New Directions in Competition Law Enforcement

Catalin S. Rusu
Anne Looijestijn-Clearie
Marc Veenbrink
Simon Tans (eds)

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Radboud Economic Law Series

ISBN: 9789462405769

Published by:
Wolf Legal Publishers (WLP)
P.O. Box 31051
6503 CB Nijmegen
The Netherlands

info@wolfpublishers.nl
www.wolfpublishers.nl

RADBOUD ECONOMIC LAW SERIES
VOLUME 4

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About This Series

The aim of this series is to disseminate ideas and research presented at the Radboud Economic Law International Conferences, which are organised annually by the staff of the International and European Law Department of Radboud University Nijmegen, the Netherlands. The conference and the published contributions focus on economic law. This legal field is dynamic and broad. Its complexity stems from the multitude of sub-domains embedded in it, as well as from the interplay between them. Economic law entails constantly developing policies and frameworks, multi-layered regulatory and law enforcement regimes, and actors active at various (domestic and transnational) jurisdictional levels. This series attempts to unravel some of the complexities which occur in the interplay between various international, EU, and domestic legal aspects pertaining to the economic law realm. Each conference, and consequently each resulting edited volume, discusses a specific economic law development from academic and practical perspectives. Therefore, the interdisciplinary nature of this series makes it attractive for academics and practitioners with an interest in (international, EU, and domestic) economic law. For more information about the Radboud Economic Law International Conferences and the edited volumes published based on the yearly proceedings, see www.ru.nl/law/relc.

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— Boosting the Enforcement of EU Competition Law at the Domestic Level (Cambridge Scholars Publishing, 2017)
— Digital Markets in the EU (2018)
— Upgrading Trade and Services in EU and International Economic Law (2019)
— New Directions in Competition Law Enforcement (2020)
— The Rise of Public Security Interests in Corporate Mergers and Acquisitions (forthcoming 2021)

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List of Abbreviations

ACM	Autoriteit Consument en Markt
AFM	Autoriteit Financiële Markten
BCA	Belgian Competition Authority
CBb	College van beroep voor het Bedrijfsleven
CCA	Czech Competition Authority
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
DG Comp	Directorate-General for Competition (EU)
ECA	European Competition Authorities
ECHR	European Convention on Human Rights
ECN	European Competition Network
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
GDPR	General Data Protection Regulation
ICA	Italian Competition Authority
NCA	National Competition Authority
NMa	(Former) Netherlands Competition Authority
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
RPM	Resale Price Maintenance
SNIPP	Small but Significant and Non-transitory Increase in Price
SME	Small and Medium-Sized Enterprises
TFEU	Treaty on the Functioning of the European Union
TSC	Territorial Supply Constraints
TEU	Treaty on European Union

Acknowledgments

This volume is based on the contributions presented at the fourth Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 24 May 2019. The theme of this conference was focused on 'New Directions in Competition Law Enforcement'. The speakers present at this event dealt with various issues pertaining to actual and prospective challenges related to competition law enforcement in the EU and in the Member States. The topics tackled by the speakers ranged from the importance of establishing compliance programmes, to the various dimensions in which the ECN+ Directive will impact domestic enforcement of the EU antitrust rules, to setting enforcement priorities and allocating cases within the European Competition Network, and last but not least, to correctly contextualising the CJEU's recent case law on the notion of undertaking in private enforcement proceedings. The conference, and consequently this volume, thus touch upon diverse, yet interconnected facets of competition law enforcement, in an attempt to ascertain the enforcement trends currently emerging in the EU. We argue that matters such as those discussed in this volume are bound to shape the development of EU competition law enforcement in the coming years.

The editors of this volume would like to express their gratitude to a number of persons without whose help both the conference and this volume would not have been possible. We are thankful to the Faculty of Law of the Radboud University Nijmegen for giving us the opportunity to host this conference in the Grotius Building. We are also grateful to all the speakers who presented their interesting research findings during the conference and then contributed to this volume. A special word of thanks goes to Professors Jacques Steenbergen and Barry Rodger, who delivered inspiring keynote speeches during the conference. Also, many thanks go to Professors Hans Vedder and Johan van de Gronden who chaired the discussion sessions during the conference, in a stimulating and thought-provoking manner.

We would also like to express our gratitude to Mrs Charley Berndsen from the Law Faculty, who ensured that everything ran smoothly from an organisational perspective before, during and after the 2019 conference. Last but not least, we would like to thank Ms Kim van der Wart, student assistant at the Department of International and European Law, for using her valuable editing skills, which were essential for bringing together the various contributions to this volume.

This volume takes account of the law(s) in force and rulings handed down up until 30 November 2019.

Catalin S. Rusu, Anne Looijestijn-Clearie, Marc Veenbrink & Simon Tans (eds)
Nijmegen, February 2020

Foreword

Barry Rodger[*]

I was delighted to be invited as a keynote speaker and attend in May 2019, the fourth Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on the theme of 'New Directions in Competition Law Enforcement'. Excellent hospitality and some Scottish reminiscing with my compatriot among the team of editors, Anne Looijestijn-Clearie, was followed by an excellent conference with a range of timely and significant contributions to the academic and policy debates on enforcement of competition law in the EU, many of which are produced in this collection of essays.

My own keynote presentation, subsequently published by the Journal of Antitrust Enforcement,[1] was an excellent opportunity to deliver some empirical research I'd undertaken on competition law enforcement by the UK competition authorities since 2001. The research provided the first comprehensive account of the work of the UK National Competition Authority in its primary task of enforcing the EU and domestic antitrust prohibitions. A rigorous empirical study of the full 19 years of enforcement practice provided the only detailed analysis of this central pillar of UK competition law enforcement, including the first data and narrative on the enforcement of the EU antitrust prohibitions within the UK. Overall, my research in the article reveals a disappointing track record by the UK competition authority in enforcing both the domestic and EU prohibitions, on an absolute and relative basis, in comparison with other leading EU Member States' NCAs, including the headline figure that (to February 2019) there had only been 16 infringement findings by the OFT/CMA involving the EU law prohibitions. Of course, as the paper alludes to, the UK withdrawal from the EU will provide new challenges for the UK competition law authorities.

The other keynote presentation, by Prof. em. Dr. Jacques Steenbergen, Director of the Belgian Competition Authority, is reproduced in Chapter 1: 'Challenges to enforcers', which provides an excellent scene-setter on the wide range of contemporary issues facing enforcers: resources, prioritisation, challenges in the shape of appeal and review to courts and the problems of digital markets are some of the key current 'existential challenges', as he notes, within the broader context of scepticism for markets and technocrats, and the benefits of globalisation and globalised markets. In this context, he probes the tension with inequality and the scope and potential for a greater role for control of excessive

[*] Professor of Law at Strathclyde University, Scotland.

[1] B. Rodger, 'Application of the domestic and EU antitrust prohibitions: an analysis of the UK competition authority's enforcement practice' (2019) Journal of Antitrust Enforcement, available at: https://doi.org/10.1093/jaenfo/jnz019.

and exploitative pricing, and price regulation more generally, which would bring the task of the competition authority closer to that of a regulator. We can indeed observe this narrative more generally in terms of debates on the balance between proactive and reactive approaches to competition law enforcement and suitable remedies, an increasingly significant issue, explored excellently more recently by Kalintiri and Ibanez.[2] An additional challenge is posed by the fairness debate, a zeitgeist issue in current debates on antitrust goals and objectives, notably associated with the Hipster/Neo-Brandeis proponents, and accurately observed by Marco-Colino in her recent analysis of the role of fairness in competition policy.[3] The challenges presented by the digital economy for traditional competition law approaches are considerable and form a key focal point in the current academic debate, policy developments and in the teaching focus in Law schools'.[4] The digital economy theme involves a range of sub-issues such as accurate market definition,[5] platforms and two-sided markets[6] and questions revolving around big data collection and use. A further challenge concerns verticals, and the extent to which these, particularly resale price maintenance (RPM), and territorial supply constraints (TSCs) are again constituting a priority in enforcement, evidenced for instance by the enforcement practice in the UK discussed by myself at the conference,[7] by recent interesting academic analysis on geo-blocking,[8] and by the Commission's decision in the recent *Guess* case.[9] The final challenge alludes to the difficulties in balancing a consumer welfare approach with other non-competition law interests: this encompasses the considerable ongoing post-Fox debate on the goals of antitrust,[10] revitalised by Stucke[11] in particular, with significant European contributions on this broad question more recently by Ezrachi[12] and Lianos.[13] More specifically, this can extend in the context of Article 101(3) TFEU

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2 P. Ibanez-Colomo and A. Kalintiri, 'The evolution of EU antitrust policy: 1966-2017' (2020) 83 Modern Law Review 321.

3 See S. Marco-Colino, 'The antitrust "F" word: fairness considerations in competition law' (2019) Journal of Business Law 329-345.

4 For instance, my Strathclyde Law School and SCALES colleague, Dr. Oles Andriychuk teaches an advanced undergraduate course on Competition Law in the Digital Economy. See https://www.strath.ac.uk/humanities/lawschool/strathclydecentreforantitrustlawandempiricalstudy/.

5 See, e.g., M. Sousa Ferro, *Market definition in competition law* (Edward Elgar 2019) and V. Robertson, *Competition law's innovation factor: the relevant market in dynamic contexts in the EU and US* (Hart Publishing 2020).

6 See, e.g., C. Pickard, 'Competition law and the rise of digital platforms' (2019) ECLR 507-510.

7 See Rodger (n 1).

8 L. Solek, 'Geo-blocking at the cross-section between competition law and regulation' (2020) ECLR 48-57.

9 *Guess* (Case AT.40428) Commission decision C(2018) 8455 final (2018).

10 See E. Fox, 'The battle for the soul of antitrust' (1987) 75 Calif. L. Rev. 917.

11 M. Stucke, 'Reconsidering antitrust's goals'(2012)53 B.C.L. Rev. 551.

12 A. Ezrachi, 'Sponge' (2017) 5(1) JAj.a.E. 49-75.

13 I. Lianos, 'Polycentric competition law' (2018) 71(1) Current Legal Problems.

to specific issues such as sustainability,[14] and also the interplay between merger control, the creation of 'national champions' and the role of industrial policy,[15] an issue of particular resonance in light of Brexit and the 'opportunities' this affords for merger policy development. The author concludes that competition enforcers need to act early with guidance or an expedited commitments process, but I would suggest that this would require, and is dependent on, engagement with and commitment by market players.

This leads beautifully to the second contribution, which is of particular relevance given my long-standing interest in business compliance strategies. While not necessarily an advocate of the Braithewaite enforcement pyramid,[16] the importance of an effective competition law culture in the business community is clearly important.[17] Awareness, advocacy and compliance are significant and central to the effective role of competition enforcement authorities and there have been various studies undertaken e.g. in the UK by the CMA in recent years.[18] There has also been renewed academic interest in Europe in competition compliance strategies,[19] and chapter 2, by Federico Ghezzi, on 'The Italian guidelines on antitrust compliance programs and the difficult goal of matching deterrence, education, and business ethics' makes a significant contribution in this context. It provides a very important assessment on recent Italian efforts to balance deterrence and education, to ensure compliance in their enforcement activities, by looking at the Guidelines on fine reductions introduced in Italy and the shifting role of the ICA. The chapter focuses on the system of incentives and rewards and notes the divergence from the Commission's approach, by reflecting on the distinctive nature of the Italian economy, driven by micro and small firms, whereby greater incentives are required. The chapter examines the effectiveness of the incentives in this specific context of the Italian economy.

Chapter 3 by Nadia Dzino considers the 'Independence requirements in Directive 2019/1 and the case of the Netherlands'. The NCA independence issue was a key driver of the Directive and there has been considerable academic discussion of the significance of the issue and the implications of the Directive's

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14 See for instance, S. Holmes, 'Climate change, sustainability and competition law. Climate change is an existential threat: competition law must be part of the solution, not the problem' (2019) available at: https://www.law.ox.ac.uk/sites/files/oxlaw/simon_holmes.pdf.

15 See, e.g., B. Lyons, D. Reader and A. Stephan, 'UK competition policy post-Brexit: taking back control while resisting siren calls' (2017) 5(3) JAE 347-374.

16 See, e.g., J. Braithewaite, *Restorative justice and responsive regulation* (Oxford University Press 2002).

17 See B. Rodger, 'Competition law compliance programmes: a study of motivations and practice' (2005) 28(3) World Competition 349-376 and B. Rodger, 'Competition law compliance: the CMA 2015 study, compliance rationales and the need for increased compliance professionalism and education' (2015) 36(10) ECLR 423-429.

18 See, e.g., https://www.icmunlimited.com/wp-content/uploads/2019/05/icm_unlimited_cma_competition_law_research_2018.pdf.

19 See J. Paha (ed), *Competition law compliance programs: an interdisciplinary approach* (Springer 2016).

requirements.[20] The implications of Articles 4 and 5 of the Directive, on operational independence and on organisational and financial independence respectively, despite their perceived generality and difficulty in implementing or enforcing in concrete terms, are explored in depth by Dzino, in the context of the nature and status of the Dutch ACM, focusing in particular on the implications of the lack of legal personality on the independent status of the ACM. Dzino carries out a fascinating and contextual assessment and concludes, for instance, that transparent and binding rules on the selection, appointment and dismissal of staff will ensure that the requirements of Article 4(2)(a) of Directive 2019/1 are adequately implemented. Overall, she stresses that binding rules rather than established practices, which may be sensitive to change, are required for effective safeguards and adequate implementation. Her concluding remark in the Dutch context has broader appeal: '*de facto* independence is very important, but remains very fragile without the necessary *de jure* independence.'

The following chapter explores the potential limitations of the Directive in the context of the need to find a compromise between the efficiency of antitrust enforcement and the rights of parties to the proceedings. The rights of parties, given the severity of sanctions potentially available under EU competition law, has been a topic which has perhaps not been explored as expansively as one would have anticipated,[21] but Dr. Malgorazata Kozak emphasises its importance in chapter 4: 'ECN+ Directive: a missed opportunity for strengthening the rights of parties?' As she notes, the Directive, in Article 3, introduces the general principle that proceedings concerning infringements of Article 101 or 102 TFEU must comply at least with the general principles of Union law and the Charter of Fundamental Rights of the European Union. The ECN+ Directive also includes some safeguards of the fundamental rights, in particular in the context of proceedings which could give rise to the imposition of penalties, and in this broader context, the chapter specifically assesses the scope of the exchange of information and its modification under the ECN+ Directive. Kozak accurately concludes that the adoption of the ECN+ Directive is a lost opportunity for clarification and approximation of national procedural principles in competition law proceedings, including the lack of safeguards for the exchange of information, in a system biased towards the efficiency of competition law enforcement.

Chapter 5 by Michal Petr explores another significant aspect of the rights of defence and the failure of the Directive to tackle the issue: 'Seven years after *Toshiba*: time to rethink parallel proceedings within the ECN?' Whereas parallel

20 See W. Wils, 'Independence of competition authorities: the example of the EU and its member states' (2019) 42(2) World Competition, 149-170; M. Sousa Ferro, 'Institutional design of national competition authorities: EU requirements' (2018) 13(2) Comp. L. Rev. 109-137.

21 See e.g. W. Wils, 'Fundamental procedural rights and effective enforcement of Articles 101 and 102 TFEU in the European Competition Network' (2020) 43(1) World Competition. See also J. Temple Lang, 'Fundamental rights and the proposed directive' (2017) 3 CLPD 48.

proceedings are noted to be relatively rare in practice, the author considers that the *Booking.com* saga in particular demonstrates that they may constitute a real problem and 'raise the fundamental question of whether they are in line with the *ne bis in idem* principle.' Again, the issue was not addressed in the ECN+ Directive, but in a comprehensive analysis of the area, the author explores how the *ne bis in idem* principle is interpreted by the ECtHR and the CJEU and whether parallel proceedings are in line with this principle. The author also assesses the extent to which the absence of 'no infringement' decisions poses a problem from the point of view of this principle. In a critical account, Petr recommends that the NCAs should be allowed to adopt non-infringement decisions and that the Commission should start adopting such decisions as well, instead of only 'closing' the case. Furthermore, commitment decisions adopted by an NCA should prevent other competition authorities from investigating the same conduct, on the basis of a high level of mutual trust within the ECN. He concludes that such changes would not limit the effectiveness of EU competition law enforcement, as parallel proceedings are rare, but would 'dramatically increase' the legal certainty for the undertakings involved in the process.

Chapter 6 is a fascinating and enlightening chapter, excellently researched by Pieter van Cleynenbreugel, on 'EU competition law public enforcement in the age of information overload: new challenges ahead?' He sets the scene as follows: 'the increased availability and use of data and easier access to more information made possible by the rise of digital technologies – so-called information abundance or 'infoglut' – could be believed to have greatly facilitated competition law enforcement. However, in practice, it turns out that this increase in available information bears in itself the risk of information overload.' The chapter proceeds to analyse three areas of EU competition law public enforcement which may require attention in the light of information overload threats: competition authorities' discretion in managing and choosing cases, the application of the proof-proximity principle that underlies the enforcement of Articles 101 and 102 TFEU and judicial review against enforcement decisions. Almost inevitably, the author argues that the ECN+ Directive has not adequately addressed these issues. The author demonstrates how competition law enforcement has arrived a little late on the scene to the concept of information overload, which was conceptualised as early as the 1950s,[22] although there has been some interesting developing scholarship here.[23] Given the author's plan to undertake future comparative research on judicial review of NCA enforcement activity, the third aspect is particularly interesting and Van Cleynenbreugel notes that the 'trustworthiness of information in this type of review cases is likely to become a key focal point in future policy-making' and the judicial role will be more challenging in this

[22] B. Gross, *The managing of organizations* (Free Press 1964), 857.

[23] A. Ezrachi and M. Stucke, *Virtual competition. The promise and perils of the algorithm-driven economy* (Harvard University Press 2016).

context. Overall, he notes that the myopia in the Directive regarding the information overload phenomenon is unsurprising but, that at least within the ECN best practices in information management could be developed to manage the increasing challenge of infoglut.

Chapter 7 turns away from the potential impact of Directive 2019/1, to turn the spotlight on private enforcement, albeit through the prism of a concept which is central to both public and private enforcement, in the discussion by Sander A. Van Dijk on 'The concept of 'undertaking' as means to ascertain liability for an infringement of EU competition law'. This is a fundamental and controversial issue, cutting across the concept of separate legal personality at the core of corporate law, and has been the focus of considerable ECJ and national case-law, both in a public[24] and private context,[25] and considerable academic commentary and critique.[26] As Van Dijk observes, the uncertainty as to how to attribute liability for competition law infringements on the basis of the concept of an undertaking, and the scope of that concept, has been considered in the recent ECJ ruling in *Skanska*. Nonetheless, a number of uncertainties remain,[27] and Van Dijk considers that this stands in the way of the effective development of private enforcement in the EU and we need a 'clear roadmap on how to ascertain liability when EU competition law is infringed'.

My particular competition law research interests lie in understanding and promoting effective compliance, private enforcement and the institutional complexities and dynamics in enforcement, all of which are tackled admirably in the range of excellent contributions to this wonderful collection. Awareness of the need for EU competition law enforcement in a digital economy to be equipped for the 21st century, following Directive 2019/1 and with a number of challenges, including adequate recognition of business rights, the essays in 'New Directions in Competition Law Enforcement' set the scene emphatically and eloquently for the coming years. The volume poses a range of further research challenges to academics and policy-makers in the fault lines between effective enforcement, a competitive digital economy and respect for businesses and innovation.

[24] See, e.g., A. Dashwood, M. Dougan, B.J. Rodger, E. Spaventa and D. Wyatt, *Wyatt and Dashwood's European Union law* (Hart Publishing 2011), 713-718.

[25] See the EU Court's ruling in case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204. See, for instance, in the English High Court, case *Media-Saturn Holding GmbH v Toshiba Information Systems* (2019) EWHC 1095 (Ch).

[26] See C. Kersting, 'Liability of sister companies and subsidiaries in European competition law' (2020) 41(3) ECLR 125-136.

[27] Ibid.

Chapter 1

Challenges to enforcers

Prof. em. Dr. Jacques Steenbergen[*]

1. Some of the challenges

Competition authorities have in my experience seldom faced more existential challenges. Some examples: Due to the economic crisis, and also to a lack of expectation management on internal market benefits, many distrust both markets and technocrats.[1] They either question the added value of competition authorities, or tend to expect too much from them; the digital revolution and other technological developments radically change markets and their dynamics; the technological revolution enables and accelerates globalization; societies risk disintegration by multiple forms of destructive behaviour when they feel at the mercy of developments that they can no longer hope to control. We cannot be blind to the fact that many feel challenged by globalisation[2]: by globalisation states lose the ability to govern their domestic market, and ultimately to preserve and shape their identity[3]. Isolationism, protectionism and militant nationalism are logical defence strategies in societies that hope to restore or preserve what little control they can retain over their cultural, socio-economic and political environment. In the absence of rational solutions, reasonable people can be tempted by populism and by extremist views at either end of the

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* Prof. em. Dr. Jacques Steenbergen is the President of the Belgian Competition Authority (BCA). This text reflects the personal opinions of the author and is not a position paper of the BCA.

1 This holds true even in the more market-oriented jurisdictions such as the UK: see, e.g., Lord Tyrie's letter to the Secretary of State for Business of 21 February 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.

2 It may be useful to recall that global trade, challenges and challengers are not new. Europeans tend to forget that China is said to have had the highest *per capita* income in the world in the 15th century, and to have accounted for one third of the world's GDP as recently as 1820, at a time when the US only accounted for 2%. See for a succinct survey, e.g., S. Green, *Good value: reflections on morals, money, morality and an uncertain world* (Allen Lane 2009), 52 *et seq*. If global trade was seen in the 19th and first half of the 20th century as less threatening in Europe, it was largely because European powers could to a significant extent control it as 'domestic' trade within colonial empires. I developed this further in J. Steenbergen, 'Competition and trade policy and the challenge of globalisation' in I. Govaere, R. Quick & M. Bronckers (eds.), *Trade and competition law in the EU and beyond, Liber amicorum Jacques Bourgeois* (Edward Elgar Publishing 2011), 3-17.

3 See for earlier example R. Foqué & J. Steenbergen, 'Regionalism, a constitutional framework for global challenges' in M. Farrell, B. Hettne & L. Van Langenhove (eds.), *Global politics of regionalism* (Pluto Press 2004), 54-68. On the transfer of power to the market see also, M. Poiares Maduro, 'Is there any such thing as free or fair trade? A constitutional analysis of the impact of international trade on the European social model' in G. de Burca and J. Scott (eds), *The EU and the WTO* (Hart Publishing 2003), 268 *et seq*. See also A.C. Zijderveld, 'The democratic triangle: the unity of state, society and market' in M-J. de Jong & A.C. Zijderveld (eds.), *The gift of society* (Enzo Press 1997), 11-24.

political spectrum; globalization, the digital revolution, ecological challenges and aging populations create or change divides in society between the haves and haves-much-less, the can-do's and the cannot or cannot-any-mores, if not between the young and the old; because the efforts of competition authorities rarely bring equal benefit to all, what some see as a solution, is to others the source of the problem.

Frederic Jenny, chairman of the OECD Competition Committee, has pointed out in a succession of conferences[4], that globalization has greatly contributed to growth, but that we were wrong in assuming that growth would bring benefit to all. Economists always said that when a trade surplus is created in total, there may well at the end be winners and losers unless the winners compensate the losers. A number of factors such as rigidities in labour markets mean that significant groups do not benefit and feel excluded. This puts our legitimacy to the test. And it is difficult to be effective when not seen to be legitimate[5]; competition authorities see it as their mission to make markets work more efficiently in the interest of consumers and other stakeholders.[6] But from the, for competition authorities rather unfamiliar angle of psychiatrists, we receive the warning that a culture of efficiency is self-destructive and destroys quality.[7] I am not in a position to assess such views, but can only see that they have an impact on intellectuals who were already highly suspicious of markets. And they attack not a dis-functioning of markets but the efforts to make them work better and lastly, now widely shared concerns about climate change and other environmental issues give particular weight to sustainability issues, certainly also in the Netherlands, and not only in respect of '*plofkippen*'.[8] But the cost of an

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4 See, e.g., his contribution on 'Fairness and Competition' to the OECD Global Forum on Competition meeting in November 2018, available at: https://www.slideshare.net/OECD-DAF/how-can-competition-contribute-to-fairer-societies-jenny-november-2018-oecd-gfc-discussion. See also Y. Van Gerven, 'Editoriaal' (2013) Competition 217.

5 I developed this further in J. Steenbergen, 'Some thoughts on legality and legitimacy' in D. Edwards, J. MacLennan & A. Komninos (eds), *Ian Forrester, a Scott without borders, Liber amicorum* (Vol. 2 Concurrences 2015), 329.

6 See, e.g., infra sub (g) the reactions of Commissioner Vestager and *Bundeskartellamt* president Mundt in the national champions debate.

7 See, e.g., P. Verhaeghe, 'De effecten van een neoliberale meritocratie op identiteit en interpersoonlijke verhoudingen' in M. Groen & P. Kuypers (eds), *Woorden breken, het democratisch tekort* (Garant 2018), 119. Foqué has however emphasised the distinction between the impact of liberal and neo-liberal market thinking on the relation between 'the market' and society, see R. Foqué, 'Vrije mededinging in rechtstatelijk perspectief' in D. Arts *et al* (eds), *Liber amicorum Jacques Steenbergen* (Larcier 2014), 44 *et seq*.

8 See e.g. J. Mulder, 'Mededingingsrecht versus duurzaamheid' (2017) 3 SEW 565. See on the competition law framework and the goals of competition law enforcement further J.W. van de Gronden, 'Europees mededingingsrecht en niet-economische belangen' (2016) 64 SEW 472; T.R. Ottervanger, 'Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld' (2010) 3 M&M 93; R. Smits, 'Sustainable competition law enforcement: animal rights' in D. Arts *et al* (eds), *Liber amicorum Jacques Steenbergen* (Larcier 2014), 33 *et seq*; or N. Petit, *Droit européen de la concurrence* (LGDJ 2018), 47, 81-98. See more specifically in respect of merger control, e.g., the Background Note from the Secretariat of the OECD on 'Public interest considerations in mergers' DAF/COMP/WP3(2016)3, available at:

effective climate policy also creates tensions in society.

2. Responses and attempts to respond

The impact of these challenges and pressures on competition policy and competition authorities is significant. I can in this context only give some examples of their responses, attempts to respond, and policy issues or challenges.

2.1. Inequality and cost of living

We try to address the concerns about increased inequality by focussing on cost of living issues, with or without partners, by market studies, recommendations as well as infringement cases.[9]

Competition authorities should expect to be particularly vulnerable in periods of higher inflation. The Belgian Competition Authority (BCA) was, for example, set up in the early nineties when we were not only motivated by the Commission's 1992 Programme on the completion of the internal market[10] and a more widely shared belief in markets, but also by the realisation that countries with a stronger competition policy (like Germany) had been more successful in limiting inflation in the seventies and eighties than countries (like Belgium) that had relied traditionally on price regulation. There was an explicit *quid pro quo* for accepting the enforcement of competition law against abandoning price regulation. But this means that we cyclically face pressure to show that we have a real impact on price levels, while we share at the same time the view that a

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http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguag=En.

9 See, e.g. Belgium: The Study of the Belgium Competition Authorities concerning 'price level in supermarkets', available at: https://www.bma-abc.be/sites/default/files/content/download/files/20120213-studie_prijsniveau_supermarkten.pdf. The study is being updated at the request of the Minister for the Economy: the yearly report at the Prijzenobservatorium: Vergelijking van het consumptieprijsniveau in België, Duitsland, Frankrijk en Nederland, available at: https://economie.fgov.be/sites/default/files/Files/Publications/files/Jaarverslag-2017-prijzenobservatorium-deel3-internationale-vergelijking-consumptieprijsniveau.pdf. See also, J. van der Linden, 'Consumptieprijzen in België en de buurlanden - Aandachtspunten voor het beleid' (2012) Federaal Planbureau Working Paper, 13-12, available at: https://www.plan.be/admin/uploaded/201212171053540.WP_1213_10339_E.pdf.
See for Luxembourg, the Report by the Government of Luxembourg: Rapports de l'Observatoire de la formation des prix, 'Analyse du niveau et de l'évolution des prix des produits de grande consommation au Luxembourg et dans la Grande Région' (2018), available at: https://gouvernement.lu/fr/support/recherche.gouv_odc%2Bfr%2Bpublications%2Brapport-etude-analyse%2Brapports-observatoire-formation-prix%2Brapport-thematique-ofp%2Brapport-thematique-ofp-0071.html. See for the Benelux the Study by the Secretariaat-Generaal 'Territoriale leveringsbeperkingen in de detailhandel in België, Nederland en Luxemburg' (2018), available at: http://www.benelux.int/files/9215/2696/9988/616-TSC-EN-draft3.pdf. See for the Euro zone the Study by the ECB regarding the grocery prices in the Euro area ECB, 'Findings from the analysis of the disaggregated price dataset' (2015), available at: https://www.ecb.europa.eu/pub/pdf/other/art01 _ eb201501.en.pdf.

10 See for a succinct history K. Lenaerts and P. Van Nuffel, *European Union Law* (Sweet & Maxwell 2011), 199-201.

competition authority should not act as a price regulator.

The conciliation of both concerns requires *inter alia*:

1) A focus not only in priority setting, but also in the opening of concrete cases (for which we are dependent on what comes into the pipeline and limited by our resources) on cases that can have a significant cost of living impact such as cases concerning consumer goods, pharmaceuticals etc.
2) A willingness to take on excessive pricing cases.[11]
3) A careful design of remedies in excessive pricing cases.[12]
4) A focus on exploitative as well as on exclusionary abuses of a dominant position.
5) And certainly, also a constructive cooperation with regulators.

2.2. Competition law and regulation

Competition law and regulation have sometimes been seen as incompatible competitors. But already in the period of liberalisation of the telecom markets between 1995 and 2000, competition law cases such as the 1996 Atlas and 1997 Unisource decisions were used as a laboratory for future regulation,[13] and competition law allowed later the enforcement of regulatory principles against undertakings. Some challenges of the digital economy can be addressed more effectively by regulation, if only because regulations apply *erga omnes*. See, for example, the rules on geo-blocking, roaming and interchange fees.[14]

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[11] See, e.g., the Background Note from the Secretariat of the OECD on 'Excessive prices in pharmaceutical markets' DAF/COMP(2018)12, available at: https://one.oecd.org/document/DAF/COMP(2018)12/en/pdf. In its Decision n. ABC-2014-I/O *Electrabel* (2014) the BCA requalified in part a withdrawal of capacity case (which it considered in the main not established) as an excessive pricing case, available at: https://www.mededinging.be/sites/default/files/content/download/files/2014IO15-ABC_Electrabel%20PUB.pdf.

[12] See, e.g., the BCA tried to do this in its interim measures' decision BMA-2018-V/M *Teco v ABB* (2018), available at: https://www.mededinging.be/sites/default/files/content/download/files/bma-2018-vm-28_pub.pdf.

[13] *Phoenix/GlobalOne* (Case IV/35.617) Commission decision 96/547/EC (1996) OJ L 239/57 and *Unisource* (Case IV/35.830) Commission decision 97/780/EC (1997) OJ L 318/1. See for further examples J. Steenbergen, '(Geliberaliseerde) openbare diensten en EU-reglementering' in H. Cousy *et al* (eds), *Liber amicorum Walter van Gerven* (Story-Scientia 2000), 427.

[14] Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) 531/2012 as regards rules for wholesale roaming markets (2017) OJ L 147/1; Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (2018) OJ L601/1; Regulation (EC) 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) 2560/2001 (2009) OJ L 266/11; Regulation (EU) 260/2012 of the European Parliament and of the Council of 14 May 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) 924/2009 (2012) OJ L 94/22. See also Case C-382/12 P *Mastercard*, ECLI:EU:C:2014:2201 and Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC and 2013/36/EU and Regulation (EU)

Competition law enforcement develops on a case-by-case basis, especially when competition authorities hesitate to give guidance before they have had the opportunity to develop case law. While the antitrust community analyses in minute detail every significant case decision as if it were quasi-legislation in order to predict future decisions, we cannot expect all stakeholders to share our fascination for every change in a turn of phrase. It is therefore of no surprise that experts' reports on the way to deal with digital markets do not focus exclusively on competition law but recommend a two-track approach, for example, with regard to data access and interoperability.[15] The BCA has had several opportunities to define its position *vis-à-vis* regulations and regulators, also outside scope of the organised and partially mandatory cooperation with sector regulators.[16]

However, the fact that it may in some cases be appropriate to defer to regulators, does not mean that regulatory concerns cannot also be competition concerns. The BCA qualified, for example, in two merger control decisions media plurality as a consumer choice, and therefore as a competition concern.[17] When a dominant player distorts competition by ignoring regulation, that can, especially when it systematically ignores applicable regulations and this is not prevented, stopped or sanctioned by a regulator, also constitute an abusive practice under competition law.[18] We should make a distinction between the establishment of infringements of a regulation requiring regulatory policy-making, and the assessment of the impact of infringements on competition.

Competition law enforcement and regulation operate on different timelines. Faced with issues and pressure from public and political opinion, politicians will

1093/2010, and repealing Directive 2007/64/EC (2015) OJ L 337/35.

15 See, e.g., the Report by the experts appointed by Commissioner (hereinafter: the Experts' Report), available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

16 See the Belgian Code of Economic Law (CEL), art. IV.34 & IV.43 provide examples of Royal Decrees in respect of information exchange with sector regulators (such as the Royal Decree of 10 December 2015 on cooperation with the telecom and postal regulator) and telecom legislation requires in conformity with the relevant EU directives for some decisions of the telecom regulator (BIPT/IBPT) a preliminary opinion by the BCA see for example Avis N° 2014-A/A-01 of 26 May 2014 given in application of par. 4, 4/1 et 5 of Article 55 of the telecom Act of 13 June 2005, available at: https://www.abc-bma.be/sites/default/files/content/download/files/2014-aa-01.pdf. See also the de BCA decision of 31 March 2015 concerning the *Villo!* contract in respect of public procurement and competition law enforcement and the BCA decision CC 13-0023 *Touring-Autoveiligheid* (2013) taking into account the disciplinary powers of the relevant administration when assessing the need for remedies in a merger case.

17 See the BCA decision MEDE-C/C-13/0020 *Mediahuis* (2013), available at: https://www.bma-abc.be/sites/default/files/content/download/files/20131025_persbericht_6_bma.pdf;MEDE-C/C-15/0017. *De Persgroep Publishing* (2015), available at: https://www.bma-abc.be/sites/default/files/content/download/files/2015cc24-bma-pub.pdf.

18 See, e.g., the decision of the *Bundeskartellamt* B6-22/16 (2019) in the German *Facebook* case, available at:https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html. See on data privacy in Commission control cases S.Y. Esayas, 'Data privacy in European merger control: critical analysis of Commission decisions regarding privacy as a non-price competition' (2019) ECLR 166.

always be tempted to prefer measures that show some immediate effect. Competition policy aims at making markets work better in order to produce over time benefits that remain – notwithstanding all efforts to measure outcome - mostly difficult to demonstrate. This holds especially true in respect of cartels and merger control, although follow-on damage procedures can help to make the public more aware of the need to act against cartels. It is for stakeholders easier to see the benefits of the blocking of abusive behaviour. This is something the competition authorities must keep in mind in their priorities and advocacy efforts. We can, however, only expect stakeholders to appreciate action against abusive behaviour when it is blocked in time. Given the requirements of due process in infringement cases, authorities must do what they can to bring the useful effect of their enforcement actions forward, for example, by communications on dawn raids,[19] on statements of objections and by appropriate interim measures procedures.[20]

Competition law and regulation or legislation can only strengthen each other when regulations are pro-competitive. It is therefore equally important that we help to reduce the risk of anti-competitive regulation. This argues in favour of a screening of envisaged regulation by the competition authority, as is the case in France. Or at least with the involvement of the competition authority, as it will often lack the resources to do so by itself without jeopardising even more its ability for enforcement.[21]

2.3. The fairness debate

The general public, on whom we depend in order to be perceived as legitimate enforcers of the rules they want to see enforced, may well insist more on fairness rather than on efficiency.[22] But seen from a legitimacy perspective, it can be quite unfair to be inefficient. It is in this context most welcome that Commissioner Vestager helps to reframe the fairness debate by insisting that not competition, but a lack of competition is unfair to consumers, starters, SMEs and all who risk being the victim of cartels and abuses of dominance. And that competition law enforcement is not about losing control over one's life but protecting the right to choose and giving it back when necessary.[23]

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[19] While the BCA considered in the past that it could only communicate by not denying that a dawn raid had taken place, it changed this policy at the suggestion of the Belgian association of competition lawyers and now issues a press release in order to create a level playing field for leniency applicants indicating the sector. See, e.g., the BCA press release No 21/2018, available at: https://www.belgiancompetition.be/sites/default/files/content/download/files/20180703_press_release_21_bca.pdf.

[20] See J. Steenbergen, 'Interim relief measures in competition cases: a European competition authority's perspective' in N. Charbit, C. Malhaldo and E. Yang (eds), *An antitrust professor on the bench: Liber Amicorum* (Vol. 1 Concurrences 2018), 545.

[21] See the Annual reports for opinions given by the BCA. But its opinion is not sought systematically.

[22] See, e.g., Jenny (n 4), 1, 35.

[23] See especially the closing remarks in M. Vestager, 'Competition and Europe's digital future' (Bundeskartellamt conference, Berlin, March 2019) (hereinafter: the 'Berlin Conference') and H.S.

2.4. The digital economy

Granting consumers control is in particular relevant in respect of the digital revolution. Digitalisation raises a wide range of issues that are often presented as the main challenge to today's competition law enforcement. Given the danger of a generalised feeling that people lose control, it is very important that competition authorities show a response to the digital challenge. Understanding the impact of technology is a major challenge but showing that competition law can help citizens to regain control over their data and daily choices is an opportunity.

