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The Uniform Application of European Competition Law: a non-negotiable value

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Premise

Competition enforcement is facing an increasing need for international co-operation. Such phenomena would require that all the subjects involved in ensuring the respect of the competition principle (either competition authorities, or courts depending on the national peculiarities of each national/regional enforcement system) communicate, co-operate, and interact one another constantly, on a daily basis. This is the case both at global as much as at European level.

Notwithstanding international co-operation has registered a positive trend during the last decade, the outcomes achieved so far are not satisfying. The inability of regional and national legal systems to provide effective answers to the need of greater co-operation in competition law enforcement is undermining the constitutional structure of the major western, capitalistic, liberal democracies.[1] The credibility and the utility of competition enforcement regimes are also under attack.[2] Individuals and companies have always less fate in the fairness and effectiveness of competition enforcement proceedings. This has led to calls for a fundamental rethink of the principles and purpose of competition law and policy.[3]

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[1] Unsurprisingly many research centres are starting analysing the effects that digital markets, market concentration, and monopolies pose to democracy. In this sense, see Stigler Center Chicago Booth School of Businesses 2020 Antitrust and Competition Conference, 'Monopolies and Politics'; and Oxford Centre for Competition Law and Policy conference on Online Markets and Offline Welfare Effects, the Internet, Competition, Society and Democracy.

[2] C. PIKE, G. CAROVANO, 'Competition Law under fire: responding to competing demands for change in the case of price parity clauses and loyalty rebates', *CPI September 2019 Antitrust Chronicle*.

[3] Stigler Center, 'Committee for the Study of Digital Platforms' (2019); T. VALLETTI, 'A view from the Chief Economist', CRA Conference (2018); and A. TYRIE, 'Is competition enough? Competition for consumers, on behalf of consumers', (2019).

Due to the increased national markets' integration and firms' interaction on a global scale, international co-operation has become one of the most crucial challenge to be solved by competition enforcers. The incapability (and sometimes unwillingness) of competition enforcers to effectively and fully co-operate has led to conflicting (and embarrassing) results. The victim of competition enforcers' international co-operation shortages has been the principle of uniform application of competition law. A given conduct X has been deemed anticompetitive in Country Y, and lawful in Country Z. While such situation might be tolerable at global level, it is not within the European Union ('EU') due to the existence of the EU Single Market, which does not offer room for the existence of different EU competition rules across European Member States ('MS').

Within the EU infrastructure, indeed, the existence of inconsistencies in the enforcement of EU competition law may (i) compromise the internal market, (ii) increase the cost of international trade, (iii) raise the threat of externalities and races to the bottom, (iv) set back the progress of a unified body of case law and, most importantly, (v) weaken the legal certainty and predictability of EU competition law, thus undermining the credibility of the all EU competition enforcement regime.[4] In other words, inconsistencies in the enforcement of EU competition law may compromise the entire EU infrastructure.[5] From this emerges that the uniform application of EU Competition Law is an essential and non-negotiable value.

Preserving the uniform application of EU Competition Law, however, requires co-ordination and collaboration among different sets of subjects. Due to the complexity

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[4] See G. CAROVANO, The ECN Grand Chamber: Updating the ECN to Face the Challenges of the Online World. (2018) European Competition and Regulatory Law Review, Volume 2, Issue 3, page 166-186; C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13.

[5] L. BLANCO and A.L. DE PABLO, *EU Competition Law Enforcement: elements for a discussion on effectiveness and uniformity*, (2011) Fordham 38th Conference on International Antitrust Law and Policy.

of the EU competition enforcement system, the EU Commission ('Commission' or 'EC'), the National Competition Authorities (NCAs), the National as well as the EU Courts are all called to play a role in carrying out the heavy task of ensuring and protecting the uniform application of EU Competition Law. At EU level, therefore, the uniform application of EU Competition Law requires a co-ordination between both *Public* and *Private Enforcement.*

Based on this premises, this thesis's relevance lies in its questioning who should produce EU competition law's substantive policy, mainly focusing on digital markets. It focuses on new policy-making methods; and renegotiating Member States' roles, vis-à-vis the Commission. In EU competition law, for example, there is conflict regarding aims and methods. Should the Commission suppress this as damaging fragmentation, imposing its regulatory vision; or, celebrate this debate in areas of doubt? This thesis turns the spotlight on these crucial issues.

In order to achieve the above-mentioned objectives, the thesis will be structured as follow:

(i) Chapter 1, as introductory chapter, will set the stage for the reforms to be suggested in Chapters 2 and 3. Specifically, it will show the main factors driving up the demand for international co-operation among competition enforcers. It will also offer a picture of the status and forms of international co-operation in the competition enforcement world as well as describing its current risk, and problems. Such representation will be also done through a collection of multijurisdictional cases. Finally, it will analyse how the demand for international co-operation has been dealt with at regional level, with a particular focus on the EU;

(ii) Chapter 2 will analyse how the principle of uniform application of EU Competition Law is protected within the *EU Public enforcement* framework as represented by the European Competition Network ('ECN'). Particularly, Chapter 2, will firstly retrace the ECN's history, showing the reasons behind its current configuration, and introduce the ECN's operating mechanism. Secondly, it will analyse which are the problematic aspects of the current EU Public enforcement system in terms of ensuring the respect of the principle of uniform application of

EU competition law. Finally, it will present a reform of the EU Public enforcement system that the author of this thesis believes needed both: (i) to ensure the uniform application of EU Competition Law within the EU Single Market; (ii) to allow the ECN to be able to cope with the challenges presented by the digitalisation of the economy.

(iii) Chapter 3 will analyse how the principle of uniform application of EU Competition Law is protected within the *EU Private Enforcement* framework. Since such complex task within the EU system is left to Article 16(1), Regulation n. 1/2003 ('Art. 16(1)'), Chapter 3, will firstly present the contents of Art. 16 (1) and its predominantly accepted interpretation. Subsequently, Chapter 3 will analyse the historical and legal reasons that led to the adoption of Art. 16 (1) and then it will suggest a new interpretation of Art. 16(1) that is most consistent with its historical purposes and background. According to the author of this thesis, while it is not strictly necessary to modify the literal datum of Art. 16(1), a change in its interpretation is needed to ensure the uniform application of EU competition law within the *EU Private Enforcement* ecosystem. Finally, Chapter 3 will evaluate the boundaries of the binding effects of Commission's decisions *ex* Art. 16 (1), and it will investigate the relationship existing between those effects and the principles of '*res judicata'* and '*nemo iudex in causa sua*'.

(iv) Chapter 4 will offer some conclusions.

1. International co-operation in the enforcement of competition law: the global picture

1.1. Introduction

The tension between national dimension of competition law enforcement and markets global scale has long been recognized. Nonetheless, attempts and proposals to develop a global competition law system were not successful. '*World antitrust*' never meant more than '*antitrust without borders*'[6.] and it mainly took the form of bilateral agreements.[7] Globalisation and digitalisation, however, had made effective and efficient international co-operation not only desirable, but necessary.[8] As the new millennium advances, the limits and drawbacks of bilateral agreements are becoming evident, and networking solutions appear more effective and needed.

International Competition law enforcement is currently in a crossroad, due to the challenges brought by (i) market's globalisation, (ii) market's digitalisation , (iii) proliferation of new national and regional competition regimes.[9] Those phenomena have brought international enforcement co-operation back again on the international policy agenda, since there is a need to develop effective responses to the listed challenges.

The history of the attempts to address those challenges is a long one. As described in detail by Gerber, at the Geneva conference that took place in May 1927, the members of the League of Nations first discussed the idea of an international legal

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[6] E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015.

[7] Among others, this has also impeded the existence of dispute resolution mechanisms in competition law because there is no global standard to be used for that perspective within the WTO.

[8] A. MUNDT, *International Competition Convergence Pathways, Challenges, and Prospects for Success*, Forty-third Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, 2017.

[9] These driving factors will be better analysed later on in Paragraph 1.2.

framework for fighting cartels.[10] The economic crisis and the war put an end to this attempt, but in the 1950s a new effort to establish a global competition law was part of the discussions toward the creation of an international institution providing a framework to commercial relations: the International Trade Organization. Unfortunately, the whole project was abandoned, as well as the discussions around a multilateral framework for competition law.

It is in the early nineties that, again, thinking and discussions were devoted to the idea of a world view of competition and trade. From 1991 to 1993 the Munich group of experts including, among others, professor Eleanor Fox, produced a '*Draft International Antitrust Code*'[11] (also knowns as '*Munich Code*'[12]) which contained

[10] D.J. GERBER, Global Competition, *Oxford University Press*.

[11] The Draft International Antitrust Code (DIAC) was the result of the work of the so-called '*International Antitrust Working Group*' founded by Wolfgang Fikentscher and Ulrich Immenga (the names of the all Members of the group are listed in: W. Fikentscher and U Immenga, *Draft International Antitrust Code* (1995) 71). The DIAC in 1993 was presented to Peter Sutherland, at the time Director General of GATT, since the DIAC was conceived as a pluri-lateral trade agreement to be incorporated within the WTO (then GATT). The DIAC defined minimum rules in all areas of law including horizontal and vertical restraints, mergers, joint ventures and state-owned enterprises. Fikentscher called the DIAC '*basically nothing more than a collection of (…) minimum standards*' (Fikentscher, the draft international antitrust code in the context of international technological integration (1996) 72 Chi-Kent L Rev 533). The Group believed that there was a need for an International Antitrust Authority (IAA) and proposed one headed by a President and an International Antitrust Council consisting of 20 members (Art. 19 DIAC). The IAA would have operated within the institutional framework of GATT. In addition, DIAC would establish a permanent dispute resolution panel, the International Antitrust Panel (IAP), comprised of experts appointed by consensus (Art. 20, DIAC). The idea found more support in Europe than in the US and the minimum standards were not really accepted in all jurisdictions. As noted by Eleonor Fox, many rules in the DIAC would be entirely unacceptable to many nations. She rejected the full competition code approach and endorsed a minimal approach that would embody 15 principles set forth in the introduction to the DIAC (E. FOX, *Toward World Antitrust and Market Access* (Jan 1997) 91 (1) Am J Intl L1, 15-16).

[12] It is also called this way since two of the four meetings between 1991 and 1993 took place in Munich.

competition principles and rules for their enforcement at global level. In 1995, a European committee of 'Wise Men' proposed an international competition system within the WTO.[13] As the project was maybe too ambitious, it did not gain consensus[14] but led to the next important step: in 1996, the EU proposed a discussion on the need for an international competition framework in the WTO.[15] Between 1997 and 2001, a WTO working group was established and published several reports trying to devise a framework for international competition law.

Simultaneously, in November 1997 a whole new plot strand was initiated by the US which launched the International Competition Policy Advisory Committee (ICPAC) '*to address the global antitrust problems of the 21st Century*'.[16] ICPAC,

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[13] Group of Experts' Report ('Van Miert Report') (1995). See European Commission, *XXVIth Report on Competition Policy* (1996), p. 95. The system would have started with building blocks of transparency, non-discrimination, and due process; cooperation; and assistance to developing economies and it would have offered dispute resolution.

[14] E. FOX, *The "Alternative World-Antitrust Framework" in the Light of the Twenty-First Century* in Competition Law on the Global Stage: David Gerber's Global Competition Law in Perspective, eds N. Charbit, E. Raimundo*, Institute of Competition Law*, 2014.

[15] In December 1996 at the Singapore WTO Ministerial, the EU initiated a Working Group on the Interaction between trade and Competition Policy (WGTCP) which was established '*to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework*' (Singapore WTO Ministerial 1996, Ministerial Declaration adopted on 13 December 1996, WT/MIN(96)/DEC, 20, Investment and Competition.

[16] US Department of Justice, ICPAC, www.justice.gov/atr/icpac,accessed 6 August 2018. The driving force behind the ICPAC was not Europe but the US although the EU supported the idea and was heavily involved, as highlighted by Charles A James when presenting ICN (GCN) in Paris: '*As I have spent a great deal of time during my first few months at the Antitrust Division thinking about the GCN and consulting with Tim Muris, Mario Monti, Konrad von Finckestein, and others about how to get GCN moving. We hope to launch the GCN next spring'* (International Antitrust in the 21st Century: Cooperation and Convergence, OECD Global Forum on Competition, Paris, 17 Oct 2001) before the first ICN Annual Conference, Mario Monti highlighted that: '*The European Commission*

in its final report of February 2000, proposed the creation of a 'Global Competition Initiative' (GCI) where government official, private firms, and non-governmental organizations could consult on antitrust matters. ICPAC's recommendation was embraced and in early February 2001 the International Bar Association convened a meeting in Ditchley Park (England), gathering more than 40 of the world's senior competition officials and practitioners. The results of the Ditchley Park meeting was the creation of the ICN on 25 October 2001 by top antitrust officials from 14 jurisdictions.[17]

Even after the launch of the ICN, the EC was still expecting opening formal negotiations on a multilateral agreement within the WTO.[18] The initiative, however, met with skepticism and opposition by both developed[19] and developing

has been one of the driving forces behind the ICN' (M. MONTI, *A Global Competition Policy? European Competition Day*, Copenhagen (17 September 2002)).

[17] See ICN, "About>History", www.internationalcompetitionnetwork.org/about/history.aspx. The ICN founding members were Australia, Canada, The EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the US, and Zambia. The first ICN annual conference took place in Naples, Italy on 28-29 September 2002.

[18] M. MONTI, *A Global Competition Policy?, European Competition Day*, Copenhagen (17 September 2002).

[19] The US was not convinced that international competition rules would hold any benefit that it could not achieve on its own, and feared that antitrust at the bargaining table would produce a watering down of good law and create an unaccountable bureaucracy. See KLEIN, JOEL I., "No Monopoly on Antitrust," *Financial Times*, Feb. 13, 1998, p. 20; KLEIN, JOEL I., *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, in 1997 Fordham Corp. Law Institute 9 (Barry Hawk ed., 1999). For a different explanation of the failure of an antitrust regime in the WTO, see T. A. GUZMAN, "*Global Governance and the WTO,*" 45 Harv. Int'l L.J. 303 (2004), and A. BRADFORD, *International Antitrust Negotiations and the False Hope of the WTO*, 48 Harv. Int'l L.J. 383 (2007) (arguing that agreement has been frustrated by lack of flexibility and vision in pursuing cross-issue regulatory bargains and by other collective action problems).

countries,[20] was dropped in July 2004.[21] Several political and historical reasons can explain these failures. Economic crises, wars, protectionism but also the short sightedness of leaders in recognizing that the lack of a global governance in antitrust enforcement would result in a less effective system. In a globalizing world with national-level laws, there would be differences in procedure and substance, overlaps and gaps of jurisdiction, lack of coherence, and conflicts generating uncertainties in the application of competition law.

Notwithstanding the historical reconstruction and the above-mentioned reflections, two things should not be underestimated. On the one hand, although differences are a fact of life, their justifying reasons should not be underrated. Differences can be related to (i) political/cultural values; (ii) legal standards; (ii) degrees of experience of NCAs; (iii) factual dissimilarities; (iv) stages of economic development. On the other, due to the mentioned existing differences, substantive convergence should not be overrated. '*There is no one acceptable set of detailed antitrust rules in the world, except at the highest level of generality*'.[22] Nations at different stages of economic development may correctly have different perceptions and priorities.

[20] Developing countries were not convinced that international competition rules would be good for them. Particularly, they feared that WTO antitrust could be another Trojan horse, as many regarded the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). See T. JOEL, *legal aspects of a poverty agenda at the WTO: Trade Law and 'Global Apartheid'*, 6 JIEL (2003); R. JEROME, from free riders to fair followers: global competition under the Trips agreement, 29 N.Y.U. J. Int'l L.&Pol. 11(1997).

[21] The WTO Ministerial in Cancun ended as "Cancun collapse" with no agreements globally on any one of the issues brought forward, and in July 2004 the WTO decided that no more work towards negotiations on the interaction between trade and competition policy would take place within the WTO. After more than 20 meetings of the WGTCP over seven years, competition policy in WTO died. The topic "Trade and Competition" was taken off the general WTO work programme and has not been resumed since. See J. STIGLITZ and A. CHARLTON, *Fair Trade For All: How Trade Can Promote Development*, Oxford, 2005.

[22] E. FOX, *Toward World Antitrust and Market Access*, (Jan 1997) 91 Am J Intl L 1, 15.

There is no other way than embracing these differences to move from nations and nationalisms to (global or regional) community.

Diversity, in fact, is an asset as it presents several benefits. As argued by Townley, economics and political science demonstrate that diversity '*furthers tolerance, helps solve jurisdictional problems, increases democratic legitimacy and accommodates diverse national views, both substantively and through openness to different mechanisms for achieving such goals*'.[23] The European Motto '*in varietate concordia*' directly acknowledges those benefits. Diversity is essential to preserve Countries' identity in supranational infrastructure,[24] and openness of the channels for experimentation and adjustment has its own dynamic, pro-competitive rewards.

