The Added Value of the ECN+ Directive. Exploring the Design of the European Legal Framework for the EU Antitrust Public Enforcement by National Competition Authorities

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by

Naida Dźino
born on July 6, 1992
in Sarajevo, Bosnia and Herzegovina

PhD supervisors:
Prof. mr. J.W. van de Gronden
Dr. C.S. Rusu

Manuscript Committee:
Prof. mr. J. Krommendijk
Prof. M. Maggiolino (Bocconi University, Italy)
Dr. M.W. Kozak (Utrecht University)

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1. Introduction

Antitrust law rests on the premise that competition encourages companies to offer consumers goods and services at the most favourable terms. It encourages innovation, lower prices and better quality. In this respect, two central articles are set out in the Treaty on the Functioning of the European Union (hereinafter TFEU). Article 101 TFEU (previously Article 81 EC) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition and which may affect trade between Member States. Article 102 TFEU (previously Article 82 EC) prohibits one or more undertakings from abusing a dominant position within the internal market or a substantial part of it insofar as it may affect trade between Member States. These substantive provisions are mainly enforced through a public enforcement system.[1]

In the first decades of European integration, the enforcement of EU competition law was highly centralised. This meant that the European Commission (hereinafter Commission) played a key role in pursuing enforcement actions. With the workload of the Commission increasing intensely, in 2004 the involvement of the Member States was sought in order to relieve the Commission and to intensify the public enforcement. Regulation 1/2003 decentralised the enforcement of the antitrust provisions so that the Commission and the National Competition Authorities (hereinafter NCAs) have parallel competences to apply the rules of Articles 101 and 102 TFEU and rendered Article 101(3) TFEU directly applicable.[2] Regulation 1/2003 therefore provided that the Commission and the NCAs should together form a network for the purpose of consultation and information exchange.[3] The European Competition Network (hereinafter ECN) was established where information is exchanged and cases are allocated in order to ensure an efficient division of work. Furthermore, to ensure a uniform application of the EU antitrust provisions by the many different enforcement actors, provisions on cooperation and information exchange were included in the Regulation. At the same time, Regulation 1/2003 did not provide an institutional and procedural framework for the functioning of NCAs, but left this matter mostly up to domestic law, limited eminently by the EU law principles of equivalence and effectiveness.[4] This led to the situation where NCAs in some Member States did not have the powers they need to do their work. The challenge of a multi-level enforcement system is guaranteeing that each authority enforces the substantive rules uniformly, ensuring a level playing field, despite the involvement of

1 A. Jones & B. Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, Oxford University Press 2016) 884.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1 (Regulation 1/2003).

3 Recital 15 of Regulation 1/2003.

4 Case 33/76, *Rewe-Zentral* [1976], ECLI:EU:C:1976:188 and case C-261/95, *Palmisani v. INPS* [1997], ECLI:EU:C:1997:351.

different actors.[5] Differences between strong and weak national enforcement systems also lead to fragmented national enforcement of European competition law in the internal market. Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the Internal Market (hereinafter the Directive), also known as the ECN+ Directive, was therefore adopted on 11 December 2018 and entered into force on 3 February 2019. The ECN+ Directive aims to put in place fundamental guarantees of independence, adequate financial, human, technical and technological resources and minimum enforcement and fining powers for NCAs applying Articles 101 and 102 TFEU and for applying national competition law in parallel to those Articles so that NCAs can be fully effective. Before we delve into the main research question of this book, I will first take a moment to discuss more elaborately some of these challenges that exist in EU antitrust public enforcement, specifically relating to NCAs.

2. Challenges to public enforcement under Regulation 1/2003

As stated above, Regulation 1/2003 did not provide an institutional and procedural framework for the functioning of NCAs, but left this matter largely up to the Member States domestic laws, subject to the EU law principles of effectiveness and equivalence. At the same time, since 2004 there has been more reliance on the NCAs for the public enforcement of the EU antitrust provisions. Under Regulation 1/2003 a number of issues emerged. NCAs applied the same substantive rules, yet their enforcement powers were mainly subject to national law. This resulted in the situation where, in some cases, NCAs did not have the necessary tools to do their work effectively. Therefore, a problem that was identified under Regulation 1/2003 is that there is no EU standard of minimum tools and powers that NCAs must be afforded to do their work.[6] Differences in the institutional position of NCAs and in national procedures and sanctions ensued. These differences in themselves are not necessarily problematic from an enforcement point of view. As long as a certain minimum-level of institutional and procedural rules is in place, it could still be possible to reach effective enforcement. Uniformity of enforcement rules does not in itself lead to effective enforcement if those rules are inadequate, incomplete or unsuitable. Uniformity is only valuable insofar as the uniform rules are well designed. If the uniform rules are flawed, merely making them uniform will not improve enforcement outcomes.