Competition authorities and governments, such as the Dutch government, have already invested significant efforts in studies on the impact of the digital revolution and the new economy[24], and they benefit from numerous contributions to publications and conferences.[25] Some examples:

i. E-commerce

E-commerce makes it in the first place easier to buy cross border. But geographic restrictions such as geo-blocking also have an increased impact, as was clearly shown by the Commission's sector enquiry.[26] The way competition authorities deal with e-commerce illustrates that we can meet the challenge with existing concepts, provided that we carefully look at the facts and interpret rules and concepts in the light of evolving markets.

Nyong'o, H. Schneider and N. Callan, 'Antitrust Law' (ABA Spring Meeting conference, Washington, 29 March 2019).

24 See the Experts' Report (n 15). See also the letter of the Dutch Secretary of State of Economy to Parliament of 20 May 2019, accessible via *GCR* newsletter of 20 May 2019, available at: (https://globalcompetitionreview.com/article/1193142/dutch-minister-wants-eu-wide-digital-platform-reforms. See also the Furman Report to the UK Government, J. Furman, *Unlocking digital competition: Report of the digital competition expert panel* (Crown 2019) (hereinafter: the Furman Report), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (hereinafter: the Furman Report); see Lord Tyrie (n 1); see also ACM Position Paper of the Round table talk on market dominance of internet and technology companies (2018), available at: https://www.acm.nl/sites/default/files/documents/2018-02/positionpaper-acm-over-marktdominantie-grote-tech-bedrijven.pdf. See also the Report by the ACM, 'Market study into mobile app stores' (2019), available at: https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf. This study led to the opening of an investigation. See also the Joint Study of the French Autorité de la Concurrence and the Bundeskartellamt, 'Competition law and data' (Berlin/Paris 2016), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2. The French Competition Authority has issued an opinion on digital advertising markets Autorité de la Concurrence Avis N. 18-A-03 'portant sur l'exploitation des données dans le secteur de la publicité sur internet' (2018), available at: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//18a03.pdf.

25 See, e.g., the special issue of SEW on the new economy (2018) SEW 480 with contributions on regulation, unfair B2B practices, competition law, algorithms and collusion and labour relations).

26 Commission, 'Final report on the e-commerce sector inquiry' COM(2017) 229 final, available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

E-commerce transactions are assimilated with passive sales under para 52 of the 2010 Guidelines[27]. It follows that a refusal to deal will usually be a hard-core restriction by object.

Hard-core restriction rules such as the prohibition of RPM clauses apply to online as they do to offline businesses, i.e. as restrictions by object: see the four recent decisions on RPM on online markets.[28] In these decisions, the Commission focused on the supplier, and that may well signal a tendency. Furthermore, geo-blocking in e-commerce was sanctioned in the Commission's decision of 25 March 2019 in the *Nike* case.

Does that mean that all restrictions of e-commerce are hard-core and by object? A prohibition to sell online: yes (the 2011 *Fabre* case[29]); a prohibition to sell on a third-party platform: no in the case of a luxury product (the 2017 *Coty* case[30]). But what is a luxury product? And quid for other considerations than the preservation of a luxury image: it is work in progress.

ii. Market definitions

New products, products reaching customers in at least potentially much larger markets, mean that we need to look at many product and geographic markets with a fresh pair of eyes. But again, rather than needing new concepts, the application of well-established concepts and methods leads to new outcomes.[31]

It has been suggested that market definitions deserve less attention in a digital environment.[32] While I share the view that the SNIPP test will be less relevant,[33] competition authorities need, however, to take into account that review judges are unlikely to accept a significant impact on competition, and especially dominance without a credible market definition.[34]

iii. Platforms and two-sided markets

Discussions on two-sided markets are not new and not necessarily concerned with the digital economy. Newspapers earning income from readers and advertisers have often been given as examples. And not all two-sided markets

27 Commission, 'Guidelines on vertical restraints' (2010) OJ C 130/1.

28 *Asus* (Case AT.40465) Commission decision C(2018) 4773 (2018) OJ C 338/15; *Denon Marantz* (Case AT.40469) Commission decision C(2018) 4774 (2018) OJ C 335/5; *Philips* (Case AT.40181) Commission decision C(2018) 4797 (2018) OJ C 340/10; *Pioneer* (Case AT.40182) Commission decision C(2018) 4790 (2018) OJ C 338/19.

29 Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, ECLI:EU:C:2011:649.

30 Case C-230/16 *Coty Germany*, ECLI:EU:C:2017:941.

31 See, e.g., BCA decision BMA-2018-C/C-07 *Roularta Media, Rossel and Mediafin* (2018) and BCA decision BMA-2017-C/C-14 *Mediahuis* (2017).

32 See, e.g., L. Kaplow, 'Market definition: impossible and counterproductive' Antitrust L.J. (2013) 361. See more neutral and distinguishing *ex ante* and *ex post* issues the Experts' Report (n 15), 47.

33 The Experts' Report (n 15), 44.

34 See further C. Cauffman, 'Biedt het mededingingsrecht een recht op (effectieve) toegang tot platformen?' (2018) 12 SEW 497.

are platforms, and not all platforms are digital.[35] But the explosive growth of digital platforms such as Amazon and Google has made that both in competition law enforcement and in the review of policies and tools, dealing with digital platforms is a key concern for competition authorities.[36]

There has been no lack of significant enforcement decisions concerning digital economy platforms: see, for example, on price parity clauses used for e-books by Hachette and others[37] and by Amazon,[38] and Google conferring an advantage on its own products in an adjacent market,[39] on Google imposing restrictions on Android device manufacturers.[40]

iv. Data and data processing

The public debate on competition policy and the digital economy focuses in particular on the accumulation of data by the digital giants.[41] It is addressed in Europe both by regulation and by competition law enforcement.

The common characteristic of both approaches is that we focus on the use of and access to data. This is illustrated by the GDPR rules on the protection of privacy,[42] by rules on copyrights in the digital single market,[43] by infringement decisions in respect of a level playing field on platforms with fines of more than € 8 billion for a single company,[44] and on sharing of data between products of a same company,[45] by commitments in respect of users' rights on Facebook,[46] by remedies in merger cases,[47] the appointment of experts,[48] joint market studies,

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35 See, e.g., V.J. Daskalova, 'Oneerlijke *platform-to-business* handelspraktijken: oude kwesties, nieuwe regelgeving' (2018) 12 SEW 487. See also Caufman (n 34), 44. See also OECD, 'Two sided markets' DAF/COMP(2009)20, available at: https://www.oecd.org/daf/competition/44445730.pdf.

36 See the Experts' Report (n 15), 54; the Furman Report (n 24), 58 *et seq*.

37 *Hachette Livre* (Case AT.39847) Commission decision (2012) OJ C 73/17.

38 *Amazon* (Case AT.40153) Commission decision (2017) OJ C 264/7; K. O'Connell and S. de Morant, 'EU - e-commerce: MFN clauses' in C. Jeffs (ed), *E-commerce competition enforcement guide* (GCR 2018), 39.

39 *Google Search (Shopping)* (Case AT.39740) Commission decision (2017) OJ C 9/11.

40 *Google Android* (Case AT.40099) Commission decision C(2018) 4761 final (2018).

41 See, e.g., OECD, 'Big data: bringing competition policy to the digital era' Background Note by the Secretariat DAF/COMP(2016)14, available at: https://one.oecd.org/document/DAF/COMP(2016)14/fr/pdf; the Experts' Report (n 15), 73-109; the Furman Report (n 24).

42 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119/1 (hereinafter: Regulation 2016/679).

43 See on the political agreement on a draft directive Commission, 'Press release on the Digital Single Market: EU negotiators reach a breakthrough to modernize copyright rules' (Communication), available at: https://europa.eu/rapid/press-release_IP-19-528_en.htm.

44 See e.g. *Google Search (Shopping)* (Case AT.39740) Commission decision (2017) OJ C 9/11.

45 See e.g. Bundeskartellamt decision B6-22/16 *Facebook* (2019).

46 See on the Press release from the Dutch Competition Authority ACM (2019), available at: https://www.acm.nl/nl/publicaties/facebook-past-voorwaarden-aan-het-voordeel-van-consumenten.

47 *Liberty Global/Corelio/W&W/De Vijver Media* (Case M.7194) Commission decision (2015) C(2015) 996 final and the BCA decision BMA-2019-C/C-16 *Telenet/de Vijver* (2019). See for a survey of Commission decisions for example J. Modrall, 'Big data and merger control in the EU' (2018) 9 ECL&P, 569 *et seq*.

and sector enquiries by national competition authorities,[49] etc.

Both in respect of regulation and competition law enforcement, the EU is widely seen as a leading actor on how to deal with big data in order to enable consumers to control their privacy and the way their data are monetised.[50] There is a debate in Europe on when and to what extent it is advisable to force companies to share data.[51] The EU prefers focussing on measures on access to and control over data rather than attempts to split up companies.[52] The US seems more willing to go for a forced break-up.[53] This can partly be explained by differences in legal tools and past enforcement in the US oil and telecom industries, but also by the fact that the giants are US based. Blocking a merger between parties in third countries is not easy, but breaking up a foreign company is even less obvious.

When designing remedies in competition cases, privacy protection rules can help a competition authority,[54] but they may also complicate matters.[55] It is, more generally increasingly important to dispose of adequate guidance on the distinction between personal data and data on consumer behaviour that has become corporate by aggregation and processing.[56]

v. More general comments

Competition authorities need in the first place to understand new technologies and their potential impact on markets, for example, when asked to assess the impact of algorithms.[57] Some appoint technology officers, the Commission can benefit from the services of DG Connect, and we all attend conferences and workshops such as the workshop organised by the ACM with the cooperation of

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48 See the Experts' Report (n 15); see on this initiative European Commissioner Vestager: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/commission-appoints-professors-heike-schweitzer-jacques-cremer-and-assistant-professor-yves_en.

49 See, e.g., the Joint Project of the Bundeskartellamt and the French Autorité de la concurrence as well as other projects of the French authority on e-commerce and on-line advertisements, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=667&id_article=2964.

50 See, e.g., The Economist 23-29 March 2019, 11 and 19-22. In the US, California takes the lead on privacy protection.

51 See, e.g., the Experts' Report (n 15), 9, 92 *et seq.*; see also the Furman Report (n 24), 74 *et seq*.

52 See, e.g., the interview with Margrethe Vestager European Commissioner for Competition (*Les Echos* 26-27 April 2019).

53 See, e.g., the views of FTC Chairman Simons as reported in C. Thomas, 'Trumps marktmeester heeft 'big tech in het vizier' (2019) FD, available at: https://fd.nl/profiel/1294499/trumps-marktmeester-heeft-big-tech-in-het-vizier?_ga=2.56353195.1465264301.1573210034-114253296.1573210034. But Commissioner Noah Phillips seems less convinced: GCR USA Briefing of 1 May 2019, available at: https://globalcompetitionreview.com/article/usa/1190781/dont-break-up-the-tipline-for-1-may-2019.

54 Regulation 2016/679, Article 20.

55 The BCA had to deal with this issue in its decision in the case BMA-2019-C/C-16 *Telenet/de Vijver* (2019).

56 See also the Experts' Report (n 15), 26, 87 *et seq.*

57 See e.g. R. Steppe, 'Algoritmische prijsbepaling en stilzwijgende collusie onder EU-mededingings-recht' (2018) 12 SEW 512; the Furman Report (n 24), 109-112; OECD, *Algorithms and collusion: competition policy in the digital age* (2017), available at: https://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf.

the AFM in The Hague on 7 March 2019 following the ECA meeting.[58]

Competition authorities also need to be equipped to carry out investigations in a digital environment. National authorities benefit significantly from the experience of others and the effective cooperation in, for example, the ECN Forensic IT Workgroup the scope of which has been expanded to cover also other digital challenges.

As virtually everything has a cross-border impact, coherent decision making is more important than ever. Unfortunately, that also tends to be more difficult.

1) Issues are new or perceived to be new.
2) The Commission and most of the NCAs develop their views from case to case, and only issue guidelines once the case law has clarified some key issues.
3) It is unpredictable which authority will be the first to be confronted with new issues, and some decide more swiftly than others. It is therefore unpredictable who will be the first to develop a case law that may not always prove to be a basis for consensus, as is illustrated by the *Booking.com* case.
4) Without enhanced concertation and preferably *ex ante* guidance we risk confusion and significant disruption of the internal market. This has prompted competition authorities to ask for studies such as the above-mentioned Experts' and Furman reports. And it prompted the ECN to adopt an early warning procedure, it has intensified the exchange of experiences in ECN working groups, in the OECD Competition Committee, ICN workgroups and countless conferences such as this one.

Decision-making should not only be coherent, but also swift for competition authorities to be relevant on online markets without losing sight of quality in due process and output. Regardless of whether you think regulation can adapt more rapidly to change than competition cases can hope to give it direction or not, both instruments tend to be too slow to respond to the needs and certainly the expectations of stakeholders.

2.5. Verticals and the more economic approach

The challenges are not limited to the impact of the digital revolution. The above-mentioned[59] comparisons of prices in supermarkets of neighbouring Member States show that we also need to look again at what we tended to consider to be issues of the past such as vertical restrictions.

Many competition authorities now see also non-digital verticals as a priority. Not because we like verticals to be a problem or because we would be able to deal with them in our comfort zone. But because market studies such as the above-

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[58] See also the proposal in respect of a digital markets unit in the Furman Report (n 24), 8-11, 54-83.

[59] See Lenaerts and Van Nuffel (n 10), 199.

mentioned studies[60] comparing prices in supermarkets in neighbouring countries showed significant price differences that cannot be explained by objective cost factors. They are in particular concerned about the impact of a wide variety of territorial supply constraints (TSCs).[61]

If hard-core restrictions such as RPM clauses were to be assessed as restrictions by effect that may benefit of the *de minimis* communication, we might as well give up our advocacy efforts towards SMEs as most can claim that their agreements taken separately are well below the thresholds and have only a marginal impact on markets. But if SMEs do not even feel concerned by the most basic rules of competition, it is unlikely that there will ever be a competition culture in socio-economic environments where the overwhelming majority of undertakings are SMEs.

Several NCAs have asked the Commission to take up vertical cases in order to give guidance by enforcement. This has resulted in the above-mentioned recent decisions on fairly straightforward RPM restrictions (even though on online markets) and on geo-blocking.[62] I do not see this development as a reversal of the search for a more economic approach. It is on the contrary the result of a confrontation with economic reality. That also applies to the arguments that we must be able to deal with some infringements as hard-core by object. Some types of behaviour can be identified *ex ante*, while others only on a case-by-case assessment of their impact. We need on the contrary more economic analysis, but often of a different nature.[63] As Andreas Mundt has often emphasised,[64] one of the main challenges in dealing with the digital economy is the definition of effective remedies, and that requires a better understanding of consumer behaviour. There is therefore a great need for more and more robust behavioural economics.

2.6. Consumer welfare and non-economic or non-competition specific issues

It follows, for example, from the wording of Article 101(3) TFEU that consumer interests were always a key factor in competition law enforcement. But it also follows from Article 101(3) TFEU that authorities in the EU have always been able to take into account contributions improving the production or distribution

60 See the Study of the Belgium Competition Authorities concerning price level in supermarkets (n 9).

61 See, e.g., the study of the Benelux Secretariaat-Generaal (n 9).

62 *Asus* (Case AT.40465) Commission decision C(2018) 4773 (2018) OJ C 338/15; *Denon Marantz* (Case AT.40469) Commission decision C(2018) 4774 (2018) OJ C 335/5; *Philips* (Case AT.40181) Commission decision C(2018) 4797 (2018) OJ C 340/10; *Pioneer* (Case AT.40182) Commission decision C(2018) 4790 (2018) OJ C 338/19; *Ancillary Sports Merchandise* (Case AT.40436) Commission decision C(2019) 2172 final (2019) OJ C 216/4.

63 See in the same sense the Experts' Report (n 15), 41 *et seq*; and less inclined to change the paradigm: the Furman Report (n 24), 86-88, but arguing in favour adaptations to existing tools, 89.

64 See, e.g., the Berlin Conference (n 23). We can in this context also refer to the Joint paper of the French, German and Polish Ministers of Economic Affairs of 4 July 2019 arguing in favour of more behavioural remedies, available at: https://www.concurrences.com/en/bulletin/news-issues/july-2019/the-french-german-and-polish-ministries-for-economic-affairs-publish-joint.

of goods or promoting technical or economic progress, provided they allow consumers a fair share of the resulting benefit. We may assume that in doing so, many sustainability arguments can be taken into account.[65] I may add that the Court has never really endorsed an exclusive focus on consumer welfare,[66] and that the Commission also referred in its Notice on priorities for the enforcement of Article 102 TFEU to the protection of the competitive process.[67]

The same holds true to some extent under the EU Merger Control Regulation. Article 21(4) of the Merger Control Regulation allows the EU Member States also in respect of concentrations that must be authorised by the European Commission to take appropriate measures in order to protect public security, plurality of media and prudential rules. Other (non-economic) public interests may only justify measures by Member States with the agreement of the European Commission.[68]

In a number of Member States national competition law makes it possible for the government to intervene in merger control procedures, usually in order to overturn or avoid a decision of the competition authority prohibiting a concentration on various public policy grounds,[69] such as: industrial development, protecting employment, and promoting the competitiveness of the undertakings in international competition in France; benefits to the economy as a whole or an overriding public interest in Germany; relevant general interests of national economy within the context of European integration in Italy; general interest reasons in the Netherlands; questions of principle or interest of major significance to society in Norway; the benefits to fundamental strategic interests of the national economy in Portugal; national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of the environment, promotion of technical research and development and the maintenance of the sector regulation objectives in Spain; exceptional public interests, such as national security, media plurality, or the stability of the financial system in the United Kingdom.

2.7. Merger control: market power and national champions

The 2017 findings of De Loecker, Eeckhout and Unger[70] concerning the impact of

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65 See (n 11).

66 See, e.g., Case C-501/06 P *GlaxoSmithKline*, ECLI:EU:C:2009:610, para 63; see however for the General Court Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG*, ECLI:EU:T:2006:151.

67 See Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' COM(2008) 832 final. See in the same sense the Experts' Report (n 15), 40-41.

68 See, e.g., on privacy as a non-price competition concern in EU merger control Esayas (n 18), 166 *et seq*.

69 See, e.g., OECD Background Note from the Secretariat (n 8).

70 See J. De Loecker, J. Eeckhout and G. Unger, 'The rise of market power' (2017) Working Paper 23687, available at: http://www.janeeckhout.com/wp-content/uploads/RMP.pdf; J. De Loecker and J. Eeckhout, 'The rise of market power and the macroeconomic implications' (2017) Working Paper 2368, available at: https://www.nber.org/papers/w23687.

concentrations in the US are still the talk of the day. And while the findings of DG Comp's Chief economist are somewhat different (less inequality and increase of concentration), they also point to an increase of profit margins even though at a lower level[71] and show a similar pattern.[72]

US and UK[73] reports on common ownership were presented in the OECD Competition Committee hearing (December 2017), with a lively debate among US experts on the relevance of the data.

Both market power and common ownership issues are being examined at various levels, but I cannot say that we can already come up with a clear assessment or response.[74] The Experts' Report concluded, for example, that it is too early to take a position on a reform of merger control thresholds and the introduction of, for example, transaction value based thresholds.[75] The Dutch Secretary of State for the Economy is seeking a reform of the thresholds at the EU level.[76] With regard to common ownership, we have, for example, the impression that the issue may be of less concern in economies in which many shareholder structures continue to be characterised by the strong presence of founding families. And I continue to think that cross-board memberships in competing companies are more relevant from a competition law perspective than common ownership.

However, the debate on merger control is now dominated by the issues of national champions with the reaction of the French and German governments to the rejection by the Commission of the merger between Alstom and Siemens,[77] the above-mentioned question of how to deal with the tech giants and massive accumulation of data, and the difficult issue of 'killer acquisitions'.

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71 Less outspoken: Deutsche Bundesbank, 'Mark-ups of firms in selected European countries' (2017) Monthly Report 53, discussed in Speech by J. Weidmann, 'Herausforderungen der Geld- und Wirtschaftspolitik' (Industrie-Club Düsseldorf 2019), available at: https://www.bundesbank. de/de/presse/reden/herausforderungen-der-geld-und-wirtschaftspolitik- 795900.

72 J. De Loecker and J. Eeckhout, 'Global market power' (2018) NBER Working Paper 24768, available at: https://ideas.repec.org/p/cpr/ceprdp/13009.html.

73 UK Contribution to OECD Competition Committee Hearing, 'Common ownership by institutional investors and its impact on competition' DAF/COMP/M(2017)2?ANN3/FINDAL: *"BlackRock, Vanguard and State Street (collectively, 'The Big Three') combined constitute the single largest shareholder in at least 40% of all listed companies in the US. When restricted to the S&P 500 stock index, The Big Three combined constitute the largest owner in 438 of the 500 member firms (or 88%)"*, available at: https://one.oecd.org/document/DAF/COMP/M(2017)2/ANN3/FINAL/en/pdf.

74 See further on merger control for example I. de Silva, 'Assessing online platform mergers: taking up the new challenges faced by the French competition authority in the digital economy' (2018) 2 Concurrences 39.

75 See the Experts' Report (n 15), 112-117.

76 See the GCR newsletter of 20 May 2019, available at: https://globalcompetitionreview.com/article/1193142/.

77 *Siemens/Alstom* (Case M.8677) Commission decision COM(2019) 921 final (2019) OJ C 300/14. See on this decision the Speech by the Director-General for Competition of the European Commission Johannes Laitenberger to the *Brüsseler Arbeitssitzung der Studienvereinigung Kartellrecht* (2019), available at: https://ec.europa.eu/competition/speeches/text/sp2019_02_en.pdf.

It is telling that opinions differ significantly on the question whether there is a need to review the merger control rules in order to avoid 'killer acquisitions',[78] but all tend to consider that we should be more critical in applying existing rules. Personally, I tend to conclude that we have to make a distinction between start-ups and spin-offs that have already a market presence, and those that have not. Without any track record on any market, it is not only questionable whether they might ever be able to be a credible competitor on their own, but also whether the starters would have been willing to start without the perspective of an acquisition. The question is then rather on the acceptability of the purchaser provided there is a realistic possibility to choose.

The debate on competition policy and industrial policy, or, as the Experts' Report puts it,[79] competition law as the background regime, is probably as old as the Union and its earlier incarnations.[80] Commissioner Vestager referred recently to the choice made by the 'founding fathers' to include in the Treaty competition rules in order to create a fair market for everyone.[81] She and the president of the *Bundeskartellamt*, Andreas Mundt, argued that when politicians give priority to non-competition concerns, they must know that such options come at a price as consumers are likely to pay for a loss of efficiency.[82] And more recently the governments of Belgium, Denmark, Finland, the Netherlands, Portugal and Sweden all supported the Franco-German proposals on industrial policy,[83] but rejected the idea of a modification of the competition rules.[84]

These are certainly not arguments against the idea of national champions, or against accepting the natural growth of tech companies by competition on the merits.[85] But they argue against the artificial creation of champions who would not have made it on their own merits. It may moreover be an illusion to think that artificially supported champions will be welcome in third countries as Mario Monti pointed out.[86] They will be vulnerable to anti-subsidy measures and various other restrictions. The real issue concerning the opportunities of EU industry on world markets has at least as much to do with a lack of reciprocal

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78 See the Experts' Report (n 15), 117-120.

79 See the Experts' Report (n 15), 53.

80 The author had already the opportunity to discuss the issues in G. De Clercq and R. Foqué, *Change and adjustment: external relations and industrial policy of the EC* (Kluwer Law & Taxation 1983).

81 See M. Vestager, 'Competition and Europe's digital future' (*Bundeskartellamt* conference Berlin, 14 March 2019).

82 Ibid. See also with a warning against 'rashly calling into question' the EU competition law regime speech by Weidmann (n 71).

83 Franco-German memorandum on industrial policy (2019), available at: https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century.

84 mLex, 27 May 2019.

85 See also the contribution by Andreas Mundt to the conference celebrating the 10th anniversary of the Autorité de concurrence in Paris on 5 March 2019, available at: https://www.autoritedelaconcurrence.fr/fr/video/les-10-ans-de-lautorite.

86 Ibid.

access to markets, as with the size of EU companies.[87] We should therefore address the issues of competitiveness not only as issues of competition and industrial policy, but also make active use of trade policy instruments.[88]

Both the German Minister for the Economy and Commissioner Vestager pointed out during the Berlin conference that champions can also be smaller. Commissioner Vestager saw the large number of smaller companies, generating half of business turnover in the EU, almost two thirds of jobs and about one third of exports in value, as the European model for a more agile economy, making "*us more resilient by letting us put our money on a series of small bets, instead of staking all we have on one throw of the dic*e." Competition law must safeguard their market opportunities and protect consumers against abuse and an abusive strengthening of dominance. And trade policy and instruments such as the Foreign Direct Investment instrument[89] must be used in order to defend reciprocity in the access of all to markets abroad and protect our strategic interests.

3. Conclusion

I hope this succinct survey shows that EU and national competition law provide us with the conceptual framework and key powers required to meet today's needs.[90] And also that competition authorities do respond to the challenges to and opportunities for competition law enforcement. But more is needed.

Two major concerns for me are the relation between competition law and regulation, and the need to impact on market behaviour within a time period that meets the legitimate expectations of stakeholders.

If addressing concerns with regard to the functioning of markets becomes a race between competition authorities and regulation, competition authorities will always lose. We must seek constructive co-operation, and should, for example, seek to be involved in the design of regulation in order to avoid anti-competitive solutions, as is, for example, the French competition authority.

When infringement cases concern novel issues, we need: an early identification and case allocation as envisaged in the ECN 'early warning' procedure, and fast track cooperation in related cases[91]; a further optimization of accelerated

87 See, e.g., the contribution by Pascal Lamy to the Paris conference (n 85).

88 I developed this further in Steenbergen (n 2).

89 See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (2019) OJ L 791/1; see also Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (2012) OJ L 351/40.

90 This holds not only true with regard to the EU see the 'Common understanding of G7 Competition Authorities on "Competition and the digital economy"' (Paris, 5 June 2019), available at: https://www.banque-france.fr/sites/default/files/media/2019/08/02/commonunderstanding_0.pdf. See also the conclusion in the letter of the Dutch Secretary of State (n 24), 8.

91 Informal contacts among authorities work well. It may nevertheless be surprising that this issue is not

procedures such as settlements and commitments; an optimization of interim measures procedures[92]; more generally a use of any technique that may bring forward the useful effect of such procedures, for example, by communicating on dawn raids.

But this will not be sufficient. I am, with others,[93] increasingly convinced that we must develop the ability and willingness to offer guidance *ex ante* in guidance papers,[94] also before we have developed the relevant case law. And we must design procedures that allow us to sidestep the infringement route in a much less formal and fast track commitment procedure. That may not require a legislative change,[95] but it will not be easy and raises a number of issues, such as the design of procedures will require a careful definition of its scope: only for certain sectors, or operators or issues? It should provide a fast track concertation among the ECN members; what about third parties? If it is developed by analogy to guidance letters, there will be no judicial review. And perhaps even more difficult, it requires a willingness to abandon in some cases the possibility or even probability to establish an infringement in order to give priority to an earlier outcome.

And all of this will require an even more intensive exchange of knowledge and experience among competition authorities.

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dealt with comprehensively in the European Competition Network or in 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 (2019) OJ L 11/3. See also A. Mundt, 'Ten years of ECN-cooperation at its best' in D. Arts, W. Devroe and R. Foqué (eds), *Liber Amicorum Jacques Steenbergen* (Larcier 2014), 512.

92 See, e.g., the above-mentioned Joint Paper of the French, German and Polish Ministers of Economy (n 64).

93 See also the conclusion in the letter of the Dutch Secretary of State (n 24), 10, 11.

94 See on the limits of an ex post and the development of an ex ante approach in respect of IPR: I. Govaere and V. Demedts, 'Toward an 'ex ante' or 'preventive' application of Article 102 TFEU in the Commission's policy pursuant to the Astrazeneca-case' in D. Arts, W. Devroe and R. Foqué (eds), *Liber Amicorum Jacques Steenbergen* (Larcier 2014), 441.

95 See, e.g., by a new notice on informal guidance. See for the present Commission, 'Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases' (2004) OJ C 101/78.

Chapter 2

The Italian guidelines on antitrust compliance programs and the difficult goal of matching deterrence, education, and business ethics

*Federico Ghezzi**

1. Introduction

On 25 September 2018, the Italian Competition Authority (ICA) issued the Guidelines on antitrust compliance programmes.[1] This document identifies the adoption and implementation of a robust and effective compliance programme as a mitigating circumstance in the calculation of fines for anti-competitive violations. Specifically, it allows for a reduction of up to 15% of the fine in the event that an antitrust compliance programme is adopted before the beginning of an investigation (so-called *ex ante facto* programmes) and a more limited reduction, of up to 5% of the fine, for compliance programmes implemented during the investigation (so-called *ex post facto* programmes). These reductions are applicable to fines imposed as a result of anti-competitive arrangements and abuses of a dominant position under both the European and Italian competition law provisions.[2]

The Guidelines are part of a major policy shift happening within the ICA in recent years, a change that can be summarized as an attempt to reinforce simultaneously the two complementary pillars of antitrust enforcement, deterrence and education, with the aim of increasing compliance.[3] To begin with, the ICA has recently made clear its intent to pursue its punitive-dissuasive purpose more vigorously than in the past by increasing the level of fines. With this shift, it aims both to induce companies to refrain from adopting anti-competitive behaviour, and – together with the functioning of leniency programmes – to undermine the stability of existing cartels and therefore

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[1] See ICA n. 27356 Linee Guida sulla compliance antitrust, Bull. 37/2018 (hereinafter: the Guidelines). The Guidelines were issued after a public consultation concerning a first draft of the Guidelines together with an Explanatory Report. All the replies to the consultation are available at: https://www.agcm.it/competenze/tutela-della-concorrenza/intese-e-abusi/contributi-alla-consultazione-pubblica-compliance.

[2] See Law no. 287/1990, Art. 2, 3 and 4. These provisions contain the Italian provisions dealing with restrictive practices and abuses of a dominant position. They closely resemble Articles 101 and 102 TFEU. The ICA applies the Italian antitrust law provisions to practices taking place in geographically narrow markets, while most significant infringements are investigated under Articles 101 and 102 TFEU.

[3] See for the need to consider education as a central factor to boost compliance with the antitrust rules C. Beaton-Wells, 'Normative compliance: the endgame' (2012) CPI Antitrust Chron. 1; A. Riley and D.D. Sokol, 'Rethinking compliance' (2015) JAE 31, 40.

provoke their break-up. In this context, a central role has been played by the 2014 Guidelines on the quantification of fines (hereinafter: the Fining Guidelines), aimed at increasing the level of fines by raising the basic fine, especially for secret cartels, and, at the same time, limiting the possibility of their reduction by narrowing down the application of mitigating circumstances.[4]

In an effort to improve the awareness of antitrust, the ICA has also endeavoured to nurture a more widespread knowledge and "culture" of competition law and its underlying economic principles. According to the ICA, many antitrust violations are ascribable both to the lack of recognition of competition as a fundamental value in doing business,[5] and to the ignorance in relation to the principles behind the prohibitions of restrictive agreements and abuses of a dominant position.[6] For that reason, the ICA has begun to be more active in advocating competition law and values, so as to try to follow Cesare Beccaria's still relevant *adage* that "*the most certain method of preventing crimes is to perfect the system of education.*"[7] From this perspective, it comes as no surprise that the Guidelines declare their primary goal to be the promotion of "*a wider culture of effective competition among entrepreneurs*."[8]

Concisely, the idea underlying the new Guidelines is that a widespread adoption of compliance programmes may help to protect competition better in two different ways. On the one hand, by contributing to the education of the managers and employees of a larger number of firms, these programmes may prevent a number of "unaware" violations of the law, especially by small and medium-sized companies. On the other hand, they may reinforce the deterrence level by increasing the rate of detection of wrongdoings.

Compliance programmes may in fact improve firms' ability to monitor the conduct of their own divisions and employees and both reduce the risk of illegal behaviour being undertaken (*ex ante*), and identify and promptly put to an end (*ex post*) violations incurred despite the company's commitment to abide by the antitrust rules. If we consider the (rough) theoretical index of antitrust

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4 See ICA n. 25152 Linee guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1 legge n. 287/90, Bull. 42/2014. On the Fining Guidelines, see F. Ghezzi and G.D. Pini, 'The Italian guidelines on the method of setting fines. A (half) step towards transparency and deterrence' (2016) 5 Oss. Dir. Civ. Comm. 297.

5 See G. Pitruzzella, *Introductory remarks to the ICA annual report 2014* (AGCM 2015), available at: https://www.agcm.it/dotcmsDOC/relazioni-nnuali/relazioneannuale2014/AnnualReport2014_Presentation.pdf.

6 This problem has been magnified by the absolute predominance of small firms in the majority of Italian industrial sectors; the fact that there is a gap in the knowledge and understanding of the antitrust rules appears however to be a common trend at an international level, see ICN Advocacy Working Group, *Competition culture project report* (ICN 2015), available at: http://competitionpolicy .ac.uk/documents/8158338/9254690/ICN_Competition_Culture_Project.pdf/9 ea6b364-07af-4b32-bf91-0dc1c976d525.

7 C. Beccaria, *On crime and punishment* (Hackett Publishing 1764), Chapter 4, 45.

8 The Guidelines, para 3.

enforcement's effectiveness given by the ratio between the number of prohibitions and the total number of violations, the main reason to encourage the adoption of compliance programmes is that they may have the twofold merit of increasing its numerator and reducing its denominator. This, in short, seems to be the fundamental reason that prompted the ICA to issue the new Guidelines and to reward *ex ante facto* compliance programmes in particular.

The Guidelines are very detailed and focus on: (1) the structure and content of compliance programmes in order to be eligible for a fine reduction, (2) the different reward schemes available for *ex ante* and *ex post facto* compliance programmes, and finally (3) on more specific issues such as the adoption of programmes within groups of companies, their evaluation in the case of recidivism, as well as the possible consideration of compliance programmes as an aggravating circumstance.

This is not the place for a thorough examination of the requirements that compliance programmes must satisfy in order to be considered by the ICA as a mitigating circumstance.[9] The objective of this chapter is rather to examine the system of incentives provided for in the Guidelines and their compatibility with other antitrust enforcement tools. The conditions set for rewarding compliance programmes appear to be well designed, with the exception of the situation in which the running of the programme leads the firm to identify a secret cartel. In this circumstance, the Guidelines mandate immediate reporting of the wrongdoing to the ICA in order to be eligible for a reduction of the fine.[10] If, on the contrary, a firm detects and terminates the wrongdoing, but does not report it to the ICA, it will completely lose the prospect of being rewarded with a reduction of the fine. Antitrust officials have declared that this condition is aimed at promoting ethical behaviour by undertakings,[11] and at fully protecting

9 The Guidelines do not diverge significantly from the antitrust compliance models promoted by several competition authorities and business associations around the world. See, for the UK, CMA & The Institute of Risk Management, *Competition law risk: a short guide* (IRM/CMA 2017) Vol. 2, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587464/cma-risk-guide-2016-revised.pdf. See for France, *Autorité de la Concurrence*, *Antitrust compliance and Compliance Programmes. Corporate Tools for Competing Safely in the Marketplace* (*Autorité de la Concurrence* 2012). Many private institutions have published antitrust compliance models and guidelines, such as the ICC, 'Antitrust Compliance Toolkit' (2013), available at: https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/ or the Italian guidelines Confindustria, 'Linee Guida Confindustria per la compliance antitrust delle imprese' (2016), available at: https://www.associazioneantitrustitaliana.it/attivita/linee-guida-confindustria-per-la-compliance-antitrust-delle-imprese/.

10 The Italian leniency policy is very close to the European Union one. It provides for immunity from fines to firms that are the first to report "secret cartels" to the ICA. Other leniency applicants may have their fine reduced according to the "added value" of their contribution to the definition of the wrong-doing. The Italian leniency Guidelines are published in ICA n. 24506 Comunicazione sulla non imposizione e sulla riduzione delle sanzioni, Bull. 35/2013.

11 See, e.g., the Introductory Remarks of M. Ainis, 'Diritto antitrust e compliance programs: le guidelines dell'AGCM' (AGCM conference 2018).

the current appeal of leniency programmes. However, the design of the incentives in this situation seems to lead to the unintended consequence of discouraging the adoption of compliance programmes especially by small and medium-sized companies, which should on the contrary be the main target of the ICA's educational efforts.

A modification of the incentives' scheme provided for in the Guidelines could correct this problem, at the same time allowing the ICA to reach its goals of educating firms to a better understanding and respect of competition rules and maintaining the appeal of its most important enforcement tool, the leniency programme.

2. The discussion on the opportunity of rewarding compliance programmes

The decision by the ICA to reward antitrust compliance programmes is quite surprising, given the high degree of similarity between the Italian and European antitrust laws and the longstanding tendency of the ICA to follow the main policy choices made by the European Commission.

At EU level, there is a general perception, especially among top competition officials, that frequently the real goal of antitrust compliance programmes is indeed to educate companies and their employees… but to educate them to identify, hide or even better eliminate any evidence of anticompetitive misconduct.[12] Hence, the very cautious judgments on the possibility of explicitly rewarding compliance programmes. To give an example, the former EU Commissioner for competition, Joaquin Almunia has very clearly stated his sceptical position: "*To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?*"[13]

Other competition officials were even harsher in stigmatizing the morally

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[12] A suspicion that concerned also the ICA, see ICA n. 26901 *Vodafone-SMS informative*, Bull. 50/2017, para 353, where the ICA argued that the instructions contained in Vodafone's compliance programme were suitable to favour the refusal, omission or delay of providing information and showing the required documents during an on-site inspection.