In light of the above, notwithstanding the call for 'world antitrust' derived from markets' globalisation and digitalisation, 'world antitrust' and 'world antitrust substantive convergence' may not be the best desirable outcome. Solutions, instead, should come from regional and cross-regional co-operations and by relaunching the Comity principle.[25]

Given these premises, this Chapter will analyse which are the main factors boosting the demand for international co-operation among competition enforcers (Paragraph 1.2.). Secondly, It will present a picture of the status of international co-operation in the competition field at global level through a recollection of the most sensitive

[23] C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13.

[24] See G. CAROVANO, The ECN Grand Chamber: Updating the ECN to Face the Challenges of the Online World. (2018) European Competition and Regulatory Law Review, Volume 2, Issue 3, page 166-186.

[25] In the sense of relaunching the utilisation of the Comity principle see: F. JENNY, keynote address, OECD Competition Open Day, 27 February 2018, webcast available at: https://oecd.streamakaci.com/cod2019/; J. PECMAN and D. PHAM, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019.

cross-border competition cases (Paragraph 1.3.). Finally, it will analyse how the demand for international co-operation has been addressed and which forms it has taken both at global and at regional level (with a special focus on the EU) (Paragraph 1.4.).

1.2. International cooperation: driving factors

The demand for international co-operation in the competition law field has increased considerably in recent years. The potential for conflicts, indeed, due to the lack of an international coordinated enforcement approach, has been exacerbated for a number of reasons. The biggest three factors pushing cooperation, which are connected but will be studied individually below, are: (i) the extent to which the global economy has digitised (ii) the growing number of jurisdictions having chosen to take on a competition law regime; and (iii) market globalisation.

(i) The extent of the economy's digitalisation naturally demands more co-operation between countries, for two reasons. Firstly, numerous large corporations function within digital markets between many countries. Collaborating together across borders would make many things easier, such as gathering evidence, coordinating remedies and sanctions, and resolving disputes of policy. Second to this, there is a good chance of conflict regarding methodologies and results between competition enforcers. This could arise owing to the nature of issues encountered when digital firms are being challenged on competition, these ranging from algorithmic collusion, network effects, two-sided markets to artificial intelligence.[26] Perhaps

[26] See A. CAPOBIANCO and A. NYESO, "Challenges for Competition Law Enforcement and Policy in the Digital Economy" (2017) 1 JECL & Pract 1; J. MANYIKA, S. LUND, J. BUGHIN, J. WOETZEL, K. STAMENOV and D. DHINGRA, "Digital Globalization: The New Era of Global Flows""(McKinsey Global Institute February 2016), available at: https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows, last accessed 26 February 2019 ("*Remarkably, digital flows—which were practically nonexistent just 15 years ago—now exert a larger impact on GDP growth than the centuries-old trade in goods*"); UK Report of the Digital Competition Expert Panel, "Unlocking digital competition", March 2019, p. 122-123 (recommended action n. 19), available at:

expectedly, more than one study attempting to understand this digital phenomena, has been carried out jointly by various competition agencies within the EU.[27]

(ii) Over the last two to three decades, the amount of countries using competition law soared by more than 600%; 139 in 2016 in contrast to fewer than 20 in 1990. This increase seems set to continue, for two reasons. Firstly, new regimes are continually appearing.[28] Secondly, some regimes already in existence have been substantially improved by, for example, the institution of merger control powers.[29] Consequently, the more enforcing jurisdictions there are, the more chance there is of diverging decisions and thus creating more demand for co-operation among competition enforcers.[30]

(iii) International trade continues to increase, as demonstrated by the increasing number of Regional Trade Agreements negotiated and signed since the 90s. Approximately two-thirds of these negotiated Regional Trade Agreements

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https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

[27] See, for examples, the joint market studies conducted together by the French Autorité de la Concurrence and the German Bundeskartellamt in relation to big data (available at: http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf), and algorithms and their implications on competitions (which is still undergoing; see: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/19_06_2018_Algorithmen.html).

[28] Among others: Philippines (2015), Hong Kong (China) (2015), Brunei Darussalam (2016), and Thailand (2017). In this sense see OECD Competition Law in Asia-Pacific, A Guide to Selected Jurisdictions, OECD/Korea Policy Centre Competition Programme, 2018, available at: https://www.oecd.org/daf/competition/Competition-Law-in-Asia-Pacific-Guide-2018.pdf.

[29] Among others, United Arab Emirates, Peru, Argentina, Philippines. In this sense see J. HOLIAN and A. REEVES, Tracking Global Merger Control Changes for 2017, Law360, 2017, available at: https://www.lw.com/thoughtLeadership/byline-tracking-global-merger-control-changes-for-2017.

[30] See OECD Challenges of International Co-operation in Competition Law Enforcement, 2014, available at: http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

contained competition chapters by the start of 2019.[31] Similarly, trade across borders and direct investments from abroad are also increasing.[32] Market globalisation consequently results in a higher number of cross-border competition cases, as differing business practices in each jurisdiction have the potential to affect each other.[33] As can be seen in Figure 1 there has been a huge jump, from 50 to 450, of international cartel cases (from the initial study period of 1995-1999 to that between 2010 and 2017). The number of cross border mergers also reached a peak in 2018, unseen in the previous decade. In terms of value, these accounted for 47% of all global mergers and 36% in terms of volume.[34] The result of this increase is that many of the mergers required two or more jurisdictions to be involved.

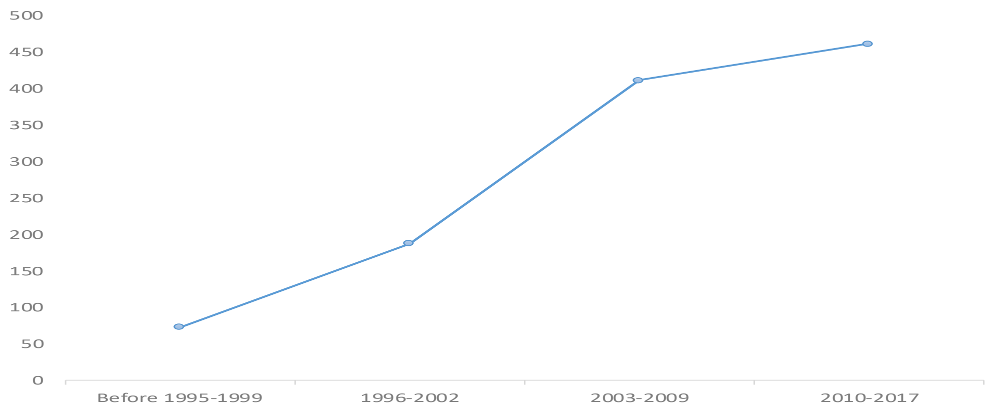
[31] Regional Trade Agreements Information System (RTA-IS), WTO, available at the following link: http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx (last accessed on 29 January 2018). A small minority of those FTAs include ambitious cooperation mechanisms designed to pave the way for bilateral convergence of competition laws of the parties. For example, Chile-Costa Rica, Chile-El Salvador, and Republic of Korea-Australia FTAs require the parties to cooperate towards the adoption of common rules to avoid anticompetitive practices. In this sense, see F.C. LAPRÉVOTE, S. FRISCH, and B. CAN, Competition Policy within the Context of Free Trade Agreements, theE15Initiative, September 2015, available at: http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf.

[32] See OECD Challenges of International Co-operation in Competition Law Enforcement, 2014, available at: http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

[33] For an elaboration of effects-based conflicts, see D. D. PHAM, "*Resolving Conflicts in International Merger Reviews through Merger Remedies*" (2016) 39(2) World Competition 267, 272-75.

[34] Baker Mckenzie's cross-border m&a index q2 2017, available at the following link: https://www.mergermarket.com/info/baker-mckenzie-cross-border-ma-index-q2-2017; S. GROCER, "A record $2.5 Trillion in Mergers Were Announced in the First Half of 2018", *New York Times*, available at: https://www.nytimes.com/2018/07/03/business/dealbook/mergers-record-levels.html.

Figure 1. Number of international cartels detected



Source: Connor (2016),[35] - OECD's analysis (2019).

1.3. Local enforcement in global markets: some issues

National enforcements of competition law in supranational markets raised several problematics. Eleonor Fox[36] has identified nine main criticalities.[37] The author of this thesis, slightly modifying Fox's classification, believes that the existing problematics can be grouped in four mains clusters. The problem of: (i) gaps; (ii) overlaps; (iii) antitrust contaminations; (iv) developing countries.

Gap issues arise when national competition enforcements disregard (i) export cartels, or world cartels primarily impacting outsiders; (ii) anticompetitive state actions, i.e. when States bless cartels or anticompetitive abuses that predominantly

[35] J.M. CONNOR, "The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990 July 2016 (Revised 2nd Edition)". Available at SSRN: http://ssrn.com/abstract=2821254.

[36] E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015.

[37] See E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015, who identified: (i) the problem of gaps; (ii) the problem of overlaps; (iii) the problem of myopic concern or disregard; (iv)the problem of parochialism; (v) the problem of lack of vision from the top; (vi) the problem of antitrust as an island; (vii) the problem of inventing 130 wheels when one will do (better); (viii) the special problems of developing and transitional countries; (ix) the problem of differential law.

hurt foreigners.[38] These situations exist because of an attitude of Countries disregarding harms caused abroad by anticompetitive conducts of their national firms (also called externalities). These attitudes can be more or less opportunistic, depending on whether there was or not an intention of the firms' parent Country to damage the others suffering the effects of the anticompetitive conduct.

Overlaps problems exist when the treatment of the same transactions or conduct is inconsistent, conflicting, over regulatory; or remedies may be pile-up remedies. Overlaps do also produce unnecessary enforcement costs, both for authorities and private parties, which might be reduced by better-designed co-operative frameworks.

Antitrust contaminations takes place when political pressures seeped national competition enforcement. Mergers seem to be the most sensitive area. Significant

[38] This category can also include what Fox in her classification called (i) the problem of myopic concern, (ii) the problem of parochialism, and (ii) the lack of vision from the top.

is the debate started not only in Europe after the *Siemens AG/Alstom* case,[39] but also in China,[40] South Africa,[41] Australia,[42] and the UK.[43]

[39] After the European Commission's prohibition decision in the Siemens AG/Alstom merger case where Germany's Economy Minister, Peter Altmaier, and its French equivalent, Bruno Le Maire, called for a reform of European Competition Rules. In this sense see: https://www.reuters.com/article/us-britain-eu/uks-may-to-promise-new-brexit-debate-in-push-for-more-negotiating-time-idUSKCN1PZ09S; and the Report '*La politique de la concurrence et les intér intérêts stratégiques de l'UE*', April 2019, available at: http://www.igf.finances.gouv.fr/files/live/sites/igf/files/contributed/IGF%20internet/2.RapportsPublics/2019/2018-M-105-03-UE.pdf. Contrarily see M. MOTTA, and M. PEITZ, Competition Policy and European Firms'Competitiveness, VOX CEPR Policy Portal, 20 February 2019, available at: https://voxeu.org/content/competition-policy-and-european-firms-competitiveness.

[40] China's merger enforcement is particularly aggressive when it sees national or strategic interests at stake. See, e.g., M. MICHAEL. "Insight: Flexing antitrust muscle, China is a new merger hurdle," Reuters, 2 May 2013.

[41] See Competition Amendment Act, 2018, Act No. 18 of 2018, available at: https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf. See J. OXENHAM, M.-J. CURRIE, and A. STARGARD, "Changing South Africa's Competition Law Regime: A Populist Departure from International Best Practices", *European Competition Law & Practice*, 5 February 2019, available at: https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpy075/5307060?guestAccessKey=845e0b6b-2104-4c65-aa96-081ffcbc87f8, who commented the Bill by saying that it provides for greater ministerial intervention at the initial stage of a merger (based on national security), during the merger investigation (based on public-interest grounds) and broadens the right of appeals to parties outside the merger control review. The Bill lowers the standard that the South African Competition Commission must meet to prosecute cases and foreshadows a risk of increased third-party interventionism more generally.

[42] See ACCC's Preliminary Report, "Digital Platforms Inquiry", December 2018, available at: https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf.

[43] See House of Lords's report, Select Committee on Communications, "Regulating in a digital world", 9 March 2019, available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf.

Developing countries present specific issues. Firstly, they are unable to protect themselves from offshore acts or transactions capable of harming them. Secondly, the substantive rules of law most suitable for them maybe different from the rules most suitable for developed countries. Thirdly, the need assistance in acquiring knowledge, knowhow and expertise. Developing Countries are those who need more regional co-operation since they are unlikely both (i) to deter incoming anticompetitive conducts, (ii) to compensate their citizens from those incoming anticompetitive conducts.

A developed horizontal, co-operation framework will be capable of solving almost all the above-mentioned problematics. Only the gaps issues may persist and need an higher-level solutions. The EU enforcement system has been conceived, in theory, to deal with all the mentioned issues. Despite the good intentions of the EU founding fathers, enforcement practice (as will be demonstrated later on in the thesis) has shown that this is not the case. Notwithstanding the EU is the most developed regional competition framework of the World, it has proven unable, as it currently stands, to solve, *inter alia*, the issues of gaps and overlaps. This said, while the EU's specific problems will be analysed later on in the thesis, let us now turn on examining how the above mentioned issues have arisen in practice providing few examples grouping them by enforcement area.

1.3.1. Merger cases

All the above-mentioned issues can take place in multijurisdictional merger scenarios. This fact is even more worrying considering the importance that cross-border mergers have recently acquired. As shown in the previous paragraph 1.2., the number of cross-border mergers has increased steadily during the last ten years.[44] It is not a case in fact that during the last twenty years, since the conflicting decisions on *Boeing/MCDonnel Douglas*[45] and *GE/Honeywell*[46] taken on the two

[44]Baker Mckenzie's cross-border m&a index q2 2017.

[45] *Boeing/McDonnell Douglas*, Case IV 877, 1997 O.J. (L336) 16 (8 Dec. 1997).

[46] *General Electric Co v. Commission*, Case -210/01, [2005] ECR II-5575

sides of the Atlantic, many steps have been taken to overcome such undesirable outcomes. The convergence on the substantive analysis has significantly increased and there is general agreement on the theory of harms and methodologies, at least for horizontal mergers.

Simultaneously, informal co-operation between agencies, reviewing the same merger has improved significantly (with frequent consultation between the case teams, exchange of relevant information thanks to a widespread use of waivers, alignment of timelines for the decisions). The European Director General for Competition, the US Department of Justice, the Canadian Competition Bureau, and the Australian ACCC, for example, has deepened their cooperation with some key agencies, and cooperated extensively on a number of important multijurisdictional mergers. Relevant in this sense are the following cases:

Box 1. Examples of successful international co-operation in merger cases

General Electric/InVision Technologies Inc.: in this case, concerning the acquisition by General Electric of InVision, the US FTC and the Bundeskartellamt closely co-operated. The two authorities decided to clear the transaction after having jointly discussed and agreed the remedies with the parties, as well as the nomination of a security trustee. Specifically, the transaction was cleared subject to the divestiture of InVision's Hambourg based subsidiary YXLON NDT.[47]

Louisiana Pacific Corporation's/Ainsworth Lumber Company Limited: this case was characterized by a close informal co-operation between the CCB and the US

[47] See US Federal Trade Commission Press Release, "Preserving Competition, FTC Clears General Electrics $900 Million Acquisition of InVision Technologies", 15 September 2004, available at: https://www.ftc.gov/news-events/press-releases/2004/09/preserving-competition-ftc-clears-general-electrics-900-million; Bundeskartellamt Press Release, "Clearance of General Electric/InVision Merger in Close Cooperation with US Competition Authority", 19 August 2004, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2004/19_08_2004_GE_InVision_eng.html.

DoJ since the mills that would have been acquired served purchasers of both countries. The case teams of both authorities used to have regular calls, and share information. Ultimately, the two agencies: (i) compared theories of harm, (ii) attended each other's depositions, and (iii) coordinated the review of the parties' proposed remedies. The CCB and DoJ economists also worked together, discussing data and econometric models. Because of the anticompetitive concerns expressed by both authorities, the parties abandoned the transaction.[48]

Nufarm/AH Marks: this case was characterised by extensive co-operation between the US FTC and the Australian, Canadian, and UK competition authorities. The case concerns the acquisition by an Australian chemical company (Nufarm) of a UK-based manufacturer of herbicide chemicals (AH Marks). As a sresult of the intense co-operation, the US FTC, the CCB and the UK Competition Commission (now CMA) accepted the same remedies.[49]

Agilent Technologies/Varian, Inc.: in this transaction involving chromatographic testing equipment manufacturers, the US Federal Trade Commission (FTC) closely co-operated with the Australia, EU, and Japan competition authorities. As a result, the mentioned authorities adopted co-ordinated and cross-border remedies.

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[48] See Competition Bureau, "Louisiana Pacific and Ainsworth abandon proposed acquisition of OSB Mills: Competition preserved for the supply of OSB", 14 May 2014, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03724.html.