The problems that ensued under the regime of Regulation 1/2003, relate to shortcoming in the design of the legal framework. In other words, the lack of a minimum toolbox empowering NCAs to do their work, created numerous

5 See N. Dzino & C.S. Rusu, 'Public Enforcement of EU Antitrust Law: A Circle of Trust?' (2019) 1 *REALaw*.

6 Commission, 'Communication Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' (Communication) COM (2014) 453 final.

enforcement issues.[7] First, because Regulation 1/2003 did not harmonise the investigative powers of NCAs, shortcomings arose in the NCAs' ability to perform effective fact-finding. Reports mention that some NCAs lack the power to seal premises, use forensic IT tools, or inspect non-business premises.[8] These drawbacks hinder the NCAs' capacity to detect and prove antitrust violations, undermining the deterrence of enforcement.

Second, in the area of NCAs' decision-making powers, weaknesses began to come to light.[9] For example, not all NCAs could impose behavioural or structural remedies or combine cease-and-desist orders with fines. This is a major problem since, if NCAs cannot impose effective remedies, they cannot ensure competition on the markets. The infringer continues to reap the benefits of a past violation to the detriment of consumers.[10] Lacking the necessary decision-making powers was therefore signalled to hinder the EU antitrust enforcement by NCAs.[11]

Third, Regulation 1/2003 left the sanctioning powers of NCAs largely to national laws, resulting in a number of issues. While there has been some voluntary convergence on fining practices, differences arose, eg in calculating fines, leading to very low or insignificant fines in some Member States. When calculating the legal maximum fine that can be set, some NCAs do not use the worldwide turnover of the corporate group that has been held liable for the infringement, but only the national turnover of the direct infringer.[12] This is very problematic as it results in low legal maximums, depriving sanctions of their deterrent effect. Moreover, the concept of undertaking used for the calculation of the fine was not in all Member States convergent with the EU law concept of undertaking as interpreted by the EU Courts. This may have consequences for establishing parental liability and economic succession. Some NCAs also lacked the power to fine associations of undertakings. These inconsistencies in fining powers have a negative effect on the deterrence of NCAs decisions and thus on enforcement.

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7 See for example: Commission, 'Executive Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market' (Commission Staff Working Document) SWD (2017) 115 final; COM (2014) 453 final; W. Wils, 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of Competition Law and Practice*.

8 Commission, 'Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market' (Commission Staff Working Document) SWD (2017) 114 final, 15.

9 SWD (2017) 114 final, 17.

10 Ibid.

11 In 2012, the ECN made a detailed inventory of the investigation and decision-making procedures for competition enforcement which exist in the Member States <https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network/documents_en#ecn-recommendations-on-investigative-and-decision-making-powers> accessed 1 August 2025.

12 SWD (2017) 114 final, 20.

Fourth, under Regulation 1/2003, leniency programmes were not harmonised across the EU, requiring undertakings seeking leniency to apply separately to each NCA likely to address the infringement. Although the 2006 ECN Model Leniency Programme (MLP) established non-binding minimum standards, Member States were not obligated to implement this Programme. The absence of a clear, binding, and harmonised leniency framework created uncertainties for leniency applicants and makes the tool less attractive for them and thus less powerful for the antitrust enforcers as a tool for detecting cartels.

Fifth, Regulation 1/2003 did not establish detailed requirements for the institutional design of NCAs, leaving the specifics largely to be regulated by the Member States. Article 35 of the Regulation requires NCAs to ensure compliance with antitrust provisions but offers little guidance on how this should be achieved. Challenges that were identified relate to potential government influence, and a lack of financial independence. Some NCAs also indicated having problems with recruiting sufficient and qualified staff due to the way in which they are set up. These shortcomings affect the NCAs' independence, financial autonomy, and capacity to enforce EU antitrust law.

Lastly, while Regulation 1/2003 provides rules for a Commission-NCA cooperation, it lacks provisions for cooperation between NCAs. Effective cooperation ensures cases are handled by the most competent authorities, but also enables the sharing of evidence and enforcement of decisions across jurisdictions. A lack of a binding legal framework for NCA cooperation therefore undermines their ability to enforce the EU antitrust rules. All of the abovementioned points raised questions about the effectiveness of NCAs, and the shortcoming under the system of Regulation 1/2003 led to the proposal for the ECN+ Directive.

3. Research question and sub-questions

The decentralised EU antitrust public enforcement in combination with the enforcement autonomy that was left to the Member States following Regulation 1/2003 raises questions on the effectiveness of the NCAs. Directive 2019/1 was adopted to specifically empower the NCAs to be more effective enforcers. Against this background, this study aims to provide an answer to the following question:

> To what extent does the design of the legal framework of EU antitrust public enforcement, as enshrined in the ECN+ Directive, enable the National Competition Authorities to be effective?

In order to answer this question, Regulation 1/2003, which has introduced the system of decentralised enforcement in EU competition law, and Directive 2019/1 will be studied extensively. In addition, two Member States are selected to gather information on national enforcement gaps that may exist and to evaluate how

public enforcement is regulated in the domestic law of these Member States. The two selected Member States are the Netherlands and Germany. The choice for these two Member States will be explained in further detail in section 3.1 below. Though the evaluation of these national systems serves to explain how the legal framework can play out in a certain Member State, it does not strive to give a universal picture as to how decentralised public enforcement takes place in the entire EU.

