



The long and winding road towards a unified competition law enforcement model in the EEA



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On November 4, 2015, the European Commission (the “Commission”) initiated a consultation on the need, and means, to give national competition authorities (the “NCAs”) broader and more effective enforcement powers. It is the first time, since the adoption of Regulation 1/2003², that the European Commission is seeking views on the efficiency of the system put in place more than 10 years ago and, especially, as to how its efficiency can be enhanced. What remains to be seen is whether — and how — the Commission will actually pick up on the issues raised by the various stakeholders and proceed with the further fine-tuning of Regulation 1/2003.

HELP: BACKGROUND

In 2014, the Commission published a Communication whereby it presented an overview of the enforcement of competition law at a national and European level over the ten years since the adoption of Regulation 1/2003 (the “Communication”). In continuation of that effort, the Commission initiated a public consultation on how to better empower the NCAs in order to make them more effective enforcers and to reduce differences between the national competition enforcement regimes in the European Union (the “Consultation”).

Regulation 1/2003 essentially decentralized the application and enforcement of EU competition law by conferring the possibility of applying Article 101 and 102 TFEU upon the NCAs that, alongside the Commission and the Courts, became responsible for the public and private enforcement of EU competition law. Furthermore,

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² 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 January 2003, p. 1–25.





it set up a system of cooperation between the Commission and the NCAs — the European Competition Network (the “ECN”) — in order to ensure a coherent enforcement of competition rules across Europe.

ALL YOU NEED IS LOVE: THE COMMUNICATION AND THE CONSULTATION

The findings of the Commission’s Communication were quite straightforward: Regulation 1/2003 works well. The objectives of the “modernization” of the European competition enforcement rules, *i.e.* greater contribution to the enforcement of competition rules by the NCAs and national courts and less burden on the Commission, have been met.³

This is illustrated by the fact that from May 2004 to December 2013, 112 antitrust cases were handled by the Commission and 665 antitrust cases — nearly six times more cases — were dealt with by the NCAs.

Furthermore, despite the change in the way competition rules are enforced, the Commission and NCAs seem to have moved along the same enforcement lines, thereby creating an “institutional infrastructure”⁴ in EU competition law enforcement. The bulk of enforcement efforts made by both the Commission and the NCAs relate to cartels (48 percent and 27 percent, respectively) and the investigation of horizontal and vertical agreements (24 percent and 46 percent, respectively). The Commission and the NCAs have been concentrating a large part of their enforcement efforts on basic and manufacturing industries, *i.e.* industries that produce materials that are supplied to other industries.⁵

The statistics show that the NCAs have gradually become key institutions for the application of EU competition rules. In the same vein, the role of the ECN has become central to the consistent application of EU competition rules by the Commission and the NCAs.

Despite the fact that Regulation 1/2003 empowered the NCAs to apply EU competition rules, thereby transferring a substantial amount of cases to the NCAs, it did not necessarily follow that all of the NCAs receive the necessary means and instruments to enforce these rules. In this context, convergence among NCAs has been achieved via “soft rules”, such as the recommendations issued by the ECN.⁶ However, even though it is fair to say that good results have been achieved so far, “recommendations have their limits”⁷ – and a material degree of divergence as regards the enforcement of EU competition rules by the NCAs still remains across Europe.

Against this background, in November 2015, the Commission initiated the Consultation. The areas on which the Consultation focuses – and which were already identified in the Commission’s Communication – are:

- i. resources and independence of the NCAs;*

³ European Commission, Press release database, Brussels, 30 March 2004, *Commission finalises modernisation of the EU antitrust enforcement rules*.

⁴ Giovanni Pitruzzella – President of the Italian Competition Authority – “The Public Consultation on Regulation 1/2003: A Stronger Institutional Infrastructure for Fostering the EU Common Competition Culture *Journal of European Competition Law and Practice* 1 (2016).

⁵ Communication from the Commission to the European Parliament and the Council “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Brussels 9 July 2014, COM (2014) 453 final.

⁶ See e.g. *ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information*; *ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means*; *ECN Recommendation on Assistance in Inspections conducted under Articles 22(1) of Regulation(EC) No 1/2003*, <http://ec.europa.eu/competition/ecn/documents.html>.

⁷ Commissioner Margrethe Vestager, Speech “Perspectives on Europe,” London School of Economics, 20 November 2015.





