the importance of regional cooperation allowing for early coordination, investigative assistance and exchange of confidential information, three advantages provided by Regulation EU n. 1/2003.

Outside the regional network, case-specific cooperation is still rare and cannot be as extensive as within the ECN as it does not benefit from the same advantages. The AGCM's cooperation has therefore been limited to sharing experiences and practices in multilateral organisations or bilaterally.

Notwithstanding this, one of the most important factors for successful cooperation is the mutual trust among cooperating agencies. This factor may be easily developed within regional networks as well as international organisations. In this respect, the presence of formal cooperation agreements is not a pre-requisite, while participation in the activities promoted by international organisations can contribute to increased familiarity among the competition agencies and mutual understanding of each other's legal frameworks. The ICN, being the only international organisation run exclusively by competition agencies, has been successful in this regard – developing tools for cooperation tailored to a specific agency's needs, without introducing formal mechanisms with the risks of unduly increasing the costs of cooperation.

As a final remark, formal and informal cooperation can be viewed as complementary. Informal cooperation may be a step in the process that ends with formal cooperation. The ECN is a clear example of this complementarity because, rather than being a mere channel for formal communication, it also represents a precious platform for the exchange of non-confidential information in bilateral and multilateral forms, as well as for discussions aimed at promoting the coherent application of EU antitrust rules in different Member States.

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EUROPEAN SIZE OF TRANSACTION TESTS WITHIN THE EUMR'S CASE REFERRAL SYSTEM AND THE GERMAN-AUSTRIAN GUIDANCE PAPER[1]

MARTIN SAUERMANN

FABIAN PAPE

Abstract:

The acquisition of WhatsApp by Facebook in 2014 revealed that the internationally prevalent system of turnover-based merger control thresholds was struggling to cope with cases in the digital world in which merging parties, typically acquisition targets, do not generate sufficient turnover to fall under turnover thresholds of international merger control regimes. The German and Austrian legislators reacted by introducing new size of transaction tests in their merger control thresholds, with the NCA issuing respective guidelines in 2017/2018. In various jurisdictions and at the EU level, the question arose whether such thresholds should also be introduced, or whether it will suffice if Germany and Austria could control high value low turnover transactions and could refer them to the EU level under the existing EU Merger Regulation's referral mechanism. This article sheds light on this debate. It explains the details of the German and Austrian size of transaction tests and the joint German-Austrian guidelines, and analyses how they, and the typical transaction value merger cases, fit into the referral mechanism of the EU Merger Regulation.

Keywords:

transaction value threshold, merger control, referral mechanism, EU Merger Regulation

1 All views expressed in this article are strictly personal, and should not be construed as reflecting the opinion of the European Commission or the Bundeskartellamt.

NEW CHALLENGES FOR MERGER CONTROL

At least since the takeover of WhatsApp by Facebook in 2014, and the current debate about killer acquisitions, the global competition community has sought intensively for ways to cope with the challenges that the digital economy has brought about for merger control. Facebook/WhatsApp revealed that the prevalent system of turnover-based thresholds was struggling to cope with cases in which merging parties, typically merger targets, do not generate sufficient turnover to fall under turnover thresholds, but nevertheless play a prominent or paramount role in their respective markets.

In the good old merger control times, a company's turnover figures reflected its market position, and hence its competitive power. Without sufficient turnover, a company was typically not expected to have enough power to require its merger or takeover to be controlled. With business models in the digital economy, that perception changed. Like with WhatsApp, there are numerous cases in which a company's business model, especially in the case of a start-up, is aimed primarily at creating a market-leading position, in particular by relying heavily on network effects, and only at a second stage at generating cashflow and turnover with its market position.

The German and Austrian legislators reacted by introducing new 'size of transaction tests' in their merger control thresholds in 2017, not used before in the European Union and only rarely elsewhere. The ongoing international debate seems very interested in the German and Austrian experiences. In various jurisdictions and at the EU level, the question arose as to whether such thresholds should also be introduced, or whether it would be enough if Germany and Austria could control high value low turnover transactions and could refer them to the EU level.

This article intends to shed some light on this debate. Therefore, it first describes the merger control regime in Germany before the transaction value threshold was introduced. In section 2, it goes on to explain the new 'size of transaction test' that was introduced in Germany and Austria in 2017. The third step sets out respective guidelines for applying the test, and finally, in section 4, the EUMR's referral mechanism is explained, followed by a discussion on whether relying on the German and Austrian size of transaction tests is sufficient for merger control at the EU level, and whether these national regimes can compensate for the lack of such a test in the EUMR.

DEVELOPMENT OF NEW MERGER THRESHOLDS

The situation before the transaction value threshold: traditional turnover thresholds

Before the size of transaction test was introduced in Germany in 2017, the German merger control regime relied mainly on an entity's turnover as a measure of its market position, competitive strength and the local nexus of any of its transactions. Furthermore, according to section 185, paragraph 2 of the GWB, the effects doctrine applies.

A merger is therefore not subject to German merger control if it does not have any effects on German markets. Compared to other jurisdictions, the relevant German turnover figures that require a notification used to be very low, resulting in relatively high notification numbers of more than 1,200 transactions per year for the German Competition Authority – the Bundeskartellamt.[2] Prior to the new thresholds, a notification was required in Germany mainly if the following conditions were met in the business year preceding the concentration:

1) the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2) the domestic turnover of at least one undertaking concerned was more than EUR 25 million, and that of another undertaking concerned was more than EUR 5 million.

However, even these comparably low thresholds were not suited to trigger a notification in the case of Facebook/WhatsApp, as WhatsApp did not achieve any substantial turnover. That led the German Monopolies Commission, a think tank and independent expert committee that advises the German government and legislature, to propose an alternative to the traditional turnover-based thresholds. It did so in 2015 in its *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte* [Special Report 68: Competition policy: The challenge of digital markets] and proposed to complement the turnover thresholds of both the EUMR, the Regulation 139/2004, and the German Competition Act, the Gesetz gegen Wettbewerbsbeschränkungen,[3] by additional notification requirements based on the transaction volume.

For Germany the proposal foresaw a transaction value of EUR 500 million accompanied by a domestic turnover threshold for at least one undertaking of EUR 25 million.

For the EU level, the proposal foresaw a transaction value threshold of EUR 5 billion with a Community-wide turnover threshold for at least one undertaking of EUR 250 million (alternatively EUR 2.5 billion and a Community-wide turnover of at least one undertaking of at least EUR 100 million accompanied by a turnover of all undertakings concerned of at least EUR 100 million in at least three Member States and additionally in at least three of these Member States a turnover of EUR 25 million of at least one undertaking).

2 See Bundeskartellamt (2019) *Tätigkeitsberichtdes Bundeskartellamtes 2017/2018,* p. 133. Available from: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017_2018.html [Accessed September, 12 2020].

3 See Monopolkommission (2015) *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte*, para. 461, on p. 107, see also para. S54 of the summary. Available from: https://www.monopolkommission.de/de/gutachten/sondergutachten/sondergutachten-auf-eigene-initiative/117-sondergutachten-68.html [Accessed September, 12 2020].

New Size of transaction test

At the European level, the proposal was not implemented. In Germany, however, the legislator decided to introduce a new size of transaction test in 2017.[4] Therefore, a new section 35 para. 1 a was introduced in the German Competition Act, according to which the relevant transaction value thresholds are:

- in the last business year, the combined aggregate worldwide turnover of all undertakings concerned was more than EUR 500 million.
- in the last business year, the domestic turnover of one undertaking concerned was more than EUR 25 million. Neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 5 million.
- the value of the consideration for the acquisition exceeds EUR 400 million.
- the target undertaking has substantial operations in Germany.
- Similarly, the Austrian Cartel and Competition Law Amendment Act 2017 (Kartell-und Wettbewerbsrechts-Änderungsgesetz, KaWeRÄG) introduced a new transaction-value-based threshold to the Austrian Cartel Act 2015 (Kartellgesetz, KartG). According to section 9, para. 4 of the amended Cartel Act, the relevant thresholds are:
- in the last business year, the combined aggregate worldwide turnover of all undertakings concerned was more than EUR 300 million.
- in the last business year, the domestic turnover of the undertakings concerned was more than EUR 15 million.
- the value of the consideration for the acquisition exceeds EUR 200 million.
- the target undertaking has substantial operations in Austria.

THE NEW GUIDANCE PAPER

Introduction

The new Guidance Paper is unprecedented in the sense that it is the first guidance document that the Bundeskartellamt (and the same is true for the Bundeswettbewerbsbehörde – the Austrian Competition Authority) has published together with a fellow National Competition Authority. While the Bundeskartellamt has previously published documents together with other NCAs, with one recent example being the 'Algorithms paper'[5] published jointly by the Bundeskartellamt and the French Autorité de la

4 See, for instance, MEYER-LINDEMANN, H.J. (2017) Die neue Aufgreifschwelle in der deutschen Fusionskontrolle. In: Kersting, C., Podszun R., *Die 9. GWB-Novelle*, München: C.H. Beck; SAUERMANN, M. (2018) New Merger Control Guidelines for Transaction Value Thresholds in Austria and Germany. Availabe from: https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/ [Accessed September, 12 2020].

5 Joint study of [the French] Autorité de la concurrence and [German] Bundeskartellamt (2019) *Algorithms and Competition*. Availabe from: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf [Accessed September, 12 2020].

concurrence, this was a study paper published as a result of a joint conceptual project. The German-Austrian Guidance Paper on the Transaction Value Test is the first case of a joint guidance document in which two competition authorities explain how they intend to apply a newly enacted law.

This was only possible because of the broad consistency of the law in both countries. Not only is the wording of the law almost identical – the most notable difference being the amount of the value threshold, with the Austrian explanatory memorandum making reference to the German one – but also the two countries share a similar legal culture. There are only very few instances in which the joint Guidance Paper needs to differentiate between the two jurisdictions. Of course, the fact that both countries speak the same language was also helpful while drafting the text.

The guidance document is structured into six chapters. After an introductory chapter and a second chapter where the relevant German and Austrian legal provisions are presented, the following two chapters deal with the value of the concentration and with the concept of substantial domestic activity. These two chapters (Chapters C and D) will be discussed here. Finally, the two last chapters give some guidance on the concept of a concentration and on procedural matters.

Value of the consideration

The chapter on the value of the consideration explains in detail how the authorities intend to define the term 'consideration for the acquisition'. One of the main reasons the Guidance Paper is quite detailed in this chapter is that this topic was discussed extensively during the legislative process. In particular, concerns were voiced in the sense that, contrary to the concept of turnover, where an established administrative and judicial practice exists in Germany and Austria, no rules had been established on how to calculate the value of the consideration. However, it turned out that the calculation of the value of the consideration was, after all, not that difficult or controversial in most cases. In a very few cases that were presented to the Bundeskartellamt for consultation, the value of the consideration was a major topic of discussion between the parties and the authority. In addition, similar tests are regularly applied in other jurisdictions, like the 'size of transaction test' in the USA.

As regards the transaction value, the Austrian law sets a lower threshold than the German law (EUR 200 million as opposed to EUR 400 million in Germany), which takes into account the smaller size of the country and its economy. However, the rules for calculating the threshold are the same.

The Guidance Paper defines the value of the consideration as encompassing "all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question."[6] The term 'assets' should be interpreted in a broad sense.

6 Bundeskartellamt, BWB (2018): Guidance on transaction value thresholds for mandatory pre-merger notification (Section 35 (1a) GWB and Section 9 (4) KartG, para 11. Available from: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2 [Accessed September, 12 2020].

It covers all cash payments and the transfer of voting rights, securities, and tangible and intangible assets.

The value of the consideration relates only to the proposed merger in question. The value assessment does not cover shares already held by the acquirer, for example. If an acquirer buys different tranches of shares in the target company, a case-by-case assessment has to be carried out in order to establish whether individual transactions that are closely connected in timing or material terms are deemed to be part of a single merger. The Guidance Paper gives an example to illustrate this: A company holds 25% of the shares of a target company, and intends to enlarge its shareholding to a majority share. To this end, it buys another 26% of the shares from two independent sellers who sell 13% each in two different sale and purchase agreements concluded in quick succession. In this case, the two purchases are to be considered as a single merger, and the total consideration (paid to the two sellers) is relevant. However, the value of the 25% held from the outset is not part of the consideration.

One issue that is dealt with by the Guidance Paper is the question of how to deal with future payments and payments that are contingent on uncertain conditions. This can be especially relevant in mergers in the pharmaceutical sector, which often involve the acquisition of companies owning rights to future medicines or active ingredients. Typically, the purchase price includes various elements such as a down payment, milestone payments payable when and if certain milestones such as marketing authorisations in various jurisdictions are achieved, and royalties calculated as a percentage of the turnover.

Here, the Guidance Paper refers to the present value of future payments, i.e. future payments have to be discounted. If future payments are uncertain and contingent upon uncertain future events, they have to be weighted according to their probabilities, in order to establish their value. This can be a difficult exercise, and the parties might disagree between themselves. If, for example, part of the purchase price for a start-up company is dependent on future sales, the seller (often the founders) might be more convinced of the future market success of the target's products than the acquirer, who can be more sceptical, this disagreement can drive the parties to agree on a low down payment and high bonus payments if high turnover goals are met.

For such scenarios the Guidance Paper points out that it is up to the parties to validate their value assessment. It remains the responsibility of the parties to the merger to check the value of the consideration and establish whether it is subject to notification. The purpose of explaining this information to the competition authority is to enable the authority to check and evaluate the plausibility of the consideration value. However, this does not change the fact that the burden of proof lies with the authority. If the parties come to the conclusion that the value of the consideration is below the threshold, and the competition authority is not in a position to prove the contrary, it cannot force the parties to make a notification (or to examine the merger *ex officio*).

However, if the parties wrongly assume that a merger is not notifiable, and therefore put the merger into force without notification and subsequent clearance, they violate

the prohibition on implementing in section 41 GWB and risk a fine and the voidability of the contract under civil law. Because of this risk, the Bundeskartellamt offers a case-by-case guidance in case of doubt.

Finally, the Paper gives some guidance with respect to the point in time relevant for determining the value of the consideration. Basically, the reference date for determining the value is the date of closing the transaction. So what happens when the value changes between the signing and the closing? Among other things, this may be the case if the acquirer pays – partially or wholly – in its own shares, and these shares are listed on a stock exchange, or when the consideration is to be paid in foreign currency. This question arises because, contrary to the turnover achieved in a completed period of time, the transaction value has to be calculated with respect to a point in time.

In theory, two situations have to be differentiated. If, between signing and closing, the transaction value falls below the threshold, the merger can be consummated without needing to be notified (and hence without a waiting period). The Guidance Paper makes clear that, once the merger is put into effect exempt from notification, a subsequent rise in the value of the consideration does not lead to a reinstatement of the notification obligation. However, in the opposite case, the merger may not be consummated without clearance by the competition authority. This can be problematic if the parties did not anticipate an increase in the value of the consideration. In a situation where the value of the consideration fluctuates around the threshold a precautionary notification or pre-notification talks may be recommendable.

Domestic activity

A second topic that was widely discussed during the legislative process was the question of the local nexus. Regarding this topic, the legislator was in a dilemma. On the one hand, it was clear that the legislator wished to respect international law rules requiring a certain local nexus for a State to have jurisdiction over a specific matter. This is laid out more in detail in the ICN (International Competition Network) Recommended Practices for Merger Notification and Review Procedures, which under II.A. states that "Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction[7]", and under II.B. that "Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction."[8] During the legislative process, this discussion led to a substantial narrowing of the required domestic activities. The first draft (known as the Ministerial draft) foresaw that the new threshold is applicable if "one of the undertakings concerned is active in Germany or will be foreseeably active in Germany." After a public consultation, and also discussions within the ICN, the wording in the second draft ('the Government

7 WMG, ICN recommended practices for merger notification and review procedures (2017), point II.A. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [Accessed September, 12 2020].

8 Ibid, point II.B

draft') was changed to "the target company has substantial operations in Germany"[9]. This wording was eventually adopted officially. Three differences stand out: firstly, it is now required that it is the 'target undertaking' that has substantial operations in Germany. The case of a German undertaking acquiring a foreign company that is not (yet) active in Germany is not caught by the new threshold. Secondly, the domestic operations need to be 'substantial'. Obviously, this concept is undetermined and needs to be clarified. Chapter D of the Guidance Paper attempts to perform such a clarification. Finally, it is no longer sufficient to assume that the undertaking concerned 'will be foreseeably active in Germany.' From a legal certainty point of view, it is understandable that such vague wording was removed from the draft. However, the requirement that the target company be active in Germany at the time of the notification, actually limits the effectiveness of the new threshold considerably. In particular, in the case of a group acquiring a nascent competitor, and in an industry where products are typically marketed worldwide, the location of this nascent competitor can be circumstantial and without relevance for the competitive assessment of the merger. Let's assume an internationally active pharmaceutical group holds patents and other IP rights to a certain molecule, and therefore enjoys, both in Germany and in other countries, a monopoly position on a certain product market. This group acquires a start-up company, e.g. a university spin-off that has discovered an alternative treatment and needs funds to carry out the relevant tests, and to develop and market a new drug. In that case, competition in Germany may be endangered independently of the place where the start-up company is located or active. Still, it can be said that if the start-up is not active domestically, even if the acquisition threatens local competition, then the competition authority might not be in a position to carry out the necessary investigations, and therefore should not have a jurisdiction in the first place.

In accordance with the principle that a sufficient local nexus is required to assert jurisdiction, the criterion of substantial domestic activities was introduced in the law with the aim of eliminating cases from the scope of the provision where the company acquired is primarily active abroad. The Guidance Paper makes it clear, therefore, that the acquisition of a company that is exclusively (or primarily) active in Germany meets the criterion, even if the activities of the target company are not very substantial in total. In fact, it would be difficult to argue that the activities of the target company are not 'substantial' if the acquirer agrees to pay more than EUR 400 million for it.

The Guidance Paper goes on to explain the measurement criteria and the assessment of the local nexus. It points out that domestic activity is generally not measured on the basis of domestic turnover. Other measurement criteria are relevant, and these can differ according to the economic sector in question. For example, in the digital sector, as explained in the explanatory memoranda, user numbers ('monthly active users') or

9 OECD (2020) DAF/COMP/WD(2020)20*, Start-ups, killer acquisitions and merger control – Note by Germany*, p. 3. Available from: https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf [Accessed September, 12 2020].

the access frequency of a website ('unique visitors') can be relevant indicators. However, a generally applicable measurement criterion cannot be given by the Guidance Paper.

However, if domestic turnover cannot be used as such to assess domestic activity, the comparison with the turnover thresholds can give an estimate of how important the local activity should be in order to qualify as sufficient to meet the local nexus requirement. In other words, if the turnover thresholds currently require one party to the concentration to have a domestic turnover of €5m, the domestic activity in the transaction value threshold should have a comparable weight.

In this context, the Guidance Paper explains that the Bundeskartellamt will find that there is no significant activity if the target company generated a turnover below €5m in Germany, and if this turnover adequately reflects its market position and its competitive potential. This is likely to be the case if the company's products generate significant turnover abroad, but not in Germany, for instance if the target company has not (yet) established a sales structure in Germany. In that case, it can be assumed that the 'traditional' turnover thresholds adequately filter out the cases worth assessing by the competition authority.

On the other hand, there are cases in which the turnover does not reflect the significance of the target company's market position. This might be the case, for example, in the digital domain when the target company has not (yet) developed a monetisation strategy, or if the end customer does not pay with cash or liquid assets, but with data or attention. In that case, other criteria need to be taken into consideration, like the number of users of an app or service. Another area where the target undertakings often do not achieve significant turnover is the pharmaceutical industry, when the rights to drugs in development are acquired. Here the target does not achieve any turnover by definition. In such a case, the Bundeskartellamt will typically ask whether R&D activities are performed in Germany, e.g. clinical trials. In addition, activities in preparation of entering the German market (e.g. applications for a marketing authorisation) can establish the required local nexus.

THE GERMAN AND AUSTRIAN SIZE OF TRANSACTION TESTS AS BUILDING BLOCKS FOR EU MERGER CONTROL OF DIGITAL CASES

In recently published policy reports, it has been argued that EU Merger Control could count on German and Austrian digital transaction value cases to be referred to the EU level.[10] Hence, it could be argued that there would be no need for an EU size of transaction test. This argument is based on experience from the takeover case of Facebook/WhatsApp, which was indeed referred from national level to the EU level with the approval of several Member States, even from jurisdictions without a size of trans-

10 See *Unlocking Digital Competition – Report of the Digital Competition Expert Panel,* March 2019, London: [HM Treasury], p. 94. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [Accessed September, 12 2020].

action test.[11] This approach would have the advantage that a potentially burdensome overhaul process of the European Union's Merger Regulation need not be started. Looking at the case Facebook/WhatsApp and the referral mechanism in detail reveals that this approach is highly dependent on cooperation between the Member States or merging parties. In the case of Facebook/WhatsApp, the referral was based on Article 4(5) EUMR, which required that the transaction be capable of being reviewed under the national competition laws of three Member States.[12] A closer look at the EUMR's referral mechanism and practice is therefore interesting.

At first sight, looking at the statistics of the European Commission, it can be stated that referrals from Member State level to EU level are not uncommon.[13]

From 1990 to February 2020, there have been 371 requests to refer a case from the national level to the EU level initiated by merging parties before a formal notification according to Article 4(5) EUMR. In 358 of these requests, a referral was accepted. In only seven cases was a referral refused. Post notification, the absolute numbers are lower, though the overall picture remains the same. There were 41 referral requests initiated by Member States after a national notification according to Article 22 EUMR,[14] of which 37 were accepted. In only four cases was a referral refused. Looking at the timeline of the referral requests and decisions taken by the European Commission, it can be seen that these cases are relatively evenly distributed. There was a surge in cases after the introduction of Regulation 139/2004, the new EUMR in 2004, which may well be due to the EU enlargement of 2004, but after the initial years of the new regulation, with its introduction of the referral mechanism of Articles 4(4) and 4(5) the number of cases declined. Since 2010, there have been between 11 and 24 accepted referrals according to Article 4(5) EUMR, and between zero and three accepted referrals according to Article 22 EUMR per year. So from a practical perspective, the referral mechanism seems well established and a routine process with hardly any frictions. When a referral was requested, it was likely implemented.

Guiding principles and Legal requirements for referrals

The European Commission laid down some guiding principles for merger case referrals in its Commission Notice on Case Referral in respect of concentrations.[15]

11 See EC (2014) COMP/M.7217, *Facebook/ WhatsApp* Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

12 See Ibid, para 10.

13 See EC (2020) [Statistic of merger in period since 21 September 1990 to 31 August 2020]. Available from: https://ec.europa.eu/competition/mergers/statistics.pdf [Accessed September, 12 2020].

14 Or its predecessor Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1–12.

15 See here and for the following Commission notice on case referral in respect of concentrations, OJ C 56, 5.03.2005, pp. 2-23, para. 8 et seq. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=EN [Accessed September, 12 2020].

Here the European Commission points out that reattributing cases between the Commission and Member States is consistent with the principle of subsidiarity as enshrined in the EC Treaty.[16] Therefore, for a referral of cases all aspects of the application of this principle should be taken into account. This involves, in particular, the questions of whether the Commission or a national competition authority is the more appropriate authority to carry out a merger investigation, whether a referral is in line with the one-stop-shop system, and whether legal certainty with regard to jurisdiction is ensured.

Regarding the appropriateness of the authority, the notice points out that reattributing jurisdiction should take the specific characteristics of the case, as well as the tools and expertise available to the authority, into account. Moreover, the importance of the likely locus of any impact on competition resulting from the merger, and the implications in terms of administrative effort are pointed out. In this context, it is also mentioned that referrals are more compelling for cases that may have a significant impact on competition, and so may deserve careful scrutiny.

With respect to the principle of a one-stop-shop, the notice explains that the handling of a merger by a single competition authority normally increases administrative efficiency, by avoiding the duplication and fragmentation of the enforcement effort, as well as potentially incoherent treatment by multiple authorities. In particular for merging firms, the one-stop-shop system should help reduce the costs and burdens arising from multiple filing obligations, and the risk of conflicting decisions taken by a number of competition authorities under diverse legal regimes should be eliminated.

For the Commission's assessment in this regard it is inter alia emphasised that, for a referral request to be appoved, the Member State has to have accurately identified the competition concerns raised by the concentration on the relevant markets in that Member State. In this context, the relative cost, time delay, legal uncertainty and risk of conflicting assessment associated with a referral may be considered.

Concerning legal certainty, the notice further points out that a referral should normally only be made when there is a compelling reason for departing from the original jurisdiction.

In addition to the Commission's notice, the European Competition Authorities ECA issued principles on the application of Articles 4(5) and 22 of the EUMR.[17] Here the authorities stress the importance of close cooperation and efficient information-sharing and consultation between the European Commission and the national competition authorities when applying their respective competencies regarding referrals.

16 See Article 5 of the Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, pp. 33–184.

17 See European Competition Authorities ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

With respect to referrals under Article 4(5) EUMR, the principles make clear that national competition authorities will take account of the various factors of a transaction.[18] They will take into account whether the market in which there may be a potentially significant impact on competition is wider than national in scope, and whether the main competitive impact of the concentration is linked to that market. Furthermore, it will be considered whether national competition authorities expect to encounter difficulties in information-gathering. This might be the case if merging parties or relevant market participants are not based within a Member State's borders. Potentially significant competition concerns in a number of national or subnational markets located in the EEA are a further factor regarded as relevant for a referral, as well as potentially expected problems in identifying or enforcing suitable remedies.

The competition authorities also point out that there are circumstances under which they might be less inclined to agree to a referral request under Article 4(5) EUMR.[19] Examples include cases in which the national competition authority is already examining a concentration that involves the same parties or the same product markets, or where the concentration's main competitive impact is in that authority's national or a subnational market.

Concerning referrals under Article 22 EUMR, the principles explain that, in addition to the legal criteria of Article 22(1) EUMR, national competition authorities will take further factors into account.[20] One factor is whether the relevant geographic market affected by the concentration is wider than national in scope, and whether the main competitive impact of the concentration is linked to that market. As for assessments of Article 4(5) referrals, potential difficulties in information gathering are also taken into account.

Finally, for Article 4(5) referrals, the location of potentially significant competition concerns and expected problems in identifying or enforcing suitable remedies will also be considered when assessing Article 22 referrals. It is also acknowledged that such analyses can only be made on a prima facie basis at this stage and with the time constraints.

The legal requirements for a referral from Member State level to EU level are laid down in detail in Article 4(5) EUMR and in Article 22 EUMR. Moreover, according to Recital 11 of the EUMR, the overarching principle of the referral mechanism is that it should operate as an effective corrective mechanism in the light of the principle of subsidiarity. The rules governing the referral mechanism are accordingly intended to protect the competition interests of the Member States in an adequate manner and, as also mentioned in the Commission notice, take due account of legal certainty and the one-stop-shop principle.

18 See European Competition Authorities ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation, para. 8.

19 See Ibid, para. 9.

20 See Ibid, para. 19.

Referrals according to Article 4(5) EUMR

Referrals according to Article 4 EUMR take place at the initiative of the merging parties and before a formal notification is made.[21]

According to Article 4(5) EUMR, the European Commission may be informed by the merging parties that a concentration without a Community dimension, capable of being reviewed under the national competition laws of at least three Member States, should be examined by the Commission at EU level. Therefore, the merging parties may file a reasoned submission before any notification to the national competition authorites takes place.[22]

At the next step, the European Commission will transmit this submission to all the Member States. Any Member State competent to examine the concentration under its national competition law may then, within 15 working days, express its disagreement as regards the request to refer the case. If at least one such Member State has expressed its disagreement within the period of 15 working days, the case shall not be referred.

Only if no Member State has expressed its disagreement within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission, which then has jurisdiction. Accordingly, no Member State shall apply its national competition law to the referred case.

Referrals according to Article 22 EUMR

Referrals on the basis of Article 22 EUMR take place after a notification has been submitted to the Member States and at the initiative of a notified Member State.[23]

According to Article 22 EUMR, Member States may ask the Commission to examine any concentration that does not have a Community dimension, but which affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or the Member States making the request. The first criterion is further clarified in the Commission's referral notice, according to which a concentration is deemed to affect trade between Member States to the extent that it is liable to have some discernible influence on the pattern of trade between them.[24] Such a request shall be made within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.[25] In the next step, the Commission shall inform the competent authorities of

21 See also HELLMANN, H.-J. (2004) Das neue Verweisungsregime in Art. 4 FKVO aus Sicht der Praxis. *Europäisches Wirtschafts- und Steuerrecht*, 7, p. 289.

22 See also BERG, W. (2004) New EC Merger Regulation: A First Assessment of Its Practical Impact, The Symposium on European Competition Law, *Northwestern Journal of International Law & Business*, 24, p. 695.

23 See also DE STEFANO, G., MOTTA, R., ZUEHLKE, S. (2011) Merger Referrals in Practice – Analysis of the Cases under Article 22 of the Merger Regulation. *Journal of European Competition Law & Practice*, 2 (6), pp. 537-550. Available from: https://www.lw.com/thoughtLeadership/merger-referrals-in-practice [Accessed September, 12 2020].

24 See Commission notice on case referral in respect of concentrations (2005), para. 45.

25 See also BERG, W. (2004), p. 692.

the Member States and the merging parties without delay. These other Member States then have the right to join the initial request within a period of 15 working days. The referral decision is then taken by the Commission, which has another 10 working days to decide to examine the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the requesting Member State or States.

The referral mechanism and transaction value cases

The referral practice and the applicable regulation and procedures make clear that the referral system is a well established instrument, strictly regulated as a corrective mechanism. One could argue that using referrals on a regular basis to make use of different national notification thresholds counterdicts the potentially intended exceptional character of the referral mechanism. However, there has been only one case referred to the EU level that was subject to a size of transaction test on a national level, even after two years after the introduction of such threshholds in Germany and Austria. This was the Microsoft/Github case.[26] The concentration was notifiable in four Member States, including Germany and Austria, and was referred to the Commission on the basis of Article 4(5) EUMR. In Germany, the case was notifiable on the basis of the new transaction-value-based threshold. So, especially when compared to the number of notified cases at a national level in the European Union and at EU level, a referral will still be an exception, even with potentially more size of transaction cases. However, the rules of Article 4(5) and Article 22 EUMR also show that this instrument is based on cooperation and certain preconditions.

For Article 4(5) EUMR, this means that a case has to be capable of being reviewed in at least three Member States. If that criterion is not met there will be no referral. The case of Facebook/WhatsApp made clear that, even in cases deemed to be outstanding, it can be hard to meet this criterion. And, although the newly introduced size of transaction tests should provide some relief in that regard, with Austria and Germany there are still only two jurisdictions applying such a test. A look at other European jurisdictions reveals that the vast majority of other Member States base their notification thresholds on turnover figures. Spain, with its market share test, and the United Kingdom, with its share of supply test, are exceptions in that regard, though the Spanish exception might soon be alone, given that the UK has left the EU. Moreover, a market share test might be difficult to be applied to highly valued R&D cases, where probably only a portfolio of patents or a promising but as yet unreleased new drug is transferred.

Furthermore, the merging parties have to be willing to see their case examined at the European level, since it is them who have to initiate the proces. For various reasons, companies may be reluctant to do so. They may prefer national notification requirements

26 See EC (2018) Case M.8994 - *Microsoft / GitHub* Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8994_257_3.pdf [Accessed September, 12 2020].

and timelines, or aim for a strategic step-by-step clearance in individual Member States. They may also try to avoid the investigative resources of the European Commission. This means that, especially in cases expected to be problematic, it will be difficult to convince merging parties to move their case to the European Commission.

In the next step, the competent national authorities will have to agree to a proposed referral. Thus, for a referral to take place, the national competition authorities' interests have to be aligned with those of the parties requesting the referral, in all of the Member States that are competent to examine the concentration. So at least three Member States have to be convinced to refer their case to the European level.

Past practice shows that cooperation between national competition authorities and the European Commission is well established in that regard. However, as the Commission Notice on Case Referrals points out, it should be considered whether a case referral is appropriate. Therefore, the guiding principles referred to above should be taken into account, and in particular whether the Commission is the more appropriate authority for dealing with the case.[27] This question of the more appropriate authority, which also takes case experience into account, might be difficult to answer in the area of innovative business models at which the German and Austrian size of transaction tests are aimed. However, the European Commission's advances in the area of innovation in merger control in recent years, especially in the cases of Bayer/Monsanto[28] and Dow/Dupont[29] might bring some relief when arguing for a referral in certain cases.[30]

Looking at the ECA referral principals, it furthermore becomes clear that cases in which the national competition authority is already examining a concentration that involves the same parties or the same product markets, or where the concentration's main competitive impact is in that NCA's national or subnational market, arguing for a referral might become particularly challenging.

According to Article 22 EUMR, a referral request by Member States after notification will also have to meet a set of preconditions. A referral request may take place if a notified transaction affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or the Member States making the request. One might argue that there is no need for a referral in case these conditions are not met, but as the newly introduced size of transaction tests were intended to deal

27 See Commission notice on case referral in respect of concentrations (2005), para. 25 et seq.

28 See Commission decision C(2018) 1709 final of March, 21 2018 declaring a concentration to be compatible with the internal market and the EEA agreement (case M.8084 – *Bayer/Monsanto*), para 61 et seq. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8084_13335_3.pdf [Accessed September, 12 2020].

29 See Commission decision C(2017) 1946 final of March, 27 2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932 – *Dow/DuPont*), Annex 4. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf [Accessed September, 12 2020].

30 See EC Competition Directorate–General (2016) EU merger control and innovation. *Competition Policy Brief*, 1. Available from: https://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf [Accessed September, 12 2020].

with merger cases in the rapidly developing data economy or R&D intensive industries, there is a chance that Member States might only discover the full potential threat to competition after the referral request deadline of 15 working days after notification has lapsed. Moreover, it may be difficult to substantiate that the acquisition of a software app with a certain number of domestic users or a portfolio of innovative research projects is affecting trade between Member States. This might prove particularly challenging for R&D projects that have not resulted in a product yet, like a new pharmaceutical substance that is still in phase III of its clinical trials. The acquisition of such substances can fall under the German size of transaction test,[31] though might be difficult to be referred to the Commission.

Whether the Commission is the more appropriate authority for dealing with a case might also be debated in case of the Article 22 referral request.[32] A closer look at the German size of transaction test reveals that, in course of determining jurisdiction, the Bundeskartellamt will probably already gain detailed insights into a merging party's business. Since the size of transaction test is also based on establishing significant domestic activity in Germany as a way of ensuring a local nexus, this very activity and its measurement will surely be discussed as part of the notification, and probably even before filing a notification. This knowledge might then be used to argue against a referral. The same could hold true for establishing jurisdiction under the Austrian size of transaction test.

Moreover, according to the ECA principles, arguing in favour of a referral might be less straightforward if a case does not meet certain criteria, such as a market wider than national, the location of the main competitive impact, difficulties in information gathering and potential problems in identifying or enforcing suitable remedies.

Ongoing debate

The debate goes on, and one interesting alternative instrument aimed at digital mergers that are not caught by the traditional turnover thresholds has been proposed by the French Autorité de la concurrence.[33] It has considered the relevance of introducing a mandatory information requirement of every merger carried out by digital structuring platforms. In addition, it suggests vesting in competition authorities the power to order the notification of mergers below turnover thresholds when such transactions are likely to raise competition concerns, provided that specific conditions are met. Such an order to notify would be issued after providing information on the merger, but before implementing it. The relevant national competition authority would therefore still be in a position to refer the merger to the European Commission. The future will show

31 See Bundeskartellamt, BWB (2018): Guidance on transaction value thresholds for mandatory pre-merger notification (Section 35 (1a) GWB and Section 9 (4) KartG, para 105.

32 See Commission Notice on Case Referral in respect of concentrations (2005), para. 25 et seq.

33 Autorité de la concurrence (2020) *The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges*. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf [Accessed September, 12 2020].

whether such legislation will be adopted by the French legislator, and if so, how such an instrument will fit into the referral mechanism of the EU Merger Regulation, and what the results on the national level will be.

Germany is also again amending its merger regime in 2020 and has proposed a rule – aimed primarily at regional mergers – giving the Bundeskartellamt the possibility to order specific companies to report smaller mergers.[34] However, with its focus on small regional mergers, the importance of this rule will presumably be quite limited for international digital mergers and the EU merger control regime.