[49] See US Federal Trade Commission Press Release, "FTC Order Restores Competition in U.S. Markets for Herbicide Products", 28 July 2010, available at: https://www.ftc.gov/news-events/press-releases/2010/07/ftc-order-restores-competition-us-markets-herbicide-products; Australian Competition and Consumer Commission Press Release, "Nufarm Limited – Completed acquisition of AH Marks Holdings Limited", 19 august 2009, available at: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/nufarm-limited-completed-acquisition-of-ah-marks-holdings-limited; Canadian Competition Burea Press Release, "Competition Bureau requires divestitures in herbicide merger", 28 July 2010, available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03264.html; CMA, "OFT closed case: Completed acquisition by Nufarm Limited of AH Marks Holdings Limited", 29 August 2008, available at: https://www.gov.uk/cma-cases/nufarm-ltd-a-h-marks-holdings-ltd-oft.

Specifically, the EC and the FTC worked together to choose a common monitor with personnel in Europe, United States, Australia, and Asia.[50] In addition, since competitive concerns in Japan were deemed sufficiently resolved by the remedies adopted by the FTC and the EC, the JFTC closed its investigation without taking any action.

Continental AG/Veyance Technologies: this case witnessed close co-operation between the CCB, the US DoJ, and the Mexican Federal Competition Commission since both involved companies had manufacturing and assembly plants located in both the US and Mexico. Because of the close co-operation, the CCB did not take any action since Canadian competition concerns were deemed addressed by the settlement agreement reached between the parties and the US DoJ.[51]

Cisco/Tandberg: in this case, the EU Commission cleared the transaction subject to commitments by way of a phase I decision. The US DoJ concluded that the transaction was not likely to be anticompetitive taking account the commitments that Cisco made to the Commission. The successful alignment of remedy discussions was reflected by the fact that press releases on the outcomes of the case were published by the two agencies on the same day.[52]

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[50] See US contribution to the OECD, remedies in cross-border merger cases, 4 October 2013, DAF/COMP/WP3/WD(2013)54, available at: https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310merger-remediesus.pdf; European Commission Press Release, "Comimssion clears proposed acquisition of Varian by Agilent, subject to conditions", 21st January 2010, available at: http://europa.eu/rapid/press-release_IP-10-39_en.htm?locale=en; Japan FTC press release, "the proposed acquisition of shares of Variant, Inc. by Agilent Technologies, Inc.", 9 June 2010, available at: https://www.jftc.go.jp/en/pressreleases/yearly-2010/jun/individual-000018.html.

[51] See Competition Bureau, "Competition Bureau clears Continental's acquisition of Veyance", 11 December 2014, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03862.html.

[52] See European Commission press release, "Commission clears Cisco's proposed acquisition of Tandberg subject to conditions", 29 March 2010, case M.5669, available at:

United Technologies Corporation /Goodrich Corporation: this case was characterized by extensive cooperation between the EU Commission, the US DOJ, and the CCB. Timing alignment and confidentiality waivers allowed not only for synergies for the agencies and the parties resulting from joint investigative efforts, but also coordination on remedy design, including the exchange of remedy proposals received from the parties and detailed discussions (involving the sharing of confidential information).[53] In addition, DOJ had discussions with other competition agencies, including the Mexican CFC and the Administrative Council for Economic Defense in Brazil ("CADE").[54]

Baxter International/Gambro: in this case, the European Commission cooperated closely with the Australian Competition and Consumer Commission (ACCC) and the Commerce Commission of New Zealand. The three authorities held joint calls to discuss, based on confidentiality waivers, key remedy design issues. Ultimately, the three authorities accepted the same remedies, appointed the same trustee, and accepted the same purchaser.[55]

http://europa.eu/rapid/press-release_IP-10-377_en.htm; DoJ press release, "Justice Department will not Challenge Cisco's Acquisition of Tandberg", 29 March 2010, available at: https://www.justice.gov/opa/pr/justice-department-will-not-challenge-cisco-s-acquisition-tandberg.

[53] See European Commission press release, "Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions", 26 July 2012, case M.6410, available at: http://europa.eu/rapid/press-release_IP-12-858_en.htm; Press Release, Canadian Competition Bureau, Competition Bureau Statement Regarding United Technology Corporation's Acquisition of Goodrich Corporation (26 July 2012), available at http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/03483.html.

[54] See US contribution to the OECD, remedies in cross-border merger cases, DAF/COMP/WP3/WD(2013)54, available at: https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310merger-remediesus.pdf.

[55] See European Commission press release, "Commission approves acquisition of Swedish medical technology company Gambro by US rival Baxter, subject to conditions", 22 July 2013, available at: http://europa.eu/rapid/press-release_IP-13-724_en.htm; ACCC press release, "ACCC will not

GTCR/PR Newswire: in this case, the CMA has closely co-operated with the US DOJ in order to align remedies to solve competition concerns caused by the acquisition of PR Newswire by GTCR. As a result, both authorities subjected the clearance of the transaction to the divestment of PR Newswire's subsidiary Agility to a third global digital services and solutions company (Innodata).[56]

Abbott Laboratories/Alere: in this case, the US FTC, the EC, and the CCB approved subject to conditions (the divestment of Alere's Epoc and Triage tests, as well as Alere's BNP reagents business) the merger between Abbott Laboratories (a global health care company) and Alere (a professional supplier of diagnostic solutions for infectious diseases). The three authorities, given the global nature of the transaction, mutually took into account other jurisdictions' interests and policies and co-operated extensively in designing cross-border remedies to avoid conflicts.[57]

oppose proposed global acquisition of Gambro by Baxter following divestiture remedy", 4 September 2013, available at: https://www.accc.gov.au/media-release/accc-will-not-oppose-proposed-global-acquisition-of-gambro-by-baxter-following-divestiture-remedy; New Zealand Commerce Commission press release, "Baxter International cleared to acquire Gambro AB subject to a divestment undertaking", 31 July 2013, available at: https://comcom.govt.nz/news-and-media/media-releases/2013/baxter-international-cleared-to-acquire-gambro-ab-subject-to-a-divestment-undertaking.

[56] See US Department of Justice Press Release, "GTCR Agrees to Divest Third Largest Media Contact Database Provider in the U.S. in Order to Proceed With Acquisition of PR Newswire", 10 June 2016, available at: https://www.justice.gov/opa/pr/gtcr-agrees-divest-third-largest-media-contact-database-provider-us-order-proceed-acquisition; CMA Press Release, "CMA accepts media contact databases merger remedy", 8 July 2016, available at: https://www.gov.uk/government/news/cma-accepts-media-contact-databases-merger-remedy.

[57] See US Federal Trade Commission Press Release, "FTC approves final order preserving competition in the U.S. Markets for two types of medical testing devices", 14 November 2017, available at: https://www.ftc.gov/news-events/press-releases/2017/11/ftc-approves-final-order-preserving-competition-us-markets-two; European Commission Press Release, "Commission approves acquisition of Alere by Abbott Laboratories, subject to conditions", 25 January 2017, available at: http://europa.eu/rapid/press-release_IP-17-147_en.htm; Canadian Competition Bureau Press Release, "Competition Bureau statement regarding the acquisition by Abbott of Alere", 28

Dow/DuPont: in this merger (cleared subject to conditions in several jurisdictions), the EU Commission has been in close contact with a number of other competition authorities, which were also reviewing the transaction. In particular, the Commission has had regular exchanges with the US Department of Justice and the competition authorities of Australia, Brazil, Canada, Chile, China and South Africa.[58] Those authorities co-operated closely while reviewing the transaction and co-ordinated to align requested remedies.

Bayer/Monsanto: the acquisition of Monsanto by Bayer involved several authorities around the globe. The transaction was cleared although the divestiture of overlapped markets (seeds, pesticides, digital agriculture) was requested. This case was characterized by close co-operation between the EU Commission, the US DoJ and a number of competition authorities including, among others, the Australian, Brazilian, Canadian, Chinese, Indian and South African competition agencies.[59]

September 2017, available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html.

[58] See European Commission press release, "Commission clears merger between Dow and DuPont, subject to conditions", 27 March 2017, available at: http://europa.eu/rapid/press-release_IP-17-772_en.htm; US DoJ press release, "Justice Department Requires Divestiture of Certain Herbicides, Insecticides, and Plastics Businesses in Order to Proceed with Dow-Dupont Merger", 15 June 2017, available at: https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics; CADE press release, "Merger between Dow and DuPont is approved with restrictions", 18 May 2017, available at: http://en.cade.gov.br/press-releases/merger-between-dow-and-dupont-is-approved-with-restrictions.

[59] See European Commission press release, "Commission clears Bayer's acquisition of Monsanto, subject to conditions", 21 March 2018, available at: http://europa.eu/rapid/press-release_IP-18-2282_en.htm; US DoJ press release, "Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto", 29 May 2018, available at: https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; CADE press release, "CADE approves with restrictions Bayer's acquisition of Monsanto", 9 February 2018, available at: http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-

Notwithstanding the mentioned co-operation developments, not all the problems have been solved. Occasionally, conflicting outcomes still exist. This may be due to (i) different legal principles; (ii) different appreciation of same legal principles; (iii) different factual contexts. Few recent examples of conflicting decisions are:

Box 2. Examples of unsuccessful international co-operation in merger cases

Deutsche Borse/NYSE –Euronext: this case concerns a securities exchange operators merger leading to the world's largest combined market for trading stocks and derivatives. While the transaction was cleared subject to conditions in the US, [60] it was blocked in the EU. The EC after defining a more specific market, deemed the proposed divestitures insufficient considering that the transaction would have generated a quasi-monopoly for the European financial derivatives traded on exchanges, having the potential of harming derivative users and the European economy as a whole.[61]

Eurotunnel: this case regards the acquisition by Eurotunnel of three ships and their related assets from the bankrupt ferry company SeaFrance, during the liquidation processed overseen by the French Commercial Court. Whereas the deal was

monsanto; Competition Commission of South Africa, "Commission conditionally approves Bayer and Monsanto transaction", 3 May 2017, available at: http://www.compcom.co.za/wp-content/uploads/2017/01/Commission-Conditionally-Approves-Bayer-Transaction-Final.pdf.

[60] The DOJ cleared the deal conditional on the divestiture of Direct Edge, the fourth largest stock exchange operator in the US, ultimately controlled by DB, considered an innovator in the exchange space and a competitive constraint on NYSE. See US DoJ Press Release, "Justice Department Requires Deutsche Borse to Divest Its Interest in Direct Edge in Order to Merge with NYSE Euronext", 22 December 2011, available at: https://www.justice.gov/opa/pr/justice-department-requires-deutsche-b-rse-divest-its-interest-direct-edge-order-merge-nyse.

[61] See European Commission Press Release, "Commission blocks proposed merger between Deutsche Borse and NYSE Euronext", 1st February 2012, available at: http://europa.eu/rapid/press-release_IP-12-94_en.htm.

approved although subject to conditions by the French Competition Authority[62], it was blocked by the (back at that time) UK Competition Commission.[63] The conflicting results lie in the approach to the counterfactual. While in the CMA and UK courts concluded that the attribution of the bid to another company would have produced a better outcome for competition, the French Autorité de la concurrence did not consider such a scenario.

Akzo Nobel/Metlac: while the German Bundeskartellamt cleared the transaction in April 2012,[64] the CMA prohibited it in phase II in October 2015 after a two years investigation.[65] The conflicting results were caused by different tests ('SLC test' in the UK, 'dominance test' in Germany) and timing misalignments.

[62] See Autorité de la concurrence Press Release, 'L'Autorité de la concurrence autorise, sous conditions, la prise de contrôle de certains actifs de SeaFrance par le groupe Eurotunnel', 8 November 2012, available at : http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=417&id_article=1994. The text integral of the official decision is available at : http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12DCC154.

[63] See CMA Press Release, "Ban on Eurotunnel ferry service provisionally confirmed by CMA", 20 May 2014, available at: https://www.gov.uk/government/news/ban-on-eurotunnel-ferry-service-provisionally-confirmed-by-cma. The CMA's decision after several appeals, was confirmed by the Supreme Court on 16 December 2015, [2015] UKSC 75, available at: https://www.supremecourt.uk/cases/docs/uksc-2015-0127-judgment.pdf.

[64] See Official Press Release at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/02_05_2012_Akzo_Metlac.html;jsessionid=3AE04F00ECD88904BE48890FA98EB3D7.2_cid387?nn=3591568, and the Official Decision at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2012/B3-187-11.pdf?__blob=publicationFile&v=4.

[65] See https://www.gov.uk/cma-cases/akzo-nobel-n-v-metlac-holding-s-r-l-merger-inquiry#core-documents. The prohibition decision was appealed and upheld by the CAT. The judgement is available at the following link: https://www.catribunal.org.uk/cases/12044813-akzo-nobel-nv.

<u>Siemens AG</u>/ *Alstom*: while the merger was cleared in Singapore[66], it was blocked by the EU Commission.[67]

Divergence outcomes, however, as stated in the introduction, should not be overrated as justified by factual differences. In the *Reckitt Benckiser/Johnson and Johnson* merger case,[68] for example, differently from other jurisdictions, the New Zealand Commerce Commission had to block the merger since it could not find appropriate remedies to clear the transaction since there was no viable divestiture option in New Zealand.[69] A 'world antitrust' solution, therefore, albeit impossible, seems also not to be the best desireable outcome.

The real remaining issues are the fact that (i) remedies do not always take into account mergers' externalities; (ii) sometimes there is a problem of pile-up remedies;[70] (iii) absent a global uniform top down assessment, there is the risk that local productive efficiencies may bring authorities to disregard that the transaction may not benefit consumers or the market at large. An example of the latter is the

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[66] See the Official Press Release at the following link: https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/siemen-alstom-merger-clearance-24-oct-18.

[67] See European Commission Press Release, "Commission prohibits Siemens' proposed acquisition of Alstom", 6 February 2019, available at: http://europa.eu/rapid/press-release_IP-19-881_en.htm.

[68] In this case, Reckitt Benchiser Group Plc wanted to acquire the K-Y brand and product assets from Johnson and Johnson (J&J). The New Zealand Commerce Commission decision is available at the following link: https://comcom.govt.nz/__data/assets/pdf_file/0032/76487/2015-NZCC-12-Reckitt-Benckiser-and-Johnson-Johnson-clearance-determination-public-version-24-April-2015.pdf.

[69] See OECD Summary of discussion of the Roundtable on the Extraterritorial Reach of Competition Remedies, DAF/COMP/WP3/M(2017)2/ANN2, 10 August 2018, available at: https://one.oecd.org/document/DAF/COMP/WP3/M(2017)2/ANN2/FINAL/en/pdf.

[70] To reduce this problematic, as suggested by E. FOX, new cooperation agreements may contain an obligation of sympathetic consideration of previously adopted remedies. In this sense, see E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015.

Holchim/Lafarge merger case; a merger between two global leading cement companies which, as noted by Eleonor Fox, '*principally hurts small developing economies; and mergers, agreements, and conduct may create buying power that hurts poor commodity producers (e.g. of cocoa beans), while the developed world is oblivious*'.[71] The transaction was approved subject to conditions firstly in the EU, South Africa and Brazil in 2014, and then by the FTC (US) in 2015. All the jurisdictions required the divestiture of assets, although with different justifications.[72]

While those problems cannot be totally solved, and partially need to be tolerated, they can be reduced and marginalised by an increased co-operation. From this perspective significant and interesting is the idea of an opt-in clearing house system suggested by the US advisory committee (the IGAD Climate Prediction and Applications Centre (ICPAC))[73] and endorsed by Eleonor Fox.[74]

A different but similar call has been made by Terry Calvani and Andreas Mundt who suggested the ICN considering voluntary, non-binding norms that national

[71] See E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015.

[72] Notably, while the US and South African authorities stressed the risk of future collusion in the cement market; the EU focused on the insufficient competitive pressure from remaining players in the market.

[73] Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (ICPAC Report) (2000), p. 76-78.

[74] E. FOX, *Antitrust without Borders: From Roots to Codes to Networks*, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015. E. Fox proposed a common clearinghouse for premerger notification by firms that elect to opt into such a system. The notified merger centre or jurisdiction would announce the filing to member nations (or to be interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

competition authorities might consider in deciding whether to get involved in an international merger review or cartel investigation.[75] A deeper procedural co-operation could help not only in reducing or in solving the problems of overlaps or clashes, but it will also help moving move from national and nationalistic to (global) communitarian approaches, consequently also shedding competition law from the recurrent waves of political pressure calling for reforms.[76]

1.3.2. Cartel cases

The same issues mentioned in relation to mergers apply to cartels. Many cartels, in fact, tend to have a cross-border dimension and it is worth mentioning that the number of international cartels is growing sharply since the beginning of the new millennium. Examples of well-known worldwide cartels are the Lysine Cartel, the Vitamin Cartel, the Citric Acid Cartel, the Graphite Electrode Cartel, or the Liquid Crystal Display (LCD) Cartel.

