

THE EUROPEAN COMPETITION NETWORK

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1. INTRODUCTION

2014 marked the tenth anniversary of the entry into force of regulation 1/2003, and there was indeed plenty to celebrate, as the European competition network has been a resounding success. Yet we have not exhausted the pool of topics that call for our attention, and I know for sure that we are all eager to keep working to achieve a “more perfect union” of competition enforcers, and that we have a strong resolve to make this second decade as fruitful as the first.

In view of the huge progress already made, I would not think there is a grand plan to unfold but rather a series of concerns to address, each in a specific and targeted manner, in order to get a clearer, fairer, more even competition landscape at EU level. Now that the ECN has gained for itself undisputable legitimacy and that its members have grown a deep sense of belonging to a community of enforcers, we can afford being ambitious in order not only to make existing mechanisms work to their best but also to unlock our full potential beyond today’s framework. Moving from broad institutional matters to the fine-tuning of the decision-making process, through a couple of

features pertaining to the agencies’ toolbox in between, I would like to browse some key issues to ensure a shining future for the ECN.

These remarks could be organized along the lines of the motto of the French Republic: liberty, equality, fraternity.

2. THE INDEPENDENCE OF NATIONAL COMPETITION AUTHORITIES

This first item easily fits under the heading of “*liberty*”, since the independence of competition enforcers is the condition of their decisions being made freely, with no other interest in view than that of consumers stemming from well-functioning markets.

This issue is crucial and the fact that regulation 1/2003 has no provision on this notion should somehow be an incentive for us in the ECN to discuss what an independent competition enforcer is.

I would be of the opinion that hard law is essential in order to guarantee the independence of competition authorities. Most of us are of course so fortunate as to enjoy well-crafted domestic provisions that protect our independence by prohibiting government instructions. However, none of these are written in stone at an EU level and it could happen any day that one government or another feels inclined to try and exert some pressure upon their local competition agency. If and when that day comes, we would all feel

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safer if there were a binding EU provision to further safeguard our independence.

When it comes to devising legal tools to ensure the independence of competition authorities, we may have a look at similar European legislation on data protection agencies and telecom and energy regulators. There are EU directives comprising provisions on the independence of data protection agencies, on the need for telecoms regulators to be endowed with "*adequate financial and human resources to carry out the task assigned to them*" and on the management of potential conflict of interest regarding energy regulators. At a time when a number of competition agencies have undergone a major institutional reshuffling and merged with one or several sector regulators, it is somehow ironical, and possibly confusing, that the guarantees of independence may differ within one and the same agency.

While these existing provisions may serve as an inspiration, they are not meant to establish a standard and we would be at liberty to go further, for instance by also reinforcing the duties of competition enforcers regarding accountability and transparency, or perhaps by exploring the idea of defining a set of common rules of ethics for competition authorities. A balanced, yet protective overall framework would be a desirable improvement.

3. THE NECESSITY TO REDUCE THE DISCREPANCY IN THE RANGE OF POLICY INSTRUMENTS AVAILABLE TO ECN MEMBERS IN ORDER TO FOSTER GREATER CONVERGENCE

This will provide an illustration of how we should aim for more "*equality*" between us, in order to raise our collective strength by improving our respective capacities.

3.1 Ascribing to National Competition Agencies the same powers as those held by the European Commission

This is the first avenue to explore in this respect.

Article 5 of Regulation 1/2003 provides that national competition agencies have the power to apply articles 101 and 102 in individual cases and that, for this purpose, they may require that an infringement be brought to an end, order interim measures, accept commitments, impose fines or, as the case may be, decide that there are no grounds for action on their part.

It is worthy of interest that some of the powers the European Commission is entrusted with do not appear on this list: the capacity to decide that articles 101 or 102 are inapplicable, in other words to take a "negative" decision on the merits, as the Commission is empowered to under article 10 of regulation 1/2003, and that to grant exemptions on the basis of 101 §3.