CONCLUSIONS

The past referral practice on basis of Article 4(5) and Article 22 EUMR proved that merger cases caught by national merger thresholds are regularly scrutinised on the European level, and that the referral of suitable cases is well established and takes place in a transparent and cooperative manner between the authorities. However, as details of the relevant provisions of the Merger Regulation and the respective guidelines point out, referrals are regarded as a corrective measure only, whereby the referral process has to take hurdles that are particularly challenging for mergers involving new, innovative business models. As the Austrian-German guidelines on the transaction value test make clear, even the establishment of a notification requirement can sometimes be difficult, which is due to the very nature of a size of transaction test. In particular, establishing the value of a transaction and its local nexus cannot always simply be derived from a company's financial statements, unlike its turnover. The first example of a referral of such a case, the referral of Microsoft/Github, proved that these challenges can be overcome. However, it is difficult to already derive a general judgement from that single case.

34 PODSZUN R. (2020) *It's official: The draft bill GWB10*. Available from: https://www.d-kart.de/en/blog/2020/01/24/offiziell-gwb10-refe/ [Accessed September, 12 2020].

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HOW THE CORRELATION OF PUBLIC AND PRIVATE ENFORCEMENT AFFECTS INTERNATIONAL COOPERATION BETWEEN COMPETITION AUTHORITIES IN EUROPE: A LEGAL HISTORIC REVIEW[1]

EDUARD PAULUS

Abstract:

While implementing damages actions for a breach of European competition rules, the correlation of public and private enforcement was a much-debated question in science and in practice. In particular, the effects on the (hitherto well-functioning) leniency programme and common efforts preventing forum shopping. Both have remarkable and well-known effects on the cooperation between competition authorities. Therefore, it is expedient (not only from a legal historic point of view) to analyse the chronological order from the first beginnings to the white paper on damages actions, in order to obtain a clearer understanding of those obstacles.

Keywords:

private enforcement; damages actions; competition law; leniency; obstacles

1 The present analysis reflects the state of knowledge in August 2008. The content of this article does not necessarily reflect any position of an authority or a court.

PRELUDE

In its 2005 Green Paper,[2] the European Commission ('the Commission') concluded that there are various legal and procedural hurdles in the EC Member States rules governing actions for antitrust damages before national courts. Therefore, no citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) would be able to claim reparations from the party that caused the damage. The Green Paper also identified the main obstacles and set out various options for further reflection and possible action to improve damages actions, both for follow-on actions (e.g. cases in which the civil action is brought after a competition authority has found an infringement) and for stand-alone actions (e.g. actions that do not follow on from a prior finding by a competition authority of an infringement of competition law).

The Green Paper was also intended to discuss those options with all the stakeholders and National Competition Authorities ('NCAs'). After this consultation period, on 2 April 2008, the European Commission adopted a White Paper[3] on damages actions for a breach of EC antitrust law, proposing certain solutions to the various obstacles.

JUDICIAL AND LEGAL BACKGROUND

ECJ – *Courage v Crehan*[4]

Facts of the case

In 1991, Mr Crehan, a tenant of pubs and the defendant party, concluded two 20-year leases with IEL, an undertaking under the joint control of the brewery Courage Ltd (the claimant) and Grand Metropolitan plc, imposing an obligation to purchase from Courage.

In 1993, Courage brought an action for the recovery of the sum of GBP 15,266 from Mr Crehan for unpaid deliveries of beer. Mr Crehan contested the action on its merits, contending that the beer tie was contrary to Article 85 (now Article 81(1)) of the Treaty. He also brought a counterclaim for damages, contending that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie, and that this price difference therefore reduced the profitability of tied tenants, driving them out of business.

According to the referring court (preliminary ruling!), English law does not allow a party to an illegal agreement to claim damages from the other party, even if Mr Crehan's defence, namely that the lease into which he entered infringes Article 85 of the Treaty,

2 Green Paper on damages actions for a breach of EC antitrust rules (presented by the Commission); {SEC(2005) 1732}; COM(2005) 672 final; 19 December 2005. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672 [Accessed September, 12 2020].

3 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008) 405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008. Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0404:FIN:EN:PDF [Accessed September, 12 2020].

4 Judgment of the ECJ in Case C-453/99 [2001] *Courage Ltd* v *Crehan*, ECLI:EU:C:2001:465.

were upheld. The Court of Appeal therefore raises the question of whether Community law and English law are compatible.

Decision

The ECJ held as follows: Any individual can rely on a breach of Article 85(1) of the Treaty before a national court, even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.[5] The full effectiveness of Article 85 of the Treaty, and the practical effect of the prohibition laid down in Article 85(1), would be put at risk if it is not open to any individual to claim damages for a loss caused to him by a contract, or by conduct liable to restrict or distort competition.[6] There should therefore not be any absolute bar to such an action being brought by a party to a contract that would be held to have violated the competition rules.[7]

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction, and to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive directly from Community law, providing that the principles of equivalence and effectiveness are observed.[8]

Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.[9] Similarly, provided that the principles of equivalence and effectiveness are respected, Community law does not preclude national law from denying a party who is found to have incurred significant responsibility for the distortion of competition the right to obtain damages from the other contracting party.[10]

'Ashurst-Study'

After the Courage decision, the Competition Directorate-General of the Commission (hereinafter DG COMP) took action. Further to an open tender[11] procedure, DG COMP appointed Ashurst, a law firm in Brussels, to produce two reports for the provision of a study[12] regarding the conditions of claims for damages in the case of an infringement of EC competition rules: One comparative report that sets out to give a comparative analysis of the various legal systems in the Member States of the enlarged

5 See recital 24, ibid.
6 See recital 26, ibid.
7 See recital 28, ibid.
8 See recital 29, ibid.
9 See recital 30, ibid.
10 See recital 31, ibid.
11 See EC (2003) Open procedure COMP/2003/A1/22. Available from: http://web-old.archive.org/web/20070711141420/http://ec.europa.eu/dgs/competition/proposals2/study_tender_specifications.pdf. [Accessed November, 2 2020]
12 See WAELBROECK, D., SLATER, D., EVEN-SHOSHAN G. (2004) *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules – Comparative Reports* COMP/2003/A1/22. Brussels: Ashurst. Available from: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf [Accessed September, 12 2020].

EU, and to identify the real obstacles to private enforcement and how damages actions might be facilitated.

The picture that emerged from this first report on the parameters in the enlarged EU was one of 'astonishing diversity and total underdevelopment'. The second report produced by Ashurst contained an analysis of economic models for the calculation of damages.

Green Paper

After this discouraging result, DG COMP drew up a draft of a Green Paper, called 'Discussion Paper of the DG COMP for the formulation of a Green Paper on Damages Actions for a Breach of the Community Competition Rules as laid down in Articles 81 and 82 EC', on 29 July 2005, to discuss with the Member States of the EU the miscellaneous possibilities of how to facilitate these actions for damages, e.g. how to get access to evidence, whether a fault requirement is necessary, how to calculate the amount of the harm suffered, whether it should be permitted to pass on defence, is there a need for collective action, about the costs and funding of these actions, how to coordinate public and private enforcement, and about other issues such as limitation periods etc.?

A lively discussion ensued. In particular, the Commission's proposals of double and treble damages (punitive damages), as well as possible interactions between leniency programmes and actions for damages attracted some criticism.

In the next step, the Commission put the main ideas of the Discussion Paper together and formed the Green Paper[13] 'Damages actions for breach of the EC antitrust rules', which was published on 19 December 2005. (The original draft was changed into an annex to the Green Paper with the title 'Commission staff working paper'.[14])

The Commission invited comments on this Green Paper, about 150 were submitted.

ECJ – Manfredi[15]

The Commission started to analyse all the comments received on the Green Paper. Meanwhile, the ECJ made a subsequent decision regarding actions for damages.

Facts of this case

The Italian Competition Authority AGCM (Autoritá garante della concorrenza e del mercato) initiated proceedings concerning an infringement against various auto insurance companies in 1999 and 2000, and obtained documentation showing extensive and widespread exchange of information relating to all aspects of insurance activities, such as, in particular, prices, discounts, receipts, costs of accidents and distribution costs.

13 Ibid.

14 Commission staff working paper – Annex to the Green Paper damages actions for a breach of the EC antitrust rules, COM(2005) 672 final, SEC(2005) 1732, 19 December 2005. Available from: https://op.europa.eu/en/publication-detail/-/publication/8a5e61bd-b976-4610-a9f2-b612ca00e9d0/language-en [Accessed September, 12 2020].

15 Judgment of the ECJ in joined cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461.

AGCM decided that these unlawful agreements enabled those undertakings to coordinate and fix the prices in order to charge users large increases in premiums that were not justified by market conditions and which they could not avoid.

The applicants in the main proceedings brought their respective actions to obtain damages against each insurance company concerned for the increase in the cost of premiums paid by reason of the agreement declared unlawful by the AGCM (follow-on action). The insurance companies in the main proceedings pleaded that the right to restitution and/or compensation in damages had expired.

The national court was uncertain whether the period of limitations for bringing actions for damages, and whether the amount of damages to be paid, both of which are fixed by national law, were compatible with Article 81 EC.

Therefore, the national court referred several questions to the Court for a preliminary ruling, regarding the 'causal relationship between the agreement or concerted practice and the harm', the beginning of the 'limitation period' as well as 'punitive damages'.

Decision

The ECJ confirmed the 'Courage judgment' and held as follows: The full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it was not open to any individual to claim damages for a loss caused to him by a contract or by conduct liable to restrict or distort competition.

Therefore, any individual can rely on a breach of Article 81 EC before a national court and can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the details, as long as the principles of equivalence and effectiveness are observed, e.g.

- to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship',[16]
- to designate the courts and tribunals with jurisdiction and to set out the detailed procedural rules governing actions for safeguarding rights that individuals derive directly from Community law,[17]
- to prescribe the limitation period for seeking compensation for harm,
- *In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings.*[18]

16 See recital 64, ibid.

17 See recitals 62, 71-72, ibid.

18 See recitals 79-81, ibid.

- and to set the criteria for determining the extent of the damages for harm. Firstly, therefore, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, then it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them. Secondly, it follows that injured persons must be able to seek compensation not only for the actual loss (damnum emergens), but also for lost profits (lucrum cessans) plus interest.[19]

THE COMMISSION'S WHITE PAPER

After analysing all comments on the Green Paper options and the above-mentioned landmark decision *Manfredi*, in which the ECJ drew the conclusion that it is – because of the absence of Community law governing those matters – for the domestic legal system of each Member State to designate the details, the Commission drafted a White Paper. DG COMP discussed this White Paper with the National Competition Authorities, the National Ministries of Justice and Ministries of the Economy, national judges and others. Afterwards, the Commission shaped the main chapters of the White Paper,[20] which had been adopted by the Commission on 2 April 2008, and changed the original draft into an annex to the White Paper with the title 'Commission staff working paper – accompanying the White Paper on damages actions for the breach of the EC antitrust rules'.[21]

General

According to the White Paper, the current ineffectiveness of antitrust damages actions would be best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims' right to damages under Articles 81 and 82 in every Member State, along with a more level playing field and greater legal certainty across the EU.

Some Member States called in question the competence of the Commission to rule on action for damages (as matters of civil law). (This report is not the appropriate place to discuss this interesting and important question. Because of its complexity, it would form an article on its own.) But at the moment (2008) it is quite unclear on which legal basis the Commission will choose which common legal instrument. Based on a rational

19 See recitals 98-100, ibid.

20 White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, COM(2008) 165 final, 2 April 2008.

21 Commission staff working paper - accompanying the White Paper on damages actions for the breach of the EC antitrust rules, {COM(2008) 165 final} {SEC (2008) 405} {SEC (2008) 406}. Available from: https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX:52008SC0404 [Accessed September, 12 2020].

consideration, and after carefully reading the EC Treaty, a possible legal basis could be found from, for example, Articles 65, 83, 95 or 308 of the Treaty.

The White Paper announces the guiding principle that (a) the legal framework for more effective antitrust damages actions should be based on a genuinely European approach and (b) strong public enforcement of Articles 81 and 82 should be preserved by the Commission and the competition authorities of the Member States.

Reading the White paper, it is very pleasant to realise that the original proposals regarding double and treble damages respectively punitive damages have been dropped. In addition, the main objectives have changed. One of the most important accentuated targets of the past was deterrence, now the primary objective is to improve the legal conditions for victims to get full compensation, although, according to the White Paper, improving "compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules."[22]

Some Member States argued before that deterrence is an element of criminal law but not of civil law. Therefore, this objective could cause problems with their legal systems. This problem, along with other differences between the legal systems of the Member States (e.g. is there a fault requirement to adjudge damages?), based on historical reasons, leads to obvious difficulties in harmonising the various tort systems of Europe.

Nevertheless, the Commission is trying to bridge those divides and has proposed certain measurements. The following chapters will explain these proposals:

Main proposals of the White Paper

Access to evidence

According to the White Paper, there is a structural information asymmetry between the defendant and the claimant, because much of the key evidence necessary to prove a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant. Therefore, the victims' access to relevant evidence should be improved and the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses, avoided. Thus, across the EU, a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured, with access to evidence being based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.

In this context, the Commission suggests that:

- *national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence;*
- *conditions for a disclosure order should include that the claimant has:*

22 White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, COM(2008) 165 final, 2 April 2008.

  - *presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;*
  - *shown to the satisfaction of the court that he is unable otherwise, despite applying all the efforts that can reasonably be expected, to produce the requested evidence;*
  - *specified sufficiently precise categories of evidence to be disclosed; and*
  - *satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate;*
- *adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities;*
- *to prevent the destruction of relevant evidence or a refusal to comply with a disclosure order, courts should have the power to impose sufficiently deterring sanctions, including the option to draw adverse inferences in the civil proceedings for damages.*[23]

Access to evidence is one of the most important chapters of the White Paper and has to been seen in the context of the proposed collective actions and possible negative effects on leniency programmes. Because it is very complicated to provide proof in competition law cases, even for competition authorities, with successful investigations often taking several years, it seems logical that private claimants who suffered just marginal harm, do not have the time, the money or the instruments to find relevant evidence. On the other hand, ensuring that every victim can bring collective actions with no cost risk (because of reduced or cancelled court fees; see below) and can obtain access to every proof held by the defendant would admittedly accomplish the objective of deterrence, but could have very negative effects on the cooperation between undertakings and competition authorities.

Why should undertakings cooperate with competition authorities if there is a risk that every paper or file given to the authorities could be submitted to court via a fact pleading? Therefore, those proposals could harm public enforcement and should be evaluated very carefully.

To protect public enforcement and leniency applicants, the White Paper contains just one ambiguous sentence mentioned above. What is 'adequate protection', what are 'investigations'? Reading this sentence in the context of the options of the Green Paper – which proposed,[24] among other things, i) the "obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all the documents that have been submitted to the authority, with the exception of leniency applications"[25], and also ii) access 'for national courts to documents held by

23 Ibid.

24 See option 6 and 7 of the Green Paper. Green Paper on damages actions for a breach of EC antitrust rules (presented by the Commission); {SEC(2005) 1732}; COM(2005) 672 final; 19 December 2005.

25 Ibid.

the Commission' – doubts arise as to what extent leniency applicants and public enforcement are effectively protected.

In the author's opinion, not only corporate statements by leniency applicants have to be protected. It is necessary to protect every file, paper and piece of information submitted to the competition authorities, not only leniency applications. The information has to be kept strictly secret, otherwise undertakings could decide not to cooperate with the authorities. So while firms may be afraid of the amount of possible fines, what about collective actions? These also are a risk! Therefore, why do they cooperate? Why should an infringer apply for immunity and a fine reduction risking collective actions? (See below for the proposed solutions by the Commission.)

Apart from these problems, 'fact pleading' is unknown and not a legal instrument in most EU Member States. Implementing 'fact pleading' would cause problems with the legal systems of several Member States and would be very difficult. Last but not least, why should a kind of 'fact pleading' be invented simply for infringements of competition law, why not for other legal matters?

Conclusion: This proposal is unconvincing and could endanger the success of public enforcement, unless all files transmitted to authorities are protected in all cases, and not only information submitted by a leniency applicant.

Binding effect of NCA decisions

Victims of an infringement of Articles 81 or 82 of the EC Treaty can, by virtue of established case law and Article 16 (1) of Regulation 1/2003, rely on the Commission's decision as binding proof in civil proceedings for damages. For decisions by national competition authorities (NCAs) ascertaining a breach of Article 81 or 82, similar rules currently exist only in certain Member States.

Therefore, the Commission suggests:

- *national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision, or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.* [26]

In the Commission's opinion, this obligation would 'significantly increase the effectiveness and procedural efficiency of actions for antitrust damages',[27] but should not prejudice the right of national courts to seek clarification on the interpretation of Article 81 or 82 under Article 234 of the EC Treaty.

26 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, COM(2008) 165 final, 2 April 2008. Final decision means a judgement, where the defendant has exhausted all appeal avenues, and relates only to the same practices and same undertaking(s) for which the NCA or the review court found an infringement.

27 Ibid.

On the one hand, the Commission's arguments are convincing as far as they referring to cost cutting and to speeding up proceedings; on the other hand, implementing those binding effects could cause real constitutional problems in some Member States, because of their constitutional principle of the separation of powers. In most Member States, the NCA, an administrative authority and not a court, decides in the first instance. If this is a final decision, a decision by an authority will – according to the proposal – bind other national courts. Therefore, it is not quite clear whether all Member States could implement such a binding effect.

Fault requirement

Member States take a diverse approach concerning the requirement of fault to obtain damages.

> *The Commission, therefore, suggests a measure to make it clear to Member States that require fault to be proven that:*
>
> - *once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused, unless he demonstrates that the infringement was the result of a genuinely excusable error;*
> - *an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.*[28]

This proposal is not convincing. In hard-core cartel cases, it should be quite clear that infringers are to blame for their actions. However, in cases of abuses of a dominant position etc. it is more 'tricky' to decide about a fault of the acting undertakings. Therefore, there are good reasons why several Member States like Germany and Austria have a fault requirement. In the new system of regulation 1/2003 undertakings have to assess by themselves whether they are infringing competition law or not. Still for experts this assessment is getting more and more complicated, especially because of new methods like the 'new economic approach' etc. In this context the fault requirement is a necessary corrective which should not be dropped to reckless. Then, a new instrument as a 'genuinely excusable error' is not needed. (What exactly is a genuinely excusable error?)

Damages

The Court of Justice has confirmed the types of harm for which victims of antitrust infringements should be able to obtain compensation.[29] According to the White Paper, the Commission welcomes this confirmation and intends:

> - *to draw up a framework with pragmatic, non-binding guidance for the quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.*[30]

28 Ibid, p. 6-7.

29 See Judgment of the ECJ in joined cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA.*

30 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008)

Indeed, the quantification of those damages is very complicated and also difficult to prove. Therefore, a non-binding guidance with approximated methods and simplified rules could be very useful. Meanwhile DG COMP invited tenders for a study[31] – 'quantification of the harm suffered by victims of competition law infringements'.

Passing on overcharges

If the direct customer (of the infringer) passed on the illegal overcharge to his own customers, the indirect purchasers, several legal issues can arise.

First, the infringer could invoke the passing-on of overcharges as a defence against an action for damages of the direct costumer, arguing that the claimant suffered no loss because he passed on the price increase to his customers.

In this context, the Commission suggests that:

- *defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. The standard of proof for this defence should not be lower than the standard imposed on the claimant to prove the damage.*[32]

Should this defence be permissible? The ECJ[33] decided that everyone has the right to bring actions for damages. Therefore, a rule is needed to ensure that not only the direct but also the indirect purchaser can claim damages, as well as to impede an unjust enrichment of the purchaser who passed on the overcharge and to impede undue multiple compensation for the illegal overcharge.

Is it really necessary to 'create' a new instrument like a 'passing on defence' to accomplish these objectives? Rather not. Certain Member States already have other legal instruments to avoid unjust enrichment and undue multiple compensation, though the proposal is a viable solution.

According to the Commission, another problem that arises is that indirect purchasers near the end of the distribution chain find it particularly difficult to prove that the illegal overcharge was passed on down the distribution chain. If those claimants "are unable to produce this proof, they will not be compensated and the infringer, who may have successfully used the passing-on defence against another claimant upstream, would retain the unjust enrichment."[34] To avoid such a scenario, the Commission suggests that:

405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008, p. 7.

31 See COMP/2008/A5/10: Study *Quantification of the harm suffered by victims of competition law infringements*. Available from: https://ec.europa.eu/competition/calls/tenders_closed.html [Accessed September, 12 2020].

32 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008) 405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008, p. 8.

33 See Judgment of the ECJ in Case C-453/99 [2001] *Courage Ltd* v *Crehan;* and also Judgment of the ECJ in Joined Cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA*.

34 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, COM(2008) 165 final, 2 April 2008, p. 8.

- *indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in full*.[35]

This proposal seems to be an easy way out, though many problems arise in the case where several purchasers, each of a different level of the distribution chain, bring claims for damages. The Commission simply encourages the national courts in this context "to make full use of all the mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation".[36]

To avoid forum shopping and confusing situations due to possible joint, parallel or consecutive actions brought by purchasers at various points along the distribution chain, there have to be precise rules.

Limitation periods

While limitation periods provide legal certainty, they can also be a considerable obstacle to the recovery of damages, both in stand-alone and follow-on cases.

> *The Commission therefore suggests that the limitation period should not start to run:*
>
> - *in the case of a continuous or repeated infringement, before the day on which the infringement ceases;*
> - *before the victim of the infringement can reasonably be expected to have knowledge of the infringement, and of the harm it caused him.*[37]

To keep open the possibility of follow-on actions and to avoid limitation periods expiring while public enforcement is still ongoing, the Commission suggests that:

- *a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.*[38]

Indeed, it might be necessary to find very precise, simple and common limitation periods; precise and simple rules to facilitate their calculation providing legal certainty, and common periods to avoid forum shopping.

A distinction between follow-on and stand-alone cases also appears appropriate: Agreeing to the proposal to start a new limitation period once a final decision has been held could be useful to enable follow-on cases at all, though the period of at least two years is a little bit too inaccurate and needs further discussion.

The Commission's concept of limitation periods for stand-alone cases also needs more clarification: The requirement to have knowledge of the infringement and harm can be approved usefully, though the proposal regarding a 'continuous or repeated infringement' could cause some difficulties. There have always been problems when determining

35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid, p. 9.

whether an action is a continuous one. Therefore, this could end in different national judicial interpretations.

Costs of damages actions

According to the White Paper, antitrust damages actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action. Therefore, the costs of those actions can prevent claims being brought.

> *The Commission therefore encourages Member States:*
> - *to design procedural rules fostering settlements, as a way to reduce costs;*
> - *to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;*
> - *to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all the costs incurred by the other party.*[39]

Most of the Member States have a range of instruments to accelerate proceedings, e.g. German and Austrian procedural law knows settlements and arbitration. Since the court fees are in proportion to the value of the claim, they are not disproportionate. Furthermore, there are exceptions to the principle that the defeated party has to pay all the court fees. Therefore, the Commission's first and second suggestions have already been put into practice and are not necessary.

The third proposal has to be rejected: This could result in the claimant no longer wanting to settle. Secondly, this could cause problems with Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, unless the defendant becomes also entitled to pay reduced court fees in the case of being defeated.

Interaction between leniency programmes and actions for damages

The possible negative effects on leniency programmes have been mentioned above (chapter 'access to evidence'). The Commission suggests 'adequate protection' against disclosure in private actions for damages.

> [This] *protection should apply:*
> - *to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel);*
> - *regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.*[40]

39 Ibid, pp. 9-10.
40 Ibid.

In the author's opinion, not only corporate statements by leniency applicants have to be protected, but also it is necessary to protect every file, paper or piece of information submitted to the competition authorities, to ensure that public enforcement is not harmed (see above).

- To avoid deterring leniency applicants, the Commission

  puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.[41]

Since actions for damages could deter leniency applicants, it seems logical that limiting the civil liability would reduce the possible deterrence. Implementing such a limitation would cause many legal problems and raise several questions. It is not obviously, why cooperation with an administrative authority should limit civil liability. The proposed limitation would also harm the constitutional right of Article 1 of the First Protocol of the European Convention on Human Rights. What happens if just the leniency applicant 'survives', but all other infringers have to file for bankruptcy because of the imposed fines? Therefore, also the private enforcement would be harmed. Thus, there are a considerable number of unsolved questions. Without an appropriate solution, this could significantly deter leniency applicants. Indeed, as the Commission announced, more discussion is needed.

CONCLUSION

During the implementation procedure of damages actions for a breach of the European competition rules, the correlation of public and private enforcement was the much-debated question in science and practice, particularly the effects on the (heretofore well-functioning) leniency programme and common efforts preventing forum shopping. Both have remarkable, well-known effects on the cooperation between competition authorities. Therefore, it is expedient (not only from a legal, historic point of view) to analyse the chronological order from the first beginnings to the white paper on damages actions for a clearer understanding of those obstacles[42]:

> *Years of discussions and proposals have passed by. We had the Discussion Paper, the Green Paper, the White Paper, the ECJ's judgements Courage and Manfredi, some studies such as the «Ashurst-study». Others are still running. Options changed to particularly determined proposals. Some ideas have been dropped, others remained. There are a lot of differences in the legal systems of the Member States based on historical reasons and causing problems to implement the Commissions suggestions. More than 170 stakeholders submitted their comments on the White Paper. The Commission is still analysing and*

41 Ibid.

42 The present analysis reflects the author's state of knowledge in August 2008.

has already announced further discussions for the next year. Which common legal instruments will be chosen on which legal bases?[43]

The correlation between public and private enforcement undoubtedly affects, especially via leniency programmes and possible forum shopping, the international cooperation between competition authorities. Hence it was very expedient to recall the chronological order for a deeper understanding of those obstacles arising out of a combination of European Common Law and various national legal frameworks. In particular, those national distinctions in civil law procedures lead to obstacles harmonising the damages claims system in the event of an infringement of European Competition Law. Because not even each national legislations knows a fault requirement for compensation damages. And all national legal systems differ in calculation of the amount of the suffered damages, prescribe different conditions to get access to evidence (e.g. allow or deny fact-pleading), accept almost never a binding effect of other jurisdictions (apart from this very often national courts may not accept decisions by their own national authorities which causes already internal obstacles within one Member State), distinguish in limitation periods, court fees, rules for settlements etc. In the words of the quoted Ashurst-study: a picture of astonishing diversity and total underdevelopment that is predestined to encourage forum shopping.

Meanwhile exist Directive 2014/104/EU was signed into law, and the European Court of Justice made subsequent decisions concerning the quoted Courage and Manfredi judgements, namely Kone,[44] Skanska,[45] as well as, more recently, Otis.[46] Despite those clarifications on binding framework, the national distinctions in civil law procedures, and therefore the possibility of forum shopping, still existed. This should also have a significant impact on the investigations and pending cases of national competition authorities, and their cooperation between each other, namely binding capacities, both in the case of stand-alone and follow-on actions.

How far those described effects of encouraging forum shopping could have been banned by the framework of a European Regulation, rather than by the chosen Common Directive is doubtfully, and in any case there was no political consensus to harmonise it that way.

43 Meanwhile Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was signed into law on 26 November 2014 OJ L 349, 5.12.2014, pp. 1–19.

44 Judgment of the Court (Fifth Chamber) [2014] in case C557/125 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

45 Judgment of the Court (Second Chamber) [2019] in case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, ECLI:EU:C:2019:204.

46 Judgment of the Court (Fifth Chamber) [2019] in case C-435/18 *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others,* ECLI:EU:C:2019:1069; INNERHOFER, I., HINTERDORFER, S. (2020) Jedermann ist Jedermann – Aktivlegitimation bei Kartellschadenersatz (Otis ua C-435/18). Österreichische Zeitschrift für Kartellrecht, 1, pp 20-29. Available from: https://doi.org/10.33196/oezk202001002001.

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COOPERATION IN MULTIJURISDICTIONAL MERGER FILINGS: THE ECA NOTICE MECHANISM[1]

RITA PRATES

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Abstract:

Cooperation among Competition Authorities in multijurisdictional filings should always be a factor to take into consideration. The ECA Notice is a mechanism through which European Competition Authorities cooperate with each other when reviewing transnational merger transactions. Although active for almost 20 years, the ECA Notice cooperation mechanism is hardly well-known among stakeholders, in particular merging parties. Nevertheless, the ECA Notice cooperation mechanism has proven to be an extremely useful tool in promoting consistency and avoiding conflicting assessments and final decisional outcomes in EU national merger control. This, however, is not short of challenges. This article intends to provide a brief insight on how cooperation in multijurisdictional filings of merger transactions works in practice, the principles it is based on, and its benefits and challenges to both National Competition Authorities and merging parties.

Keywords:

merger control; multijurisdictional filings; cooperation by national competition authorities and European Commission; referral mechanisms; ECA Notice mechanism

1 The opinions expressed in this article are personal and do not necessarily reflect the views of Autoridade da Concorrência.

INTRODUCTION

Cooperation and coordination amongst National Competition Authorities on merger proceedings can enhance the efficiency and effectiveness on the review process, help achieve consistent and non-conflicting outcomes, and reduce transaction costs as well as administrative burdens.

In 2001, this need to foster increased consistency and convergence within the European Union's jurisdictions in merger proceedings led the National Competition Authorities of each of the European Union Member States, together with the European Commission, the EEA EFTA States and the EFTA Surveillance Authority (all together hereinafter referred as the 'ECA members' or 'NCA'), to start a cooperating platform with the main focus on mergers subject to be reviewed by more than one NCA – known as 'multijurisdictional filings'.

Through this arrangement, the ECA members agreed upon a set of Principles and Best Practices' documents, based on which cooperation would be put in place through a system of sharing/exchange of information in cases involving multijurisdictional filings. The *ECA Notice* – a simple form whereby the first notified NCA transmits to its sister NCAs the basic information on the merger transaction – was introduced.

Along with the creation of the cooperation platform, and in order to better ensure consistency, convergence and cooperation involving such multijurisdictional filings, the ECA members decided to formalise and institutionalise the creation of the Merger Working Group (hereinafter the 'MWG') within the European Competition Network.

Established in Brussels in 2010, the MWG's mandate is to identify areas of possible improvements regarding issues arising in relation to mergers with cross-border impact, and to explore possible solutions, focusing on what is feasible within the existing national legal frameworks, and drawing from the practices and experience of NCAs.

With this in mind, the ECA members issued guidelines that deepened the convergence and benefits of cooperation when reviewing merger transactions: individual NCAs would work with each other when reviewing the same merger transaction, thus aiming to achieve a consistent and coherent assessment and outcome, while at the same time reducing transaction costs and the administrative burden.

By doing so, the ECA members devised a cooperation system, the ultimate goal of which parallels that of the *one-stop-shop* principle: the review of the merger is entrusted to a single-entity, which would ensure the consistency and coherence of the assessment throughout the EEA, and a final decisional outcome compatible with the principles of creating a common market *vs*. a review of the merger entrusted to individual NCAs who, by cooperating with each other, will ensure consistency and coherence between each of its autonomous assessments, and a final decisional outcome compatible with the principles of creating a common market.

Contrary to Regulation 1/2003[2], Regulation 139/2004 (the 'EU Merger Regulation')[3] only very lightly addresses issues of cooperation; and when it does, it is to determine jurisdiction in multijurisdictional filings, rather than how to best conduct it.

Under the EU Merger Regulation, there is a clear separation between the European Commission's jurisdiction and that of the Member States in reviewing merger transactions: if it meets the EU Merger Regulation's thresholds, the European Commission has exclusive jurisdiction; if not, the review falls with the Member States' jurisdiction (all or only some, depending on each of their respective legal framework).

There are, however, four exceptions to this rule on jurisdiction: the referral mechanisms pursuant to Articles 4(4) and 4(5), on one hand, and to Articles 9 and 22, on the other.

Articles 4(4) and 9 of the EU Merger Regulation enable the Member States' NCAs to assess and decide upon merger transactions that originally fall under the scope of the EU Merger Regulation (i.e. the merger originally falls within the European Commission's jurisdiction). On the opposite 'direction', Articles 4(5) and 22 enable the European Commission to assess and decide upon merger transactions that originally fall outside the scope of the EU Merger Regulation (i.e. the merger originally falls within Member States' jurisdiction).

In terms of timing, Articles 4(4) and 4(5) may be invoked (only) by the merging parties prior to formally submitting the notification to the European Commission or the relevant NCAs as appropriate, whereas Articles 9 and 22 can be invoked after the merger has been formally submitted to the European Commission or the relevant NCAs as appropriate. Contrary to Articles 4(4) and 4(5), Articles 9 and 22 can be invoked only by either the European Commission or NCA, depending on where the merger was notified.

In addition, Article 4(5) provides for two extra details that single it out from the other three provisions: first, Article 4(5) can only be triggered if the merger transaction is reviewable in three or more EEA national jurisdictions, whereas Articles 4(4), 9 and 22 only need one actor in order to be triggered; second, Article 4(5) does not allow for a partial referral, and so, no parallel investigations NCA-European Commission are possible, whereas all of the remaining three provisions allow for a part of the merger case to be assessed and decided upon in parallel by both NCAs and the European Commission.

Article 4(5), therefore, represents a clear manifestation of the one-stop-shop principle. Unlike Articles 4(4), 9 and 22, which enable the possibility of the merger being only partially referred to the concerned NCAs or to the European Commission (i.e. the European Commission assesses only that part of the merger that the referral NCAs have

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 04.01.2003, pp.1-25.

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, pp. 1-22, in particular Articles 3(1) and 1(2) and 1(3). The Commission's exclusive jurisdiction to enforce the EU Merger Regulation derives from its Article 21.

agreed to, whereas the NCAs that oppose the referral remain competent to review their respective parts), an opposition to a referral under Article 4(5) will preclude it *tout-court* (i.e. no partial referrals are possible).

Irrespective of their differences, Articles 4(4), 9, on one hand, and Articles 4(5) and 22 represent a transfer of jurisdiction, from the European Commission to NCAs, and from NCAs to the European Commission respectively, based on the principle that the latter would the best-placed authority to review the merger case.

Notwithstanding the EU and national legal frameworks on the assessment of merger transactions, cooperation between NCAs is almost totally based on the Principles and Best Practices' Guidelines drafted by ECA Members, initially acting solely as ECA and later as a part of the MWG.

The first set of guidelines dates from 2001 and is entitled *The Exchange of information between members on multijurisdictional mergers: a procedural guide*[4]. Pursuant to it, NCAs adhere to a cooperation system of exchanging/sharing information in multijurisdictional filings. The *ECA Notice* – a simple form whereby the first notified NCA transmits to its sisters NCAs the basic information on the merger transaction – was introduced.

In 2005, following the adoption of the 2004 Merger Regulation, the ECA Members adopted the *Principles on the application by National Competition Authorities within the ECA of Articles 4(5) and 22 of the EC Merger Regulation*[5]. Pursuant to these principles, cooperation between NCAs in what regards multijurisdictional filings took a step further from a 100 per cent NCA cooperation system to also include the dimension of cooperation in the context of a referral of an assessment from Member States to the European Commission under Articles 4(5) and 22 of the EU Merger Regulation (in the latter case, in full or only partially).

The evolution of merger control in the EEA – either pursuant to national or EU legal frameworks – meant a growing awareness of the need for undertakings to comply with merger control rules. In addition, the deepening of the creation of the common market meant that NCAs received growing numbers of notifications that were also subject to review by their sister NCAs – in short, multijurisdictional filings.

Faced with the challenges that multiple fillings may pose on NCAs (risks of in-coherent assessments and conflicting outcomes) and uncertainty on merging parties, the ECA Members decided to deepen the 2002 and 2005 cooperation principles and rules. In 2011, already in the context of the MWG, the *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*[6] were adopted.

4 ECA (2001) The Exchange of information between members on multijurisdictional mergers. A procedural guide. Available from: https://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf [Accessed September, 12 2020].

5 ECA (2005) Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation. Available from: https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf [Accessed September, 12 2020].