The problems of clashes and overlaps have been partially resolved by the increased level of informal co-operation among competition agencies. The conflicts existing in the famous *Dyestuff* cartel (1972), *Uranium Westinghouse* Cartel (1982), *Transatlantic Ocean Shipping* Cartel (1983), and *Wood Pulp* Cartel (1988) seem significantly far away from present times.

Although considerably reduced, conflicting decisions in Cartel cases have not been totally eliminated. A recent example is the *Shipping liner case* which initially was

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[75] T. CALVANI and A. MUNDT, International Competition Convergence Pathways, Challenges, and Prospects for Success, Forty-third Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, 2017.

[76] Think about at what happened after the European Commission's prohibition decision in the Siemens AG/Alstom merger case where Germany's Economy Minister, Peter Altmaier, and its French equivalent, Bruno Le Maire, called for a reform of European Competition Rules. In this sense see: https://www.reuters.com/article/us-britain-eu/uks-may-to-promise-new-brexit-debate-in-push-for-more-negotiating-time-idUSKCN1PZ09S.

closed with commitments by the EC,[77] and with a prohibition decision by the Russian Federal Antimonopoly Service (FAS), according to which shipping lines' use of price announcements constituted a non-cartel concerted action.[78] Later on, however, the misalignment was solved since FAS - notwithstanding its decision was upheld on appeal[79] - decided to terminate its original decision due to a settlement agreement. Through the mentioned agreement, the originally fined companies agreed to pay a fee much lower than the initial sanction, and committed to cease public price announcements for cargo to Russian ports (customers will receive price information via email or a password protected webpage) and to implement industry guidelines for price announcements. Notably, the guidelines are aligned with the commitments required by the EC in July 2016.[80]

Despite the substantive analysis in different jurisdictions is generally aligned, there are a number of problems that arise when agencies conduct parallel investigations on the same cartel. The timing of the investigation, and especially dawn raids targeted to a company participating in a cross-border cartel in one country, can jeopardize the possibility for another agency to intervene.

Competition authorities also face the challenge of how to cooperate in international cartel cases efficiently, without deterring leniency applications. For many competition authorities leniency has become the most important tool in detecting

[77] See European Commission Press Release, "Antitrust: Commission accepts commitments by container liner shipping companies on price transparency", 7 July 2016, available at: http://europa.eu/rapid/press-release_IP-16-2446_en.htm.

[78] See FAS Official Press Release, "FAS upheld at Court its decision on a case against container carriers", 13-09-2016, available at: http://en.fas.gov.ru/press-center/news/detail.html?id=47097.

[79] See FAS Official Press Release, "FAS upheld at Court its decision on a case against container carriers", 13-09-2016, available at: http://en.fas.gov.ru/press-center/news/detail.html?id=47097.

[80] See Maersk Line Press Release, "Maersk Line and the Russian antimonopoly authority reaches agreement on competition case", 8 February 2017, available at: https://www.maersk.com/en/news/2017/03/27/ml-and-the-russian-antimonopoly-authority-reaches-agreement-on-competition-case.

cartels. Currently, more than 60 jurisdictions have leniency programs in place, including all OECD member countries.[81]

Participants of international cartels will likely not apply only in one jurisdiction -as one application might trigger a chain of investigations in other jurisdictions- but consider multi-jurisdiction applications. However, due to the different and sometimes conflicting requirements imposed by different jurisdictions to qualify for leniency, and the diverse existing marker systems,[82] costs and risks of leniency applications are high and may discourage infringers from applying. While the one-stop-shop marker system advocated by business does not seem a viable option,[83] greater standardisation is possible as well as greater co-ordination in conducting joint interviews, or making witnesses available in one place at one time. A starting point could be developing a standardised form to increase convergence across different jurisdictions with respect to the requirements needed to obtain a leniency marker. The EU is leading by example on this point thanks to the last achievements introduced by the so-called 'ECN Plus' Directive.[84]

[81] See OECD, Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, June 2018, available at https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf.

[82] Some jurisdictions require little information to grant a marker and some require a lot of information; some require written proffers and some do not. The risk of not satisfying the requirements in some jurisdictions may be a significant disincentive to seek leniency in any of them. In this sense see OECD roundtable on challenges and co-ordination of leniency programmes DAF/COMP/WP3/WD(2018)14.

[83] Competition Authorities, especially those having criminal enforcement powers, have been reluctant in ceding their prosecutorial discretion and powers. In this sense see OECD roundtable on challenges and co-ordination of leniency programmes DAF/COMP/WP3/WD(2018)14.

[84] See Chapter VI 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, O.J. L11,14.1.2019, P.3-33. For a broad understanding of the ECN Plus Directive and its practical consequences see F. GHEZZI, and B. MARCHETTI, la proposta di direttiva in materia di Rete europea della Concorrenza e la

In terms of cartels, the only problem a greater co-operation mechanism is not able to solve directly is that of gaps, i.e. when national competition enforcement actions disregard export cartels, or world cartels primarily hurting foreigner countries.[85] Disregarding cartel externalities, however, is not a wise and communitarian approached. Specifically, it is not wise because export cartels are not beneficial in the long term for the exporting country.[86]

In a future perspective, a potential solution to force Competition Authorities to take into account cartel (or merger) externalities, could be introducing within the next OECD Recommendation on International Co-Operation or ICN Best Practices a provision very similar to Article 43 of the EU guidelines on the application of Article 101(3) of the TFEU[87] which dictates that '*negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market*.' Traditionally, this article has been interpreted as a limitation on the extent to which negative effects in one EU member state could be compensated by positive effects elsewhere in the EU. An obligation of this kind in relation to the treatment of efficiencies may be sufficient in preventing opportunistic situations of under-enforcement.

necessità di un giusto equilibrio tra efficienza e garanzie, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 1015-1076.

[85] This category can also include what Fox in her classification called (i) the problem of myopic concern, (ii) the problem of parochialism, and (ii) the lack of vision from the top.

[86] In this sense see ELEANOR FOX and JANUSZ ORDOVER, "The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action," 19 World Competition L. & Econ. Rev. 5 (December 1995).

[87] Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427%2807%29. Similarly see also E. FOX, Antitrust without Borders: From Roots to Codes to Networks, The E15 Initiative Strengthening the global trade and investment system for sustainable development, November 2015.

It is also worth mentioning that under-enforcement situations are as damaging as those of 'over-enforcement', where antitrust law is used as a 'trade war instrument'. An example of a case where the jurisdictional nexus was at least debated is the famous *LCD* Cartel.[88] The case was investigated in several jurisdictions[89] and, among others, in the US by the DoJ (2006-2012). The DoJ investigation (which resulted in criminal fines and convictions of several executives) was justified by the fact that the foreign cartelised products had a '*direct, substantial, and reasonably foreseeable effect*' on prices in the US. This final point was highly debated across US courts since it is not clear whether US antitrust law can impose damages upon firms that operate outside the US and fix the price of components that are included in products manufactured outside the US and then exported for sale into the US. The situation was similar in Europe where the EC sanctioned companies selling inputs that were embedded in foreign manufacturing and arrived in Europe several steps down the production chain.[90]

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[88] It consists in a global price-fixing agreement among the major LCD panel producers, realized through multiple meetings in South Korea and Taiwan between 2001 and 2006.

[89] See European Commission Press Release, "Commission fines six LCD panel producers Euro 648 Million for price fixing cartel", 8 December 2010, available at: http://europa.eu/rapid/press-release_IP-10-1685_en.htm; Korea Fair Trade Commission press release, "KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD International Cartel", 8 October 2011, available at: http://www.ftc.go.kr/solution/skin/doc.html?fn=7fd54d9f40612298f8588045925f570cbe259dd16c11ef13dcf437ada33d1df5&rs=/fileupload/data/result/BBSMSTR_000000002402/; Brazilian CADE Press Release, "Cade convicts cartel in the market of computer LCD monitors", 1 march 2019, available at: http://en.cade.gov.br/press-releases/cade-convicts-cartel-in-the-market-of-computer-lcd-monitors; Congressional-Executive Commission on China, Chinese Authorities Fines LCD Cartel in First Case Concerning Conduct Outside China, 12 February 2013, available at: https://www.cecc.gov/publications/commission-analysis/chinese-authorities-fine-lcd-cartel-in-first-case-concerning.

[90] See European Commission Press Release, "Commission fines six LCD panel producers Euro 648 Million for price fixing cartel", 8 December 2010, available at: http://europa.eu/rapid/press-release_IP-10-1685_en.htm. Notably, the geographic scope of the European Union Competition Rules was set forth in the Woodpulp, Gencor and Intel cases. They apply to conduct that occurred,

1.3.3. Unilateral conduct cases

Also unilateral conduct cases, although in the past tended more often to be national in scope, have recently become more international as they concern the conduct of the same firm in different countries (typically this is happening with cases involving the so-called 'tech giants'). After *Microsoft*, more recent examples include cases against *Google*, with a somehow divergent approach taken in Europe and in the

was implemented within or produced effects in the EU or the European Economic Area (EEA). Specifically, in September 2017 the ECJ in Intel (Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632) ruled that '(...) *it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied'.* The General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration '*the conduct of the undertaking viewed as a whole'* in order to assess the substantial nature of its effects on the market of the EU and of the European Economic Area (EEA). '(...) [To do otherwise would] lead to a fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the European Union's jurisdiction. (…) The General Court noted, as regards the postponement of the worldwide launch of certain computer models, that it was apparent from the evidence before it that sales of those computers were planned in the Europe, Middle East and Africa region, of which the EEA is a very important part, *which was sufficient for a finding that there were at least potential effects in the EEA*.' (all emphasis added).

US,[91] and *Intel*.[92] As these cases are often closed imposing remedies the question arise on the possible conflict created by the extraterritorial reach of remedies imposed by a national competition authority.

The recent case involving the decision of the Korean Federal Trade Commission (KFTC) against *Qualcomm* provides a good example of the difficulties that can arise in such cases. In 2016, the KFTC imposed sanctions against *Qualcomm's* abuse of its mobile communications Standard Essential Patents (SEPs) by ordering *Qualcomm* to negotiate license agreements with willing licensees, for any of its

[91] While Google was sanctioned in the EU, the case was closed by FTC (US) after Google issued a letter (but did not sign an enforceable order) promising to adjust certain practices (See FTC press release, "Google Agrees to Change its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search" 3rd January 2013, available at: https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc). The same case has been investigated also by CADE (See CADE Press Release, "CADE investigates Google's possible anticompetitive practices in the Brazilian online search market", 11th October 2013, available at: http://en.cade.gov.br/press-releases/cade-investigates-google2019s-possible-anticompetitive-practices-in-the-brazilian-online-search-market), and cleared by a Brazilian Court in a private lawsuit (2011-2012). The authorities mostly differ in assessing whether Google's alleged search bias (promoting its own services in general search results) is harmful for the consumers, and whether direct intervention on Google's product design is desirable.

[92] Intel's conditional rebates and direct payments to PC manufacturers, aimed at impeding the use of rival AMD's CPUs, were fined in the EU (2007-2009) and South Korea (2007-2008), where the competition authorities deemed that the behaviour made it difficult (if not impossible) for AMD to compete on merits; the company settled with the American FTC (2008-2010) and a "cease and desist" order was issued by the JFTC in Japan (2004-2005), the latter authorities being more concerned with the prompt termination of the anti-competitive behaviour. See European Commission Press Release, "Commission imposes fine of EUR 1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices", 13th May 2009, available at: http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en; FTC Press Release, "FTC Settles Charges of Anticompetitive Conduct Against Intel", 4th August 2010, available at: https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel).

patents, on Fair Reasonable and Non-Discriminatory (FRAND) terms, and to pay a fine. The KFTC's order applies to *Qualcomm's* global patents portfolio, including Korean and non-Korean patents, and covers all willing licensees.[93] The same behavior has been sanctioned by the Chinese NRDC[94] and a cease and desist order has been issued by the Japan FTC.[95] The same case, however, was dropped by the EC after the withdrawal of the complaints.[96] Irrespective of the merit of the case, it is clear that a widespread and uncoordinated application of extraterritorial remedies

[93] KFTC's decision of 20 January 2017 (Qualcomm), Case number 2015Sigam2118, translated by the American Consumer Institute Center for Citizen Research, www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf.

[94] See Allen&Overy Publications, "Antitrust in China: NDRC v. Qualcomm – One All", 12 February 2015, available at: http://www.allenovery.com/publications/en-gb/Pages/Antitrust-in-China-NDRC-v--Qualcomm-%E2%80%93-One-All.aspx.

[95] See JFTC Press Release, "Cease and Desist Order against QUALCOMM Incorporated", 30 September 2009, available at: https://www.jftc.go.jp/en/pressreleases/yearly-2009/sep/individual-000038.html.

[96] See European Commission Press Release, "Commission closes formal proceedings against Qualcom", 24th November 2009, available at: http://europa.eu/rapid/press-release_MEMO-09-516_en.htm.

can create conflicts[97] and ultimately undermine the effectiveness of the enforcement of competition law.[98]

[97] Relevant from this perspective are the US Department of Justice and Federal Trade Commission, "Antitrust Guidelines for International Enforcement and Cooperation", 13th January 2017, available at: https://www.justice.gov/atr/internationalguidelines/download. These Guidelines articulate a clear policy indicating that US agencies '*will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law. In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct.*' Additionally, the 2017 US Guidelines identifies important limits on the Agencies' pursuit of extraterritorial remedies establishing that the agencies '*will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis.*' These provisions shows the inextricable relationship existing between extraterritoriality and comity. As highlighted by BIAC, '*agencies should not engage in the former without full consideration of the latter*' (See BIAC contribution to the OECD Roundtable on the Extraterritorial Reach of Competition Remedies, DAF/COMP/WP3/WD(2017)46, 17 November 2017, pag. 3, para 7, available at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)46/en/pdf).

[98] Differently, as examples of cases were a more restrictive approach was adopted see: (i) the EU *Motorola Standard Essential Patent (SEP)* case (Case AT.39985) and (ii) the EU Samsung case (Case AT.39939), where the EC limited the remedies imposed to conduct occurring in the EEA and patents granted in the EEA; (iii) the US Google/MMI case, where, as highlighted by the FTC Acting Chairman Ohlhausen, the FTC's Consent Decree, which represented a voluntary commitment by the parties, was constrained by the jurisdiction of the District Court. '*Through this limitation, the consent cabins its application only to the aspects of the global conduct needed to effectively redress harm or threatened harm to U.S. commerce and consumers.*' See MAUREEN K. OHLHAUSEN Acting Chairman, Federal Trade Commission, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints, IBA 21st Annual Competition Conference September 8, 2017, available at: https://www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf.

Same reasoning are applicable to the approach taken by the German Competition Authority in its *Facebook* decision.[99] Many commenters doubt about the correct application of its competition law enforcement mandate by the Bundeskartellamt.[100] Others competition authorities, indeed, did not adopt such approach but left data protection concerns either to data protection authorities,[101] or addressed them using consumer protection law powers.[102] Once again, irrespective of the merit of the case, it is clear that an uncoordinated approach in solving new competition issues

[99] Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, B6-22/16, February 15, 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3, accessed on 6 March 2019, p. 7 ("Case Summary"). The decision is adopted only under Section 19(1) of the German Competition Act ("GWB") and not under Article 102 TFEU. Section 19(1) prohibits 'the abuse of a dominant position by one or several undertakings.' Section 19(2) sets out an illustrative list in terms that are different to Article 102(a) – (d). It may be doubted whether the conduct would not have an effect on trade between Member States so that the BKA was under an obligation to apply Article 102 as well. In any event, since national competition law may prohibit conduct that is not an abuse under Article 102, the issue is largely theoretical in the actual case. This approach, however, may raise significant issues in terms of consistency of application of EU competition law as Article 3 of Regulation 1/2003 was enacted precisely for the purpose of preventing Member States from applying their national competition law only in order not to take a position under EU law, thus escaping the safeguards applicable when a national competition authority adopts a decision under EU competition law.

[100] W. WILS, The obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt, *Concurrences*, n. 3, 2019.

[101] See Commission Nationale Informatique et Libertés, Délibération n. SAN-2019-001, 19th January 2019, available at: https://www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000038032552.

[102] See AGCM Press Release, "Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes", 7 December 2018, available at: http://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes.

brought by digital firms can create conflicts and ultimately undermine the effectiveness, and the identity of the enforcement of competition law.

1.4. The demand for international co-operation and the role played by Regional Co-operation Agreement: the EU model

The proliferation of national competition law regimes and cross-border competition cases highlight the constant necessity for effective international co-operation both at the global and regional level. International co-operation can take place in different forms as it can be either informal or formal. These forms will be analysed in turn.

