THE ECN@2.0. SYSTEM FAILURE AHEAD?

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Summary Directive ECN+ builds upon the experience and track record of the European Competition Network in the application of Regulation no. 1/2003, departing from traditional rules facilitating decentralisation – jurisdiction, cooperation and exchange of information – to address governance features of the national agencies tasked with enforcing competition rules – independence, adequate resources, priority setting. However, it remains to be seen if these features are adequate (or enough) to ensure cohesive policy setting and enforcement action throughout the single market.

HAS ENFORCEMENT DECENTRALISATION REACHED ITS LIMITS?

The radical shift in enforcement of the prohibitions enshrined in articles 101 and 102 TFEU brought about by Regulation no. 1/2003 can be fully apprehended by revisiting the previous enforcement rules, set out under Regulation no. 17/62. These rules were based on a pre-notification and authorisation system for article 101(3) TFEU centralized in the European Commission. In other terms, if a company wanted to benefit from the application of article 101(3) TFEU exempting it from article 101(1) TFEU (which generally prohibits any agreement between companies which prevent, restrict or distort competition and which may affect trade between Member States, *unless* the conditions found in article 101(3) TFEU are met), it would have to notify its

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agreements to the Commission and apply for a negative clearance, certifying that there would be no grounds for action in respect of that agreement under article 101(1) TFEU.

This system of exemption by authorisation ensured that the power to grant an exemption was kept under the prerogative of the Commission, and while article 101(1) should be applied in tandem by the Commission and national authorities, the centralization of the exemption procedure meant that, in practice, the full effect of the Treaty's competition rules was somewhat muted at national level: national authorities (including the courts) had the power (and the obligation) to find infringements of the Treaty, as the prohibitions in articles 101 and 102 TFEU were directly applicable and were applied in parallel and concurrently by the Commission, the national authorities and the courts, but the legality of any restrictive practices meeting the requirements of article 101(3) would be conditional upon authorisation by the Commission.

Administrative centralization was arguably required to ensure an harmonised approach to, and *effective supervision*[1] of, the application of Treaty rules on competition in what was then an emerging – and relatively untested – reality of economic integration: in 1962, the six Member States of European Economic Community had already some experience of economic integration with the Benelux Union of 1948 and with the European Coal and Steel Community of 1951[2], but while most provisions of the Treaty were aimed at the States themselves, competition rules were original in that their provisions are aimed at companies, and their goal to prevent a disruption to the internal market resulting from the behaviour of companies, not of the States – here, it would be for the States to enforce the rules of the Treaty on their nationals, while a European-wide *competition culture* required to enable this was still emerging[3]. Additionally, the legal framework supporting this developing edifice was still nascent, as was the *constitutional* power of the Court nudging it[4].

However, in 2004, when Regulation no. 1/2003 came into force, this was no longer the case; and while the need to ensure a uniform application of the Treaty competition rules was (and is) still paramount, the centralised system

1 See Regulation no. 17/62, 2nd whereas.

2 Which already contained provisions to safeguard competition, albeit with a narrower scope.

3 It should be recalled that when the Treaty of Rome was signed, the only founding Member State with a modern competition legal and institutional framework in place was Germany.

4 The principle of primacy of EU Law would be defined in *Van Gend en Loos* (C-26/62, *Van Gend en Loos/Administratie der Belastingen*, EU:C:1963:1), delivered on 5 February 1963.

established in 1962 was no longer keeping pace with the enlargement of the internal market.

If in 2004 Regulation no. 17/62 was already at that point 40 years old and unchanged, and somewhat a relic of a system of centralised administrative review and authorisation gone out of fashion[5], Regulation no. 1/2003 was all about *decentralisation*, through a *directly applicable exception system*[6]: decentralisation by empowering national authorities, including the courts, to apply in full article 101 TFEU, including the exempting conditions of article 101(3) TFEU, and decentralisation through the *self-assessment* of market behaviour. Once article 101(3) TFEU became directly applicable, companies were no longer required to notify their agreements to the Commission to obtain a negative clearance or an exemption, instead having to rely on their own assessment of the rules to ensure compliance with the Treaty.

The shift from a centralized application system relying upon a strong and independent bureaucracy with technical acumen in constant dialogue with a powerful judicial authority to a decentralised model where a common set of rules was to be applied by national authorities each with its own legal statute, varying degrees of technical capacity and independent judicial systems was bound to generate problems leading to inefficient outcomes, where the lack of coherence in the application of the Treaty rules could become apparent in instances where the decentralised approach to competition enforcement could potentially hamper integration goals.