[13] J. Almunia, 'Compliance and competition policy' (Businesseurope & US Chamber of Commerce Competition Conference 2010). Former Commissioner Almunia further argued: "*a successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition*" (J. Almunia, 'Cartels: the priority in competition enforcement' (15th International Conference of Competition: A Spotlight on Cartel Prosecution 2011). U.S. antitrust officers share this very sceptical position. See B. Snyder, 'Compliance is a culture, not just a policy' (International Chamber of Commerce/U.S. Council of International Business Joint Antitrust Compliance Workshop 2014), available at: https://www.justice.gov/atr/file/517796/download: "*the existence of a compliance programme almost never allows the company to avoid criminal antitrust charges. Why? Because a truly effective compliance programme would have prevented the crime in the first place.*"

dubious conduct of many firms that have adopted compliance programmes.[14] For these reasons, contrary to the experiences of some Member States,[15] in the last 20 years the EU Commission has never considered the adoption and implementation of a compliance programme as a mitigating factor.[16]

Two reasons seem to explain the ICA's decision to diverge from the well-established position of the European Commission:[17] (i) the clear lack of deterrence shown by the Italian antitrust system as a whole, and (ii) the very peculiar structure of the Italian economy, which is characterized by a very significant number of micro and very small firms.[18] Indeed, there would be no need to offer any material incentive for adopting a compliance programme if the advantages deriving from its implementation[19] more than offset its direct and indirect costs.[20] If the costs of non-compliance and the risk of detection are very

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14 W. Wils, 'Antitrust compliance programmes and optimal antitrust enforcement' (2013) 1 JAE 52, 61. Wils refers to perverse learning (employees inclined to engage in antitrust infringements can learn from compliance training how to engage more effectively in antitrust infringements whilst avoiding detection and punishment). According to Wils, the risk of perverse learning effects is particularly high with dawn raid training, especially through mock raids, as this may teach cartelists or prospective cartelists how to avoid detection. Negative enforcement effects can also arise where a compliance programme leads to the detection of an infringement but, instead of reporting the infringement to the antitrust authorities, the company decides to conceal or destroy the evidence of the infringement. On the effectiveness of compliance programmes and the sometimes not so 'snow-white' reasons to adopt them see A. Stephan, 'Hear no evil, see no evil: why antitrust compliance programs may be ineffective at preventing cartels' (2009) ESCR CCP Working paper 09-09, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432340.

15 For a description of the main experiences, see N. Jalabert-Doury, D. Harrison and J.P. Schmidt, 'Enforcers' consideration of compliance programs in Europe: a long and winding – but increasingly interesting road' (2015) 4 CPI Antitrust Chron. 2; E.S. Lachnit, 'Compliance programs in competition law: improving the approach of competition authorities' (2015) 11 Utrecht Law Rev. 31 and OECD 'promoting compliance with competition law' Daf/Comp(2011)20, available at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

16 Even if the EU Commission has maintained that "*any effort by a company to ensure compliance with the EU competition rules is laudable.*" See Commission, 'Compliance matters – what companies can do better to respect EU competition rules' (Publications Office of the European Union 2012) 10, available at: https://op.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe- aa08c2514d7a/l language-en.

17 For a qualification of the different approaches of the various antitrust authorities, see A. Capobianco, 'Compliance, compliance programs & competition policy' (Entrance Launch Workshop, Florence, 26 June 2015).

18 According to the 2015 industry census by the Italian National Statistics Institute (ISTAT), out of 4,390,000 active firms, 4,180,870 have less than 9 employees (with an average 3.5 employees), while only 3,780 have more than 250 employees, available at: https://www.istat.it/it/files//2015/09/14-Industry-services.pdf.

19 Advantages that mainly consist in the prevention of future wrongdoings (avoiding both fines and damages), but that can be present in case of early detection of an anti-competitive conduct. According to W.J. Kolasky, 'Antitrust compliance programs: the government perspective' (Corporate Compliance 2002, Conference PLI San Francisco, July 12 2012): "*early detection of antitrust crimes will give a company a head-start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.*"

20 Indirect costs relate to a heavier internal control structure, but also to the possible cooling effect on

high (i.e. the level of deterrence is very high), the advantages of adopting an antitrust compliance programme are likely higher than the investment needed to conceive, design and implement it. However, the design of compliance programmes, and the training, monitoring, and reporting activities involved can be very costly.[21] In addition to being potentially quite significant, these costs are immediate, concrete and substantially fixed, while the related benefits are uncertain (no education and monitoring programme can eliminate the risk of violations), impalpable[22] and postponed to a rather distant future. Thus, offering a material incentive to adopt compliance programmes may be justified when reaching a sufficient level of deterrence is impossible or very unlikely. This is the case where, as in Italy, for a vast set of reasons the ability to identify and punish anticompetitive behaviour is still rather limited.[23] Furthermore, economic studies report that in Italy, as in many other legal systems, the trend towards more rigorous antitrust enforcement policies has not contributed significantly to reducing the inclination to form cartels and other blatant antitrust violations.[24]

On the other hand, compliance with the antitrust rules and the consideration of the value of robust competition as drivers of the growth of firms and of the country as a whole do not seem to have been completely assimilated into the

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certain entrepreneurial strategies. For a general discussion see G.P. Miller, 'An economic analysis of compliance programs' in J.H. Arlen (ed), *Research handbook on corporate crime and financial misdealing* (Elgar 2018); D. Herold, *A principal agent model of competition law compliance* (Mimeo 2015).

21 In particular, this may prove to be true if a firm needs to use sophisticated screening models. See R.M. Abrantes Metz, 'Why and how to use empirical screens in antitrust compliance' (2012) 2 CPI Antitrust Chron. 4.

22 A compliance programme makes it possible to highly reduce the risk of adopting conduct that, if detected and proven, could result in heavy fines (and possibly compensation for damages). However, the risk of detection of the anti-competitive conduct is so low that firms doubt it is worthwhile to make the necessary investments from an economic point of view.

23 This is particularly true in Italy where, until very recently, the contribution of the private enforcement channel to deterrence was almost non-existent and public enforcement limited by the many tasks that the Parliament assigned to the ICA over time. The ICA has jurisdiction, *inter alia*, over antitrust, unfair commercial practices, the exercise of excessive power in the agro-food chain, abuses of economic dependence, conflicts of interest by members of the government, the concentration of movie theatres, etc. The adoption 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 (2019) OJ L 11/3, may change this situation slightly.

24 There is a growing amount of literature on this topic, see A. Giannaccari and C. Landi, 'Le sanzioni antitrust nella prassi applicative: si va nella città dolent'e' (2014) Merc. Conc. Reg. 214. For an international comparison see I. Bos, S. Davies, J.E. Harrington and P.L. Ormosi, 'Does enforcement deter cartels? A tale of two tails' (2018) 59 International Journal of industrial organization 372; V. Ghosal and D.D. Sokol, 'The rise and (potential) fall of U.S. cartel enforcement' (2018) University of Florida Levin College of Law Research Paper 19-3, available at: https://ssrn.com/abstract=3162867; J.M. Connor, 'Price fixing overcharges: revised 3rd edition' (2014) SSRN, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780; Y. Katsoulacos, E. Motchenkova and D. Ulph, 'Measuring the effectiveness of anti-cartel interventions: a conceptual framework' (2016) TILEC Discussion Paper 2016-001, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id =2714238.

DNA of the public institutions and private actors in many sectors of the national economy.[25] The fact that the vast majority of firms operating in Italy is very small, and does not have the structure to assess the competitive lawfulness of its behaviour, obviously exacerbates this problem.

These reasons led the ICA to embrace a different approach from the EU's agnostic one, in the hope that an incentive to adopt compliance programmes would give rise to a virtuous circle. In the presence of an adequate reward, a relevant number of firms may in fact opt for the implementation of effective antitrust compliance programmes (that would not be otherwise economically appealing). This, on the one hand, could contribute to spreading the culture of competition within small and medium-sized firms and in this way facilitate the prevention of certain antitrust violations resulting from the (certainly not rare, at least in Italy)[26] lack of knowledge of the law. On the other hand, for bigger companies the running of sophisticated compliance programmes could facilitate the detection of restrictive conduct implemented by rogue employees and/or subsidiaries in spite of the directives of the parent company.[27] From this perspective, it could be argued that the incentive to adopt compliance programmes represents a necessary first step towards self (or inside) policing, which should complement public and private enforcement. This would thus be a stimulus to adopt an internal monitoring system that, by being applied by companies in a continuous, detailed and informed way, could be very effective in the prevention of illegal activities and in the detection and termination of violations carried out "unconsciously" or by disloyal employees.[28] Therefore, from a public perspective, the price to be paid - in terms of a fine reduction - would be wholly justified by the increase in deterrence, detection, and prevention. In fact, the adoption of compliance programmes by private firms

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25 See A. Pera and M. Cecchini, *La rivoluzione incompiuta :25 anni di antitrust in Italia* (Fazi Editore 2015), 251: in their view, the development of competition law in Italy is still *"a rugged path full of obstacles: cultural resistance, lobbyist oppositions, political interference, collusive tendencies, hostility towards the deep institutional and market reforms that would be necessary"* (my translation from the Italian).

26 In Italy, but also in many other countries. See J.E. Murphy and D. Boehme,' Fear no evil: a compliance and ethics professionals' response to Dr. Stephan' (2011) SSRN, available at: http://ssrn.com/abstract=1965733.

27 For a discussion, see OECD (n 15), 343.

28 F. Thepot, 'Can compliance programmes contribute to effective antitrust enforcement?' in J. Paha (ed), *Competition law compliance programs: an interdisciplinary approach* (Springer 2016), 196, argued that because of informational advantages of companies over agencies, *"compliance programs can improve the probability of detection if strong incentives are provided to companies to undertake internal monitoring of antitrust infringement."* See also J. Murphy, *Promoting compliance with compliance law: do compliance and ethics programs have a role to play*? in OECD (n 15), 278, a well-designed compliance programme *"can do internally what the government attempts to do externally, but with much more presence, credibility and organizational insight."* However, external enforcers still need to monitor the compliance function to ensure that it is faithfully and effectively carried out (and obviously, this adds to aggregate social cost). See G.P. Miller, 'The compliance function: an overview' in J. Gordon and W-G. Ringe (eds.), *The Oxford handbook of corporate law and governance 981* (Oxford University Press 2017).

would result in a public benefit, consisting in reducing the number of possible violations (preventive function) and, at the same time, in putting to an end several anti-competitive offences that the antitrust authority would probably not discover. Finally, at least some of the restrictive practices detected by compliance programmes could be reported to the ICA under the leniency policy. In that event, the level of general deterrence would increase, thanks to the fines applied to the other cartelists.[29]

3. *Ex ante* versus *ex post facto* compliance programmes in Italian case law and in the new Guidelines

To understand the policy choices made with the new Guidelines better, it is necessary to briefly take a step back. Before 2014, the ICA had never fully addressed the issue of antitrust compliance programmes as a mitigating circumstance. This scenario changed with the adoption of the Fining Guidelines.[30] In fact, paragraph 23 of the Fining Guidelines established that "*the adoption and implementation of a specific compliance programme, adequate and in line with European and national best practices*" might result in a reduction of the basic fine of up to 15%. The Guidelines however warned that the mere existence of a compliance programme would not in itself be considered a mitigating circumstance, absent evidence of a concrete commitment to respect the provisions of said programme.

From the wording of the Fining Guidelines it was not possible to conclude whether a reduction of the fine would be recognized only if the programme had been adopted before the infringement, during the investigation, or in both situations. Subsequent decisional practice clarified these doubts, showing that the ICA was ready to consider *ex post facto* compliance programmes as a mitigating factor.[31] On the contrary, the ICA never contemplated the existence of an *ex ante facto* compliance programme as a mitigating factor. Adopting a wording very similar to the statements of many EU officials, in a couple of decisions the ICA maintained that: "*the circumstance that, despite the adoption of*

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29 See also the Guidelines, para 6, stating that "*an antitrust compliance programme can have a positive impact on social welfare when it prevents an antitrust violation, or reduces its duration and/or when it makes possible enforcement interventions thanks to the reporting of illegal conduct.*"

30 The Italian Fining Guidelines closely resemble the EU Commission's 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty (2002) OJ C 210/2. The main difference is that the Italian Guidelines provide for a 15% cap for each possible reduction of the basic amount of the fine due to the existence of a mitigating circumstance.

31 They should have been adopted and implemented after the beginning of the procedure, but before sending of the Statement of Objections; the parties should have promptly and fully informed the ICA about the specific characteristics of the programme and its effectiveness in dealing with the violation under investigation, and show that they have put in place the first concrete implementing measures. See ICA n. 25401 *Calcestruzzo Friuli Venezia Giulia*, Bull. 12/2015, para 121; ICA n. 26064, *Accordo tra operatori del settore del Vending*, Bull. 21/2016, para 445; ICA n. 25784, *Mercato dei servizi tecnici accessori*, Bull. 47/2014, para 272; ICA n. 25801 *Mercato Calcestruzzo Veneto*, Bull. 49/2015, para 103.

an antitrust compliance programme, the party has carried out an anticompetitive violation, plainly demonstrates the ineffectiveness of the programme adopted."[32]

The incentive system envisaged by the new Guidelines therefore represents a complete change of direction compared to the ICA's prior enforcement practice, since *ex ante facto* compliance programmes are now rewarded, and with a reward significantly higher than *ex post facto* programmes. This change seems commendable. A significant reward applied only to *ex post facto* compliance programmes could generate opportunistic behaviour favouring, rather than limiting, anti-competitive behaviour. In fact, when a company has to take a decision on whether to participate in unlawful conduct, it would face a lower expected cost, given that if caught and fined, it could benefit from an almost automatic reduction of the fine through the adoption, during the investigation, of a compliance programme designed according to the indications of the antitrust authority. Therefore, it may be better not to adopt any compliance programme, saving the use of this "bullet" if involved in a future antitrust investigation. This kind of strategic use of *ex post facto* compliance programmes is all the more likely (and counter-productive for the antitrust authority's goal of spreading the culture of competition with eminently preventive purposes) the more significant the reduction envisaged for their adoption. Having introduced an incentive, generally higher, for *ex ante facto* programmes and at the same time having contained the size of the reduction of the fine for *ex post facto* programmes seems therefore a proper way to limit the above-mentioned perverse incentive.

4. The (insufficient?) incentives for adopting an *ex post facto* compliance programme

The chapter of the Guidelines devoted to *ex post facto* compliance programmes does not contain any substantial changes in terms of procedure and content compared to the ICA's previous decisional practice. In principle, to be considered a mitigating circumstance, the programme (whose robustness and adequacy, with specific reference to the violation referred to in the investigation, must be showed by the party) must be presented and effectively implemented *during* the proceedings; the quantification of the reduction depends upon the completeness and quality of the programme.

The maximum reduction is more limited than in previous ICA practice and, for this reason, it has been criticized by some commentators.[33] Given the lack of

[32] See ICA n. 26316 *Gare Ossigenoterapia*, Bull. 2/2017, para 505; ICA n. 26901 *Vodafone-SMS informativi*, Bull. 50/2017.

[33] Many law firms and associations of undertakings participating in the consultation insisted that the reduction of the fine should be higher; otherwise, the incentive would not reflect the investment needed to implement this complex internal control system and, thus, would not sufficiently enhance the firms' commitment to shape their future behaviour in compliance with the antitrust laws.

reliable information on the actual cost of creating and implementing antitrust compliance programmes, and on how much this cost differs, in absolute and relative terms, between large and small businesses, it is difficult to understand whether such criticism has merit. Indeed, some authors argue that, especially for small and medium-sized enterprises, the cost of adopting and implementing an antitrust compliance programme may be relatively limited.[34]

A number of reasons suggest particular caution in considering whether to increase significantly the incentive provided for *ex post facto* compliance programmes. We have already mentioned the possible perverse effects that an excessive reward could generate, given that the reduction in the fine would entail a consequent decrease in the expected cost of the infringement. Furthermore, the main goal of the Guidelines is to stimulate the largest possible number of firms to adopt robust antitrust compliance programmes. Thus, it is necessary to design the incentive mechanism in such a way that it stimulates the maximum number of firms to adopt *ex ante facto* compliance programmes, rather than only a handful of convicted firms to adopt *ex post facto* programmes. This desired outcome can only be achieved through the setting of a significantly higher reward (in terms of reduction of the fine) for *ex ante facto* compliance programmes than for *ex post facto* ones. Therefore, if the incentives for *ex post facto* programmes were raised, in order to avoid distortive effects, it would be necessary to raise also the *ex ante facto* ones.[35] However, this in turn would probably lead to an excessive reduction of the fine, also in comparison with the other mitigating circumstances provided for by the Fining Guidelines.

5. *Ex ante facto* programmes

The most innovative chapter of the Guidelines is devoted to the treatment of *ex ante facto* programmes. It provides for three different bands of reduction of the fine, respectively for: (i) unfounded programmes (no reduction), (ii) compliance programmes which are not "manifestly inadequate" (reduction of up to 10%), and (iii) robust and effective compliance programmes (reduction of up to 15%). Hence, no discount is provided for programmes which are considered *unfounded*, i.e. programmes with serious content gaps; programmes that have never received concrete application; and cosmetic programmes, well designed and applied in theory, but clearly disregarded by top management of the firm

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34 J. Murphy, *A compliance & ethics program on a dollar a day: how small companies can have effective programs* (Society of Corporate Compliance and Ethics 2010).

35 Another element which is sometimes underestimated is that in the case of *ex post facto* programmes the reward, in terms of reduction of the fine, is real and immediate, while in the case of *ex ante facto* programmes it is only hypothetical (the company *may* or *may not* be involved in an antitrust proceeding in the future) and uncertain (the ICA will have to judge if the programme has proven adequate both in its design and concrete implementation). Add to this that the firm asking for a reduction of the fine during the investigation is in a situation in which the internal incentives to adopt a compliance programme are already very high, given the risk of a consistent increase in the fine in case of recidivism.

(given that these same managers were directly involved in the wrongdoing).

A discount of up to 10% applies if the compliance programme is *not manifestly inadequate*, even though it has failed to prevent the infringement. To this end, a firm must show the robustness and correctness of the original design of the programme and its actual implementation. In addition, during the investigation the firm must propose changes to the programme and show that these changes "*are suitable to fill the gaps that had prevented the effective functioning of the original compliance programme*."[36] Finally, there is a discount of up to 15% for *adequate compliance* programmes that have worked effectively, allowing for a timely detection and termination of the wrongdoing before the notification of the proceedings.

It has been argued that the reasoning that led the ICA to set three different bands is somehow confusing, mixing up the capability of a compliance programme to prevent potential wrongdoing (*ex ante*) with its effectiveness in putting an end to it *(ex post*). For example, it may happen that the running of the compliance programme allowed the firm to identify suspect conduct from an antitrust standpoint. However, the manager in charge of the programme, after a thorough analysis did not consider that conduct to significantly restrict competition. Subsequently, the ICA opened an investigation and decided that the conduct at stake was anti-competitive. In that circumstance, not-withstanding the decision of ICA, we should conclude that the compliance programme was well designed and fully effective, because it led to the identification of the conduct and brought this to the attention of the compliance manager.[37] This argument is not fully convincing. On the one hand, following this line of reasoning, if identified and brought to the attention of the compliance manager, the highest band of fine reduction would be available for any violation, even the most obvious one, and thus also in case of manifestly incorrect or imprudent judgments about the lawfulness of a given conduct. On the other hand, it is true that the main function of compliance programmes is educational/preventive, and that the evaluation must therefore be linked to how the programme was designed and implemented for this purpose. However, the recognition of a mitigating - or better, a fully mitigating - circumstance may well be linked to a further goal assigned to such programmes, that is their ability to increase the number of anti-competitive infringements that are put to an end. Therefore, if the firm, having detected potentially restrictive conduct, has (wrongly) concluded that such conduct did not in fact restrict competition, and has consistently carried on with it, it will not have access to the maximum

[36] See the Guidelines, para 37.

[37] During the consultation phase, Confindustria (the Italian main business association) argued that the decisive element for the purposes of recognizing full mitigation should be represented by the correct implementation of the risk management process envisaged by the compliance programme to prevent antitrust infringements.

reduction of the fine, but it may still obtain the lower, but still significant, reduction available for non-manifestly inadequate compliance programmes.[38]

6. Compliance programmes, leniency programmes and business ethics: some technical problems

The logic and coherence of the same set of bands raises greater perplexity when the infringement detected by the compliance programme amounts to a secret cartel, for which a firm may decide to apply for leniency. These perplexities are linked to the specific conduct that the Guidelines mandate in order to be eligible for the maximum band of discount (i.e. the need to self-report to the ICA) and the consequences if the cartel is not reported (no discounts, even if the programme allowed for the detection and termination of the secret cartel). In other words, the decision not to report the wrongdoing is equivalent to having adopted an "inadequate" (or better, ineffective) programme even if the fault does not lie in the ability of the programme to identify a possible offence, but rather to a subsequent business decision with external relevance (the request for leniency).

The aim of the ICA seems clear, i.e. to limit the higher reward to conduct that it deems ethically impeccable and coherent with the decision of adopting a compliance programme in the first place. A firm, with the adoption of a compliance programme, expresses its commitment to comply fully with the antitrust provisions. Consequently, in the event of offences that occur despite all the efforts spent in the implementation of the programme, a firm must immediately cease participation in the infringement, and mitigate its harmful consequences, reporting it to the antitrust authority.[39] This is the only way in which a firm can show that it wants to put a stop to not only its own involvement in the wrongdoing, but also to the infringement itself, which in case of a secret cartel is necessarily a multilateral one.[40]

At the same time, by linking the reduction of the fine to the filing of a leniency application, the ICA is seeking to stimulate conduct that has the most significant impact in terms of specific and general deterrence. It is true, in fact, that even the termination of an individual participation in a secret cartel may lead to its disintegration by breaking down the trust among the other participants. However, a leniency application makes this outcome certain. Furthermore, by

38 Besides, from a culpability perspective the situation of a firm that has done everything to avoid violating the antitrust laws, but is involved in an investigation for a lack of the compliance programme, does not seem very different from that of a firm that has identified doubtful behaviour, but has erred - albeit in good faith - in its assessment, considering it lawful.

39 At the same time, some authors consider that receiving leniency is the ultimate credit for having an effective compliance programme. See Snyder (n 13), 5.

40 See also the Explanatory Report to the draft proposed Guidelines, para 61: "the presentation of a leniency application is the only choice consistent with the ethical commitment of the company to make the values of competition their own and spread them within the firm".

letting the ICA open a full investigation, this also leads to the application of a fine to all (other) participants, as well as potential compensation for damages in civil proceedings.

Multiple objections have been made to the scheme established in the Guidelines.[41] Many respondents to the consultation process argued that there should be no ties between compliance programmes and leniency programmes, given that compliance programmes mainly perform a preventive role while leniency programmes perform a remedial one. The obligation to file a leniency application could then have the effect of decreasing the relevance of antitrust compliance programmes as a means of promoting the culture of competition, reducing them, ultimately, to an instrument bent to public enforcement needs. Furthermore, given that in many circumstances self-reporting is not an immediate option for a firm, the almost automatic link between compliance and leniency programmes would risk discouraging companies from adopting compliance programmes.[42]

Secondly, the degree of penalization in the case of failure to report the wrongdoing appears irrational. In the situation described, a compliance programme has certainly performed effectively, having led to the identification and termination of the involvement in a serious infringement of the competition rules. Yet, quite paradoxically, this positive result is rewarded to a lesser extent (or rather, it does not in itself receive any benefit) compared to that achieved with a compliance programme not manifestly inadequate, for which a significant discount is expected (up to 10%), even though it did not lead to the detection of the illegal practice. In this sense, the Guidelines give greater value to an ineffective programme than to one that has shown full efficacy. This discriminatory treatment seems wrong also from a public perspective. Even if failure to self-report does not lead to increased specific deterrence in terms of fines (and damages), the termination of participation in a cartel may lead to its abandonment by all its members, contributing to restore competitive market conditions.

Thirdly, the paradigm according to which the decision not to self-report always shows unethical behaviour is not – or at least not always – true. Indeed, this decision may depend on uncertainty about the ability to gather enough evidence to be eligible for immunity. Furthermore, it may be linked to the need to limit

[41] The first objection should be about the very idea of offering a reward of up to 15% of the basic fine to a firm that may be eligible for full amnesty under the leniency programme. However, before a dawn raid and/or the opening of a formal investigation, a firm does not know whether other firms have already applied for leniency. A firm may still consider this reduction because it may not be the first one to self-report to the ICA. In this situation, it may add the 15% discount to the possible further reduction of the fine due to the leniency policy (in Italy, the second and third leniency applicants may still receive a reduction of up to 50-60 % of the fine if they have provided further evidence of the cartel).

[42] Almost all the respondents to the public consultation launched by the ICA shared this argument.

the risk of exposing the company to damages that could undermine its financial stability or to other negative business consequences.[43] Finally, a non-vertically integrated firm may refrain from filing a leniency application for fear of retaliation by other vertically integrated firms. Therefore, the ethical substance of a firm's decision not to self-report should be weighed and linked to other elements, such as the decision to end participation in the wrongdoing, the adoption of disciplinary measures against the employees involved, or an autonomous modification of the compliance programme in order to better prevent similar infringements in the future.

All these arguments seem at least partially convincing. However, if no distinction were made between conduct limited to detecting and terminating participation in a cartel and conduct leading to a leniency application and thus a full assessment of the wrongdoing, there would be a risk of discouraging recourse to what is considered the most powerful and effective enforcement tool available to the antitrust authorities. The negative consequences in terms of the degree of specific and general deterrence would be clear. As already mentioned, when an antitrust authority receives a leniency application, it usually takes a decision sanctioning all the firms involved in the wrongdoing (except the leniency applicant). Furthermore, in the case of a follow-on action, damages could be awarded to victims of the cartel. In that event, the total "cost" of the infringement (in terms of fines and damages to be paid) would further increase.

On the contrary, when a firm merely terminates its illegal behaviour, the collusive conduct and the other participants may not be identified (or identified in due time) by the antitrust authority. This second option is sub-optimal in terms of specific and general deterrence. However, it could prove to be equally or even more favourable for the firm, especially if the likelihood of detecting the infringement is low. In fact, if the firm self-reports, it may enjoy complete or partial immunity (with the addition of the discount provided in the compliance programmes Guidelines), but would still be fully exposed to follow-on actions for damages. If, on the contrary, the firm limits itself to ceasing its participation in the offence, it would be exposed to the risk of paying a high fine (albeit reduced by 15%) and damages; however, if the likelihood of detecting the illegal conduct by the antitrust authority is very low, this second strategy would be dominant.

One could then rethink the overall design of the different bands of the fine's reduction. More specifically, a gradually increasing discount could be envisaged starting from inadequate programmes (no benefit at all), to programmes that are not manifestly ineffective (benefit up to 10%), to effective programmes that

[43] For example, in Italy participation in a bid-rigging cartel could prevent the company from participating in subsequent tenders as provided by Article 80(5)(c) of the Italian code of public contracts (Legislative Decree 50/2016) and stated by the National Anti-Corruption Authority (Guidelines n. 6, 2.1.3.1, sub 1). See Case n. 12640/2017 *CNS c. ASL Rome 5* (Rome Administrative Tribunal).

have led to the identification and cessation of conduct (benefit up to 15%), to effective programmes leading to a leniency application (a reduction of *at least* 15% of the fine).[44] In this way, the incentive to submit a request for leniency would remain strong, due to the higher reduction of the fine, without penalizing those compliance programmes that have been adequately structured and have been found effective in identifying and terminating participation in an infringement. This proposal could be objected to from several perspectives. Firstly, a strong reward for compliance programmes leading to a leniency application could result in a reduction of the total amount of fines for firms participating in the cartel. Furthermore, it may provide for easy ways out for weak and crashing cartels. Finally, firms could even agree on a sort of concerted abandonment of the cartel, as they could count, in addition to total or partial immunity, on a further significant mitigating circumstance.

These objections are not groundless, even though some of this strategic conduct could also be orchestrated independently of the rewarding treatment of compliance programmes. In addition, even with a stronger reward for self-reporting, not every firm would be immunized from fines. Partial immunity provided by the leniency programme entails reductions in the penalties, which are gradually more contained according to the position in the ranking of the companies that have requested to participate in the programme, and to the added value of the evidence provided to the antitrust authority. On the other hand, the dilutive effect on the otherwise applicable fines to each individual cartel member could be more than compensated for if the greater incentive to apply for leniency also gives rise to an increase in follow-on actions for the compensation of damages (and a larger number of cartels being discovered, and fines imposed).

7. The lack of effectiveness of the incentives for small and medium-sized enterprises

This chapter offers a first examination of the ICA's Guidelines on antitrust compliance programmes. At this stage, it is difficult to assess whether and to what extent the incentives provided for in the Guidelines will be enough to stimulate companies to adopt effective compliance programmes and whether they will concern only large companies or also small and medium-sized firms. The observation of empirical reality may lead to some adjustments in the design, width, and maximum level of the various bands of reduction of the basic fine. The ICA, in the Explanatory Report published with the draft Guidelines has already underlined this prospect.

44 The reduction should be strong enough to induce firms to "hurry" to file a leniency application. See on this point F. Thepot, 'Antitrust v. anticorruption policy approaches to compliance: why such a gap?' (2015) 4 CPI Antitrust Chron. 8.

We have also observed that the approach followed in the Guidelines is of a mixed nature, giving weight both to the *a priori* adequacy of the programme and the *ex post* result of its implementation in terms of detection and termination of the offence. This approach, criticized by most observers, should instead be welcomed, at least until it does not introduce excessive constraints. From this perspective, while the idea to reward conduct better that shows greater adherence to the values of competition is understandable, the choice of denying any fine reduction in connection with cartel infringements detected by the programme, but not reported to the ICA, cannot be shared. As seen, the legitimate aim of stimulating leniency applications ends up penalizing the consideration of compliance programmes that have instead proven to be robust, adequate, and effective. If conduct (termination of the participation in a cartel, even if not followed by self-reporting) which may be reasonable and still have some positive effects on competition entails the erasure of any benefit deriving from the adoption of an effective (and potentially costly) compliance programme, the company may opt not to make the investment in the first place. A different design of the bands of fine's reduction, even if it does not solve the issue, may highly reduce the likelihood of this undesirable outcome.

One last fundamental question remains. Compliance programmes may be useful in preventing and detecting antitrust offences and the idea of providing an incentive for their adoption may be proper especially for small and medium-sized firms, which otherwise have few tools and resources to fully understand and observe the competition law rules. However, as a mitigating circumstance, the reduction of the fine applies to the basic fine. In turn, the basic fine depends on the duration of the offence, its gravity and the turnover achieved in the relevant market to which the infringement relates. The vast majority of Italian firms are single-product small-sized firms, operating in local geographical markets. In such cases, when an infringement lasts for several years the basic fine may reach a value that is a multiple of the legal maximum, i.e. 10% of the total turnover achieved (which in the hypothesis of a single-product firm coincides with the turnover achieved in the relevant market). Consequently, even applying a mitigating circumstance equal to the maximum reduction provided for in the Guidelines (15% of the basic sanction), the reduction would not affect the fine eventually applied, which would remain anchored to the legal maximum. In other words, for those firms the incentive provided for in the Guidelines would remain only on paper and would not alter the fine actually applied. Now, if the primary goal of the Guidelines is to favour the maximum dissemination of the culture of competition, this objective should concern primarily small and medium-sized firms, since they represent the bulk of Italian enterprise system. However, the majority of smaller firms tend to be active on a local relevant market and the problem of the ineffectiveness of the incentives linked to the adoption of a compliance programme are therefore more likely.

The ICA should thus modify the mechanism for setting fines currently envisaged by the Fining Guidelines. Otherwise, the new incentives may at most benefit large corporations, which certainly do not lack the knowledge and resources to comply with the antitrust rules regardless of any incentive to adopt a compliance programme. On the contrary, the firms most in need of encouragement for better understanding and ensuring observance of the competition law rules - small and medium-sized enterprises - would not have any incentive to make the investment needed to adopt a compliance programme.

Chapter 3

Independence requirements in Directive 2019/1 and the case of the Netherlands

Naida Dzino[*]

1. Introduction

From 1 May 2004, both the European Commission and the National Competition Authorities (hereinafter: NCAs) of the Member States enforce the substantive EU antitrust provisions, namely Articles 101 and 102 TFEU, in close cooperation. Article 35 of Regulation 1/2003 requires the Member States to designate one or more competition authorities in such a way that they are able to effectively fulfil that assigned task.[1] The broad formulation of Article 35 together with the principle of national institutional autonomy left the Member States much discretion to choose the internal design of the NCAs as they see fit. Research concluded in 2014 reveals that great variations exist in the institutional design of the NCAs across the Member States, despite the fact that all NCAs enforce the same substantive rules.[2] These differences are specifically problematic for a uniform and effective enforcement of the EU antitrust provisions. Even though the majority of NCAs enjoy a sufficient degree of independence, there are some Member States where NCAs suffer from limited financial resources or very low staff numbers.[3] To encourage all Member States to put in place at least minimum safeguards for the independence of the NCAs, Directive 2019/1[4] was adopted on 11 December 2018 containing, among other elements, provisions on the NCAs' institutional design.

Specifically, in the Netherlands, critical questions have been raised about the independence of the Dutch NCA, the Authority for Consumers and Markets (*Autoriteit Consument en Markt*, hereinafter: ACM). The ACM is an independent administrative body without legal personality, falling under the responsibility of the Ministry of Economic Affairs and Climate Policy (*Ministerie van Economische*

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1 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

2 M. Guidi, 'Delegation and varieties of capitalism: explaining the independence of national competition agencies in the European Union' (2014) 12 CEL 343.

3 Commission, Staff working document 'Enhancing competition enforcement by the Member States competition authorities: institutional and procedural issues' SWD(2014) 231/2.

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 (2019) OJ L 11/3 (hereinafter: Directive 2019/1).

Zaken en Klimaat, hereinafter: Ministry of EZK). The lack of legal personality means that the staff is officially employed by the Ministry and that the budget is determined by the government. This resulted in the ACM receiving criticism in terms of its independence.[5] Nevertheless, the response of the Netherlands to the 2015/2016 public consultation on how to empower the NCAs to be truly effective EU antitrust enforcers shows no need for intervention when it comes to the institutional (and procedural) framework of the ACM.[6] Considering this past criticism, the aim of this chapter is to investigate whether the institutional design requirements of the directive will require the Netherlands to make changes to the way the ACM is set up. In other words, this chapter will determine which independence requirements arise from Articles 4 and 5 of the directive, and to what extent the ACM meets these requirements. Furthermore, it will be revealed if the Dutch legislator will have to take action to ensure a full implementation of the directive's provisions on independence. The need and importance for this research derive from the fact that the directive needs to be implemented in the Member States by 4 February 2021.

The next section will provide a more detailed picture of what independence encompasses and what aspects are considered to fall under this term. Section 3 will dive into the provisions of Directive 2019/1 in general, in terms of those provisions that lay down requirements for the independence and resources of NCAs, namely Articles 4 and 5. It will be analysed whether these provisions of the directive are specific and clear enough to be able to add concrete standards that Member States have to comply with. This will also reveal whether there are aspects that the directive provisions do not cover, which could have benefitted the NCAs' independence. The overall general added value of the directive in terms of independence requirements will be elucidated. After the evaluation of the directive's provisions, the discussion will shift towards the system of the Netherlands. Section 4 will set the tone by diving into the general institutional organisation of the ACM. Thereafter, the specific institutional organisation of the ACM will be analysed in section 5. Within this evaluation a distinction will be made between different requirements of independence that are also reflected in the directive's provisions, namely i) independent decision-making, ii) appointment and dismissal of board members, iii) power to prioritise, iv) sufficient resources, and v) sufficient number of qualified staff. This discussion will reveal whether the Dutch rules comply with the standards that are set in the directive. The main finding shows that the Dutch system in general can be viewed as providing sufficient safeguards to ensure the ACM is independent. However, there are some areas where the Dutch government should take action

5 See, e.g., L.M. Schouten & A.J.C. de Moor-van Vugt, 'De onafhankelijkheid van de Autoriteit Consument en Markt' (2015) SEW 2.

6 Commission, 'Empowering the national competition authorities to be more effective enforcers' 2015/2016 public consultation, available at: https://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

in order to ensure full compliance with the directive's provisions. Therefore, section 6 provides a number of recommendations. Finally, section 7 presents the main conclusions of this chapter. An interesting point to consider and worth mentioning at this stage, is the question of whether the directive's independence requirements go even further than the independence requirements for the Commission. What are the independence requirements for the Commission and does the directive require more in terms of independence from NCAs than from the Commission? These questions require an extensive evaluation on their own, and fall outside the scope of this chapter. They will therefore not be further examined in this contribution but could potentially be the topic of a future publication.

2. Independence

The importance of the independence of administrative institutions has been the topic of many academic contributions in the recent years, with variations in the angle and approach to the discussion. The concept of 'independence' has been described mostly similarly but not completely uniformly by different authors. There is not one set and universally agreed upon definition, and the purpose of this contribution is not to elaborate on all the different interpretations possible.[7] However, as this chapter will explore whether the Dutch NCA meets the independence requirements under the recently adopted Directive 2019/1, it cannot be avoided to give a clarification of what this concept entails. The different interpretations by legal scholars are very helpful in this respect, and a careful evaluation reveals that the concept of independence mostly encompasses three different facets.[8] First, it can refer to the NCAs' ability to act independently when enforcing the EU rules (i.e. whether the authority is bound to take instructions from public or private entities). In the legal literature, authors often make a separation within this discussion to distinguish between independence from the market and independence from political influences. In this chapter, the main focus will be on the latter, since this is where the main point of criticism seems to lie with regard to the ACM, because of its lack of legal personality. Second, independence can relate to whether the organisation is equipped to perform its duties in terms of the number of staff that is employed, meaning whether the organisation has adequate human resources. Third, independence is linked to the financial resources which (i.e. budget) NCAs need to perform their tasks. In general, these three items are referred to as operational, organisational and financial independence.[9]

Directive 2019/1 contains, among other provisions, articles that cover all these

7 For a more detailed description of the notion of independence, see: W. Wils, 'Independence of competition authorities: the example of the EU and its member states' (2019) 42(2) World Competition, 155-157.