Informal co-operation indicates all forms of co-operation among competition authorities excluding those involving the disclosure of confidential information or the collection of evidence on behalf of another authority.[103]

Informal cooperation, being more easily facilitated and not applicable to certain legal restrictions, is likely the most frequent type of cooperation. It has been a primary player in synchronising and merging enforcement actions across jurisdictions. Knowledge and mutual understanding are both gained through the sharing of information and non-confidential details, usually enabled through telephone or face to face meetings, emails and conferences.[104]

[103] See Roundtable on improving international co-operation in cartel investigations (DAF/COMP/GF(2012)16), available at: http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

[104] See Roundtable on improving international co-operation in cartel investigations (DAF/COMP/GF(2012)16), available at: http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

Investigations in cross-border cases can be streamlined by informal cooperation as it permits dialogue on investigation tactics, market details, witness evaluations, mutual disclosure of leads and comparison between authority methods.[105]

The benefit of informal cooperation could be considered even more notable when taking into account that neither the presence or indeed absence of international agreements guarantee cooperation. Hence, working together informally may encourage dialogue regarding non-confidential matters or co-ordinations of unexpected inspections.[106]

[105] For few examples of cases facilitated by informal co-operation see: (i) the *Marine Hose case* the Australian Competition and Consumer Commission relied on information and documentation provided informally by the US Department of Justice (DOJ), as well as information provided formally by the UK's Office of Fair Trading (See *ACCC v Bridgestone Corporation & Ors* [2010] FCA 584; *U.S. v. Bridgestone Corp., Criminal No.* H-11-651; *R v. Whittle, Allison, and Brammar*, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77); (ii) the *Lysine case*: in this case, the Brazilian investigation started following its staff becoming aware of the US DOJ's investigation during a conference they attended in Washington. The information regarding the prosecution was already public and the US DOJ subsequently provided the Brazilian authorities with document and leads (See Roundtable on improving international co-operation in cartel investigations (DAF/COMP/GF(2012)16), available at: http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.); (iii) the Vitamin cartel: where the Brazilian proceeding was aided by informal leads provided by the Canadian Competition Bureau. This exchange was attributed to the professional relationships developed between the staffs of the Brazilian and Canadian authorities (see DE ARAUJO TAVARES (2002), The Brazilian Experience on International Cooperation in Cartel Investigation, Working Paper, 2002 pp.5, 7).

[106] In this sense, a significant example is the co-ordinated investigation carried out by the Competition Commission of South Africa (CCSA) together with the EU and the US DoJ in 2007 in relation to a cartel involving freight forwarding companies. In that case, indeed, the three authorities managed to conducted simultaneous raids (See South Africa's written contribution to the 2008 OECD Roundtable on Cartel Jurisdictional Issues, Including the Effects Doctrine, DAF/COMP/WP3/WD(2008)92 (unpublished) and to the 2012 OECD Global Forum on Competition, DAF/COMP/GF/WD(2012)51).

Differently from informal co-operation, formal co-operation between governments or national competition authorities shows a desire to work constructively with foreign peers. However, though distinct, informal and formal co-operation are not mutually exclusive and can certainly complement each other.

Formal co-operation, instead, can either take the form of bilateral/multilateral agreements (between either governments or agencies), or it can result in regional competition agreements.

Since the initial proliferation of bilateral competition agreements, following the first being signed between the US and Germany in 1976, [107] they have continuously developed and become more thorough and extensive.[108]

While bilateral cooperation agreements can also be between governments, the most commonly used model is inter-agency, this being known as a Memorandum of Understanding (MoU).[109] Despite MoUs not being able to derogate differing national laws, they remain the most popular agreement model.

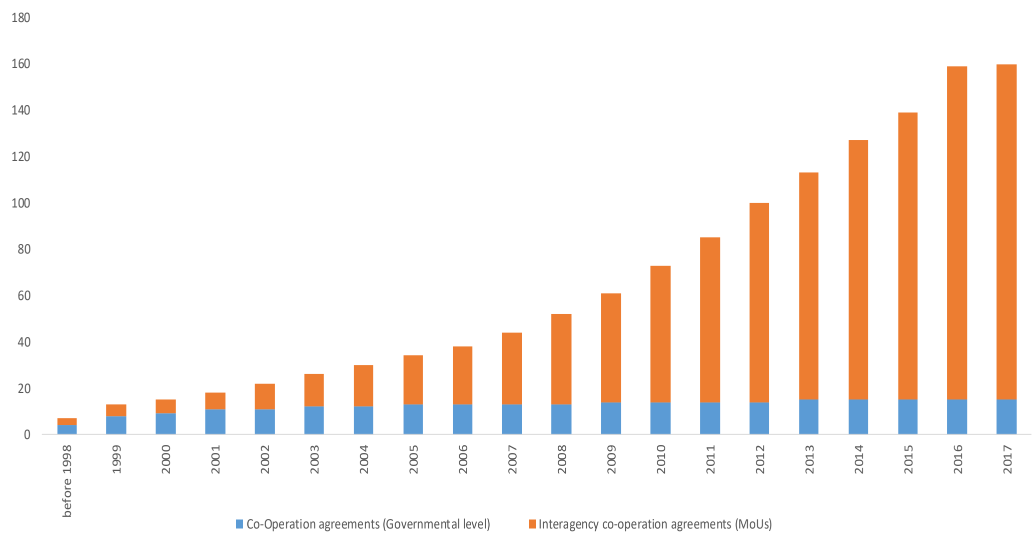
[107] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, 4 Trade Reg. Rep. (CCH) 13501.

[108] For examples see the OECD inventory of international co-operation agreements on competition, available at http://www.oecd.org/daf/competition/inventory-competition-agreements.htm, and the OECD inventory of international co-operation agreements between competition agencies (MoUs), available at http://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm.

[109] See OECD (2016) Note by the Secretariat on Inventory of Provisions in inter-agency co-operation agreements (MoUs), available at the following link: www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)1/REV2&docLanguage=En; OECD (2015) Note by the Secretariat on Inventory of Co-operation Agreements, at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2015)12/rev1&docLanguage=En. The OECD Competition Committee has put together an inventory of international co-operation agreements in which at least one of the signatories is an OECD country, available at the following link: www.oecd.org/competition/inventory-competition-agreements.htm.

There has been a dramatic rise in the quantity of bilateral inter-agency cooperation agreements since 1998, and the number continues to grow (Figure 2). At the end of April 2017, according to the OECD, figures show a minimum of 180 MoUs having at least one signatory from a member country of the OECD or an associate of the OECD Competition Committee.

Figure 2. Development of co-operation agreements



Source: OECD (2017), Inventory of Provisions in inter-agency co-operation agreements (MoUs).

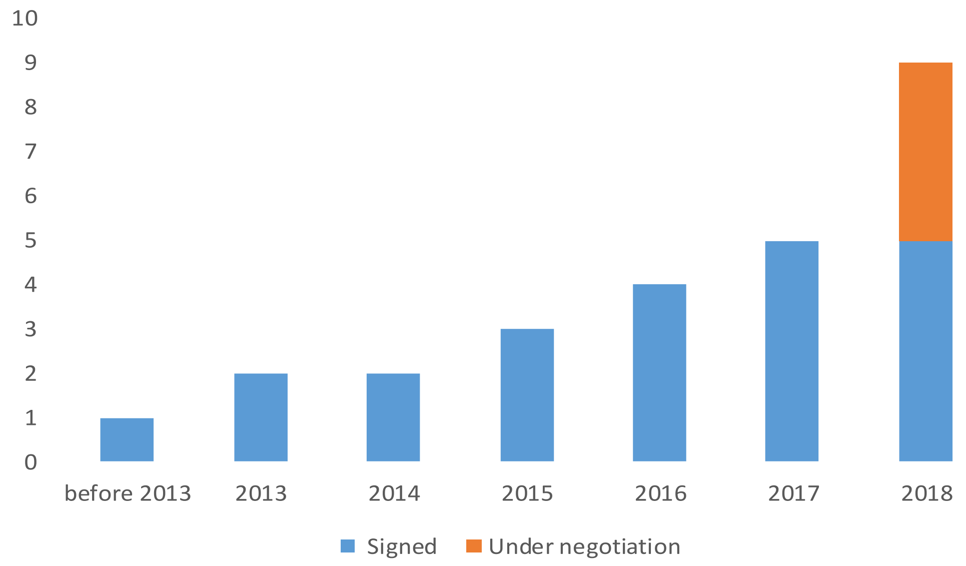
One intriguing outcome, following the taking on of the '2014 OECD Recommendation on international co-operation on competition investigations and proceedings'110 is the rise in second-generation agreements (

Figure 3). These are agreements that contain provisions enabling competition authorities to exchange confidential information under certain circumstances,

[110] OECD Recommendation concerning International Co-operation on Competition Investigations and proceedings, (2014), available at: https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

without the need to seek prior consent from the source of information.[111] Contrary to this, only non-confidential information, or that dependent on the consent of the information source, can be exchanged within a first generation cooperation agreement.

Figure 3. Development of second-generation co-operation agreements



Source: OECD's Analysis (2019).

[111] See OECD Inventory of co-operation agreements (DAF/COMP/WP3(2015)12/REV1), available at the following link: https://one.oecd.org/document/DAF/COMP/WP3(2015)12/REV1/en/pdf. On this point, see also V. DEMEDTS, Second Generation Agreements: Ignoring Crucial Issues, in The Future of International Competition Law Enforcement, Brill, 2018.

According to the OECD, by the end of 2018, six second-generation co-operation agreements have been signed,[112] and three were under negotiation.[113]

Globalisation and digitalization, however, had made effective and efficient international co-operation not only desirable, but necessary.[114] As the new millennium advances, the limits and drawbacks of bilateral agreements are becoming evident, and networking solutions appear more effective and needed. Such a situation over the years has led to the signature of several Regional Competition Agreements ('RCAs').

Compare to bilateral agreements, RCAs have shown to have greater potential as they generally offer more profound levels of integration and a higher degree of co-operation on competition enforcement. Specifically, RCAs allow: (i) regional

[112] See: (i) Australia-US on mutual antitrust enforcement assistance (April 1999); (ii) New Zealand-Australia, Co-operation Agreement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the Provision of Compulsorily-Acquired Information and Investigative Assistance (April 2013); (iii) EU–Switzerland Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (May 2013); (iv) Australia-Japan Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (April 2015); (v) Canada-New Zealand Cooperation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance (April 2016); (vi) Agreement on Co-operation in Competition Cases signed by the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the Government of the Republic of Iceland, the Government of the Kingdom of Norway, and the Government of the Kingdom of Sweden (September 2017).

[113] To the author's best knowledge, by the end of 2018, three second generation co-operation competition agreements are under negotiation between EU-Japan (http://ec.europa.eu/competition/international/bilateral/japan.html), EU-Canada, and EU-Korea. On this final point see V. DEMEDTS, Second Generation Agreements: Ignoring Crucial Issues, in The Future of International Competition Law Enforcement, Brill, 2018.

[114] A. MUNDT, International Competition Convergence Pathways, Challenges, and Prospects for Success, Forty-third Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, 2017.

convergence to be enabled, (ii) the adoption or improvement of competition laws in one region to be triggered, (iii) the generation of scale economies in enforcement, which are particularly important for developing and emerging economies, [115] (iv) an ease of information exchange regarding cross-border competition cases, and (v) building capacity for less experienced authorities.[116]

Among the most developed examples of multilateral regional agreements for mutual assistance in competition proceedings,[117] it is worth mentioning the European Competition Network ('ECN'),[118] the recently renewed Nordic Co-

[115] See OECD Roundtable on benefits and challenges of regional competition agreements, 29 September 2018, DAF/COMP/GF(2018)5, available at: https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf; OECD Roundtable on Improving International Co-operation in Cartel Investigations (DAF/COMP/GF(2012)16), referring to GAL M. S. (2011). International antitrust solutions: Discrete steps or causally linked?, in Drexl et al (eds.) *More Common Ground for International Competition Law*, Cheltenham, Edward Elgar.

[116] See OECD Roundtable on benefits and challenges of regional competition agreements, 29 September 2018, DAF/COMP/GF(2018)5, available at: https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf.

[117] For an overview of regional frameworks addressing competition, see Regional competition agreements - inventory of provisions in regional competition agreements, available at https://one.oecd.org/document/DAF/COMP/GF(2018)12/en/pdf. This document includes general information on selected regional competition frameworks that have developed regional competition provisions and established a Regional Competition Authority. It provides an indicative overview of the different characteristics of such regional competition frameworks.

[118] Regulation n. 1/2003 and *Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 15/10/97, p. 3.*

operation Agreement,[119] and the Trans-Tasman economic co-operation.[120] Among these enhanced frameworks, the ECN is by far the most advanced and active ones. In addition to the legislative progress recently made with the adoption of the so-called 'ECN Plus Directive',[121] relevant in this sense are also the decision practice and case law that show a positive trend in terms of both amount and quality of co-operation enforcement among EU competition enforces (see below Box n. 3).

Box 3. Examples of successful international co-operation in competition proceedings within the EU

Sugar case: This case regards anticompetitive agreements on sales areas, quotas and prices related to the sale of sugar for the processing industry (so-called

[119] The 2017 agreement on Cooperation in Competition Cases signed by the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the Government of the Republic of Iceland, the Government of the Kingdom of Norway, and the Government of the Kingdom of Sweden is available at the following link: http://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf. The agreement is now subject to ratification, acceptance or approval by the parties in accordance with their respective constitutional requirements. As of October 2018, only Sweden and Finland have deposited their ratification instruments in accordance with the agreement. The agreement between these countries entered into force on 28th November 2018.

[120] Australia and New Zealand have developed a close Trans-Tasman economic co-operation based on the close geographical and economic relationship between the two jurisdictions. The effort has culminated in various economic co-operation agreements concluded between the two jurisdictions. *Inter alia*, see New Zealand-Australia second generation agreement on compulsorily-acquired information and investigative assistance (2013), available at: https://www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20New%20Zealand%20Commerce%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf.

[121] For an estensive overview of the ECN Plus Directive and its consequences see F. GHEZZI, and B. MARCHETTI, la proposta di direttiva in materia di Rete europea della Concorrenza e la necessità di un giusto equilibrio tra efficienza e garanzie, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 1015-1076.

industrial sugar) and sugar for the end consumer (so-called retail sugar).[122] Similarly to the *Flour Mill* case, in the *Sugar* case, the BKartA, the ACM, and the BWB closely co-operated at the investigative stage. While all the three authorities exchanged information (such as minutes, evidence, and leniency applications) under Article 12, Regulation 1/2003, the Dutch ACM and the German BKartA also organised joint interviews in Germany.[123]

Towage cartel case: This case concerns cartel agreements between Dutch and German towage companies in various ports in Germany and the Netherlands. In dealing with this case, the Dutch NCA and the BKartA co-operate intensively. As a result, the ACM deferred enforcement actions to the BKartA as it was best-positioned to investigate the case and, simultaneously, seconded a member to the lead agency.[124] This case, while represents a positive development in the direction of a more intensive collaboration between competition authorities, also shows a different way through which EU competition authorities can immagine their co-operation. Differently from the *Flour Mill*[125] and *Sugar* cases, in the *Towage cartel*

[122] See Bundeskartellamt press release, ,'Bundeskartellamt imposes fines on sugar manufacturers', 18 February 2014, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/18_02_2014_Zucker.html.

[123] See German written contribution to the 2012 Global Forum on Competition, p. 216, DAF/COMP/GF(2012)16, available at: http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

[124] See http://competitionlawblog.kluwercompetitionlaw.com/2018/02/06/towage-services-cartel-new-chapter-collaboration-competition-authorities/; https://www.acm.nl/nl/publicaties/samenwerking-bundeskartellamt-en-acm-leidt-tot-schikkingen-sleepsector; https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2017/18_12_2017_Hafenschlepper.html.

[125] For a better description of the case see below the same Paragraph let. c).

case the ACM and the BKartA co-operated not by carrying out parallel proceedings, but joined their enforcement actions in one single investigation, making sure that the Dutch's consumers' interests were adequately protected by the presence of an ACM official within the BKartA's investigation team.

The EU enforcement ecosystem, however, still present several drawbacks and poses a serious threat to the uniform application of EU competition law. Quite paradoxically, the imperfect arrangements of powers and competences within the EU infrastructure has always emerged in almost every highly-profile case where the EU enforcement system had an opportunity to show its advancements in terms of co-operation between competition enforcers. These drawbacks, in other words, have always obscured or shadowed the significant progress the EU system has achieved compared to other regional competition framework. In this sense, among others, particularly relevant are the *Facebook*,[126] *Booking.com*, [127] and *VIMC*[128] cases (which will be analysed in Chapter 2) and the cases commented below in box n. 4.

Box 4. Example of cases showing some shortages of the EU competition enforcement system

FSL Holding case:[129] In the present case, the ECJ expanded the Network's resources by confirming the GC's judgement establishing that the EC can use in a cartel investigation evidence transmitted by a national authority other than a Member State competition authority. The ECJ reached this conclusion with the

[126] See above Paragraph 1.3.3.

[127] See below Paragraph 2.3.2.4.

[128] See below Paragraph 2.3.2.4.