6 MWG, Best practices on cooperation between EU National Competition Authorities in merger review

According to the press release:

> *The Best Practices aim to foster cooperation and sharing of information between NCAs in the European Union, for mergers that do not qualify for review by the Commission itself (the one-stop-shop review) but require clearance in several Member States.* [...]
> *The Best Practices have been adopted to alleviate the difficulties related to multiple filings. They identify the key steps at which the NCAs should cooperate and the information they may share, for instance on the timing of the review process or on remedies when necessary to avoid a merger harming customers and consumers.*
>
> *Cooperation on mergers that have the potential to affect competition in more than one Member State, or where remedies need to be designed in more than one Member State, would help both merging parties and NCAs by reducing the risk of divergent outcomes.*
>
> *The Best Practices were prepared by a Working Group set up in 2010 by the Commission and the NCAs. The European Economic Area's NCAs were also represented.* [...]
> *The best practices do not envisage cooperation in all multi-jurisdictional cases. NCAs will decide on a case-by-case basis whether well targeted cooperation could enhance the review process.*
>
> *The success of cooperation will depend to a great extent on the goodwill and cooperation of the merging parties, because NCAs will in most cases depend on them for permission to exchange confidential information. Both the merging parties and NCAs have an interest in good cooperation, as it can increase the overall efficiency, transparency and effectiveness of the review process. The timing of notifications is also an important area where merging parties can facilitate cooperation between NCAs.* [...]
>
> *The Best Practices are without prejudice to existing guidance on the system of re-allocating cases between the Member States and the Commission. However, the enhanced cooperation recommended in these Best Practices may also facilitate smooth case reallocation.*
>
> *The Best Practices are the result of thorough reflection following broad stakeholder consultation this spring. On that basis, the Best Practices were amended to clarify for instance the use and scope of the case information system, the voluntary nature of waivers and the timing for providing up-front infor*

adopted November, 8 2011. Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed: September, 12 2020].

> *mation about the merger. The Best Practices make it clear that confidential information is protected under the national legislation in all Member States*[7].

One final comment: as a document of soft-law, the Best Practices

> *is intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create new rights or obligations which may fetter that discretion.*[8]

More than reproducing soft-law instruments that represent the basis for the cooperation mechanism – the *ECA Notice* – this article should be read in conjunction with them.

COOPERATION IN PRACTICE

Procedural Issues – How it works: The *ECA Notice*

Although the object of the cooperation in multijurisdictional filings is focused on substantive issues, such as defining the market, theories of harm, or remedies, the manner in which institutional cooperation materialises is very much a procedural issue.

Naturally, the aim of cooperation is to ensure that measures adopted by different NCAs during proceedings to assess the same merger transaction, as well as the final outcome, are not in conflict with one another, or at least do not hinder the others' purpose. With this in mind, NCAs are encouraged to promote enhanced cooperation, in particular at key stages of the merger control proceedings. So how does all of this work in practice?

Procedurally, it is quite simple and straightforward. It all starts when a particular merger transaction is formally notified to an NCA in accordance with competition law. The first task for any NCA, when faced with a merger notification, is to determine whether it has, *prima-facie*[9], the jurisdiction to assess it. Assuming the answer to this question is affirmative, the necessary elements submitted by the parties should also inform the notified NCA about whether the same merger will also be notified in other jurisdictions (at least) within the ECA network. If that is the case, the notified NCA should trigger the cooperation mechanism with other NCAs by emailing them the ECA Notice.

7 EC (2011) *Mergers: competition authorities agree best practices to handle cross-border mergers that do not benefit from EU one-stop shop review* [Press release of November, 9 2011]. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1326 [Accessed September, 12 2020].

8 MWG, Best Practices on cooperation between EU National Competition Authorities in merger review adopted November, 8 2011, §1.3.

9 *Prima-facie* because assessing jurisdiction is a three-step process: 1) are we dealing with a merger transaction for the purpose of competition law?; if so, 2) who has jurisdiction to assess the merger: the European Commission pursuant to Regulation 139/2004 or national competition authorities pursuant to their respective merger control legal frameworks?; if the latter, 3) whether the merger transaction triggers (any of) merger notification threshold(s)?

The ECA Notice is a simple form whereby the first notified ECA NCA informs all the other sister ECA NCAs that a particular merger transaction has been notified to it, and that ECA NCA *x* or *y* should also expect to be notified as well; in short, the notified merger transaction is subject to a multijurisdictional filing.

The process of completing the ECA Notice is simple, and the level of information necessary is quite basic: what the merger consists of; who the undertakings concerned are (potentially their parent companies); what the relevant economic sector is (NACE code, if available); what the date of notification and provisional deadline are; who the case-handlers and contacts are; and which NCAs are expected to also be notified.

The current Model 'ECA Notice' is as follows[10]:

MODEL ECA NOTICE

[Date]

In accordance with the decision made at lhe ECA meeting on 20 April 2001, the [NCA] provides you with the following intormation:

The [NCA] received a merger notification which might be of interest to you:

Notified merger (merging parties and type of transaction):	
Sector/Industry concerned and/or products concerned. NACE code if readily available:	
Date of notification:	
Provisional deadline:	
Case handler: Email: Phone/fax:	
Notified by the merging parties in Member States:	
ECA members informed:	

Once the 'Notice' has been filed, the first notified NCA emails it to all its sisters NCAs.[11] At this stage, the main relevant aspect is that it is the responsibility of the first notified NCA to send the 'ECA Notice' and trigger the cooperation mechanisms; this is important because – as will be shown – one of the main strategies to fulfil the objectives of cooperation in multijurisdictional fillings is to try to align assessment timelines as far

10 The ECA Notice Model here presented corresponds to an updated and in-use version of the formally adopted Model of 2001 (cfr. European Competition Authorities, 2001). This updated version has not been published.

11 NCAs should maintain an up-to-date contact-person mailing list.

as possible among all the notified NCAs. Therefore, if the 'ECA Notice' was sent by the second or third notified NCA, the possibility of timeline alignment would be hampered.

Once all the NCAs have been informed and the NCAs relevant to where the merger is to be notified have been identified, cooperation involving multijurisdictional fillings should develop subject to the following principles: (i) it should be restricted to NCAs where the merger is reviewable; (ii) the concerned NCAs should keep each other informed about whether a referral under Article 22 of the Merger Regulation [or even under Article 4(5)] may be an issue to consider. The same should occur accordingly by the European Commission as to the possibility of a referral under Article 9 [or even under Article 4(4)]; (iii) the concerned NCAs should liaise with one another and keep one another informed of their progress at key stages of their respective investigations; (iv) the concerned NCAs should use cooperation mechanisms to reduce the administrative burden on the NCAs and on the merging parties or third-parties; (v) the concerned NCAs should use their best efforts to ensure that cooperation leads to coherent (or, at least, non-conflicting) and consistent decisional outcomes. We will examine each of these in turn.

One preliminary note: cooperation is not an end in itself, but a means to achieving a coherent and consistent final decisional outcome for the same merger transaction notified in multiple jurisdictions. The concerned NCAs are not legally obliged to co-operate with each other every time a multijurisdictional filing occurs. Once the ECA Notice has been sent, the concerned NCAs will informally determine whether even contacting each other is in the best interest of a sound investigation and a final outcome. Therefore, as cooperation principles and mechanisms are at their disposal, it will be up-to the concerned NCAs to evaluate whether, how and when they can be used.

(i) Cooperation beyond the ECA Notice should remain confined to those NCAs reviewing the merger[12]

The main reason is that cooperation resulting from a multijurisdictional filing should focus on those NCAs/jurisdictions where the merger will have a direct impact.

Issues such as defining the relevant market, the transnational impact of the merger (in particular when concerned jurisdictions neighbour each other), or the mere circumstance that discussions regarding remedies in one jurisdiction will have an impact on another may surely present food-for-thought to all ECA NCAs. However, when in the presence of a merger control review, time is-of-the-essence, and it would be neither efficient nor in the best interest of the concerned NCAs or the merging parties – which are suspending the implementation of the transaction until all clearances have been obtained – to remain dependent on inputs by NCAs where the merger will not have an impact.[13]

12 The exception would be a third-NCA finding at a later stage that the merger should have been notified to it and was not (a gun-jumping situation).

13 This does not preclude the possibility for a concerned NCA to contact other NCAs (concerned or either) through specific mechanisms of the European Competition Network and pose a particular query on the case. This, however, is intended to aid the concerned NCA on a particular issue by recourse to comparative law or to the addreesse's past experience, and should, on any situation, add an extra burden on the merging parties.

Keeping cooperation in multijurisdictional filings confined to the concerned ECA NCAs has another purpose, which should not be undermined:

(ii) The fact that one or more of the notifiable[14] NCAs consider referring the assessment of the merger transaction to the European Commission, pursuant to Article 22 of the Merger Regulation,[15] or vice-versa, from the European Commission to the NCAs, pursuant to Article 9 of the EU Merger Regulation,[16] will necessarily trigger close contact between them.

First and foremost, it is necessary to evaluate whether the European Commission is the best-placed authority to assess the merger, in accordance with the legal criteria established in Article 22(1) of the EU Merger Regulation. Or, in the case of Article 9, to evaluate whether the singularities of a particular jurisdiction are relevant enough to justify a deviation from the exclusive jurisdiction of the European Commission.

Secondly, it is necessary to evaluate whether the pan-EEA impact of the merger is significant enough to justify a single-entity assessment instead of a fragmented one, even though each individual concerned NCA may actively cooperate towards coherent and consistent investigations and a final outcome amongst themselves.

Third, if one or more of the concerned NCAs opts to oppose to the referral, the resulting parallel investigations will lead to a scenario equivalent to that of a multijurisdictional filing. This will require investigative NCAs and the European Commission to use their best efforts not to undermine each other's investigations and final outcomes, in

14 An important note is that Article 22 allows for the European Commission to accept referrals from NCAs irrespective on whether they had the power to review the case themselves. However, the European Commission very rarely accepts referrals based on these circumstances. This rather restrictive approach to Article 22 – in the sense they are very rare – has been revisited following an announcement by the European Commission's VP Margrethe Vestager, on September 11th 2020, in which the Commission plans to start accepting referrals from NCAs of mergers that are worth reviewing at the EU level irrespective on whether they (i.e. NCAs) had the power to review the case themselves [cfr: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en (accessed: 31.12.2020)] , together with the publication, on March 26th 2021, of the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases {EC (2021) Communication from the Commision. Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final, Brussels 26.03.2021. Available from: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf [Accessed: June, 28 2021]}, as well as the referral request accepted by the Commission in case *Illumina/Grail* – EC (2021) Case M.10188 *Illumina/Grail*. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021M10188&from=EN [Accessed: 28.06.2021]. Very interesting developments are expected on this topic since the parties appealed to European Courts the Commission's decision to accept the referral request (T-227/21 - *Illumina v Commission*).

15 Or, eventually, even during a pre-notification stage, pursuant to Article 4(5) of the Merger Regulation, provided (i) that the merging parties do not oppose to a referral in such an early stage, in particular since it would involve confidentiality wayvers *vis-a-vis* NCAs and the Commission and (ii) that the concerned NCAs are straightforwardly identified and made aware that that particular merger will, sooner or later, be notified to it.

16 The same rationale of the previous footnote, applies accordingly in the case of Article 4(4).

particular if it leads to the implementation and monitoring of remedies with a broader impact than a national scope.

This is valid irrespective of which authority assesses and decides upon the merger, and the legal basis. In the cases of parallel investigations by both NCAs and the European Commission, under Articles 4(4), 9 and 22, the need for the relevant authorities to materially align their assessments and avoid conflicting outcomes makes ongoing cooperation even more important.

However, even following an Article 4(5) referral, the exclusive jurisdiction conferred to the European Commission to assess the merger should not underrate the need for cooperation with Member States, in particular with those concerned jurisdictions where the transaction would originally have been reviewable.

For these NCAs who voluntarily transferred their original jurisdiction to the European Commission, issues such as theories of harm and remedies should be taken into particular consideration by the European Commission in its assessment and in its final decision, as well as in responding in the Advisory Committee (pursuant to Article 19 of the EU Merger Regulation, if applicable).

(iii) Concerned NCAs should liaise with one another and keep one another informed of their progress at key stages of their respective investigations

In order to fulfil this objective, the ECA Notice provides a minimum of information related to the case, namely the date of notification to the first concerned NCA and a provisional deadline. Upon sharing this information with other NCAs – in particular with those where the merger is reviewable – the concerned NCAs should liaise with one another in order to try to align their respective investigative timetables as much as possible.

This measure implies combined efforts by both NCAs as well as by the merging parties and is not short of challenging obstacles. First, the merging parties would have to submit the individual merger notifications to the various NCAs almost simultaneously, which may not be as simple as it seems, as each national jurisdiction has its own legal particularities and NCAs are legally bound to enforce them.

Second, the information provided for by the merging parties will need to be as complete and clear as possible, so that concerned NCAs are made aware of the full context of the merger transaction as early as possible in the proceedings (possibly even during pre-notification contacts). Therefore, the merging parties play an important role in informing and keeping the NCAs informed of all relevant aspects concerning the merger, which can contribute to a swift and sound assessment.

Third, the competitive contexts and conditions in jurisdiction A will certainly differ from those of jurisdiction B and from those of C. Therefore, aligning investigative timetables may pose difficult challenges, as one NCA may be ready to be formally notified, while that may not be the case in another NCA.

In any case, the main focus should therefore be that the concerned NCAs keep each other informed of the key stages of their respective investigations, namely on significant

changes in deadlines to issue a decision, on the likelihood of the outcome of the first phase investigation and/or the decision to open an in-depth investigation, its outcome, as well as any discussion regarding remedies.

The topic of remedies is one of the most sensitive, particularly if it occurs in the context of multijurisdictional filings. As mentioned, the competitive conditions in jurisdiction A will likely differ from those of jurisdiction B. And even though it is the same merger transaction, NCA *x* and NCA *z* may need to impose remedies, while NCA *y* need not, and the remedies to be imposed by NCA *x* may substantively differ from those to be imposed by NCA *z*.

Therefore, it is of the utmost importance that the NCAs liaise with each other on the topic of remedies as soon as the concerned NCA identifies competitive concerns and starts to discuss possible solutions with the merging parties. Keeping each other informed on the progress regarding the discussion of remedies will contribute to a coherent and consistent final outcome on the assessment of the merger, as well as to a solution whereby each jurisdiction will have safeguarded its own competitive concerns as a result of the merger.

(iv) Concerned NCAs should use cooperation mechanisms to reduce the administrative burden on both NCAs and on the merging parties or third parties

The topic of administrative burdens is an ever-present issue, and one that NCAs are particularly sensitive to when it comes to merger control. NCAs fully acknowledge that the need to halt the implementation of a merger transaction – sometimes for several months – due to an *ex-ante* assessment can cause uncertainty amongst market stakeholders and, more especially, to the merging parties.

With this in mind, the NCAs employ their best efforts to minimise the administrative burden during the merger procedure by: (1) obtaining – as far as possible – the necessary information and data to conduct the assessment and to produce an outcome as rigorous as possible; (2) not to burden stakeholders – both the merging parties and third parties – with unnecessary requests for information; (3) adopting, as soon as possible, a final decision on the merger transaction, thus not delaying its final outcome beyond what is strictly necessary.

Naturally, these measures are much simpler said than done, as the NCAs and the merging parties are fully aware. And this is where cooperation mechanisms can play an important role.

As mentioned above, the first task for any NCA, when faced with a merger notification, is to determine whether it has jurisdiction to assess it. On most occasions, determining jurisdiction is relatively straightforward, but sometimes it may not be so; issues such as the nature of the transaction ('is it a merger for the purposes of competition law?'), can sometimes pose challenging questions that must be answered without ambiguity before the assessment per se even begins. In addition, questions as to the parties' activities, as to the relevant market (e.g. transportation costs and import-exports influencing the geographical dimension of the market), or as to items necessary to conduct the assessment

may not be as simple as it appears due to insufficient data or a complete absence of data.

Cooperation between concerned NCAs may help clear many of these questions and challenges, simply by exchanging views on the subject or by sharing relevant information from one NCA to another. This latter solution can be particularly useful to NCAs who have difficulty in gathering information on a certain stakeholder located in another jurisdiction. If the merging parties or third parties show reluctance/difficulty in providing such information, the relevant NCA can only access it through the local NCA, which can only be done through close institutional cooperation.

One important aspect regarding the exchanging/sharing of information among concerned NCAs is that, unless the merging parties or third parties waive confidentiality, it should be confined to non-confidential information. This limitation can cause serious constrains on the effectiveness of the cooperation mechanisms for obvious – although, quite often, legitimate – reasons, as on many occasions the level of exchangeable non-confidential information is either clearly insufficient or unable to provide a clear and intelligible perspective on what the NCA seeks to know.

In order to cope with such a limitation, the merging parties or third parties should feel encouraged to provide a waiver of confidentiality broad enough to meet all of the NCAs' needs to obtain the necessary information and data to assess the merger and to produce an adequate outcome.[17]

The merging parties or third parties may be reluctant to waive the confidential nature of their information to all NCAs, in particular as they then lose control over how the exchange takes place. However, what the merging parties should also consider in their reluctance to waive confidentiality is that, by allowing for the exchange/sharing of confidential information, and as long as NCAs confine the information strictly for the purposes of assessing that particular merger transaction, they are effectively helping to reduce the administrative burden that NCAs and the merging parties themselves (as well as third parties) have to bear. In fact, unless easily accessible through NCAs pursuant to waivers, the requesting NCA will have no alternative but to request it directly from the merging parties and third parties, which often implies the suspension of the term of the decision.

This option puts pressure on the requesting NCA, because it will have to (i) determine what information it needs; (ii) produce a clear official request addressed to the merging and/or third-parties; (iii) wait for complete responses; (iv) analyse all the information and determine whether it suffices and, if necessary, renew the requests for new information or the completion of the previous ones.

On the part of the parties, they will have to understand what is being asked by the NCA (the scope of the request), duly organise the information and provide it to the NCA within the indicated timeframe and hope that the NCA considers it satisfactory.

17 Although different waivers may vary, the format proposed by the ICN model waiver is recommended. Appendix A. ICN Model Waiver Form. Available from: https://ec.europa.eu/competition/ecn/icn_waiver_model_form_en.rtf [Accessed September, 12 2020].

All these steps on 'both sides' are time and resource-consuming and almost certainly will delay the conclusion of the assessment and the adoption of a final decision. Confidentiality waivers for the exchange/sharing of information between concerned NCAs could represent, in sum, a major factor in reducing the administrative burden on both the NCAs and on the merging parties, as well as a way of speeding proceedings.

(v) Concerned NCAs should use their best efforts to ensure that cooperation leads to coherent (or, at least, non-conflicting) and consistent decisional outcomes.

This fifth principle represents the ultimate goal of cooperation in multijurisdictional filings and takes from all of the previous principles, in the sense that only if a coherent, pro-active and effective cooperation is put in place by all concerned NCAs will the risk of conflicting decisional outcomes be reduced or even eliminated.

Close and regular contact between fully informed officials from every concerned NCA, particularly at relevant key stages of the proceedings, cooperating on procedural (including whether a referral to the European Commission should be considered and why) as well as on substantive aspects (especially if remedies are a likely option) of the assessment will most likely reduce to a minimum the risk of inconsistent final outcomes.

However, as previously mentioned, cooperation is not an end in itself, but a means to achieve a coherent and consistent final decisional outcome for the same merger transaction notified in multiple jurisdictions. Concerned NCAs are not legally obliged to cooperate with each other every time a multijurisdictional filing occurs. Therefore, as cooperation principles and mechanisms are available, it will be up to the concerned NCAs to evaluate if and when they can be of use.

BENEFITS & CHALLENGES OF COOPERATION

Benefits triggered by the ECA Notice

Cooperation among Competition Authorities in multijurisdictional filings should always be a factor to consider.

The ECA Notice mechanism has been in place for almost 20 years, and it is fair to say that during that time it has been demonstrated to be a most valuable tool in multiple dimensions.

First, it is known for its practicability and informal use, with very little or no bureaucracy attached.

Second, the ECA Notice is deemed beneficial for the NCAs concerned, for the merging parties themselves and for third parties, as it namely reduces the administrative burden.

Third, it enables a very important exchange of information between NCAs, thus actively contributing to a coherent assessment of the merger case throughout the various jurisdictions and reducing the risk of conflicting decisional outcomes, in particular in the case of remedies.

Fourth, it also promotes the sharing of know-how in a particular sector by one NCA with other NCAs, as well as the exchange and discussion of different approaches to the case, thus contributing to a more enriched and informed assessment.

Fifth, it represents an extremely useful tool for NCAs to detect gun-jumping infringements, since it allows them to cross-check whether a specific merger notified in another jurisdiction should also have been notified to its own.

One can also say that the cooperation system triggered by the ECA Notice also benefits the internal market. Most particularly, by contributing to a coherent decisional outcome by all the concerned NCAs, it automatically contributes to a coherent application of merger control throughout the EEA, even though in individual national dimensions.

Challenges

As stated at the beginning of this article, the option to cooperate with one another is a prerogative conferred on NCAs. Even in the case of Articles 9 and 22, no Competition Authority – including the European Commission – is obliged to trigger the referral mechanism, or even adhere to it.

In addition, as a document of soft law, the Best Practices

> *are intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create new rights or obligations which may fetter that discretion.*[18]

Therefore, the first challenge is to advocate with NCAs the benefits of cooperating in multijurisdictional filings. Cooperation only delivers if it is used to the fullest by those who can benefit from it.

However, even if the Competition Authorities do cooperate with each other when multijurisdictional filings occur, the second challenge lies with how best to align the cooperation mechanisms, starting with what follows from the ECA Notice.

As seen above, aligning different timelines at key-stages of the procedure can be as important as it is difficult, given the specifics of each of the individual assessments and legal frameworks.

As merger proceedings can progress at different paces in different jurisdictions, due to differences in legal deadlines or merging parties notifying at different times in different jurisdictions, the issue of timing alignment is a challenge to the proper functioning of this system.

With this in mind, it will be up to NCAs to develop ongoing and regular contacts (equivalent to state-of-play contacts between the NCAs and the merging parties).

A third challenge relates to access to information from stakeholders – first and foremost, the merging parties, but also third parties – and to the (im)possibility of sharing confidential information amongst concerned NCAs. The difficulties related to

18 MWG, Best practices on cooperation between EU National Competition Authorities in merger review adopted November, 8 2011, §1.3.

obtaining a confidential waiver from the parties apply here in full.

CONCLUSION

Cooperation amongst Competition Authorities in multijurisdictional filings should always be a factor to consider.

The ECA Notice mechanism has proven to be an extremely useful tool in promoting consistency and avoiding conflicting assessments and final decisional outcomes in EU national merger control. This, however, is not short of challenges.

The ECA Notice is a simple instrument that, over the years, has allowed informal cooperation between NCAs in merger control proceedings. Although not perfect, it has proven to be mostly a successful tool and probably the key to its success is its simplicity. We hope that NCAs keep on using it and that merging parties contribute with waivers on confidentiality, information and time alignment in notifications for its intended purpose – cooperation and coordination.

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ECN+ DIRECTIVE AND PROJECTED CHANGES IN POLISH COMPETITION LAW: TOWARDS THE POLITICAL AND JUDICIAL INDEPENDENCE OF THE POLISH COMPETITION AUTHORITY

RAFAŁ STANKIEWICZ

Abstract:

The ECN+ Directive aims to create a 'homogeneous' plane for the operation of antitrust authorities in the EU. Therefore, it is intended above all to harmonise the functioning of the national competition authorities in all the Member States, so that they can exercise the same powers and apply identical legal instruments when enforcing EU competition law. This article describes how to implement the ECN+ Directive into Polish antitrust law. Ensuring objective standards for the appointment of the President of the Office of Competition and Consumer Protection is the basic way to achieve this goal.

Key words:

ECN+ Directive, independence, accountability, President of the Office of Competition and Consumer Protection

INTRODUCTION

Apart from empowering national competition authorities to directly apply the EU rules on competition, the purpose of Regulation 1/2003[1] was to lay down how national competition laws should be implemented in parallel in such cases (Articles 3 and 35 of Regulation 1/2003), while harmonising only selected aspects of the operation of such authorities.[2] Regulation 1/2003 was meant to make it possible for national competition authorities to co-enforce, together with the European Commission, the EU rules on competition. However, it did not provide for any procedural solutions on how to apply these rules, which translated into a wide range of solutions being adopted in individual Member States. A dozen or so years after the introduction of the system for the decentralised enforcement of EU competition law regarding competition-restricting practices,[3] a new legislative act was passed that announced far-reaching changes in this respect. A central premise underlying the adoption of Directive 2019/1 of 11 December 2018 (the ECN+ Directive)[4] was to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The ECN+ Directive sets out common systemic and procedural standards for all national competition authorities (Chapter III of the ECN+ Directive).[5] The main purpose of the ECN+ Directive is to make competition authorities more efficient in the enforcement of Article 101 or 102 the Treaty on the Functioning of the European Union, predominantly by increasing the powers available to the authorities, adding to their independence, allowing them to take coercive measures and imposing financial penalties where necessary. The ECN+ Directive is focused on harmonising certain aspects of the antitrust procedure, strengthening the role of national competition authorities and providing such authorities with minimum resources and instruments to efficiently enforce Articles 101 and 102 TFEU (without ruling out the possibility of delegating to the competition authorities powers going beyond those provided for in the directive – see Recital 9 of the preamble). So, as pointed out by K. Kowalik-Bańczyk, it is intended,

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003, p. 001-0025.

2 KOWALIK-BAŃCZYK, K. (2012) Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings, *Yearbook of Antitrust and Regulatory Studies*, 6, pp. 220–222.

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5/12/2014, pp. 1-19.

4 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14/11/2019, p. 3-33.

5 See also: SINCLAIR, A. (2017) Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+). *European Journal of Competition Law*, 8(10), p. 625 et seq.; WILLS, W.P.J. (2017) The European Commission's "ECN+": Proposal for a Directive to Empower the Competition Authorities of the Member States to be More Effective Enforcers. *Concurrences*, 4, p. 60 et seq..

above all, to harmonise the operation of national competition authorities so that in all Member States they have the same powers and use identical legal instruments when enforcing EU competition laws.[6]

On the one hand, the solutions adopted in the ECN+ Directive are designed to counteract the provisions of national laws that sometimes make the effective enforcement of competition laws impossible (e.g. the inconsistent implementation of leniency programmes, low or varying punishments for antitrust offences). On the other hand, they are also to ensure that the same guarantees and instruments are in place for EU law when it is applied in parallel with national law. Thus, through the backdoor, so to speak, the ECN+ Directive accomplishes the partial harmonisation of national antitrust procedures, regardless of whether EU law is applied or not. The ECN+ Directive also aims at making it possible for national competition authorities to use each other's support when bringing cross-border indictments and enforcing antitrust penalties between Member States and European Economic Area countries.[7]

The scope of changes is a result of analysing how efficient the system for the decentralised enforcement of EU competition law is.[8] As it appears from Directive 2019/1, the guarantees and powers form a prerequisite for the effective enforcement of EU competition law, or a decentralised application of Articles 101 and 102 TFEU.[9] With such guarantees in place, national competition authorities obtain effective tools to find evidence of violation of Articles 101 and 102 TFEU.

The harmonisation of both EU and national situations is a result of the European Commission having concluded that, at least in some of the Member States, the enforcement standard of competition law was not necessarily satisfactory, and certainly not homogeneous.[10] As mentioned in the preamble of the directive, such differences may have some effect on certain businesses. Since national competition authorities have been empowered to obtain all information, including in digital form, on businesses that are

6 KOWALIK-BAŃCZYK, K. (2012) p. 221.

7 EC, Commission staff working document SWD(2014) 230/2, Ten years of antitrust enforcement under Regulation 1/2003 accompanying the document communication from the Commission to the European Parliament and the Council: Achievements and Future Perspectives {COM(2014) 453} {SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/swd_2014_230_en.pdf [Accessed September, 12 2020]; EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues Accompanying the document 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 final} {SWD(2014) 230 final}, point 43. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0231&from=EN [Accessed September, 12 2020].

8 KOWALIK-BAŃCZYK, K. (2019) Dyrektywa ECN+ – sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych?. *Europejski Przegląd Sądowy*, 10, p. 5.

9 Ibid.

10 THOMAS, S., DUEÑAS, M. (2018) The Draft Provisions on Antitrust Fines in the Commission's ECN+ Proposal, *Zeitschrift für Wettbewerbsrecht*, 1, p. 2.

subject to the antitrust procedure, such authorities, in order to be effective, should also be able to use the same possibilities at an earlier stage, e.g. when launching an investigation under national law. It was also necessary to provide national competition authorities with identical powers of scrutiny, regardless of whether they apply EU law or only national law. Similar to Article 6 clause 3 of the ECN+ Directive, Recital 31 of the ECN+ Directive states that 'the Directive should not prevent Member States from imposing the requirement to have such scrutiny pre-authorised by a national judicial authority'. Recital 4 indicates, however, that the 'modernisation' of antitrust procedure in EU Member States, as accomplished by the ECN+ Directive, has two major goals: to make the competition authorities more effective when enforcing EU and national competition law, and to ensure better, more efficient cooperation between competition authorities in individual Member States.[11] Without clearly defining a procedural framework for national antitrust proceedings, it has been made possible to use the EU standard for the protection of entrepreneurs' rights.

So the ECN+ Directive aims to create some 'level playing field' for the operation of antitrust authorities in the EU. Therefore, it is intended, above all, to harmonise the functioning of national competition authorities so that, in all the Member States they exercise the same powers and apply identical legal instruments when enforcing EU competition law.

INDEPENDENCE OF THE NATIONAL COMPETITION AUTHORITY: A PLAN FOR THE FUTURE UNDER POLISH LAW

The changes aimed at making national competition authorities more efficient, should also consider their independence. Chapter III of the directive contains provisions that are intended to protect the independence of national competition authorities when applying Articles 101 and 102 TFEU from 'external interference and political pressures' (Recital 14 of the Preamble). The Member States are obliged to provide, in their respective national laws, solutions to promote the independence of officials and members of competition authorities (Article 4): (a) to make them independent from any political pressures and other external influences when performing their duties; (b) to exclude the possibility of them consulting or being instructed by public authorities and any other parties. The final draft of the directive is a result of trade-offs and reveals certain weaknesses. As far as the independence of national antitrust authorities is concerned, some doubts can be raised about the lack of a clear requirement in Article 4 that such authorities be appointed for terms of office, or a failure to precisely define in Article 5 when human, financial and technical resources are sufficient. Nevertheless, the ECN+ Directive should be considered positive. It will force an increase in the level of guarantee of independence of the authorities.

Before the ECN+ Directive was adopted, no formal requirements for the independence of competition authorities were established by EU legislation. Such requirements

11 KOWALIK-BAŃCZYK, K. (2019), p. 4.

are missing from Regulation 1/2003, although such a requirement can be deduced, even if only indirectly, from this regulation's principle of ensuring the effective enforcement of Articles 101 and 102 TFEU. However, EU competition law does not impose a single institutional model upon the Member States respecting the procedural autonomy of the latter.

The ECN+ Directive does not force Member States to adopt a specific institutional model to be implemented as part of its enforcement, but it may affect how the internal functioning of national competition authorities will work. Firstly, the ECN+ Directive stresses that differences in the functioning and the scope of guarantee of procedural fairness could adversely affect the consistency of the whole system for the enforcement of EU competition law. Secondly, the directive explicitly associates the efficacy and consistency of enforcing Articles 101 and 102 TFEU with the operational independence of national competition authorities (see Recital 17 of the directive), setting out requirements for the impartiality and independence of authorities responsible for enforcing competition law. The efficient enforcement of substantive competition law is strictly related to the proper institutional constitution of the relevant authorities and the provision thereof with appropriate legal instruments. For without a systemic model and procedural rules being properly established, substantive law is unable to bring about the achievement of its underlying objectives.[12]

It should be noted that the independence of the competition authority is enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). For this article reads that, in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. According to the prevailing view, proceedings regarding practices restricting competition should be seen as a semi-criminal procedure.[13] As a result, it is essential to ensure a higher standard of procedural fairness, similar to that applied in traditional criminal law.

Although the issue of the minimum rights for businesses being a party under Article 6 of the ECHR is admittedly not explicitly addressed in the ECN+ Directive, both factors, namely 'independence' and the protection of the minimum rights of businesses, seem to be closely interrelated as far as this independence is concerned. So it can be assumed

12 PODRECKI, P., MROCZEK, M., MENSZIG-WIESE, K. (2019) O potrzebie zastąpienia Prezesa UOKiK kolegialnym organem ochrony konkurencji. *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 5, p. 13.

13 BERNATT, M. (2012) Ustawa o ochronie konkurencji i konsumentów – potrzeba nowelizacji. Perspektywa sprawiedliwości proceduralnej. *internetowy Kwartalnik Antymonopolowy i Regulacyjny,* 1, p. 87; BŁACHNIO-PARZYCH A. (2012) The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights, *Yearbook of Antitrust and Regulatory,* 5, p. 54; KRÓL-BOGOMILSKA, M. (2013) *Zwalczanie karteli w prawie antymonopolowym i karnym*. Warszawa: Scholar, p. 205 et seq.

that, before the deadline for the implementation of the directive (i.e. by 4 February 2021) elapses, it will become necessary to thoroughly assess the system that currently exists in Poland from the point of view of these two factors together.

The question arises here: how do we define 'independence'? There is no doubt that the independence of the body requires the creation of appropriate mechanisms to protect against political influences and business organisations.[14] As G. Materna emphasises, the independence of the body forms the basis of many specific legal guarantees.[15] Therefore, the aspect of organisational, financial and decision-making independence should be pointed out. Organisational independence should be understood as a location in the hierarchical structure of the public administration of a given body that ensures the person performing the function of the body will not be subject to 'external' pressure from his superiors, as well as the business environment. In turn, financial independence is the formation of the body's financing rules in a way that enables the full implementation of the tasks entrusted to the given body. Finally, decision-making independence means the possibility to autonomously take decisions, without being influenced by other entities on individual decisions. This is expressed in the prohibition of members of decision-making bodies and staff from asking for and taking instructions from other institutions, bodies or organisational units.

In the context of the competition authority's activity, the notion of 'independence' should be associated with the authority being so formed as to take decisions under the guidance and within the bounds of law, and protected against external pressures exerted by both politicians and private individuals. 'Independence' means taking decisions without any undue influence, based on available data and with careful consideration of various interests.[16] Independence understood in this way serves the rule of law and democracy.[17] Independence is ensured by clear-cut rules governing the recruitment of individuals for managerial positions, their appointment for a defined term only, and the introduction of a closed-end and objective list of premises that could be used to justify their dismissal. In this context, it relates to a set of mechanisms designed to make sure that officials can pursue institutional goals without having to compromise their own interests.[18]

14 MATEUS, A.M. (2007) Why Should National Competition Authorities be Independent and How Should They be Accountable?. *European Competition Journal,* 1, p. 17–30.

15 MATERNA, G. (2019) Gwarancje niezależności organu ochrony konkurencji w dyrektywie ECN+ a status Prezesa UOKiK. *Europejski Przegląd Sądowy*, 10, p. 20.

16 OTTOW, A. (2015) *Market and Competition Authorities: Good Agency Principles*. Oxford: OUP, p. 74.

17 BERNATT, M. (2019) Niezależność polskiej administracji. Czas zmian. *Rzeczpospolita* of February, 8 2019.

18 BECKER, T.E. (1998) Integrity in Organizations: Beyond Honesty and Conscientiousness. *Academy of Management Review*, 23, p. 154.

The degree of independence also depends on the expertise and experience of management, the authority's budgetary autonomy, the size of the budget and levels of remuneration. Only a few research studies have been published in the Polish literature so far.[19] What is worth noticing here is, above all, M. Błachucki's monograph[20], in which author enumerates four dimensions of independence: organisational, regulatory, financial and personal.[21] The author also deals with the notion of what is termed the 'reversal of independence', namely 'accountability'.[22] However, the issues of both independence and accountability, which act as prerequisites for the proper functioning of the authorities, are better covered by the literature outside of Poland.[23] So what is 'accountability', in the context presented above? Accountability as such consists in the possibility of verifying the actions taken by an authority. When an authority has to provide explanations for its conduct, that can be instrumental in holding it liable,[24] including ordering it to change any of its decisions. The sequence of accountability is as follows: there is a relationship between a party and the forum where the party is active; the relationship obliges the party to explain and justify its conduct; in response, the forum can ask questions and make evaluations, and the party can be held liable.[25]

The principle of accountability relates to the financial, procedural and substantive aspects of actions taken by authorities. Hence, accountability is not only about how an authority discharges its responsibilities, but also how it uses the resources assigned thereto, including the transparency of its financial policy. This also applies to compliance with procedural standards, which should be fair, transparent and impartial.[26] Accountability adds to the legitimisation of what an authority does and the fairness of both the authority and its officers.