8 See also, N. Dzino and C.S. Rusu, 'Public enforcement of EU antitrust law: a circle of trust?' (2019) REALaw 1.

9 See, e.g., Commission SWD (n 3).

three elements. As will become clear from the section below, there are many points in the discussion of independence that have common ground with not only one, but also two or perhaps even all three facets. To give an example, the discussion on the staff of an NCA can raise different interesting questions. One of the facets relates to the way staff is appointed and dismissed. It is possible that these matters are not (entirely) in the hands of the NCA, but for example in the hands of a Ministry, which appoints the staff and places them on secondment to the NCA.[10] It could be argued that this construction leaves the Ministry with great power, and creates a potential situation where there could be indirect influence on the decisions taken by the staff of the NCA. The authority that can decide on matters such as appointment, promotion and dismissal of staff could potentially indirectly influence the behaviour of that staff. Even though the word potentially is used, this does not make the matter less pressing. On the contrary, if the benchmark is that the NCA staff should act independently from political and other external influence, it is undesirable that this rule could be circumvented through indirect influence on the staff. This would interfere with the operational independence of the NCA. The power to dismiss or appoint staff, clearly also has an effect on the number of personnel an organisation has. By only appointing a set number of candidates or by dismissing a certain number of employees, this will have effect on the work that is carried out within the organisation. Less staff means less cases that could be handled. This discussion does not necessarily relate to the operational independence, but to the organisational independence. This example is given to show that the discussion on one topic, namely appointment and dismissal of staff, can have a connection to different facets of independence. Mainly for that reason, section 5 will not necessarily make a strict distinction between the three facets, but will rather focus on the different topics that the directive provisions cover, namely i) independent decision-making, ii) appointment and dismissal of board members, iii) power to prioritise, iv) sufficient resources, and v) sufficient number of qualified staff.

3. Directive 2019/1

This section will give an overview of Articles 4 and 5 of Directive 2019/1 in order to analyse what the directive requires from NCAs in terms of their independence. The discussion of the directive's provisions and their scope and effect will be particularly important for the analysis under section 5 where it will be evaluated if the Netherlands complies with the directive's provisions on independence. Before diving into the legal provisions, it is important to note that most of the directive, and also the articles on independence, provide for minimum harmonisation.[11] This is quite understandable, as there are many

[10] This is the case in the Netherlands. See the Establishment Act ACM (Instellingswet Autoriteit Consument en Markt), Article 5(1).

[11] See Directive 2019/1, Articles 4 & 5.

Member States and differences when it comes to the institutional design of the NCAs. Sometimes enforcement is exclusively entrusted to administrative authorities and sometimes to both judicial and administrative authorities.[12] Directive 2019/1 therefore aims to set the groundwork in terms of independence and other matters such as investigation and decision-making powers, but leaves the Member States room to move beyond the provisions of the directive and provide their NCAs with even more safeguards, if so desired. Minimum guarantees of independence are important for effective enforcement because they underpin the impartiality and credibility of the agencies' actions *vis-à-vis* different stakeholders.[13]

Article 4 of Directive 2019/1 deals with matters of operational independence. Article 4(1) contains a somewhat broad statement that Member States must ensure that NCAs perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of Article 101 and 102 TFEU, subject to proportionate accountability requirements. Not surprisingly, here the directive acknowledges that independence does not mean there should not be any form of control of an authority whatsoever.[14] As other scholars have mentioned, there can be different levels of independence, going from absolute independence to levels where more and more external control is exercised over an authority.[15] A certain amount of external control is important in my opinion, as it provides for a system of checks that protect against arbitrariness.[16] In the words of the directive, proportionate accountability requirements in any case entail the publication by NCAs of periodic reports on their activities to a governmental or parliamentary body.[17] The NCAs might also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.[18]

The other paragraphs of Article 4 aim to provide somewhat more specific guarantees that fill in the broader statement of the first paragraph. Article 4(2) contains three topics that specifically relate to the staff and persons who take decisions within the NCAs. The following short note on these three topics will reveal the scope and depth of those topics. First, Article 4(2)(a) lays down that Member States must ensure that the staff and persons who take decisions are able to perform their duties independently from political and other external

12 Commission SWD (n 3), 5.
13 S. Alves, J. Capiau and A. Sinclair, 'Principles for the independence of competition authorities' (2015) 11(1) CLI 13.
14 See Directive 2019/1, Recital 22.
15 A.M. Mateus, 'Why should national competition authorities be independent and how should they be accountable?' (2007) 3 ECJ 17. See also G. Monti, 'Independence, interdependence and legitimacy: the EU Commission, national competition authorities, and the European Competition Network' (2014) EUI Working Paper 2014/01, 14, available at: https://cadmus.eui.eu/handle/1814/29218.
16 See Directive 2019/1, Recital 22.
17 See Directive 2019/1, Article 5(4) and Recital 22.
18 Ibid.

influence. This reads again as a rather broad formulation, and it is necessary to think about what situations this would cover in practice. It could relate to the topic of taking instructions from other public or private bodies, however, this is already covered separately in Article 4(2)(b) and is a more direct way of influencing the staff. The preamble does not give much clarity in this respect either. A more fitting interpretation of subsection (a) would be that it covers situations where the way an NCA is set up can *indirectly* have an influence on the staff. Examples are the matters on appointment, promotion, and dismissal of staff.[19] Via these channels, there could be a path to indirectly influence decisions that are taken by ACM personnel, e.g. by only hiring those individuals that fit your agenda or by promoting only those persons that take decisions according to your political preference. These situations seem to be covered by Article 4(2)(a).

Moving on, Article 4(2)(b) prohibits, as previously stated, the seeking or taking of instructions from government or any other public or private entity, without prejudice to the right of a government of a Member State to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings. The scope of this provision is rather clear and straightforward. In terms of content, it does not add much to the regime under Regulation 1/2003, as it was already common practice in the Member States that case specific instructions were not allowed.[20] However, there is added value in terms of legal certainty and clarity, as the directive now lays down clearly and in writing that case specific instructions by the government are prohibited.

Article 4(2)(c) intends to ensure that the staff and persons who take decisions refrain from taking any action that could give rise to a conflict of interest, both during their office and for a reasonable period after leaving office. Unfortunately, in terms of scope, and again much like the situation under subparagraph (a), the exact depth of this obligation is not entirely clear. Some authors have therefore already pointed to directives and regulations in e.g. the areas of railway or data protection, to indicate how Article 4(2)(c) of Directive 2019/1 could have included an obligation for the Member States to lay down by law precise prohibitions on actions and occupations incompatible during and after the staff member's term of office.[21] Paragraph 19 of the preamble of the directive does mention generally

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19 Selection, recruitment and appointment of NCA *board members* is specifically dealt with in Article 4(4) of Directive 2019/1.

20 See, e.g., the Policy rule of the Dutch Minister of Economic Affairs of 4 July 2014, no. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets, (2014 ACM Fining Policy Rule, amended on July 1, 2016 Stcrt. 2016, 34630), available at: https://www.acm.nl/sites/default/files/documents/2017-10/2014-acm-fining-policy-rule-amended-on-july-1-2016.pdf and J.W. van de Gronden, *Mededingingsrecht in de EU en Nederland* (Uitgeverij Paris 2017), 382.

21 M. Sousa Ferro, 'Institutional design of national competition authorities: EU requirements' (2018) 13(2) Comp. L. Rev.; see the paper presented by W. Wils, 'Competition authorities: towards more independence and prioritisation?' (New Frontiers of Antitrust 8th International Concurrences Review Conference 2017), 26-27.

that it would be incompatible with the performance of their duties if persons taking decisions were to be engaged in proceedings which concern businesses by which they have been employed or otherwise professionally engaged, or where those persons or their close relatives were to have an interest in those organisations. Either way, it is positive that the directive contains a provision to protect against possible conflicts of interest.

Article 4(3) and 4(4) specifically apply only to the members of the decision-making body of NCAs. Article 4(3) states that these persons shall not be dismissed for reasons related to the proper performance of their duties or to the proper exercise of their powers. They may be dismissed only for two reasons, namely if they no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law. Exactly what conditions are required for the performance of their duties, and what constitutes serious misconduct, must be laid down in advance in the Member States' national law. The wording of Article 4(3) is clear, however it is a missed opportunity that the directive does not indicate a set time period for the mandate of board members. Now it remains up to the Member States to decide on this matter and it leaves a door open for potentially putting in place short, non-renewable terms that could diminish the effect of Article 4(3).[22] This practice would clearly go against the purpose of the directive. However, by not establishing a set time period for the mandate, the directive does leave a grey area in this context. Article 4(4) states that the members of the decision-making body of NCAs are to be selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law. This is a very welcome point that was missing from the original Commission proposal. Lastly, Article 4(5) refers neither to the staff nor the board members, but to the NCAs in general. It lays down that NCAs shall have the power to set their own priorities and to reject complaints on this ground and on other grounds laid down in national law. This seems to be a rather clear provision and it is a very welcome safeguard considering the fact that the 2017 impact assessment indicated that a large number of NCAs do not have this power.[23]

Article 5 of Directive 2019/1 contains provisions on the organisational and financial independence of NCAs. Article 5(1) unfortunately contains very broad formulations, stating that Member States shall ensure at a minimum that NCAs have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties. The words 'sufficient' and 'qualified' are very much open to interpretation. Article 5(2) does however provide a small clarification of the phrase 'necessary for the effective performance of their duties', which is meant

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22 Ibid, 27.

23 Commission, Staff working document 'Impact assessment accompanying the ECN+ Directive proposal' (2017) SWD(2017)114 final 17.

to ensure at a minimum that NCAs are able to conduct interviews, adopt decisions, cooperate in the ECN and advise public institutions and bodies on measures which may have an impact on competition in the internal market. Regardless of this statement, the broad terminology of Article 5(1) will make it rather difficult to assess whether a Member State complies with this provision. The general formulations in Article 5(1) mean that it is not unimaginable that cases could appear where there is a difference of opinion as to whether a Member State complies with this provision. On the other hand, it is understandable that it would be rather difficult to set concrete numbers in a directive that is applicable to a large number of Member States differing in size and design of their NCAs. Article 5(3) provides that NCAs should be able to independently decide on the spending of the allocated budget. Lastly, Article 5(4) reflects back on the requirement that NCAs should be subject to the proportionate accountability requirements laid down in Article 4(1). It states that NCAs must submit periodic reports on their activities and their resources to a government or parliamentary body.

Summing up, Articles 4 and 5 of Directive 2019/1 contain a number of welcome safeguards for the NCAs' independence which are now laid down in binding legislation. As was shown above, some provisions are clearer than others. However, the main point that has become clear is that the majority of provisions are very broadly formulated, sometimes understandably so because of the practical difficulty of mentioning specific standards in a directive that applies to a large number of Member States. Therefore, it will be very interesting to see how the Member States will implement the provisions of the directive. Generally speaking, it is unfortunate that the directive does not provide for a set period of appointment of board members, or for more specific prohibitions on actions and occupations that are incompatible with the performance of their duties. However, as the directive provides only for minimum harmonisation, one can only hope that the Member States will choose to incorporate more specific safeguards in their national law. It is therefore time to evaluate what is currently laid down in Dutch law. This will reveal if the Netherlands meets the standards set in the directive, or if it is necessary to take steps in order to fully implement the provisions of the directive.

4. ACM's general organisation

The ACM was established on 1 April 2013, when the Dutch Competition Authority (formerly known as the *Nederlandse Mededingingsautoriteit*), the Consumer Authority (*Consumentenautoriteit*) and the Independent Post and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*) merged to create this new regulator.[24] One of the objectives of the activities of the ACM is to ensure that markets function well, that market

[24] See the Establishment Act ACM, Article 2.

processes are orderly and transparent, and that consumers are treated with due care.[25] The ACM therefore applies the Dutch Competition Act (*Mededingingswet*) as well as Articles 101 and 102 TFEU whenever trade between Member States is affected. With the merging of the three afore-mentioned authorities, the choices that were made for the ACM's organisational structure are very important because these choices directly have a consequence on the degree of independence of the ACM. The ACM is set up as an independent administrative body (*zelfstandig bestuursorgaan*) without legal personality. This means that the ACM is part of the entity of the State but it is not hierarchically subordinate to a minister.[26] The Minister of Economic Affairs and Climate (EZK) is however, among other aspects, responsible for competition policy and has control over a number of independent administrative bodies, including the ACM. What this responsibility exactly entails will be elaborated more extensively in section 5.

As stated earlier, the choice not to confer legal personality on the ACM directly has consequences for its operational, financial and organisational independence. It means that the ACM's budget is part of the budget of the Ministry and that the staff members are civil servants formally employed by the Ministry.[27] Even though the staff is seconded from the Ministry and falls under the exclusive authority of the ACM, the minister remains ultimately responsible for the ACM staff.[28] The choice not to grant legal personality to the ACM is therefore often criticised, the main argument being that the responsibility over staff and resources opens the possibility of potentially influencing the ACM's decisions.[29] This seems to be a valid point of criticism, since the staff may indeed be influenced to act in a certain way if their appointment, promotion and dismissal is in the hands of the Ministry. Whether this really is the case in the Netherlands will be further discussed in section 5 of this contribution. For now, it is relevant to point out that one of the regulators that was merged into the ACM, the OPTA, was a completely independent, autonomous administrative authority, with legal personality and with its own budget and personnel. The Dutch parliament chose not to adopt the same legal structure for the ACM as it considered that such an entity would be too large and too distant from the government in terms of accountability.[30] However, the question arose whether this choice means there is too much control of the ACM. Although it is not a part of the Ministry, there are general instruments that may have an influence on the ACM's independence. For example, under the Dutch Autonomous Administrative Authorities

25 See the Establishment Act ACM, Article 2(5).
26 See Dutch Autonomous Administrative Authorities Framework Act (Kaderwet zelfstandige bestuursorganen), Article 1(a).
27 Kamerstukken II 2011/12, 33186 n. 3, 8.
28 See Establishment Act ACM, Article 5(1) and Autonomous Administrative Authorities Framework Act, Article 16.
29 Schouten & de Moor-van Vught (n 5), 68.
30 A. Ottow, *Market and competition authorities: good agency principles* (Oxford university Press 2015), 105.

Framework Act (*Kaderwet zelfstandige bestuursorganen*), the ACM is obliged to provide information to the responsible minister when requested.[31] Furthermore, the minister may annul decisions of an independent administrative body such as the ACM.[32] How extensive this power is and whether it will have a noteworthy impact on the independence of the ACM will be evaluated in the next section of this chapter.

5. ACM's independence

This section will analyse whether the independence of the ACM is sufficiently guaranteed when compared to the institutional design requirements that flow from Directive 2019/1. These requirements can be divided into separate categories, namely i) independent decision-making, ii) appointment and dismissal of board members, iii) power to prioritise, iv) sufficient resources, and v) sufficient number of qualified staff. It will be evaluated whether the ACM complies with the requirements laid down in the directive, also keeping in mind that some of the provisions of the directive, e.g. on resources and staff, are laid down in general terms and therefore make it difficult to assess whether Dutch law currently is in conformity with these provisions.

i. Independent decision-making

As was stated above, Article 4(2)(a) provides that Member States must ensure that the staff and persons taking decisions within the NCA are able to perform their duties independently from political and other external influence. In practice there could be various ways through which influence is exercised over the NCAs' tasks, either directly or indirectly. If it were to be the case that the appointment, promotion and dismissal of staff is in the hands of the Ministry, this could be a way to indirectly influence decision-making within the ACM.[33] As was explained in section 4, the staff is officially employed by the Ministry but it is seconded to the ACM. Matters concerning Personnel and Organisation (P&O) are mandated to the ACM.[34] The mandate decision provides in rather general terms that Personnel and Organisation affairs cover matters concerning personnel, organisation, formation and the related budget.[35] It is somewhat unclear from this construction (employment with the Ministry but mandate of P&O matters to the ACM) who is responsible for the actual selection, appointment and dismissal of staff and what this procedure precisely looks like. Practice in the Netherlands reveals that the ACM itself places vacancies, carries out interviews and appoints and dismisses the personnel. The procedure for the selection of

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31 See the Dutch Autonomous Administrative Authorities Framework Act, Article 20.

32 Ibid, Article 22.

33 This is also argued by M.P. Schinkel, 'Gevraagd: autoriteit met rechtspersoonlijkheid' (2013) 1 M&M 11.

34 See the Decision on mandate, authority and authorisation of ACM, Article 6(1) (Besluit mandaat, volmacht en machtiging ACM, 2013 nr. WJZ / 13052618).

35 Decision on mandate, authority and authorisation of ACM, Article 1(d).

staff usually entails a minimum of two interviews and a final interview discussing employment conditions. This could take away some of the concerns about external influence that might be exercised over the ACM staff via appointment, promotion or dismissal. However, apart from some general remarks on the ACM website, this practice is not laid down in any binding legal document and is therefore not transparent to the outside world. To avoid any possible questions in a letter of formal notice from the Commission requesting further information about the implementation of Article 4(2)(a) of the directive, the Dutch legislator should enact binding rules on the procedure for the appointment and dismissal of the ACM staff. As is well known, implementation requires more than simply reliance on state practice that could change easily over time.[36]

Furthermore, the mandate decision excludes certain powers from the mandate, such as decisions concerning employees falling under scale 15 or higher.[37] In addition, the minister remains free to exercise the mandated powers herself/himself, because the instrument of mandate means that the initial competence remains with the Ministry and that it retains responsibility for the mandated tasks.[38] In the legal literature it has therefore been argued that a better solution would be to use the instrument of delegation instead of mandate.[39] Delegation would ensure that the competence and responsibility are transferred to the ACM. Nevertheless, even in this scenario the minister would retain the power to revoke the delegation decision. However, it would provide a greater guarantee if the minister could not exercise the delegated power herself/himself compared to the construction of mandate. An even further step would be to afford the ACM legal personality, whereby it would formally have full responsibility and control over the staff.[40]

The minister's power to overturn ACM decisions is another way in which influence could be exercised on the independence of an NCA, and which could possibly conflict with Article 4(2)(a) of Directive 2019/1. However, under Article 10(1) of the Establishment Act ACM (*Instellingswet Autoriteit Consument en Markt*), the minister may overturn a decision of the ACM only if the decision concerned is an order of general application and if the ACM was not competent to take that decision. The delimitation to decisions of general application means that the minister cannot overturn a decision of the ACM concerning energy, post, telecommunication and transport or a decision in an individual case.[41] From the parliamentary debate on the Establishment Act ACM, it became clear

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36 P. Craig and G. de Burca, *EU law: text, cases and materials* (Oxford University Press 2015), 447.

37 See for more matters that are excluded from the mandate, the Decision on mandate, authority and authorisation of ACM, Article 6(2).

38 General Administrative Law Act (Algemene wet bestuursrecht), Article 10:7.

39 Schouten & de Moor-van Vught (n 5), 71.

40 Authors advocating for legal personality of the ACM: Schouten & de Moor-van Vught (n 5) and Schinkel (n 33).

41 Establishment Act ACM, Article 10(3).

that this competence of the minister is only a measure of last resort.[42] From the point of democratic legitimacy it was considered necessary to ensure that an independent administrative authority does not act *ultra vires*, and that was one of the reasons why this measure was included in the Establishment Act ACM.[43] Under Dutch law, a decision of an independent administrative authority can also be overturned if it is contrary to the law or the public interest.[44] However, this possibility is expressly declared inapplicable in the Establishment Act ACM.[45] In my view, because this power of the minister to overturn ACM decisions is very well and narrowly defined, it would not constitute a threat to the independence of the ACM.

Another, perhaps more direct, way in which influence could be exercised over an NCA is through the power to give instructions in individual cases. Article 4(2)(b) of the directive prohibits these instructions, but lays down that general policy rules issued by a government are allowed. As was explained in section 4, the staff of the ACM falls under the exclusive authority of the ACM. According to the Establishment Act ACM, it is not allowed to seek instructions from the minister, and neither is the minister allowed to give instructions in individual cases.[46] This way, the crucial conditions for independent staff are enshrined in national law. The minister may issue general policy guidelines, and this is also in accordance with Directive 2019/1.[47] However, there is of course the possibility that general policy guidelines may contain instructions that in essence relate to instructions in individual cases. This would mean a clear misuse of the power to issue general policy rules, and is a highly undesirable situation. However, in 2010 there was a case in the Netherlands that underlines that this is not simply a theoretical possibility.[48] This case revolved around a judgment taken by the Regulatory Industrial Organisation Appeals Court (*College van Beroep voor het Bedrijfsleven*, hereinafter: CBb) in the energy sector. GTS (Gas Transport Services B.V.) is the operator of the national gas transmission network in the Netherlands. This network consists of an infrastructure of gas pipelines and compressor stations in the Netherlands and in the north of Germany, and is owned by the gas infrastructure company Gasunie.[49] GTS operates the network and is a wholly-

42 Kamerstukken II 2011/12, 33186 n. 3, 11.
43 Kamerstukken II 2011/12, 33186 n. 6, 46.
44 General Administrative Law Act, Article 10:35.
45 Establishment Act ACM, Article 10(2).
46 Establishment Act ACM, Article 9.
47 An example of a general policy guideline issued by the minister is the Beleidsregel van de Minister van Economische Zaken van 4 juli 2014, nr. WJZ/14112617, met betrekking tot het opleggen van bestuurlijke boetes door de Autoriteit Consument en Markt (Boetebeleidsregel ACM 2014). See also the Dutch Autonomous Administrative Authorities Framework Act, Article 21 and Kamerstukken II 2011/12, 33186 n. 3, 12.
48 See the Case of the Dutch Board of Appeal for Business: College van Beroep voor het bedrijfsleven *GTS* (2010) NJB 2010, 1499.
49 Ministry of Economic Affairs, Agriculture and Innovation, 'The Dutch Gas Hub: Connecting Northwest Europe with the global gas market' (2011) 17, available at: https://www.government.nl/documents/leaflets/2011/12/07/the-dutch-gashub.

owned subsidiary of Gasunie. Under the Dutch Gas Act of 2000, the Netherlands Competition Authority (NMa), the predecessor of the ACM, had the power to set gas transport rates.[50] Accordingly, the NMa took three method decisions in 2008, which set gas transport tariffs that GTS charges its customers. Two of these customers, EnergieNed and VEMW, appealed against these method decisions, on the ground that they were based on a policy guideline from the Ministry of Economic Affairs which should have been set aside in this case. The policy guideline instructed the board of the NMa how to deal with the rates charged by GTS by setting concrete parameters. EnergieNed and VEMW argued that the policy rule should not be regarded as a general policy rule, but instead as an individual instruction to the Board of the NMa.[51] The CBb agreed and annulled the method decisions as the minister had intervened in the independent decision-making process of the NMa, by issuing general policy guidelines which contained specific parameters for this individual case.[52] Even though the minister had set these parameters specifically with the intention of creating financial room for GTS for investments that were very necessary in the future, this case shows how general policy rules can amount to an intervention in a specific case.[53] Nonetheless, it remains clear that such conduct is prohibited under the directive and under the Dutch Establishment Act ACM and that the domestic courts will intervene in the case of such peculiar practices.

Lastly, independent decision-making of the ACM staff could be at stake if they engage in actions which are incompatible with the performance of their duties both during office and for a certain period after leaving office. Article 4(2)(c) of the directive therefore provides rules to safeguard against this situation. Regarding the phrase 'for a reasonable period after leaving office', the preamble states that the length of that period might be determined by taking into account the nature of the new occupation of the individuals concerned as well as the level of their involvement and responsibility in the same proceedings during their employment or term of office in the national administrative competition authority.[54] Under the Dutch rules, it is laid down that the ACM board members are prohibited from having any financial or other interests that could jeopardise their impartiality, and that they should declare this in a written statement each year.[55] Dutch law does not mention any period after leaving office. Furthermore, Article 4(2)(c) of Directive 2019/1 applies to all NCA staff, not only to the board members. There are however specific rules that apply to the ACM staff, as they

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[50] See the Dutch Gas Act, Article 12f.

[51] A. Ottow, 'The different levels of protection of national supervisors' independence in the European landscape' in S. Comtois and K. de Graaf, *On judicial and quasi-judicial independence* (Boom Juridische Uitgevers 2013), 143.

[52] Case *GTS* (2010) NJB 2010, 1499, para 6.2.4.

[53] Ibid.

[54] See Directive 2019/1, Recital 20.

[55] See the Dutch Autonomous Administrative Authorities Framework Act, Article 13 and Establishment Act ACM, Article 3(5), 3(6).

are officially civil servants employed by the Ministry. Article 61(4) of the General Rules on Civil Servants in the Central Government (*Algemeen Rijksambtenaren-reglement*, hereinafter: ARAR) specifically prohibits civil servants from performing activities or taking actions which would interfere with the proper performance of their duties or with the proper functioning of the public authority.[56] Further rules regarding this topic were laid down in the Rules on Implementation of Integrity Policies (*Regeling uitvoering integriteitsbeleid EZ)*. Again, what has not been covered by the Dutch legislator is the period after leaving office. There is a circular letter which clarifies that Article 61 of the ARAR applies both to civil servants during and outside '*diensttijd*'.[57] This term could be interpreted as referring to a person's working hours or to his/her entire length of employment. The exact depth of the term '*diensttijd*' is not entirely clear, but in this context most likely it refers to the fact that also after working hours and in the weekend, a civil servant should refrain from any incompatible actions.[58] In that case, the circular letter does not say anything about the period after leaving office. A last document which could provide clarity on that matter is a Code of Conduct which lays down specific rules for the situation when a civil servant would consider taking another job where he or she could have a potential conflict of interest.[59] Similar to the directive text, the Code of Conduct provides that regard should be given to the new position of the person concerned, the extent to which they are involved in the same procedure and their responsibilities up to the moment of the transfer. This means that the Netherlands complies with Article 4(2)(c) of the directive. Furthermore, the directive itself specifically refers to a Code of Conduct as an adequate tool to cover matters of conflicts of interest.[60]

ii. Appointment and dismissal of board members

Article 4(3) and (4) of Directive 2019/1 regarding dismissal and recruitment specifically applies to the members of the decision-making body of the NCA. In the case of the ACM, these persons are the three board members. Dutch law lays down that ACM members are appointed, suspended or dismissed by the minister.[61] However, suspension or dismissal may only take place on the grounds that the person concerned is unsuited or incompetent to do the job in question, or for other compelling reasons relating to the person concerned.[62] The text of

56 See the Dutch General Government Officials Regulation 'ARAR', Article 61a(4).

57 Circulaire Nevenwerkzaamheden rijksambtenaren.

58 '*Diensttijd*' however could perhaps also be read in such a way to refer to the term of office of the civil servant. See, e.g., ARAR, Articles 79(2), 94b(2).

59 See the Code of Conduct of Dutch the Ministry of Internal Affairs and Relations of the Kingdom (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Gedragscode Integriteit Rijk 2017/2018), available at: https://www.rijksoverheid.nl/documenten/richtlijnen/2017/12/01/gedragscode-integriteit-rijk-gir.

60 See Directive 2019/1, Recitals 18-21.

61 Dutch Autonomous Administrative Authorities Framework Act, Article 12(1).

62 Ibid, Article 12(2).

Article 4(3) also mentions the ground of unsuitability for the job in question, but then states that the other ground should be if the person is found guilty of serious misconduct under national law. The directive also states that it should be laid down in advance in national law what constitutes serious misconduct. In my opinion, 'compelling reasons relating to the person concerned' do cover the situation where a person is found guilty of serious misconduct, however it could also be much broader. What constitutes serious misconduct should therefore be laid down in Dutch law more explicitly. Here the Dutch legislator will have to take steps to ensure that only on the two grounds of Article 4(3), members of the ACM board can be dismissed.

When it comes to the appointment of board members, it was stated in section 3 of this chapter that Article 4(4) of the directive does not mention a specific time period for the mandate of board members. Here, Dutch legislation actually goes even further and provides more safeguards than Directive 2019/1. National law provides that the chairperson shall be appointed for a seven year term, and the other members for a five year term.[63] The chairperson and the other members may be reappointed once for a similar term.[64] Moreover, Dutch legislation states that the board member appointments shall be based on the expertise that is required for carrying out the tasks of the ACM, and on the knowledge of, and experience in, social questions and issues.[65] The question is whether the board members are appointed through clear and transparent procedures laid down in advance in national law.[66] In the past there has been criticism of the procedures through which appointment takes place. It has been argued that these procedures are not transparent.[67] Following these concerns, a public document was adopted in 2015 laying down precise rules on recruiting, selecting and appointing the ACM board members, titled the Protocol on working arrangements between the ACM and ministers (*Relatiestatuut ACM en ministers 2015*, hereinafter: the Protocol).[68] From that document it becomes clear that the ACM is involved in every step of the recruitment process, from drafting the profile to the nomination of the candidate. This meets the requirement from Article 4(4) of Directive 2019/1 very precisely in my opinion, and makes the critique on transparency no longer valid. The only small critical remark would be that the Protocol lays down that it is possible to deviate from the prescribed

63 Establishment Act ACM, Article 3(3).
64 Ibid.
65 Establishment Act ACM, Article 3(2).
66 Directive 2019/1, Article 4(4).
67 R. Sandee, 'Interview with N. van Eijk: Het gaat er niet om of het functioneert' (2012) SC online, available at: http://www.sconline.nl/artikelen/details/2012/11-november/01/-Het-gaat-er-niet-om-of-het-functioneert-.html.
68 See Annex to Protocol on working arrangements between the Netherlands Authority for Consumers and Markets, and ministers 2015, available at: https://www.acm.nl/sites/default/files/old_download/documenten/acm/staatscourant-relatiestatuut-acm-en-ministers-2015.pdf.

procedure.[69] This leaves the possibility open that the procedure will not be followed entirely and, in that case, there would be no safeguard for independence of the ACM board members. However, the Protocol also states that the Minister of Economic Affairs and the ACM together have to decide whether or not to deviate from the prescribed procedure. The ACM therefore will be aware of any changes to the selection and appointment practice.

iii. Power to prioritise

According to Article 4(5) of Directive 2019/1, NCAs should have the power to set their own priorities. On the website of the ACM we can find a number of documents explaining the ACM's working methods. One of these documents contains information on the ACM's strategy when it comes to prioritising cases.[70] This policy document reveals the way in which the ACM prioritises its cases, however, a policy document cannot serve as an instrument for the implementation of a directive.[71] Even though policy rules are in principle binding on the administrative body, deviation from the rules is possible where, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule.[72] Policy rules are intended simply to express how the administrative body will exercise an already existing power which it has been given. Currently, there is no basis in Dutch law for this power for the ACM to prioritise its cases. In order to comply with its implementation obligation, the Netherlands will therefore have to adopt national provisions of a binding nature in order to comply with Article 4(5) of the directive.

iv. Sufficient financial resources

As was stated in section 3, Article 5(1) of Directive 2019/1 does not excel in clear definitions and precise formulations. The term 'sufficient financial resources' make it difficult to evaluate whether the Dutch system complies with these requirements. However, there are a number of relevant remarks that can be made when it comes to the budget of the ACM.

In 2018 the CJEU raised a very interesting point when it comes to budgetary independence of national administrative authorities. In the *Commission/Poland* case the Court ruled that "in principle, the organisational independence required for the investigating body does not require it to have a separate budget. Thus,

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69 Protocol on working arrangements between the Netherlands Authority for Consumers and Markets, and ministers 2015, Article 9(3).

70 ACM, 'Prioritering van handhavingsonderzoeken door de Autoriteit Consument en Markt' ACM/DJZ/2016/200888, available at: https://www.acm.nl/nl/organisatie/missie-visie-strategie/regelgeving-en-toelichting.

71 Kenniscentrum Wetgeving en Juridische zaken, factsheet beleidsregels, available at: https://www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/6-wat-het-beste-instrument/61-1.

72 See the Dutch General Administrative Law Act, Article 4:84; R.J.N. Schlossels en S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat* (Wolters Kluwer 2017), 224-234.

the Member States may provide that, from a budgetary point of view, the body comes under a given ministerial department, provided that independent access of that body to the financial resources that must be granted to it for carrying out its tasks are guaranteed."[73] However, since in the underlying case the National Railway Accident Investigation Commission (the *Państwowa Komisja Badania Wypadków Kolejowych*, hereinafter: PKBWK) did not have legal personality and was structurally integrated into the Ministry of Transport, of which the responsible minister is at the same time the authority that controls an infrastructure manager and a railway undertaking, such independence could, according to the Court, only be guaranteed by granting the PKBWK its own budget line. This case has clear similarities to the situation in the Netherlands. After all, like the PKBWK, the ACM has no legal personality and therefore its budget is part of the budget of the Ministry of EZK. The Ministry in this case, the Ministry of EZK, is also the managing Ministry of the companies Energie Beheer Nederland B.V. and GasTerra BV, which are subject to (sector-specific) supervision by the ACM on the energy market. Following the *Commission/Poland* case, this would mean the ACM should be afforded a separate budget from that of the Ministry.

Additionally, every year, before 1 April the ACM sends the minister a draft budget which is then established by the minister.[74] However, it has been argued, rightfully so in my opinion, that it would be preferable if the minister would only approve the budget, and not establish the budget.[75] Approval is a rather 'light' instrument because it can only be withheld if the budget is incompatible with the law or the public interest.[76] Only on these, explicitly delimited grounds, can approval be denied. Establishing the budget, on the other hand, entails a more detailed evaluation than simply stating yes or no.[77] Dutch law provides that for autonomous administrative authorities that do not form part of the state (meaning authorities with legal personality) the budget would only require approval by the minister.[78] However, providing the ACM with legal personality and therewith only allowing the minister to approve the budget of the ACM was rejected by parliament.[79] The main reasons being that legal personality is not considered to be a necessary precondition for independence, and the desire to safeguard a degree of ministerial responsibility towards the overall functioning of independence administrative authorities.[80] The former Minister of Economic Affairs, Mr. Kamp, furthermore argued that either way, approving or establishing the budget would leave the minister with the responsibility to have

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73 Case C-530/16 *Commission v Poland*, ECLI:EU:C:2018:430, para 100.
74 See the Autonomous Administrative Authorities Framework Act, Article 25.
75 Schouten & de Moor-van Vught (n 5).
76 Autonomous Administrative Authorities Framework Act, Article 29(2).
77 See also Schouten & de Moor-van Vught (n 5), 69.
78 Autonomous Administrative Authorities Framework Act, Article 26, 29.
79 Kamerstukken II 2011/12, 33186 n. 3, 6-7.
80 Kamerstukken II 2011/12, 33186 n. 3, 7.

the final say over the resources.[81] However, one should not forget that the legislator explicitly makes a distinction in the Autonomous Administrative Authorities Framework Act between establishing and approving a budget. Therefore, these two instruments are not the same, contrary to what the minister seems to suggest.[82]

Furthermore, a valid and relevant side question that was raised by the *Christen-Democratisch Appèl* (CDA) political party was whether the fact that the ACM budget forms part of the overall budget of the Ministry, means that it must then compete with the other components of the Ministry's budget. The minister recognises first of all that the ACM, like all other departments of the Ministry of Economic Affairs, must have access to sufficient resources in order to effectively carry out its tasks and that the draft budget which is sent to the minister is independently assessed, meaning it does not compete with other budget items.[83] Even though this seems to take away the concerns in theory, the question is what this entails in practice. If the overall budget of the ministry is composed of different components, it means that an overview will be made to examine how much budget can be established for each component, depending on priority and need. The minister's words of reassurance could most likely be taken to mean that the ACM budget would not be cut in the situation that more resources are needed for the other items of the Ministry's budget.

Lastly, Article 5(3) of Directive 2019/1 states that NCAs shall have independence when it comes to spending the allocated budget. In the Netherlands, this is already the case. Although the ACM is bound by the budget that has been set, once it has been established the ACM can decide for itself how to allocate the resources within its organisation.[84] As was stated above, the freedom to allocate resources is an important ingredient for independence, given that this can influence the choices made by an agency in terms of prioritisation.[85]

v. Sufficient number of qualified staff

Article 5(1) Directive 2019/1 is also not very specific when it comes to the requirements for the staff of the NCA. The words 'sufficient' and 'qualified' in this article are very much open to interpretation. As was stated above, the ACM staff is officially employed by the Ministry, due to the ACM's lack of legal personality. However, the staff is under the authority of and accountable exclusively to the ACM and not to the responsible minister, since matters concerning Personnel and Organisation (P&O) are mandated to the ACM.[86] In practice this means that the ACM decides when there is a need for more

81 Kamerstukken II 2011/12, 33186 n. D, 13.
82 Schouten & de Moor-van Vught (n 5), 69.
83 Kamerstukken II 2011/12, 33186 n. D, 13.
84 Ottow (n 30), 104.
85 Ibid.
86 See the Decision on mandate, authority and authorisation of ACM.

personnel, and it places vacancies and appoints the persons most qualified for the job. The main objection here is that the construction of mandate leaves the possibility open for the minister to exercise the mandated powers, as was explained in section 5 of this chapter. In other words, the minister could decide to intervene in the selection, appointment and dismissal process and thereby exercise influence over the quantity and the quality of the ACM staff. Furthermore, whether the staff is qualified to fulfil its task is largely a matter that will be assessed during the appointment phase. The lack of transparency of the selection procedure could be an item of concern. However, because of the general wording of the directive in this respect, it is difficult to ascertain what requirements the Dutch legislator must meet in order to ensure an adequate implementation of Article 5(1) Directive 2019/1.

6. Recommendations

The above evaluation of Directive 2019/1 and the organisation of the ACM has revealed that, overall, the Netherlands largely provides clear and sufficient safeguards when it comes to the following areas: i) independent decision-making, ii) appointment and dismissal of board members, iii) power to prioritise, iv) sufficient resources, and v) sufficient number of qualified staff. In some areas, the Dutch legislator has even provided for independence safeguards that the directive unfortunately does not cover, for example when it comes to a specific time period for the mandate of board members. It was established that Article 4(4) of the directive does not mention a specific period for the mandate, whereas the Establishment Act ACM lays down that the chairperson of the ACM shall be appointed for a seven year term, and the other members for a five year term. There are, however, some areas where the Dutch legislator should provide more transparency and ensure that rules are laid down in a binding legal framework.