- ii. *enforcement toolbox of the NCAs;*
- iii. *fining policies; and*
- iv. *leniency programs of the NCAs.*

WE CAN WORK IT OUT: THE NEED FOR MORE CONVERGENCE

From a legal – and especially business – perspective, further convergence is a necessary step in the modernization of the EU competition law enforcement rules. The lesser the degree of procedural and institutional divergence between NCA’s, the smaller the risk of substantive discrepancies – and ultimately legal uncertainty.

In this section, we would like to submit some views and endeavor to put forward some recommendations in favor of a more consistent approach by the NCAs in enforcing competition rules, in line with the four topics identified by the Commission in the Consultation.

With A Little Help From My Friends: Resources And Independence Of The NCAs

NCAs have become increasingly important players in the EU competition law arena. Therefore, it is of the utmost importance that all NCAs can function independently and have sufficient resources. This will increase their efficiency, both in terms of antitrust-specific focus and breadth of analysis, and is ultimately essential for further market integration.

Currently, businesses involved in multi-jurisdictional investigations are too often confronted with differing levels of technical skills, a lack of economically sound analysis, diverging interpretation/application of key EU competition law principles, substantially different timetables, etc., which, on occasion, give rise to unpredictable or divergent outcomes and delays.

Accordingly, more harmonization as to the level of resources each Member State allocates to its NCA is highly desirable. This is confirmed by many NCAs, such as the UK Competition and Markets Authority (the “CMA”), according to which “a certain level of resources is also critical to underpin that independence and enable effective enforcement”.⁸ This view and recommendation is also echoed by other stakeholders, such as the American Bar Association (the “ABA”) that points to the need for the NCAs to retain or hire economists to analyze complex cases.⁹

In conclusion, and taking into account the current economic climate in Europe, it is essential that Member States receive a clear signal that their respective NCAs must have sufficient resources to ensure a level playing field for companies.

While increased resources are a more straightforward point, the issue of political independence is more delicate. Despite NCAs, in most Member States, being independent public bodies, they “necessarily operate within a political context”.¹⁰

⁸ CMA submission, para. 13.

⁹ ABA submission, p. 2.

¹⁰ CMA submission, para. 13.





Though Member States' governments can indeed seek to guide competition policies and objectives, NCAs ought to be fully independent in enforcing competition rules in that context.¹¹ For example, the CMA takes into account the "Strategic Steer" of the UK Government – a non-binding statement of strategic priorities outlining the government's aims for the CMA¹² – but remains fully independent in enforcing competition rules and selecting the cases to investigate.

There can be little doubt that the political interference in the enforcement of competition rules is highly undesirable for a number of reasons: it undermines the credibility of the NCA; it seeks to deal with issues that are by definition unrelated to the principles of competition law; and it interferes with the level playing field competition enforcement seeks to create.

Beyond the case of direct intervention of governments into the day-to-day operation of their NCA, such as the Greek government's recent legislative proposal whereby NCA's officials may be dismissed for disciplinary offences that are vaguely referred to rather than clearly defined in the proposal¹³, there are more insidious ways in which competition law principles can be affected. For example, to what extent is it acceptable that national laws *ex ante* provide for clearly and narrowly defined cases of government intervention in the public interest? Again, the UK provides a good example: the Secretary of State can intervene on grounds of public interest, e.g. national security, media plurality, or the stability of the UK financial system, and in exceptional circumstances it has used this power in the past without negatively affecting the proper enforcement of competition rules.¹⁴ However, in Germany, this has recently led to a rift between the Government and the Bundeskartellamt leading to the resignation of the chairman of the Monopolies Commission.¹⁵

For businesses, protectionism and political interference with competition proceedings risks undermining legal certainty and due process, and should simply be avoided.

That Means A Lot: The Enforcement Toolbox

Since the investigatory powers of the NCAs are broadly similar, the key concern in this regard – in particular for businesses – is represented by the lack of a consistent EU-wide approach to Legal Professional Privilege ("LPP"). The Consultation offers an opportunity for a much needed reflection on the need of a consistent approach to LPP throughout Europe. Currently, the case law in a number of Member States¹⁶ is

¹¹ Cf. U.S.: ABA note 18: The ability to exercise discretion in choosing which investigations to conduct, and cases to bring, is so important in the American system that it is almost completely unreviewable by the courts. See *Heckler v. Chaney*, 470 U.S. 831, 831-32 (1985).

¹² CMA submission, para. 14.