Instruments that ensure accountability are mechanisms of notifying supervisory bodies, parties and stakeholders. If such mechanisms are effective, they make the authorities and the way in which they act more credible.[27]

19 KOZAK, M. (2019) Raz, dwa, trzy, niezależny będziesz ty... O konieczności szerszego spojrzenia na niezależność polskiego organu antymonopolowego w świetle dyrektywy ECN+,. *internetowy Kwartalnik Antymonopolowy i Regulacyjny,* 6, p. 25.

20 BŁACHUCKI, M. (2019) *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)*, Warszawa: ILS PAS, p. 354 and subseq. Available from: http://www.doi.org/10.5281/zenodo.1494958.

21 Ibid, p. 354-355.

22 Ibid, p. 359.

23 Kozak, M. (2019) p. 25.

24 BŁACHUCKI, M. (2019) p. 359.

25 BOVENS, P., CURTIN, D., HART, M. 't (2012) The EU's Accountability Deficit: Reality or Myth?. In: Bovens, P., Curtin, D., Hart, M. 't (eds.) *The Real World of EU Accountability What Deficit?*. Oxford: OUP, p. 37.

26 OGUS, A. (1994) *Regulation: Legal Form and Economic Theory.* Oxford: OUP, p. 111.

27 KOZAK, M. (2019) p. 26.

The Commission's working document[28] scrutinises the standing of the competition authorities in various Member States. It stresses that independence means that decisions of authorities are free of any external influence and rely on the use and interpretation of competition rules by invoking legal and economic arguments. With regard to accountability, it notes that almost all national competition authorities are obliged to submit reports regarding their activities in the previous year, predominantly in the form of an annual report to the parliament or the executive power. In addition, some national competition authorities can be heard before a parliamentary commission or submit an annual plan for the following year. It has also been pointed out that a vast majority of national competition authorities enjoy operational, organisational and financial independence. Foreseen for the majority of national competition authorities that are active, operational independence consists in the categorical exclusion of interference from any other government agencies or individuals, the issue of instructions during investigations and the taking of decisions in individual competition cases. A significant number of national competition authorities also decide about their internal organisation and have a separate share in the general budget of the state, for which they enjoy budgetary autonomy. However, although most national competition authorities have a separate budgetary line, some of them generate their own income.

In Poland, the President of the Office of Competition and Consumer Protection (hereinafter the OCCP) is a central authority of government administration. It operates within the limits defined by the Competition and Consumer Protection Act (hereinafter the CCPA),[29] and its activity is funded directly from the state budget. The President of the OCCP is subject to supervision exercised by the Prime Minister. The monocratic nature of this body is a unique solution anywhere in the European Union. Antitrust regulations in the Member States of the European Union usually adopt a solution whereby the body responsible for competition protection matters is a collegiate body, or the collegiate body is an advisory body to the body making the decision. A solution is also accepted that making decisions belongs to internal collegiate bodies with a high degree of independence.[30]

Poland's 2007 Competition and Consumer Protection Act does not provide for a guarantee of independence of the antitrust authority. The President of the OCCP is appointed by the Polish Prime Minister from candidates proposed by a team established by the Head of the Chancellery of the Prime Minister. The team comprises at least three

28 The Commission's EC, Communication from the Commission to the European Parliament and the Council, COM(2014) 453. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and Future Perspectives {SWD(2014) 230}_{SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020].

29 The Act on Competition and Consumer Protection of 16 February 2007, Dz.U. 2019, item 369 as amended).

30 See also: SKOCZNY, T. (2011) *Instytucjonalne modele wdrażania reguł konkurencji na świecie – wnioski dla Polski*. *Ruch Prawniczy, Socjologiczny i Ekonomiczny*, 2, p. 77 et seq.

individuals whose expertise and experience give a guarantee that the best candidates will be selected. They will assess the professional experience of the candidate, the expertise necessary to perform the tasks involved, as well as the executive skills,[31] and can commission someone with appropriate qualifications from outside the team to assist with the assessment.[32]

Not only is the antitrust authority not necessarily independent, but the mechanism for dealing with antitrust matters in Poland is long and complicated. The current Polish competition protection system is viewed jointly as proceedings before the President of the OCCP and the common court. Decisions of the President of the Office may be appealed against before the Circuit Court in Warsaw – the Court for the Competition and Consumer Protection (hereinafter called the "Court for the Competition and Consumer Protection") within one month from the date of servicing the decision. The Court of Competition and Consumer Protection acts as the court of first instance, i.e. the court that resolves the matter substantially and from the beginning, and does it in the course of (separate) procedural proceedings. The judgment of the Court of Competition and Consumer Protection may be appealed against to the Court of Appeal in Warsaw, and then a cassation appeal to the Supreme Court.

Several years ago, in an article in a popular legal journal in Poland, the above model was deemed by *Z. Kmieciak* to be a "hybrid procedure". The two-stage structure of the procedure (administrative procedure and subsequent civil court proceedings) is recognised as one of the manifestations of the concept of the hybrid procedure, understood as a model of proceedings combining elements belonging to various procedural regulations. The above terminology is derived from the concept existing in the American legal system.[33] There is no doubt that the proceedings before the President of the OCCP, then finalised by issuing an administrative decision, may close the antitrust case. The party may or may not appeal to the court against the decision of the President of the OCCP. The current model of settling competition cases explicitly assumes the priority of the administrative procedure and the basic importance of the "judicial activity" of the public administration body in these cases.[34]

Although the existing provisions do not enable the Prime Minister or members of the Council of Ministers to exert any pressure on decisions taken by the President of the OCCP, the Act allows the President to be dismissed at any time, without having to provide reasons. So there is, at least theoretically, a risk that the President of the OCCP

31 Art. 29. 3d) Act on competition and consumer protection of 16 February 2007.

32 Art. 29. 3e) Ibid.

33 Kmieciak, Z. (2002) Postępowanie w sprawach ochrony konkurencji a koncepcja procedury hybrydowej. *Państwo i Prawo*, 4, p. 46-47.

34 There is no doubt, however, that most of the explanatory actions that were specified in the literature on the subject in relation to antitrust matters 'full cycle of competition protection'– i.e. the initiation of proceedings, activities at the explanatory (evidence) phase, adjudication (by issuing administrative decisions) and application of sanctions in the competition protection system are the competence of the public administration body.

will avoid taking decisions that could expose him to criticism from ruling politicians, or lead to a conflict with influential companies.

Following the adoption of the ECN+ Directive, in October 2018 the OCCP proposed a draft amendment to the Competition and Consumer Protection Act,[35] but one that barely satisfies even the truncated postulates of the ECN+ Directive. There have been many negative comments, primarily about the pace at which changes are happening, and the lack of in-depth discussion about the role of the President of the OCCP and the OCCP itself, as well as their organisational empowerment.[36] This negative assessment is obviously justified. There has been no resumption of parliamentary work on this project in recent months. It remains unclear whether it will be taken into consideration or not. The ongoing erosion of the independence of the judiciary suggests rather a reverse direction of changes in the legal culture of Poland, and the lack of legal regulation and in-depth discussion of how to ensure independence does not make it easy to build an efficient system for the enforcement of competition laws.[37]

There is no doubt that complying with the provisions of the ECN+ Directive should be contingent on an independent competition of candidates, who should be tested for their aptitude for the office they are applying for. Key changes involve the introduction, in Article 29 of the CCPA, of a six-year term of office for the President of the OCCP and the compilation of a closed-end catalogue of grounds for dismissal. The proposal should undoubtedly be deemed legitimate. Concerns, if any, boil down to abolishing the open and competitive recruitment without setting any merit-based criteria in the law, and giving up the election of Vice-Presidents of the OCCP through an open and competitive recruitment process.[38]

The publicly disclosed draft amendment does not address the remaining issues, including, but not limited to, the introduction of a code of integrity and a guarantee of employment for and of the impartiality of the personnel of the OCCP. The draft amendment ignores the need to ensure sufficient resources for the effective enforcement of both Articles 101 and 102 TFEU and national regulations. This last gap poses a major hindrance to the efficient functioning of Poland's OCCP and the provision of officers with market-based employment and remuneration conditions. Finally, the draft amendment completely leaves out *the reverse* of independence, which is accountability, and this applies in relation to both the President and the personnel of the OCCP. M. Blachucki stresses that "the numerous guarantees of independence contrast with

35 Adopted by the Council of Ministers on 6 June 2019. Sejm print No. 3542.

36 Comments of the SPK to the Draft of January 22, 2019. ACT of [...] amendments to the Act on competition protection and certain other acts, Warsaw January, 30 2019. Available from: http://www.spk.com.pl/uploads/pdf/2019-01-31/190130_Uwagi%20SPK%20do%20nowelizacji%20uokik.pdf [Accessed September, 12 2020].

37 BERNATT, M. (2019).

38 BŁACHUCKI, M. (2019) p. 329.

a minimum number of instruments to hold the antitrust authority accountable"[39] and the dependence of the incumbent of the authority on his or her political base.

The lack of a comprehensive approach to the policy of the OCCP is reflected at least in the failure to set any large-scale goals to be pursued by this authority. An analysis of the recent legislative activities and the increasingly wider powers of the OCCP show that they are merely an ad hoc response to occurring problems, but not a component of any strategy roll-out. There is no doubt that the President of the OCCP has already launched a large-scale information campaign regarding his or her activity. However, there are still some doubts as far as proceedings before the President of the OCCP are concerned, e.g. with regard to the right to access the file,[40] which may affect the scope of the right to a defence. Instead of strengthening his or her role as an expert necessary to achieve economic goals, the proposed regulations will undoubtedly lead to further bonding the incumbent with his or her support base.

INDEPENDENCE OF THE POLISH COMPETITION AUTHORITY: *DE LEGE FERENDA* CONCLUSIONS

Below are suggestions for possible changes in the organisational shape of the competition protection system in Poland, which may help increase the authority's independence. The independence of the Polish competition authority should move closer to the form of organisational, financial and decision-making independence.

The process of implementing the assumptions of the ECN+ Directive in the scope of increasing the independence of the competition protection authority will depend on the implementation of changes concerning primarily the political and financial independence of the President of the OCCP. It seems, however, that these are not sufficient factors when changing the constitutional law in this respect. First, it seems reasonable to maintain the monocratic nature of the competition authority. However, the system of competition protection model in Poland could be regulated in such a way that the President of the OCCP would be entrusted with only explanatory functions in the course of conducted proceedings, and decisions would be taken by adjudicating teams (panels).

At the same time, a strict term of office for the President of the OCCP should be put in place. The dismissal of the President of the OCCP would only be possible after meeting strictly defined, qualified conditions. It would also be necessary to strengthen the independence of officials employed at the competition authorities. Creating greater independence of the body would also be possible by ensuring its financial (budgetary) independence. It is also necessary to develop a code of conduct for officials.

Secondly, ending the way in which decisions are verified through a specific action before a common court and the introduction of a model of administrative court control over all the activity of these bodies means that antitrust (regulatory) cases would remain

39 Ibid, p. 401.

40 KOZAK, M. (2019) p. 26.

only in the sphere of activity of public administration, and only the administrative court will be able to control of this activity, based on the legality criterion.

The most appropriate solution seems to be to create a separate administrative appeal body whose task would be to consider verification measures against the decisions (or inaction) of the antitrust authority and market regulators. Some thought should be given to changing the way in which decisions issued by the President of the OCCP are verified. The move should be to an administrative and legal mode, with a further transition to the court-administrative procedure. The current model, which is in fact an exception to the assumed method of verifying the administrative authority's decision, does not meet the needs; indeed the thesis about its lack of consistency or even effectiveness can be put forward.

There are no grounds to claim that transferring the analysed cases to the administrative courts would mean that the standard required by Article 6 of the European Convention on Human Rights and Fundamental Freedoms would be considered as unfulfilled. Of course, the administrative court may only carry out limited evidentiary proceedings. Administrative courts examine the correctness of establishing the legal and actual state of affairs by administrative bodies, not accepting administrative matters for final settlement and not replacing administrative bodies. The process of extending the jurisdiction of the administrative courts in Poland by granting them the power to take reforming decisions in a given scope, and applying additional protection measures also applies to the Polish administrative judiciary.

Therefore, the optimal solution would be to end the verification procedure model based on the civil procedure, and to replace it with an administrative and legal way of verifying the decisions issued by the President of the OCCP. The establishment of a collective public administration body responsible for examining appeals against decisions of the President of the OCCP should be considered a positive solution (it could be called the Competition Protection and Sector Regulation Council). Such a body would have the powers of a higher level body within the meaning of the Code of Administrative Procedure. This body would be composed of individuals distinguished by practical knowledge and practical experience in the field of competition protection (lawyers, economists) appointed by the Prime Minister. The committee would adjudicate in three-person formations. Decisions issued in proceedings before the appeal administrative body would then be subject to a complaint to the administrative court. The adoption of a full administrative model, based at the same time on the established system of judicial control of administrative activity, seems reasonable and would be, in addition, consistent with the overall structure of the government administration system in Poland and the assumed responsibility of specific entities of that administrative apparatus for individual segments of government policy. The full participation of public administration in making imperious decisions in matters related to competition protection and sector regulation creates the possibility of more effective protection

(undertaken in the public-law interest) of competition on the market, which ensures that other objectives of the antitrust regulation are met.

The ECN+ Directive merely indicates that the establishment of a competition authority should be carried out using transparent and objective procedures. It seems that the need to strictly regulate the way in which the selection board functions should be set out in the act. The committee should include representatives of the Prime Minister as well as independent experts who do not conduct business or provide legal services in relation to competition protection.

BŁACHUCKI, M., ed., (2021)
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Warsaw: Publishing House of ILS PAS
DOI: 10.5281/zenodo.5012043
pp. 197–207.

BACKGROUND AND BENEFITS OF THE COOPERATION AGREEMENT BETWEEN THE NORDIC COMPETITION AUTHORITIES

MAARIT TAURULA

Abstract:

The Nordic competition authorities have decades of experience in cross-border collaboration, and the first formal cooperation agreement between the authorities was signed in 2001. Sixteen years later, the cooperation agreement was renegotiated and expanded to enable wider forms of cooperation. On this occasion, Finland also joined the agreement. The European Competition Network provides for a well-functioning cooperation framework for the national competition authorities of the European Union. However, the EU framework does not meet all the needs of the Nordic countries and leaves room for a more extensive regional cooperation agreement. The Nordic Cooperation Agreement enables the exchange of confidential and non-confidential information in both antitrust and merger cases. In addition, the agreement also applies in purely national cases, i.e. where the competition restriction in question does not affect trade between the Nordic countries. Most importantly, as not all the Nordic countries are part of the EU, the Nordic agreement enables a deep cooperation between EU and non-EU countries.

Keywords:

Regional cooperation between competition authorities; Nordic Cooperation Agreement; European Competition Network; Information exchange and mutual assistance in antitrust and merger investigations

INTRODUCTION

In 2017, the director generals of the Nordic competition authorities signed an agreement on cooperation in competition cases.[1] The agreement facilitates information exchange and mutual assistance in investigations, thereby enhancing cross-border co-operation in both antitrust and merger control matters. The forms of cooperation include notifications about pending investigations, information exchange between authorities and assistance in carrying out inspections of undertakings and requesting information from them. The agreement replaces the previous Nordic Cooperation Agreement from 2001.

This article aims to describe the origins and reasons for the long-lasting cooperation within the Nordic region. Based on the new Cooperation Agreement, the Nordic competition authorities have more extensive cooperation tools than before, and more extensive than within the European Competition Network. The article also covers the main provisions of the Nordic Agreement and explains the benefits brought by the agreement compared to the EU legal framework.

HISTORY OF NORDIC COOPERATION

The Nordic countries have very similar market structures and the same companies often operate in more than one Nordic country. The Nordic countries also share similar values and a culture that has grown out of a common history. Because of these connecting factors, the competition authorities of the Nordic countries have a long history of cross-border collaboration. The authorities' delegations have been meeting each other in annual Nordic meetings since the end of the 1950s. In addition to Denmark, Finland, Norway and Sweden, the Icelandic Competition Authority has participated in these meetings since 1975, with the Faroe Islands and Greenland, autonomous territories of Denmark, joining in 2000 and 2002 respectively.[2] Besides the major annual meetings each autumn, the director generals of the Nordic authorities have a separate directors' meeting every spring. Both meetings are important fora for discussions and the exchange of experiences on topical cases and competition law issues.

In addition to those annual meetings, the Nordic competition authorities have founded several permanent and ad hoc specialist subgroups. A Nordic cartel working group was formed back in 2000. The working group meets annually and shares experiences

1 The agreement of 8 September 2017 between Denmark, Finland, Iceland, Norway and Sweden on Cooperation in Competition Cases. Available from: https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/ [Accessed: September, 12 2020] (hereinafter also the '2017 Nordic Agreement').

2 OECD (2018) DAF/COMP/GF/WD(2018)14: Global Forum on Competition Regional Competition Agreements: Benefits and challenges contribution from Denmark, Finland, Norway, Iceland and Sweden-Session III -29-30 November 2018, p. 3. Available from: https://www.konkurrensverket.se/globalassets/om-oss/2018_regional-competition-agreements-benefits-and-challenges_daf-comp-gf-wd-2018-14.pdf [Accessed September, 12 2020].

concerning ongoing case activities, project management and investigation methodologies, among other things. The authorities have also formed working groups for chief economists, chief legal officers and merger control units. Furthermore, there are numerous ad hoc expert meetings covering a wide range of issues that may be arranged when needed. For instance, the authorities' communication departments and forensic IT specialists recently met each other and learned from each other's experiences.

The Nordic competition authorities have also joined forces in competition advocacy work. During the last two decades, the authorities have published several joint reports on topics of common interest. The reports cover various subjects and industry areas, such as airlines,[3] the electricity market,[4] the food chain,[5] retail banking[6] and waste management.[7] In June 2019, the Nordic authorities published a joint article in which they gave their support to a strict merger control regime without political interference, thereby distancing themselves from the French-German initiative to ease the creation of 'European Champions'.[8]

It is worth mentioning that one of the combining factors facilitating the close relations and tight co-operation of the Nordic competition authorities has been the language. Historically, much of the Nordic co-operation has taken place in Nordic languages, though English is gaining ground in both formal and informal communication.

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3 Report from the Nordic competition authorities, No. 1/2002: Competitive airlines, towards a more vigorous competition policy in relation to the air travel market. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report_competitive-airlines.pdf [Accessed September, 12 2020].

4 Report from the Nordic competition authorities, No. 1/2003: A powerful competition policy, towards a more coherent competition policy in the Nordic market for electric power. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordisk-energirapport.pdf. [Accessed September, 12 2020]. See also: Report from the Nordic competition authorities, No. 1/2007: Capacity for competition, investing for an efficient Nordic electricity market. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/capacity-for-competition.pdf [Accessed September, 12 2020].

5 Report from the Nordic competition authorities: Nordic food markets - a taste for competition, 2005. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_food_markets.pdf [Accessed September, 12 2020].

6 Report from the Nordic Competition Authorities, No. 1/2006: Competition in retail banking. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_retail_banking.pdf [Accessed September, 12 2020].

7 Report from the Nordic Competition Authorities: Competition in the waste management sector – preparing for a circular economy, 2016. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2016-waste-management-sector.pdf [Accessed September, 12 2020].

8 Finnish competition and consumer authority (2019) *The Nordic competition authorities support a strict merger control regime* [Press release of Juny, 26 2019]. Available from: https://www.kkv.fi/en/current-issues/press-releases/2019/26.6.2019-the-nordic-competition-authorities-support-a-strict-merger-control-regime/ [Accessed September, 12 2020].

SIMILARITIES IN THE NORDIC COUNTRIES' COMPETITION LEGISLATION

The Nordic countries' competition acts resemble each other, which facilitates cross border cooperation even further. Even though not all the Nordic countries are Member States of the EU, the material competition rules are fairly similar across the Nordic region. In all the Nordic countries, the antitrust rules prohibit cartels and other restrictive conduct between undertakings. The abuse of a dominant position is also forbidden. The EU Member States: Denmark, Finland and Sweden, apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in cases where trade between Member States may be affected. Where the competition restriction in question only has effects within the Member State in question, the national competition rules contain prohibitions identical to those found in the TFEU. Norway and Iceland, who are not EU, but are EFTA members (European Free Trade Area), apply Articles 53 and 54 of the EEA Agreement,[9] which are almost identical copies of Articles 101 and 102 TFEU. The prohibitions contained in the Greenlandic[10] and Faroese[11] competition acts closely resemble the EU rules as well.[12]

Every competition act in the Nordic area also contains rules on merger control. The EU Merger Regulation (EC) No. 139/2004 governs merger control at the EU level, but in cases without a community dimension the merger may be reviewable in one or more EU and EEA jurisdictions. The EU does not require the Member States to regulate mergers, and hence the merger control rules in Denmark, Finland and Sweden have been defined at a national level. The same goes for the merger control regimes of Iceland, Norway, the Faroese Islands and Greenland. However, as a result of convergence between national merger regimes both at the EU and Nordic levels, the merger control rules have become very similar. For instance, as regards the substantive assessment of mergers, all the Nordic countries have moved from a dominance test to the SIEC test.[13]

9 Agreement on the European Economic Area, OJ L 001, 3.01.1994, p. 3.

10 Chapters 2 and 3 of the Greenlandic Competition Act. Inatsisartutlov nr. 1 af 15. maj 2014 om konkurrence (konkurrenceloven) Grønlands Selvstyre d. 15. maj 2014. Available from: http://lovgivning.gl/lov?rid=%7BB4B1627B-E5B2-4A41-AE64-63953E79FDE8%7D [Accessed September, 12 2020].

11 Parts 2 and 3 of the Faroese Competition Act. Consolidated Act. No 35 of 3 May 2007 as amended with Act. No 35 of the27 April 2012. Available from: https://vs.cdn.fo/media/1355/kappingarlogin-ensk-u-tga-va.pdf?s=DSX9bpbv6fLub-JMcYEfndJ1xjw [Accessed September, 12 2020].

12 Report from the Nordic competition authorities, No. 1/2013: A vision for competition policy towards 2020, p. 44. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report_a-vision-for-competition.pdf [Accessed September, 12 2020].

13 A significant impediment of effective competition, as in Article 2(2) of the EUMR 139/2004: "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

However, the notification thresholds, timeframes for investigation and other procedural issues still vary across the Nordic jurisdictions.

NORDIC CO-OPERATION AGREEMENTS

The 2001 Nordic Agreement

Despite the long-lasting collaboration between the Nordic competition authorities, the first formal Nordic co-operation agreement was only signed in 2001, between Denmark, Norway and Iceland. Sweden joined the Agreement in 2004,[14] but Finland was never a party to the 2001 Nordic Agreement.

The objective of the agreement was to strengthen and formalise the cooperation between the authorities and to enhance the parties' enforcement activities by enabling a wider exchange of both confidential and non-confidential information. The exchange of information under the agreement was implemented by notifications, whereby one competition authority informed the other of activities that affected competition interests within the other authority's jurisdiction.[15] The information exchange applied both to antitrust and merger related issues.[16] It was also agreed that the parties will exchange non-confidential information, which facilitates the more effective application of competition laws, and improves the understanding of the legal and financial conditions and theories of harm that were relevant to the authorities' enforcement activities.[17]

Shortcomings in the 2001 Nordic Agreement and the EU legal framework

The 2001 Nordic Agreement provided for information exchange in antitrust and merger cases, but lacked further tools for cooperation. Although the agreement proved useful on several occasions, the parties to the agreement found that a further strengthening and expanding of the forms of cooperation would be needed.[18] In particular, a possibility to assist one another in investigative measures would have improved the examining of cases with cross-border effects in the Nordic region. However, the 2001 Nordic Agreement did not provide for legal grounds for such assistance.

The EU Legal Framework enables strong and in-depth cooperation within the ECN network in antitrust proceedings, but has limitations towards EFTA Member States. Article 22 of the Council Regulation (EC) No. 1/2003 provides a legal basis for national competition authorities to assist each other in inspections and other fact-finding

(the EC Merger Regulation) OJ L 24, 29.1.2004, pp. 1–22.

14 Agreement of 16 March 2001 and 9 April 2003 between Denmark, Iceland, Norway and Sweden on cooperation in competition issues. Available from: https://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf [Accessed September, 12 2020] (hereinafter also '2001 Nordic Agreement')

15 Ibid, Art. II.

16 Ibid.

17 Ibid, Art. III.

18 OECD (2018) DAF/COMP/GF/WD(2018)14, p. 3.

measures,[19] but in the Nordic area this possibility only concerns Denmark, Finland and Sweden. Norway and Iceland are not members of the EU and Regulation 1/2003 does not extend to EFTA Member States, even though it has been implemented into the EEA Agreement.[20] The EEA Agreement, however, does not provide for the necessary tools for cooperation between national competition authorities in the two pillars. Hence, Article 22 of Regulation 1/2003 is not applicable between EU and EFTA Member States.[21] It is worth noting that the EFTA states have stressed the importance of expanding the EU and EFTA 'cross-pillar' cooperation in the future.[22]

In addition, the EU legal framework is limited to competition matters that are capable of having cross-border effects within the EU. If the competition restriction in question may not affect trade between the Member States, only national rules apply.[23] Consequently, a national competition authority may not seek assistance from another competition authority under Article 22 of the Regulation 1/2003 when investigating purely national restrictions that have no effect on inter-state trade.

Another shortcoming of Regulation 1/2003 is that it only applies in respect of antitrust proceedings. There was a wide consensus among the Nordic competition authorities that enhanced cooperation should cover merger cases and merger control procedures as well. Neither the 2001 Nordic Agreement nor Regulation 1/2003 established a legal basis for assisting in fact-finding measures relating to merger investigations.

Lastly, the fact that Finland was not part of the 2001 Nordic Agreement reduced the geographical scope of the Nordic cooperation. Finland did not join the first Nordic Cooperation Agreement, because in Finland the EU legislation was thought to enable sufficiently broad cooperation between the authorities.[24] However, the mutual aid

19 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 04/01/2003, p. 1.

20 The European Economic Area (EEA) consists of the Member States of the EU and three countries of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein and Norway. The fourth EFTA Member State, Switzerland, has not joined the EEA. The Agreement on the EEA entered into force on 1 January 1994.

21 See the EEA Standing Committee of the EFTA States, Ref.17-2294 Subcommittee I on the Free Movement of Goods EEA EFTA Comment on the proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (July, 6 2017), para 6. Available from: https://www.efta.int/sites/default/files/images/EEA%20EFTA%20Comment%20-%20Proposal%20to%20empower%20NCAs%20to%20be%20more%20effective%20enforcers%20(COM(2017)142).pdf [Accessed September 12, 2020].

22 Ibid, paras 7-10.

23 According to Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33 (ECN+ Directive 2019/1), the scope of the directive covers both the application of Articles 101 and 102 TFEU on a stand-alone basis and the parallel application of national competition law to the same case. Recital 4 and Article 1(2).

24 Finish Government (2018) *New agreement to enable more efficient monitoring of competition in the*

within the ECN network does not extend to other Nordic countries, which was clearly a limitation to pan-Nordic cooperation.

The 2017 Nordic Agreement

In 2014, following the approval by the OECD Council of the Recommendation concerning International Co-operation on Competition Investigations and Proceedings,[25] the Nordic countries began work on updating and reassessing the scope of the Nordic Cooperation Agreement.[26] The OECD recommendation states that member countries should commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles to effective enforcement co-operation between competition authorities.[27]

Inspired by the OECD Recommendation, and given the shortcomings of the 2001 Nordic Agreement, the Nordic Competition Authorities negotiated and drafted an extended Cooperation Agreement. The new agreement[28] was signed in 2017 by the director generals of the authorities, and was thereafter subject to ratification, acceptance or approval by the parties in accordance with their respective constitutional requirements.[29] The new agreement expanded the Nordic cooperation geographically, as now also Finland became a party to the agreement. By July 2020, all five Nordic Countries had acceded to the agreement. The agreement also contains provisions on its entry-in-to-force in the Faroese Islands and Greenland.[30]

The 2017 Nordic Agreement contains very similar provisions on notifications from one authority to another about pending investigations as the earlier 2001 Nordic Agreement:

> *Article 2*
>
> *Notifications of competition investigations, proceedings and mergers*
>
> *The competition authority of a Party shall have the power to notify the competition authority of another Party when its investigation or proceeding can be expected to affect the other Party's important interests. Circumstances that may justify a notification include, but are not limited to;*

Nordic countries [Press release of November, 29 2018]. Available from: https://valtioneuvosto.fi/en/-//1410877/pohjoismainen-kilpailuvalvonta-tehostuu-uudella-sopimuksel-1 [Accessed September, 12 2020].

25 OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*. Available from: https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm [Accessed September, 12 2020].

26 OECD (2018) DAF/COMP/GF/WD(2018)14, p. 6.

27 OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*, p. 3, Recommendation II.

28 2017 Nordic Agreement, footnote 1.

29 Article 7 of the 2017 Nordic Agreement.

30 Ibid.

a) Formally seeking non-public information located in the territory of another Party;
b) The investigation of an enterprise located in or incorporated or organized under the laws of another Party;
c) The investigation of a practice occurring in whole or in part in the territory of another party, or required, encouraged or approved by the government of another Party;
d) The consideration of remedies that would require or prohibit conduct in the territory of another Party;
e) A merger that belongs under the jurisdiction of another Party; or
f) A merger where one or more of the participants in the transaction are enterprises located in, incorporated or organized under the laws of another Party.

The notifying competition authority, while retaining full freedom of the ultimate decision, should take account of the views that the competition authority of the other Party may wish to express.[31]

In addition to the notifications referred to in Article 2, the agreement provides three main tools to facilitate Nordic cooperation. Firstly, the agreement enables the exchange of confidential and non-confidential information in both antitrust and merger cases. Article 3 of the agreement reads as follows:

Article 3

Exchange of information

For the purpose of applying competition rules and merger control rules the competition authorities of the Parties shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

Information exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority.[32]

The wording of Article 3 is based on Article 12 (Exchange of information) of Regulation 1/2003, with the exception that under the 2017 Nordic Agreement there is no need to assess whether the competition restriction has effects on cross-border-trade or not. Another major extension to the EU framework is the possibility to exchange information with regard to merger cases.

The second mechanism brought about by the 2017 Nordic agreement concerns requests for information. Article 4 of the agreement states:

31 Ibid, Art. 2.
32 Ibid, Art. 3.

Article 4

Requests for information

The competition authority of a Party may in its own territory carry out any requests for information under its national law on behalf and for the account of the competition authority of another Party in order for the requesting authority to apply competition rules or merger control rules. Any exchange or use of the information collected shall be carried out in accordance with Article 3[33].

According to this provision, the requested competition authority will have the legal basis to carry out any requests for information under its national law on behalf of and for the account of the requesting competition authority. The article closely resembles the wording of Article 22 of Regulation 1/2003, but again it extends to merger cases and purely national antitrust cases.

When it comes to information exchange on merger cases within the European Competition Network, it must be noted that a lot of cooperation takes place between the merger control units of the national authorities, even without binding legal provisions. For instance, the authorities of the EU Member States have agreed on Best Practices, whereby they strive to enhance cooperation between the national competition authorities in multijurisdictional merger cases.[34] The Best Practices were prepared by the ECN Merger Working Group in 2011 and they set out the key steps at which the national competition authorities should cooperate, and the information they may share.[35] The merging parties are encouraged to facilitate cooperation, in particular by providing waivers of confidentiality.[36,37] It is normally in the best interest of the merging parties to waive confidentiality in order to guarantee a prompt and efficient merger review process across jurisdictions. Therefore, the information exchange under the 2017 Nordic Agreement and within the ECN network, the latter based on voluntary waivers, probably does not differ that much in practice.

33 Ibid, Art. 4.

34 MWG (2011) Best practices on cooperation between EU National Competition Authorities in merger review adopted November, 8 2011. Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed: September, 12 2020].

35 EC (2011) *Mergers: competition authorities agree best practices to handle cross-border mergers that do not benefit from EU one-stop shop review* [Press release of November, 9 2011]. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1326 [Accessed September, 12 2020].

36 Internet page of the European Commission: 'European Competition Network, Cooperation in merger control'. Available from: https://ec.europa.eu/competition/ecn/mergers.html [Accessed December, 30 2019].

37 The format proposed by the ICN model waiver is recommended. ICN, Waivers of confidentiality in merger investigations. Available from: https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/ [Accessed September, 12 2020].

A third form of cooperation under the 2017 Nordic Agreement relates to unannounced inspections. According to the agreement, one competition authority may conduct inspections for another competition authority that is a party to the agreement.

> *Article 5*
>
> *Inspections*
>
> *The competition authority of a Party may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf of and for the account of the competition authority of another Party in order to establish whether there has been an infringement of competition rules governed by the requesting Party. Any exchange or use of the information collected shall be carried out in accordance with Article 3.*
>
> *The officials of the competition authority who are responsible for conducting the inspection as well as those authorized or appointed by them shall exercise their powers in accordance with their national law.*
>
> *If so requested by the competition authority in whose territory the inspection is to be conducted, officials and other accompanying persons authorized by the competition authority requesting the inspection may assist the officials of the authority concerned*[38].

Just like Articles 3 and 4, the power to conduct inspections under Article 5 for another Nordic competition authority covers matters in which national competition law provisions apply exclusively. However, it is relevant to note that, unlike the provisions on information exchange and requests of information, Article 5 only relates to antitrust enforcement. This is an important delineation, as in Finland inspections are possible and have been conducted in merger investigations as well.[39] As a result of the wording of Article 5, the Finnish Competition Authority is not, however, entitled to conduct dawn raids for fellow Nordic authorities in relation to their merger control proceedings.

38 Article 5 of the 2017 Nordic Agreement.

39 Finnish Competition Act No 948/2011, section 35 (Inspections on the business premises of an undertaking). Available from: https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/competition-act/ [Accessed September, 12 2020]. In original language version: Kilpailulaki. Sisällysluettelo 948/2011. Available from: https://finlex.fi/fi/laki/smur/2011/20110948 [Accessed September, 12 2020].

CONCLUSION

The 2017 Nordic Agreement entered into force so recently that the full benefits of the enhanced tools for cooperation are yet to be seen. However, the advantages of the Agreement for the effective enforcement of competition law in the Nordic area are evident. When investigating competition violations in the Nordic area, the adequacy of cooperation within the European Competition Network is uncertain, as the EU legal framework only enables cooperation between EU Member States and with regard to competition restrictions having inter-state trade effects. Cooperation in the area of merger control also falls outside the scope of the cooperation enabled by Regulation 1/2003.

The Nordic Cooperation Agreement provides a legal basis for more extensive collaboration in the day-to-day enforcement work of the Nordic Competition Authorities. This, in the end, contributes to the well-functioning markets to the benefit of consumers.

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pp. 209–228.

COOPERATION IN THE FIELD OF COMPETITION ENFORCEMENT: TAKEAWAYS FOR NATIONAL COMPETITION AUTHORITIES FROM THE PREVAILING INTERNATIONAL LEGAL LANDSCAPE

DAVID VIROS

Abstract:

Competition authorities are liable to cooperate with one another on many levels, through formal and less formal channels, with exchanges ranging from general policy considerations to case-specific intelligence and evidence. Where applicable, the legal bases for such cooperation vary in nature, scope and depth. The state of play as regards cooperation arrangements outside the EU provides a useful backdrop against which to assess the specificities and limitations of enabling instruments at the EU level. In particular, the glaring gap between existing frameworks for cooperation among NCAs in, antitrust and merger control matters does not necessarily reflect the prevailing situation outside the EU, or models advocated in international fora such as the OECD. This underscores the specific historical and political underpinning of the current EU legal framework. As regards the particularly potent instruments for cooperation established under Regulation 1/2003, there is also room for deepening and expanding, as illustrated by the recently adopted Directive 2019/1. Again, non-EU international arrangements can inform and have indeed informed, perhaps surprisingly, the course chosen to improve these cooperation instruments.