As part of a decentralized enforcement of European Competition Law, it would be helpful to amend article 5 of Regulation 1/2003 to endow NCAs with these two

powers, thus giving a boost to the efficiency of their action as ECN members. This would also make for a higher degree of legal certainty for undertakings, since they would not fear that proceedings may be opened again in some jurisdiction once another agency has found that EU law was inapplicable or has granted an exemption for the facts at stake.

One may object that such new provisions would jeopardize consistency within the network, or that it could occur that a case gets somehow “preempted” by an ECN member. However it would be easy enough to avert that risk since the Commission would retain its right to rule on the decisions reached by the NCAs before they are adopted as per article 11§4 of regulation 1/2003, which would need to be amended in order to continue to mirror the provisions of article 5. If necessary, the Commission would in any case still be entitled to apply article 11§6 and take up a case if it were at risk to lead to conflicting national decisions.

3.2 Upgrading every member’s procedural toolbox

This is another way to attain greater convergence throughout the EU.

It is fair to say that the ECN has much fostered procedural convergence between its members, through comparative reports and issuing recommendations. Yet there are inherent limits to voluntary convergence, and they have proved to be uneasy to overcome, especially as diverse national legal environments stand in the way.

Let me give a couple of examples of areas where I trust there would be ground to bring all agencies on an equal footing.

The capacity of NCAs to adopt “*interim measures*” is the first one that comes to mind. Indeed, recent experience of ECN members has shown that the definition of an appropriate standard for the adoption of such measures is instrumental in ensuring effective use thereof. This can be illustrated with the UK recently moving from the standard of a risk of a “serious, irreparable damage” to that of a “significant damage”, a far greater change than one may think. A harmonized standard would go a long way towards enabling NCAs to provide a swift and appropriate remedy to urgent matters, which even other flexible tools such as commitments fail to address.

The French Competition Authority is well placed to testify to the usefulness of interim measures, as it has taken no fewer than 30 of them since 2000, two thirds of which were in the telecom and energy sectors and, quite often, came at a key moment when these former legal monopolies were being opened up to competition. There is some leeway for increased use of this tool for many agencies in Europe, which convergence on substantial standards could well foster.

Another concern regards the “*rules governing the admissibility of evidence*”. This is no minor issue: a discrepancy between the different systems in place in the EU member states can simply result in one and the same antitrust litigation moving forward in one jurisdiction and being dropped in another. Here again, France is a case in point, as the Competition Authority is subject to a criminal law standard with respect

to the inspections it carries out while being subject to a civil law standard as regards the admissibility of evidence. This dual standard puts the French Competition Authority at a disadvantage since some evidence, such as recordings of conversations obtained by the claimant without the consent of the person recorded, is held not to be admissible. Elsewhere in Europe, a variety of situations can be encountered – the European Commission for instance was able to make use of that same kind of recordings in its recent shrimps traders cartel case.

Harmonizing these rules across EU jurisdictions would be a welcome move, and would enhance the impact of article 12 of regulation 1/2003 which facilitates exchange of information between ECN member agencies.

4. STRENGTHENING THE EFFECTIVENESS OF COMPETITION ENFORCEMENT THROUGH CONSISTENT APPROACHES TO THE DETERMINATION OF FINES

This is probably a must for members of such an integrated network as the ECN. Although it may be seen as stretching the meaning of “*fraternity*” a bit far, it actually applies here since the overall deterrence of fines under EU competition law as perceived by major stakeholders is entirely dependent on the level of fines imposed by each individual agency – it’s the weakest link effect.

It comes as a bit of a surprise that the members of such a closely knit network as the ECN have

reached a point where they apply the same substantial law but are left to calculate as they see fit the penalties imposed as a consequence of a breach of this law.

Procedural autonomy is actually not without limits, since the ECJ ruled in the “*X BV*” case (2009) that the effectiveness of the penalties imposed by the competition authorities was a condition for the coherent application of articles 101 and 102. Absent any provision in regulation 1/2003, voluntary convergence has tried to fill in the procedural gap. Many agencies, among which the French Competition Authority, have taken on the principles defined within the ECA in 2008 regarding the determination of fines. The most remarkable achievement of this move lies in that nineteen competition agencies now calculate the basic amount of the fine as a proportion of the value of the sales connected with the infringement, while only five of them did so at the time the ECA principles were endorsed.