¹³ See PaRR, January 29, 2016 "Greek agency lambastes reform proposal as attack on independence" referring to the example of the Greek government's recent legislative proposal whereby NCA's officials may be dismissed for disciplinary offences that are vaguely referred to rather than clearly defined in the proposal. Furthermore, according to the legislative proposal, it would amount to a conflict of interest for any president, vice-president or board member, or their spouse, to be a sitting MP in the Greek or European parliaments, or a government minister. This clause was allegedly specifically targeted at the current vice-president of the Greek NCA.

¹⁴ In the midst of the financial crisis, on 18 September 2008, the Secretary of State for Business and Enterprise issued an intervention notice in the merger of HBOS and Lloyds TSB on public interest grounds to ensure the stability of the UK financial system.

¹⁵ Daniel Zimmer, Chairman of the German Monopolies Commission, announced his resignation after the Government conditionally approved the Edeka/Kaiser's Tengelmann deal which had previously been rejected by the Bundeskartellamt. See GCR, "*German advisory board head quits over Edeka/Kaiser's Tengelmann*," 21 March 2016.

¹⁶ See e.g. Belgium, where the Brussels Court of Appeal ruled that in-house advice is covered by a confidentiality obligation (Brussels, 5 March 2013, *Belgacom*). In the Netherlands, the Supreme Court has confirmed that in-house lawyers who are members of the Dutch bar are covered by LPP, in the same way as independent attorneys.





clearly diverging from the principles set out in *Akzo*,¹⁷ and regulatory intervention may be required to create consistency here.

A further procedural point to consider relates to a formalized system of coordination of investigations through working groups as part of the ECN.¹⁸ In these working groups, NCAs would cooperate on cross-border cases, with uniform investigative powers and adequate guarantees for procedural fairness. These working groups would also have the power to adopt joint settlement decisions.¹⁹ This system would increase consistency and legal certainty, but would indeed require a carefully crafted and balanced mechanism to address possible divergence on substantive issues.

Money, That's What I Want: Fines

The Commission traditionally stresses the importance of sufficiently deterrent fines on undertakings. In the context of the Consultation, we would however like to caution against an excessive focus on public enforcement characterized by high fines, without taking into account the significant added deterrence caused by the surge in private enforcement in the European Union (and in particular, in the UK, Germany and the Netherlands).

Effective enforcement requires a balanced – and well-considered – mix of sanctions and other deterrents, while avoiding the stifling effect of over-deterrence. A uniform method for calculating fines is of course desirable, and would greatly improve efficiency and predictability of antitrust enforcement in the different Member States. However, the goal of further convergence should not be an ever-increasing level of fines. To achieve optimal deterrence, a balanced mix between (i) fines on undertaking, (ii) sanctions on individuals and (iii) private enforcement, is indeed more appropriate.

The 10 percent fining cap is a notable example of a concrete – and problematic – divergence between Member States, which should be addressed. Whereas some NCAs rely on the national turnover (sometimes including export sales) to determine the legal maximum of the fine, others rely on worldwide turnover. A uniform approach would greatly improve legal certainty, and it seems proportionate and logical to rely on a 10 percent cap of national turnover for fines imposed by NCAs.

As to the possibility for Member States to impose criminal sanctions and sanctions on individuals, further harmonization – although desirable – may be difficult since the criminal field basically remains under Member States' exclusive jurisdiction. We are of the opinion that sanctions on individuals – be these criminal or administrative in nature – are an efficient and compelling way to deal with “rogue employees”; however, it is paramount for the attractiveness of leniency programs that systems which provide for sanctions on individuals, also provide for leniency for individuals.

Twist And Shout: Leniency

Further harmonization of leniency programs throughout Europe should be a top priority.

The current summary application system complicates the application process, and entails serious risks for applicants.

¹⁷ ECJ 14 September 2010, C-550/07P, *Akzo*.

¹⁸ ABA submission p. 5-7. The American States can also form informal joint working groups.

¹⁹ In the hotel bookings case, the French, Swedish and Italian NCAs negotiated a *de facto* joint settlement with Booking.com. Other NCAs, like the German Bundeskartellamt, pursued their own investigation, sometimes resulting in diverging outcomes. The President of the French Conseil de la concurrence, Mr. Lasserre, was quoted saying there should have been earlier coordination between all NCAs (see MLex, 29 September 2015).





First of all, it requires applicants to have a full understanding of the geographical scope of the behavior early on in the application process, and to follow-up as more details about the behavior emerge.