Keywords:

International Cooperation, EU, Exchange of information, Antitrust, Merger control

INTRODUCTION

The focus of this contribution is on the legal framework within which competition authorities cooperate, with an emphasis on the ability to exchange information, which is the cornerstone of any meaningful cooperative relationship between enforcers. The approach taken by the author consists in exposing the state of play on the international scene before looking at the specific features of the European Union legal order and distinguishing between the vastly different features of antitrust enforcement on the one hand, and merger control on the other.

The main objective is to evaluate the extent to which existing cooperation mechanisms between national competition authorities within the EU (hereafter, 'NCAs') differ from those found in arrangements struck between or with third countries, as well as from model arrangements espoused among others by the OECD. Where applicable, the question is then whether these discrepancies, especially when the EU legal framework is found lagging behind in terms of the ability given to NCAs to cooperate, can be explained by certain policy choices or objective factors that are specific to the EU.

This contribution begins by touching upon the drivers of international cooperation, before looking at the particular means by which such cooperation is enabled, which depends in turn on the type of information that competition authorities are seeking to exchange. The insights gained with this brief overview are then applied to the evaluation of the existing frameworks governing cooperation between NCAs in the fields of antitrust enforcement and merger control.

WHY DO COMPETITION AUTHORITIES COOPERATE?

Widely shared objectives feed stakeholder support for greater international cooperation among competition authorities. In Europe, other factors pertaining to the organisation and articulation of enforcement at EU and Member State levels are equally decisive in shaping policy choices with regard to cooperation.

The worldwide impetus for international cooperation in the field of competition

Worldwide, the consensus around the need for competition authorities to tackle hard core cartels is firmly established. The OECD's Recommendation of the Council concerning Effective Action against Hard Core Cartels which dates back to 1998 was a significant milestone in that respect, serving as a potent advocacy tool to entrench the view, among stakeholders, that hard core cartels are inherently bad and worthy of punishment. This acknowledgment of the nature of hard core cartels came hand in hand with the equally decisive recognition that "effective action against hard-core cartels is particularly important from an international perspective (because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive) and particularly dependent upon co-operation (because they generally

operate in secret, and relevant evidence may be located in many different countries)."[1] Thus, the need for cooperation between competition authorities in fighting hard core cartels was seen as a function of the particularly egregious nature of cartels, as well as of the evidence-gathering challenges that these pose.

As regards mergers, the justifications set out within the relevant fora for cooperation among cooperation authorities are concerned with mitigating costs and enhancing the efficiency and effectiveness of the merger review procedure to the benefit of all concerned, firms and authorities alike.[2]

Beyond these specific reasons, the broader context, associated with the growth in the number of national competition law regimes and the globalisation of trade, firms and supply chains, is the backdrop against which the imperative of cooperation has grown ever stronger, for fear of otherwise inconsistent or conflicting outcomes reached by competition authorities regarding the same practice or transaction. This need for co-operation is even more pressing when one acknowledges the potential extraterritorial reach of national competition rules, which further compounds the risk of situations arising where coordination between several competition authorities is decisive. Indeed, the introduction[3] and refinements of the 'effects doctrine', especially both sides of the Atlantic, have increased the odds that multiple authorities will be dealing with the same crux of facts under their respective enforcement regimes.[4] It is the same for merger control, where the largest transactions of the past few years have attracted an unparalleled number of filings.[5]

1 Recommendation of the Council concerning effective action against hard core cartels, OECD, 1998

2 See OECD (2005) *Recommendation of the OECD Council on Merger Review*. Available from: http://www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm [Accessed September, 12 2020]. See also recommended practice X (interagency enforcement cooperation) of MWG (2017) ICN Recommended practices for merger notification and review procedures. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [Accessed September, 12, 2020].

3 See Judgement of US Court of Appeals for the 2nd Circuit *United States v. Alcoa* [1945] 148 F.2d 416. Available from: https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/ [Accessed September, 12 2020]: "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."

4 The recent judgment in Intel confirms the «qualified effects» test as being an alternative to the «implementation» test which, if fulfilled, suffices to establish the European Commission's jurisdiction: see Judgment of the Court (Grand Chamber) [2017] *Intel Corp. v European Commission*, C-413/14 P, ECLI:EU:C:2017:632, para. 41-46. Moreover, the judgment has important implications in allowing the Commission to assert jurisdiction in the context of a single and continuous infringement with regard to the 'qualified effects' of the conduct viewed as a whole, irrespective of whether certain components of the single and continuous infringement do not, in and of themselves, qualify as holding such 'qualified effects'. See Ibid, para. 55-57.

5 E.g. *Dow/Dupont* (25 jurisdictions) and *AB InBev/SABMiller* (28 jurisdictions), quoted in: GIDLEY, M., ROGER, A., DEKEYSER, K., CHAPSAL A. (2018) EU-US Antitrust Enforcement : the Atlantic Dialogue. Available from: https://www.concurrences.com/en/conferences/eu-us-antitrust-enforcement-the-atlantic-dialogue-en [Accessed September, 12 2020].

The specific rationales for cooperation in Europe

The rationale for bolstering cooperation internationally is naturally just as applicable, if not more so, with regard to the European Union. The economic integration at the heart of the single market means that potential restrictions to competition that flow from mergers or cartels are bound to exceed national borders and affect several Member States at once.

This being said, the specific legal and institutional make-up of the European Union with regard to competition enforcement provides extra justification for cooperation, and one that appears to have been decisive in bringing about the adoption of a gamut of cooperation tools that are unique in their comprehensiveness. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU][6] both allows and obliges NCAs to apply the provisions of the articles of the Treaty in full. This decision was taken to effect a necessary shift from a centralised system of enforcement under the former regulation with the European Commission at its helm to a decentralised system whereby NCAs would shoulder more of the burden of enforcement alongside the Commission.

While perceived as excessively resource-intensive and cumbersome, the former centralised system remains the relevant benchmark in terms of the consistent and unified enforcement of competition rules throughout the single market. There was a widely shared view in the run-up to the adoption of Regulation 1/2003 that the uniform application of EU law should not be a collateral victim of the effort to relieve the Commission and firms of the burden associated with the previous system. It was also foreseen that, with the decentralisation of the enforcement of EU competition rules, the issue of case allocation within the newly established European Competition Network would come to the fore. Hence, increased cooperation between the Commission and NCAs, on the one hand, and among the NCAs, on the other hand, was necessary both to maintain the level of uniformity and consistency witnessed under the previous, centralised, system, and to allow the smooth and efficient (re-)allocation of cases within the ECN to the authorities best placed to investigate and decide on the facts at hand.

Examining the additional rationales for cooperation within the European Union is important in view of the exceptionally powerful cooperation instruments available to its Members in the field of competition law enforcement. Indeed, delineating these specificities may help understand which factors matter most to goad national policymakers into stepping up the ability of their competition authorities to cooperate. It is interesting, for instance, to contrast the ability of Member States to cooperate with the near-absence of

6 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.04.2004, pp. 18–24.

cooperation tools between Switzerland and its neighbouring countries, especially France and Germany, even though these two countries are Switzerland's largest trading partners.[7]

As far as merger control is concerned, the EU-specific factors are less salient, which probably explains why the legal framework for cooperation is, in turn, less developed. Firstly, there is no single set of substantive rules shared by all Member States, even though the tests applied tend to be similar in practice. Secondly, there is no history of a centralised, EU-wide merger review predating national regimes. Indeed, when the first EU merger regime was introduced with Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[8] at least three Member States had functioning domestic regimes and had gathered, to varying degrees, some experience in the matter.[9] Thirdly, while the review of transactions may very well be transferred to another competition authority than that which would normally have jurisdiction, thus mirroring the mechanisms foreseen under Regulation 1/2003, as well as under the Commission Notice on cooperation within the Network of Competition Authorities,[10] such transfers are envisaged on a purely vertical, top-down[11] or bottom-up,[12] basis. Indeed, the glaring gap of the EU Merger Regulation with regard to horizontal cooperation has already been underscored.[13]

HOW DO COMPETITION AUTHORITIES COOPERATE?

While cooperation objectives and tools can vary greatly from one arrangement to the next, it is clear that incremental changes in the objectives of cooperation are matched by an evolution in the nature of the information being exchanged, enabled by a broad range of legal instruments.

7 However, it was reported in 2018 that Swiss and German authorities were negotiating an agreement to facilitate cooperation between their respective competition authorities, with the agreement to enter into force in 2020/2021. See BUCHS J.-P., Concurrence: projet d'accord avec l'Allemagne. Available from: https://www.bilan.ch/economie/concurrence_projet_d_accord_avec_l_allemagne [Accessed September, 12 2020].

8 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1–12.

9 United Kingdom (1965), Germany (1973) and France (1977).

10 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43-53 (hereafter, 'the Network Notice').

11 See Article 4, para. 4, and Article 9 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1, (EU Merger Regulation). See also Article 9 of Regulation (EEC) 4064/89 of 21 December 1989.

12 See Article 4, para. 5, and Article 22 of Regulation (EC) 139/2004 of 20 January 2004; see also Article 22 of Regulation (EEC) 4064/89 of 21 December 1989.

13 See calls for a 'European Merger Area' and the critique of the 'patchwork' of national merger review regimes in LASSERRE, B. (2015) Navigating Merger Regimes Across the Globe: What are the New Challenges?. *Concurrences Review*, 2, Art. No 72271, pp. 46-53.

From comity to investigative assistance

Comity in its traditional (or negative) understanding has long been a staple of cooperation agreements in the competition field. Abiding by principles of traditional comity entails exercising one's jurisdiction, while having due regard to the impact that the exercise has on the interests of other countries.[14] Specifically, a competition authority that seeks to abide by traditional comity principles will take care to inform its counterparts from another country of its enforcement actions that may affect that country's interests. The OECD has advocated early on[15] for compliance with such principles amongst the national authorities responsible for the enforcement of competition rules.[16] The scope of events triggering a duty to inform is broad and, if strictly adhered to, would entail a significant volume of notifications per year.[17]

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14 As stated by the Supreme Court in its seminal ruling in *Hilton v. Guyot* [1895] US Supreme Court, 159, pp. 113-159. "It is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other", but the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws".

15 Council Recommendation concerning co-operation between Member Countries on restrictive business practices affecting international trade [C(67)53(Final)] of October, 5 1967.

16 See OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade, 27 July 1995, C(95)130/FINAL, para. I.A.1. Available from: https://www.oecd.org/daf/competition/21570317.pdf [Accessed September, 12 2020]:
"When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices."
It is worth noting the particular insistence on advance information, as a means to ensure a fruitful exchange and the possibility for the notifying authorities to take account of the receiving authorities' observations, where applicable.

17 Guiding principles for notifications, exchanges of information, cooperation in investigations and proceedings, consultations and conciliation of anticompetitive practices affecting international trade Appendix to the OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade of July, 27 1995 C(95)130/FINAL. Available from: https://ec.europa.eu/competition/international/multilateral/oecd_recommendation_1995.pdf [Accessed September, 12 2020]:
"3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:
a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;
b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed

Positive comity is a more recent addition to cooperation instruments, with the Agreement of 1991 between the European Communities and the United States being the first of its kind[18] to include provisions whereby either party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory which affects the important interests of the requesting party.[19]

Whether it is traditional or positive comity, it seems that the use of formal instruments underlying the enactment of these principles has not, and has never really been, sustained. One reason lies in the extensive use amongst authorities enjoying a sufficient level of reciprocal trust of informal mechanisms of information and consultation. This, together with potential media coverage of the case at hand, means that the usefulness of formal notifications in keeping authorities abreast of investigations affecting their jurisdiction can be somewhat limited. As regards formal cooperation instruments buttressing positive comity, recourse to these appears even more marginal.[20] One explanation, beyond the prevalence of informal exchanges, may reside in the fact that firms falling victim to such behaviour will have the incentive to complain or otherwise

to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries."

18 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 57. Available from: https://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf [Accessed September, 12 2020].

19 Article V.2 of the Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (OJ L 95, 27.04.1995, p.47) provides:

"If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide."

20 The only known instance of a positive comity request being lodged by one the parties was with respect to the US DOJ's request to investigate several (mostly European) airlines regarding an alleged discrimination against SABRE, an American computerised reservation system. See EC (2000) *Commission acts to prevent discrimination between airline computer reservation systems* [Press release IP/00/835]. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_00_835 [Accessed September, 12 2020].

contribute to the initiation of an investigation, without the need to set in motion a formal request by the competition authority of their own country.[21] Interestingly, notifications retain some value in the field of merger control, in bringing to light transactions that do not require notifications in the addressee's jurisdiction, while still possibly raising competition issues. It should be mentioned that, beyond the scope of authority-to-authority cooperation, comity may continue to act as a self-restraining principle, informing a court's review of jurisdiction over behaviour carried out abroad.[22]

In order to maximise the effectiveness of competition enforcement in the face of multijurisdictional anticompetitive behaviour, it has been recognised for some time that competition authorities should be entrusted with the ability to provide one another with investigatory assistance, as well to exchange information. However, this type of cooperation goes one step further than the implementation of positive comity principles: it falls to be used much more frequently and is likely to be seen as impinging to a greater extent on the requested state's sovereignty. Indeed, by following-up on a request by another state to launch or extend enforcement actions, the requested state remains firmly in control of the proceedings and their outcome, conducted under its own laws and subject to its prioritisation choices. Conversely, by assisting a requesting authority in the latter's own investigation, the requested authority is an accessory to the former's investigation and does not control the conduct of the investigation – its influence, if any, rests only with the conditions it may impose on the use made of the evidence it has provided.

Such a departure from a stricter sovereign-to-sovereign approach may explain why the OECD Recommendation of 1995 on international cooperation in the field of competition couched the possibility of exchanging information in guarded and unspecific terms: [member countries] "should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose."[23] The suggestion that states should adapt their laws and introduce

21 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 59-60.

22 Judgement of US States Court of Appeals (9th Circuit) [1976] *Timberlane Lumber Co. v Bank of America*, 549 F.2d 597. Available from: https://law.resource.org/pub/us/case/reporter/F2/549/549.F2d.597.74-2813.74-2812.74-2354.74-2142.html [Accessed September, 12 2020]. The so-called jurisdictional rule of reason test based on comity principles put forward in this judgment was later rejected by the US Supreme Court in [1993] *Hartford Fire Insurance Co. v California*. *US Supreme Court*, 509, p. 764.

23 Article I.A.3 of the OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade, 27 July 1995, C(95)130/FINAL. However, Article 6 of the appendix to the recommendation is more specific on what such exchange of information might entail in practice, e.g. "employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority". Throughout the appendix remains the proviso that an exchange occurs only "in a manner consistent with the national laws of the countries involved.".

enabling legislation allowing for such an exchange of information is hinted at in the 1995 Recommendation, but only, it seems, through an implicit reference to blocking statutes that hinder the cooperation of foreign undertakings in national proceedings.[24]

The 1998 OECD Council's Recommendation Concerning Effective Action Against Hard Core Cartels is more straightforward in advocating the elimination or reduction of legal obstacles to cooperation through investigative assistance,[25] while encouraging the conclusion of arrangements or the adoption of instruments enabling such cooperation.[26]

Consistent with the gradual build-up of momentum for enacting legal changes, where necessary, to allow for investigatory assistance, the 2005 OECD Best practices for the formal exchange of information between competition authorities in hard core cartel investigations go yet one step further by setting out a blueprint for enabling legislation or international agreements, while also focusing on more operational concerns. The basic principles for cooperation, which have been reflected in national and international legal instruments adopted hereafter, include: (i) discretion to refuse cooperation; (ii) pre-existing safeguards to protect confidential and privileged information that is exchanged against improper disclosure or use; (iii) consideration of the interests of leniency applicants and informants.[27] Before a request for information is lodged, the requested authority should make it known to the requesting authority whether it is under disclosure requirements towards the source of the information.[28] The Best Practices contemplate that such notice to the source of the information should be avoided.[29] The requesting authority should on the other hand provide sufficient information for the requested authority to act upon the request,[30] as well as map out its own laws and practices relevant to the protection of the confidentiality of the information exchanged.[31] A decisive requirement for cooperation under the Best Practices is that, unless other-

24 "Should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests." Ibid.

25 Article I.B.3 of OECD (1998) C(98)35/FINAL: Recommendation of the Council concerning effective action against hard core cartels (adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]):
"Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests."

26 Ibid, Article I.B.2, last indent.

27 OECD (2005) Best practices for the formal exchange of information between competition authorities in hard core cartel investigations, Recital 5. Available from: https://www.oecd.org/competition/cartels/35590548.pdf [Accessed November, 2 2020].

28 Ibid, Article II.A.1.

29 Ibid, Article II.D.

30 Ibid, Article II.A.2.

31 Ibid, Article II.B.1.

wise agreed, "the exchanged information should be used or disclosed by the requesting jurisdiction solely for the purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction."[32]

To conclude this general overview, it is worth noting that the OECD's efforts to encourage the adoption of legal instruments enabling the exchange of confidential information between competition authorities reached their acme in the form of a call on Member States to adopt so-called information gateways in the field of competition taken as a whole. This was done in the context of the 2014 OECD Council's Recommendation Concerning International Co-operation on Competition Investigations and Proceedings. This recommendation is a result of the 2013 OECD/ICN Survey on International Enforcement Co-operation, the findings of which pointed to the lack of a legal basis for the exchange of information between competition authorities as a key structural defect hindering greater international cooperation,[33] one that is only partially addressed by the use of confidentiality waivers.[34]

The ability to share information in relation to the nature of the information being exchanged

International cooperation encompasses a wide variety of actions, which can more often than not be executed without an explicit legal basis. The possibility for authorities to engage in general policy discussions is, of course, uncontroversial. The same can be said of more specific exchanges on particular issues (e.g. a contemplated takeover or recent developments in a given industry) relying solely on publicly available information.

A greyer area, it seems, concerns what is known as agency-internal information, namely information related to proceedings being conducted or contemplated by a competition authority, but which are not necessarily known to the public, e.g. because transparency requirements as regards the various procedural steps vary from jurisdiction to jurisdiction.[35] The notion also covers staff assessments of substantive issues in a given case, from

32 Ibid, Article II.B.2.

33 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, pp. 164 et seq.

34 Ibid, p. 140: "Confidentiality waivers are often relied upon by the large majority of agencies to address, when possible, limitations to the exchange of confidential information. The use of waivers, however, has its limits: agencies cannot mandate waivers, which remain at the discretion of the parties; and parties' incentives to grant waivers differ significantly between merger and cartel cases; in cartel cases their availability largely depends on whether the party has applied for amnesty/leniency. Respondents identified areas of possible improvement to the waiver system, referring to the need to further standardise their scope, and the terms and conditions under which the information may be exchanged."

35 Communication around the conduct of dawn raids is one such example. While a long-established practice for the European Commission, the French competition authority committed to publishing a press release in the wake of a dawn raid relating to a suspected cartel as of 2015: see Autorité de la concurrence (2015) Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français, para. 14. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/cpro_

determining the relevant product and geographic market, to the applicable theory of harm. This kind of exchange is viewed by many authorities as not requiring a prior legal basis.[36] The rationale for this view stems from the fact that such exchanges do not entail confidential information as regards a third party, and that they are conducted on an informal basis.[37] This being said, the confidentiality of investigations is often protected under national laws,[38] and the duty to preserve that confidentiality falls not only on the parties, but also on the civil servants involved or made aware of the investigations in performing their tasks.[39] Moreover, the existence of procedural waivers granting authorities the right to exchange information exclusively in connection with procedural, and not substantive, matters, signals, at least in some jurisdictions, that the communication of agency-internal information does indeed require a legal basis.[40]

Finally, there is a category of information towards which the 'default position', absent any safeguards or framework, is to oppose free exchange among authorities.

In that respect, it is worth distinguishing information whose communication is hindered by virtue of the fact that the communication would impinge on the source's or the concerned party's rights of defence, notably information covered by legal professional privilege or liable to infringe the privilege against self-incrimination. These do not, and indeed should not, be open to use by an authority, and a fortiori to transmission among authorities. However, without a harmonised definition of what such privileges cover, discrepancies between legal systems may raise barriers to cooperation that cannot easily be surmounted.

Conversely, the case for enabling the exchange of confidential information is strong. Obstacles to cooperation stemming from the confidential nature of the information at

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autorite_clemence_revise_0.pdf [Accessed September, 12 2020].

36 See OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 120. See also DEKEYSER, K. (2018) Statements in EU/US Antitrust Enforcement: the Atlantic Dialogue, 26 February 2018. Available from: https://www.concurrences.com/en/page/backend/?id_auteur=39997 [Accessed September, 28 2020]: "Formal agreements are not necessary for international cooperation to be a reality. Many agencies collaborate by sharing so-called agency information, i.e. the timing of their investigations, the orientation of the case, the provisional conclusions, etc."

37 Cartel Working Group. Subgroup 2: Enforcement techniques anti-cartel enforcement manual (2013) Chapter on international cooperation and information sharing, p. 9. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMInternationalCooperationInfosharing.pdf [Accessed September, 12 2020] The scope of informal cooperation overlaps with the scope of agency-internal information. Moreover, by identifying when the need for formal cooperation is triggered, the Manual provides a negative delimitation of the scope of (informal) agency internal information: "Generally speaking, when competition agencies wish to exchange more sensitive information, or wish to use information formally in their proceedings, they must exchange such information through formal avenues."

38 See, e.g. Article L. 463-6 of the French Commercial Code. Ordonnance n° 2010-1307 du 28 octobre 2010 relative à la partie législative du code des transports, JORF 2010 n°0255, item 113.

39 E.g. Under a general duty to preserve professional secrecy.

40 Cartel Working Group. Subgroup 2: Enforcement techniques anti-cartel enforcement manual (2013) Chapter on international cooperation and information sharing, p. 7.

stake mean that the commercial interests of the source or subject of the information are pitted against the public interest of effectively suppressing/preventing anticompetitive behaviour. However, the conciliation of both interests can be achieved through reciprocal arrangements aimed at guaranteeing that the information is only disclosed by the receiving authority in accordance with what the transmitting authority had foreseen and accepted. Of course, the issue goes beyond the existence of effective legal and operational mechanisms that prevent the undesired divulgation of confidential information once it is received, e.g. monitoring the internal dissemination of the information, limiting the scope of addressees to those who actually need to be acquainted with the information, providing for deterrent penalties in the case of unauthorised disclosure, etc. As with the legal privileges referred to in the previous paragraph, the remit of confidential information, as well as the scope and number of instances where disclosure is legally required, vary from one jurisdiction to the next. Ultimately, reciprocal transparency on the authorities' respective legal regimes regarding confidentiality and exceptions thereto appears to be of paramount importance.

This being said, before the authorities discuss the terms of their exchange of (confidential) information, the mere ability to proceed with such an exchange must be secured, which in turn depends on the existence of a relevant legal basis.

The ability to share information in relation to the legal instrument supporting the exchange

To date, it appears that most MoUs, arrangements and agreements entered into between (bilaterally) or among (multilaterally) competition authorities or States do not so much provide for new and hitherto absent powers to exchange information as they seek to encourage cooperation and, in particular, information exchange, within existing laws and regulations. A near-ubiquitous proviso in both MoUs and bilateral arrangements/agreements is that no provision should be construed as requiring a competition authority to act in a manner inconsistent with the laws of its jurisdiction, or requiring changes in those laws. Any contemplated cooperation is generally subject to the laws and regulations in force in the parties' respective jurisdictions.[41]

The exceptions to this are second-generation agreements providing for 'information gateways' enabling the exchange of confidential information between the parties involved without seeking the consent from the source of information, though there are very few of these. For instance, the EU Commission is involved in bilateral relations supported by a bilateral cooperation instrument, in one form or another, with over 30 non-EEA jurisdictions: of these, only five are competition-specific bilateral agree-

41 See OECD (2015) OECD inventory of international co-operation agreements between competition agencies (MoUs). Available from: https://www.oecd.org/competition/inventory-competition-agency-mous.htm [Accessed September, 12 2020]; OECD (2017) Competition co-operation and enforcement inventory of international co-operationmous between competition agencies. Provisions on Existing Law. Available from: https://www.oecd.org/daf/competition/mou-inventory-provisions-on-existing-law.pdf [Accessed September, 12 2020].

ments,[42] and of these five the 2014 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws is the only second-generation agreement. Outside Europe, the 1999 Australia-US Agreement on mutual antitrust enforcement assistance also provides for such potent mechanisms of information exchange. Conditions set out for the information exchange reflect the different objectives pursued by the two latter agreements. While the Australia-US Agreement contemplates investigative assistance being provided through the exchange of information compulsorily obtained at the request of the other party, the EU-Switzerland Agreement only foresees the exchange of information already in the possession of either party, in the context of parallel proceedings concerning the same or related conduct or transaction.[43]

If one puts aside the specific mechanisms for information exchange that exist within the ECN, it appears that the more widespread legal bases for the formal exchange of confidential information for use as evidence are either ad hoc waivers granted by the source of the information,[44] or national enabling provisions.[45] With regard to the latter, an analysis of the British and French 'information gateway' provisions points to the need to have due regard to such common factors as (i) reciprocity, (ii) equivalent safeguards against disclosure in the receiving jurisdiction and (iii) overriding public interests that oppose the exchange.[46] In addition, these enabling national provisions impose, or at least contemplate, entering into bilateral arrangements with potential receiving authorities in order to further frame future information exchanges.[47]

42 LAITENBERGER, J. (2017) Closer Together: the Case for International Cooperation, *Concurrences Review Event*, September, 14 2017. Available from: https://ec.europa.eu/competition/speeches/text/sp2017_12_en.pdf [Accessed September, 12 2020].

43 Article 7, para. 4, a) of the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. Available from: https://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf [Accessed September, 12 2020].

44 Waivers are mentioned as the primary legal basis for international cooperation in general in the OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, 2013, p. 13

45 Six respondents to the *OECD/ICN Survey on International Enforcement Cooperation* indicated, in 2013, that their national framework included such enabling legislation serving as an 'information gateway'. One such legal basis (Part 9 of the UK Enterprise Act 2002) was used to exchange information between the OFT and the ACCC in the Marine hose case.

46 For the UK, see Section 243 of the Enterprise Act 2002, UK Public General Acts c.40; for France, see Article L. 462-9 of the French Commercial Code: Ordonnance n°2000-912 du 18 septembre 2000 relative à la partie Législative du code de commerce. Available from: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069441?etatTexte=VIGUEUR [Accessed September, 12 2020].

47 See Article L. 462-9 of the French Commercial Code.

THE STATE OF PLAY OF COOPERATION IN EUROPE: LESSONS TO BE LEARNT FROM EXISTING FRAMEWORKS FOR COOPERATION WITH THIRD COUNTRIES

Let us now examine the existing frameworks for cooperation amongst NCAs with respect to antitrust enforcement and merger control against the international context we have just outlined.

Antitrust enforcement: are any gaps left?

Article 22 of Regulation 1/2003 provides a legal basis for the reciprocal provision of investigative assistance between NCAs, as well as between the latter and the Commission. All 'fact-finding measures' are concerned, i.e. interviews, inspections and written requests for information. Article 12 of Regulation 1/2003 acts, in turn, as a legal conduit through which information collected through these fact-finding measures can be transmitted back to the requesting authority. In addition, Article 12 allows for the exchange of information already held by the requested authority. Exchanges can cover 'any matter of fact or of law' and include confidential information.[48] It follows that the scope of Article 12 is far-reaching: it covers and legally secures the exchange of agency internal information as well as confidential information.

Article 12 is, in essence, an 'information gateway' provision that reflects the specific nature of the EU legal order, grounded in principles of mutual recognition and trust. While the exchange of information between NCAs remains a faculty and not an obligation, additional conditions present in corresponding national enabling legislations or model frameworks such as those espoused by the OECD, pertaining in particular to reciprocity, confidentiality safeguards[49] and the absence of overriding public interests, are not to be found. On the other hand, Article 12 foresees restrictions in relation to the use as evidence of information exchanged when such use is intended to support the imposition of a sanction on an individual:[50] these restrictions are in keeping with the regard generally given, in the context of 'information gateways', to the nature of the proceedings being conducted by the receiving authority, and whether defence rights are protected in equal measure in the receiving and transmitting jurisdictions.[51] Finally, there is at least one aspect *vis-à-vis* which the EU legislator has taken a somewhat more restrictive approach. Article 12 provides that "information exchanged shall only be used in evidence for the purpose of applying Article [101] or Article [102] of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority."

48 Article 12, para. 1 of Regulation 1/2003 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1-25.

49 Article 28 of Regulation 1/2003 provides for a common minimum standard in terms of protection of confidential information.

50 Article 12, para. 3 of Regulation 1/2003.

51 See Section 243 (6) (b) of the Enterprise Act 2002

While international cooperation agreements mention, as a rule, the possibility for the transmitting authority to spell out restrictions on the receiving authority's use of the information thus transmitted, Article 12 is rather unique in pegging *ex ante* the use of the information received to a specific legal and substantive application. The legal and practical significance of such a limitation to the scope of cooperation is not to be overlooked, and is at least twofold.

Firstly, Article 12 allows for cooperation only in the event that Articles 101 and/or 102 TFEU apply, and does not therefore foresee cooperation with the sole[52] view of applying the equivalent national competition rules. It is true that the extensive understanding of the concept of effect on trade in the context of Articles 101 and 102 TFEU makes it rather unlikely that an investigation requiring information located in another Member State would concern behaviour falling outside the remit of Articles 101 and/or 102 TFEU. This being said, such a condition incentivises firms to argue that EU rules are not applicable in national proceedings, in order to exclude as inadmissible the evidence obtained pursuant to Article 12.[53]

Secondly, the requirement that the information should only be used in evidence 'in respect of the subject-matter for which it was collected' raises specific issues in situations in which the information was not collected in the first place, as a result of a request for investigative assistance under Article 22 of Regulation 1/2003. Indeed, if the transmitting authority is to provide another NCA with information it has already collected pursuant to its own procedure for the application of Articles 101 and/or 102 TFEU, both NCAs must satisfy themselves that their respective procedures have the same 'subject-matter'. This, in turn, begs the question of what is covered by the notion of 'subject-matter'. It seems this notion is to be construed in a strict manner, and derives from the case-law of the Court of Justice prohibiting the use by the Commission of incidental evidence, i.e. evidence in relation to conduct other than that which is the object of the investigtions and

52 Information exchange to further an investigation based on the concurrent application of EU and national rules is allowed under Article 12, para. 2 of Regulation 1/2003: "where national competition law is applied in the same case and in parallel to (EU) competition law, and does not lead to a different outcome, information exchanged under this article may also be used for the application of national competition law."

53 See the French NCA's Decision 08-D-30 of 4 December 2008 (Le Conseil de la concurrence, Décision n° 08-D-30 du 4 décembre 2008 relative à des pratiques mises en œuvre par les sociétés des Pétroles Shell, Esso SAF, Chevron Global Aviation, Total Outre Mer et Total Réunion. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//08d30.pdf [Accessed September, 12 2020]) concerning a cartel in the tendering of Air France's aviation fuel supplies in the Reunion Island. A large portion of the supporting documentary evidence was held at the premises of the condemned oil companies' subsidiaries in the UK, and obtained through cooperation with the British OFT on the basis of Article 12 Regulation 1/2003. On appeal, the parties argued that there was no effect on trade. In a ruling of 24 November 2009, the Court of Appeal allowed the appeal on the basis that there was no effect on trade, before being overturned by the Civil Supreme Court (Cour de cassation).

obtained 'incidentally' during the investigations.[54] This is confirmed by the practice of the Commission, which appears to equate the same subject-matter with same infringement.[55]

All in all, the breadth of the cooperation tools offered to ECN members by Regulation 1/2003 is such that the Commission did not suggest strengthening these as part of its ECN+ initiative. The reinforcement of cooperation was only sought indirectly, by seeking to reduce divergence in national regimes, which dampen incentives to cooperate in the first place.[56] However, this position evolved, to some extent, between the publication of its 2014 Communication and its proposal for a directive three years later, by contemplating some moderate changes to the existing legal framework for cooperation among ECN members. These reflect, in particular, stakeholder contributions made in the meantime, as well as fruitful discussions carried out within the ECN.

On the one hand, the proposal extends the scope for cooperation to the recovery of fines and the notification of procedural acts in another Member State.[57] On the other hand, it completes the existing legal basis for investigative assistance through inspections, by foreseeing that the assisting NCA can allow representatives of the requesting NCA

54 See reference made to para. 17-20 of the Court of Justice's judgment of 17 October 1989 in case 85/87 in footnote 10 to para. 28, b) of the Commission Notice on cooperation within the Network of Competition Authorities OJ 2004, C 101, 27.04.2004, p. 43.

55 See para. 353 of the French NCA's Decision 11-D-17 of 8 December 2011 (Autorité de la concurrence, Décision n°11-D-17 du 8 décembre 2011relative à des pratiques mises en œuvre dans le secteur des lessives. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//11d17.pdf [Accessed September, 12 2020]). The Commission is quoted a refusing the transmission to the French NCA of evidence held in its file in case COMP/39579, in relation to the same sector, for the reason that 'it concerns an infringement other than that examined in the French case.'

56 See EC (2014) Communication from the Commission to the European Parliament and the Council: *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* {SWD(2014) 230}_{SWD(2014) 231} (COM(2014)453). Available from: https://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020]; Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (COM(2017) 142 final) {SWD(2017) 114}{SWD(2017) 115} {SWD(2017) 116}, p. 7. Available from: https://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf [Accessed September, 12 2020]:
"One of the main elements of Regulation (EC) No 1/2003 is that it provides for cooperation mechanisms that allow NCAs to investigate alleged infringements beyond the borders of their Member State. [...] this mechanism does not work well if not all NCAs have effective powers to carry out inspections or to request information".
See also Ibid, recital 6:
"Gaps and limitations in NCAs' tools and guarantees undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU which is designed to work as a cohesive whole based on close cooperation within the European Competition Network. This system depends on authorities being able to rely on each other to carry out fact-finding measures on each other's behalf. However, it does not work well when there are still NCAs that do not have adequate fact-finding tools."

57 Ibid, Articles 24 and 25.

to participate and actively assist in the conduct of the concerned inspections.[58] Among the additions made to the content of the directive during the legislative procedure is a specific reference to interviews alongside inspections. There is also a new paragraph extending the application of existing investigative assistance mechanisms under Article 22 of Regulation 1/2003 to procedural infringements, e.g. a failure to comply with a request for information or opposition to an inspection.[59] The latter amendment should be seen in the context of the growing importance of procedural infringements in the overall enforcement strategy pursued by competition authorities, as illustrated by the eye-catching fines imposed in recent years, with respect to both antitrust and merger procedures.[60]

Interestingly, the inclusion of an enabling legislation for cooperation amongst NCAs with regard to the notification of procedural acts mirrors a similar arrangement contained in the exchange of notes between the Mission of Switzerland to the EU and the Commission of 17 May 2013, adopted alongside the EU-Switzerland Agreement.[61] This is justified in view of the objectives underlying the arrangement found in the EU-Swiss context, which may also be relevant to an EU-internal context: to overcome a national legal hurdle to direct notification (in particular 'blocking statutes') and to ensure an undisputable starting point for the calculation of key time limits (e.g. for replying to an SO or lodging an appeal against a decision issuing a fine). Moreover, the Commission's practice of notifying such acts to EU subsidiaries of third country firms means that, in practice, the situation contemplated in the exchange of notes is quite limited, i.e. a situation in which a firm has no subsidiary in any Member State. Conversely, the absence of such a practice or possibility in (most) Member States may make this new cooperation tool for the notification of procedural particularly relevant for NCAs.

58 Ibid, Article 23.

59 See Article 24, para. 1 and 2 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, 14.09.2019, p. 3.

60 See Commission Decisions of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003 for a failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 [Case COMP/C-3/39.530 – *Microsoft* (tying). Available from: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf [Accessed September, 12 2020]. See also Commission decision of 17 May 2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 –*Facebook / Whatsapp*. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf [Accessed September, 12 2020].

61 See Swiss Confederation, Federal Department of Economic Affairs, Education and Research EAER (2014) Note Competition: Questionnaires sent by the European Commission to Swiss companies. Available from: https://www.weko.admin.ch/dam/weko/en/dokumente/2014/09/questionnaires_sentbytheeuropeancommissiontoswisscompanies.pdf.download.pdf/questionnaires_sentbytheeuropeancommissiontoswisscompanies.pdf [Accessed September, 12 2020].