When it comes to ensuring that the NCA staff and persons taking decisions are able to perform their duties and to exercise their powers independently from political and other external influence, it was inevitable to look at how the staff and board of the ACM are appointed and dismissed and who is responsible for matters concerning promotion. Even though the staff is officially employed by the Ministry, due to the ACM's lack of legal personality, there is a mandate decision stating that matters concerning personnel and organisation fall under the ACM's responsibility. The text does not clearly state who is involved in the appointment and dismissal of the staff. Does this mean that the staff is hired by the Ministry, but that after the secondment all matters concerning promotion, pay etc. are handled by the ACM? Or is the ACM already involved from the start in selecting and recruiting the personnel? The practice in the Netherlands is the latter. However, this practice is not laid down in any binding regulations nor is it clear how the selection process takes place, who is involved in developing the job description and in carrying out the interviews. This should be laid down in binding national provisions. Furthermore, the mandate over P&O matters excludes certain powers, meaning these remain in the hands of the Ministry. In addition, the instrument of mandate makes it possible for the minister to exercise the mandated powers himself, and thereby leaves a door open for potential influence over the staff. The main recommendation therefore is to ensure a transparent and binding codification of the existing practice of appointment and dismissal. Furthermore, a rethinking of the instrument of mandate would be necessary, in order to ensure a correct implementation of Article 4(2)(a) of Directive 2019/1. Transparent and binding rules on the selection, appointment and dismissal of staff will ensure that the requirements of Article 4(2)(a) of Directive 2019/1 are adequately implemented.

Furthermore, in the situation of dismissal of board members, the Dutch rules in the Autonomous Administrative Authorities Framework Act lay down that board members can be dismissed only if they are unsuited or incompetent to do the job in question or for other compelling reasons relating to the person in question. This last phrase seems to be broader than what is laid down in Article 4(3) Directive 2019/1, namely that the person must be found guilty of serious misconduct under national law. What constitutes serious misconduct should also be laid down in advance in national law. This does not appear to be the case and the Dutch legislator will have to take steps to implement this rather clear provision of the directive.

Moving on, according to Article 4(5) of the directive, NCAs must be designed in such a way that they have the power to set their priorities for carrying out their assigned task of public enforcement of the EU antitrust rules. Currently, there is an ACM policy document on prioritisation which is listed under the heading "working method" on the ACM website. This policy document however cannot be considered adequate implementation of the directive. Therefore, the recommendation is for the Dutch legislator to ensure that the ACM's power to prioritise is laid down in national provisions of a binding nature.

When it comes to having sufficient resources, the directive does not excel in clarity. The broad general terms used make it difficult to establish whether the Dutch system complies with the directive or not. However, the Netherlands could take into account, considering the large criticism in this respect, that perhaps the power of a minister to approve the budget would be better suited than the power to establish the budget. If only it were for the situation to take away any possible doubts that could arise in terms of independence when it comes to setting the budget for the ACM.

All in all, the main thread throughout these recommendations is the message to the Dutch legislator to ensure that binding rules are set in place to ensure an adequate implementation of Directive 2019/1. It would be a solution to lay down the above-mentioned items in binding national rules, if only to avoid a possible information request in the form of a letter of formal notice and potential infringement proceedings under Article 258 TFEU in the future.

7. Conclusion

In this chapter I examined whether the Dutch NCA, the ACM, complies with the independence requirements of Directive 2019/1, laid down in Articles 4 and 5. Considering that on the one hand, the Netherlands declared in 2016 in its reply to the public consultation that there are no independence concerns for the ACM, and on the other hand, the criticism on how the ACM is set up, it was interesting to examine if the Dutch response was truly justified and if the directive provisions would require the Netherlands to make some changes to the institutional structure of the ACM. This contribution has shown that, overall, the Dutch system offers a sufficient degree of safeguards for the ACM's independence. Practice also illustrates that, despite the lack of legal personality, the ACM is very much in charge of its staff and is free to set its own priorities and spend the allocated budget as it deems appropriate. The selection, appointment and dismissal of staff are handled by the ACM. The staff is not permitted to seek or take instructions concerning individual cases, nor is the minister allowed to give instructions in individual cases. Even though the *GTS* case has shown that it could happen that general policy guidelines are misused to issue disguised instructions in an individual case, this practice was condemned by the Dutch courts and it is clear that such misuse of power is not permitted. The ACM board members have a clearly set out term of office, and their selection and appointment is very transparent. From the development of the job description, to the final stages of appointment, there is deliberation between the Secretary-General of EZ and a member of the ACM. As far as their dismissal is concerned, the Dutch rules lay down only two possible reasons for dismissal. For possible conflicts of interest during the ACM board and staff term of office, there are rules aimed to protect against any unwanted situations in which the personnel would not be able to take independent decisions. Furthermore, the ACM is able to prioritise cases to its own appraisal. The ACM develops its own draft budget, and is able to distribute its resources independently from external influence. As the ACM is in charge of identifying any possible vacancies, preparing job descriptions and selecting new staff, it is in charge of ensuring there is sufficient and qualified personnel at its disposal. The above-mentioned matters illustrate that the Dutch system in principle complies with the independence requirements of Directive 2019/1. However, in terms of adequate implementation of the directive, the main point of criticism is that many of the before-mentioned safeguards are not laid down in binding legislation. The selection and appointment of ACM staff is not laid down in transparent rules, but relies on general practice. Moreover, the mandated powers for personnel and organisation could be exercised by the minister, since a mandate does not confer powers and responsibility on the ACM. Delegation would be the preferred choice in this matter. Furthermore, the grounds for dismissal of ACM board members are not completely in line with the directive's text either. All in all, general practice shows great autonomy of the ACM. However, a practice is very sensitive to change and is thus not a proper implementation method. Furthermore, in order to ensure that this practice is backed up with proper and binding safeguards, the Dutch legislator needs to take some steps to ensure that Articles 4 and 5 of Directive 2019/1 are implemented properly. *De facto* independence is very important, but remains very fragile without the necessary *de jure* independence.

Chapter 4

ECN+ Directive: a missed opportunity for strengthening the rights of parties?

Małgorzata Kozak[*]

1. Introduction

Directive 2019/1 (the "ECN+ Directive")[1] was adopted in order to provide (among others) a specific legal basis for the cooperation of EU competition law enforcers. However, the European Commission and Member States' national competition authorities (hereinafter: NCAs) already act under the framework of the European Competition Network (hereinafter: ECN). As was indicated by the Romanian Competition Authority: "*ECN is a forum of discussion and cooperation amongst national competition authorities of the EU Member States, via exchange of information within the ECN working groups, electronic correspondence, etc.*"[2]

The ECN is composed of the European Commission and the national antitrust authorities. The establishment of the ECN was a natural consequence of the introduction of a decentralization system of enforcing the EU competition law rules. By virtue of Regulation 1/2003,[3] all ECN members and the European Commission have the competence to apply in full Articles 101 and 102 TFEU in parallel with national antitrust provisions.

As was emphasized by the CJEU "*Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation*."[4]

Thus, the mechanisms for the uniform application of European competition law

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

2 E-mail response from the Romanian Competition Authority received on 16 May 2019.

3 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 (2003) OJ L 1/1.

4 Case T-339/04 *France Télécom SA v Commission of the European Communities*, ECLI:EU:T:2007:80, para 79.

and the solutions that allow national competition systems to get closer to creating a common European competition culture have already been established.[5] These mechanisms were constructed to improve enforcement efficiency on the basis of the assumption of the equivalence of national systems. Among those mechanisms, the allocation of cases within the network, the exchange of information between NCAs and the Commission and the provision of assistance in carrying out inspections and collecting evidence, are the most important. The exchange of information was also one of the very first tasks of the ECN.[6] All those mechanisms require that the NCAs and the European Commission exchange information between themselves, which becomes crucial for the co-operation among the competition authorities conducting parallel investigations.

The framework foundation for the exchange of information in antitrust cases, including confidential information within the network, is Article 105(1) TFEU, Article 4(3) TEU on the duty of sincere co-operation[7] and Articles 11 and 12 of Regulation 1/2003. Information that is obtained on the basis of Article 22 of Regulation 1/2003 can also be exchanged on the basis of Article 12 of Regulation 1/2003. The ECN+ Directive indicates that the exchange of information must be carried out in accordance with Article 12 of Regulation 1/2003.[8] Moreover, Article 28 of Regulation 1/2003 provides safeguards concerning professional secrecy. Further safeguards are included in the Commission Notice on cooperation within the Network of Competition Authorities (hereinafter: the Notice) in section 2.2.3.[9]

However, Regulation 1/2003 does not provide a detailed procedure for the exchange of information.[10] Neither Regulation 1/2003, nor the ECN+ Directive harmonise national procedural rules regulating the application of Articles 101 and 102 TFEU. The Commission considered such harmonisation unnecessary, provided that the principles of effectiveness and equivalence are preserved.[11]

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5 M. Gac, *Europejska Przestrzeń Administracyjna jako mechanizm zwiększający efektywność stosowania prawa europejskiego – analiza na przykładzie Europejskiej Sieci Konkurencji*, Rocznik Administracji Publicznej (2015) 1 SSRN, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732511.

6 G. Monti, 'Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network' (2014) EUI Working Paper LAW 2014/01, available at: https://papers.ssrn.com/so13/papers.cfm?abstract_id=2379320.

7 Article 105(1) TFEU: "*Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.*"

8 Directive 2019/1, Recital 14.

9 Commission, 'Notice on cooperation within the Network of Competition Authorities' (2004) OJ C 101/43, 53 (hereinafter: the ECN Notice). The European Commission has no specific plans to amend the Notice. The exceptions are listed in para 28 of the Notice.

10 M. Błachucki and S. Jóźwiak, 'Exchange of information and evidence between competition authorities and entrepreneurs' rights' (2012) 5(6) YARS 155.

11 Directive 2019/1, Recital 15. D. Reichelt, 'To what extent does the co-operation within the European

The ECN+ Directive "*does little to strengthen the procedural rights of companies in national authorities' procedures*",[12] although it seems to recognise the need to find a compromise between the efficiency of antitrust enforcement and the rights of parties to the proceedings. The directive (Article 3) introduces the general principle that proceedings concerning infringements of Article 101 or 102 TFEU must comply at least with the general principles of Union law and the Charter of Fundamental Rights of the European Union (hereinafter: the Charter).

The ECN+ Directive also includes some safeguards of the fundamental rights in particular in the context of proceedings which could give rise to the imposition of penalties.[13] However it does not provide specific rules concerning the exchange of information. Its adoption did not touch upon the divergences between national laws and again "*appears to be the result of a quite one-sided approach.*"[14] The ECN is perceived by the European Commission as a great achievement especially in relation to Article 3 of Regulation 1/2003.[15] However, its functioning, including issues touching upon the rights of undertakings under investigation, is mostly framed by *soft law* of the European Commission (the Notice) or other types of documents that do not belong to the directory of EU law acts, such as the Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities.[16] The fact that co-operation within ECN is regulated by the non-binding sources influences also the informality of the communications within the network. This informality normally should be perceived positively. However, together with the lack of legal personality of the ECN,[17] those informal contacts could also lead to decreased transparency[18] and "*create accountability and due process issues.*"[19] Those concerns are addressed specifically in respect of individual proceedings when the contacts between competition authorities could influence the conclusion of proceedings while

Competition Network protect the rights of undertakings?' (2005) 42 CMLR 747. Commission, 'Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2014) OJ C 101/54, para 2, 10(c).

12 J. Temple Lang, 'Fundamental rights and the proposed directive' (2017) 3 CLPD 48.

13 Directive 2019/1, Recital 14.

14 Reichelt (n 11), 782.

15 Commission, 'Staff working paper accompanying the 'Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003' COM(2009)206 final, para 191-194.

16 Joint Statement of the Council and the Commission of the functioning of the Network of Competition Authorities 15435/02 ADD 1, available at: https://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

17 K. Cseres and A. Outhuijse, 'Parallel Enforcement and Accountability: The Case of EU Competition Law' (2017) University of Groningen Faculty of Law Research Paper 2017-11, 30, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995729. See also Monti (n 6), 17.

18 I. Maher, 'Competition law networks and the challenge of transparency' (2019) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper 1/2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339884.

19 D. Geradin, 'Public enforcement: the ECN – network antitrust enforcement in the European Union' in I. Lianos and D. Geradin (eds), *Handbook on EU competition law* (Edward Elgar Publishing 2013), 199.

remaining unrevealed to the parties.[20]

Therefore, the doubts as to the level of legal protection of entities affected by the cooperation within the ECN remain a concern.[21] Moreover, the CJEU expressly refused to exercise judicial review and supervise the procedures by which the ECN operates.[22]

This paper analyses the scope of the exchange of information and its modification under the ECN+ Directive. The analysis deals with the existing forms of co-operation and the significance which the ECN+ Directive has for them. Furthermore, it will point out the issue of fundamental rights of undertakings participating in proceedings including such co-operation, which could occur in relation to the exchange of information between the European Commission and NCAs. Those fundamental rights include the rights of defence and the confidentiality of (also privileged) documents.

During the drafting of this paper, the European Commission and the Romanian Competition Authority responded to some of my questions. When the answers to those questions are discussed, this will be indicated in the text.

2. Exchange of information

i. Who exchanges information?

Regulation 1/2003 obliges Member States to designate a competition authority or authorities applying Article 101 and 102 TFEU.[23]

Jóźwiak indicates that the European Commission's role in relation to the other NCAs under Regulation 1/2003 and Article 105(1) TFEU is *primus inter pares*, as it is the European Commission which is the authority responsible for the coherent and effective application of Articles 101 and 102 TFEU and for shaping the European competition culture.[24] Gac refers to the "*dominant position of the European Commission.*"[25] This dominant position is expressed through various mechanisms, e.g. the fact that national courts and NCAs cannot decide contrary to Commission decisions,[26] and the fact that the Commission has the final say in case allocation, etc. The key element is the interpretation of the influence on intra-Union trade which triggers the application of Articles 101 and 102 TFEU, but which leaves also a vast margin of discretion to the Commission.

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20 Ibid.

21 K. Kowalik-Bańczyk, 'Prawo do obrony w unijnych postępowaniach antymonopolowych w kierunku unifikacji standardów proceduralnych w Unii Europejskiej' (2012) LEX, para 8.1.

22 Case T-339/04 *France Télécom SA v Commission of the European Communities*, ECLI:EU:T:2007:80, para 85.

23 Regulation 1/2003, Article 35(1).

24 S. Jóźwiak, 'Europejska Sieć Konkurencji — model: struktura i współpraca oraz kompetencje decyzyjne członków' (Warszawa 2011) 8, available at: https://www.uokik.gov.pl. Cseres and Outhuijse (n 17), 11.

25 Gac (n 5), 105. Cseres and Outhuijse, (n 17) 13.

26 C. Townley, *A framework for European competition law, co-ordinated diversity* (Hart 2019), 348.

ii. What is exchanged?

The term information is not defined in Regulation 1/2003 nor in the ECN+ Directive. Nevertheless, it has an extremely wide scope and covers all forms of information, documents or electronic data.[27] Meanwhile, a definition of information – however single and erroneous[28] - is included in the framework of police and judicial cooperation.[29] According to this definition "information and/or intelligence" is any type of information or data which is held by law enforcement authorities, or any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures.

The term "evidence" is not defined either. The character of evidence that can be used for proving an antitrust infringement is broad and the existence of such an infringement can be deduced from *"a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."*[30] The evidence must be assessed in light of the nature of the infringement and its secret nature and must be substantially credible.

iii. How is information exchanged within the ECN?

The flow of information within the ECN can be both vertical (between the Commission and the national authorities) and horizontal (between national authorities from individual Member States).

Co-operation within the ECN also means ongoing discussions and the exchange of experience, in order to develop a coherent and effective European competition policy. These are carried out in different fora including: the meeting of heads of antitrust authorities, under the chairmanship of the Director General of DG Competition,[31] plenary meetings including the heads of antimonopoly authorities or top-ranking officials dealing with ECN matters in the NCAs[32] and horizontal working groups and sectoral sub-groups (regular or *ad hoc* meetings) or, finally, during *ad hoc* meetings.[33]

Knowledge within the network is available through a secure communication

27 Kowalik-Bańczyk (n 21), para. 8.3.

28 A. Fiodorova, *Information exchange and EU law enforcement* (Routledge 2018).

29 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (2006) OJ L 386/89.

30 Case-469/15 P *FSL and Others v Commission,* Opinion of AG Kokott, ECLI:EU:C:2016:884, para 32.

31 Those are held at least once a year or convened *ad hoc* serving to develop a common culture of competition and to set directions for competition policy development for the future.

32 During the plenary meetings, the most important issues from the point of view of competition policy are discussed which directly translate into the work carried out in individual working groups.

33 Those meetings are held for the purpose of the discussion of specific current issues and problems regarding the application of the EU competition rules. Jóźwiak (n 24), 7.

platform and database.[34] It is described as *"a generalized and systematic peer review system aimed to generate discussions and mutual learning on both substantive and remedial issues"* facilitating mutual learning.[35] It is based on the assumption of mutual trust.

The formal exchange of documents in working groups also takes place through a secure exchange of e-mails, in which each of the national authorities has a special e-mail account dedicated to the ECN. Those accounts are managed by a strictly limited circle of so-called officers of authorized access on the principle "*need to know.*"[36] Authorized access officers distribute e-mails to the officials, for whom they are intended - for example taking part in a work specified working group**.** In addition, some documents related to work in the structures of the ECN are sent traditionally by mail. Simultaneously there is also a less formal direct exchange of e-mails between officials, members of groups.[37]

iv. Safeguards for undertakings

The Notice specifies the following safeguards for undertakings and individuals in respect of the exchange and use of information:[38] (professional secrecy, restrictions on the use of information which has been exchanged within the network,[39] in relation to the character of sanctions that can be imposed on individuals.[40] Moreover, a specific regime is only provided – under para 42 of the Notice – for the exchange of information obtained in relation to *leniency* programs. No consent of the leniency applicant for the transmission of information to another authority is required in the situations described in para 41 of the Notice.

3. Legal basis

Two provisions of Regulation 1/2003, Article 11 and Article 12, provide a general framework for the exchange of information.

Article 11 of Regulation 1/2003 sets out the principle of close vertical co-operation between the European Commission and the NCAs. It includes specific information measures required from the NCAs: the first formal investigative measures, before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a

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34 There is no publicly available full description of the database. It is described as "*The purpose of the system is to act as one-way communication system between the Competition Authorities and the Commission services. A highly secured environment will be used for that purpose. The Fuseframe architecture framework will be used in the project which is located in the EC DIGIT Data Center and already used by other IDA/IDABC projects from DG COMP such as ECN-Interactive and SANI.*" http://ec.europa.eu/idabc/en/document/7781/5637.html.

35 Geradin (n 19), 198.

36 Response from the Romanian Competition Authority.

37 Jóźwiak (n 24).

38 The ECN Notice, 28.

39 Regulation 1/2003, Article 12(2).

40 Regulation 1/2003, Article 12(3).

block exemption regulation. In this case, the regulation includes specific requirements as to what can be exchanged: a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action or a copy of other existing documents necessary for the assessment of the case (at the request of the European Commission). Moreover, this provision allows for the possibility of the transmission of copies of documents from the European Commission to the NCAs, that it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1), or a copy of other existing documents necessary for the assessment of the case (at the request of the NCA). Finally, NCAs can exchange information between themselves that is necessary for the assessment of a case that they are dealing with under Article 101 or Article 102 TFEU. Pursuant to Article 11(5), the NCAs may also consult the Commission on any case involving the application of Union competition law.

Article 12 provides the general framework for the exchange of information. Its objective is to facilitate and promote co-operation between the authorities within the ECN.[41] According to this provision, data transmitted between competition authorities may be used for information purposes or as evidence in a specific case.[42] Thus, it enables the Commission and the NCAs to provide one another with and use in evidence any matter of fact or of law, including confidential information, on the condition that the information exchanged is used as evidence for applying Articles 101 and 102 TFEU (or in the case where national competition law is applied in the same case in parallel to EU competition law and does not lead to a different outcome) and in respect of the subject matter for which it was collected by the transmitting authority.

Finally, the use of information is restricted since it can only be used in evidence to impose sanctions on natural persons where: (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 TFEU or, in the absence thereof, (ii) the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.[43] However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Except for the provisions described above, the legislative framework does not provide specific conditions for the exchange of information between different

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41 Case-469/15 P *FSL and Others v Commission,* Opinion of AG Kokott, ECLI:EU:C:2016:884, para 45.

42 In the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (2000) COM/2000/0582 final, p. 284–296, the Commission explained that: *"Paragraph 1 [of Article 12] creates a legal basis for the exchange of any information between the Commission and the Member States' competition authorities and its use as evidence in proceedings applying Community competition law. (...) Paragraph 2 introduces limits on the use of information transmitted under paragraph 1, thereby ensuring that the undertakings concerned benefit from appropriate procedural safeguards."*

43 Regulation 1/2003, Article 12(3).

competition authorities. This lacuna can be contrasted, for example,[44] with the framework of information exchange in the area of Freedom, Security and Justice that has developed since 1999.[45] This framework includes the principles of equivalent access and availability.[46] The condition of availability is conditioned upon seven prerequisites that aim at reconciling privacy and security. Those conditions include the following: the exchange may only take place so that legal tasks may be performed, the integrity of the data to be exchanged must be guaranteed, the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently, common standards for access to the data and common technical standards must be applied, supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured, individuals must be protected from the abuse of data and have the right to seek correction of incorrect data.

The Hague Programme: strengthening freedom, security and justice in the European Union, also emphasizes that *"the methods of the exchange of information should make full use of new technology and must be adapted to each type of information, where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS. New centralised European databases should only be created on the basis of studies that have shown their added value*".[47]

This example shows that it is possible to reconcile the rights of individuals, even in criminal cases, with the need for an efficient exchange of information. The rules in place are specific and clear. The competence for such an exchange is well framed.

4. The principle of equivalence of rights of defence of national systems

The European Commission assumes that Article 12(2) of Regulation 1/2003 provides for "*a sufficient degree of equivalence of the rights of defence in the different enforcement systems*".[48] The legality of the gathering of information is defined according to the national law binding on the national authority and Regulation 1/2003 does not refer directly to it.[49] We will refer to this as the principle of equivalence of rights of defence. Nevertheless, this should not be confused with the principle of equivalence *stricto sensu*, that rights stemming

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44 Another example can be information exchange under Schengen *aquis*. Fiodorova (n 28), 86.

45 Fiodorova (n 28), 25.

46 Fiodorova (n 28), 27. See also Commission, 'Communication from the Commission to the Council and the European Parliament – Towards enhancing access to information by law enforcement agencies (EU information policy)' COM/2004/0429 final. See also The Hague Programme: strengthening freedom, security and justice in the European Union (2005) OJ C 53/1.

47 The Hague Programme (n 46), 8.

48 See Commission, 'Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003' COM(2009)206, Recital 16.

49 Reichelt (n 11), 751.

from EU law must obtain protection at least equivalent to that given to corresponding rights under national law.

Information collected in one system can therefore be used as evidence in another system, provided that the general conditions of Article 12(2) are fulfilled, notably that the information may be used only for the purpose of applying Article 101 or 102 TFEU and in respect of the 'subject matter' for which it was collected. It is emphasized that this system creates a "*double barrier*". Firstly, the authority collecting the information acts according to its own national rules of due process, and then the authority receiving the information delivers a decision according to its own rules of due process.[50] This opinion by Townley however does not take into account that the parties may not be aware of the fact that the information has been exchanged which could lead to a violation of their defence rights.

As was underlined by the CJEU in the *France Telecom* judgement, the objective of Article 12 is to "*allow the circulation of information within that network, while ensuring that the appropriate procedural safeguards for undertakings are respected*." The Court explained that the prohibition on using information for purposes other than those for which it was collected should be considered on a case-by-case basis since it is aimed to meet a specific need "*namely the need to ensure that the procedural safeguards inherent to the collection of information by the Commission and by the national competition authorities in the context of their tasks are respected, while allowing an exchange of information between those authorities.*"[51] If Article 12 had introduced a more general prohibition for exchange of information, it would render the tasks entrusted to the Commission and the NCAs more difficult.

Nevertheless, the ECN+ Directive does not take the differences between national procedural systems and the differences in the NCAs' size, the background of the officials, experience etc., into account.[52] It is hard to disagree with the opinion that the "*Commission should have done much more than it has done so far.*"[53] A very general reference to the Charter and general principles of European Union shows that the ECN+ Directive is a missed opportunity for the Commission in summing up the current state of play in respect of the preservation of fundamental rights in EU antitrust proceedings. One of the remaining solutions now could be *the publication by the Commission of guidelines on the procedural aspects and rights* guaranteed by the Charter and those that result from the general principles of EU law.

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50 Townley (n 26), 381.

51 Case T-339/04 *France Télécom SA v Commission of the European Communities*, ECLI:EU:T:2007:80, para 78.

52 Temple Lang (n 12), 51.

53 Ibid, 51.

5. Confidentiality of exchanges of information

One of the conditions for effective network functioning is that information will be exchanged confidentially within the network. According to the European Commission, "*[g]ranting access to documents that have been created solely for this purpose to anyone outside the Network will inevitably have a negative impact on the way the system functions today. For this reason, observations submitted in an Article 11(4) procedure are treated as network internal documents.*"[54] In addition, Article 28 of Regulation 1/2003 extends the principle of professional secrecy that applies to the Commission and its services also to national competition authorities.

The confidentiality and the obligation of professional secrecy also serve as a precaution for keeping the information securely within the network. So far, no leak or disclosure of confidential information has been reported. However, the lack of access of parties to the proceedings makes it almost impossible to verify how the information was used with the exception of situations when information served as exculpatory evidence as is included in the statement of objections or the decision of a competition authority. In this case, the confidentiality strengthens the impossibility to verify how the information was processed.

6. Minimum safeguards by the Charter

Article 3(1) of the ECN+ Directive reads "[*p*]*roceedings 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*."

I do not wish to enter into a debate on the relationship between the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR),[55] however, it must be mentioned that according to Article 6(3) TEU fundamental rights, provided in for the ECHR constitute general principles of EU law.[56] The European Court of Human Rights confirmed, in its judgment *A. Menarini Diagnostics S.R.L. v. Italy*,[57] that "*the fine imposed on the applicant company* [by the AGCM, the independent regulatory authority in charge of competition – MK], *was of a criminal law nature, with the result that Article 6 §1 [ECHR] was applicable, in this instance, under the criminal law aspect of that provision.*"

The preamble to the ECN+ Directive refers to the right to be heard, including the

[54] Commission, 'Staff working paper accompanying the 'Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003' COM(2009)206 final, point 5.6; Regulation 1/2003, Article 27(2).

[55] The Convention was opened for signature on 4 November 1950 in Rome. It was ratified and entered into force on 3 September 1953.

[56] Case law of the ECtHR must be taken into account while interpreting the Charter. See Opinion 2/13, ECLI:EU:C:2014:2454.

[57] *Menarini Diagnostics S.R.L. v Italy*, App no 43509/08 (ECtHR, 27 September 2011).

right to good administration and the respect of undertakings' rights of defence. Neither Article 3, nor the Preamble refer to the right to a fair trial provided by the Charter. However, no specification as how these safeguards are to be ensured is provided. The obligation imposed on Member States is to "*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*"[58] which means that no national legislation is required and rights of defence will be applied and assessed on a case-by-case basis by the NCAs and the courts.[59] The ECN+ Directive only limits those obligations to the general principles of the European Union and the Charter on the Member States. Finally, it does not take into account the multi-level character of the ECN.[60]

The rights of defence are framed in Articles 41(2) and 48(2) of the Charter, however their application is not absolute. According to the AG Kokott in her Opinion in *FSL Holdings* "*the rights of the defence provide only certain procedural safeguards which the Commission must observe when conducting those proceedings, with the infringement of such safeguards leading to the annulment of the Commission's final decision.*"

The need for effective national remedies is not a *novelty* in the EU law system. It derives from the EU fundamental principle of effective judicial protection as stated in Article 19(1) of the Treaty on European Union (hereinafter: TEU) and Article 47 of the Charter.[61] Briefly, this principle of effective judicial protection requires that individuals should be able to enforce their rights derived from EU law before national courts. Among the various elements the principle consists of, the following can be indicated: effective access to courts, existence of institutional and procedural safeguards, and availability of legal remedies which allow to effectively enforce EU law rights.[62]

Furthermore – and this is the only specific obligation introduced therein – the ECN+ Directive imposes on Member States the obligation to 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[63] or a similar measure prior to taking a decision finding an infringement. Those parties should have the opportunity – before a decision is adopted – to express effectively an opinion on an alleged infringement of Article 101 or 102 TFEU, on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an

58 Directive 2019/1, Article 3(2).
59 Temple Lang (n 12), 48.
60 F. Cengiz, 'Multi-level governance in competition policy: the European Competition Network' 35 ELR 660.
61 Directive 2019/1, Recital 4.
62 R. Ortlep and R.J.G.M. Widdershoven, 'Judicial protection' in J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of public law* (Europa Law Publishing 2015), 333.
63 Case C-534/07 P *William Prym*, ECLI:EU:C:2009:505, para 27.

infringement.[64] Expressing an opinion effectively means having the right to access the case files provided that business secrets, confidential information and internal documents are protected.[65]

Finally, in reference to mutual assistance and the exchange of information, Article 24(2) ECN+ Directive reads that "*the applicant national competition authority and the requested national competition authority shall have the power to exchange and to use information in evidence for this purpose, subject to the safeguards set out in Article 12 of Regulation (EC) No 1/2003*."

7. Right to privacy

The gathering and further processing of information obtained from the parties create a risk of violation of the right to privacy which is guaranteed by Articles 7 and 8 of the Charter and Article 8 ECHR.

The scope of the term *privacy* is difficult to define.[66] It, however encompasses a respect for private and family life, home and correspondence, respect of dignity, personal integrity or reputation, etc.[67] The protection of privacy, assuming the right of the sole control of a person over a specific sphere of life, should be perceived in two basic dimensions: in relation to the individual's relations with other individuals (horizontal) and in individual-public authority relations (vertical).[68] This right is not absolute and can be restricted (Article 52(1) of the Charter)[69] provided that "*the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.*"[70]

Since the General Data Protection Regulation (hereinafter: GDPR)[71] entered into force on the 25 May 2018, some claims were sent to several EU institutions (including DG COM and the European Anti-Fraud Office – OLAF) signalling that the GDPR prevents undertakings from co-operating in the context of their investigations.[72] The European Data Protection Supervisor (hereinafter: EDPS)

64 Case C-407/04 P *Dalmine*, ECLI:EU:C:2007:53.

65 Directive 2019/1 also imposes the obligation on Member States to conduct proceedings within a reasonable timeframe.

66 M. Pryciak, 'Prawo do prywatności, Biblioteka Cyfrowa' (2010), available at: http://www.bibliotekacyfrowa.pl/Content/37379/011.pdf.

67 Fiodorova (n 28), 47.

68 M. Safjan, *Prawo do ochrony życia prywatnego*, [w:] Szkoła Praw Człowieka, Helsińska Fundacja Praw Człowieka (Warszawa 2006) 213.

69 Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* and *Hartmut Eifert v Land Hessen*, ECLI:EU:C:2010:662, para 50.

70 Case C-112/00 *Eugen Schmidberger*, ECLI:EU:C:2003:333, para 80.

71 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (2016) OJ L 119/1.

72 EDPS letter addressed to the DPOs of the EC, EIB, and EIF on implications of GDPR on investigative activities of EU institutions, notably regarding anti-fraud, competition and trade, WW/OL/sn/D(2018)

in its letter dated 22 October 2018, indicated that the GDPR does not change the situation substantially. However, the EU institutions are required to observe a high standard of data protection on the basis of a specific regulation applicable to the EU institutions, which is Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.[73] The EDPS considered the situation from two different angles: the conditions under which the EU institutions are entitled to collect and further process personal data and the conditions under which economic operators are allowed, or even obliged, to disclose personal data to such institutions. The EDPS analysed three hypotheses of collecting and processing of personal data by the EU institutions:

– from the perspective of the authority when action is necessary for the performance of a task in the public interest assigned by law (Article 5(a) of Regulation 2018/1725, equivalent to Article 6(1)(e) of the GDPR);
– from the perspective of the undertakings who provide information – voluntarily or compulsorily;
– whether individual notification to the data subject is necessary.

The last issue is interesting from the point of view of this paper. The EDPS observes that some undertakings informed the EU institutions that "*Article 14 GDPR always requires individual notification of people concerned by the investigation (data subjects), including about the fact that their personal data have been made available to [their services] for the purpose of an investigation.*" Such a possibility could lead to impacting an investigation by "tipping off" potential suspected companies. The EDPS notes that when exercising their powers under Union law, the EU institutions may qualify as "independent administrative authorities" who are not considered as "recipients" under Article 14(1)(e) read together with Article 4(9) of the GDPR. Thus, they can "*receive personal data in the framework of a particular inquiry in accordance with Union law.*" Therefore, economic operators subject to a particular inquiry or voluntarily cooperating with the EU institutions with a view to carrying out a particular inquiry do not have a legal obligation to inform people about the disclosure of their personal data to the EU institutions.

However, in order for the recipients to be considered as "independent administrative authorities" data must be processed for the purpose of starting/carrying out a "particular inquiry" (carve-out). The EDPS has interpreted the carve-out in Article 2(g) of the regulation as applying to an internal and

2422 C 2018-0632, available at: https://edps.europa.eu/sites/edp/files/publication/18-10-30_letter _ investigative_activities_eui_gdpr_en.pdf.

[73] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, PE/31/2018/REV/1 (2018) OJ L 295/39.

external investigation by the European Anti-Fraud Office – OLAF - or case-related inquiries by the Directorate General for Competition. It does not apply to standard financial verifications and checks (e.g. checking the eligibility of declared expenses as part of standard ex-post controls). The EDPS emphasizes that "*in those cases, EU institutions have to inform data subjects up front about the processing, for example using the data protection notice for grant management or other relevant procedures*".[74]

The co-operation within the ECN does not include a verification of appropriateness of procedures accomplished by an authority sending the information. The ECN authorities apply mutual trust in this exchange considering that it is for national data protection authorities to verify how the personal data is collected and processed.

8. No fruit from the poisonous tree doctrine in EU competition law?

In her Opinion in the *FSL Holdings and Others* case,[75] AG Kokott analysed the legal framework of the prohibition on the use of evidence. In the theory of the poisonous tree, evidence cannot be accepted and therefore used, if it has been acquired by infringement of the fundamental rights of the persons concerned.

AG Kokott indicated that the preclusion of evidence could only be exceptional on the basis that:

- The evidence was obtained in breach of essential procedural requirements intended to protect the individuals concerned. Verification of this condition requires examination whether the Commission obtained the evidence in the course of national criminal proceedings in a lawful manner. The lawfulness should be assessed in the light of the national law. Or
- The evidence is to be used for an unlawful purpose and the EU courts have no jurisdiction to decide on the lawfulness of the national authority's actions which is a matter of national law. However, respect for human rights is a condition of the lawfulness of EU acts.[76] Subsequently, the Commission and the EU courts cannot *knowingly* rely on evidence which was "*quite clearly obtained in breach of essential procedural requirements*"[77] since it would entail a violation of the right to good administration (Article 41(1) Charter) and the right to a fair trial (Article 47(1) Charter).

Subsequently, AG Kokott indicated that "*in the administrative proceedings, therefore, the Commission must ensure that, according to all the indications available to it, the evidence in question was neither unlawfully gathered by the national authorities nor unlawfully forwarded to it. Moreover, the General Court too must check the evidence against those criteria where complaints that the latter*

[74] EDPS letter (n 72).
[75] Case-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, ECLI:EU:C:2016:884, para 30.
[76] Case C-112/00 *Eugen Schmidberger*, ECLI:EU:C:2003:333, para 73.
[77] Case-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, ECLI:EU:C:2016:884, para 37.

were not satisfied are raised in the proceedings at first instance."[78]

In the *FSL Holdings* case, the AG suggested that: the transmission of evidence was not prohibited by national law, the evidence was forwarded to the Commission with the authorisation of the competent national prosecutor's office and that the appellants did not contest the soundness of the General Court's arguments concerning the transmission of evidence.

AG Kokott emphasized that Article 12 of Regulation 1/2003 provides that evidence exchanged between NCAs and the European Commission may be used automatically in antitrust proceedings. The exclusion of evidence coming from an authority not belonging to the ECN would be contrary to the principle of the procedural autonomy of the Member States and could obstruct another principle such as effective enforcement of EU competition law.

According to her, there is no general principle deriving from Article 12(2) of Regulation 1/2003 that the only evidence that may be used in antitrust proceedings is that which has already been gathered for the purposes of such proceedings. She emphasized that "*It does not follow from this, however, that evidence which was gathered for a purpose other than competition (…) must never be used for a purpose connected with competition law (…).*"[79] Does this mean that evidence gathered for antitrust proceedings may always be used for other proceedings provided that they are antitrust proceedings? According to AG Kokott, evidence cannot be used only if the legislation (national or EU) specifically describes an intended purpose for particular items of evidence which means their reuse for purposes other than that for which they were originally gathered is subject to a prohibition, e.g. Article 28(1) of Regulation 1/2003.

The objective of Articles 12(2) and 28(1) of Regulation 1/2003 provides undertakings with safeguards against the prospect of evidence which has been gathered by a competition authority in antitrust proceedings. This evidence could include information which undertakings provide voluntarily or usage of information in other proceedings in which stricter standards of procedural law may apply. The Opinion of the AG concerned the transmission of evidence from criminal proceedings relating to tax offences, hence not less strict from point of view of procedural standards than antitrust proceedings.

9. Lack of a mechanism for contesting the transmission of information within the ECN

While the information is transmitted within the ECN, there is no verification of how the information was obtained and is used. In the case of the transmission of information, a receiving authority has no legal basis to consider the conditions in which the transmitting authority gathered and chose the specific, transferred

78 Ibid, para 38.

79 Ibid, para 47.

information. Also, a transmitting authority has no power to verify how information is processed and used later on. It may (not must) inform the receiving authority whether the gathering of the information was contested or could still be contested.[80]

Due to its multilevel governance character, but also the role of the European Commission, the construction of the network does not take into account a lack of neutrality and possible inter-dependence between NCAs and the Commission.[81]

The next issue is silence as to the consequences in the case of irregularities and the lack of an appeal procedure outside the network.