Secondly, as is demonstrated in the recent *DHL* judgment,²⁰ summary application has become a misleading term. Applicants should ensure their summary applications describe the behavior in sufficient detail to avoid obtaining leniency in one jurisdiction but risking losing it in another.

It is difficult to gain insight in the motives convincing undertakings to go in for leniency or not, let alone to quantify the actual chilling effect of certain legislation. However, it is clear that the current system of summary applications is lacking in clarity and efficiency, thus undermining legal certainty.

In this respect, despite certain NCAs being not necessarily convinced of the need for a more streamlined system for leniency application across Europe,²¹ we advocate for the adoption of a “one-stop-shop” for leniency applicants, taking *inter alia* into account the success of such a model in the merger arena. This view is shared by several stakeholders, such as the ABA that notes “As commendable as the summary application process is, it reduces – rather than eradicates – the risks borne by the applicants”.²² The goal should be to eradicate uncertainty and risks borne by the applicant. A one-stop-shop for leniency applications is the only way forward.

How Do You Do It? Soft Convergence, Directive Or Regulation?

The decentralization of competition enforcement through Regulation 1/2003 has proven to be a big challenge for the Commission and the Member States. Substantial convergence has already been achieved through soft law, but we have reached the limits of a system based mostly on soft law and general principles of law. As a result, at a national level, inconsistencies remain to a certain degree, giving rise to legal uncertainty for businesses with cross-border activities in the EU.

Even though this is an issue that has not been covered in the Consultation, it may now well be the time to resort to a binding system of convergence. In that regard, the Commission will have to choose between a regulation or a directive depending on the legal effect it wants to achieve through the act it will adopt. Bearing in mind that a regulation is “*binding in its entirety and directly applicable in all Member States*” and that a directive is binding as to the results to achieve but “leaves to the national authority the choice of form and methods”,²³ we would suggest that the Member States maintain some leeway only with respect to certain aspects of the EU competition law enforcement. For instance, as regards the NCAs’ resources and independence, the Commission could adopt a directive – like it did with the antitrust damages – thereby giving more leeway to the Member State and allowing them to “ensure that new rules are consistent with their existing substantive and

²⁰ ECJ 20 January 2016, C-428/14 - *DHL*. DHL had submitted an immunity application to the European Commission relating to the international freight forwarding cartel, and summary applications to the Italian Competition Authority. After receiving conditional immunity from the European Commission, DHL submitted further information to the Commission relating to freight forwarding by road. The Italian NCA found the initial application did not cover freight forwarding by road. DHL submitted an additional summary leniency application, but in the meantime Schenker Italiana SpA (a subsidiary of Deutsche Bahn AG) had already submitted a leniency application to the Italian Competition Authority. In the end, DHL received immunity in the proceedings before the European Commission, which only related to freight forwarding by air, but only a 50 percent discount in the proceedings before the Italian Competition Authority. The ECJ ruled there is no legal link between a leniency application before the Commission and a summary application before a NCA, which would oblige the NCA to interpret the summary application in light of the application to the Commission.

²¹ For example, the CMA “is not aware that the absence of such a system is in fact currently deterring applicants from coming forward such as to have a material adverse effect on either leniency incentives or cartel enforcement” - see CMA submission, para. 41.

²² ABA submission, p. 7-8.

²³ Article 288 of the Treaty of the Functioning of the European Union.





procedural legal framework”.²⁴ On the other hand, as regards a potential one-stop-shop for leniency, a regulation would probably be the most appropriate tool as it would ensure a consistent approach in all Member States.

WE CAN WORK IT OUT: CONCLUSION

All in all, more convergence is needed in relation to all the areas on which the Consultation focuses. Independent NCAs with sufficient resources will ensure more legal certainty and predictability for businesses with cross-border activities.

As to the enforcement tools NCAs have at their disposal, the lack of a consistent approach to LPP is currently a major issue for businesses operating in the EU. Further convergence as to criminal or administrative enforcement, and a more uniform approach to sanctions on individuals would also improve legal certainty, as would a formal system of coordination of investigations and the ability for NCAs to adopt formal joint settlement decisions.

A uniform approach to fine calculation would be welcomed by businesses, but a balanced mix between public and private enforcement is needed to avoid a stifling environment of over-enforcement. A uniform approach to the 10 percent cap would also greatly improve legal certainty and consistency throughout Europe.

Finally, the Consultation is a timely opportunity to introduce a one-stop-shop for leniency application.

²⁴ Proposal for a Directive 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, 11 June 2013, COM(2013) 404 final.