Merger control: is there a case for deeper cooperation instruments?

To date, the NCAs and the Commission have agreed on a series of non-binding frameworks providing guiding principles for cooperation in specific situations, such as upward referrals[62] and multijurisdictional filings.[63] On the other hand, there are no legally binding norms at EU level enabling the NCAs to exchange information, let alone provide investigative assistance to each other in the context of a merger review. Provisions of the kind contained in the EU Merger Regulation only relate to unilateral, vertical, cooperation, whereby an NCA assists the Commission at the latter's request.[64] A specific legal basis also exists to allow for the Commission to send case-related material to the NCAs, in connection with an obligation to "carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States."[65]

The 2011 Best Practices drawn up by the EU Merger Working Group reflect this state of affairs. They reaffirm the role of the ECA notices, introduced in 2001[66] as the sole systematic information mechanism on which the NCAs rely when cooperating in multijurisdictional filings. They foresee cooperation in certain limited instances where comparable jurisdictional or substantive issues arise in the event of a merger being reviewed by two or more competent NCAs.[67] The nature of the cooperation is akin to that foreseen under 'traditional' competition-specific international agreements, i.e. the exchange of procedural/agency-internal information to facilitate coordination and the exchange of confidential information subject to the grant of a waiver by the concerned parties.

Without the widespread existence of enabling legislation at Member State level, which would make up for the absence of 'information gateways' at EU level,[68] the prevailing legal situation with regard to cooperation between NCAs in the field of merger control thus denotes a level of ambition that stands below several existing international bilateral agreements, among which the EU-Switzerland agreement of 2014 and the Nordic Cooperation Agreement of 2019. It also marks a level of integration somewhat inferior

62 ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EU Merger Regulation.

63 ECA procedures guide on the exchange of information between members on multijurisdictional mergers (2001) and MWG (2011) Best Practices on Cooperation between EU National Competition Authorities in Merger Review. Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed September, 12 2020].

64 See Article 11, par. 6, Article 12 and Article 13, para. 5 of the EU Merger Regulation.

65 Article 20, para. 1 and 2 of the EU Merger Regulation.

66 Information notice sent out to all ECA members with regard to a merger case giving rise to a multifiling in Europe.

67 Para. 3.2 of MWG (2011) Best Practices on Cooperation between EU National Competition Authorities in Merger Review.

68 The 'information gateway' provided for under Article L. 462-9 of the French Commercial Code also applies in the merger control context. To the best of the author's knowledge, this is the exception rather than the rule amongst Member States.

to that advocated by the OECD's 2014 Recommendation concerning international cooperation on competition investigations and proceedings.

Some have already levelled criticism at the dearth of EU legal basis for horizontal cooperation in the field of merger control, calling for the introduction of cooperation tools akin to those that already exist for antitrust enforcement.[69] On the other hand, this lacunae was barely touched upon by the Commission's White Paper of 2014. While the more general issue of substantive convergence and consistent outcomes between NCAs in the context of multijurisdictional filings was mentioned,[70] the lack of an EU-wide legal basis for NCAs to exchange information was not specifically addressed. However, an indirect and partial response came in the form of a proposal to formalise the ECA notice system and to link it to the Article 22 referral mechanism.[71] DG COMP's public consultation on the 'evaluation of procedural and jurisdictional aspects of EU merger control' conducted at the end of 2016 did not mention any new proposals relevant to NCA cooperation.

At this stage it seems that, notwithstanding a clear international trend towards adopting, or at least advocating the establishment of, 'information gateways', including in the field of merger control, at EU level the momentum for securing the transmission of (confidential) information irrespective of the sources' consent in the field of merger control is lacking. This is notwithstanding the volume of multijurisdictional filings made every year to Member State authorities, which tends to underscore the potential expediency of such a cooperation tool.[72] While there is prima facie a valid argument to be made as regards the need to safeguard the confidentiality of data and documents submitted by the concerned undertakings and exchanged without their consent, the fact that such cooperation mechanisms already exist, not only in the antitrust field under Regulation 1/2003, but also in the merger field under Article 20 of the EU Merger Regulation, means that there is already a prevailing consensus that safeguards are sufficiently in place throughout the EU. As for the view that the parties are always forthcoming in the provision of waivers in merger cases, thus negating the need to exchange information without their consent, it glosses over the fact that the authorities' and the parties' interests may not necessarily be aligned. For instance, the parties may be tempted to delay the exchange of information between two authorities when by doing so they can benefit from the misalignment of the concerned authorities' procedural timetables.

69 French Competition Authority (2013) Making merger control simpler and more consistent in Europe – a 'win-win' agenda in support of competitiveness. Report to the Ministry for Economy and Finance– 16 December 2013. Available from: https://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf [Accessed September, 12 2020].

70 EC (2014) White Paper: Towards more effective EU merger control (COM/2014/0449 final), para. 6-22. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52014DC0449 [Accessed September, 12 2020].

71 Ibid., para. 71-73.

72 The French Competition Authority's report of 16 December 2013 provides estimates of more than 200 cases per year, based on ECA notices received.

Moreover, if competition authorities decide to step up the enforcement of procedural infringements in the context of a merger review, especially with regard to incomplete or misleading replies to requests for information,[73] then the information exchanged with their counterparts may lay bare any gaps in the filing parties' replies, and thus provide initial grounds for an infringement procedure. Recoiling at such an outcome, firms may grow more reluctant to grant waivers in the first place.

CONCLUSION

When it comes to the ability of NCAs to cooperate, it seems that the discrepancies witnessed between antitrust enforcement and merger control are, to a significant extent, by-products of the enforcement models retained for each field. Whereas nearly as early as the entry into force of the founding treaties, antitrust enforcement operated on a centralised, uniform, EU-wide basis, merger control functions were assumed by the Commission at a stage at which some Member States were accustomed to reviewing mergers, and were therefore loath to hand over, even if only partially, jurisdiction thereupon.

It is suggested that, as a result, the imperative of maintaining the benefits of the centralised enforcement of Articles 101 and 102 TFEU, while devolving its implementation in part to NCAs, was a key factor in establishing an enabling environment for cooperation among NCAs under Regulation 1/2003. Conversely, such a historic imperative does not exist in the field of merger control, even if maintaining consistency between the NCAs' approaches is naturally seen as desirable. As already mentioned above, the EU Merger Regulation contains a form of 'information gateway', but only in order to enable the Commission to liaise with NCAs in relation to the cases it is dealing with.

A brief overview of the non-EU legal context shows that 'information gateways' in the field of merger control have been included in several bilateral and regional agreements, as well in certain national laws. If and when a reform of the EU Merger Regulation actually takes place, it is submitted that policymakers should take stock of the application of these agreements and laws in order to ascertain whether these, rather than a system of ad hoc waivers, present the greatest benefit to NCAs cooperating in the review of a multijurisdictional merger.

73 See, e.g. Commission decision of 17 May 2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 –*Facebook / Whatsapp*.

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pp. 229–250.

Amendments to the Competition framework during Troika times in Portugal: A *soft tool* for enhancing enforcement a decade before ECN+

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Abstract:

On 21 May 2021, Portugal's XXII Government submitted to Parliament a proposal of a law implementing the ECN+ Directive. Ten years earlier, the Portuguese authorities agreed on an Economic Adjustment Programme for Portugal with international creditors in the context of the formers' request for financial assistance to the country. These creditors included the European Commission, which was entitled to 'continued advice and guidance' on the 'ambitious agenda for structural reforms', including the competition framework.

In 2014, paving the way for what would later be the 2017 proposal of the ECN+ Directive, the Commission qualified Economic Adjustment Programmes as one of the *soft tools* to achieve the aims of strengthening the powers of enforcement of the national competition authorities concerning EU competition rules, as well as increasing their independence and resources.

This paper seeks to systematise the indications of the impact of the Economic Adjustment Programme for Portugal on the anticipation of the reform of the Competition framework in line with the aims and goals of the ECN+ Directive. In my view, the acuteness of this reflection goes beyond the ongoing implementation of the ECN+ Directive; it may also be useful for the future amendment of the Competition Act and the Portuguese Competition Authority's powers beyond the ECN+ Directive.

Keywords:
Troika, PAEF, competition law, ECN+ Directive, European Commission, Portugal, Portuguese Competition, competition enforcement, competition framework, Commission's powers, ECN, Portuguese Competition Authority, European Commission's policy, ECN, soft tools, Economic Adjustment Programmes, Assistance Programmes

Introduction

On 21 May 2021, Portugal's XXII Government[1] submitted to Parliament a proposal of Law No 99/XIV/2.ª (the Proposal of Law).[2] This is intended to implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, empowering the competition authorities of the Member States to be more effective enforcers and ensuring the proper functioning of the internal market (the ECN+ Directive).[3]

Ironically, the government's Proposal of Law came in the same month that, back in 2011, the agreement on the Economic Adjustment Programme (the Programme) was being negotiated between the Portuguese authorities and officials from the European Commission (Commission), the European Central Bank and the International Monetary Fund (together the international creditors, also commonly referred to as the Troika). This negotiation followed Portugal's request for financial assistance in 7 April 2011, made towards the European Union, the eurozone countries and the IMF. The terms and conditions of the financial assistance package were agreed by the Eurogroup and the EU's Council of Economics and Finance Ministers on 17 May 2011.[4] The financial package covered Portugal's financing needs of up to €78 billion.[5]

1 This government was chosen by the president of the Portuguese Republic, given the results of the legislative elections that took place on 6 October 2019 and its support by the majority in Parliament, composed by the Socialist Party, the Communist Party and Bloco de Esquerda.

2 Proposta de Lei 99/XIV/2 Transpõe a Diretiva (UE) 2019/1, que visa atribuir às autoridades da concorrência dos Estados-Membros competência para aplicarem a lei de forma mais eficaz e garantir o bom funcionamento do mercado interno. Available from: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=110842 [Accessed June, 19 2021].

3 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33.

4 The Minister of State and Finance of the XVIII Government participated in this ECOFIN meeting. EC (2011), *3088th Council meeting Economic and Financial Affairs Brussels, 17 May 2011.* Available from*:* https://ec.europa.eu/commission/presscorner/detail/en/PRES_11_131 [Accessed June, 19 2021]. For more, see: EC (2011-2021), *Financial assistance to Portugal*. Available from*:* https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-portugal_en [Accessed June, 19 2021] and Banco de Portugal (2014), The Financial Assistance Programme. Available from*:* https://www.bportugal.pt/en/page/efap-and-post-programme-surveillance [Accessed June, 19 2021].

5 The EU, through the use of EFSM and EFSF, would provide up to €26 bn each to be disbursed over three years and further support would be made available through the IMF for up to €26 bn.

The Economic Adjustment Programme is provided for in the Letters of Intent of the Portuguese authorities[6] addressed to the international creditors, and their enclosures comprising the Memorandum of Understanding on Specific Economic Policy Conditionality (Memorandum of Understanding), the Memorandum of Economic and Financial Policies and the Technical Memorandum of Understanding (together the memoranda of understanding).

The Programme notably provides for "deep and frontloaded structural reforms to boost potential growth, create jobs, and improve competitiveness"[7] and includes a title on the Competition Framework. Under the latter title, the Portuguese authorities expressly commit that

> *State involvement in private sector activities will be reduced, and the independence of sectoral regulators reinforced. We will eliminate "golden shares" and all other special rights established by law or in the statutes of publicly quoted companies that give special rights to the state* [...] *We will take bold steps to address excessive profits and reduce the scope for rent-seeking behavior. We will (i) submit to Parliament a law revising the Competition Law, clearly separating rules on competition enforcement procedures and penal procedures, and (ii) establish a new Court on Competition Matters and introduce greater specialization of judicial functions*[8].

In 2014, the Commission concluded its analysis of the first decade of Council Regulation 1/2003 (Regulation 1/2003)[9] being in force. The analysis was from the perspective of the National Competition Authorities, given that the regulation decentralises the

6 The Letters of Intent were signed by the Minister of State and Finance, Fernando Teixeira dos Santos, and by the Governor of the Bank of Portugal, Carlos Costa. On 5 May 2011, the Council of Ministers of the XVIII Government – supported in Parliament by the Socialist Party – approved a resolution according to which:
(1) having concluded the negotiations with the three international creditors about the financial assistance to Portugal, considers that the conditions are met so as to a) approve the adjustment programme contained in the Memorandum of Understanding on Specific Economic Policy Conditionality (Memorando de Entendimento and Memorando de Políticas Económicas e Financeiras) and b) approve the draft instruments that formalise the financial assistance to Portugal, and
(2) delegate to the Minister of State and Finance the authority, on behalf of the Government and in representation of the Portuguese Republic, to agree on the adjustment programme and the financing contracts, as well as any other instruments necessary to implement the financial assistance to which the Resolution refers to, pursuant to its approval by the Council of the European Union (ECOFIN) on 17 May 2011. Resolution No 8/2011 was published in the DR, II Series, No 95, 17.05.2011, p. 21164.

7 See for all, the Council's Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal (Council Decision), OJ L 159, 17.06.2011, p. 88. See Recital 3.

8 Under the title "Competition Framework", see paragraphs 40 and 41 of the MEFP (in its original version).

9 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, pp. 1–25.

application of EU competition law by empowering NCAs to apply it alongside the Commission. In this line, the Commission highlights that,

> *the NCAs have to ensure procedural fairness in accordance with national law and practices, including fundamental rights standards laid down in their national law, while respecting the requirements flowing from EU law, including the Charter on Fundamental Rights, as well as the ECHR. All this may have an impact on the institutional structures and the decision-making processes of NCAs which are not harmonised by EU law.*[10]

Thus the main aim of the ECN+ Directive is to ensure that all NCAs will have enforcement powers that mirror those held by the Commission under Regulation 1/2003, and thus create a level playing field in terms of the enforcement of EU competition rules. It also strengthens the ECN, created by the Commission in 2004 when Regulation 1/2003 entered into force, and constituting a forum for discussion and cooperation gathering of the Commission and the NCAs.[11] This means that the implementation of the ECN+ Directive may entail very significant changes in several Member States, depending on the existing frameworks at a national level.

Going back to 2011, it is particularly relevant to acknowledge that the implementation of Portugal's economic adjustment programme was paramount to the smoothness of the disbursements for the requested financial assistance. More precisely, after the initial disbursements in the first weeks after it was agreed, the following weeks were subject to Portugal's "requirements and to quarterly reviews by the Commission in cooperation with the IMF and in liaison with the European Central Bank".[12] To this should be added the 2012 ruling of the Portuguese Constitutional Court (the Constitutional Court), which expressly confirmed the binding nature of the memoranda of understanding sent

10 EC (2014) Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues accompanying the document 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 final} {SWD(2014) 230 final}. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:52014SC0231&from=EN [Accessed September, 12 2020]. Footnote 317 in the excerpt transcribed above states as follows: "See the jurisprudence regarding Article 51(1) of the Charter of Fundamental Rights of the European Union according to which the Member States are required to comply with the provisions of the Charter "when they are implementing Union law". See in particular the judgment of 26 February 2013 in Case C-617/10 *Åklageren v Hans Åkerberg* Fransson, paragraphs 16-29 and the judgment of 6 March 2014 in Case C-206/13 Siragusa v Regione Sicilia-Soprintendenza Beni Culturali e Ambientali di Palermo".

11 The basic foundations of the functioning of the ECN are laid out in the Commission Notice on cooperation within the Network of Competition Authorities and in the Joint Statement of the Council (of the European Union) and the Commission on the Functioning of the Network of Competition Authorities. More information: EC, European Competition Network. Overview > More details. Available from: https://ec.europa.eu/competition/ecn/more_details.html [Accessed June, 19 2021].

12 See the Council's Implementing Decision 2011/344/EU.

by the Portuguese authorities to the Troika, to the extent they are based on legal instruments that are "the founding Treaties of the international institutions participating in the same [memoranda of understanding], and to which Portugal is an integrant part – of International Law and European Union Law, as recognised first and foremost by Article 8(2) of the Portuguese Constitution". The Constitutional Court thus concluded that "the implementation by the Portuguese authorities of the measures contained in the memoranda of understanding is the condition for the staged execution of the financing agreements entered into with the same entities".[13]

Among the Commission's roles was the aim to:

> *"provide continued advice and guidance on* [...] *structural reforms", "in order to ensure the smooth implementation of the Programme's conditionality, and to help to correct imbalances in a sustainable way". "Within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, it* [the Commission] *shall periodically review the effectiveness and economic and social impact of the agreed measures, and shall recommend necessary corrections with a view to enhancing growth and job creation, securing the necessary fiscal consolidation and minimising harmful social impacts, particularly regarding the most vulnerable members of Portuguese society.*[14]

It should be noted that, irrespective of the merits of the Portuguese Competition Authority concerning the authorship for earlier calls for action,[15] it seems undisputed that competition culture in Portugal until 2011 was not such as to show receptiveness to the PCA's call for substantially increased investigatory powers and further alignment with EU rules. This paper addresses in particular the extent to which the 2011/2014 Economic Adjustment Programme to Portugal and the structural reforms agreed with the Troika are precursors to the ECN+'s ultimate purpose and goals. In fact, in 2014 the impact of

13 Non-official translation of the Constitutional Court's plenary judgment in case 353/2012, DR Série I, No 140, 20.07.2012. A group of members of the Parliament had lodged an action for the declaration *erga omnes* of the unconstitutionality of given reductions of remunerations provided in the 2012 Budget Law in the context of the implementation of the Economic Adjustment Programme. The same action was partially upheld.

14 See Article 3(9) of the Council's Implementing Decision 2011/344/EU.

15 See M. Moura e Silva's paper seeking "to demonstrate that although Law No 19/2012 was to be portrayed as fulfilling a commitment to the Troika, it emerged from an initiative of the Portuguese Competition Authority, long before the economic adjustment programme addressed changes in the national competition law and enforcement". See MOURA E SILVA, M. (2014) As Práticas Restritivas Da Concorrência Na Lei N.º 19/2012: Novos Desenvolvimentos (Restrictive Practices Under the Portuguese Competition Law No. 19/2012: New Developments) (20 March 2014). *Revista do Ministério Público*, 35(137), p. 9. Available from: https://ssrn.com/abstract=2468752 [Accessed June, 19 2021]. We also very briefly addressed this background in ROSADO DA FONSECA, M (2020) As diligências de busca e apreensão em processos sancionatórios: contextualização da sua evolução a partir da Lei da Concorrência. In: de Sousa Mendes, P., Neves da Costa, J., Geraldo, T. (eds.) *Novos Estudos sobre Law Enforcement, Compliance e Direito Penal*. Coimbra: Almedina, pp. 443-470.

the same Programme was positively mentioned by the Commission when comparing the evolution that occurred in the Member States under assistance (programme countries) with the remaining Member States, in the context of its justification for an approach beyond the use of "soft tools", later presented as proposal for the ECN+ Directive.[16]

It should be noted that the Economic Adjustment Programme did not formally interfere with the rights and obligations of Portugal as a Member State of the EU under the Treaties.[17] In addition, there is no public information about any interruption or suspension of any previous interaction between the EU institutions and the national authorities, such as the one taking place within the ECN between the Commission and the PCA.

In this paper, we briefly mention the four axes comprising the structural reform on the Competition framework in Portugal, and in particular the amendment of the competition law, while referring further to the extensive doctrine on the topic.[18]

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16 Par. 33 {COM(2014) 453 final} {SWD(2014) 230 final} "In the absence of any explicit requirements concerning NCAs in Regulation 1/2003 or, in the case of an integrated authority, any extended application of sector specific requirements, there are no EU law provisions that explicitly oblige Member States to ensure the independence of the NCAs and to require the grant of sufficient resources. Nonetheless, the competition enforcement regimes in several Member States have been strengthened in the framework of the Memorandum of Understanding of Specific Economic Policy Conditionality with the Member States benefiting from a financial-assistance programme (known as 'Programme countries')".

17 It is relevant to wonder whether in May 2011, the Portuguese Government's commitment to "eliminate 'golden shares' and all other special rights established by law or in the statutes of publicly quoted companies that give special rights to the state" (structural benchmark, end July 2011) was not beyond what would be required from a Member State under the EU Treaties and the European courts' jurisprudence as regards this topic. Back in June 2009, the Commission had brought an action under Art. 226 on the TFEU for failure to fulfil obligations against Portugal before the CJEU. The same action sought the declaration from the CJEU that, by maintaining special rights for the Portuguese State and for other public entities or public sector bodies in GALP Energia SGPS SA, allocated in connection with privileged ('golden') shares held by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Art. 43 and 56 TFEU. Judgment of the CJEU (First Chamber) [2011] *European Commission v Portuguese Republic,* C-212/09, ECLI:EU:C:2011:717. It was rendered only on 10 November.

18 See for all, MOURA E SILVA, M. (2018) *Direito da Concorrência*, Lisboa: Associação Académica da Faculdade de Direito de Lisboa; BOTELHO MONIZ, C. (2016), *Lei da Concorrência anotada - Lei Nº 19/2012, de 8 de Maio*. Coimbra: Almedina; LOPES PORTO, M., DA CRUZ VILAÇA, J.L., CUNHA, C., GORJÃO-HENRIQUES, M., ANASTÁCIO, G. (eds.) (2017) *Lei da Concorrência – Comentário Conimbricense*. Coimbra: Almedina; MOURA E SILVA, M. (2013) *Direito sancionatório das autoridades de Regulação, Supervisão e defesa da Concorrência: A caminho de um Direito Comum*?. Available from: https://institutoeuropeu.eu/images/stories/Apresentao_Prof._Doutor_Miguel_Moura_e_Silva.pdf [Accessed June, 19 2021]; SOUSA MENDES DE, P. (2018) Poderes de busca e inspeção: O caso especial dos dawn raids. In: Amado Gomes, C., Neves, A.F., *Estudos sobre a atividade inspetiva*. Lisboa: AAFDL Editora, p. 149 ff.; COSTEIRA, M.J. (2018) Direito da Concorrência: O controlo jurisdicional das decisões proferidas em processos sancionatórios. *Revista de Concorrência e Regulação* 36, pp. 19-38.

The Portuguese Republic is a "democratic state based on the rule of law [...] with a view to achieving economic, social [...] democracy".[19] The fundamental tasks of the state include "to guarantee the fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law".[20] Among the fundamental principles set out in the organisation of society and the economy are, "The subordination of economic power to democratic political power" and the "Freedom of entrepreneurial initiative and organisation, within the overall framework of a mixed economy".[21] In the economic and social field, the Portuguese State is under a priority duty, notably, "to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest".[22]

Without prejudice to the relevance of the analysis of the early times of competition law in Portugal, we focus hereunder on the reform of the competition framework concomitant with the preparatory works and the enactment of Regulation 1/2003. In brief, building on the work undertaken by an *ad hoc* commission that took into consideration the preparatory works of Regulation 1/2003, the XV Government[23] in 2003:

- created a Competition Authority (PCA)[24] seen as "the first step in the necessary reform of the competition legal framework in Portugal, which is indispensable to the modernisation and competitiveness of our economic life";[25] and
- submitted to Parliament the Proposal of Law, which was approved as Law 18/2003 on 11 June (2003 Competition Act).[26]

19 Art. 2 of the Constitution of the Portuguese Republic (CRP). Translation available at https://dre.pt/constitution-of-the-portuguese-republic [Accessed June, 19 2020].

20 Art. 9(b) of CRP.

21 Art. 80 (a) and (c) of CRP.

22 Art. 81(f) of CRP.

23 The XV Government was chosen by the president of the Portuguese Republic, given the results of the legislative elections that took place on 17 April 2002 and its support by the majority in Parliament constituted by the coalition between the Social Democratic Party and the Christian Democratic Party. For more details on the work of the same *ad hoc* Commission, see DA CRUZ VILAÇA, J.L. (2006) Introdução à nova legislação da Concorrência: Vicissitudes dos Projetos de Modernização. In: Goucha Soares, A., Leitão Marques, M.M., *Concorrência – Estudos*. Coimbra: Editions Almedina S.A., p. 13 ff. J.L. da Cruz Vilaça presided to the same *ad hoc* Commission, created by the former government. See p. 44 on the influence of the preparatory works of Regulation 1/2003.

24 Through the enactment of Decree-Law 10/2003, of 18 January, which approved the PCA's bylaws published in DR Series I-A, No 15, 18.01.2003.

25 Recital 2 of Decree-Law 10/2003.

26 Law 18/2003, of 11 June (2003 Competition Act), DR, Series I-A, No 134, 11.06.2003 and subsequently amended four times. Law No 39/2006, of 25 August, provided for the leniency regime in the Portuguese legal framework and complemented Law No 18/2003. As regards doctrine on the 2003 Competition Act, see for all, MENDES PEREIRA, M. (2009) *Lei da Concorrência – Anotada*. Coimbra: Coimbra Editora; BOTELHO MONIZ, C., ROSADO DA FONSECA, M., GOUVEIA

The acuteness of the creation of the PCA was further highlighted in the context of the evolution under way at EU level, and was thus considered necessary "to have a competition authority effectively capable of promoting the enforcement of the European competition rules and its inclusion" in the ECN.

In short, the significant changes included the PCA's enforcement powers covering all sectors of activity, the combined powers of investigation and sanctioning in a single entity and its independence towards the government. More precisely, the PCA is a public entity of institutional nature, with own bodies, services, staff and patrimony and financial and administrative autonomy. In addition, the PCA is a single purpose entity entrusted to "enforce competition rules within the scope of the aims and competences attributed to it" and sectoral regulators "cooperate in the application of competition rules" with it.[27] In 2004, the Government allocated to the PCA a part of the sectoral regulators' revenues stemming from the fees paid by their regulated entities,[28] in addition to the PCA's own financial revenues. Until 2011, this allocation has encountered several hurdles, as publicly reported by the PCA on various occasions.

Besides an overall inspiration on the current Articles 101 and 102 of TFEU, the influence of secondary EU law provisions is reflected notably in the economic justification of restrictions to competition.[29] It should also be noted that Art. 60 of the 2003 Competition Act sets out that the legal framework contained in, as well as in the Decree-Law approving the PCA's bylaws "will be adapted so as to include the developments occurred in the European legal framework applicable to undertakings under" the current Articles 101 and 102 TFEU and the regulations concerning merger control and "the Government is bound to undertake such amendments after consulting the PCA".

As regards the investigation and sanctioning of anticompetitive practices, the PCA's decisions cover misdemeanours.[30] The 2003 Competition Act provides that:

E MELO, P. (2004) The 2003 Competition Law Reform in Portugal. *European Public Law* 10(1), pp.19–32.

27 Art. 14 and 15 of the 2003 Competition Act. The drafting of these Articles, together with the drafting of some sectoral legislation, gave rise to debate on the boundaries of the PCA's authority in relation to the authority of the sectoral regulators, and the drafting concerning this topic evolved positively in Law No 19/2012, of 8 May which repealed the former Competition Act and is currently in force (2012 Competition Act).

28 Decree-Law 30/2004 of 6 February published in DR, Series I-A, No 31, 6.02.2004.

29 Pursuant to Art. 5(3) of the 2003 Competition Act, they may be considered justified when, "despite not affecting inter-state trade, they fulfil the remaining conditions provided for in a regulation adopted in the context of Article 81(3) of the Treaty establishing the European Community" [Art. 101(3) TFEU]. Nonetheless, the PCA may withdraw the same benefit in given circumstances.

30 MOURA E SILVA, M. (2018) considers that infringements to Competition rules have an "uncertain location between administrative sanctioning law and criminal and criminal procedural law", which can be explained in part by the proximity in terms of dates between the approval of the administrative offences' regime in 1979 (and its subsequent amendment) and the approval of the regime sanctioning the anticompetitive practices (in 1983) (our translation). The "subsequent amendment" mentioned by the author concerns Decree-Law No 433/82 of 27 October 1982, DR, Série I, No 249, 27.10.1982.

- Infringement procedures concerning restrictive practices and abuses of dominance are regulated by the same law and on an ancillary basis by the administrative offences regime, and this is "equally applicable with due adaptations to infringement proceedings concerning Articles 81 and 82 of the Treaty establishing the European Community [Articles 101 and 102 TFEU] initiated by the PCA or when the same is called upon to intervene".[31] This is without prejudice to the 2003 Competition Act also providing in a somewhat ambiguous manner that, as regards "sanctioning proceedings", it respects the principles of hearing interested parties, due process and other general principles applicable to the procedures and administrative action contained in the Code of Administrative Proceedings, "as well, as, if applicable, in the administrative offences regime";[32]
- The PCA's decisions in the context of merger control proceedings have an administrative nature and are regulated by the Code of Administrative Proceedings.[33]

The experience from the first years when the 2003 Competition Act was in force "showed difficulties in its application, mainly due to the insufficient embodiment of the procedural rules".[34] It should be added that, in an annual hearing in Parliament on 14 July 2010, the president of the PCA stated that "several circumstances suggest that possibly the time has come for an amendment to the Competition Act". It was disclosed that, "internally, the PCA is undertaking a reflection on possible new amendments on the basis of the following 'concerns':

i) Increased predictability and legal certainty with a view to diminish litigation, mainly the one related to difficulties in the interpretation of legal provisions;
ii) Increased harmonisation with the EU Competition legal framework; and
iii) Increased autonomy concerning the ancillary application through the adapted reproduction of the same legal provisions".[35]

As detailed hereunder, the similarity of this envisaged evolution with the one provided in the wording of the Memorandum of Understanding of May 2011 indicates that the same was proposed the Government (and arguably upon prior proposal by the PCA).[36]

31 Art. 22 of the 2003 Competition Act.

32 Art. 19 of the 2003 Competition Act.

33 See Art. 20 of the 2003 Competition Act, which starts with the disclaimer "Save as stated otherwise in the present law".

34 See MOURA E SILVA, M.(2018) p. 123. This author gives the example of the seizure of emails, mainly after the entry into force of the amendments introduced in 2007 to the Portuguese Criminal Procedure Code.

35 The annual hearing of the president of the PCA took place in the Commission for Economic Matters, Innovation and Energy. The presentation: SEBASTIÃO M. (2010) *Audição Parlamentar Comissão de Assuntos Económicos, Inovação e Energia*. Available from: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheAudicao.aspx?BID=88874 [Accessed June, 19 2021].

36 MOURA E SILVA, M. (2014) highlights the importance of the PCA's contribution to the evolution reflected in the current Competition Act and also to the Government's receptiveness shown in the beginning of 2011 when presenting to Parliament a set of measures aimed at reforming the 2003 Competition Act.

It is fair to say that, in 2010, both the legal community and the community in general shared a growing perception of the need for improvements to the 2003 Competition Act, though not necessarily in the same way as that of the PCA in its call to strengthen its investigative and sanctioning powers.

Some notes on the 2011/2014 Programme

As referred to above, the negotiation of the Economic Adjustment Programme in May 2011 was preceded by a request from the Portuguese authorities of financial assistance dated 7 April 2011, from the EU, eurozone countries and the IMF.[37]

On 30 May 2011, the Council Implementing Decision on granting Union financial assistance to Portugal[38] established that its authorities, "in line with specifications in the Memorandum of Understanding",

- "shall adopt the following measures before the end of 2011: [...] take urgently action to foster competition and the economy's adjustment capacity. This includes the abolition of special rights of the State in companies, a revision of competition law to make it more effective"
- "shall adopt the following measures during 2012: [...] (m) The functioning of the judicial system shall be improved by implementing the measures proposed under the Judicial Reform Map [...]; (n) The competition framework shall be improved by reinforcing the independence and resources of the national regulatory authorities".

In May 2014, Portugal exited its three-year economic adjustment programme[39] which "included the implementation of an ambitious reform agenda and contributed to regaining economic growth and restoring investor confidence".[40] Since then, Portugal

37 See for all the Commission's press release: EC (2011) *EU and EFSF funding plans to provide financial assistance for Portugal and Ireland*. Available from: https://ec.europa.eu/commission/presscorner/detail/en/memo_11_313 [Accessed June, 19 2021].

38 See Council's Implementing Decision 2011/344/EU.

39 See Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 2014 European Semester: Country-specific recommendations Building Growth, COM(2014) 400 final, Brussels, 2.06.2014. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0400&from=EN [Accessed June, 19 2021].

40 Portugal's Programme assessment is summarized by the Commission here: EC, DG ECFIN (2014) *Portugal Programme Assessment.* Available from: https://ec.europa.eu/info/sites/default/files/ppt_for_technical_briefing_15052014_en1.pdf [Accessed June, 19 2021]. The XIX Government decided to end the programme without disbursing the full amount of the assistance (in the end €24.3 billion of €26 billion was requested). This decision was publicly announced by the government on 12 June 2014 and the concluding EFSM disbursement took place on 12 November 2014. The XIX Government was chosen by the President of the Portuguese Republic considering the results of the legislative elections that took place on 5 June 2011. The Government was supported in Parliament by a coalition between the Social Democratic Party and the Christian Democrat Party and took office on 21 June 2011.

has been under post-programme surveillance (PPS), until at least 75% of the financial assistance received has been repaid.[41]

Competition measures in the 2011/2014 Programme

For the purposes of this paper, we have focused on the Memorandum of Understanding, without prejudice to the equivalent relevance of the MEFP's contents and conditionality.

In the original version of the MoUs, under the Title "Competition, public procurement and business environment", among the Objectives set out are the following: "Ensure a level playing field and minimise rent-seeking behaviour by strengthening competition and sectoral regulators; eliminate special rights of the state in private companies (golden shares); reduce administrative burdens on companies; ensure fair public procurement processes". It should be noted that the amendment of the Competition law framework constitutes a "Structural benchmark" in the MEFP, with the inherent consequences in terms of disbursements and the conditionality of the programme.[42] The text of the specific MoUs measures read as follows:

Competition and sectoral regulators

7.20. Take measures to improve the speed and effectiveness of competition rules' enforcement. In particular:

i. Establish a specialised court in the context of the reforms of the judicial system **[Q1-2012]**.

ii. Propose a revision of the competition law, making it as autonomous as possible from the Administrative Law and the Penal Procedural Law and more harmonized with the European Union competition legal framework, in particular: **[Q4-2011]**

- *simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law;*

41 The objective of PPS is to measure Portugal's capacity to repay its outstanding loans to the EFSM and EFSF. Under PPS, the Commission and the ECB launch regular review missions to Portugal to analyse economic, fiscal and financial developments, and report semi-annual assessments that may recommend further measures when necessary.

42 See Portugal (2011) Letter of Intent, Memorandum of Economic and Financial Policies (Portuguese version), and Technical Memorandum of Understanding, May 17, 2011, p. 10, table 2: Portugal. Structural Conditionality, point B: Enhance competitiveness. Available from: https://www.imf.org/external/np/loi/2011/prt/051711.pdf [Accessed June, 19 2021]. See also fn. 26 of Measure 7.20. in the MoU[s], above in the transcribed text. Concerning the commitments on Competition as assumed by the Portuguese authorities, see paragraph 27 of the MEFP in its original version and the paragraph's recitals.

- *rationalize the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims;*
- *establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex ante notification of a concentration operation;*
- *ensure more clarity and legal certainty in the application of Procedural Administrative law in merger control.*
- *evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.*

iii. Ensure that the Portuguese Competition Authority has sufficient and stable financial means to guarantee its effective and sustained operation. **[Q4- 2011]**

7.21. Ensure that the national regulator authorities (NRA) have the necessary independence and resources to exercise their responsibilities. **[Q1-2012]**
In order to achieve this:

i. provide an independent report (by internationally recognised specialists) on the responsibilities, resources and characteristics determining the level of independence of the main NRAs. The report will benchmark nomination practices, responsibilities, independence and resources of each NRA with respect to best international practice. It will also cover scope of operation of sectoral regulators, their powers of intervention, as well as the mechanisms of coordination with the Competition Authority. **[Q4-2011]**

ii. based on the report, present a proposal to implement the best international practices identified to reinforce the independence of regulators where necessary, and in full compliance with EU law. **[Q4-2011]**

In brief, the two measures transcribed above contain four complementary axes for pursuing the aim of strengthening competition enforcement of EU competition rules in Portugal, as follows:

i) the creation of a court with specific competence for competition cases, until then of the competence of the Lisbon's commercial court;
ii) the amendment or enactment of a streamlined Competition law more aligned with the EU rules;
iii) adequate measures to ensure stability and suitability concerning the PCA's financial means (a condition for the due exercise of its powers of enforcement of EU rules);

iv) legal assurance that not only the PCA but also the main sectoral regulators[43] hold "the necessary independence and resources" to exercise their responsibilities.