Finally, parties are practically not able – at the stage of the national procedure – to efficiently question the way in which the information was collected. The fact that the CJEU considers it a national problem and avoids addressing this issue does not help in building a common competition enforcement culture and setting specific standards for the rights of defence.

10. Access to file

One of the elements of the principle of good administration enshrined in Article 41 of the Charter is the right of access to a file,[82] while respecting the legitimate interests of confidentiality and of professional and business secrecy. This right gives the undertaking concerned the opportunity to examine all the pieces of evidence that might be relevant for its defence, with the exception of business secrets of other undertakings, internal documents of the authority and other confidential information.[83] As the CJEU stressed, "*the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.*"[84]

Moreover, the principle of good administration guarantees the so-called

80 The ECN Notice, 27.

81 Townley (n 26), 105.

82 In proceedings before the Commission the right of access to the file is embodied in Article 27(2) of Regulation 1/2003 and Article 15(1) of Regulation 773/2004. Moreover, the specific and technical rules including the treatment of confidential information are set out in the Commission Notice on the rules for access to the Commission file (last amended in 2015 to incorporate disclosure principles resulting from Directive 2014/104 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 (2014) OJ C 325/7). Finally, the institution of Hearing Officer is one of the *safeguards* that help to resolve any access to the file controversy. In addition to the Access to File Notice, the Commission has issued an informal guidance paper on confidentiality claims.

83 T. Ward, J. Bourke and M. Kristof, 'Enforcement and procedure' in D. Bailey, L.E. John and N. Gibson (eds), *European Union law of competition* (Oxford University Press 2018), para 13.072 *et seq*.

84 Joined Cases C-100 to 103/80 *Musique Diffusion Française* ('*Pioneer*'), ECLI:EU:C:1983:158, para 10.

"equality of arms" and the right to be heard. The equality of arms principle entails – in respect to contradictory proceedings – that each party has the opportunity to "comment effectively" on evidence presented by the other party.[85] *Mutatis mutandis* in proceedings before a competition authority it presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceedings is the same as that of the authority.[86] Moreover, the right to access to the file is one of the forms of effectively expressing of the right to be heard (right to a fair hearing).[87] Therefore, this right encompasses access to incriminatory but also exculpatory evidence.

Therefore, within proceedings before the European Commission, this is the Statement of Objections which not only constitutes a guarantee of a procedural character but also marks the end of the first stage of the Commission's investigation.[88] This is also the moment when the addressee of the Statement of Objections can examine the evidence in the case file, so as to fully rely on its rights of defence. The lack of access in the first stage is justified by the effectiveness of the Commission's investigation. However, even at this stage there are discrepancies between NCAs as to the requests for documents/ information e.g. the amount of documents copied electronically in different Member States.[89]

The access to evidence comprises access to incriminating and exculpatory evidence although those two groups are treated differently as was stipulated in the *Aalborg Portland* judgment.[90] In the case of a lack of access to an incriminating document, there is a breach of rights of defence only if the undertaking concerned shows that the Commission relied on that document to support its statements concerning the existence of the infringement and that these statements could be proved only by reference to that document. Therefore, the undertaking must prove that if the document in question was held not to be admissible, the result of the Commission's analysis in the decision would have been different. If the Commission fails to provide access to incriminating documents, they are excluded from the evidence and cannot be relied upon in the Commission's decision.[91] In the case of an exculpatory document, that has not been communicated, the undertaking concerned only

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85 *Mantovanelli v France* (1997) 24 EHRR 370, para 36; Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij* ('*PVC II*'), ECLI:EU:T:1999:80, para 1012; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij* ('*PVC II*'), ECLI:EU:C:2002:582.

86 Case C-109/10 P Solvay, ECLI:EU:C:2011:686, para 54.

87 Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR*, ECLI:EU:T:1992:123, para 38.

88 Directive 2019/1, Recital 4.

89 Temple Lang (n 12), 54.

90 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others*, ECLI:EU:C:2004:6, para 71–77.

91 Joined Cases T-379/10 and T-381/10 *Keramag Keramische Werke ('Bathroom Fittings')*, ECLI:EU:T:2018:400, para 115–116.

needs to establish that the non-disclosure of that document was able to influence, to its detriment, the course of the proceedings, and the content of the Commission's decision.[92] However, if an undertaking is already familiar with the content of the documents by means of other evidence accessible to it,[93] then the lack of possibility of getting acquitted with this specific content has no significance. Access to the file *„is not an end in itself, but is intended to protect the rights of the defence"*[94] and that failure to give proper access does not necessarily lead to annulment of the decision. In order to annul the Commission's decision, there must be a real connection between the document with limited access and the charges in the Commission's decision and the document could not have been available to or in the possession of the applicant.

It results from above that equality of arms is really not ensured, since the undertaking could not be aware of a document being in the possession of the authority. However, even if the authority learns about the infringement, it could always find other evidence to substantiate it without showing where the information came from.

One of the proposed solutions could be the establishment of an equivalent to a hearing officer for documents and information derived ECN exchanges, so that such a person could independently assess whether all the information relevant for parties is included in the case file.

11. Lack of consequences for violation of safeguards

One of safeguards of rights of defence of parties is the access to case files. Therefore, the management of case files is crucial to ensure this right. Consequently, the following issue is the admissibility of specific documents transmitted by the NCAs as evidence in the case file and their use for a statement of infringement in the decision.

Pursuant to Article 12(2) of Regulation 1/2003, the information exchanged between the Commission and the NCAs can be used as evidence only "*in respect of the subject-matter for which it was collected by the transmitting authority."* However, the CJEU rejected the opinion[95] that the use, by the Commission, as evidence in a procedure governed by Regulation 1/2003, of documents obtained by national authorities for any kind of purposes other than the application of Articles 101 TFEU and 102 TFEU and for purposes other than those covered by the investigation carried out by the Commission, constituted an infringement of

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[92] Case C-413/14 P *Intel*, ECLI:EU:C:2017:632, para 96.

[93] Joined Cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens*, ECLI:EU:C:2013:866, para 364–369.

[94] Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR*, ECLI:EU:T:2000:77, para 156.

[95] Case T-655/11 *FSL Holdings*, ECLI:EU:T:2015:383, para 104.

the safeguards laid down in Article 12(2) of Regulation 1/2003.

As the AG analysed in her Opinion in the *FSL Holdings* case, the fact that the information the admissibility of the evidence transmitted by the Italian finance police to the Commission, does not preclude the Commission from using the information for competition proceedings. As was confirmed by the General Court, in the case of the initiation of proceedings, the Commission is entitled to start new inquiry "*in order to verify or supplement information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules, and that, in a new investigation, the Commission is entitled to request fresh copies of the documents obtained during the first investigation and then to use them as evidence in the case to which the second investigation relates, without the rights of defence of the undertakings concerned being affected as a result*."[96]

As stated in the judgment in the *Dalmine* case,[97] and repeated in *France Telecom*,[98] "*the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, the EU judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority. Accordingly, if the transmission of the documents at issue was not declared unlawful by a national court, those documents cannot be considered to be inadmissible evidence which must be removed from the file*."

Understanding the principle of effectiveness and the need for competition enforcers to be able to use any piece of information that is at their disposal, such an approach cannot be accepted from the point of view of ensuring the rights of defence. This is the duty of the competition authority to act within the boundaries of its competences. Clear guidelines as to the use of information should be formulated.

12. Conclusion

As was shown, the adoption of the ENC+ Directive is a lost opportunity for clarification and approximation of national procedural principles in antitrust proceedings including the lack of safeguards for the exchange of information. It was shown that in other EU law areas regulation of the exchange of information is possible. The authorities that transmit information do not verify the objective for which the information is transmitted, its use and the duration of its storage. The receiving authorities have no means to verify objectively how the information was obtained. Therefore, the introduction of a hearing officer

96 Ibid.

97 Case T-50/00 *Dalmine*, ECLI:EU:T:2004:220, para 62, confirmed by Case C-407/04 P *Dalmine*, ECLI:EU:C:2007:53.

98 Ibid, para 80.

verifying the information being transferred could lead to objective assessment of those issues.

The necessity of the efficiency of competition law enforcement is a reason for this one-sided formulation of the ECN+ Directive. The interpretation of the CJEU that the "management" of information is a matter that should be dealt with by a national court leads to the lack of a coherent system of checks of the activities of NCAs. It could lead to different procedural outcomes in different Member States even if the minimum standard of the Charter is observed. The simple fact that incriminatory information is included in the Statement of Objections could not be enough. It could happen that the competition authority does not reveal how it got into possession of specific pieces of evidence or carry a dawn raid later on to find this specific piece of information. Then, it is very difficult, if not impossible in practice, for the parties to prove that the information should or should not be included in the case file. Finally, the access to exculpatory documents should also be objectively assured. This calls for a modification of the approach of the CJEU that could lead to strengthening the due process principles in the EU.

Chapter 5

Seven years after *Toshiba*: time to rethink parallel proceedings within the ECN?

Michal Petr[*]

1. Introduction

The modernization of EU competition law in 2004, based on the Regulation 1/2003,[1] established, among others, the European Competition Network (hereinafter: the ECN), a network consisting of national competition authorities (hereinafter: NCAs) and the Commission. Thus, a system of parallel competences was created, in which both the NCAs and the Commission can apply the EU competition law rules,[2] in particular Articles 101 and 102 TFEU.

The rules according to which it may be determined which ECN member is to conduct proceedings in a specific case are rather flexible and do not provide for exclusive competences; instead, they only set criteria to identify a *well-placed* authority (i.e. not the *best placed* one).[3] Thus, even though Regulation 1/2003 proclaims as its objective that *each case should be handled by a single authority*,[4] it is possible that more authorities will deal with a single case.[5]

Parallel proceedings, i.e. situations when the same case is investigated (and possibly, a fine is imposed) by multiple ECN members, are relatively rare in practice. Five years after the modernisation, the Commission reported only a single case.[6] Still, the ongoing saga of *Booking.com*, where the putatively anticompetitive vertical agreements of that undertaking came under review in several EU Member States,[7] resulting in some countries in a prohibition decision

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1 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1 (hereinafter: Regulation 1/2003).

2 Commission, 'Notice on cooperation within the Network of Competition Authorities' (2004) OJ C 101/43 (hereinafter: the ECN Notice), para 1.

3 See the ECN Notice, para 5-15.

4 Regulation 1/2003, Recital 15.

5 The ECN Notice, para 12, expressly acknowledges that under certain circumstances, parallel action of two or three NCAs may be appropriate.

6 Commission, Staff working paper accompanying the Communication from the Commission to the European Parliament and Council, 'Report on the functioning of Regulation 1/2003', COM(2009)206 final (hereinafter: the CSWP Report), 66.

7 In detail, see, e.g., the Report on the monitoring exercise carried out in the online hotel booking sector

and in others in a commitment decision, whereas in other countries, the proceedings were closed, demonstrates that parallel proceedings may constitute a real problem.[8]

Apart from "practical" issues for the undertakings concerned, who need to concentrate on multiple proceedings instead of just one, parallel proceedings raise the fundamental question of whether they are in line with the *ne bis in idem* principle. This problem is exacerbated by two factors. First, the reasoning of the Court of Justice of the European Union (hereinafter: the CJEU) on *ne bis in idem* in the area of competition law is arguably not in line with the jurisprudence of the European Court of Human Rights[9] (hereinafter: the ECtHR) and even the CJEU's own case law in other areas of law, in particular the Schengen *acquis.* And second, the NCAs are only allowed to adopt a decision that there was an infringement of EU competition law. They cannot take a decision stating that the law was *not* infringed. Thus, even after the full investigation by a NCA, the NCA cannot decide that the undertakings concerned have not breached EU competition law. It may only close the proceedings because there are no grounds for action; this might enable multiple prosecutions of the same case by other ECN members. None of this was addressed by the ECN+ Directive.[10]

Three issues will therefore be analysed in this chapter. We will first explore how the *ne bis in idem* principle, and specifically the *idem*, is interpreted by the ECtHR and the CJEU. We will then examine whether parallel proceedings are in line with this principle. And finally, we will ask whether the absence of "no infringement" decisions poses a problem from the point of view of this principle, specifically as far as *bis* is concerned.

2. Jurisprudence on *ne bis in idem*

The *ne bis in idem* principle constitutes a fundamental procedural guarantee in criminal proceedings. In the European Convention on Human Rights (hereinafter: the Convention), it is defined in Article 4 of Protocol No. 7,[11] whereas in the

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by EU competition authorities in 2016, available at: http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

[8] Crucially, in 2015, the German competition authority decided that Booking.com's conduct constituted an anticompetitive agreement, whereas the competition authorities in France, Italy and Sweden closed the case while accepting commitments by the said company. Curiously, the Czech competition authority adopted a decision in 2019, finding an anticompetitive agreement and imposing a fine on Booking.com.

[9] See, e.g., W. Devroe, 'How general should general principles be? Ne bis in idem in EU competition law' in U. Bernitz, X. Groussot and F. Schulyok (eds), *General principles of EU law and European private law* (Wolters Kluwer 2013), 426; R. Nazzini, *Competition enforcement and procedure* (Oxford University Press 2016), 236; S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing 2014), 1412. More recently, see, e.g., Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, Opinion of AG Wahl, ECLI:EU:C:2018:976, para 45.

[10] 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 (2019) OJ L 11/3 (hereinafter: Directive 2019/1).

[11] According to Protocol No. 7 to the European Convention on Human Rights, Article 4: "*No one shall be*

Charter of the Fundamental Rights of the European Union (hereinafter: the Charter), it is provided for in Article 50.[12] The wording of these two articles is practically identical. Both of them prohibit repeated prosecution for the same offence (*même infraction*). Even though infringements of EU competition law do not technically constitute a crime, it is uncontested that the principle of *ne bis in idem* fully applies to them as well.[13]

In addition to the Convention and the Charter, it is also important to mention the Convention implementing the Schengen Agreement (hereinafter: the CISA), which also incorporates the *ne bis in idem* principle, though formulated in a different way.[14] Whereas the Convention and the Charter prohibit second proceedings concerning the same *offence*, the CISA refers to the same act (*les mêmes faits*). A similar formulation can also be found in the European Arrest Warrant.[15]

The evolution of the interpretation of *idem* may be best demonstrated by reference to the ECtHR's case law, and we will therefore start with it. We will then go on to the CJEU's jurisprudence, which corresponds in most of the cases with the ECtHR's current approach. It will however be argued that in case of competition law, the CJEU's jurisprudence is inconsistent with that of the ECtHR.

2.1. The ECtHR's case law

The ECtHR's approach to what constitutes *idem*, i.e. the "same offence" (*même infraction*) has been dramatically evolving.

In 1995, the ECtHR focused on identity of the conduct – *idem factum* (same conduct, *même comportement*) in the *Gradinger* judgement.[16] In a case concerning a driver who was prosecuted for the crime of killing a cyclist and the administrative offence of driving while intoxicated, the ECtHR concluded that as

liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

12 According to the Charter of Fundamental Rights of the European Union, Article 50: "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*"

13 See, e.g., G. di Frederico, 'EU competition law and the principle of ne bis in idem' (2011) 2 EPubL 241, 243.

14 According to the Convention Implementing the Schengen Agreement, Article 54: "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*."

15 According to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA (2002) OJ L 190/1, Article 3(1): "*The judicial authority of the Member State of execution [...] shall refuse to execute the European arrest warrant [...] if the executing judicial authority is informed that the requested person has been finally judged by a Member State* ***in respect of the same acts*** *[...]*"; emphasis added.

16 *Gradinger v Austria,* App no 15963/90 (ECtHR, 23 October 1995).

the two offences were based on identical conduct of the same person, the *ne bis idem* principle was breached:

> "*The Court is fully aware that the provisions in question differ not only as regards the designation of the offences but also, more importantly, as regards their nature and purpose. It further observes that the offence provided for in [...] the Road Traffic Act represents only one aspect of the offence punished under [...] the Criminal Code. Nevertheless,* ***both impugned decisions were based on the same conduct. Accordingly, there has been a breach*** *of Article 4 of Protocol No. 7.*"[17]

In 1998, the ECtHR nonetheless focused on the "same offence" (*même infraction*) in the *Oliveira* judgement.[18] In a similar case concerning a driver killing another person while driving too fast on an icy road, the ECtHR concluded that this case is a typical example of a single act constituting various offences (*concours idéal d'infractions*), the parallel prosecution of which is not prohibited by the *ne bis in idem* principle:

> "*The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. [...]*
>
> *There is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (concours idéal d'infractions) one criminal act constitutes two separate offences. [...]*
>
> *[...]* ***Article 4 of Protocol No. 7 [...] does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts****, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater.*"[19]

This latter approach was refined in 2001 in the *Franz Fischer* case.[20] The ECtHR upheld the *Oliveira* ruling stating that, in principle, the same conduct may constitute several offences. It added, however, that there had to be a real, not only a nominal difference between the offences, and the "essential elements" of the offences thus need to be compared:

> "*[W]hile it is true that* ***the mere fact that a single act constitutes more than one offence is not contrary to this Article****, the Court must not limit itself to finding that an applicant was [...] tried or punished for nominally different offences. The Court [...] notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination*

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[17] Ibid, para 55; emphasis added.

[18] *Oliveira v Switzerland*, App no 25711/94 (ECtHR, 30 July 1998).

[19] Ibid, para 26, 27; emphasis added.

[20] *Franz Fischer v Austria*, App no 37950/97 (ECtHR, 29 May 2001).

> *shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others […]. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other,* ***the Court has to examine whether or not such offences have the same essential elements****.*"[21]

Even though the *Franz Fischer* judgement seemed to have definitively settled the problem of *idem*, the ECtHR rather surprisingly[22] shifted its approach again in the *Zolotukhin* judgment[23] in 2010. The ECtHR admitted that the different interpretation of the question of *idem* in its past judgments has produced legal uncertainty, and the Grand Chamber thus needs to harmonise the interpretation thereof. It concluded that only the identity of the facts (*faits identiques*) is decisive:

> "*[T]he approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 […].*
>
> *Accordingly, the Court takes the view that* ***Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same****. […]*
>
> *The Court's inquiry should therefore focus on those facts which constitute* ***a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space*** *[…]*."[24]

By the *Zolotukhin* judgment, concentrating solely on identity of the facts, the ECtHR brought its case law in line with the CJEU jurisprudence on the Schengen *acquis*, as will be described below.[25]

2.2. The CJEU's Schengen case law

The *Zolotukhin* judgment was influenced by the CJEU's case law interpreting the CISA, even although CISA prohibits second proceedings concerning the same *act* (*les mêmes faits*) whereas the Convention and the Charter refer to the same *offence*.

The CJEU clarified the meaning of the term "same act" in its *Van Esbroeck* judgment in 2006.[26] Mr. van Esbroeck, a Belgian national, was sentenced in Norway for trafficking narcotics into Norway. After he was released and

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[21] Ibid, para 25, emphasis added.

[22] See, e.g., N. Negau, 'The ne bis in idem principle in the interpretation of European courts: towards uniform interpretation' (2012) 4 Leiden JIL 955.

[23] *Sergey Zolotukhin v Russia*, App no 14939/03 (ECtHR, 10 February 2010).

[24] Ibid, para 81, 82 and 84; emphasis added.

[25] See, e.g., Negau (n 22).

[26] Case C-436/04 *Van Esbroeck*, ECLI:EU:C:2006:165.

escorted back to Belgium, he was sentenced there for trafficking narcotics out of Belgium. The CJEU recalled the above-mentioned difference in wording and stressed that the fact that national criminal laws are not harmonised makes the legal criterion inapplicable in practice, as it would vary from state to state. Therefore, there the contracting states need to have "mutual trust" in the criminal justice systems of the other contracting states and to recognise the criminal law in force in them.[27] On the basis of these considerations, the CJEU concluded that:

> "*In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is* ***identity of the material acts*** *[l'identité des faits matériels]****, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together***."[28]

The same interpretation was later adopted by the CJEU concerning the similarly worded European Arrest Warrant.[29] Finally, the CJEU recently ruled in the *Menci* case that it is prepared to interpret the Charter in the same way despite its wording putting emphasis on the *offence* rather than the *act*:

> "*According to the Court's case law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned [...]. Therefore,* ***Article 50 of the Charter prohibits the imposition, with respect to identical facts****, of several criminal penalties as a result of different proceedings brought for those purposes*."[30]

Before concluding that the ECtHR and the CJEU interpret the *ne bis in idem* principle in the same way, it is nonetheless necessary to examine the CJEU's "traditional" approach, developed in antitrust cases.

2.3. The CJEU's antitrust case law

The CJEU originally developed its approach to the *ne bis in idem* principle in competition law cases, specifically with regard to international cartels. In the seminal judgment *Aalborg Portland*[31] in 2004, the CJEU proclaimed that *idem* is characterised not only by the facts but also by their legal qualification, or more specifically, by the legal interest protected by the infringed legislation:

> "*As regards observance of the principle ne bis in idem, the application of that principle is subject to the* ***threefold condition of identity of the facts, unity of***

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27 Ibid, para 30.
28 Ibid, para 36; emphasis added.
29 Case C-261/09 *Mantella*, ECLI:EU:C:2010:683, para 40.
30 Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para 35; emphasis added.
31 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others*, ECLI:EU:C:2004:6. These cases are also often referred to as "Cement", because of the product which was cartelised.

> ***offender and unity of the legal interest protected****. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset*."[32]

This threefold condition is often described as the "three-prong test", and it is characteristic of all the subsequent *ne bis in idem* cases in the area of competition law.

The three-prong test was established before the *Van Esbroeck* judgment. It is therefore surprising that in the latter judgment, the CJEU did not even refer to its previous antitrust decisions. This issue was however raised later in the *Gasparini* case,[33] where AG Sharpston drew attention to this issue.[34] She concluded that "*as a matter of logic the principle of ne bis in idem should not be substantially different depending on whether it applies under Article 54 of the CISA or as a fundamental principle of Community law*".[35] Unfortunately, the CJEU did not expressly address this issue.

The CJEU returned to the *ne bis in idem* principle in antitrust proceedings in the *Toshiba* judgment in 2012.[36] The detailed facts of the case are not decisive.[37] In essence, an international, world-wide cartel relating to gas-insulated switchgear (GIS), which was in effect since 1988 until mid-May 2004, was investigated by the Commission, presumably with respect to the effects of the cartel within the EU, consisting of the Member States before the 2004 enlargement (the EU-15).[38] In May 2004, when the cartel was still ongoing, ten new countries joined the EU, including the Czech Republic. As the GIS cartel distorted competition also within the Czech Republic, its competition authority (hereinafter: the CCA – Czech Competition Authority) investigated the cartel as well, but only for the time period before EU accession and only concerning its effects within Czech territory.[39] The CCA thus issued its decision when it was a member of the EU, but the facts of the case predated its EU membership.

The Czech court reviewing the CCA's decision was confronted with the issue of *ne bis in idem* and ultimately addressed the CJEU with a preliminary reference.

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32 Ibid, para 338; emphasis added.

33 Case C-467/04 *Gasparini*, ECLI:EU:C:2006:610.

34 Case C-467/04 *Gasparini*, Opinion of AG Sharpston, ECLI:EU:C:2006:406, para 155: "*In Cement, in the context of applying ne bis in idem as a fundamental principle of EC law to competition law, the Court made its application subject to the 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected'. In contrast, in Van Esbroeck the Court explicitly stated that the existence of a 'unity of the legal interest protected' is not a condition under Article 54 of the CISA. A mere identity of material facts is sufficient*."

35 Ibid, para 156.

36 Case C-17/10 *Toshiba Corporation*, ECLI:EU:C:2013:72.

37 For further details, see, e.g., G. Monti, 'Managing decentralized antitrust enforcement: Toshiba' (2014) 1 CMLR 261. Concerning specifically the proceedings in the Czech Republic, see, e.g., V. Štencl, 'Jediný postih pro jediné trvající protisoutěžní jednání? Nad rozsudkem Soudního dvora ve věci Toshiba' (2012) 11 Právní rozhledy 404.

38 *Gas Insulated Switchgear* (COMP/F/38.899) Commission decision (2007) C(2006) 6762 final.

39 The CCA issued its final decision on 26 April 2007, Ref. No. R 59 *et seq.*/2007 (*Kartel PISU*).

As the CJEU was deciding (for the first time in antitrust matters) after the ECtHR *Zolotukhin* judgment and with the Charter fully in force, the outcome of the proceedings was eagerly awaited.

Surprisingly, the CJEU did not give up its "three-prong test", devised in the *Aalborg Portland* judgment. Even though AG Kokott argued to the contrary.[40] The CJEU concluded that "*in competition cases, [...] the application of this principle [ne bis in idem] is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected*."[41]

2.4. Conclusions on *ne bis in idem*

The three-prong test employed by the CJEU in antitrust cases is difficult to defend. As one of the leading commentaries on the Charter puts it:

> "*[I]t is submitted that it is difficult to identify a theoretical basis that justifies [...] a differentiated application of the ne bis in idem principle in the field of competition law. If the ne bis in idem principle precludes the repeated prosecution of the same act of drug trafficking, then it is not apparent why it should permit repeated prosecution of the same anti-competitive conduct.*"[42]

As has already been observed above, several Advocates General have argued against the three-prong test, most recently AG Wahl in the *Powszechny Zakład Ubezpieczeń na Życie* case:

> "*I have difficulty in identifying good reasons why the three-fold criterion should continue to be applied in the context of competition law*."[43]

Given the jurisprudence of the ECtHR and the CJEU itself (but for the area of competition law), it is in my opinion clear that the CJEU needs to abandon its three-prong test in antitrust cases and in the future concentrate only on the identity of facts and the offender.[44]

Notwithstanding this, it is possible to make an argument in favour of parallel proceedings on the basis of recent case law both of the CJEU and the ECtHR.[45]

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40 Case C-17/10 *Toshiba Corporation,* Opinion of AG Kokott, ECLI:EU:C:2011:552, para 118: "*There is no objective reason why the conditions to which the ne bis in idem principle is subject in competition matters should be any different from those applicable to it elsewhere. For, in the same way as, within the context of Article 54 of the CISA, that principle serves to guarantee the free movement of EU citizens [...], so, in the field of competition law, it helps to improve and facilitate the business activities of undertakings in the internal market [...].*"

41 Case C-17/10 *Toshiba Corporation*, ECLI:EU:C:2013:72, para 97.

42 Peers, Hervey, Kenner and Ward (n 9), 1412.

43 Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, Opinion of AG Wahl, ECLI:EU:C:2018:976, para 45.

44 For the same conclusion, see, e.g., Nazzini (n 9), 236: "*The case law of the Court of Justice in Walt Wilhelm and Toshiba relies on the requirement that two offences are the same only if they protect the same legal interest. Because [...] this requirement is in breach of Article 50 EU Charter, this case law lacks foundation and should be overruled at the earliest possibility.*"

45 This argumentation was developed by M. Veenbrink, *The impact of criminal law concepts on the*

The ECtHR thus confirmed in the *A and B v Norway* case,[46] that parallel proceedings concerning the same facts might be in line with the *ne bis in idem* principle, as long as they form "*a coherent whole so as to address different aspects of the social problem involved*",[47] provided that such parallel proceedings are "*the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice*".[48] Five requirements need to be met in order for such parallel proceedings not to constitute *bis*.[49]

In a similar line of argument, the CJEU confirms that parallel proceedings may be exceptionally permitted as a legal limitation of the *ne bis in idem* principle [Article 52 (1) of the Charter], under conditions similar to that prescribed by the ECtHR.[50] Both the CJEU and the ECtHR thus allow for the legal interest protected to be to certain extent taken into account in order to justify parallel proceedings.[51]

This case law is nonetheless not concerned with *idem*, for the purposes of which, it is not disputed that only the material facts of the case are relevant and that the legal interest is not to be taken into account.

It is worth mentioning that that is what the CJEU in fact did in the *Toshiba* case. In its interpretation, the *ne bis in idem* principle was not breached not because the proceedings in the EU and in the Czech Republic pursued different goals (different legal interests), but because the facts were not the same, specifically, the temporal and territorial scope of the investigations did not overlap:

> "*Whether the undertakings have adopted conduct having as its object or effect the [...] distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory [...] in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect*".[52]

The CJEU therefore concluded – in line with the reasoning of AG Kokott – that the Commission's and the CCA's decisions covered different territorial and temporal aspects of the same cartel,[53] and therefore, as their jurisdictions were not overlapping, the *ne bis in idem* principle could not have been breached;[54] thus, even although the CJEU referred to three conditions, it only relied on the

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enforcement of national and European competition law: a silent take-over? (Wolters Kluwer 2019), 406.

46 *A and B v Norway,* App no 24130/11 and 29758/11 (ECtHR, 15 November 2016).

47 Ibid, para 121.

48 Ibid, para 122.

49 Ibid, para 132.

50 Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para 40–63; Case C-537/16 *Garlsson Real Estate and Others*, ECLI:EU:C:2018:193, para 42-63.

51 Veenbrink (n 45), 406.

52 Case C-17/10 *Toshiba Corporation*, ECLI:EU:C:2013:72, para 99.

53 Ibid, para 102.

54 Ibid, para 98: "*one of the conditions thus laid down, namely identity of the facts, is lacking.*"

first two.

3. Parallel proceedings and *ne bis in idem*

The *Toshiba* case was specific because it was not a "within-the-EU" investigation; the Commission investigated only the part of the cartel taking place in the EU, while the CCA investigated that part "outside" it, in the territory of the Czech Republic before this country became an EU member. Thus, there were not two proceedings within a single state (prohibited by the Convention) or within the EU (prohibited by the Charter),[55] but two proceedings in two jurisdictions, which are not covered by *ne bis in idem*;[56] it was thus relatively easy to decide the *Toshiba* case solely on this basis, without going into the details concerning the *ne bis in idem*.[57]

Read together with the Opinion of AG Kokott, the *Toshiba* judgment nonetheless seems to imply that the *ne bis in idem* principle cannot be breached even within a single jurisdiction as long as different competition authorities within the EU investigate different territorial and temporal effects of the same conduct. Indeed, AG Kokott is very clear in her Opinion that:

> "*the ne bis in idem principle does not in any way prohibit more than one competition authority or court from penalising restrictions of competition — by object or by effect — resulting from one and the same cartel in different territories or during different periods of time within the European Economic Area*."[58]

This interpretation is arguably too wide. The ECtHR understands *idem* as *a set of concrete factual circumstances which are inextricably linked together*;[59] so does the CJEU.[60] The facts themselves are therefore decisive.

If the principal criterion for determining whether the *ne bis in idem* principle was breached was instead the assessment whether in different proceedings, only different, non-overlapping territorial and temporal effects of the conduct in question were prosecuted, the assessment would not be based on the facts

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55 Even though the proceedings of the Commission and the CCA took place after the accession of the Czech Republic, and thus "within" the EU, the facts under investigation differed: for the Commission, the facts were "within" the EU, but for the CCA "outside" it. Because of this, they were arguably not *idem*, as the CJEU seems to suggest; Case C-17/10 *Toshiba Corporation*, ECLI:EU:C:2013:72, para 99.

56 R. Nazzini, 'Parallel proceedings in EU competition law: ne bis in idem as a limiting principle' in B. van Bockel (ed), *Ne bis in idem in EU law* (Cambridge University Press 2016), 163.

57 It ought to be added that the wording of the *Toshiba Corporation* case corresponds with this view, as is apparent from para 103: "*the ne bis in idem principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects.*"

58 Case C-17/10 *Toshiba Corporation*, Opinion of AG Kokott, ECLI:EU:C:2011:552, para 131.

59 *Sergey Zolotukhin v Russia*, App no 14939/03 (ECtHR, 10 February 2010), para 84.

60 Case C-524/15 *Menci*, ECLI:EU:C:2018:197, para 35.

alone but rather on the discretion of competition authorities.[61]

By virtue of Article 52 (3) of the Charter, EU law cannot afford less protection for corresponding fundamental rights than the Convention does. It is therefore submitted that if specific conduct of the same undertakings constitutes a single continuous conduct, it ought to be treated as a single case, as *idem*, and may be, as far as its effects within the EU are concerned, investigated only by a single ECN member, be it the Commission or a NCA.

The possibility of parallel proceedings, provided for by the *A and B v Norway* and *Menci* cases, does in my opinion not change this conclusion. Parallel proceedings within the ECN are not necessary to investigate anticompetitive conduct; they only make it easier in certain (rather exceptional) cases. The fact itself that parallel proceedings are extremely rare and to a great extent unpredictable (the *Booking.com* case might be an example) makes them hardly *foreseeable*.[62] In any case, in order to exploit this possibility, the CJEU would need to resort to a completely new line reasoning, not yet employed in competition law cases, and abandon the understanding of *idem* taken in the *Toshiba* judgment.

3.1. Exterritorial application of EU competition law

If there was to be only a single competition authority investigating a single case, even though the infringement in question had effects in more Member States, the NCAs would need to have the power to apply EU competition law exterritorialy, i.e. to assess the effects of the conduct in question outside their territorial jurisdiction and to take such effects into account for the purposes of setting the fine.

Whether this is the case is not self-evident. Regulation 1/2003 as well as the ECN+ Directive do not address this issue. Conversely, the ECN Notice appears to be based on the presumption that exterritorial application of competition law is possible.[63]

In line with this, some notable scholars argue that exterritorial application of EU competition law is possible,[64] and legal practice, even though limited, seems to support this claim. For example, in the Dutch *Silverskin onion cartel*, the fine was calculated on the basis of the turnover of the cartelists not only in the Netherlands but also in other EU countries to which the onions were exported.[65]

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61 For similar conclusions, see Nazzini (n 56), 146: "*[T]he test cannot depend on the discretion of the prosecuting authorities. If the prosecuting authorities were free to decide, in the definition of an offence, which facts are inextricably linked together and which are not, the guarantee of ne bis in idem would become totally ineffective.*"

62 *A and B v. Norway,* App no 24130/11 and 29758/11 (ECtHR, 15 November 2016), para 122.

63 ECN Notice, para 11: "*[S]ingle action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.*"

64 Nazzini (n 56), 132.

65 Press release of Dutch Competition Authority (2012), available at:

This approach was later approved by reviewing courts.[66]

Other scholars nonetheless argue to the contrary[67] and suggest that the NCA's power to apply EU competition law exterritorialy needs to be incorporated in written law.[68]

In our opinion, the arguments in favour of the exterritorial application of competition law prevail; the ECN system relies on it, EU competition law is meant to protect competition within the single market, not in individual Member States, and national courts, when confronted with this issue, concurred.

On the other hand, it is submitted that the ECN+ Directive missed an opportunity to proclaim this principal unequivocally. Because this issue may cause confusion, we would opt for an explicit amendment of the underlying legislation, either the ECN+ Directive or Regulation 1/2003.

3.2. Other legislative changes needed to achieve compliance with the *ne bis in idem* principle

In order to achieve compliance with the *ne bis in idem* principle, interpreted in the way suggested above, further legislative changes would be necessary in EU competition law. In particular, Regulation 1/2003 ought to be amended in order to make sure that within the EU, only a single competition authority may deal with the same case, even when the anti-competitive conduct effects markets in more Member States. Corresponding amendments would have to be made in the ECN Notice.

It should also be discussed whether the rules determining the competence of a particular ECN member, contained in the ECN Notice, are sufficient. Admittedly, the criteria according to which a "well-placed" authority (which would need to be re-named in order to identify the "best-placed" one) may be chosen are rather flexible, it is nonetheless the case that they work well in practice, which may be demonstrated by the very low number of re-allocated cases.[69] In our opinion, it is thus not necessary to further refine these criteria.

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https://www.acm.nl/en/publications/publication/6749/NMa-fines-two-cartels-in-agricultural-industry. In this case the *ne bis in idem* principle was not invoked, as the Dutch Competition Authority was the only one investigating it, it only demonstrates that the exterritorial application of EU competition law is indeed legal.

[66] C. Nelisse, 'Dutch court upholds fining method for onion cartel' (MLex 20 March 2014), available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=515883&siteid=190&rdir=1. M. Hilgenfeld, 'Onion-bulb cartel fines reduced by Dutch tribunal' (MLex 10 October 2016), available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=834264&siteid=190&rdir=1.

[67] K. Lenaerts and D. Gerard, 'Decentralisation of EC competition law enforcement. Judges in the frontline' (2004) 3 World Competition 313, 322.

[68] T. Wißmann, 'Decentralised enforcement of EC competition law and the new policy on cartels' (2000) 2 World Competition 123, 144.

[69] According to CSWP Report, para 220, there were only three instances of case re-allocation among NCAs in the first five years of the ECN.

4. A few comments on "*bis*"

Under the current rules, NCAs are not allowed to conclude that the EU competition rules were *not* infringed; they may only decide that there are no grounds for action on their part.[70] This contrasts with the legislation in many Member States that generally requires that criminal as well as semi-criminal (administrative infractions) proceedings end with a decision on the merits, finding either an infringement or declaring that there was not one. Such was the situation in the *Tele2 Polska* case, in which the CJEU declared that non-infringement (acquittal) decisions concerning EU competition law are not possible, even if such a decision was required by national legislation.[71] According to the CJEU, Regulation 1/2003

> "*must be interpreted as precluding a national competition authority, in the case where, in order to apply Article 102 TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, from being able to take a decision stating that there has been no breach of that article*".[72]

In the same line of argument, the General Court decided recently that such a "no-ground-for-action" decision cannot be relied on to prevent any future investigation of the same case:

> "*when a competition authority of a Member State, pursuant to Article 5 of Regulation No 1/2003, […] decides that there are no grounds for action, it cannot be considered to have adopted a decision finding that there was no infringement of Article 101 TFEU or of Article 102 TFEU. Therefore, the applicant may not validly use the decision adopted by the authority in respect of it for the purpose of applying the principle ne bis in idem*".[73]

The situation is similar as far as the Commission is concerned. The Commission may issue a decision on inapplicability,[74] such a decision is however perceived as an instrument for clarifying competition policy rather than a "not guilty" decision.[75] In any event, no such decision has yet been issued. Thus, the Commission in practice only *closes the case*,[76] which does not prevent it or the

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70 Regulation 1/2003, Article 5.

