Editorial

Fifteen Years of Decentralised Antitrust Enforcement – Diversity at the Expense of Uniformity?

Both in the lead up to Regulation 1/2003, which set up a system of decentralised enforcement of EU antitrust rules, and in the years following its implementation, the commonly held view was that the European Commission would retain a close grip over the decision-making of national competition authorities (NCAs) and the development of EU competition policy.¹ After all, various procedural and institutional safeguards appeared to make the decentralised system unsuited for policy experiments. First, Regulation 1/2003 introduced several information and cooperation mechanisms to ensure a uniform and coherent application of Articles 101 and 102 TFEU within the European Competition Network (ECN). Second, competition policy would continue to be determined at the EU level, by means of legislation, notices and guidelines, and individual decisions subject to the supervision of the EU courts.² And third, the Commission would remain best placed to handle cases with a large geographical scope (the ‘three-plus’-rule) as well as cases that raise novel competition issues.³

Recent activism among national enforcers, however, challenges the Commission’s long-standing hegemony over the shaping of EU antitrust enforcement norms.

In the ongoing debate about competition enforcement in the digital economy, various NCAs have grasped the opportunity to provide intellectual leadership – not only through studies, position papers, and sector inquiries, but also through initiating antitrust investigations.

The online hotel booking saga already signalled the Commission’s willingness to allow NCAs scope for bottom-up learning outside the comfort zone of established precedents. The experiment did, however, result in divergent substantive treatment of narrow MFN retail clauses in Germany and Sweden (following the annulment of the NCA decision by the Patent and Market Court).

A good test case for the ‘solution’ that was chosen – increased coordination between the Commission and NCAs (instead of the Commission using its powers under Article 11(6) of Regulation 1/2003) – has already presented itself. While the Commission is still contemplating a formal investigation into Amazon’s collection and cross-usage of third

DOI: 10.21552/core/2019/2/3

1 Yane Sventiev, ‘Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?’ in Charles F. Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union. Towards a New Architecture* (OUP 2010) 79-120.

2 European Commission, White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1, paras 83-90.

3 European Commission, Notice on cooperation within the Network of Competition Authorities [2004] OJ C-101/43.

party sellers' data, the German, Italian, and Austrian NCAs have launched proceedings to examine whether Amazon has abused its dominant position against third party sellers. At least some of these investigations seem to concern a similar factual matrix.

Even if the various Amazon investigations will ultimately not give rise to an incoherent application of Article 102 TFEU, they at the very least raise pertinent questions about case allocation within the ECN. The current (non-binding) allocation criteria would point to the European Commission as the best placed authority, not in the least because remedial action can in principle only be national in scope.

The same can be said about the recently opened investigation into Apple by the Dutch NCA. The authority will investigate whether Apple has abused its dominant position by giving preferential treatment to its own apps in the App Store. Even though it has conducted an insightful market study into app stores, it is questionable whether the Dutch NCA is particularly well placed to deal with this case. It is also telling that various complainants, including Spotify and several developers of parental control apps, lodged their complaints against Apple with the European Commission.

Ongoing legislative debates at the national level inhibit further risk fragmentating competition enforcement among the Member States. For instance, the Belgian legislator recently introduced new provisions concerning the abuse of economic dependence, which could be used to tackle competition issues relating to digital platforms. Pursuant to Article 3(2) of Regulation 1/2003, NCAs are not obliged to concurrently apply Article 102 TFEU to cross-border unilateral conduct when they enforce 'stricter national law'. This carve-out to the general convergence rule enabled the German NCA to conclude its investigation into Facebook's collection and usage of data, another example of recent activism and experimentation by NCAs, solely on the basis of national competition law.

Now that Regulation 1/2003 has completed its 15th year in operation, the scope for (coordinated) policy experimentation by national competition law laboratories seems greater than before. This creates uncertainties for defendants and complainants. To what extent it will also come at a cost for the uniform and coherent application of, in particular, Article 102 TFEU remains to be seen.

Another key challenge in the quest for uniform enforcement of the EU antitrust rules, namely procedural diversity among the NCAs, is at heart of the first article in this issue. In *The ECN Plus Directive*, Francesco Rizzuto discusses the reasons for the adoption of Directive 1/2019 to empower NCAs to be more effective enforcers and offers a detailed analysis of its provisions. And in *The Bundeskartellamt Evaluation of Facebook's Behaviour*, Irene Lorenzo-Rego discusses the above-mentioned German NCA's Facebook decision and its potential wider impact.

As always, our Reports section keeps you abreast of important competition law and regulatory law developments – in this edition, with updates from Bulgaria, Germany,

Norway, and the United Kingdom. We also have two case notes on judgments of the Court of Justice in the field of competition law (C-633/16 *EY v Konkurrencerådet*; and C-144/17 *Lloyd's of London*). Finally, this issue includes book reviews of Peter Cartensen's *Competition Policy and the Control of Buyer Power: A Global Issue* and Maria Bergström, Marios Iacovides and Magnus Strand's *Harmonising EU Competition Litigation: The New Directive and Beyond*.

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