Without prejudice to focusing specifically on the Competition framework in this context, one should not underestimate the importance of the intertwining nature of the broader commitments assumed by the Portuguese authorities with the aim of substantially increasing competitiveness, as the Troika arguably seems to acknowledge during its ongoing evaluation. It may explain (at least partially) the evolving nature of the wording of the versions of the memoranda of understanding until the conclusion of the Economic Adjustment Programme.

After the First Review mission in August 2011, the Troika's assessment of the actions to implement the above measures was undertaken globally and in a positive tone. More precisely, the Commission's staff report states that

> *the first actions to improve the speed and effectiveness of enforcing competition rules have been taken with the creation of a specialised court for Competition, Regulation and Supervision.* [...] *An independent report on the governance and resources of the NRAs is due by Q1-2012, to be followed by proposals in the following quarter, which will be implemented by Q3 and Q4-2012. A new measure sets October 2011 for the launch of the tender.*[44]

43 Even though measure 7.21. of the MoUs (original version) does not identify the main sectoral regulators it concerns, when considering the overall goals of the Economic Adjustment Programme it is safe to assume that first and foremost the measure is addressed to the sectors where there was already increased harmonisation, and where EU rules provided for the existence of independent sectoral regulators, such as energy, telecoms and transports. This may be explained not only by the interplay between sectoral regulators and the PCA within the scope of their respective competencies, but also by the related structural reforms that were in the memoranda of understanding as regards the implementation of EU legislation on those sectors of activity. See for instance, measure 5.2. of the MoUs: Transpose the Third EU Energy Package by the end of June 2011. This will ensure the National Regulator Authority's independence and all powers foreseen in the package; measure 5.16 of the MoUs: Ensure more effective competition in the sector by implementing the new Directive on EU electronic communications regulatory framework ("Better Regulation Directive"), which will (among other things) enhance independence of the National Regulator Authority. [Q2-2011]; measure 5.20 of the MoUs: Further liberalise the postal sector by transposing the Third Postal Directive ensuring that powers and independence of the National Regulator Authority are appropriate in view of its increased role in monitoring prices and costs [Q3-2011]; and measure 5.23 of the MoUs: Transpose the EU Railway Packages and in particular: [Q3-2011] i. Strengthen the rail regulator independence and competences including by strengthening its administrative capacity in terms of decision and execution powers and staffing.

44 See page 5 of the report available at: EC (2011) *The Economic Adjustment Programme for Portugal. First review - Summer 2011*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op83_en.htm [Accessed June, 19 2021]. After the joint EC/ECB/IMF mission met with the Portuguese authorities in Lisbon from 1 to 12 August 2011 to assess compliance with the terms and conditions of the First Review under the Economic Adjustment Programme, the Commission's services produced the referred report which includes their joint conclusions.

More precisely, the Competition, Supervision and Regulatory Court was created by Law No 46/2011, of 24 June[45] (and later installed by Decree No 84/2012, of 29 March).[46] During the same Review, the "full commitment of the newly elected Government to the programme agreed in May" was duly noted by the Troika.[47]

On 4 November 2011, the Government launched a public consultation on a draft proposal of the Competition Act that, in our view, somewhat attenuated the initial revamping impetus set out in the original version of the memoranda of understanding. Public consultation lasted for a month and the observations presented by many stakeholders still criticised the unbalance between the substantial reinforcement of the PCA's powers and the constitutional and legal safeguards inherent to misdemeanours, notably as regards the rights of defence and due process.[48] The Ministry of the Economy was particularly involved in the implementation of this measure and created an informal working group that included the PCA and representatives of very relevant stakeholders with different backgrounds, with the view of covering as a broader range of insights as possible, in addition to the public consultation.[49] The same working group analysed the observations received and provided its input to the Government's internal conclusion of the draft proposal of law.

Given the Commission's role to "provide continued advice and guidance [...] [on] structural reforms"[50] as referred above, it is possible to guess the intensity of the interaction there may have been between the Portuguese authorities and at least the Competition Directorate-General on the contents and wording of the draft proposal of law. It should be noted that the Commission, in the context of its participation in the

45 Lei n.º 46/2011 Assembleia da República, DR, Series I, No 120, 24.06.2011.

46 Portaria n.º 84/2012 Ato da Série I Ministério da Justiça Declara instalados o 1.º Juízo do Tribunal da Propriedade Intelectual e o 1.º Juízo do Tribunal da Concorrência, Regulação e Supervisão, DR, Series I, No 64, 29.03.2012.

47 See par. 67 of the report mentioned above in fn. 44. Reference to the XIX Government is made above in fn. 40. As regards the binding nature of the memoranda of understanding for the Portuguese State, see above fn. 13.

48 According to information publicly available, there were at least 27 contributions to the public consultation, which included notably undertakings, associations and law firms and many of them continue to be publicly available.

49 Besides the president and his team from the PCA, the working group included a member of the Minister's Cabinet, a member of ESAME (from the Cabinet of the Deputy Secretary of State to the Prime Minister) and the presidents of the Portuguese Competition Lawyers Association (CAPDC) and the Portuguese delegation of the International Chamber of Commerce.ESAME was the Government's technical unit monitoring the implementation of the Economic Adjustment Programme, liaising (together with the Ministry of Finance) between the Government and the Troika as regards the technical implementation. ESAME was created by Resolution of the Council of Ministers No 28/2011 of 11 July, later repealed by Decree-Law No 177/2012, of 3 August, which integrated the technical unit in the Cabinet of the Deputy Secretary of State to the Prime Minister. Annex 1. "provision of data" to the MoU[s] had commitments for ESAME on the reporting of data to the Troika. ESAME was disbanded with the successful conclusion of the Economic Adjustment Programme in 2014.

50 See Article 3(9) of the Council's Implementing Decision 2011/344/EU.

ECN and ongoing assessment of the effectiveness of enforcement of EU competition rules by NCAs and the means to improve it, would be particularly attentive to the implementation of this measure.

After the Second Review mission in mid-November 2011, the Commission's staff report[51] states that

> *The success of the Programme depends crucially on the implementation of a wide range of structural reforms that will remove the rigidities and bottlenecks behind the economy's decade-long stagnation.* [...] *As for tackling entrenched practices distorting competition, a strengthening of the competition framework is underway.*[52]

The timeline for the enactment of the competition law was extended to January 2012.[53]

After the Third Review mission of mid-February 2012, the Commission's staff report[54] stated that "Noticeable progress has been made in the area of structural reforms. The far-reaching and ambitious reform agenda is on track in the areas of [...] regulatory framework including competition". In the meantime, the Government submitted the Proposal of Law for the new Competition Act to Parliament.[55] After a thorough legislative procedure, which included opinions delivered by several entities, such as the Superior Council of Judiciary and the Public Attorney's office, as well as the Bar Association,[56] Parliament approved the new Competition Act, Law 19/2012 and it was published on 8 May 2012 (2012 Competition Act).[57]

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51 European Economy (2011) *The Economic Adjustment Programme for Portugal Second review-Autumn2011. Brussels: EC Directorate-General for Economic and Financial Affair*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp89_en.pdf [Acceessed June, 19 2021].

52 Council recommendation of 10 July 2012 on the National Reform Programme 2012 of Portugal and delivering a Council opinion on the Stability Programme of Portugal, 2012-16 (2012/C 219/20), OJ C 219, 24.07.2012, p. 69.

53 As provided in the third version of the MoUs and likewise on the updated Table 2. Portugal. Structural Conditionality, Point B: Enhance competitiveness enclosed to the updated MEFP.

54 A joint EC/ECB/IMF mission met with the Portuguese authorities in Lisbon from 15 to 27 February to assess compliance with the terms and conditions of EC, *The Economic Adjustment Programme for Portugal Third Review - Winter 2011/2012.* Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp95_en.pdf [Accessed June, 19 2021].

55 Proposta de Lei 45/XII/1 Aprova o Novo Regime Jurídico da Concorrência, revogando a Lei n.º 18/2003, de 11 de junho, e a Lei n.º 39/2006, de 25 de Agosto. Available from: https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=36753 [Accessed June, 19 2021]. The initial text of the Proposal of Law was submitted on 6 February 2012, but there were technical problems and it was subsequently replaced.

56 See above in the link mentioned in fn. 54 the different phases of the legislative procedure and the opinions delivered by the participating entities.

57 Lei n.º 19/2012 Aprova o novo regime jurídico da concorrência, DR, Series I, No 89, 8.05.2012. Already amended by Law 23/2018, of 5 June, which implements Directive No 2014/104/EU of the

Deadlines were addressed during this same Review mission and the Troika acknowledged that

> *A number of deadline postponements in the current review are not necessarily a sign of non-compliance by the Portuguese authorities. When negotiating the original MoU*[s] *in May of last year, a relatively large cluster of deadlines were set to be fulfilled by the end of the year. Most were met by Portuguese authorities, but a number of deadlines turned out to be over-optimistic for one or several reasons, be this (i) an underestimation of the challenges to be tackled, (ii) capacity constraints as overlapping demands have been addressed to the same services; or (iii) the need to deal with unforeseen events.*[58]

After the Fourth Review mission of late May-early June 2012, the Commission's staff report[59] stated that "In the area of structural reform, a number of dossiers have been closed, but a lot remains to be done to complete the agenda. [...] Regulatory reform is making headway in various areas, including the general competition framework, and the judicial reform is advancing on schedule"[60]. Nonetheless, "The monitoring of the implementation of structural reforms will continue to be a major task over coming staff missions".[61]

The wording of measures 7.20 and 7.21 (original version), aimed at implementing the four axes mentioned above, reflect different "margins of manoeuvre" of the Portuguese authorities when implementing them. The final wording of the 2012 Competition Act, which concerned several of the features to which the Portuguese authorities committed under the above measures, notably as regards merger control, is fully deserving of a detailed analysis. However, for the purposes of this paper, and considering the primary aim of Directive ECN+, we merely highlight the commitment to "simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensuring the effective enforcement of competition law".

European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19.

58 Proposta de Lei 45/XII/1.

59 A joint EC/EBC/IMF mission met with the Portuguese authorities in Lisbon between 22 May and 4 June to assess compliance with the terms and conditions of the Fourth Review of the Portuguese Economic Adjustment Programme. See paragraph 5 of the Report: European Economy (2012) *The Economic Adjustment Programme for Portugal Fourth review – Spring 2012*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp111_en.pdf [Accessed June, 19 2021]. On page 7 of the document, it is reminded that *7. Revisions to the Memorandum of Understanding reflect mainly advances in reform implementation. In most cases, adjustments are the result of the evolution of specific reform measures, either because the measure has been completed and therefore dropped from the MoUs or because the measure has advanced to another stage and conditions had to be modified accordingly. Occasionally also deadlines were adjusted, given changed circumstances.*

60 Ibid, p. 6.

61 Ibid.

This touches upon the complex interplay between the historic nature of a misdemeanour of competition infringements and the need to further consolidate a set of autonomous rules in the context of the competition legal framework. Though the wording of the 2012 Competition Act provides for further consolidation of the procedural rules, there are, nonetheless, subtle indications of the efforts to choose between the EU sanctioning legal framework and the ancillary application of the national misdemeanour regime (importing concepts from criminal and procedural penal law).[62] It should be noted that the Portuguese legal framework provides for the right of individuals to request leniency, their liability for infringements of competition and the sanctions applied to them.

To this should be added that the discussion on the applicable procedural rules concerning the infringement procedure continues to be very acute in the context of the ongoing implementation of the ECN+ Directive. Upon the Government commissioning the PCA to prepare a draft of the Proposal of Law to implement the directive in early 2019 and the setting up of an *ad hoc* working group with some relevant stakeholders,[63] this topic was debated heavily, including during the subsequent interaction with stakeholders and the public consultation on the updated draft which followed. The PCA's final draft was sent to the Government[64] and served as the basis for the latter's proposal of law currently being debated in Parliament.

The last two axes of the amendment of the Competition framework provided in the Economic Adjustment Programme, as mentioned above, were addressed in a convergent manner between 2012 and 2014. More precisely, the financing of the PCA was temporarily ensured by decree, and subsequently included in the bylaws of the PCA[65] amended in line with the new Framework Law of Independent Administrative Entities (Framework Law).[66] This regulated the creation and functioning of the main NRAs. The bylaws of several sectoral regulators were subsequently amended or enacted in light

62 See, for instance, MOURA E SILVA, M. (2014), when analysing the amendments introduced by the 2012 Competition Act in the sanctioning procedure (title 3).

63 More information: AdC (2020) *The AdC has submitted to the Government the proposal of draft legislation for the transposition of the ECN+ Directive*. Available from: http://www.concorrencia.pt/vEN/News_Events/Noticias/Pages/The-AdC-has-submitted-to-the-Government-the-proposal-of-draft-legislation-for-the-transposition-of-the-ECN--Directive.aspx?lst=1&Cat=2020 [Accessed June, 19 2021].

64 See, for instance, the opinions received by the PCA and made available at: AdC (2019) *Consulta pública sobre proposta de anteprojeto de diploma de transposição da Diretiva "ECN+"*. Available from: http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta-p%C3%BAblica-sobre-proposta-de-anteprojeto-de-transposi%C3%A7%C3%A3o-da-Diretiva-%E2%80%9CECN-%E2%80%9D.aspx?lst=1&Cat=2019 [Accessed June, 19 2021] and the contributions published after the PCA updated the draft Proposal of Law subsequently to the analysis of the opinions received during the consultation procedure, available in *Revista C&R* (Competition and Regulation Review) 42-43 from September 2020, http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Revista_CR/Paginas/RevistaCR42.aspx?lst=1.

65 Decree-Law No 125/2014 of 18 August, DR, Series I-A, No 157, 18.08.2014.

66 Law No 67/2013, of 28 August, DR, Series I-A, No 165, 28.08.2013. This law has already been amended three times.

of the Framework Law and the sectoral legislation enacted in the context of the overall commitments of the Portuguese authorities.

Further insight into the Commission's assessment of the Portuguese legislator's choices made during the Economic Adjustment Programme was made public in 2014, as detailed below.

Reference to Portugal's 2011 reform in the roots of the ECN+ Directive

In the present context, we are focusing on the contents of the Commission's 2014 Communication on the Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (Communication) and the two Staff Working Documents that accompanied it.[67] This is due to the fact that they paved the way for the preparatory work of Directive ECN+[68] and contain several insightful references to the amendments introduced by Member States under financial assistance (designated by the Commission as "Assistance countries") to their respective competition frameworks, in the context of structural reforms agreed with the international creditors.

When introducing the goal of enhancing competition enforcement by the NCAs, regarding institutional and procedural issues, the Commission[69] points out the landmark change that Regulation 1/2003 brought about in the way in which EU competition law was enforced beforehand. It also presents figures confirming that, at least in terms of quantity, NCAs have become a key pillar of the application of EU competition rules,[70] even though, according to the Commission in 2014, a "substantial level of convergence in the application of the rules has been achieved, but divergences subsist".

67 COM(2014) 453 final} {SWD(2014) 230 final} and the two Staff Working Documents are mentioned above in fn. 10 and 16. Available at https://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf. This is without prejudice to the relevance of the previous assessments and notably the 2009 Report on Regulation 1/2003 and the follow-up, in the context of which the ECN made a detailed inventory of the investigation and decision-making procedures for competition enforcement which existed in the Member States. The two ECN Reports on Investigative and Decision-Making Powers were published in November 2012 and provided an overview of the status quo in the ECN for the first time. EC, *Competition Policy*. Available from: http://ec.europa.eu/competition/ecn/documents.html [Accessed June, 19 2021].

68 See the Commission's press release of 22 March 2017: EC (2017) *Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth,* Brussels, 22 March 2017. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_685 [Accessed June, 19 2021] with a link to the proposal. After the publication of the 2014 documents by the Commission, it carried out a public consultation between November 2015 and February 2016 and sounded out options for specific action with both the national competition authorities and the Member State ministries. On 19 April 2016, the Committee on Economic and Monetary Affairs of the European Parliament and the Commission's Competition Directorate General co-organised a Public Hearing on how to empower national competition authorities to be more effective enforcers.

69 Par. 7 of COM(2014) 453 final} {SWD(2014) 230 final}.

70 Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

In addition, the Commission considers that the divergences "are largely due to differences in the institutional position of NCAs and in national procedures and sanctions".[71]

More precisely, they concern the:

- institutional position of NCAs – the Commission recognises that EU law leaves Member States a large degree of flexibility for their design[72] and attributes to the circumstance that this was largely left open by Regulation 1/2003, subject to the EU law principles of effectiveness and equivalence.[73]

More precisely, in 2014 the Commission stated that, although

> *EU law leaves Member States a large degree of flexibility for the design of their competition regimes* [...] *Many national laws contain specific safeguards to ensure the independence and impartiality of NCAs. For instance, recent reforms in Cyprus, Ireland, Greece and Portugal have strengthened the position of the NCAs.*[74]

In particular, as regards the institutional design of the PCA, it should be noted that during the autumn of 2011, doubts were raised by some about whether the PCA should continue as a single purpose entity or should become a conglomerate (comprising competition and economic regulatory competences, for instance).[75]

Moreover, as regards axes (iii) and (iv) of the reform of the Competition framework during the Economic Adjustment Programme referred to above, the Commission highlighted that the "MoU[s] with Portugal provided that sufficient and stable resources

71 Par. 24 of COM(2014) 453 final} {SWD(2014) 230 final}.

72 Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

73 Par. 24 of COM(2014) 453 final} {SWD(2014) 230 final}.

74 Par. COM(2014) 453 final} {SWD(2014) 230 final}. Footnote 6 of the transcribed excerpt reads: "Such changes were underpinned by the Economic Adjustment Programmes". It should be noted that the Commission expresses its concerns on the trend of NCAs having "additional competences in various areas including, inter alia, consumer protection, public procurement and the supervision of liberalised sectors such as energy, post, telecommunications and railways" (paragraph 25 of the Communication). Indeed, it goes further by stating that, "Such merging of authorities is part of a Member State's discretion and is often motivated by a search for synergies and efficiency gains. The Commission has closely followed instances where NCAs were merged with other regulators. Such amalgamation of competences should not lead to a weakening of competition enforcement or of the additional competences granted to the NCAs, or to a reduction in the means assigned to competition supervision". Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

75 Given the influence that recent 2011 amendments to the Spanish competition framework could have on the Portuguese one that same year, it is most relevant to note the Commission's statement according to which, "The establishment of the new CNMC in Spain, merging the Spanish NCA with six sectoral regulators, has also been subject to close monitoring in the context of the European Semester, inter alia regarding its independence, financial and human resources and the division of functions between the regulator and the competent ministries. In relying on the EU legal framework for sectoral supervisory authorities, Spain was called upon to ensure the effectiveness, autonomy and independence of the newly created authority" - see par. 37 of {COM(2014) 453 final} {SWD(2014) 230 final}. The CNMC was created by Law No 3/2013 of 4 June 2013.

should be allocated to the NCA.[31"76] and that the "MoU[s] with Portugal also led to the adoption of a framework law on national regulatory authorities which provides for general principles on the structure, functioning and financing of administrative authorities in Portugal, including the NCA.[32"77]

- the procedures and sanctions for the application of the EU competition rules in the Member States – again the Commission reminds that

> *they are only subject to general principles of EU law, in particular, the principles of effectiveness and equivalence, as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable. This means that the procedures and sanctions used by the NCAs to apply Articles 101 and 102 TFEU are largely governed by national law.*[78]

In this context, the Commission acknowledges that "Procedural convergence has been enhanced in the context of agreements on financial support from the EU with the Programme Countries".[79] Furthermore, "In Portugal, a new competition law was adopted which provides for major improvements, including the introduction of priority setting and more effective investigatory powers for the NCA".[80] According to the Commission, the setting of priorities by NCAs is one of the "key components of the toolbox" that NCAs should have at their disposal, as recognised by the ECN.[81]

The above considerations were put forward by the Commission in 2014 when assessing "Convergence by 'soft tools' – achievements and limitations" in the absence of harmonisation by legislation of the Member States' laws with the system set out for the Commission in Regulation 1/2003.[82] It is most interesting that the Commission considers that "there are limits to what can be achieved by voluntary convergence and 'soft tools' developed in the ECN, as well as the means to foster convergence in the context of cross-cutting EU programmes".[83] More precisely, the Commission highlights the difficulty in achieving "convergence with a common standard through the use of 'soft tools', including in the context of economic adjustment programmes", to the extent "procedural differences are rooted in national legal traditions, national fundamental right standards or other general principles".[84] It is outside the scope of this contribution to comment on this comparison and the qualification of what the Economic Adjustment Programmes entailed, without prejudice to its utmost importance to understand the

76 Par. 34 of {COM(2014) 453 final} {SWD(2014) 230 final}.
77 Ibid.
78 Par. 42 of {COM(2014) 453 final} {SWD(2014) 230 final}.
79 Par. 49 of {COM(2014) 453 final} {SWD(2014) 230 final}.
80 Par. 49 of {COM(2014) 453 final} {SWD(2014) 230 final}.
81 Par. 59 of {COM(2014) 453 final} {SWD(2014) 230 final}.
82 Title 3.2. of {COM(2014) 453 final} {SWD(2014) 230 final}.
83 Par. 53 of {COM(2014) 453 final} {SWD(2014) 230 final}.
84 Ibid.

Commission's mindset when developing its role of "advice and guidance" concerning structural reforms in the same context.

It is in view of all the above that, in 2014, the Commission concluded that, in order to "enhance EU competition enforcement for the future, the institutional position of NCAs needed to be reinforced, while at the same time ensuring the further convergence of national procedures and sanctions applying to infringements of EU antitrust rules". And these two aspects are "key to achieving a truly common competition enforcement area in the EU".[85] In this way, the Commission paves the way for the justification of higher convergence through the enactment of the ECN+ Directive.

Conclusions

The interplay between the enhancement of the powers of the NCAs to enforce EU competition rules with the aim of creating a level playing field and the asymmetries explained by national law specificities continues to be an acute topic in the realm of the implementation of the ECN+ Directive in Member States. It also calls for a thorough analysis and an in-depth reflection that is not possible within the context of this contribution.

As regards specifically the Portuguese reality, it is most interesting to ascertain the impact of the Economic Adjustment Programme (2011/2014) on the anticipation of several of the lines of the reform of the Competition framework as set out in the ECN+ Directive.

Irrespective of any merits of the Portuguese Competition Authority concerning the authorship of earlier calls for action, there seems little doubt that competition culture in Portugal until 2011 did not show readiness to support the PCA's call for substantially increased investigatory powers and further alignment with EU rules. The circumstances under which the Portuguese authorities undertook to revamp the overall Competition framework in the context of the "ambitious reform agenda" in May 2011, and subsequently undertook the actions to comply with the overall targets, are well known.

Moreover, correlated topics with the amendment of the competition law such as (i) the PCA's stability concerning its financing and the resources to pursue its mission, (ii) the clarification of the interaction between the PCA and sectoral regulators, (iii) the assurance of their overall independence and financial resources with the consequent impact on the enforcement of competition, and (iv) the judicial scrutiny of the PCA's decisions, also constitute structural reforms considered the backbone of the "Competition framework" in Portugal. The same seem to have been considered as such when the Troika undertook the positive assessment of the changes introduced in 2011/2014.

It should be remembered that, besides continuing to develop efforts in the context of ECN, pushing the enhanced convergence of national competition frameworks towards greater alignment with EU rules, the Commission's role in the context of the 2011/2014 Economic Adjustment Programme for Portugal included to "provide continued advice

85 Par. 25 of {COM(2014) 453 final} {SWD(2014) 230 final}.

and guidance on [...] structural reforms". Can we assume that the subtle evolution of the wording of the commitments set out in the relevant measures allows for the interpretation that, in particular, the Commission acknowledged the complexity of some of the ambitious goals, including due to the diverse nature of stakeholders' contributions, and considered the boundaries of their feasibility in light of the specific nature of national law and the factual framework?

In any event, while it welcoming the evolution that occurred in the same time period, compared to Member States that did not receive financial assistance, the Commission concludes that the use of such "soft tool" has limitations for enhancing convergence of the enforcement of EU rules by NCAs. More precisely, procedural differences "rooted in national legal traditions, national fundamental right standards or other general principles". Thus, the Commission considers that, similarly to what happens with other "soft tools" having the same aim, it is not adequate for obtaining the envisaged level playing field and thus the enactment of legislation by the EU is justified.

Adopting a forward-looking perspective, we wonder how to reconcile the differences mentioned above (several of which continue to be current as regards the Portuguese framework) with the ongoing implementation of the ECN+ Directive.

We thus hope that the systematization of the most recent historical background proves to be useful when discussing the need and adequacy of the evolution envisaged by some of the provisions set out in the Proposal of Law presented by the XXII Government to the Parliament on 21 May. When anticipating an impending amendment of the Competition Act that goes beyond the implementation of the ECN+ Directive, lessons from the outcome of the amendment of the Competition framework a decade ago may also prove useful. More precisely, going beyond what the directive provides may increase litigation and legal uncertainty beyond what may already be anticipated concerning some of the directive's innovations in light of the Portuguese constitutional principles and the constitutional rights.

APPENDIX – SELECTED DOCUMENTS OF NETWORKS OF NCAS

THE EXCHANGE OF INFORMATION BETWEEN MEMBERS ON MULTIJURISDICTIONAL MERGERS

PROCEDURES GUIDE

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1. The European Competition Authorities (ECA) consists of the competition authorities in the European Economic Area (EEA) (the 15 Member States of the European Community, the European Commission, and of the EEA EFTA States and the EFTA Surveillance Authority).

2. The ECA has been considering ways in which the processing of mergers subject to investigation in more than one country (multi-jurisdictional mergers) can be made easier, both for the parties to the merger and the authorities, whilst ensuring that co-operation between members takes place as far as national legislation allows this. The ECA has agreed upon the following arrangements.

3. When an ECA authority is informed by the notifying parties to a merger that they have also notified or will be notifying the merger to other authorities within the ECA, the relevant official (the case officer or contact person) within that authority will, as soon as possible, send by e-mail an ECA Notice to the relevant officials in the other ECA authorities informing them of the fact of notification, and seeking the names of the relevant officials in those other ECA authorities. Recipients of the parties' notification will confirm its receipt to the relevant ECA officials. (A model ECA Notice is attached as Annex A.)

4. The relevant officials of the notified ECA authorities will then make contact direct and exchange views on the case without exchanging confidential information (unless national legislation makes this possible). The relevant officials will keep each other informed of the development of the case as appropriate. Where national legislation prevents the exchange of confidential information and it seems likely that (a) the analysis will demonstrate a competition problem worthy of further investigation or, potentially, remedy, and (b) an exchange of confidential information will benefit the analysis of the case or make it easier to identify an appropriate remedy, the authorities may seek permission from the parties to exchange confidential information. Without such permission, there will be no exchange of such information.

5. This note may be developed further and expanded from time to time as the authorities' experience of these arrangements develops.

Annex A

MODEL ECA NOTICE

Date:

As agreed by the ECA, the Competition Authority would like to inform you that the following transaction has been notified to it:

Notified transaction	
Ultimate parent or group companies of undertakings concerned	
Relevant economic sector(s) (and, where possible, relevant product market(s))	
Relevant geographic area(s) (and, where possible, relevant geographic market(s))	
Date of notification	
Provisional deadline	
Relevant official(s): Email: Telephone:	
Other Member States concerned	

Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation

I. Introduction

1. These Principles were agreed by the National Competition Authorities (NCAs[1]) within the European Competition Authorities Association ("ECA") in 2005 and relate to Articles 4(5) and 22 EC Merger Regulation ("ECMR") as set out in Council Regulation (EC) No 139/04 of 20 January 2004 on the control of concentrations between undertakings[2]. They replace the version of 2002[3] and may be reviewed by the NCAs from time to time to reflect legislative developments (European or national) or decisional practice[4].

   The Principles should be read in conjunction with and as complementary to the EU Commission's Notice on Case Referrals in respect of concentrations[5] (the EU Commission Notice) and the relevant parts of Commission Regulation (EC) No. 802/2004 implementing the ECMR including its annexes (Form CO, Short Form CO and Form RS)[6].

2. In the area of merger control there is a clear separation of competencies between the European Commission (the "EU Commission") and the Member States. The EU Commission has exclusive competence to review concentrations as defined in Art. 3(1) ECMR when the turnover of the parties to the concentration meet the thresholds pursuant to Art. 1(2) or 1(3) ECMR. Concentrations falling below these turnover thresholds remain within the competence of the Member States as provided for by their respective national merger control provisions. However, a referral system makes it possible in certain circumstances for concentrations falling below ECMR thresholds to be dealt with by the EU Commission, and vice versa.

3. The Council negotiations leading to Council Regulation (EC) No 139/04, focused on making the referral system more flexible and effective in order to ensure that a con-

1 These are the National Competition Authorities of the EU and the EEA EFTA States. For the sake of clarity, the term "NCA" in the following refers to these authorities.

2 Published in OJ L 24, 29.01.2004;

3 These Principles were based on the European Merger Control Regulation No 4064/89.

4 After the current discussions regarding the new EEA Agreement are finished, changes in this Agreement may need to be reflected in these Principles.

5 Available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing

6 Available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing; OJ L 133, 30.04.2004, pages 1-39

centration would be dealt with by the authority best placed to analyse its competitive effects and, where appropriate, to restore effective competition, whilst taking account of the principles of subsidiarity and the "one stop shop" as well as maintaining legal certainty to the utmost extent possible. Articles 4(5) and 22 ECMR, to which these Principles refer, provide for referrals of cases from the Member States to the EU Commission. According to recital (14) ECMR, referrals of concentrations should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to both pre- and post-filing referrals. This entails close cooperation with efficient information-sharing and consultation between the EU Commission and the NCAs in applying their respective competencies.

4. NCAs have in the past debated multiple filing issues within the framework of the ECA Working Group on Multijurisdictional Mergers. Cooperation and coordination among competition authorities on mergers of common concern can enhance the efficiency and effectiveness of the review process, help achieve consistent, co-ordinated and non-conflicting outcomes, and reduce transaction costs. In order to achieve this, in 2001 the ECA established a system that provides for a prompt exchange of information as well as closer cooperation in the assessment of multijurisdictional concentrations[7].

   In the light of the experience gained and with a view to enhancing transparency in the application of Article 22 of Regulation 4064/89, NCAs published in 2002 a document on joint referrals entitled "Principles on the Application, by National Competition Authorities within the ECA Network, of Article 22 of the EC Merger Regulation" (the "ECA Principles") which explained the factors taken into consideration when dealing with a case that may be a candidate for a joint referral to the EU Commission.

   Council Regulation 139/2004, by reviewing the former Article 22 ECMR and introducing through Article 4(5) ECMR the possibility of pre-filing referrals to the EU Commission, established a new framework for referrals that requires amendment to the ECA Principles.

5. NCAs will have regard to these non-binding Principles when considering possible referrals to the EU Commission. However, given that each concentration is unique, each case will be considered in the light of its particular circumstances, the available information and the particular time constraints. NCAs will therefore apply these Principles flexibly on a case by case basis.

II. Principles

6. Only concentrations within the meaning of Article 3 ECMR are eligible for referrals under Articles 4(5) and 22 ECMR from Member States to the EU Commission.

Cooperation on pre-filing referrals from Member States to the EU Commission pursuant to Article 4(5) ECMR

(i) Legal Provisions and Substantive Criteria

7. According to Article 4(5) ECMR, notifying parties ("the parties") may request that a concentration which does not have a Community dimension within the meaning of Article 1 ECMR and is capable of being reviewed under the national competition law for the control of mergers of at least three Member States be referred to the EU Commission[8].

   Article 4(5) ECMR does not permit partial referrals by only some of the Member States capable of reviewing a concentration. If any Member State capable of reviewing the concentration expresses its disagreement, the concentration remains subject to the applicable national competition law for the control of mergers. If no Member State capable of reviewing the concentration expresses its disagreement, the Commission has no discretion but has to accept that referred concentration.

8. Taking into account the specific characteristics of the concentration, a concentration where a potentially significant competitive impact extends beyond national boundaries will generally deserve careful scrutiny as a possible candidate for a pre-notification referral.

   In general, NCAs, when considering whether a transaction is suitable for referral to the Commission under Article 4(5) ECMR, will take account of the following factors:

   - whether the market(s) in which there may be a potentially significant impact on competition is/are wider than national in scope[9] and whether the main competitive impact of the concentration is linked to such market/s[10];

- whether NCAs expect to encounter difficulties in information-gathering as the parties or the main third party(ies) from whom information is likely to be sought is/are not based in their Member State, or
- whether there are potentially significant competition concerns in a number of national or sub-national markets located in the EEA, and whether NCAs expect problems in identifying and/or enforcing appropriate and proportionate remedies ("suitable remedies"), should these prove necessary, in particular where suitable remedies could not be secured by the NCAs under national law or through co-operation among NCAs.

9. Some examples of circumstances in which a NCA might be less inclined to agree to a referral request could include the following:
   - where the NCA is already examining a concentration which involves the same parties and/or the same product markets;
   - where the concentration has its main competitive impact in that NCA's national or sub-national market(s);
   - where it would avoid a risk of a subsequent referral back from the EU Commission under Article 9 ECMR.

(ii) Procedure

Pre-referral contacts by parties with NCAs

10. Pre-Form RS filing contacts with NCAs and with the EU Commission may be helpful in order to confirm that the criteria of Article 4(5) ECMR are met. However, NCAs cannot decide whether they agree to refer a concentration before they have received and studied the Form RS.

    Pre-referral contacts with NCAs will be particularly useful whenever parties identify any need for clarification, in particular when they have questions related to:
    - whether a concentration is capable of being reviewed by a particular Member State. Form RS needs to include sufficient information for each Member State to be able to verify whether the concentration qualifies for review under the applicable national competition law for the control of mergers.
    - whether additional information regarding the geographic or product market definition may be needed or advisable,
    - what language to use in the request for referral.

    Parties are welcome to contact NCAs concerning any other relevant issue they wish to discuss before they file Form RS with the EU Commission.

    Since it may be useful for NCAs to have informal contacts with each other at the pre-referral stage on common issues, it might be helpful to provide details about which other NCAs are likely to be capable of reviewing the concentration. Parties should also state whether the proposed concentration has been or is about to be made public or whether it remains confidential.

11. If parties wish to benefit from short pre-referral consultations between NCAs capable of reviewing the concentration, they should be prepared to provide confidentiality waivers to the NCAs.

The Reasoned Submission and its information requirements

12. Form RS sets out in general terms the information parties should provide if they wish to have their concentration referred from Member States to the EU Commission prior to notification[11]. Upon its receipt, NCAs will first check whether the proposed concentration meets the legal criteria, in particular whether the concentration is capable of review under their national competition law for the control of mergers. They will also consider other substantive criteria such as those set out in the EU Commission Notice and in paragraph 8. and 9. above and, using their discretion, decide on the request within 15 working days.
13. NCAs will normally assess the referral request based on information provided in the Form RS, without undertaking further investigation. It is in the parties' interest to ensure that the Reasoned Submission is correct and complete as any doubts may result in the request being vetoed by a Member State[12].
14. When filling in Form RS, parties should take careful note of the following issues which are particularly important for Member States' ability to properly assess whether they agree to refer the concentration:
    - the scope and type of information on which they intend to base their Reasoned Submission[13];
    - in order to verify which Member State is capable of reviewing the concentration, the relevant data has to be checked by all NCAs. It follows, therefore, that Reasoned Submissions should be made in a language that all NCAs understand; and
    - if parties wish to submit supporting documents, they are encouraged to contact NCAs capable of reviewing the concentration to verify whether a translation of all or part of a document is advisable or whether an executive summary would suffice. If a NCA asks for an executive summary, the submitting party should confirm that it is correct and complete.

Contacts among NCAs

16. If questions of mutual interest concerning the data submitted in the Reasoned Submission arise, NCAs may wish to contact each other to exchange views on the relevant issue. Apart from informal discussions among NCAs on general issues such as market definition or precedents, informal debate with the EU Commission might also be constructive for clarifying issues.

    If a NCA considers that it is unlikely to agree to the request, it will try to inform the other NCAs and the EU Commission as soon as possible.