71 The CJEU proclaimed in Case C-375/09 *Tele2 Polska*, ECLI:EU:C:2011:270, para 35 that Regulation 1/2003 "*precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.*"

72 Ibid, para 30.

73 Case T-402/13 *Orange*, ECLI:EU:T:2014:991, para 31.

74 Regulation 1/2003, Article 10.

75 In detail, see, e.g., O. Blanco (ed), *EU competition procedure* (Oxford University Press 2013), 600.

76 Commission, 'Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU' (2011) OJ C 308/6, para 114. Alternatively, if the Commission's proceedings were opened upon a complaint, and the Commission takes a decision rejecting the complaint, this does not prevent it (or an NCA) from investigating the same case in the future. In detail, see Nazzini (n 56), 149.

NCAs from further investigation of the same case.

It is therefore in principle possible that even though certain conduct of certain undertakings was examined by a competition authority and no infringement was found, the same case may be re-opened by another competition authority and investigated anew.

Despite the clear wording of Regulation 1/2003 and the jurisprudence of the EU Courts, we respectfully submit that in order to achieve compliance with the *ne bis in idem* principle, the legislation needs to be amended in this regard. The rational of this principle is to ensure that no one will be prosecuted again with regard to conduct which had been in the past scrutinised on the merits. Thus, if the Commission or a NCA conducted a full investigation of a case and was not able to decide that there was an infringement, it should be bound to issue a decision that there was no infringement, which would prevent further investigation.

In order to achieve this, Regulation 1/2003 would need to be amended in a way allowing NCAs to adopt non-infringement decisions. In our opinion, it would be advisable to enlarge the Commission's power to adopt this kind of decisions as well, leaving the decision on non-applicability for policy considerations, as is arguably the case today. The Commission nonetheless needs to be able to issue non-infringement decisions as well.

The last observation on this topic concerns commitment decisions.[77] Under EU law, if the Commission accepts commitments from the parties to the proceedings, such decision does not declare whether there was an infringement, and thus does not prevent other competition authorities from dealing with the same case in the future.[78] Most commentators agree that this is not contrary to the *ne bis in idem* principle.[79]

The legislation as well as practice on commitments differs in individual Member States. In the future, thanks to the ECN+ Directive, the approach to commitments should be unified for all the NCAs, in a way practically identical to that described above concerning the Commission.[80] Notwithstanding this, the General Court has already decided that commitment decisions adopted by NCAs do not produce the effects of a final decision on the merits, and thus do not prevent further investigation of the same case by other competition

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[77] Regulation 1/2003, Article 9.

[78] In Regulation 1/2003, Recital 13, it is expressly declared that "*commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case*."

[79] See, e.g., E. Gippini-Fournier, 'The modernization of European Union competition law: first experiences with Regulation 1/2003' in H. Franz Koeck and M.M. Karollus (eds), *The modernization of European competition law. FIDE XXIII congress proceedings Vol.* 2 (Nomos 2008), 401; I. Van Bael, *Due process in EU competition proceedings* (Wolters Kluwer 2011), 300.

[80] ECN Notice and Directive 2019/1, Article 12.

authorities.[81]

Admittedly, commitment decisions may be adopted in the early stages of the proceedings, when the investigation is far from finished, as well as at the end of it, occasionally even after the Statement of Objections.[82] Still, if only one competition authority is to be responsible for a single case, as argued above, and such an authority comes to the conclusion that the commitments meet its concerns and it has no further grounds for action, it is hard to argue that there is a reason to investigate the same case by another ECN member.

We therefore submit that commitment decisions should have the effect of preventing the investigation of the same case in the future,[83] even though from the EU case law, the opposite interpretation may clearly be identified.

5. Conclusions

It is practically universally agreed that the "three-prong test", which takes into account the legal interest protected in order to identify "*idem*", is not compatible with the ECtHR's case law and needs to be abandoned in antitrust cases, thus unifying the CJEU's jurisprudence on this matter. Hopefully, the CJEU will do so in the next suitable case it will decide.

Nonetheless, even the alternative approach to "*idem*", promoted by AG Kokott in the *Toshiba* case, enables parallel proceedings in antitrust cases to the same extent. It is submitted that neither this interpretation is sufficient to give full effect to the *ne bis in idem* principle and that for the future, a rule should be adopted that in the EU, only a single competition authority may investigate a particular case, thus excluding parallel proceedings altogether. In order not to endanger the effective enforcement of EU competition law by NCAs, it would also be necessary to make clear that NCAs are allowed to assess the effects of anti-competitive conduct in other Member States and to take these effects into account to set fines for such infringements.

In addition, it is recommended that the NCAs should be allowed to adopt non-infringement decisions and that the Commission should start adopting such decision as well, instead of only "closing" the case. In line with these changes, commitment decisions adopted by one ECN member should prevent other competition authorities from investigating the same case.

At first sight, such amendments would completely overhaul the system of competition law enforcement in the ECN. It is put forward that primarily, they would dramatically increase the legal certainty of undertakings concerned. At

81 Case T-402/13 *Orange*, ECLI:EU:T:2014:991, para 31.

82 Blanco (n 75), 580.

83 With the obvious exception, enshrined already in Regulation 1/2003, Article 9(2), the ECN Notice and Directive 2019/1, Article 12(3), enabling the proceedings to be reopened in the case of a material change of circumstances, non-compliance or incomplete, incorrect or misleading information provided by the parties.

the same time, they would not endanger the effectiveness of EU competition law enforcement, as parallel proceedings are already rare in practice.

Adoption of such changes presupposes a high level of mutual trust among the ECN members. After 15 years of creating and maintaining a common competition culture in Europe,[84] we may hope that such trust has been established and that the NCAs, now empowered by the ECN+ Directive, might be ready to support such changes.

84 ECN Notice, para 1.

Chapter 6

EU competition law public enforcement in the age of information overload: new challenges ahead?

*Pieter Van Cleynenbreugel**

1. Introduction

The effective enforcement of competition rules is premised upon the availability and correct analysis of sufficient and relevant factual information. Such information – found in documents, data and market studies – directly or indirectly allows authorities to establish the existence of anti-competitive behaviour and undertakings to refute any unfounded claims made by such authorities. In addition, it also allows businesses to justify such behaviour by showcasing the efficiencies it brings to the market. Information is therefore key to effective competition law enforcement.

The increased availability and use of data and easier access to more information made possible by the rise of digital technologies – so-called information abundance or 'infoglut'[1] – could be believed to have greatly facilitated competition law enforcement. However, in practice it turns out that this increase in available information bears in itself the risk of information overload. In its essence, information overload refers to a situation where too much information is making it difficult to distinguish relevant from irrelevant data. Information overload is known to have a potentially negative impact on decision-making processes. On the one hand, businesses may bank on such overload to escape regulatory scrutiny or to mislead the regulator. On the other hand, information overload could also directly affect the decision-making capacities of competition authorities and distort their internal decision-making procedures.

This chapter aims to conceptualise information overload and map, in general terms, the impact it may have on the organisation, structure and features of EU competition law public enforcement as put in place by Regulation 1/2003.[2] To do so, the first section will analyse three areas of EU competition law public enforcement which may require attention in the light of information overload

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1 See for background and the coining of that notion, M. Andrejevic, *Infoglut: how too much information is changing the way we think and know* (Routledge 2013).

2 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 81 of the Treaty (2003) OJ L 1/1 (hereinafter: Regulation 1/2003).

threats: competition authorities' discretion in managing and choosing cases, the application of the proof-proximity principle that underlies the enforcement of Articles 101 and 102 TFEU and judicial review against enforcement decisions (2).

Having diagnosed information overload challenges with regard to those three aspects of competition law enforcement, the chapter's second section will reflect on proposals that would offer a way forward to deal with those challenges. It will also analyse whether and to what extent Directive 2019/1, which seeks to streamline EU public enforcement at Member State level, has paid attention to the previously identified information overload challenges.[3] Arguing that the Directive only marginally addresses those challenges at best, the chapter calls for a gradual bottom-up information overload strategy to be developed in the shadow of the Directive's transposition and early implementation processes (3).

2. Information overload as a challenge to the enforcement modus of Articles 101 and 102 TFEU

The rise of digital technologies and the ease with which information has become available create the risk of overburdening individuals and organisations with information. This section conceptualises the information overload phenomenon and charts how it may impact on competition authorities' enforcement mandate. To do so, the first subsection briefly revisits the information overload concept and its emergence in literature on regulation and enforcement (2.1), prior to identifying three potentially problematic areas of competition law enforcement which may be impacted by information overload: authorities' case management discretion, the balance of proof under the proof-proximity principle and the exercise and scope of judicial review against enforcement decisions. In each of those cases, it will be shown that information overload is likely to present new challenges in the years to come. In and of themselves, those challenges may not raise immediate problems of a legal or practical nature. It is submitted, however, that they call for increased awareness when designing or refining enforcement strategies (2.2).

2.1. Information overload in theory and practice

Information overload essentially refers to a situation in which too much information constrains a decision-making process.[4] Human abilities are too scarce to process all information, and this may result in decisions being taken on the basis of incorrect or irrelevant information available. Although worries about information overload are as old as information itself, the phenomenon has been

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 (2019) OJ L 11/3 (hereinafter: Directive 2019/1).

4 J. Cohen, 'The regulatory state in the information age' (2016) 17 TIL 369.

theorised only relatively recently, and most vocally in the field of strategic management studies.

The notion of information overload has been conceptualised since the 1950s, when strategic management scholars started to focus on the administrative processes accompanying the governance of business organisations. In that particular context, Bertram Gross developed an important working definition of information overload. According to Gross, "information overload occurs when the amount of input to a system exceeds its processing capacity. Decision makers have fairly limited cognitive processing capacity. Consequently, when information overload occurs, it is likely that a reduction in decision quality will occur."[5] A more refined definition developed later describes information overload as 'a state in which a decision maker faces a set of information (i.e., an information load with informational characteristics such as an amount, a complexity, and a level of redundancy, contradiction and inconsistency) comprising the accumulation of individual informational cues of differing size and complexity that inhibit the decision maker's ability to optimally determine the best possible decision. The probability of achieving the best possible decision is defined as decision-making performance. The suboptimal use of information is caused by the limitation of scarce individual resources. A scarce resource can be limited individual characteristics (such as serial processing ability, limited short-term memory) or limited task-related equipment (e.g., time to make a decision, budget).[6]

This definition is important as it conceptualises information overload as a shortcoming in the decision-making process. In a situation of information overload, selecting the relevant information within this abundance is considered difficult or impossible because of human constraints (too limited capacity to process all kinds of information) or organisational constraints (too little time or budget to go over all information and make a selection). As a result, by virtue of those defects, the decision-making process is constrained. The increased collection and use of data in automated processing contexts, also referred to as a situation of information inflation[7] has contributed even further to situations of information overload in human decision-making processes. On the one hand, increased and automated data processing has facilitated automated or algorithmic decision-making on the basis of machine learning and has created new opportunities for businesses to streamline their decision-making processes.[8] On the other hand, however, the abundance of information available

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5 B. Gross, *The managing of organizations* (Free Press 1964), 857.

6 P.G. Roetzel, 'Information overload in the information age: a review of the literature from business administration, business psychology, and related disciplines with a bibliometric approach and framework development' (2018) 11 J. Bus. Res. 1, 6.

7 J. Doomen, 'Information inflation' (2009) 18 JIE 27.

8 A. Ezrachi and M. Stucke, *Virtual competition. The promise and perils of the algorithm-driven economy*

imposes potentially significant constraints on human decision-making and in procedures relying on such decision-making.

It is not surprising, therefore, that in the field of regulatory studies, the risks of information overload have been highlighted as well. Traditional regulatory paradigms have been based upon the premise that information is scarce and needs to be either disclosed or disclosure of which has to be prevented.[9] Within that framework, rules requiring the disclosure of information or blocking access to such information have been considered effective regulatory tools as they address the fundamental information asymmetry problem: they ensure that individuals who did not have access to information could obtain it or that certain information could not be spread because it would confuse consumers.[10] Those regulatory responses are nevertheless fundamentally premised on the idea that information is scarce rather than abundant. In contrast, under conditions of information abundance or overload, 'the problem is not scarcity but rather the need for new ways of cutting through the clutter, and the re-siting of power within platforms, databases, and algorithms means that meaning is easily manipulated'.[11] In those situations, information disclosure rules are easy to manipulate as throwing too much information at regulators clouds the decision-making process and results in either backlog or plain wrong decisions being taken with regulators having limited powers to address them.[12] A good example is the obligation to disclose all relevant information to consumers, in the context of investment transactions.[13] Requiring investment firms to develop ever more detailed prospectuses containing all relevant information is likely to be manipulated, if this requirement were to entail transferring all data available on a certain financial product and its relationship with competing products. The abundance of data readily available thanks to information technologies could result in businesses overwhelming potential clients with information, resulting in those clients not making the best informed decision.[14] In that particular case, a business would act in perfect compliance with the rules in place, yet would also succeed in using the existence of information overload to its advantage. In the

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(Harvard University Press 2016).

9 Cohen (n 4), 382.

10 See for a critique on this paradigm from a consumer protection perspective A.L. Sibony and G. Helleringer, 'EU consumer protection and behavioural sciences: revolution or reform?' in A. Alemanno and A.L. Sibony (eds), *Nudge and the law. A European perspective* (Hart 2015).

11 Cohen (n 4), 383.

12 See in the context of patent law J. Kuhn, 'Information overload at the U.S. Patent and Trademark Office: reframing the duty of disclosure in patent law as a search and filter problem' (2010) 13 YJoLT 90.

13 See in the U.S. context of copyright law F. Pasquale, 'Copyright in an era of information overload: toward the privileging of categorizers' (2007) 60 Vand. L. Rev. 135; in EU law see H. Fleischer and K.U. Schmolke, 'The reform of the Transparency Directive: minimum or full harmonisation of ownership disclosure?' (2011) 12 EBOR 121.

14 See A. Künzler, *Restoring consumer sovereignty. How markets manipulate us and what the law can do about it* (Oxford University Press 2017).

same way, information-blocking rules are relatively simple to evade as the abundance of ways to communicate information allows for previously prohibited actions to take place anyhow yet hidden behind the veil of information technology. Reliance on algorithms that process many different actions and leaving little access for regulators to those algorithms may result in certain prohibited actions still taking place and in regulators being unable even to detect them.[15] A business could use to its advantage, in that context as well, the presence of abundant pieces of information and the limited ability of a regulator to process them.

The discussion on information overload and the limits of business regulation has focused mainly on the ways in which businesses would exploit information overload to avoid regulatory scrutiny regarding their activities. Focus has been notably on how businesses circumvent or avoid regulation and how regulation is to be modified. What is remarkably lacking, is the inverse analysis focusing on how an enforcement authority is confronted in its supervisory or enforcement activities with information overload and what challenges this brings from that authority's perspective.

From a public enforcement authority's perspective, the information overload phenomenon also presents additional organisational and procedural challenges on a macro and on a micro-level. On a macro-level, the increased availability of information will have an impact on the way in which that authority approaches its enforcement mandate. To an extent that an authority has discretion to set its own enforcement priorities and procedures, information overload is likely to challenge its *modus operandi*. On a micro-level, the procedures in place to adopt individual decisions, the actual individual decisions adopted and the judicial review against those decisions may all face particular information overload challenges.

2.2. Information overload and EU competition law public enforcement: three potential challenges

From the above-mentioned succinct review, it becomes clear that the potential implications of such overload on the day-to-day activity of enforcement authorities are still relatively unknown. The purpose of this section is not to outline in a definitive way the exact scope and extent of those implications. That would require a study going well beyond the scope and ambit of this chapter. At the same time, however, it remains useful to clarify and list some of the most salient potential challenges information overload may cause in the context of the public enforcement of Articles 101 and 102 TFEU and against the background of the particular multi-layered system that has been set up to

15 See for a general overview in that regard F. Pasquale, *The black box society: the secret algorithms that control money and information* (Harvard University Press 2015).

accompany the enforcement of those provisions.

It is well-known that the public enforcement of Articles 101 and 102 TFEU is characterised by a European Commission-led decentralised administrative framework put in place by Regulation 1/2003. Within that framework, the European Commission retains the final and key responsibility in the enforcement of Articles 101 and 102 TFEU.[16] At the same time, however, national competition authorities have come to play an increasingly important supplementary role. As junior partners of the European Commission, they independently apply both provisions in parallel with equivalent national law provisions.[17] To avoid overlaps and to ensure co-ordination, the authorities and the European Commission exchange information and meet within the framework of a European Competition Network.[18] Those meetings, which are informal and do not result in final binding decisions being adopted, result in only the most appropriately positioned authority to take on a particular case of suspected collusive or abusive market behaviour and in certain enforcement and policy features being streamlined.[19] When it comes to substance, however, both the Commission and national competition authorities are to apply the same substantive law provisions and standards of proof.[20] Decisions by national competition authorities can be reviewed by national courts, which are also called upon to apply and interpret Articles 101 and 102 TFEU. Both the Commission and the Court of Justice ensure the coherent application of those rules by offering particular helplines to those authorities and national courts.[21]

That all too familiar enforcement framework, implicitly relies on the presumption that information is scarce and can be exchanged between authorities to attain the most efficient allocation of cases. It is indeed based on a governance framework in which regular communication suffices between authorities is believed to result in efficient allocation decisions, as more authorities will be able more easily to detect information that would otherwise

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16 See, among others, J. Venit, 'Brave new world: the modernization and decentralization of enforcement under articles 81 and 82 of the EC Treaty' (2003) 40 CMLR 545; H. Gilliams, 'Modernisation: from policy to practice' (2003) 28 ELR 451.

17 See S. Wilks, 'Agency escape: decentralization or dominance of the European Commission in the modernization of competition policy?' (2005) 18 Governance 431; see also A. Mateus, 'Ensuring a more level playing field in competition enforcement throughout the European Union' (2010) 31 ECLR 516.

18 F. Cengiz, 'Multi-level governance in competition policy: the European Competition Network' (2010) 35 ELR 660.

19 D. Geradin, 'The ECN – Network antitrust enforcement in the European Union' in I. Lianos and D. Geradin (eds), *Research handbook on EU competition law* (Edward Elgar Publishing 2013).

20 See Regulation 1/2003, Article 3. It is to be remembered that Article 3(2) allows Member States to adopt and apply on their territory stricter national laws which prohibit, or sanction unilateral conduct engaged in by undertakings.

21 See for the helplines P. Van Cleynenbreugel, 'National courts and EU competition law: lost in multilevel confusion?' in N. Bodiroga-Vukobrat, S. Rodin and G. Sander (eds), *New Europe – old values? Reform and perseverance* (Springer 2016).

escape the attention of a single authority.[22] Within that framework, however, information overload raises challenges or potential difficulties on at least three levels: priority-setting policies (i), evidential burden standards (ii) and the exercise of judicial review (iii). Although it could be argued that the information overload challenges identified here may still be abstract and somewhat far-fetched, it is submitted that authorities should nevertheless start to be aware of them when contemplating or rethinking their governance structures.

i. Potential impact on priority-setting policies

It is believed that giving competition authorities the freedom to choose how to best use their scarce budgetary and human resources, contributes to more effective competition law enforcement.[23] One of the ways of doing so is by granting authorities the liberty to set their own enforcement priorities.[24] Having the discretion or liberty to develop general enforcement guidelines and to decide whether or not to prosecute a particular case, without having to take instructions from anyone in doing so, is also considered a key value to promote at EU level.[25] Priority-setting discretion traditionally encompasses general and/or individual priority-setting powers, as was confirmed in a 2013 recommendation adopted by the European Competition Network.[26] General priority setting powers refer to 'the formulation of long, medium or short-term strategic plans relating to the Authorities' overall portfolios and the allocation of resources across their areas of responsibility'.[27] Individual priority setting powers concern an authority's freedom to decide whether or not to initiate prosecution in a particular case, or deciding to reject a complaint on the basis that the case does not currently enter the enforcement priorities of the authority concerned.[28]

At EU level, the power to prioritise by the European Commission was confirmed by the EU General Court in 1992. In its *Automec II* judgment, the Court stated that the Commission cannot therefore be required to give a decision.[29] More

22 See on the information exchange practices within the European Competition Network J. Nowag, 'Due process: the exchange of information and risk of hindering effective cross-border co-operation in competition cases' (2010) 7 CompLRev 107.

23 See for that argument W.E. Kovacic, 'Institutional foundations for economic legal reform in transition economies: the case of competition policy in antitrust enforcement' (2001) 77 Chi.-Kent L. Rev. 265.

24 M. Trebilcock and E. Iacobucci, 'Designing competition law institutions: values, structure, and mandate' (2010) 41 Loy. L. Rev. 455, 469.

25 See in that regard K. Cseres, 'Accession to the EU's competition law regime: a law and governance approach' (2014) 7 YARS 31, 51.

26 See the ECN Recommendation on the power to set priorities (2013), available at: https://ec.europa.eu/competition/ecn/recommendation_priority_09122013_en.pdf (hereinafter: the ECN Recommendation).

27 The ECN Recommendation, para 2.2.

28 Ibid.

29 Case T-24/90 *Automec v Commission (Automec II)*, ECLI:EU:T:1992:97, para 75-76. See for the scope of positive and negative priorities set by the Commission W. Wils, 'Discretion and prioritisation in public antitrust enforcement, in particular EU antitrust enforcement' (2011) 34 World Competition 357.

importantly, 'setting priorities within the limits prescribed by the law where those priorities have not been determined by the legislature' is an inherent feature of administrative activity, especially where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition'.[30] Ever since, it is clear that, as a matter of EU law, it is legitimate for the European Commission to close a case file on grounds of lack of EU interest as a priority criterion.[31]

The same has not been true at Member State level, however. As Regulation 1/2003 leaves it up to the Member States to determine whether or not authorities have powers, a certain amount of divergence was present across the European Union.[32] In terms of general priority setting, no obligation was imposed on authorities to set and communicate their general enforcement priorities.[33] Under national law, however, introducing such an obligation was always possible.[34] The United Kingdom authority even published guidelines on the basis of which it would set those priorities,[35] a practice later followed by, among others, the Belgian authority.[36] In essence, the criteria used to determine enforcement priorities essentially boil down to a cost-benefit analysis. An authority will have to assess the likely impact of a case, the resources available and the risk that a case may be brought to an end on the basis of an *ex ante* evaluation of the market and behaviour on that market within the authority's jurisdiction. That preliminary assessment would give the authority an idea of sectors and types of behaviour it would like to focus its attention on in the near future.

Concerning individual priority setting powers, significant differences remained, varying between a framework allowing authorities explicitly to reject a complaint on the basis of lack of enforcement priority and an obligation, in individual cases, to investigate all complaints, without having the possibility of

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30 Case T-24/90 *Automec v Commission (Automec II)*, ECLI:EU:T:1992:97, para 77. See also C.D. Ehlermann, 'Implementation of EC competition law by national authorities' (1996) 17 ECLR 90.

31 Case T-24/90 *Automec v Commission (Automec II)*, ECLI:EU:T:1992:97, para 88. For a relatively recent example, Case AT.400.50 *Federauto*, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40050/40050_72_7.pdf.

32 As noted in 2010 already by N. Petit, 'How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities? A multi-jurisdictional assessment' (2010) Concurrences 44.

33 The ECN Recommendation, para 2.2.

34 The Office of Fair Trading (OFT) in the United Kingdom, and later the Competition and Markets Authority (CMA) were obliged to publish enforcement priorities, see, https://www.complianceconsultancy.com/pdf/gb/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf

35 Guidelines on prioritisation principles (2014) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf.

36 See Belgian Code of Economic Law, Article IV.25.

rejecting a complaint on priority grounds.[37] In addition, differences existed regarding the possibility to initiate judicial review against an authority's decision rejecting a complaint.[38] In order to streamline those approaches, Article 4(5) of Directive 2019/1 now explicitly states that '[n]ational administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU as referred to in Article 5(2) of this Directive. To the extent that national administrative competition authorities are obliged to consider formal complaints, those authorities shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This is without prejudice to the power of national administrative competition authorities to reject complaints on other grounds defined by national law'. Recital 23 of the directive explicitly adds that the decision to reject a formal complaint remains reviewable under national law, if national law provides for this.[39] In addition, Member States' governments still have the right to issue to national administrative competition authorities general policy rules or priority guidelines that are not related to sector inquiries or specific proceedings for the enforcement of Articles 101 and 102 TFEU.[40] Once transposed, individual priority setting powers will thus be harmonised across all EU Member States.

Priority setting gives competition authorities the opportunity to focus only on those cases that are likely to result in infringement or settlement decisions being adopted and case files being closed. Cases that stand only little chance of being prosecuted successfully can thus be rejected outright. Setting priorities nevertheless remains a delicate exercise and relies on a very important assumption: the fact that information is available on different types of behaviour and on the structure of markets allows it to infer correct policy priorities and to choose the right enforcement priorities.

It is submitted that information overload could nevertheless challenge priority-setting powers of competition authorities. To the extent that too much information on potentially anti-competitive behaviour in too many sectors is available, this may risk distorting the cost-benefit analysis preceding general priority setting. If an authority has to confront too much information on potentially too many (hypothetical) competition law infringements, the choice to focus on only certain of them may result in wrong priorities being chosen. To the extent that, subsequently, individual complaints regarding potential anti-

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37 F. Cengiz, 'An academic view on the role and powers of national competition authorities background to the ECN plus project', Study prepared for the European Parliament (2016), available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL_STU(2016)578971_EN.pdf

38 Petit (n 32), 54-55.

39 National law may still provide other grounds to reject complaints on as well, see Directive 2019/1, Article 4(5) last sentence.

40 Directive 2019/1, Recital 23 last sentence.

competitive behaviour are rejected for lack of enforcement priority, behaviour potentially damaging for society could escape enforcement authorities' attention. That is most likely to be the case in terms of complex competition law infringements that go beyond traditional infringements. One could think of different formats of collusive behaviour triggered or caused by algorithms. Information and predictions regarding algorithmic collusion are presently contradictory in nature.[41] That may result in authorities choosing not to go after those cases, especially as other information may be available regarding other types of potential competition law infringements. Making an appropriate choice that would result in the best-informed cost-benefit analysis to be made is likely to be ever more difficult in times of information abundance.

It cannot be denied, therefore, that information overload risks clouding the cost-benefit analysis accompanying the priority-setting exercise. From a legal point of view, however, this challenge is likely to remain academic at most. Priority-setting powers belong to an authority's discretionary power arsenal. As long as an authority can show it has taken all reasonable steps to ensure that an appropriate cost-benefit analysis preceded its priority-setting exercise, it is unlikely that a court – if at all competent to review this exercise – would consider an authority's list of enforcement priorities to be in violation of a higher law principle. The only reason one could imagine in that regard, would be a failure of the authority to ensure the effective enforcement of competition law. Such failure would comprise a legal reason to reprimand the authority concerned and to push it to take action effectively to counter information overload challenges. For now, it remains to be seen whether a court would indeed take such steps and, if so, under what conditions.

ii. Potential impact on evidential burden standards

According to Article 2 of Regulation 1/2003, the burden of proving an infringement of Article 101(1) or of Article 102 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 101(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled. That provision summarises the essence of how proof of an infringement or a justification to such infringements is to be offered: the one claiming is the one having to offer the evidence for doing so (*actori incumbit probatio*).[42] As a result, enforcement authorities will have to prove, up to the requisite standard, the existence of an infringement, whereas undertakings will have to offer sufficiently

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41 cf A. Ezrachi and M. Stucke, 'Artificial intelligence and collusion: when computers inhibit competition' (2015) U.I.L. Rev. 1775 with U. Schwalbe, 'Algorithms, machine learning and collusion' (2019) 14 J.C.L. & E. 568.

42 See for an overview F. Castillo de la Torre and E. Gippini Fournier, *Evidence, proof and judicial review in EU competition law* (Edward Elgar 2017), Chapter 2.

convincing evidence to the contrary. In doing so, the presumption of innocence would be maintained, placing a heavy burden of proof on the prosecuting and enforcing authority.[43]

In practice, however, the evidential burden standards in the framework of Articles 101 and 102 TFEU are more complex than the simple division of Article 2 Regulation 1/2003 indicates. Indeed, the EU Courts have allowed the Commission and national competition authorities to rely on a series of factual presumptions, allowing them to infer the existence of a *prima facie* infringement without having to offer all necessary proof. Two examples of such presumptions can be highlighted in that regard. First, when the existence of a concerted practice needs to be proven under EU law, the Courts have accepted that proof of contact between representatives of two or more undertakings followed by parallel behaviour allows authorities to infer that a concerted practice is in place.[44] Enforcement authorities would not have to prove the causal link between contact and behaviour; it would then fall upon the defending undertakings to offer evidence that the parallel behaviour can only be explained by rational parallel conduct in that particular market.[45] Second, whenever a subsidiary of a parent company has engaged in anti-competitive behaviour, the Commission or national competition authorities will calculate the amount of the fine on the basis of the global consolidated turnover of the enterprise group of which the subsidiary forms part.[46] That is so because the Commission acts on the presumption that the parent company will have had a decisive influence on the subsidiary's market behaviour.[47] When the parent company holds all or virtually all the shares or control rights in that subsidiary, a legal presumption of decisive influence has been accepted.[48] To escape being held liable, the parent company concerned will have to demonstrate with sufficient detail that it did not, in that particular case, exercise decisive influence.[49] In practice, that proof is difficult to offer.[50] In both instances, the enforcement authorities can offer partial elements to infer, as a matter of law, important consequences as to the qualification of the market behaviour of undertakings. In doing so, a so-called

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43 C. Volpin, 'The ball is in your court: evidential burden of proof and the proof-proximity principle in EU competition law' (2014) 51 CMLR 1159.

44 Case C-49/92 P *Commission* v *Anic Partecipazioni*, ECLI:EU:1999:C:356, para 117 and Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:342, para 33.

45 See to that extent Case C-455/11 P *Solvay SA v European Commission*, ECLI:EU:C:2013:796, para 39-41.

46 Case C-107/82 *AEG Telefunken v Commission*, ECLI:EU:C:1983:293, para 50.

47 See A. Kalintiri, 'Revisiting parental liability in EU competition law' (2018) 43 ELR 145.

48 Case C-97/08 P *Akzo Nobel NV e.a. v Commission*, ECLI:EU:C:2009:536, para 60 and Case C-90/09 P *General Quimica et al v Commission*, ECLI:EU:C:2011:21, para 87.

49 Ibid, para 61.

50 J. Briggs and S. Jordan, 'Presumed guilty: shareholder liability for a subsidiary's infringements of article 81 EC Treaty' (2007) 8 BLI 28.

'proof proximity' rule of thumb has been set up.[51] The actor concerned being closest to certain types of evidence will be responsible for the offering of such evidence. As the undertakings concerned have easier access to evidence that they did not engage in concerted practices or did not exercise decisive influence, they would be responsible for offering this kind of evidence. Proof proximity is said to establish an equilibrium between both enforcement authorities and defending undertakings.[52]

The proof proximity framework and the presumptions that come with it are premised upon the fact that information is scarce and that some actors have better or easier access to it. As a result, it seemed legitimate to ask from the actor having the most relevant information to bring it forward in particular enforcement situations. One could question, however, whether this equilibrium still holds to the same extent in times of information abundance and overload. In instances where information can be obtained more easily by competition authorities, they should be able to assert this information. In the Court's case law, it has been accepted that this makes the case stronger and that, if available, the Commission should obtain and use such information as well before making inferences on the basis of recognised presumptions.[53] In the same way, to the extent that more information is available within or to the undertaking, the latter will bear the responsibility of sifting through it and adducing the most relevant information that is relevant to its case. As such and at first sight, it would seem that the proof proximity framework is sufficiently flexible to accommodate increases in information. On top of that, EU Courts have experience in dealing with – sometimes conflicting – economic studies or evidence.[54] From that point of view, it therefore may very well be the case that information overload does not present a fundamental problem as regards the evidential burden standards in place.

Despite that apparent flexibility, it is submitted that information abundance presents a new challenge in this context as well. To the extent that more information is more readily available, questions may arise as to the truthfulness and trustworthiness of such information. Debates in competition law enforcement cases are therefore likely going to shift from the economic correctness and availability of information to the truthful nature of the information offered. As the proof proximity framework is premised on scarce rather than abundant information, additional safeguards to verify or control the used information may become ever more necessary. So far, the literature and

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51 Volpin (n 43), 1173.
52 Ibid, 1179.
53 See, e.g., Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v European Commission*, ECLI:EU:T:2013:188, para 182.
54 See For those difficulties A.L. Sibony and E. Barbier de la Serre, 'Expert evidence before the EC courts' (2008) 45 CLMR 941.

case law dealing with proof proximity questions have not directly engaged with the question of false information. From a legal point of view, that problem seems to have been addressed in a preliminary way. Article 23(1)(a) of Regulation 1/2003 allows the Commission to impose fines on undertakings supplying false or misleading information, the law provides a tool to tackle such instances. Practically speaking, however, it will be ever more difficult to detect false or misleading information, even with all the enforcement and inspection tools at the disposal of the Commission. In times where information can be manipulated easily, also thanks to more developed information technologies, verifying information nevertheless presents an additional challenge for which the law does not offer a clear answer at present.

iii. Potential impact on the scope of judicial review

A third aspect of EU competition law public enforcement that may be impacted by information overload concerns the scope of judicial review against competition authorities' decisions. As those authorities enjoy broad discretion when adopting decisions and when applying Articles 101 and 102 TFEU, questions have arisen for a long time as to how far judges should be able to go in reviewing the legality and correctness of such decisions.

In accordance with Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), any individual should have the right to have a decision concerning him and affecting her or him reviewed by an independent and impartial tribunal.[55] According to the European Court of Human Rights (ECtHR), that tribunal is to have 'unlimited' jurisdiction to review the facts and law in a particular case. In practice, unlimited jurisdiction implies 'the power to examine all questions of fact and law relevant to the dispute before it and to quash in all respects, on questions of fact and law, the decision at issue'.[56] Within the realm of EU competition law, both the Member States and the EU abide by this broad principle, albeit with some nuance.

At Member States level, decisions adopted by administrative competition authorities can all be reviewed by national courts or tribunals. In most Member States, including France, Germany and the Netherlands, those review courts have the power to replace the decision taken by the authority, arguing that the facts were distorted or the law was misapplied and correcting the authority on

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55 In administrative proceedings classified as criminal, that protection offered by that provision would be more intense. On competition law being considered (quasi-)criminal, see M. Bernatt, 'Between Menarini and Delta Pekarny. Strasbourg view on intensity of judicial review in competition law' in C. Nagy (ed), *The procedural aspects of the application of competition law – European frameworks, Central-European perspectives* (Europa Law Publishing 2016), 4, 5-6.

56 *Menarini Diagnotics S.R.L. v Italy*, App no 43509/08 (ECtHR, 27 September 2011) and *Sigma Radio Television Ltd. v Cyprus*, App nos 32181/04 and 35122/05 (ECtHR, 21 July 2011).

that point.[57] In doing so, new facts can be adduced at the review stage level or errors in the determination and appraisal of facts can be corrected.

At EU level, review procedures generally take place within the framework of the action for annulment of Article 263 TFEU. When ruling on whether or not to annul a Commission decision, the Court has argued it should be able comprehensively or thoroughly to review the legal and factual analysis of the Commission.[58] According to the Court, 'the Commission has a margin of discretion with regard to economic matters, [yet] that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. The EU judicature must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[59] At the same time, however, 'the analysis by the European Union judicature of the pleas in law raised in an action for annulment has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure'.[60] As a consequence, the Court 'cannot encroach upon the discretion available to the Commission in the administrative proceedings by substituting its own assessment of complex economic circumstances for that of the Commission, but, where relevant, must demonstrate that the way in which the Commission reached its conclusions was not justified in law'.[61] Only in cases when the Courts review Commission decisions imposing a fine, do they have the right to adjust the amount of the fine and replace the Commission's decision with their own. The Court of Justice nevertheless very clearly highlighted that this full jurisdiction power is limited only to the amount and calculation of the fine and in no way extends to the existence of an infringement of Articles 101 or 102 TFEU.[62]

In theory, the review powers entrusted to courts and tribunals at both EU and Member State level allow for factual evidence to be called into question and for the facts and the authority's rendition of it to be questioned. It may be very likely that, in times of information abundance and overload, tribunals and courts will be called upon ever more frequently to evaluate the ways in which the authority concerned has collected and processed information underlying a competition

57 See for an overview https://globalcompetitionreview.com/jurisdiction.
58 Case C-272/09 P *KME Germany, KME France SAS and KME Italy SpA v Commission*, ECLI:EU:C:2011:810, para 94; Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission*, ECLI:EU:C:2011:815, para 54; Case C-389/10 P *KME Germany, KME France SAS and KME Italy SpA v Commission*, ECLI:EU:C:2011:816, para 125.
59 Case C-295/12 P *Telefonica et al v Commission*, ECLI:EU:C:2014:2062, para 54.
60 Case C-510/11 P, *Kone Oyj et al. v Commission*, ECLI:EU:C:2013:696, para 26.
61 Ibid, para 27.
62 See Regulation 1/2003, Article 31 *juncto* Article 261 TFEU.

law infringement. As that possibility already exists as a matter of law, it would be easy to discard information abundance as irrelevant and most likely not a challenge from the point of view of review powers.

A potential challenge can nevertheless also be found in this particular context. It is submitted indeed that challenges as to the correct finding and interpretation of facts will increase as more information is available. As a result, the appellant undertaking may come forward with alternative evidence suggesting the authority's factual basis for imposing a prohibition decision was wrong. At that point, it will fall upon reviewing courts to assess which information is factually correct. It can be questioned legitimately whether a review court would be more capable of doing so than a public enforcement authority. It would seem that review courts, just like competition authorities, would need to be made aware of the risks of false and confusing information and should have a framework in place that allows judges better to assess the quality of information adduced. As of now, little if any attention has been given to this problem at EU level. It could be considered useful to reflect on ways in which judges could be trained better to distinguish and assess information offered in competition law cases.

It follows from the foregoing that the power accorded to courts to review the facts of a case may become more important in times of information overload. It could therefore be considered that attention to training judges to understand how to assess the value or trustworthiness of information in this type of review cases is likely to become a key focal point in future policy-making. The existing judicial review framework is based on the assumption that judges can distinguish false from accurate information. With the rise of new information technologies and information abundance, this can no longer unequivocally be taken for granted.