[129] Case T-655/11 – *FSL Holdings and Others v Commission*, judgment of the General Court of 16 June 2015, ECLI:EU:T:2015:383. Similarly see also Case C-407/04 P *Dalmine v Commission*, judgment of the Court of 25 January 2007, ECLI:EU:C:2007:53.

caveat that the rules of Article 12, Regulation 1/2003 (whose objective is to facilitate the exchange of information among NCAs) are not applicable in such cases. Notably, the ECJ held that "*the lawfulness of the transmission to the Commission by a prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law and second that the Courts of the European Union have no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority*". This means that also national authority other than NCAs can provide evidence to the EC or other NCAs. These exchanges, however, will not be cover by Article 12, Regulation 1/2003, as they will be regulated by national provisions, which may differ from country to country, and from a national authority to another. While this case indeed represents a positive development in the structuring of a co-operative competition enforcement environment, it is questionable why Article 12 privileged procedure does not apply to any exchange of information realised to apply competition rules.

Flour Mill case: This case is particularly relevant from a co-operative enforcement perspective. The case started in 2008 when the Bundeskartellamt ('BKartA') conducted several dawn raids on diverse flour mills active in different EU countries. As a result, the German, French and Dutch (ACM) competition authorities received leniency applications and started multiple parallel investigations in close co-operation. The three authorities exchanged documents, and one German official attended the dawn raids conducted in France. Moreover, on top of co-operating at the investigatory stage, by assisting each other in interviewing key market players and by exchanging information, the case is also relevant as the German and Dutch authorities co-ordinated their fines since one of the involved companies pleaded the 'inability to pay defence'.[130] As a result, the ACM modified its decision lowering

[130] See German written contribution to the 2012 Global Forum on Competition, p. 216, DAF/COMP/GF(2012)16, available at:

its initial fine and, in parallel, the BKartA imposed a fine considering the joint assessment of the inability to pay. Consequently, the concerned undertaking announced its decision of not appealing the BKartA's fine and withdrew the already launched appeal against the ACM's first fine.[131]

Following the proceeding of the German, French, and Dutch authorities, also the Belgian NCA opened an investigation against the same anticompetitive conduct and sanctioned five flour mills active in Belgium. Taking into account the fines already imposed by its counterparts, the Belgian Competition Council decided to impose limited and lump sum fines.[132] Such a kind of decision highlights the issues related to the absence of an ECN's budget. Because of the Belgian NCA consideration of precedent decisions, Belgian consumers, while suffering the negative consequences of the anticompetitive conducts adopted by fined companies, will be worst of (in terms of reimbursement) compared to Dutch and German consumers whose authorities issued higher fines due to their first-mover position.

This case, however, also shows the enormous potential of the ECN. Co-operation among competition authorities can take place at different competition proceedings' levels, both (i) at the investigation stage, when collecting evidence, and (ii) at the decision-making stage when imposing fines.

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http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

[131] See Concurrences, the German Competition Authority Coordinates with the Dutch NCA its fining against a German Mill Involved in a Cartel in the Flour Industry, 12 February 2013, available at: https://www.concurrences.com/en/bulletin/news-issues/february-2013/The-German-Competition-Authority.

[132] See Concurrences, the Belgian Competition Council imposes fines on five large flour mills (Werhahn, Meneba, Ceres, Dossche and Brabomills), 28 February 2013, available at: https://www.concurrences.com/fr/bulletin/news-issues/february-2013/The-Belgian-Competition-Council-52258. Notably, one of the Belgian fine was quashed for breach of *ne bis in idem* (Brabomills).

1.5. Conclusions

In conclusion, international co-operation in competition law enforcement has improved significantly since 1990s. Globalisation and digitalisation had made effective and efficient international co-operation not only desirable, but necessary.[133] Improvements have been achieved mainly through the development of bilateral relations between competition authorities. Recently, however, due to the limitations of bilateral co-operation in pursuing effective and efficient international co-operation in competition law enforcement, new multilateral co-operation tools have arisen, with RCAs playing a primary role. Nonetheless, with regard to the established degree of co-operation and convergence, regional cooperation frameworks are substantially differentiated across regions. RCAs have great potentials as they provide platforms capable of facilitating regional information exchanges in cross-border cases, boosting investigative assistance, and building capacity for younger authorities. Among RCAs, the EU one is the most developed and active, although it still suffers considerable shortages capable of reproducing, also at EU level, the problems discussed in Paragraph 1.3. raised by the existing tension between national competition enforcement and supranational markets.

After having contextualised the EU competition enforcement system in the global picture, and having briefly summarised its strengths and weaknesses, it is now time to analyse it in further detail. This will be done by dividing the EU enforcement system in two sub-categories: the EU Public Enforcement and the EU Private Enforcement. The examination of the former will be done in Chapter n. 2, and that of the latter in Chapter n. 3. It is noteworthy for the reader to keep in mind that both the analysis of both the EU Public and Private Enforcement systems will be conducted with the purpose of boosting the protection of the principle of uniform application of EU competition law.

[133] A. MUNDT, International Competition Convergence Pathways, Challenges, and Prospects for Success, Forty-third Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, 2017.

2. The principle of uniform application of EU competition law within the EU Public Enforcement System

2.1. Introduction

In Europe two levels of competition law exist, European and National. The former is primarily applied by the European Commission (EC) and then by the European Courts while the latter is the exclusive responsibility of National Competition Authorities (NCAs) and National Courts. Every European Member State ('MS') has its own NCA which has the power to enforce both National and European competition law (so-called 'parallel application model' or 'decentralised regime'). Simultaneously, according to recital 7 of the EU Regulation 1/2003 ('Modernisation Regulation'), National courts play an essential role in applying EU competition rules. When deciding lawsuits between private parties, they protect the subjective rights under EU law, for example by awarding damages to victims of infringements.[134] The role of the national courts, therefore, complements that of the NCAs at the national level. Because of this two-level system, EU competition enforcement competencies ebb and flow between the EU and the MSs.[135] Power

[134] On the role played by National Courts on the enforcement of EU competition law see G. CUMMING, 'Procedural Consequences of the Crehan Judgment in Enforcement of EC Competition Law by the English Courts', (2005) RLC nº 5, 109, and E. PAULIS, 'Nouvelles procédures et méthodes de coopération entre institutions', in G. Canivet (Ed.), La modernisation du droit de la concurrence (Paris, 2006), p. 41. The latter, in particular, states that '*The (national) judge plays an important role as decision-maker and as such is called upon to contribute to the development of Community law ... (it) is not merely an executor of Community law ...*' (translation by the author). On this point see also S. BRAMMER, Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation, *CMLRev*., 2005, p. 42, pp. 1383-1384; H. NYSSENS and N. PECCHIOLI, Il regolamento n. 1/2003: verso una decentralizzazione ed una privatizzazione del diritto della concorrenza, *Dir. Un. Eur*., 2003, 2-3, p. 357.

[135] U. DIEDRICHS, W. REINERS and W. WESSELS, *The Dynamics of Change in Eu Governance* (Edward Elgar 2011), 14; c.f. 44; H. WALLACE, M. POLLACK and A. YOUNG (eds), *Policy-Making in the European Union* (Sixth edn, OUP 2010), 483; J. DONAHUE and M.POLLACK, 'Centralisation and Its Discontents: The Rhythms of Federalism in the United States and the European Union' in

struggles appear between the EU and the MSs.[136] Some say that power inevitably runs to the EU. Pollack talks of cycles of federalism, power and authority being centralised 'followed periodically by backlashes in which states seek a rebalancing or devolution of power back to the states'.[137]

Researching consistency within the system, Regulation 1/2003 establishes a set of rules to ensure cooperation between national courts and EC (Arts. 15 (1) and 16 (1)), between the EC and NCAs (Art. 16(2)) and, finally, between NCAs and national courts (Art. 15(3) and recital 21). Particularly, Art. 15(1) provides that courts of the MSs may ask the Commission for information it holds or its opinion on questions concerning the application of the Community competition rules. Additionally, according to Art. 15 (3) Competition Authorities of the Member States may submit written observations to the National Courts. On the other hand, Art. 16 establishes that national courts and NCAs cannot take decisions running counter to those adopted by the Commission in the application of Art. 101 and 102 TFEU.[138]

This complex system of enforcement of EU competition law, notwithstanding the harmonisation of substantial provisions under Art. 101, remains characterised by (i) different levels of standardisation of substantial rules in respect of Art. 102 TFEU,

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Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001); and R. KEOHANE, J. NYE, 'Transgovernmental Relations and International Organisations' 27 World Politics, 58-62.

[136] P. LINDSETH, 'Delegation Is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Policy' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 160; N. WALKER, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart 2000), 10-4.

[137] H. WALLACE, M. POLLACK and A. YOUNG (eds), *Policy-Making in the European Union* (Sixth edn, OUP 2010).

[138] Article 16, Regulation n. 1/2003 will be further examined in Chapter n.3.

(ii) various national procedural rules both in front of the NCAs and National Courts, (iii) the heterogeneity of subjects entrusted to apply competition rules and (iv) the heterogeneity of ways in which the substantial and procedural rules are interpreted and implemented. As a result, the current EU enforcement system offers ample space to undermine the uniform application of EU competition rules.

This risk of inconsistency is increased by the so-called ‘digital economy’ and its disruptive innovation. The digitalisation of the economy, indeed, as shown in Paragraph n. 1.2., has increased the risk of non-homogeneous results by raising the number of multinational players and, consequently, of cross-border cases and by presenting many new questions to be answered by EC, NCAs, and National and European Courts. Possible problematic questions, for example, can be: how to define the new digital markets where usually services are discharged for free? How should the SNIPP test be modified to be applied to ‘quality standards’? Are search engines, market platforms and social networks part of the same market? To what extent? Can an algorithm create tacit cooperation? How should the so-called hub and spoke test be applied in a case where instead of persons there is an algorithm? Shall competition law apply to contrast privacy clauses? If yes, what is the acceptable competitive level of privacy? When digital operators incur a supra-competitive privacy level? What should the anticompetitive foreclosure have been? If competition law can be extended to privacy issues, can the same be done with conduct that violates other specific rules such as environment? Or, in other words, can competition law be used every time there is a regulatory failure? All these new issues which were solved differently within the EU, increasingly threaten the EU competition enforcement uniformity.

Based on this increase of inconsistency, this Chapter’s relevance lies in its questioning the effectiveness of the EU Public Enforcement system in ensuring the uniform application of the EU competition rules. Regulation 1/2003, to prevent conflicts between EU and national competition rules, foresees a principle of supremacy of EU competition rules[139] and it created the European Competition Network (ECN). The ECN is a framework whose aim is to guarantee communication and cooperation between the EC and the NCAs as well as ensuring the uniformity of European competition law. It seems, however, to be challenged by the 'digitalisation of the economy'. This Chapter will argue therefore that the ECN should be re-designed by renegotiating Member States' roles, vis-à-vis the Commission. Such reform will allow the ECN to cope with the peculiarities presented by the technological revolution. In conducting this analysis, this Chapter will firstly retrace the ECN's history, showing the reasons behind its current configuration, and introduce the ECN's operating mechanism (Paragraph n. 2.2.). Secondly, it will analyse which are the problematic aspects of the current network system offering some practical examples of its limits (Paragraph n. 2.3.). Finally, it will present some possible solutions to the analysed problems (Paragraph n. 2.4.). 'The increased heterogeneity […] inevitably brings an increase in the heterogeneity within the functioning of [the EU's] institutions and policies'[140] and consequently, it required a modification of the current network to make it absorb such a complex and heterogenic competition enforcement system.

Nonetheless, enhancing uniformity ought not to be done in exchange for the eradication of diversity. Uniformity should be the result of a process able to canalise diversity. Diversity is an asset. Hence, space within the system should be created where diversity can be utilised to produce better quality policies and avoid conflicting results.

2.2. *Res compluris dissimilis inter se, quae tamen consimili laude dignentur*

What Cicerone affirmed in his work De Oratore '*res compluris dissimilis inter se, quae tamen consimili laude dignetur*' is confirmed by the European motto '*in*

[139] Case 14/68, *Wilhelm v Bundeskartellamt* [1969] ECR I; Case C-17/10, *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2012] ECR I.

[140] G. DE BÚRCA and J. SCOTT, 'Introduction' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the Eu: From Uniformity to Flexibility?* (Hart 2000), 2.

varietate concordia'.[141] Diversity is an asset of the European infrastructure, especially in the Competition environment. The Commission or any NCA's approach cannot be considered more important than that of another NCA nor should any NCA tacitly accept the approach of another NCA where it is not shared. This is particularly true after the adoption of Regulation 1/2003, which increased the role played by NCAs and National Courts. Otherwise, '*all* (authorities) *are equal, but some* (authorities) *are more equal than others*'.[142] The system, therefore, needs to allow diversity to be externalised and conflicts generated by diversity to be reassembled and harmonised to ensure uniformity. Paragraph 2.2.1. retraces how the EU competition enforcement infrastructure functioned before the modernisation brought by Regulation 1/2003 and explains the reasons behind the current ECN conformation. Paragraph 2.2.2. analyses the working operation system of the network how it currently is after the adoption of Regulation 1/2003. Paragraph 2.2.3. describe the most relevant developments achieved with the recent adoption of the so-called 'ECN Plus' Directive.

2.2.1. Historical evolution of the EU Competition Framework: ECN's origins

A consistent enforcement of European competition law has always been considered crucial since this subject is an essential pillar of the Union's economic constitution. In this scenario, the EC has constantly enjoyed extensive enforcement and policymaking powers for several reasons. Firstly, until 1962 there was no procedural rule for the EU competition enforcement. The ancestors of Arts. 101 and 102 TFUE (Arts. 85 and 86 EEC) did not provide any detail related to procedures. Only Art. 87 EEC (now Art. 103 TFUE) gave the Council responsibility for determining procedural competition rules, a power used for the first time with the adoption of Regulation 17/1962. Secondly, there was a general lack of experienced NCAs and a risk that EU competition rules could be misapplied by NCAs in the interest of their national economies. This was a valid fear during the first years of

[141] 'United in Diversity'.

[142] G. ORWELL, *Animal Farm* (1945).

EU integration considering that the EU competition law was used as leverage to abolish national impediments to the EU single market.

Addressing these concerns, Regulation 17/1962 formalised the *status quo ante* establishing a 'centralised regime' of application of EU competition law.[143] The Commission then enjoyed the exclusive and ultimate power to decide what was to be considered as an efficiency enhancing agreement. Hence, enterprises could apply to the Commission to know if a certain agreement would satisfy the conditions established by Art. 85(3) EEC (now Art. 101(3) TFEU) (the so-called 'notification procedure').[144] Moreover, other provisions of the mentioned Regulation moved in the same direction. Art. 2 allowed negative clearance of agreements that did not fall within the scope of Arts. 85 (1) and (2) or 86. Art. 9 (3) allowed NCAs to enforce Arts. 85 (1) and 86 only '*as long as the Commission has not initiated any procedure under Arts. 2, 3 and 6*'.[145]

The 'centralised regime', however, caused an immense backlog in the EC's docket.[146] The high number of individual notifications turned the Commission's Directorate General IV (now DG Competition) into a reactive authority.[147] The already precarious efficiency of the 'centralised regime' has fallen with the enlargement of the EU. Indeed, between 1988 and 1998, only 13% of new cases were commenced upon the Commission's initiative, while 58% resulted from notifications and 29% from complaints.[148]

[143] D. J. GERBER, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (2003), 349; C.D. EHLERMANN, 'Implementation of EC Competition Law by National Anti-Trust Authorities' [1996] 17 ECLR, 88-89.

[144] Regulation 17/62, Art. (4).

[145] Regulation 17/1962, Art. 9(3).

[146] J. GOYDER and A. ALBORS-LLORENS, *Goyder's Ec Competition Law* (Fifth edn, OUP 2008).

[147] European Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', Brussels, (1999), para. 44.

[148] Ibid.

Recognising the direct effect of EU competition rules by the European Court of Justice ('ECJ') in 1973,[149] the Commission believed that further involving the NCAs in the enforcement of EU competition law was the natural solution. Thus, already under Regulation 17/1962, the Commission tried encouraging NCAs to enforce EU competition rules through several initiatives.[150] The adoption of block-exemption regulations without non-opposition procedure is an example.[151] The EU Courts played a major role in this decentralisation process. The principle that the Commission has discretion as to whether to investigate an alleged breach of EU competition law based on the EU interest, upheld by the EU Courts,[152] turned out to be a key factor in case allocation between the Commission and NCAs. The key role of private enforcement in EU competition system was recognised in three core

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[149] Case C-127/73, *BRT v Sabam* [1974] ECR-313; P. CRAIG, 'Once Upon a Time in the West: Direct Effect and Federalization of EEC Law' (1992) 12 OJLS453; RM D'Sa, *European Community Law and Civil Remedies in England and Wales* (London: Sweet&Maxwell, 1994), 58-59.

[150] See European Commission, 'Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty', OJ C 39, 13.2.1993, (replaced by 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'; OJ C 101, 27.4.2004, p. 54-64); European Commission, 'Notice on cooperation between national courts and the Commission handling cases falling within the scope of Articles 85 and 86 of the EC Treaty', OJ C 313, 15.10.1997.