    Communication between the EU Commission and NCAs and between NCAs concerning Article 4 (5) ECMR cases are confidential. All written exchanges of information will take place using secure means such as the Merger-Referrals Mailbox operated by the EU Commission. NCAs will not exchange confidential information unless they are either entitled to do so under national law or have been given waivers by the parties. Likewise, they will keep any information they receive from other NCAs concerning another NCA's decision under Article 4 (5) ECMR confidential unless that NCA itself has made its decision public.

Cooperation on post-filing referrals from Member States to the EU Commission pursuant to Article 22 ECMR

(i) Legal Provisions and Substantive Criteria

17. While the following principles concentrate on joint referrals from several Member States to the EU Commission, NCAs might also wish to apply all or part of the criteria described below when a concentration is referred to the EU Commission by only one Member State.
18. According to Article 22(1) ECMR, one or more Member State(s) may request the EU Commission to examine a concentration that does not have a Community dimension within the meaning of Article 1 ECMR but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request.

    Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the EU Commission of the initial request, according to Article 22(2) ECMR.

    In contrast to the situation under Article 4(5), Article 22 ECMR permits referral by one or some of the Member States examining the concentration (partial referrals). If there is a partial referral, the NCAs examining the concentration will, insofar as timing permits, co-operate with each other and with the EU Commission in order to avoid, to the greatest extent possible, conflicting results.

19. In addition to the legal criteria referred to in Article 22(1) ECMR, when trying to establish whether a concentration might be a suitable candidate for a joint referral, NCAs will take account of the following factors:
    - whether the relevant geographic market(s) affected by the concentration is/are wider than national in scope and whether the main competitive impact of the concentration is linked to such market/s;
    - whether NCAs expect to encounter difficulties in information gathering as the parties or the main third party(ies) from whom information is likely to be sought is/are not based in their Member State; or
    - whether there are potentially significant competition concerns in a number of national or sub-national markets located in the EEA, and whether NCAs expect problems in identifying and/or enforcing suitable remedies, should they prove necessary, in particular where suitable remedies could not be secured by the NCAs under national law or through cooperation among NCAs.

(ii) Procedure

Informing the NCAs about a multijurisdictional merger

20. Whenever a NCA receives a notification or learns about a concentration which might be a possible candidate for a referral to the EU Commission, it will ask the parties concerned:
    - whether the concentration is capable of being reviewed by any other NCA within the ECA and,
    - which NCA will or has received a notification.

    When the parties to a concentration inform a NCA that the concentration is subject to review by another NCA within the ECA, the information procedure as described in the ECA Procedures Guide will be put into effect. In particular, all NCAs within the ECA network should be informed of the concentration and which NCAs, according to the parties, are capable of reviewing the concentration. Thus, the process of identifying a concentration as a possible candidate for a joint referral does not depend on it having been notified to all NCAs which are capable of reviewing it under their applicable national competition law for the control of mergers.

The assessment of the concentration

21. NCAs assessing whether the concentration might be suitable for a joint referral to the EU Commission under Article 22(1) ECMR should try to evaluate as quickly as possible whether the concentration is expected to fulfill the above mentioned legal and substantive criteria. This can only be done on a *prima facie* basis.

Launching the referral

22. If a NCA involved in the assessment of a concentration considers that it might be a suitable candidate for a referral, it will inform all other NCAs.

    Alternatively, according to Article 22(5) ECMR, the EU Commission may inform one or several Member State(s) that it considers a concentration to be suitable for a referral and invite that or those Member State(s) to make a request pursuant to Article 22(1) ECMR. NCAs that have received such an invitation will inform all other NCAs of this fact.

    Notifying parties may also informally indicate to one or several NCAs that they would favour a concentration to be referred.

The consultation process

Contacts between NCAs

23. After the first NCA has informed the others that it considers a concentration is a suitable candidate for a joint referral, consultations will be conducted without delay in view of tight deadlines, in order to verify as soon as possible, whether there is support for a joint referral.

    Since under Article 22(2) ECMR all national time limits relating to the concentration are suspended when a referral request is made by an NCA, any NCA seriously considering triggering the referral by making a request should inform the other NCAs without delay.

24. Once a request for referral to the EU Commission has been made under Article 22(1) ECMR by one or more Member States, the EU Commission forwards it to all the NCAs and national time limits relating to the concentration are suspended. Under Article 22(2) ECMR, other NCAs can join the request within 15 working days of being informed by the Commission of the request made.

    Every NCA should inform the other NCAs and the Commission as soon as possible of its decision whether or not to join the request.

    As soon as a NCA informs the EU Commission that it is not joining the request but examining the concentration itself, the suspension of that NCA's national time limits ends. That NCA should also inform the other NCAs of the fact and should continue to co-operate with the other NCAs and the EU Commission during the parallel examination of the concentration. It should also inform the other NCAs and the Commission about the results of its examination.

    Whilst NCAs will try to avoid as far as possible diverging decisions on whether or not to jointly refer a concentration to the EU Commission, national conditions for competition may lead a NCA to conclude that its participation in the joint request would not be appropriate. No NCA is bound by another NCA's decision.

Contacts with the parties

25. NCAs should inform the parties as soon as possible that a joint referral of the concentration is being considered.

    If a NCA learns about a concentration which has not been notified to it but that is being considered by other NCAs as a possible candidate for a referral, the NCA might wish to contact the parties to ask for details concerning the concentration with a view to starting national merger control proceedings.

Consultations with the EU Commission

26. The NCAs should contact the EU Commission as soon as possible in order to verify its position regarding a possible (joint) referral. The Commission's informal agreement to a referral should be sought and the other NCAs accordingly kept informed.

The Coordinator of the procedure

27. The NCAs participating in a joint referral will try to identify amongst themselves an informal Coordinator to act as an informal liaison contact among NCAs, the EU Commission and the parties.
    The Coordinator will act as a focal point for information. He/she maintains contact with the NCAs and the EU Commission informing them about the state of affairs and also exploring their views on the initiative.
28. The Coordinator should consult NCAs verifying their position regarding initiating the referral or later joining it. Moreover, he/she should secure coordination on procedural and substantive issues relating to any joint referral, as far as national confidentiality rules permit. Both the intention and the execution of any initial request for referral should be communicated to all NCAs concerned without delay as this affects all other national procedures. The Coordinator should keep NCAs informed about which Member State has joined the initial request for referral.
29. The role of the Coordinator is meant to facilitate cooperation among NCAs. It does not prevent NCAs from undertaking their own consultations with the EU Commission and/or the parties. It will also not influence any NCA's independent assessment of whether it considers a case suitable for a referral under Article 22 (1) ECMR or whether it will join any initial request according to Article 22 (2) ECMR.

Timing

30. According to Article 22(1) ECMR, a referral request must be made within 15 working days of the date on which the concentration was notified or, if no notification is required, otherwise made known to the Member State concerned.

As far as possible, NCAs will endeavour to reach informal consensus among themselves as regards the joint referral before the expiry of the deadline.

31. With regard to Member States which do not have a mandatory notification system, „made known", which triggers the 15 working day period as laid down in Article 22(1) ECMR, should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22 ECMR[14].

The request for referral

32. In either initiating a request under Article 22 (1) ECMR or in joining the request under Article 22(2) ECMR, the NCAs agree generally to address, where appropriate, the following issues:
    i) that the merger is a concentration as defined in Article 3 ECMR;
    ii) that the concentration has no community dimension within the meaning of Article 1 ECMR;
    iii) whether a relevant geographic market is wider than national;
    iv) the jurisdictions under which it is subject to review;
    v) the potential of the concentration, on a prima facie assessment, to significantly affect competition within the territory of the Member State making the request
    vi) potential problems in identifying and/or enforcing suitable remedies should these prove necessary;
    vii) he possible effect of the concentration on trade between Member States;
    viii) the fact that the deadline imposed by Article 22 (1) or (2) ECMR is met;
    ix) whether consensus has been reached between seve ral NCAs to refer jointly the concentration to the EU Commission; and
    x) whether, if known, the parties are favourable (or not) to the referral.

    NCAs may address any other point they might find important.

The transmission of the request to the EU Commission

33. Each NCA is responsible for transmitting its own referral request to the EU Commission.

The conclusion of the proceedings

34. According to Article 22(3) ECMR, the EU Commission has discretion whether to accept the referral. Should the EU Commission inform the NCAs that it has decided to examine the concentration, the referring NCAs will transmit to the EU Commission as quickly as possible the documents received in the context of the national

proceeding, to the extent that this is possible under national confidentiality rules. Where national confidentiality rules do not permit this, a waiver from the parties will be necessary before transmitting the documents to the EU Commission. In such circumstances, NCAs will, in anticipation of the referral, ask the parties as well as third parties where appropriate, to give a waiver concerning the documents they provided to the NCAs during its national investigation.

ADOPTED 8 November 2011

EU Merger Working Group

Best Practices on Cooperation between EU National Competition Authorities in Merger Review

1 Introduction

1.1 The national competition authorities of the EU who have responsibility for merger review ("NCAs") operate in compliance with different national legal systems. They believe, however, that it is desirable to cooperate in the review of some mergers which meet the requirements for notification or investigation in more than one Member State ("multi-jurisdictional mergers"), and have therefore decided jointly to publish an agreed set of Best Practices on Co-operation in Merger Review.

1.2 This document, which has been drawn up by the EU Merger Working Group[1], sets out the Best Practices which the NCAs, to the extent consistent with their respective laws and enforcement priorities, aim to follow when they review the same merger transaction. It also sets out the steps that merging parties and third parties are encouraged to take in order to facilitate cooperation between NCAs. Cooperation extending beyond the existing ECA Notice system[2] is limited to NCAs who are reviewing the same merger transaction ("the NCAs concerned"). It is not intended that cooperation should provide a forum whereby NCAs not concerned will be involved in the review of a specific case.[3]

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1 The EU Merger Working Group ("the Working Group") was established in Brussels in January 2010. It consists of representatives of the European Commission and the national competition authorities ("NCAs") of the European Union ("EU") together with observers from the NCAs of the European Economic Area ("EEA"). The objective of the Working Group is to foster increased convergence and cooperation between the EU merger jurisdictions in order to ensure effective administration and enforcement of merger control laws.

2 The European Competition Authorities („ECA") Notice system is an information system among the NCAs of the EU and EEA EFTA States ("ECAs"). An ECA Notice is a notice which is distributed to all other ECAs by the first NCA to be notified of a multi-jurisdictional merger. It sets out the names of the merging parties, the sector/industry concerned and/or products concerned, the date of the notification, the name of the case handler, and the other member states concerned. See ECA procedures guide on the exchange of information between members on multi-jurisdictional mergers (2001);
Available for example on http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

3 Some cooperation may, however, be necessary in order to determine the NCAs concerned. NCAs may also wish to consult non-involved NCAs about past experiences with similar mergers both as regards the substantive assessment and remedies, and these Best Practices do not preclude such discussions. For example, it may be helpful to exchange non-confidential information when assessing the effectiveness of a remedy, e.g. if the remedy concerns facilities or assets located in another Member State that is not reviewing the merger.

1.3 This document is intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create new rights or obligations which may fetter that discretion.

2 Objectives of cooperation

2.1 Cooperation is beneficial for the NCAs concerned, for the merging parties themselves and for third parties. The Best Practices are intended to provide clarity on how cooperation among NCAs will operate in multi-jurisdictional merger cases. Where the merging parties provide full and consistent information to NCAs concerned, cooperation can reduce burdens on merging parties and third parties by facilitating, where possible, the alignment of timing and the overall efficiency, transparency, effectiveness and timeliness of the merger review processes.

2.2 In cases where serious concerns or difficult analytical issues arise, cooperation can be invaluable in helping to reach informed and consistent or at least non-conflicting outcomes. In such cases, cooperation will ensure that NCAs are in a better position to exchange views on, for example, possible conceptual frameworks for the assessment of the transaction and theories of competitive harm, types of empirical evidence and so on.

2.3 Cooperation is also beneficial both for the NCAs concerned and for the merging parties in relation to any remedial action which may be necessary. Remedies in a merger that is reviewable in more than one jurisdiction may differ across jurisdictions depending on the competition concern identified in each one; indeed, remedies may not be necessary in every jurisdiction. Nevertheless, where the merger affects a market or markets in more than one jurisdiction, a remedy accepted in one jurisdiction may have an impact in another jurisdiction (see section 3.2(iii)). Cooperation can therefore contribute to avoiding inconsistent remedies and obtaining those that are more coherent.

2.4 These Best Practices are intended to promote the achievement of all these ends.

3 Scope of application of Best Practices

3.1 These Best Practices address cooperation in multi-jurisdictional merger cases. While it is always useful for NCAs to provide basic case information[4] to each other in merger cases which are notifiable in more than one Member State, further cooperation will not be necessary, or even efficient, in the case of every multi-jurisdictional merger. This is particularly the case where it is clear during the early stages of an investigation that the merger does not raise any significant competition or procedural issues in any Member State or that it does so only

4 See model ECA notice (cf. Fn 2 above) as agreed in the ECA procedures guide on the exchange of information between members on multijurisdictional mergers (2001); available for example on http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

in one Member State, or where such issues are not decisive for the outcome of any of the different merger reviews. Close cooperation is not an end in itself: its benefits depend on the specific circumstances of each case.

3.2 Where multi-jurisdictional mergers raise similar or comparable issues in relation to jurisdictional or substantive questions, the NCAs concerned will decide on a case-by-case basis whether cooperation may be necessary or appropriate[5]. For example:

(i) Cooperation may assist the NCAs in forming a view as to whether a transaction qualifies for notification or investigation under merger control laws in their respective jurisdictions. It is noted that although jurisdictional rules and practices may differ across jurisdictions, cooperation may assist the NCAs in reaching an informed view.

(i) Cooperation may assist the NCAs in relation to mergers which may have an impact on competition in more than one Member State, when markets affected by the transaction cover more than one Member State or when a merger affects national or sub-national markets in more than one Member State, if such national or subnational markets are the same or similar from the product standpoint.

(i) Cooperation may also be of value in relation to mergers where remedies need to be designed or examined in more than one Member State, such as in situations where the same remedy is designed to address competition issues in different Member States or where one remedy affects the effectiveness of a different remedy in another Member State.

3.3 These Best Practices are without prejudice to the existing guidance on the system of reattribution of cases between the Member States and the Commission (see the Commission's referral notice and ECA's Principles on the application of Art. 4(5) and 22 of Regulation 139/2004).[6] Nevertheless, the enhanced cooperation recommended in these Best Practices may also facilitate the smooth functioning of the reattribution mechanisms set out in Regulation (EC) 139/2004. In particular, where NCAs are contemplating an Article 22 referral request, contacts

5 Although the NCAs concerned will keep under review throughout the merger control process the need for cooperation, it will sometimes be possible for them to form a view in this regard at an early 2 stage of the process, i.e. during pre-notification contacts (where such contacts take place) or following notification. an early 2 stage of the process, i.e. during pre-notification contacts (where such contacts take place) or following notification.

6 Article 4(5) provides for referral of cases from the Member States to the Commission prior to notification with the purpose of providing a „one-stop-shop" review. Article 22 provides for referral from the Member States to the Commission after notification where it is considered that the Commission is better positioned to investigate a merger. See also Commission Notice on Case Referral in respect of concentrations (OJ C 56, 05.03.2005, p. 2-23). See ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the Merger Regulation (2005). Available for example on http://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf

between them can facilitate the referral, and, if done before notification, can also assist merging parties in forming a view whether it is appropriate for them to speed up the referral process by themselves making an Art. 4(5) referral request (see further the description of pre-notification contacts in section 5.5).

4 Role of National Competition Authorities

4.1 In all cases that relate to a merger transaction that is reviewable in more than one EU Member State, the NCAs concerned will inform the other NCAs by means of the existing ECA Notice system, which involves the exchange of basic non-confidential case information after a notification in such a multi-jurisdictional merger case has been received.[7]

4.2 To facilitate cooperation, the NCAs concerned will aim to update the information contained in the ECA notice by informing the other NCAs about any decision to commence second phase proceedings/in-depth investigations, and any final decision, including a decision with remedies.

4.3 In cases where closer cooperation is necessary or appropriate (see paragraph 3.2 above), the NCAs, having due regard to confidentiality issues (see section 6 below), will aim to cooperate in particular in the following ways:

(i) The NCAs concerned will liaise with one another and keep one another appraised of their progress at key stages of their respective investigations. The key stages will vary depending on the procedural framework of each NCA concerned. The NCAs concerned will keep each other informed of the outcome of the first phase investigation, including, where relevant, the intention to open an in-depth investigation, and the outcome of the in-depth investigation. The NCAs concerned will also keep each other appraised of the launch and progress of any remedies discussions, if not conducted jointly.

(i) Where it is helpful to do so, the NCAs concerned may discuss their respective jurisdictional and/or substantive analyses. Where necessary, having regard to the possible effects of the transaction on the national territories of the NCAs concerned, such discussions may relate to issues such as market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories. NCAs concerned will also, where it is helpful to do so, exchange views on necessary remedial measures or submitted remedies.

7 See model ECA notice as agreed in the ECA procedures guide on the exchange of information between members on multijurisdictional mergers (2001); Available for example on http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

5 Role of Merging Parties

5.1 Effective cooperation between NCAs requires the active assistance of the merging parties at all stages of the review process, both as regards the jurisdictional and/or substantive review and, where required, the assessment of remedies.

5.2 Parties to merger investigations play an important role with regard to cooperation between the NCAs concerned. They can contribute significantly to the alignment of the review proceedings in different Member States, taking into account, among other things, procedural requirements and review periods. Such alignment will be of benefit both to merging parties and to NCAs.

5.3 Therefore, where a transaction is expected to fulfil the requirements for notification or investigation in more than one jurisdiction, the merging parties are encouraged, unless it is clear and obvious from the outset that paragraph 3.2 above does not apply, to contact each of the NCAs concerned as soon as practicable and provide them with the following basic information:

i. The name of each jurisdiction in which they intend to make a filing;
ii. The date of the proposed filing in each jurisdiction;
iii. The names and activities of the merging parties;
iv. The geographic areas in which they carry on business;[8]
v. The sector or sectors involved (short description and/or NACE code).

5.4 It is important to note that the provision of this information by the parties will not of itself be a trigger for cooperation among the NCAs concerned. That will depend rather upon whether the case is one where cooperation is necessary or appropriate, as set out in paragraph 3.2 of these Best Practices. However, it will assist the NCAs concerned to decide at an early stage whether there might be a need for cooperation in the particular case.

5.5 Depending on the circumstances of the case it may be possible to provide much of this information at the pre-notification stage. For this purpose, and where it is permitted by law, it may be helpful for merging parties and the NCAs concerned to organize pre-notification contacts as early as possible. Such contacts can assist the parties and the NCAs concerned to align as far as possible the timing of parallel proceedings and can, ultimately, contribute to the reduction of the overall burden that falls on merging parties in the course of a multijurisdictional merger. It may at times, where circumstances permit, be useful for the merging parties and the NCAs concerned to engage in joint pre-notification contacts.

5.6 Merging parties have a crucial role in helping NCAs to ensure that remedies in different Member States do not lead to inconsistent or untenable results. As already stated above, remedies in a merger that is reviewable in more than

8 The phrase "carry on business" does not include a situation where an undertaking is merely registered in a particular place.

one Member State may differ across Member States depending on the competition concern identified in each one; indeed, remedies may not be necessary in every Member State. Nevertheless, a remedy accepted in one Member State may have an impact on the effectiveness of remedies targeted at competition problems in another Member State. It is therefore clearly in the interest of the merging parties to coordinate the timing and substance of remedy proposals to the NCAs concerned, so as to ensure coherent remedies and to avoid inconsistent remedies. In certain cases, where circumstances permit, it might be appropriate for merging parties and the reviewing NCAs to engage in joint discussions on proposed remedies.

6 Confidential information

6.1 It will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. Therefore, while a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality executed by merging parties can enable more effective communication between the NCAs concerned regarding evidence that is relevant to the investigation.

6.2 For that reason, the merging parties are encouraged to be proactive and to provide waivers of confidentiality to all NCAs concerned, including, where appropriate, at the pre-notification phase. The merging parties are encouraged to use the ICN model waiver provided in the Annex to these Best Practices.

6.3 For the same reasons, where appropriate, third parties are also encouraged to provide waivers of confidentiality to all NCAs concerned. Third parties are also encouraged to use the ICN model waiver provided in the Annex to these Best Practices.

6.4 NCAs are fully aware that it lies within the discretion of the merging or third parties whether to provide a waiver. The scope of the waiver to be provided may be adapted to the specific circumstances of the case, but is essential that the waiver should fulfil the purpose of allowing for an effective information exchange between the NCAs concerned.

6.5 Where a waiver has been provided the NCAs concerned will share the information covered by the waiver without further notice to the parties. NCAs will discuss with each other, prior to any exchange of confidential information as provided for in Sections 4 and 5, how it may best be protected. Confidential information and business secrets are protected under national law in all Member States.

6.6 Confidential information exchanged on the basis of a waiver will not be used for any purpose other than the review of the relevant merger, unless the national law provides otherwise (see paragraph 6.5).

APPENDIX A

ICN Model Waiver Form

[DATE]

[CONTACT NAME AT AGENCY A]
[ADDRESS]

Re: [CASE REFERENCE]

Dear -----:

On behalf of COMPANY A, I confirm that COMPANY A, subject to the conditions and limitations set forth herein, agrees to waive the confidentiality restrictions under [RELEVANT STATUTORY OR REGULATORY AUTHORITY] and other applicable laws and rules (collectively the "Confidentiality Obligations") that prevent AGENCY X from disclosing to FOREIGN AGENCY Y confidential information obtained from COMPANY A in connection with its proposed transaction with COMPANY B. Specifically, COMPANY A agrees that AGENCY X staff may share with FOREIGN AGENCY Y [any of COMPANY A's documents, statements, data and information, as well as AGENCY A's own internal analyses that contain or refer to COMPANY A's materials that would otherwise be foreclosed by the confidentiality Obligations].[18]

This waiver is granted only with respect to disclosures to FOREIGN AGENCY Y and only on the condition that FOREIGN AGENCY Y will treat as confidential information it obtains from AGENCY X in accordance with the terms of the attached letter from [CONTACT NAME] of FOREIGN AGENCY Y. [19]This agreement does not constitute a waiver by COMPANY A of its rights under the Confidentiality Obligations with respect to the protection afforded to COMPANY A against the direct or indirect disclosures of information to any third-party other than FOREIGN AGENCY Y.

18 NOTE: This model language is intended for those situations where a waiver with respect to any and all documents and information provided to Agency X is contemplated. There may be instances where such a broad waiver is not desired. In those cases, the parties may opt for a waiver limited in scope, such as to allow the agencies to discuss potential remedies that each is considering and the reasons for such remedies, or to discuss specific limited issues such as product market definition or barriers to entry. Parties and agency staff should consider the scope of the waiver that is desired to assist them in their investigation so as to not unnecessarily burden parties or other competition agencies.

19 NOTE: "Foreign Agency Y" should provide a letter describing the confidentiality protections provided by that country. (In some cases, the parties and Agency X staff may be satisfied if that letter is directed to that contact person by representatives of the parties, with a written confirmation that Foreign Agency Y agrees to the terms of that letter.) Attached to this model form at Appendix [D] are sample confidentiality letters.

COMPANY A submits this waiver under the condition and understanding that, with respect to information that AGENCY X obtains from COMPANY A and provides to the FOREIGN AGENCY Y pursuant to this waiver, AGENCY X should continue to protect the confidentiality of such information with respect to other outside parties in accordance with the Confidentiality Obligations.

A copy of this letter is being sent to [CONTACT PERSON AT FOREIGN AGENCY Y].

Sincerely,

[ATTORNEY FOR COMPANY A]

cc: [CONTACT FOR FOREIGN AGENCY Y]

CMA
Competition & Markets Authority

Urząd Ochrony Konkurencji i Konsumentów

Public Interest Regimes in the European Union – differences and similarities in approach

Final Report of the EU Merger Working Group 10 March 2016

Introduction

1. The EU Merger Working Group (EUMWG) decided at its meeting of 13 June 2014 to undertake a review aimed at comparing how public interest considerations influence merger control systems in each Member State. A short questionnaire was circulated covering procedural, substantive and institutional issues concerning public interest considerations in merger control.[1]
2. Interim findings were discussed during a session on 5 June 2015 and provisional conclusions were accepted during a meeting on 11 September 2015.
3. This report aims to draw out themes from the responses and, in particular, considers similarities and differences in the public interest regimes.
4. The report and the findings, as set out in the conclusion below, were approved and adopted by the EUMWG at its meeting on17 June 2016.

Background

5. The EUMWG considered that the role of public interest considerations in the context of merger control proceedings was a current and relevant issue, both with regard to the EUMWG's work streams and in the context of wider concerns around potentially protectionist tendencies resurfacing in the aftermath of the financial crisis. It therefore decided to conduct a review of public interest regimes in Member States to better understand and compare the individual Member States' regimes.

Public interest considerations in different national systems

6. Several national competition regimes across the EU provide for the possibility to take account of public interest considerations going beyond the protection

1 The Member States which responded are BE, BG, CRO, CY, CZ, DK, GER, EE, ES, FIN, FRA, EL, HU, IE,ITA, LT, LV, MT, NL, NO, PL, PT, RO, SI, SK, SWE and UK.

of competition in exceptional circumstances.[2] This may mean that mergers that cause competitive harm can proceed or that mergers that do not raise competition concerns cannot proceed on the basis of wider public interest considerations in specific cases. Although interventions on that basis may be legitimate in certain circumstances, it should be limited to exceptional circumstances. Objective and precise criteria, applied in a non-discriminatory and proportionate manner can help limit the scope for such interventions. Procedural rules that provide for a high level of transparency can also play an important role.

7. There are different means by virtue of which competition regimes can meet these objectives. Each regime, and the way in which public interest considerations are taken account of, will likely be designed to operate most effectively within its particular institutional and political framework.

8. Merger cases that raise public interest concerns can be limited to one Member State or have their main impact on one Member State. If cross-border mergers are concerned, it may be useful to seek convergent outcomes.

Wider context for review of public interest considerations

9. Recent developments have also lead to concerns regarding the resurfacing of protectionist tendencies with potentially unfavourable implications for crossborder transactions that may be competitively benign or even pro-competitive. By way of example, the acquisition by General Electric of Alstom, which was originally opposed by the French government on grounds of Alstom being strategically important to France, as well as the proposed acquisition by Pfizer of Astra Zeneca gave rise to wide-ranging debates regarding the circumstances in which governments should be able to intervene to prevent or re-shape foreign acquisitions based on considerations claimed to be in the 'public interest', including the protection of certain industries or jobs. In a recent national merger case, the German Minister for Economic Affairs and Energy decided to grant a ministerial authorisation with conditions for a merger in the German food retail sector. The merger had been prohibited by the Bundeskartellamt. The ministerial authorisation was based on the public interest considerations to safeguard jobs and protect workers' rights (collective agreements and operational co-determination).

2 A report prepared by the French competition authority in 2013 considered the implications of national competition authorities' approaches to public interest in merger control: see 'Making merger control simpler and more consistent in Europe – a "win-win" agenda in support of competitiveness, 16 December 2013', F. Zivy. A detailed discussion of public interest exemptions in German law is provided for example in: Monopolkommission, Politischer Einfluss auf Wettbewerbsentscheidungen, Wissenschaftliches Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission am 11. September 2014 in der Rheinischen Friedrich-Wilhelms-Universität Bonn, 2015.

Summary of findings

Recognition of public interest grounds in merger control – how are they taken into account?

10. The majority of jurisdictions do not explicitly provide for public interest considerations to be taken into account in the assessment of mergers. There are 12 jurisdictions where wider public interest considerations can either form part of the merger control assessment or can otherwise feature in the overall decision making process.[3] However, the regimes differ considerably in terms of how, when and by whom public interest considerations are taken into account as what grounds can be relied upon. Certain regimes include public interest as part of the merger control assessment, whereas others have developed separate frameworks which are activated only in certain, specified circumstances[4] and others again take public interest into account on an ad hoc basis.

11. There are jurisdictions where public interest may lead to the exemption of certain transactions from the scrutiny of the competition authority (HUN) or enable the establishment of separate rules for review of particular mergers (ITA). Other jurisdictions provide for specific rules regarding mergers in particular sectors which is driven by public interest considerations. For example, such rules exist for media mergers in EL.

12. Some Member States noted that even if there is no official or explicit recognition of public interest considerations in statutory merger control rules, such considerations may informally influence the assessment of the particular merger.[5] Grounds for public interest intervention – what is taken into account?

13. To the extent that national merger control regimes allow for public interest based considerations to be taken into account, grounds that are regarded as being "in the public interest" appear to be different across Member States. Certain criteria, however, are common for many jurisdictions, for example national security or the plurality of the media are recognised in many Member States. A number of criteria we identified are mentioned expressly only in the legislation of certain jurisdictions, including the stability of the financial system (UK), rules of sound administration (CY), contribution to economic development or aiding technical progress (PL) and significant national security or supply interests (SWE). On the other hand, some regimes do not define any specific criteria for public interest

3 CY, GER, ES, NL, ITA, NO, PL, PT, RO, SWE, UK, FR.

4 The German system is an example of a separate framework. Public interest considerations can only be taken into account in a separate procedure in an authorisation by the Minister of Economic Affairs and Energy. The assessment concerns exclusively public interest grounds and whether they outweigh the competitive harm that was determined in the decision of the competition authority that prohibited the merger.

5 BE, EE, LV, SI.

considerations and instead provide general principles or rules (GER) which may or may not be supplemented by further specific legislation.[6]

14. We are not aware of any jurisdiction offering any further guidelines by the administrative authorities on the interpretation of public interest based grounds for departing from a competition based analysis. Any guidance to that effect therefore stems from administrative decisions of the relevant authority and to a lesser extent from court judgments.[7] Given that the number of cases where public interest served as a ground for the decision is limited, it appears that the interpretation must usually rest within administrative discretion of the relevant authority.

Institutional arrangements relating to public interest considerations in merger control

15. Differences in institutional arrangements exist across Member States as to which authority or government body may apply public interest considerations to merger control. In the majority of cases there are designated ministries (for example the Minister of Energy, Commerce, Industry and Tourism (CY), In ES Minister of Economy and Competitiveness can do the same after the Spanish NCA Decision. Minister of Economic Affairs (NL), Minister of Economic Affairs and Energy (GER) or Secretary of State (UK) or the cabinet of ministers)[8] who are able to make an intervention or to grant an authorisation on public interest grounds. Some jurisdictions emphasised that although ministerial intervention remains a theoretical option, this has never occurred in practice.[9]

16. PL is the only jurisdiction where the application of a public interest test is the sole responsibility of the competition authority and no ministerial intervention is required.

Procedural differences in enforcing public interest interventions

17. Procedural arrangements differ substantially from jurisdiction to jurisdiction. In PL, the public interest test is a part of usual merger proceedings and is applied by

6 For example, in Germany, the law refers to advantages to the economy as a whole that outweigh restraints of competition or an overriding public interest that justifies restraints of competition. For example, in the German system past decisions provide some guidance on the interpretation of these principles. Among other reasons, these decisions were based on securing technological progress, supporting international competitiveness, safeguarding energy supply and securing employment and workers' rights. It is also clear that media plurality and national security count as relevant public interest considerations in the context of the German framework.

7 In Germany, ministerial authorisations can be and have on some occasions been challenged in court. The judicial review of the procedure to be followed by the Ministry has been intense (and in one case also lead to the annulment of a ministerial authorisation and a part of the procedure had to be repeated). However, with regard to the interpretation of public interest grounds German law is generally understood to grant the minister a broad margin of appreciation.

8 NO, RO, ES.

9 CY, FRA, NL.

the competition authority on a regular basis with no special rules or process for the purpose. In the UK, the Secretary of State may issue a public interest intervention notice under which he assumes responsibility for the decision. Ministerial intervention is also foreseen in FRA where the Minister of the Economy may intervene after a phase 2 decision has been adopted by the French Competition Authority and adopt a decision based on public interest considerations. Similarly, in NL the Minister of Economic Affairs may reverse the prohibiting decision of the Dutch NCA and grant a license to a concentration. In CY, the Minister of Energy, Commerce, Industry and Tourism, prior to the decision of the Cypriot NCA, may declare by a reasoned order that the notified concentration is considered to be of major public interest which may lead to the transfer of the case to the cabinet of ministers. In ES Minister of Economy and Competitiveness can do the same after the Spanish NCA Decision. Alternatively, a public interest intervention may be sought by merging parties by virtue of an appeal which is handled by the relevant minister (PT). In GER merging parties may seek a ministerial authorisation only after a merger has been prohibited by the competition authority. Before the Minister for Economic Affairs and Energy takes a decision a number of procedural steps have to be followed that guarantee a high degree of transparency and facilitate a public debate on the public interest issues at stake in the particular case.[10]

Other types of public interest interventions outside of competition enforcement

18. Outside of merger control there are often separate rules applicable to the control of foreign investments. However, scrutiny of foreign investments is usually limited to strategic industries[11] or companies[12]. In all jurisdictions across the EU, it is not the competition authority carrying out a foreign investment control assessment. Instead, such a review is undertaken by relevant ministers, for example the Ministry for Employment and the Economy (FIN), Federal Ministry for Economic Affairs and Energy (GER), Ministry of Finance (FR), or Ministry of Treasury (PL).

19. Separate rules for the control of mergers may also exist for certain sectors and be applicable in parallel to competition enforcement. This is the case for media mergers in SI where anyone intending to acquire more 20% shares in any media

10 The procedural steps are the following: (i) an independent body of experts (Monopolkommission) provides its own assessment of the public interest considerations in a report that is submitted to the Minister and published; (ii) a public hearing takes place, which allows the applicant to argue for its case and third parties to express their views; (iii) the minister makes its own assessment of the public interest considerations and may combine the decision obligations and conditions in order to ensure that the public interest goals are achieved.

11 FIN, FRA, GER.

12 PL.

(radio, TV or press) is obliged to obtain an authorisation from the relevant minister. In GER, the acquisition of ownership interests in private broadcasters of television services in Germany are reviewed by the Commission for the appraisal of concentration in the media (KEK) on media plurality grounds.

Conclusion

20. The review showed that public interest considerations do not play a prominent role in the vast majority of merger control regimes across EU Member States. These considerations do remain relevant, however, and there are significant differences in terms of how public interest may be taken into account and what public interest grounds can validly be relied upon. However, the EUMWG also found some commonality in approach insofar as public interest based interventions that would be at odds with an economics-based competition assessment have generally been limited to a small number of cases that were characterised by exceptional circumstances.
21. All members of the EUMWG agree that government intervention based on public interest grounds should be reserved for exceptional circumstances and operate on the basis of objective criteria, applied in a non-discriminatory manner and should not restrict competition more than necessary to achieve the public interest objective. Having examined the regimes across Member States, the EUMWG notes that there are differences both in terms of the procedure and the substance relating to the taking account of public interest considerations in the context of merger control reviews. It would appear to be neither necessary nor practicable, at this stage, to strive for a harmonised approach in this regard. In so concluding, the EUMWG neither foresees nor excludes that such harmonisation would become desirable or achievable as circumstances evolve. The EUMWG considers that, given the lessons Member States have learnt from the past, a competition-based assessment should be at the heart of merger control reviews across all Member States.

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The book presents a comprehensive overview of international cooperation between the European National Competition Authorities (NCAs). It consists of fourteen contributions, accompanied by a selection of documents. The papers assembled in the book are of a diverse nature; there are articles, essays as well as case studies. They present interesting examples of bilateral cooperation (between German and Austrian or Czech and Slovak NCAs), regional cooperation (between the Nordic NCAs) or the most far-reaching continental network (like the ECN, with special attention given to changes introduced by the ECN+ Directive). There are also analyses of national experiences with international cooperation (Italy, Slovakia and Spain). Furthermore, specific issues such as the independence of NCAs, the fundamental rights of undertakings, supervision over international cooperation of NCAs and compliance programmes are discussed.

All the authors of this book are involved in the international cooperation of NCAs, performing various functions in this process: officials conducting proceedings, members of transgovernmental networks of competition authorities, non-governmental advisors to those networks, academics advising networks and NCAs, legal representatives of companies involved in those proceedings, or members of other institutions involved in this process.

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