To answer the main research question, a number of sub-questions are identified. These sub-questions will be evaluated in the chapters below. An answer is thus sought to the following sub-questions:

- What are the benchmarks according to which it can be evaluated whether the design of the legal framework facilitates NCAs to be effective?
- Which enforcement gaps were identified under the legal framework of Regulation 1/2003?
- Is the ECN+ Directive prone to bring the desired upgrades to fill the enforcement gaps identified under the design of the legal framework of Regulation 1/2003? And which, if any, enforcement problems are not (sufficiently) dealt with in the ECN+ Directive?
- How have the main provisions of the ECN+ Directive been transposed in the Netherlands and Germany? What acts were in place before Directive 2019/1 was implemented, and which, if any, public enforcement gaps existed that could potentially undermine the effective enforcement of the EU antitrust rules?
- Which recommendations can be given to improve the design of the legal framework of EU antitrust public enforcement by NCAs?

3.1. Choice of legal systems explored

The main aim of this thesis is to explore to what extent the design of the legal framework that is in place to ensure that NCAs are equipped to carry out their EU antitrust enforcement task, facilitates NCAs to be effective. Furthermore, I will investigate how this legal framework may be improved. In order to evaluate the existing legal framework and to look more specifically at issues that may arise in the domestic ambits or to evaluate what lessons can be learned from the domestic ambits, I selected Germany and the Netherlands. It goes without saying that EU competition law will be examined too. EU law is the overarching system of law containing the requirements for the EU antitrust enforcement actions. Application of the EU antitrust rules by the Commission and the case law of the CJEU will be referred to throughout.

Germany used to be the 'land of the cartels' up until World War II. From 1936, Germany had a confidential cartel register, parallel to the national cartel

legislation at the time.[13] However, Germany was also the first European country to introduce anti-cartel laws in 1958.[14] The German NCA, the Bundeskartellamt, was established in 1958. The German Act against Restraints of Competition entered into force in the same year, namely 1 January 1958. The Dutch competition authority, the Authority for Consumers and Markets (hereinafter ACM), was established on 1 April 2013. Its predecessor in competition enforcement, the Nederlandse Mededingingsautoriteit (hereinafter NMa), was operational some years earlier, namely from 1 January 1998. Also from that date, a new competition law came into force in the Netherlands: the Dutch Competition Act (*Mededingingswet*) which introduced a cartel prohibition and a prohibition of abuse of dominance, largely modelled to the EU provisions. This is also one of the reasons why, in terms of public enforcement, the Dutch competition law is considered to be a relatively new field. Before 1998, the Netherlands was considered a 'cartel paradise'.[15] The law of 1998 substituted the law of 1956, the *Wet Economische Mededinging*, which, save for some exceptions, allowed cartel agreements as long as they were reported to the Ministry of EZK. Agreements were archived in a confidential cartel register, which followed the German practice.

It is important to note that, while evaluating the specific institutional and procedural aspects of EU antitrust public enforcement in all 27 Member States would provide a very accurate picture, it would also be an enormous and unachievable task in terms of time available in this specific research project. Furthermore, the goal of this research is not to give a complete overview of all these national systems. Instead, the goal of this research is to enhance the understanding of the decentralised enforcement framework of EU competition law, and to formulate some generally applicable recommendations on how the system of EU antitrust public enforcement performed by NCAs could be improved.[16] Naturally, the two jurisdictions that are chosen and their enforcement successes or shortcomings do not reflect the situation in all other EU Member States. Evaluating the Dutch and German systems does not aim to present solutions for all Member States, but seeks to enhance the general understanding of the decentralised enforcement system and to extract more general lessons that could be beneficial to the EU antitrust public enforcement by NCAs. One could say that both the Bundeskartellamt and the ACM are, at first glance, institutionally developed authorities.[17] By contrast, many NCAs in smaller or newer Member States face significant capacity constraints, budgetary

13 S. Fellman & M. Shanahan (ed.), *Regulating Competition: Cartel Registers in the Twentieth-century World* (Routledge 2016).

14 J. Haucap, U. Heimeshoff & L.M. Schultz, 'Legal and Illegal Cartels in Germany between 1958 and 2004' (2010) Düsseldorf Institute for Competition Economics (DICE) <https://www.econstor.eu/bitstream/10419/41423/1/638076714.pdf> accessed 1 August 2025.

15 J.W. van de Gronden, *Mededingingsrecht in de EU en Nederland* (Uitgeverij Paris 2017) 15.

16 For example, this view is also followed by A.M. Mateus, 'Ensuring a More Level Playing Field in Competition Enforcement throughout the European Union' (2010) 31 *European Competition Law Review* 514.

17 For example, clear legal mandates, organisational structures, procedures and operational experience.