HAS DECENTRALISATION BEEN A STORY OF SUCCESS?

Directive (EU) no. 1/2019 came into force 15 years after Regulation no. 1/2003[7], whose decentralisation features became a hallmark of European Competition Policy: a systemic shift from the centralised framework set

5 Remnants of which can still be found in the review procedure of mergers falling under the scope of Regulation (EU) no. 139/2004, the European Union Merger Regulation ("EUMR").

6 See *White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty*, Brussels, 28.04.1999, p. 9.

7 Discussions (and concerns) surrounding the effective enforcement capabilities of national authorities under Regulation no. 1/2003 started earlier: in 2015 the Commission launched a public consultation on the effectiveness of the enforcement of EU competition rules by national authorities, following a 2014 communication from the Commission on the 10th anniversary of Regulation no. 1/2003 where these issues were already raised. This would be the starting point for the legislative proposals eventually submitted by the Commission in 2017. See https://ec.europa.eu/competition/antitrust/nca.html, for full access to the documents supporting these discussions and proposals.

out in Regulation no. 17/62 that had lasted almost 40 years and had served well the principle of competition as an integral part of the internal market[8], Regulation no. 1/2003 relies on an *ever closer* cooperation between national competition authorities and the European Commission in applying and enforcing articles 101 and 102 TFEU.

While Regulation no. 17/62 already provided for some limited exchange of information procedures between national authorities and the European Commission, Regulation no. 1/2003 – whose application, unlike the rules it repealed, is dependent upon teamwork of the European competition authorities – went further and introduced cooperation procedures between the Commission and the national authorities tasked with enforcing competition rules in each Member State (the National Competition Authorities, or "NCA"), especially in terms of responsibility sharing, not only when deciding the set of rules to apply in each case (the Treaty or national statutes), but also to determine which authority would be responsible for the application of the Treaty in any given case.

Some successes are undisputed: the emergence of a network of competition authorities tasked with the application of European Competition Law was not only relevant from the perspective of the cooperation features provided in Regulation no. 1/2003[9], but probably more so in the introduction of more coherent approach to competition policy and competition law throughout the internal market, as the approach to the fight against cartels and a renewed interest in vertical restraints, at European and national level, show.

However, if negative or positive conflicts between the European competition authorities resulting from the jurisdictional rules of Regulation no. 1/2003 are remarkable by their absence[10], and while some loopholes in the leniency programme when confronted with multijurisdictional applications are yet to be fully addressed[11], a lack of a coherent (or unified) driving

8 As shown in the discussions surrounding the "competition principle" in the Treaty of Lisbon and the need to introduce a protocol (Protocol no. 27) on competition, reminding Member States that "*the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.*"

9 See Regulation no. 1/2003, article 11.

10 Including here the lack of invocation of article 11(6) of Regulation no. 1/2003, allowing the Commission to take over an investigation initiated by a National Competition Authority.

11 As showcased in the DHL Express case (C-428/14, *DHL Express (Italy) e DHL Global Forwarding (Italy)*, EU:C:2016:27). While the Directive addressed some concerns, it stopped short of adopting a fully fledged "one stop shop" to leniency applicants facing multiple filings.

force behind competition policy and enforcement at European level can be frustrating to companies and authorities alike, as showcased by the haphazard approach to the competition assessment of *card payment scheme rules*, which would ultimately be settled by a regulation, to the difficulties in securing a coherent framework to address the application of EU Competition Law to digital markets at all levels, national and European, to name only two examples.

In the Commission's own statistics[12], decentralisation appears to have worked well: of the well over 1000 enforcement decisions concerning articles 101 and 102 TFUE adopted between 2004 and 2017 (when the Commission published the proposal for the directive), more than 85% of the decisions had been adopted by national authorities.

Such impressive figures mask a growing imbalance within this community of enforcers, especially when comparing the Member States where the local competition culture was still emerging and their institutions of the "regulatory state"[13] had yet to mature, with those which have had competition enforcement rules and agencies well established within their legal systems for longer periods.

This was clearly in the mind of the Commission when in 2017 it proposed the draft Directive later to be known as the "ECN+ Directive": in its explanatory memorandum to the draft proposal, the first concern of the Commission was that "[s]*ome NCAs do not have enforceable guarantees that they can apply the EU competition rules independently without taking instructions from public or private entities*"[14]. Other concerns dwelt on the effectiveness of the NCA's investigative tools and capabilities, the scattered approach to fines and penalties for infringement of articles 101 and 102 TFEU, the loopholes in the leniency programmes tackling multijurisdictional applications and diverging outcomes to proceedings depending on the authorities involved in certain investigations, leading to *over* or *under*enforcement of competition rules.