[151] See Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Art. 85(3) of the Treaty to categories of franchise agreements (1988) OJ L359/46; Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Art. 85(3) of the Treaty to categories of specialization agreements (1985) OJ L53/1; and Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Art. 85(3) of the Treaty to categories of research and development agreements (1985) OJ L53/5.

[152] See, Case 125/78 *GEMA, Gesellschaft für musikalische Aufführungs – und mechanische Vervielfältigungsrechte v Commission* [1979] ECR 3173; Case T-24/90, *Automec Srl v Commission (Automec No 2)* [1992] ECR II-2223; Case T-7/92, *Asia Motor France SA v Commission* [1993] ECR II-669.

judgements then receipted in the modernisation Regulation.[153] Some say that even under Regulation 17/1962 a competition network between Commission and NCAs already existed,[154] one based on occasional contacts between competition officials. However, notwithstanding the Commission's attempts, it did not reach the expected results because, under Regulation 17/1962, the Commission was the only authority having the power to apply Art. 85(3) EEC (now 101(3) TFEU).

Consequently, various options were winnowed to tackle the problem. A rule of reason approach was proposed, ie reinterpreting Art. 85 EEC to curb the cases requiring a notification. On the contrary, some offered to keep the notification system and decentralise its application by allocating some notifications to NCAs. The prevailing approach was formalised in Regulation 1/2003, namely the decentralisation of the enforcement powers and the dissolution of the individual assessment regime. Regulation 1/2003, replacing Regulation 17/1962, switched from the old 'centralised system' to a new 'decentralised' one.

In the new regime, the application of European competition rules is the responsibility of the EC, NCAs and National Courts. Consequently, now every European Member State has its own NCA with the power to enforce both National and European competition law (so-called 'parallel application model' or 'decentralised regime'). In this novel scenario, the EC's major concern was to avoid the decentralisation undermining the uniformity of EU competition law and preventing possible 'free rider' application of it by some NCAs to protect their

[153] Case C-126/97, *Eco Swiss China time Ltd v Benetton International NV* [1999] ECR I-3055, Case C-344/98, *Masterfoods ltd v HB Ice Cream ltd* [2000] ECR I-11369, and Case C-453/99, *Courage Ltd v Bernard Crehan* [2001] ECR I-06297.

[154] D. J. GERBER, 'The Evolution of a European Competition Law Network', in Ehlermann, Claus Dieter, Atanasiu, Isabela (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, (2005), 449; S. WILKS, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective', in Ehlermann, Claus Dieter, Atanasiu, Isabela (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, (2005), 74.

national economies. To address these fears, the EC established the ECN, whose main aim was to give the EC an instrument through which to control how NCAs would apply EU competition law and, in a case of necessity, intervene.[155]

This characteristic strongly influenced the ECN's current features. Unsurprisingly, within the ECN the EC still preserved a 'dominant position' compared to the other NCAs according to the '*primus inter pares'* doctrine.[156] This can be seen in Regulation 1/2003, Art. 11(6), which preserves one of the central pillars of the old 'centralised enforcement regime' by obliging the NCAs to close their proceedings when the same case is being investigated by the EC.

In conclusion, since the adoption of Regulation 1/2003 and the institution of the ECN, a hierarchy relationship between the EC and NCAs has existed and it creates various problems. Firstly, this system prevents some NCAs, especially the less experienced, from participating actively within the ECN so depriving them of having their say and the system of its main value: diversity. Secondly, for cases involving disagreement within the network, the hierarchical structure combined with the absence of a resolution mechanism leads to one of two options: either the EC directly takes charge of solving the case, causing a new centralisation of power,

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[155] According to P. CRAIG, *EU Administrative Law*, Oxford University Press, 2012, p. 74, NCAs *"act as partners in the implementation of EU policies, but the Commission retains overall responsability for service delivery"*.

[156] Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. zoo, now Netia SA w Warszawie* [2011] ECR I-03055; MARCO AMORESE, 'The primacy of the Commission in the European competition networks as a safeguard against national competition policies and the rejection of the "*primus inter pares*" doctrine [2011], 18, Columbian Journal Law, 177-196; Opinion of Advocate General Kokott, Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, para 85; L. O. BLANCO and A. L. DE PABLO, EU Competition Law Enforcement: elements for a discussion on effectiveness and uniformity, (2011) Fordham 38th Conference on International Antitrust Law and Policy, 47; M. DE VISSER, *Network-Based Governance in EC Law* (Hart 2009), 154; R. STURM, 'Networking in Unchartered Territory: The Relationship between the Members of the Network and Their National Governments' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the EU Network of Competition Authorities* (Hart 2002), 282.

and going against the spirit of the 'decentralised regime'; or conflicting decisions, express or implied, are inevitable.

2.2.2. The Regulation n. 1/2003: The ECN's features

Regulation 1/2003, formalising (with some significant changes) the proposals embedded in the Commission 1999 White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, replaced Regulation 17/1962 as of 1 May 2004. Regulation 1/2003 aims to meet the challenges of an integrated market and the enlargement of the European Union. The main features of the system can be summarised in (i) the principle of the full direct effect of Articles 101 and 102 TFEU; (ii) the principle of decentralisation; (iii) the principle of cooperation and (iv) the principle of uniform application of EU competition law.

The Commission's exclusive jurisdiction over the application of Article 101(3) TFEU has been repealed by Article 1 of Regulation 1/2003 which declares that Article 101(1)-(3) and Article 102 TFEU have direct effect '*no prior decision being required*'. The principle of decentralisation is given effect by repealing the notification system[157] and by empowering NCAs (Article 5 and 29(2)) and National Courts (Article 6) to apply Articles 101 and 102 TFEU directly in full. However, as noted in the previous paragraph, the direct effect of EU competition law and decentralised enforcement threatens the uniform application of competition law. The principles of cooperation and uniform application attempt to cure these possible shortcomings of the new system. Provisions that give effect to these principles are Arts 2, 3, 10, 11, 12, 13, 14, 15, 16, 18 (5)-(6), 19(2), 20(3)-(8), 21(2)-(3), 22, 26(3)(b), 27(3), and 28 of the Regulation.

In this scenario, to give effect to the mentioned two principles, the Commission published the new '*Commission Notice on the cooperation with the national courts of the EU Member States*' and the '*Commission Notice on the cooperation within the Network of Competition Authorities*'. The latter baptised the 'Network' between

[157] The powers of the Commission are laid down in Council Regulation n. 1/2003, Arts. 7-10.

the Commission and NCAs as ‘European Competition Network’.[158] What surprises about Regulation 1/2003 is that the Regulation which established the ‘decentralised system’ does not dedicate any Article to the ECN, nor does the word ‘network’ ever figure in the wording of Regulation 1/2003’s Articles. It only appears in the recitals of the Modernisation Regulation. Another thing that deserves to be noted from a formalistic point of view is that in Regulation 1/2003 capital letters are never used when referring to NCAs. Based on this first set of evidence, some preliminary conclusions can be drawn: (i) the attention dedicated by Regulation 1/2003 to the ECN was minimal; (ii) the designation of the ECN working system was left to a Commission Notice, ie the Commission set all the rules *iure imperi* without a real debate with the NCAs having taken place; (iii) the network was built with a top-

[158] Generally on the European Competition Network see L.F. PACE, La politica di decentramento del diritto antitrust CE come principio organizzatore del regolamento 1/2003: luci ed ombre del nuovo regolamento di applicazione degli artt. 81 e 82 TCE, *Riv. it. dir. pubbl. comun*., 2004, 1, p. 147; A. PERA and V. PACE, The Modernisation of EC Competition Law and the Role of National Competition Authorities – Revolution or Evolution*?, Dir. Un. Eur*., 2003, 2-3, p. 433; L. TORCHIA, Il governo delle differenze. Il principio di equivalenza nell’ordinamento europeo, Bologna, *Il Mulino*, 2006; S. BRAMMER, Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation, in *Common Market Law Review*, 2005, 42, p. 1383; L. ORTIZ BLANCO (a cura di), EC Competition Procedure, *Oxford Univ. Press*, 2006; A. TÜRK, Modernisation of EC Antitrust Enforcement, in H.C.H. HOFMANN and A. TÜRK (a cura di), EU Administrative Governance, *Edward Elgar Publishing*, 2006, p. 215; W.P.J. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Hart, 2008; S.B. VÖLCKER, Developments in EC Competition Law in 2003: An Overview, *CMLRev*., 2004, p. 1027; D.J. GERBER, The Evolution of a European Competition Law Network, working paper, available at: www.http://works.bepress.com/david_gerber/46; F. MÜLLER, The New Council regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition, *German Law Journal*, vol. 5 n. 6; F. CENGIZ, Multi-Level Governance in Competition Policy: the European Competition Network, *Eur. L. Rev*., 2010, p. 35; M. D’ALBERTI, La rete europea delle autorità di concorrenza, available at: http://www.learlab.it/Relazioni/D%27Alberti.pdf; S. WILKS, Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, Governance,* 2005, p. 431; S. WILKS, *Efficiency and Justice in European Antitrust Enforcement*, Oxford-Portland, 2008; E. GUERRI, *L’applicazione del diritto antitrust in Italia dopo il regolamento CE n. 1/2003*, Giappichelli, 2005.

down approach, ie it was structured more around the Commission's concerns than around the Network's needs; (iv) the NCAs were seen at a different and inferior level compared to that reserved for the Commission.

When analysing the ECN, it should be noted that according to Recital 15 of Regulation 1/2003, it is a framework whose aim is to guarantee communication and cooperation between the EC and the NCAs as well as contributing to the development of a shared competition culture in Europe. Nevertheless, the ECN is neither an institution, nor a legal entity, though it can adopt non-binding recommendations and model programs.[159] The European Council and the European Commission clarified these aspects in a Joint Statement on the Functioning of the Network of Competition Authorities stating that: '(the ECN do) *not create any legal rights or obligations. It is limited to setting out common political understanding shared by all Member States and the Commission on the principles of the functioning of the Network*'.[160]

Regarding the working schemes of the ECN, Regulation 1/2003 adopted a 'parallel application model', allowing the application of both EU and national competition rules in parallel to unlawful conduct affecting trade between MSs. To prevent possible conflicts between the EU and national competition rules, Regulation 1/2003 foresees a 'principle of supremacy of EU competition law' over the national one following the ECJ's case-law as expressed in *Walt Wilhelm case*.[161] According to Art. 3(2) of Regulation 1/2003, in fact, national competition rules may not hamper agreements not restricting competition within the meaning of Art. 101 TFUE. The only situation in which this supremacy standard is not applied concerns

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[159] Case C-428/14, *DHL Express (Italy) Srl v Autorità Garante della Concorrenza e del Mercato*, [2016], ECR I.

[160] European Council and European Commission, 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', (2002), (15435/02 ADD 1 RC 22).

[161] Case 14/68, *Wilhelm v Bundeskartellamt* [1969] ECR I.

the national rules regarding unilateral conduct, merger and other different objectives, such as unfair competition laws (Art. 3(2)).

Furthermore, to ensure that the network reaches a satisfying level of cooperation and convergence, Regulation 1/2003 also foresees a signalling and work allocation mechanism. Under the former, the EC and the NCAs are obliged to inform each other about initiation of proceedings (Art. 11(2)-(3)), envisaged decisions (Art. 11(4)) and to exchange information gathered during investigations (Art. 12). NCAs can call upon the EC for cases involving the application of EU law and are compelled to advise the EC of every decision they take. Draft decisions can be shared with other ECN members. Moreover, Regulation 1/2003, beyond the possibility of exchanging information between NCAs, has also foreseen their use as evidence for the purpose of applying EU competition law (Art. 12 (2)-(3))[162] and the option for NCAs to request other NCAs to undertake investigations or other fact finding measures (Art. 22).[163] Notably, according to Article 22(2) of Regulation

[162] According to Article 12, Regulation 1/2003, Information exchanged shall only be used in evidence for the purpose of applying Articles 101 and 102 TFEU and in respect of the subject-matter for which the information was collected by the transmitting authority. Additional limitations exist were the information exchanged must be used in evidence to impose sanctions on natural persons. Such outcome, could be possible only if: (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Articles 101 and 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. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions. On this point see D. REICHELT, To What Extent Does the Co-operation within the European Competition Network protect the Rights of Undertakings?, in *CMLRev.*, 2005, p. 745; R. BONATTI, La libera circolazione della prova nel nuovo regolamento europeo della concorrenza, in *Riv. trim. dir. proc. civ.*, 2006, 1, p. 193.

[163] According to Article 20(1), Regulation 1/2003, the competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Articles 101 or 102 TFEU. Any exchange and use of the information collected shall be carried out in accordance with Article 12. Critically on the potential

1/2003, the Commission, differently from the other members of the Network, can not only ask but also order by a decision under Art. 20(4) another NCA to carry out inspections on its behalf. In practice, network members interact with each other by means of an electronic database called the 'ECN Interactive' run by the ECN EC's Unit.

The ECN work allocation mechanism established by Regulation 1/2003, as integrated by the European Commission (2004) Network Notice, envisaged a procedure which seeks to guarantee that cases are conducted by well-placed Authorities, meaning when they are in the best position to effectively deal with infringement.[164] The Commission is considered well-placed if either a case produces effects in more than three Member States, or it is closely related to other aspects of EU law or raises novel competition issues. A case reallocation takes place only if either the Authority which commenced the case is deemed not well-placed to act or other Authorities also consider themselves well-placed. The case reallocation, save exceptional circumstances, should be done within two months;[165] after that an Authority must inform the others that it intends to pursue a case.[166] It

unattended consequences of Art. 12 provision see B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28.

[164] European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' (2004) OJ C101/43, para 8, according to which "an authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met: (i) the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory (so-called material link); (ii) the authority is able to effectively bring to an end the entire infringement (so-called effectiveness link); (iii) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement (so-called evidence link)."

[165] Ibid, para 19.

[166] According to Art. 13, Regulation 1/2003, where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 101 or 102 TFEU against the same anticompetitive conduct, the fact that one authority is dealing with the case shall

is also possible that a case is simultaneously handled by different Authorities with one of them appointed as 'lead authority' to coordinate their activities. Parallel action by two or more NCAs may be appropriate where an infringement distorts effective competition in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.[167] In the event of jurisdiction conflicts between NCAs, the only available 'safety valve'[168] of the system is article 11(6) of the Modernisation Regulation which states that the EC has the power to advocate the case and thus relieve the NCAs of their responsibility therein.

Despite this legislative framework, the ECN in its current configuration, especially considering the challenges presented by the digital revolution, may not be able to achieve its assignment to ensure a consistent application of EU competition law within the EU 'Single Market'. The digital revolution, in effect, has intensified the risk of non-homogeneous results by raising the number of multinational players and, consequently, of cross-border cases[169] and by increasing the numbers of new competition issues needing a solution. The ECN's shortages will be examined in the next chapter.

be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case. In this sense see below Paragraph 2.3.2.4. (a) that analyses Case T-431/16, *VIMC – Vienna International Medical Clinic GmbH v Commission*, Judgment of the General Court of 26 October 2017, ECLI:EU:T:2017:755.

[167] European Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' (2004) OJ C101/43, para 12.

[168] M. MONTI, 'The Network Concept, Competition Authority Networks and Other Regulatory Networks' [2004], European Competition Law Annual 2002, 8.

[169] J. MANYIKA, J. BUGHIN, S. L., O. NOTTEBOHM, D. POULTER, S. JAUCH and S. RAMASWAMY, 'Global flows in a digital age: How trade, finance, people, and data connect the world economy', [2014], *McKinsey Global Institute*.

2.2.3. The 'ECN Plus' Directive

2.2.3.1. The 'ECN Plus' Directive: a general introduction

The system as designed by Regulation 1/2003 is going to be further improved by the transposition of the recently approved 'ECN Plus Directive'.[170] Directive 1/2019 was adopted since the system, as established by Regulation 1/2003, led to a sub-optimal protection of competition due to distortions and imbalances in the application of EU competition law. According to the EU Commission's Staff Working Document 'Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues',[171] such sub-optimal application of EU competition rules was the consequence of several network's shortcomings in terms of institutional design and enforcement powers (inspections, investigations, sanctions and remedies) existing among ECN members.[172] While all

[170] 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, O.J. L11,14.1.2019, P.3-33. For an overview of the Directive and its implications see F. GHEZZI, and B. MARCHETTI, la proposta di direttiva in materia di Rete europea della Concorrenza e la necessità di un giusto equilibrio tra efficienza e garanzie, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 1015-1076.

[171] European Commission Staff Working Document, *Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues,* Brussels, 9-7-2014 SWD(2014) 231 final.