3. Information overload, Directive 2019/1 and ways to move forward…

The previous section highlighted the potential challenges the advent of information overload may provoke in relation to three key elements of EU competition law public enforcement. Although those challenges may sound hypothetical at this stage, it is important that authorities are aware of them and that appropriate steps are contemplated or taken to avoid the challenges from becoming problematic in the near future. Against that background, the question arises to what extent Directive 2019/1 is capable of addressing them

At first sight, Directive 2019/1 at best only very marginally seems to address the information overload challenges identified in the previous section. Although the directive allows member States' competition authorities to reject complaints on the sole ground that the case does not fit the authority's enforcement priorities[63], it does not in any way determine how priorities are to be set, what procedures are to be followed and what criteria are to be used in order to avoid that abundance of information does not cloud and distort the priority-setting process. In the same way, the directive does not address the balance underlying the proof-proximity principle, leaving this issue unaddressed. In terms of judicial review, review courts have to be put in place, which, thanks to Article 6 ECHR already have to have full jurisdiction. The directive itself neither mentions the issue of false information nor adds an obligation or suggestion to have information verification strategies in place, except for the *ex post* fines that can be imposed under Article 23(1)(a) of Regulation 1/2003.

The lack of attention paid by Directive 2019/1 to the information overload phenomenon should not be a surprise. Indeed, that legal instrument did not have as its purpose to address information abundance, but rather to streamline enforcement processes and features within the different EU Member States. The fact that the directive does not address the information overload issue, is not problematic as such, however. Quite on the contrary, by shaping the conditions for a more streamlined and harmonised competition law enforcement, it can be said to lay the foundations for a joint information overload countering strategy as well. Whilst neither the directive nor its accompanying preparatory documents refer to such strategy, they do not exclude it fully either.

In order for information overload challenges and their impact on EU competition law public enforcement to be taken more seriously, one would thus need to go beyond the scope and ambitions of the directive in its present setup. It follows from the challenges identified in the previous section that at least two steps would need to be taken should the information overload issues become problematic.

Firstly, both competition authorities and review courts would need to be trained on information management specific to competition law cases. Distinguishing false from true information and irrelevant from relevant information are key qualities of a lawyer yet may require some fine-tuning in light of information technology developments. To do so, guidelines on how to move forward and process information could be developed. One could imagine two parallel developments to be envisaged in that regard. On the one hand, within the framework of the European Competition Network, the Commission and competition authorities could exchange best practices in terms of information management and, if necessary, draft guidelines or recommendations on how information overload challenges can be avoided. As has been the case with Directive 2019/1 to some extent, such recommendations can subsequently be

63 Directive 2019/1, Article 4(5).

inserted in an instrument of EU secondary legislation. On the other hand, review courts should also have tools in place to deal with information overload challenges. As those courts belong to independent branches of government within Member States, the European Competition Network would have little to say on them. It could be envisaged nevertheless, within the framework of an *ad hoc* working group set up by the Commission, that Member States' review courts could also be asked to exchange best practices and that guidelines or recommendations could be developed. This could result in future guidelines or in proposals for harmonising legislation on the topic of information processing in the course of EU competition law public enforcement. This solution, if implemented, would allow for the information overload challenges identified to be taken seriously and to be addressed gradually in the course of informal discussions. It would be useful if such reflections were to start as soon as possible, in order to anticipate the emergence of the information overload challenges identified previously.

Secondly, in order to sift through information and to distinguish relevant from irrelevant information, technology may come to the rescue. As information is ever more available, so is technology that can manage, process and analyse such information. More specifically, machine learning technology may be useful. This technology would have to be programmed in such a way that a machine learns to distinguish relevant from irrelevant information in light of enforcement priorities or evidence evaluation requirements imposed by competition authorities.[64] Although it would theoretically be possible, by way of extending the scope of Directive 2019/1, to oblige national authorities or Member States to have this technology in place when dealing with Article 101 or 102 cases, such technology would first of all need to be fine-tuned and designed. In that regard, one could imagine the European Union playing a steering and stimulating role in designing such technology,[65] which would then later be implemented across the different Member States. In order to do so, however, awareness of the risk of information overload challenges materialising and the need for a common EU approach would need to be determined first. That will likely take time, which is why it seems relevant to start reflecting on the need for such common strategy today, when information overload risks appear to be mainly academic in nature.

Both ways forward outlined here would be compatible with the spirit of Directive

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64 See also implicitly, I. Lianos, 'Competition law for a complex economy' (2019) 50 IIC 643.

65 For a legal obligation to do so in the realm of EU data protection law see Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119/1. This has given rise to so-called privacy by design studies. See European Data Protection Supervisor, 'Preliminary opinion on privacy by design', 31 May 2018, available at: https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf.

2019/1. If considered or implemented, they would further streamline EU competition law public enforcement in light of new challenges raised by the digitalisation of human life. Now that the EU legislator is clearly willing to streamline the public enforcement of Articles 101 and 102 TFEU at Member State level, it can only be hoped that it will continue to build on this momentum to tackle potential future information overload challenges.

4. Conclusion

Information is more than ever dominating our lives. In times of information abundance and even overload, new questions arise as to how such overload may challenge the public enforcement frameworks underlying Articles 101 and 102 TFEU. This chapter sought to sketch the contours of the information overload phenomenon and to distinguish some of the particular challenges it would bring to competition law enforcement. Following that sketch, it charted the impact information overload might have on priority-setting powers of competition authorities, on the balanced application of the proof-proximity rule and on the scope of judicial review. Arguing that Directive 2019/1 does not really contribute to those challenges, it called for a more focused policy strategy centred on information overload to be developed, both at the European Commission level and within the European Competition Network.

Chapter 7

The concept of 'undertaking' as means to ascertain liability for an infringement of EU competition law

Sander A. van Dijk[*]

1. Introduction

An infringement of competition law inevitably carries the risk that certain individuals may suffer damages. For instance, one could incur financial loss due to an overcharge resulting from a price-fixing cartel. Since the Opinion of Advocate General Van Gerven in the *Banks* judgement,[1] the CJEU has repeatedly been invited to rule on matters concerning the right to compensation for damages resulting from an infringement of EU competition law.[2] Nowadays, it is firmly established that there is an EU right to claim damages resulting from an infringement of competition law. Administrative law, therefore, necessarily meets private law. Consequently, questions arise as to the applicability of competition law concepts in private law. One of these questions is whether the principle of economic continuity, which entails the administrative liability of the economic successor of an infringer, applies not only in competition law, but also in private law as a means to ascertain liability in damages actions.

In the *Skanska* judgment the CJEU ruled that the determination of the entity which is required to provide compensation for damages caused by the infringement of Article 101 TFEU,[3] is directly governed by EU law.[4] Competition law addresses undertakings, i.e. economic entities, not legal persons. This means that, for instance, the afore-mentioned principle of economic continuity should apply in private law, even though the private law of a Member State might not be familiar with such a concept.[5] The judgment makes sense, as it

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1 Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation*, ECLI:EU:C:1993:860.

2 Case C-453/99 *Courage v Crehan*, ECLI:EU:C:2001:465; Joined Cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461; Case C-199/11 *Europese Gemeenschap v Otis and Others*, ECLI:EU:C:2012:684; Case C-557/12 *Kone and others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

3 The same is true for Article 102 TFEU.

4 Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204.

5 For example, the concept of 'undertaking' differs significantly from concepts known and used in the private law of the Member States, since in private law the principles of separate legal personality and limited liability are deeply rooted. See inter alia, P. Voet van Vormizeele, 'Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen' (2010) WuW 1008; R. van Leuken, 'Parental liability for cartel infringements committed by wholly owned subsidiaries' (2016) 24 ERPL 513; M. J. Frese, 'Civil liability for single and continuous

would seem an odd manoeuvre to treat the concept of 'undertaking' differently in public and private enforcement. After all, both enforcement systems deal with the same area of law. At the first glance, the *Skanska* judgment seems rather straightforward. However, it raises questions with regard to private damages actions. To establish civil liability the concept of 'undertaking' has to be relied on. This is, however, hard because the concept of 'undertaking' as means to ascertain liability in the administrative procedure has not yet been fully developed.[6] Most, if not all, case law on the concept of 'undertaking' focuses on parental liability and successor liability, which are concepts resulting from the fact that the undertaking is the addressee of EU competition law. The concept of 'undertaking' is, however, a much broader concept than it has showed itself in the case law up until now. There is uncertainty as to what further extent the concept of 'undertaking' could work as means to ascertain liability in the administrative procedure. With the *Skanska* judgment this uncertainty reveals itself in private law as well. This uncertainty stands in the way of the development of the system of private enforcement.

The CJEU could and should elaborate in more detail on the competition law concept of 'undertaking' as means to ascertain liability and due regard for its private law ramifications, in particular in respect of damages actions, is called for.[7] To argue this, firstly the importance of legal personality and the principle of separation between legal persons is explained. Secondly, it is discussed why the concept of legal personality does not suffice in competition law and why, thus, the concept of 'undertaking' was introduced. As mentioned earlier, the way in which this concept is used as means to establish liability is subject to criticism. Therefore, this criticism will also be discussed. Afterwards the recent *Skanska* judgment is commented upon and it is explained how this judgement raises difficulties with regard to private damages actions. There still is a great deal of uncertainty with regard to civil liability for an infringement on EU competition. Lastly, I will argue that those difficulties and uncertainty can be overcome if the CJEU were to elaborate in more detail on the doctrinal foundation of liability for an infringement of EU competition law.

2. Separation between legal persons as a key concept of private law

Legal personality is a key concept of private law.[8] Legal personality provides a

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infringements' (2018) 41 World Competition 179.

6 See, with further references, A. Jones, 'The boundaries of an undertaking in EU competition law' (2012) 8 ECJ 309, 309-310.

7 Sieburgh has repeatedly dealt in great depth with the importance of a substantive exchange between EU law and private law in her work. See inter alia, C. Sieburgh, 'Principles in private law: from luxury to necessity – multi-layered legal systems and the generative force of principles' (2012) 20 ERPL 295; C. Sieburgh, 'A method to substantively guide the involvement of EU law in private law matters' (2013) 21 ERPL 1165.

8 For a comparative overview, see Voet van Vormizeele (n 5), 1014-1015.

certain entity with the opportunity to operate as a legal subject. This entity has its own rights and liabilities, which are separated from those of its shareholder(s) (*Trennungsprinzip*), just like legal or natural persons to which this entity is not linked.[9] The idea of legal personality has a long history that is deeply rooted in private law. Since the beginning of the nineteenth century the idea of separation of identity between a company and its shareholders and the resulting principle of limited liability developed.[10] Limited liability does not limit the obligation of a legal person to pay its debts. If anything, it restates the rule that – like everyone else – a legal person is fully liable to its creditors. The principle of limited liability expresses the rule that a shareholder can only be liable for to the amount of the shares he owns: nothing more, but surely nothing less. Economists generally see both benefits and disadvantages in limited liability.[11] However, it seems that the benefits, e.g. arguments regarding efficient the allocation of risks and resources, and the possibility for future investors to make a well-informed investment decision, tipped the scales in company and private law.[12]

Rather than being organised as a single corporation, nowadays enterprises are likely to be organised in a corporate group; thus, creating multiple layers of limited liability. Although some economic and legal scholars are more sceptical towards the application of the principle of limited liability with respect to the legal persons operating within a corporate group,[13] we need to realize that such an organisation is not (at least not as a general rule) a trick to evade liability.[14] Companies (and society as a whole) have legitimate interests in acknowledging separate identities. Private law recognises those interests. A legal person only is liable for its own acts. The fact that a certain legal person is part of a corporate group does not change anything. For that reason, piercing the corporate veil is an *ultimum remedium*: 'veil piercing' only is possible in exceptional circumstances.[15] As Sieburgh articulates clearly, a balance has to be struck between the interests of two (or more) legal persons (and society as a whole) in acknowledging separate identities and the interests of third parties in not being victims of, *inter alia*, a lack of transparency and the abuse of corporate

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9 K. Vandekerckhove, *Piercing the corporate veil* (Kluwer Law International 2007), 3.

10 For an historical overview I refer to Vandekerckhove 2007 (n 9), 3-9. I also refer to R.C. van Dongen, *Identificatie in het rechtspersonenrecht* (Kluwer 1995), 3, in particular footnote 7. Van Dongen argues that the term 'exclusive liability' seems more applicable, because it expresses the principle that a shareholder is not liable for the debts of his company and *vice versa*. The term suggested by Van Dongen also has a less negative connotation than the term limited liability.

11 See, with further references: Vandekerckhove (n 9), 6-7.

12 These principles are clearly present in company and private law, but do play a role in other areas of law as well.

13 See among others, H. Hansmann and R. Kraakman, 'Toward unlimited shareholder liability for corporate torts' (1991) YaleLJournal 1879.

14 See in the same sense, C. Sieburgh, 'The attribution of acts: towards a principled assessment under EU and national private law' (2016) 24 ERPL 645, 668.

15 N.I. Pauer, *The single economic entity doctrine and corporate group responsibility in European antitrust law* (Kluwer Law International 2014), para 5.01; Van Leuken (n 5), 522-523.

constructions.[16] In the Netherlands, for example, this balance can be found in the possibility to identify a parent company and its subsidiary when there is an evasion of the law or when company law is abused.[17] But this approach is treated with great caution. Identification (i.e. 'veil peircing') is regarded as a 'blunt tool', because any difference between the two legal persons is completely removed. This blunt tool does not allow the identification of two corporations in one situation, but not in another. For example, once corporations A and B have been identified, they are to be regarded as one entity: one might say they *de facto* merge into the corporation now called 'AB': employees of A and employees of B are now colleagues working for the same corporation, and if a director of A orders pencils, the supplier is able to charge B's account. This is a far-reaching result and that result is, therefore, to be avoided.

Rather than the blunt tool of identification, private law prefers to rely on the rules of tort instead. A corporation's *own* conduct might be unlawful.[18] When there has been an abuse of the difference in identity, that will qualify as an unlawful act and will in itself create the obligation to pay damages. But that obligation only arises towards the victims of this abuse. Another possible ground for liability may be, for example, the failure of a parent company to supervise its subsidiary, and, therefore, the failure in its duty of care towards parties injured by actions of the subsidiary. Again, the parent company only is liable if there was a duty of care towards a certain third party. Rehbinder expresses the difference between the liability of a legal person for its own unlawful conduct and identification vividly: "*Bildlich ausgedrückt: bei der bürgerlichrechtlichen Anspruchsgrundlage sieht der Wanderer den versperrten Weg und erreicht sein Ziel auf einem anderen Wege; beim Durchgriff durchbricht er die Barriere.*"[19] The approach preferred in private law (liability for *own* conduct), acknowledges the separation in liability: both legal persons have their own rights and duties. There might be situations in which the relationship between, for example, a parent company and its subsidiary raises a special duty for the parent company to take

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16 Sieburgh (n 14), 668.

17 See Van Leuken (n 5), 523, with reference to Vandekerckhove (n 9), 37: "*From the case law different factors may be deduced, that, mostly in combination with each other, may give rise to identification. Such factors are, among others, dominance of one corporation over another, intensive involvement in the management of a corporation, the creation of expectations vis-à-vis third parties, commingling of assets, close intermingling (consisting of, for instance, identity of shareholders and/or directors, identity of addresses, use of the same letterhead, et cetera).*"

18 See on this matter, *inter alia*, M.L. Lennarts, *Concernaansprakelijkheid* (Kluwer 1999), 242; S.M. Bartman, A.F.M. Dorresteijn and M. Olaerts, *Van het concern* (Wolters Kluwer 2016), para VIII.2; Sieburgh (n 14); Van Leuken (n 5).

19 E. Rehbinder, *Konzernaußenrecht und allgemeines Privatrecht. Einde rechtsvergleichende Untersuchung nach deutschem und amerikanischem Recht* (Verlag Gehlen 1969), 109. Also quoted in Vandekerckhove (n 9), 12. Roughly translated the quotation means the following. Figuratively speaking: when assessing a legal person's own unlawful conduct, the wanderer sees the blocked path and reaches his destination in a different way; when identifying two or more legal persons it simply breaks through the blockade.

the interests of its subsidiary's creditors into account. That special duty of the parent company still is its own. Ultimately, identification is possible where there is no reason to acknowledge separate identities because the difference between them is only abusively used to, for example, prevent anyone seeking recourse to any assets.

Summarizing, it can be said there are good reasons to acknowledge the separation between legal persons. The concepts governing liability of legal persons (even those affiliated with one another) in private law, are built on this basic principle. Starting from the separation between different legal entities, private law found a way to subtly solve issues where that starting point – taking all interests in account – leads to an unreasonable outcome. In doing so it provides both legal certainty and the necessary flexibility. This ultimately improves the predictability of legal decisions on the liability of one or more legal persons.

3. The undertaking as addressee of EU competition law

Taking legal personality as a starting point in competition law does not suffice. Competition law pre-eminently is an area where economics and law intertwine. This results in competition law having its own notions and mechanisms. Articles 101 and 102 TFEU are, therefore, addressed to undertakings, rather than to legal persons. An undertaking does not necessarily correspond with legal personality. After all *"the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of its legal status or the way in which it is financed"* (i.e. a single economic entity).[20] Competition law rules thus address different entities than rules elsewhere in the TFEU, e.g. Article 54 in combination with the Articles 49 and 56 TFEU, which are addressed to companies or firms, fitting the company law of the Member States. The question arises why competition law should be aimed at economic entities, rather than legal persons. The answer to this question is that competition law is aimed at activities that interfere with competition. Not all economic interactions between separate *legal* entities are able to exert a competitive force on a market.[21] Furthermore, it is possible for an entity to exert a competitive force on a market, without being regarded as a legal person in the company law of the Member States.

Competition law regulates activities, rather than specific entities.[22] Therefore, it is not tailored to other areas of law, like company law, where the entity rather than its activities plays a central role. Accordingly, difficulties arise. For example, when it is established that a certain activity is *economic*, it has to be determined which legal persons were carrying out that activity. After all, only entities with

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[20] Case C-41/90 *Klaus Höfner & Fritz Elzer v Macrotron GmbH*, ECLI:EU:C:1991:161.

[21] See, e.g., O. Odudu and D. Bailey, 'The single economic entity doctrine in EU competition law' (2014) 51 CMLR 1721, 1725.

[22] O. Odudu, 'The meaning of undertaking within article 81 EC' (2005) 7 CYELS 211, 212.

legal personality can be held liable for an infringement of EU competition law. This follows, *inter alia*, from Article 299 TFEU: acts which impose a pecuniary obligation are only enforceable if they are addressed to legal persons.[23] It is asserted that the concept of 'undertaking' operates as means to ascertain liability.[24] For example, when a parent company and its subsidiary form part of the same undertaking, they both might be liable for an infringement committed by the subsidiary. Personal involvement of the parent company in the infringement does not have to be established.[25] After all, it is the undertaking (and therefore, all its separate parts) that is responsible. The foundation of the way the concept of 'undertaking' governs liability of legal persons is as follows: (i) it is the undertaking that infringes competition law; (ii) the undertaking is regarded as a single economic unit; (iii) it is possible for multiple legal persons to constitute such a single economic unit; (iv) since it is the undertaking, i.e. the single economic unit, which infringes competition law, all legal persons belonging to that economic unit are considered infringers; and (v) are, therefore, responsible for the infringement of EU competition law.[26]

4. Irregularities in the application of the concept of undertaking

The concept of 'undertaking' has not yet been fully developed. There are irregularities in the way the concept is applied in order to attribute liability to the legal persons belonging to the undertaking. These irregularities have led to criticism. Critics argue that the application of the concept of 'undertaking' is unconvincing and illogical (and might even be in breach of fundamental principles).[27] One of the issues frequently mentioned by critics is that the concept of 'undertaking' is applied inconsistently.

As mentioned above, the reasoning of the CJEU departs from the concept of 'undertaking'. The logical application of this concept (or, the single economic entity doctrine) leads to the conclusion that the anti-competitive conduct of one or more subsidiaries would not only be attributed to the parent company but

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[23] Case C-97/08 P *Akzo Nobel NV e.a. v Commission*, Opinion of AG Kokott, ECLI:EU:C:2009:262, para 37; Odudu and Bailey (n 21), 1742.

[24] See amongst others Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Opinion of AG Jacobs, ECLI:EU:C:1999:28, para 206.

[25] Case C-97/08 P *Akzo Nobel NV e.a. v Commission*, ECLI:EU:C:2009:536, para. 59.

[26] See in the same sense: S. Thomas, 'Guilty of a fault that one has not committed. The limits of the group-based sanction policy carried out by the Commission and the European Courts in EU antitrust law' (2012) 3 JECL&P 11, 14.

[27] See *inter alia*, A. Scordamaglia, 'Cartel proof, imputation, and sanctioning in European competition law: reconciling effective enforcement and adequate protection of procedural guarantees', (2010) 7 CompLRev 5, 39-42; K. Hofstetter and M. Ludescher, 'Fines against parent companies in EU antitrust law: setting incentives for 'best practice compliance'' (2010) 33 World Competition 55; R. Burnley, 'Group liability for antitrust infringements: responsibility and accountability' (2010) 33 World Competition 595; Jones (n 6); Thomas (n 26); B. Leupold, 'Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability' (2013) 34 ECLR 570; Odudu and Bailey (n 21); Van Leuken (n 5).

also to any other legal person forming part of the same undertaking.[28] Since legal entities with a common owner (hereinafter: sister companies) will usually form part of the same undertaking,[29] sister companies could be fined. However, the competition authorities have confined themselves to fining only parent companies in addition to the infringing subsidiary. Attributing liability to sister companies is not common practice. It is comprehensible why this is the case. The amount of the fine is based on the undertaking's total turnover (Article 23(2) of Regulation 1/2003). There is a clear incentive for competition authorities to 'climb higher in the corporate tree', i.e. to fine parent companies. There is no such incentive when it comes to sister companies.

Since competition authorities have discretionary power to attribute liability, one could say that there is no inconsistency. However, in the few cases that are available on this matter, the CJEU has exercised restraint when it comes to 'sister liability'. It does not, in principle, allow competition authorities to hold a sister company (of an infringing legal entity) liable for the infringement of EU competition law.[30] As it seems liability is usually attributed on the basis either that a legal entity directly participated in the infringement committed by an undertaking or that it exercised decisive influence over the infringing legal person, which indicates that it (at least presumably) it indirectly participated in that infringement.[31]

This approach is hard to reconcile with the way the concept of 'undertaking' is said to serve as means to ascertain liability. This might not directly lead to problems in public enforcement. After all, the competition authorities' fining policy deals with parental liability, for example, in a consistent way: it is possible, regardless how it exactly is construed. This functional approach has proven to be fruitful. The case law of the CJEU does, however, not give usable criteria to answer 'follow-on' questions that arise in civil litigation. The *Skanska* judgment (which is dealt with in the next paragraphs) stresses the importance of clarifying to what extent the concept of 'undertaking' could be used as means to ascertain liability.

5. *Skanska*: a textbook example of the mismatch between competition and private law

Private law focuses on (legal) entities, their actions and the rights and duties that arise from those actions. In competition law however, the attribution of the

28 Odudu and Bailey (n 21), 1746-1747; Sieburgh (n 14), 666; Van Leuken (n 5), 518; C. Kersting, 'Haftung von Schwester- und Tochtergesellschaften im europäischen Kartellrecht' (2018) 8 ZHR 182.

29 This view is also expressed in the Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements' (2011) OJ C11/1, para 11. See on this matter, *inter alia*, Odudu and Bailey (n 21), 1731-1733, 1740; Kersting (n 28).

30 Case C-196/99 P *Siderúrgica Aristrain Madrid SL v Commission*, ECLI:EU:C:203:529, para 99.

31 Odudu and Bailey (n 21).

activities to legal persons is considered an exercise of a purely practical nature.[32] As mentioned earlier, competition law addresses activities, rather than clear-cut (legal) entities. These different starting points collide with each other and cause friction. The *Skanska* case is an illustrative example of the mismatch of both approaches.

The facts of the *Skanska* case were as follows. In 2009 the Finnish highest administrative court imposed fines on several undertakings that had participated in a cartel in the asphalt market. Not only the corporations that were actually involved in the cartel were fined. At the time of the infringement decision, some of the cartelists no longer existed; they were dissolved due to voluntary liquidation procedures and their economic activities were continued by their parent companies. Such dissolutions happen frequently within the framework of corporate reorganisations. It is generally accepted in EU competition law, that those economic successors might be held liable for the infringement committed by their predecessors.[33] Accordingly this happened in *Skanska*.[34] A salient detail that should be mentioned is that the voluntary dissolution procedures of the subsidiaries were started around the date that dawn raids were conducted by the Finnish competition authority.

After the administrative procedure, the City of Vantaa brought damages actions against all the legal persons which were fined. Vantaa had concluded agreements with regard to asphalt works during the period in which the cartel was active. It claimed to have suffered damages due to an overcharge for these works. Among the defendants, were the economic successors. Claimants argued that the competition law principle of economic continuity applied in private law as well. The defendants argued that they were not responsible for the damage caused by their predecessors. After all, a (legal or natural) person can, in principle, only be liable for its own actions. The legal persons involved in the cartel were dissolved. Once dissolved, the corporation was wound up and its assets were to be liquidated. National company law is likely to have rules regarding this liquidation process. There is no obligation to pay damages if liability does not arise from these rules or from the general rules of tort (as was the case in *Skanska*), the defendants argued.

The Supreme Court of Finland (the *Korkein Oikeus*) referred questions to the

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32 Case C-231/11 P *Commission v Siemens Österreich and others*, ECLI:EU:C:2014:256, para 55.

33 See *inter alia* and with further references, A. Jones and B. Sufrin, *EU competition law: text, cases and materials* (Oxford University Press 2016), 136.

34 *Skanska* concerned intra-group restructuring. Pursuant to the CJEU's case law competition enforcement authorities have 'been granted more leeway' to hold an economic successor accountable in intra-group restructuring, since in such case there are – almost certainly – structural links between the two, there is economic continuity. See A. Colombani, J. Kloub and E. Sakkers, 'Cartels' in J. Faull, A. Nikpay and D. Taylor (eds.), *Faull & Nikpay: the EU law of competition* (Oxford University Press 2014), para 8.545.

CJEU. It was established that there was no abuse of the difference in identity between the cartelists and their successors. So, it was not possible to establish civil liability of those successors. The questions referred concern the earlier mentioned mismatch between the (Finnish) private law approach in establishing liability and competition law concepts: how should the persons liable to pay damages for an infringement of competition law be determined?

In earlier case law, like *Manfredi* and *Kone*,[35] a national rule (on limitation of damages actions, respectively causality) was compared with the EU principles of effectiveness and equivalence. If the CJEU had done so, it would have reached the conclusion that Finnish private law rendered it practically impossible to exercise the right to damages the City of Vantaa derived from EU law. A solution could then be found within the boundaries of private law: starting from the principle of separation of identities. Inspiration for this might be found in Dutch private law. In accordance with the principles explained in paragraph II, Dutch private law does not allow a tort victim to claim damages from anyone other than the actual tortfeasor. So, in principle it is not possible to claim damages from the legal person who bought (a part of) the assets of a dissolved tortfeasor. It is likely the tort victim would try to reach out to linked legal entities, like successor companies, if the dissolved tortfeasor provides no opportunity for redress. In exceptional circumstances it is possible to identify the successor company with the dissolved tortfeasor.[36] Yet, as mentioned earlier, it is more likely a situation like *Skanska* could be solved via general rules on tort. A shareholder might act unlawful through a decision to voluntarily dissolve its corporation. An example of how that might work, is to be found in a case before the Amsterdam Court of Appeal.[37] In this case, the assets of a corporation were transferred (through an intermediary) to another corporation (both controlled by the same natural person). No price was paid for those assets. This 'transaction' took place right before a claim of a third party was allowed. By the time that third party sought recourse, its debtor turned out to be an empty shell. The third party claimed damages from the successor corporation. The Amsterdam Court of Appeal ruled that the court of first instance properly held the successor liable, because this transaction was to be regarded as an abuse of the difference in identity.[38] In view of the lack of a price paid for the assets, the Court of Appeal ruled it was logical for the successor to furnish proof to the contrary. The successor company was not able to do so in this case. In the end this approach will find a balance between the interests of two (or more) legal persons (and society as a whole) in acknowledging separate identities and the interests of third parties in not being victims of, *inter alia*, a lack of transparency and the

35 Joined Cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461; Case C-557/12 *Kone and others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

36 It must be noted that it is not entirely clear what those exceptional circumstances are.

37 Gerechtshof Amsterdam, 11 June 2013, NL:GHAMS:2013:1737.

38 Rechtbank Amsterdam, 2 May 2012, NL:RBAMS:2012:BW7116.

abuse of corporate constructions.[39]

Advocate General Wahl, however, supported a different approach. According to him there should be a clear distinction between "*detailed rules governing the exercise of the right to claim compensation before national courts*" and "*constitutive conditions of the right to claim compensation*". The determination of the persons liable to pay compensation for harm caused by an infringement of competition law, belongs to the latter, Wahl argues.[40] Where the first category is left to be solved by national law (in accordance with the principles of effectiveness and equality), the latter is directly governed by EU law: Articles 101 and 102 TFEU. The CJEU does not explicitly elaborate on the distinction made by Wahl. Despite the fact that the CJEU's ruling is brief, it states clearly that the determination of the person liable to pay compensation for harm caused by an infringement of EU competition law, is directly governed by Articles 101 and 102 TFEU.[41] This is fundamentally different from the way the CJEU used to deal with the difficulties arising from the confrontation of national private law and EU competition law in earlier case law, like *Manfredi* and *Kone*.

The landmark ruling of the CJEU in the *Skanska* case seems logical as it would seem an odd manoeuvre to treat the concept of 'undertaking' differently in public and private enforcement. After all, both enforcement systems deal with the same area of law. By the direct application of the TFEU to determine the liable entity, the CJEU attributes the obligation to pay damages to the undertaking. Since the undertaking itself has no legal capacity, the concept of 'undertaking' determines the legal entities liable in private law. The CJEU put the parallelism between public and private enforcement first. After all, "*the concept of 'undertaking' cannot have a different scope with regard to the imposition of fines by the Commission [...] as compared with actions for damages for infringement of EU competition rules.*"[42] However, as it remains unclear to what extent the concept of 'undertaking' is being applied as basis for administrative liability, difficulties now arise in civil litigation.

6. Follow-on difficulties

In *Skanska*, the parent companies which were regarded as economic successors, were fined. The CJEU made clear that those legal entities which were fined, were also liable in private law as they form part of one and the same undertaking. The concept of 'undertaking' has thus made its entry into private law. This seems like a clear rule, but it immediately raises questions in private law which did not come up in cases with regard to the assessment of administrative liability. What

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39 Sieburgh 2016 (n 14), 668.

40 Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, Opinion of AG Wahl, ECLI:EU:C:2019:100, para 55.

41 Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, para 28.

42 Ibid, para 47.

to do with corporate reorganisations after a fine has been imposed? To what extent does the principle of economic continuity apply then? In other words, does every (future) economic successor (and maybe even its parent company, subsidiary or siblings) have to take the possibility of civil liability into account? And what if a competition authority chooses (considering its discretionary power) not to fine all legal persons within one undertaking, but only a few?[43] Is it, under those circumstances, possible to claim damages from those legal persons belonging to the same undertaking (e.g. a subsidiary or a sibling), as those who have been fined?[44]

By linking civil liability to the competition law concept of 'undertaking' (in)consistency matters have been introduced into private damages cases as well. In private law, it is likely that these issues play a more central role. After all, the exposure to private damages claims is likely to be much bigger than the exposure to administrative fines. Unlike administrative liability, in private law there is no place for mitigating circumstances (like co-operation or negligence) or, in exceptional cases, reduction due to an undertaking's inability to pay, to 'ease the pain'.[45] Furthermore, a claimant is likely to deal with the competition law concepts in a creative way, for there is a significant chance it will not be the first in line to claim damages. Since in the context of liability the concept of 'undertaking' has not been fully developed and has been subject to profound criticism, the answers to above-mentioned 'follow-on' questions are unpredictable. The *Skanska* judgement has not solved these issues unequivocally. On the contrary, the judgment possibly even leads to more discussion. I will explain this through an example. At the end of November 2013 several traders of North Sea shrimps were fined by the European Commission for operating a cartel. One of the traders involved was Heiploeg BV (hereinafter: Heiploeg). Heiploeg was facing financial difficulties at that time and invoked its inability to pay the fine of €27 million under paragraph 35 of the 2006 Guidelines on Fines. This appeal was rejected; Heiploeg had to pay the fine imposed by the European Commission.[46] Within two months Heiploeg was declared bankrupt.[47] As it turned out, the fine was a financial setback, from which Heiploeg could not recover. Its assets were transferred to a third party as part of a so-called 'pre-pack'.[48] The third party continued the economic activities of Heiploeg. The

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43 See, with further references, A. Colombani, J. Kloub and E. Sakkers (n 34), para 8.520.

44 This was the question at hand in one of the follow-on cases in the Netherlands regarding the GIS-cartel: Rechtbank Oost-Nederland, 16 January 2013, *Tennet v ABB*, NL:RBONE:2013:BZ0403; Gerechtshof Arnhem-Leeuwarden, 2 September 2014, *ABB v Tennet*, NL:GHARL:2014:6766.

45 Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty' (2002) OJ C 210/2.

46 See the Commission's press release (2013), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1175.

47 W. Keuning, 'Heiploeg failliet, doorstart in de maak' (2014) FD 15.

48 A pre-pack is a transfer of the assets prepared before the declaration of insolvency, with the consent of a prospective insolvency administrator, appointed by the court, and put into effect by that

question arises whether injured parties could claim damages from the economic successor, even though this economic successor was not an addressee of the infringement decision and fine.[49]

Since the parallelism between public and private enforcement played a central role in the *Skanska* judgment, it has been argued by some scholars that only those entities which are addressed in the infringement decision are also liable with regard to the private damages claims.[50] The answer to the question raised above, should in this view be negative. However, if this view is followed (too) strictly, one could avoid civil liability through reorganisation after a fine has been imposed. Therefore, one might take a different view. If competition law is infringed by an undertaking, anyone who suffered damages has a right to claim damages from the legal persons belonging to that undertaking. The undertaking has a dynamic nature. It may consist of multiple legal entities and it may be shaped differently from time to time. This right to claim damages requires no preceding fine (so called stand-alone damages actions are allowed). An injured party is – in those cases – allowed to claim damages not only from the legal person that was actually involved, but from any legal person the undertaking consists of. There is no good reason why claimants in stand-alone cases are free to seek recourse from any legal person within an undertaking (this includes economic successors) and claimants in follow-on cases are bound by an infringement decision. However, if this is allowed, the concept of 'undertaking' could be applied differently in private law than in administrative law which obviously would be contrary to the idea of parallelism between both areas of law. Furthermore, boldly applying the competition law concepts in all private damages cases will lead to unacceptably heavy and undesirable consequences. The application of the concept of economic continuity in a situation like *Heiploeg* would lead to liability of the successor company. It has to compensate the damages suffered by cartel victims. However, this approach disregards interests that might not be at stake in public enforcement. Inevitably the possibility of claims by third parties has a price-lowering effect. This leads to a disproportionate prejudice to other creditors in insolvency proceedings, in favour of the victims of a cartel. It may be deemed necessary to address the wish of society to maximize the bankrupt estate and therefore limit the application of the concept of economic continuity.

It seems like we have arrived at an impasse. However, the above-mentioned difficulties could be overcome by making a distinction between the application

administrator immediately after the declaration of insolvency.

49 To the author's knowledge there had been no litigation on this matter at the time this chapter was finished.

50 B.J. Drijber, 'Unierecht bepaalt welke vennootschappen aansprakelijk zijn voor kartelschade' (2019) Ondernemingsrecht 383; S.L. Boersen and S. de Jong, 'Skanska, de onderneming en de laedens: gamechanger of buitencategorie' (2019) Maandblad voor Vermogensrecht 279, 283-284.

of the concept of an undertaking for the purpose of establishing the infringement or to decide if intra-group arrangements fall outside the scope of EU competition law and its application as means to ascertain liability. When such a distinction is made, it is possible to elaborate on the doctrinal foundation of liability for an infringement of EU competition law in more detail. This will contribute to legal certainty and the predictability of legal decisions regarding the civil liability of one or more legal persons. In doing so, due regard for the private law ramifications of the concepts governing liability in a public enforcement context is called for. It is being said that although they are different, public and private enforcement impact upon each other[51] and, furthermore, that the interplay between EU law and the domestic laws of the Member States in regulating claims for antitrust damages based on an infringement of EU competition law is a fundamental aspect of private enforcement of EU competition law.[52] Private law concepts (as discussed in this chapter), thus, might even be a source of inspiration in further developing the way in which the concept of 'undertaking' functions as means to ascertain liability as they provide a certain amount of flexibility, necessary to meet all interests involved.

7. Conclusion

So far, the case law on the application of the concept of 'undertaking' as a means of establishing liability has not always been clear. This has often been criticised. Critics especially argue that the concept of 'undertaking' is applied inconsistently. With the *Skanska* judgment, the CJEU has introduced these (in)consistency matters in private law. It is unsure to what extent the concept of 'undertaking' is usable in a private law context. Therefore, the 'follow-on' questions that arise cannot be answered unambiguously. This stands in the way of the system of (effective) private enforcement being developed. This stresses the importance of critically evaluating, exploring and explaining principles of competition law.

Private law, and thus the enforcement of competition law, gains from well-considered, logical and consistently applied rules in competition law. Those rules should take into account their private law ramifications. The consequences for civil liability of an approach chosen in competition law must be thought through and (preferably) taken into account in the assessment of liability in the administrative law process. Therefore, more attention has to be drawn to the doctrinal foundation of competition law concepts. It is time to create a clear roadmap on how to ascertain liability when EU competition law is infringed.

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51 A.S. Hartkamp, C.H. Sieburgh and W. Devroe (eds), *Cases, materials and text on European law and private law* (Hart Publishing 2017), 106.

52 Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, Opinion of AG Wahl, ECLI:EU:C:2019:100, para 22.

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