As the success of market integration grows, imbalances between the application of competition rules across the European Union by different agencies will become increasingly harder to manage. This duality is coupled with a lack of institutional answers regarding *how* the national authorities operate and

12 Available in https://ec.europa.eu/competition/ecn/statistics.html.

13 See, e.g., Majone, G., "The rise of the regulatory state in Europe", in *West European Politics*, Vol. 17, no. 3, pp. 77-101.

14 See European Commission, COM(2017) 142 final, p.2.

how a single competition policy for the internal market should be framed, none of which, unfortunately, the Directive addressed.

It is doubtful whether the Directive has indeed successfully tackled the issues it set out to solve: by adopting a minimum harmonisation approach setting a relatively low standard for institutional independence and enforcement capability, the Directive may be able to raise the playing field relative to those Member States where enforcement is lacking, or adequate institution-building is still inadequate; but in those Member States where competition enforcement has benefited from a stronger regulatory and institutional framework (which in any case appears to be the case of the majority of Member States), changes ought to be minimal. In relation to these, however, the Directive failed to develop a second layer of integration goals and stronger incentives and institutional mechanisms for a more coherent approach to competition policy across the Union.

SHOULD WE START DISCUSSING A MORE INTEGRATED EUROPEAN COMPETITION NETWORK?

Admittedly, the development of an institutional network of agencies independent of each other to pursue collective goals and a harmonised approach to articles 101 and 102 TFEU – which, in their application, owe much to the action of the Commission and to the case law of the EU Courts – is challenging, and in many ways an example of the *step by step approach* adopted in so many other fields of European integration: beyond the allocation of cases, the Commission, at the centre of the network, nudges, incentivizes, and advises on specific investigations (and ultimately may take over investigations, even if this power has not been acted upon until now), while national authorities have the opportunity to discuss investigations led by the Commission; the multiplication of working groups within the Advisory Committee[15] contributes to ongoing discussions involving enforcers from the Commission and NCAs where a common purpose is developed. This in turn fosters a harmonised frame of mind between competition enforcers, enabling a uniform discourse and (hopefully) practice, with shared concerns and goals[16].

15 See Regulation no. 1/2003, article 14.

16 Even if the Commission's role within the network is not one of leader, but more akin to a *primus inter pares*, this movement also translates into an ever-growing influence of EU Law over national enforcement agencies and national law. Competition Law is a good case in point, as the concurrent application of EU *and*

With Regulation no. 1/2003, the decentralised enforcement of article 101 and 102 TFEU was framed with a set of rules on competence allocation, cooperation and exchange of information within the authorities tasked with the application of competition rules, including rules applicable to the national judiciary. The European Competition Network, while deprived of own powers and competences, operates in a way to facilitate the implementation of the cooperation framework required to enforce competition rules across the Union and enables a discussion forum to share best practices between enforcers.

But as Directive ECN+ pushes the decentralisation model inaugurated with Regulation no. 1/2003 to a different direction, moving from base rules on how national authorities cooperate to the governance models of those authorities vis-à-vis their national governments, we may already recognise a steppingstone for a new governance model for this network.

Indeed, the Directive now entitles NCAs to set their own enforcement priorities. But it remains mute on how the priorities for competition enforcement across the single market should be defined (and by whom), and on how national priorities set at each Member State should be coherently adopted within a competition policy for the single market – which is, in the end, the ultimate goal of the competition rules in the Treaty. It clearly addresses the need to ensure that NCAs are independent and adequately staffed, but it is neutral on how the enforcers themselves should be organized, or to what standards of technical capacity and internal checks and balances they should be held up to, issues pertaining directly to the way competition policy and law is applied throughout the single market.

If we consider the regulatory models adopted in the Union for the financial sector, including the regulatory frameworks now in place for capital markets and banking, where the European agencies in place (such as ESMA and EBA) have a clearer role in setting the standards of operation and goals of national agencies alongside the framework that will be in place for competition enforcement in the single market following the transposition of the Directive, it remains to be seen if the (revised) European Competition Network will be able to provide a coherent and clear approach to competition law enforcement, of if these unanswered questions will eventually open the way for "re-centralisation" of competition enforcement in the European Union.

National Competition Law is progressively leaving little to no room to the particularities of national law to subsist.