Yet a significant degree of divergence remains. The ECN members have grown aware of this discrepancy and have convened an *ad hoc* working group, co-chaired by DG Comp and the French Competition Authority, to take stock of existing practices and, where feasible, improve convergence on various aspects of the calculation of fines, including the inability to pay, the extent of parental liability, or parallel cases.

Should we rely on soft law, or are tougher means necessary? There is cause for satisfaction in the fact that some issues can be addressed effectively through discussion among enforcers leading to a consensus – that was the case for

the so-called “path for coordination”, a fine guidance produced by the ECN working group laying out a set of sensible principles with respect to situations where an undertaking may get fined by several authorities that have opened parallel cases against it.

Yet taking a harder stance may sometimes be the only way to secure sufficient deterrence of competition enforcement across the EU. It would be the case if one were to face obstacles themselves of a “hard law” nature, enshrined in national legislations and case law built upon it. The issue of whether liability under EU competition law extends to a legal entity’s parent company or successor which belongs to the same undertaking is one such issue that can only be sorted out through an amendment to Regulation 1/2003 itself. To some extent, the claims regarding the alleged inability to pay may also require that a legal framework be established at EU level.

5. CONCLUSION

In view of the intense cooperation that is now the trademark of the ECN, one may want to wander into yet unknown territory and consider extending the perimeter of this cooperation playground to other branches of competition regulation. As additional food for thought, let me mention briefly two of them.

The most obvious is perhaps “merger review”. So far, no common pattern has been designed regarding on merger control. There is no equivalent of Articles 101 and 102, no substantial law to speak of, no common

procedural scheme, and national agencies may not even enjoy the same powers.

Still, in view of the cost-effectiveness of offering a more unified landscape for merger review, any initiative to that effect ought to be identified as a priority for European enforcers. There has been progress already in terms of voluntary convergence, regarding the substantive test of merger control, the theory of harm, main steps of notification and review – but a lot more can and should be done.

Cross-border mergers especially require our attention. I will not dwell into the “*Eurotunnel / Seafrance*” case for now, but I will simply recall that the French and British authorities did apply the ECN best practices, and this proved not to be sufficient to ensure that we reach a common analysis of the proposed operation. Our divergence did not lie in the applicable test but in the very premise of the analysis.

The French Competition Authority has tried to draw some conclusions from this unfortunate case and has issued a report handed out to the ministry of the Economy, with several ambitious and occasionally rather bold suggestions both on procedural and substantial matters to improve convergence and, ultimately, legal certainty. I hope these can bear fruit in the not too distant future.

The other one is about “advocacy”. So far, looking into what its members do in terms of advocacy has not been on the ECN’s priority list to, and it is a shame, since many of us have devoted a lot of resources to carrying out sector enquiries and issuing recommendations to market players and government, ultimately

in the best interest of consumers across Europe.

We should make no mistake: while the ECN is only concerned as yet with antitrust, advocacy is actually an integral part of it. A sound competition policy works as a continuum of soft and tough actions, that together aim to maintain or restore the competitive functioning of market.

Greater coordination would offer fantastic leverage to all of us as it would expand the reach of our advocacy efforts both when conducting enquiries and when publicizing our findings.

One striking example can be found in the food sector: in the past 10 years, that is: during the ECN's first decade, thirteen agencies have completed market enquiries, leading to the emergence of highly interesting common findings. Of course, once they got started, these agencies took into account each others' reports, and exchanged on methodological issues, but wouldn't it be more efficient for coordination to take place at an earlier stage?

It would also be an upgrade for the standing of advocacy in the ECN if joint sector inquiries could be conducted by groups of national competition authorities, in industries of particular interest, sharing similar features across borders. The impact on stakeholders and decision-makers would be greatly enhanced and public debate would be raised to a new level.