[172] F. JENNY, The institutional design of Competition Authorities: Debates and Trends, *mimeo*, 2016; A. PIARKIEWICZ, M. BOTTA, NCA's Institutional Design and Enforcement Strategies*, EUI Policy Brief*, 2016/03; W.E. KOVACIC, D.A. HYMAN, Competition Agency Design: What's on the menu, *GWU Legal Studies Research Paper n° 2012- 135*; A. FELS, H. ERGAS, Institutional Design Of Competition Authorities, *OECD Competition Committee*, 17/18-01-2014, DAF/COMP/WD(2014)85, available at: http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm; E.M. FOX, M.J. TREBILCOX, The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project, *New York University Law and Economics Working Papers*, 8-1-2012; W.E. KOVACIC, The Institution of Antitrust Law: How Structure Shapes Substance, *110 Mich. Law Rev.*, 2012, p. 1021 ss.; M. BRONCKERS, A. VALLERY, EU Competition Law After the Menarini Case*, Mlex Magazine*, 3, 2012,

ECN members apply EU competition rules *ex* Regulation 1/2003, under the same Regulation their institutional configuration[173] as well as their investigating, decision-making, and sanctioning powers remained governed solely by national laws.[174] In this scenario, the primary aim of Directive 1/2009 was providing NCAs with a minimum set of rules concerning their independence, resources, investigative and sanctioning powers as well as mechanisms for mutual cooperation.

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p. 44 ss.; G. BREI, Due Process in EU antitrust proceedings – causa finita after Menarini?, 13 *ZWeR*, 2015, p. 104; W. WILS, The Compatibility with Fundamental Rights ofthe EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker, 37 *World Competition*, 2014; M. BERNATT, Between Menarini and Delta Pekarny – Strasbourg view on intensity of judicial review in competition law, *mimeo*; A. SANCHEZ-GRAELLS, The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156904; H. SCHWEIZER, Judicial Review in EU Competition Law, in D. GERADIN, I. LIANOS (eds.), Research Handbook on EU Antitrust Law, *Edward Elgar Publishing*, 2014; M. BOTTA, A. SVETLICINI, The right of fair trial in competition law proceedings: Quo vadis the courts of the new EU Member States?, 9th ASCOLA Conference Warsaw 2014 on procedural fairness in competition proceedings; G. MONTI, Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and European Competition Network, *EUI Working Paper*, No. 2014/1.

[173] The public enforcement systems provided for in the Member States are different: they can provide for a single antitrust authority that combines inspection and sanctioning functions, two distinct administrative authorities, one with inspection and investigation functions and the other with decision-making functions, or a system in which an authority with inspection functions is supported by a judge, to whom the system entrusts the function of sanctioning and providing sanctions. The first institutional model, with some slight variations, can be found, for example, in Italy, Germany and France. The second model, instead, characterises the Belgian experience, while the third and last model is found, among others, in Ireland. Despite the differences, however, the EU NCAs recognise each other for the purposes of co-operating within the ECN (point 8 of the Joint Declaration by the Council and the Commission on the functioning of the network (doc. 15435/02).

[174] According to H. ANDERSSON, ECN Plus – Should the New EU Directive Empowering National Competition Authorities be all about Effectiveness?, ASCOLA Conference, Stockholm 15-17 June 2017, within the ECN *"institutional set up varies and the EU leaves the Member States a large degree of flexibility for the design of their enforcement regimes"*.

Consequently, Directive 1/2019 undertook the following actions: (i) it strengthened NCAs' independence from both political and non-political influences;[175] (ii) it reinforced NCAs' economical, financial, human, and infrastructural resources;[176] (iii) it strengthened and harmonised NCAs' investigating[177] and sanctioning

[175] For instance, some EU NCAs are part of ministries (as it was the case until recently in Belgium and Slovenia) or depend directly on a minister who can, among others, give general instructions, order studies, sector analyses, investigate specific cases or even consider the need to apply provisional measures. For some practical examples of situation where the independence of some NCAs was undermined see Commission Staff Working Document, 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 1/2, cit., p. 26-27; American Chamber of Commerce to European Union, Empowering the national competition authorities to be more effective enforcers, February 2016, p. 2; Assonime, European Commission consultation *"Empowering the National Competition Authorities to be more effective enforcers"* Some comments – 4/2016, p. 2; Bundeskartellamt, Empowering the national competition authorities to be more effective enforcers, January 2017, p. 15; W.P.J. WILS, Competition Authorities: Towards more Independence and Prioritization? The European Commission's "ECN+" Proposal for a Directive to Empower the Competition Authority of the Member States to be more Effective Enforcers, paper presented at the Conference 'New Frontiers of Antitrust', Paris, June 2017.

[176] According to the EU Commission (*Report on the 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 (COM(2017)0142 – C8-0119/2017 – 2017/0063(COD)*) some NCAs are confronted with a lack of human and financial resources, which may affect their ability to enforce the EU competition rules effectively. For example, some NCAs were found to be not able to carry out simultaneous investigations at all members of an alleged cartel, thus allowing them valuable time to destroy evidence not to be discovered. Other authorities were found to lack the necessary forensic IT tools to find evidence of violations on technological devices.

[177] For instance, some NCAs lack fundamental investigative powers to collect data and information (for example, the German Bundeskartellamt till recently could not require companies to provide the data and documents requested in the course of investigations if their content could lead to the imposition of a penalty on them), to conduct surprise inspections outside the premises of the company (as it is the case in Italy, Denmark, and Bulgaria) or to consider evidence contained on

powers;[178] (iv) it harmonised leniency programmes;[179] (v) it enhanced mechanisms for procedural co-operation and investigative assistance among NCAs.

Finally, it is worth mentioning that while Directive 1/2019 standardises NCAs' institutional design and powers and makes them more effective enforcers, it devotes only one (and partly pleonastic) provision, Article 3, to ensure minimum standards to guarantee a certain level of protection of undertakings' safeguards and rights of

digital media (It was calculated that the NCAs of 6 Member States cannot access company data during inspections if stored in cloud systems or servers located in other countries. In 5 Member States, NCAs cannot verify the content stored in mobile phones, and in 7 cases NCAs cannot carry out the so-called continuous inspection procedures (i.e. continue to verify the seized hard disks once the inspection at the premises of the company has been completed)). In addition, their investigative powers are often ineffective because penalties for non-compliance are either not provided or not sufficiently effective.

[178] Some elaborations have led to the assertion that for the same infringement (of equal duration and gravity), committed by undertakings with the same turnover at national and worldwide level, the applicable sanction may vary by 2500%. In some Member States there is a maximum in terms of percentage of the undertaking's turnover, while in others there is a fixed maximum threshold expressed in local currency (as it is the case in Estonia); again, when referring to turnover, the maximum percentage is sometimes different (generally 10% is the maximum percentage, but in some Member States it is 5% for certain infringements, while in others it can reach up to 80% of the undertaking's turnover in the most serious and longest-lasting cases.) and the notion of undertaking and the geographical size of turnover are different when calculating the actual penalty (in some Member States, reference is made (for the maximum threshold) to the worldwide turnover of the entity involved in the infringement; in others, such as Belgium, to national turnover only). Finally, in 11 Member States structural remedies cannot be applied either for infringements of Article 101 or for infringements of Article 102. For more detailed information see N. DUNNE, Converging in Competition Fining Practices in the EU, 53 *Common Market Law Review*, 2016, p. 457 ss.; D. GERADIN, The EU Competition Law Fining System: A Reassessment, TILEC Discussion Paper No. 2011/52, 2011, p. 35.

[179] Critically on the risk of a new centralisation of power in the EC's hands as a result of the makers system designed by Directive 1/2019 see F. GHEZZI, and B. MARCHETTI, la proposta di direttiva in materia di Rete europea della Concorrenza e la necessità di un giusto equilibrio tra efficienza e garanzie, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 1015-1076.

defence. As result, there is a risk that the ECN network will be uniform in terms of NCAs design and powers but not in terms of undertakings' guarantees, so compromising the level playing field for the businesses and consumers as well as the effectiveness of the public enforcement.

2.2.3.2. The 'ECN Plus' Directive: procedural co-operation

Directive 1/2019 while empowering NCAs and increasing consistency of national leniency regimes presents a dedicated chapter to increase procedural co-operation between NCAs. Chapter VII of Directive 1/2019, indeed, provides rules on mutual legal assistance among NCAs. Article 24 establishes that NCAs are to be given powers to carry out an inspection or interview on behalf and for the account of another NCA, and exchange and use as evidence, the collected information provided the constraints of Article 12 Regulation 1/2003 be respected. Articles 25 and 26 provide the conditions for legal assistance with, respectively, notifications of preliminary objections/other documents, and the enforcement of fines and periodic penalties where enforcement in the applicant NCA's MS proved non-sufficient or fruitless.[180] According to Article 27(1), the actions requested under Articles 25 and 26 are carried out under the law of the requested NCA, except made for limitation periods requests for the enforcement of fines or periodic penalties which are governed by the law of the applicant NCA's MS (Article 26(4)).

[180] F. WAGNER-VON PAPP, 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 ('ECN Plus Directive'), *Competition Policy International*, January 2019. Requests for assistance under Articles 25 and 26 are executed by use of a 'uniform instrument' to which the act to be notified or enforced is to be attached. The uniform instrument has to contain the information listed in Article 27(2), and in the case of the enforcement of a fines or periodic penalty decision additionally the information listed in Article 27(3). The uniform instrument does not require any act of recognition in the requested NCA's Member State. However, the applicant NCA has to provide the uniform instrument, and (if required by national law of the requested NCA's Member State) the act to be notified or enforced, in the official language (or one of the official languages) of the requested NCA's Member State, unless the NCAs bilaterally agree otherwise.

Directive 1/2019 seems moving forward compared to Regulation 1/2003 when holding that the requested NCA shall not be obliged to execute an Article 25 or 26 only if it is able to demonstrate on '*reasonable grounds*' that the execution of the request is manifestly contrary to its Member State's public policy (Article 27 (6)). While not introducing an explicit '*duty to co-operate*' (such as Article 20(4), Regulation 1/2003 for the EC), Article 27(6) seems to limit considerably the NCAs' margin of discretion when refusing legal assistance requests. Such 'informal co-operation duty', however, is counterbalanced by Article 27(7) (8), which entitles the requested NCA to reimbursement of all incurred costs. The requested authority may recover 'Article 26-request-related costs' from any recovered fines or periodic penalties (Article 27(8)).

Disputes related to the lawfulness of an act or decision, respectively, to be notified or enforced, are governed by the bodies and law of the applicant NCA's Member State. Contrarily, the bodies and law of the requested NCA's Member State regulate disputes concerning the validity of the enforcement measures taken by the requested authority.[181] Finally, Article 33 formalised the *status quo ante* by establishing that the EU budget will bear the costs faced by the EC for running the ECN and its centralised information system.

[181] On this point B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28, has noticed that the new system causes some new problems: (i) the different safeguards and guarantees recognised and applied by NCAs means that undertakings are subject to different rules and procedural guarantees according to which NCA carries out a given investigation or investigative measure; (ii) in the absence of a homogeneous procedural law, it will be necessary to ascertain on a case-by-case basis whether the information circulated within the ECN has been collected in accordance with the relevant (specific) national procedural rules; (iii) it will be necessary to establish who is the guarantor of the legitimacy of this circulated information and of its correct collection. On these points see also M. MEROLA and D. WAELBROECK, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003?, *Bruylant*, Paris, 2010, 306; I. VAN BAEL, Problemi irrisolti nel diritto procedurale antitrust comunitario, *Conc. merc*., 2010, p. 435.

2.3. *Res novissima ex argomento vetustissimo*

Galileo Galilei used the expression '*res novissima ex argomento vetustissimo*' to argue that behind any problem there is opportunity. Before speaking about opportunities, however, in this chapter the ECN's issues and criticalities will be treated again and analysed systematically. Paragraph 2.3.1. will show the different kinds of cooperation which are in theory available. Paragraph 2.3.2 will examine in concept the current ECN's problems which will be divided into endogenous criticalities, Paragraph 2.3.2.1, and exogenous criticalities, Paragraph 2.3.2.2. Part 2.3.2.3 will then demonstrate how the mentioned criticalities are exacerbated by the digital revolution. Finally, Paragraph 2.3.2.4. will show some practical examples of the highlighted problematics.

2.3.1. From multi-cooperative-enforcements to a single co-enforcement

The founding fathers of the ECN could have structured it in different ways. Four different growing levels of 'interaction' between the EC and NCAs can be identified at least. The first and most basic can be classified as 'technical cooperation'. In this scenario, the EC and NCAs will cooperate in exchanging information regarding closed and ongoing cases, helping each other carry out investigations and exchanging expertise. The varied weak points of this cooperation include the fact it does not ensure that the enforcement actions address the same policy issues.

A second category of cooperation can be named as 'political cooperation'. In this case, the EC and the NCAs together would ex ante define the priorities of their enforcement actions. This modality, however, leads to multiple issues. Firstly, it does not ensure a technical cooperation consequently not creating the benefits – above mentioned - related to it. Secondly, it does not guarantee a homogeneity of results of the national enforcement actions as ex-ante prioritisation is not the same thing as ex-post reached priorities.

A third kind of cooperation, titled 'techno-political cooperation', is the result of a combination of the first two. Here, the interaction levels between the EC and NCAs are consistently increased compared to the first two scenarios taken singularly. A 'techno-political cooperation' ensures that all the network members will cooperate and help each other carry out their duties and that their enforcement actions are aligned to address the same market criticalities. This cooperative methodology is the one currently adopted by the ECN, due to be reinforced with the recently proposed Directive to empower the NCAs to be more effective enforcers.[182] Although this initiative should be welcomed, it is not without criticism. This cooperation modality is still not able to ensure a consistent application of EU competition law. It is not able, indeed, to guarantee that the ex-ante identified political priorities are ex-post executed in the same way.

The fourth and final stage in the cooperation scale is the so called 'single co-enforcement' level. Notably, the 'single co-enforcement' is not an evolution of the previous 'techno-political cooperation', but rather it is a revolution of it. The paradigm changes. At the co-enforcement stage, consistency is no longer the result of the sum of synchronised multiple national and EU actions; it is the consequence of their fusion in a single action. There is a switch from multiple enforcements to a single enforcement while preserving multiple enforcers. To clarify, at this level the ECN's members should not only identify their enforcement priorities upstream and share information, expertise, and resources at the investigative stage. They should also agree on the final results of the carried-out enforcement actions to avoid, explicit or implicit, inhomogeneous results. It is challenging, indeed, if not impossible, using Wilks's words, '*divorcing "policy-making" from "policy*

[182] European Commission, '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' COM(2017) 142 final; 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, OJ L11, 14.1.2019, p.3-33.

implementation'".[183] This should be the level of integration towards which the ECN should move. And this should not surprise. As much as the Single Market is more than the mere sum of its constituent national markets, the enforcement to preserve it should be more than the sum of national and EU enforcement actions.

The co-enforcement level can symbolically be represented by the Vitruvian Man,[184] a drawing depicting a man in two superimposed positions inscribed in a circle and square, which can be reinterpreted as follows: the circle is the European Single Market, the square the European Member States' markets, and the Man the ECN. Although representing different things with different values (the universe the circle and the earth the square), the circle and the square have the same area. This explains how the Single Market, though having the same area as the sum of national markets, has a different and higher value. As much as the Vitruvian Man, in its two superimposed positions, indicates the union between art and science, it can represent the ECN as the union between the EU and National levels of enforcement.

2.3.2. The ECN's criticalities

The ECN's criticalities may be endogenous or exogenous. The endogenous problematics can be grouped into five macro-categories: (i) hierarchical structure; (ii) lack of transparency; (iii) no incentives for parallel investigations; (iv) absence of a resolution mechanism to solve disagreements; (v) the merger lacuna. The exogenous issue, by contrast, is the possibility for the Member States, established by Art. 3(2) of Regulation 1/2003, to adopt on their territory stricter national laws about unilateral conduct engaged in by undertakings. All these criticalities will be treated in turn. During this excursus, it should always be kept in mind which are the two main scopes of the ECN: (i) sponsor diversity to ensure experimentation and

[183] S. WILKS, 'Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement' 3 ECJ 442; M. SCHILLIG, *Konkretisierungskompetenz Und Konkretisierungsmethoden Im Europäischen Privatrecht* (DeGruyter 2009), 156-7.

[184] The 'Vitruvian Man' is a Leonardo Da Vinci's famous drawing of around 1490 of a nude male (representing the Roman architecture Vitruvius) in a circle and a square.

innovation of solutions;[185] (ii) drive diversity to guarantee consistency and legal certainty. These two purposes will have the double function of highlighting the ECN's dark corners and of being the keystone for their resolution.

2.3.2.1. Endogenous criticalities

a. Hierarchical structure

The first endogenous issue to be examined is the ECN's hierarchical structure. Notably, as identified by Cengiz,[186] this structure is a consequence of the fact that, compared to other traditional cooperation networks which naturally emerge, the ECN came into existence as a highly juridical system, in other words, with a top-down approach. As shown in Paragraph 2.2.1., in fact, the ECN was created to give the EC a valid instrument through which to control how the other NCAs would apply the EU competition law and, if needed, to intervene. Therefore, the hierarchical structure of the ECN was a necessary side effect, with some consequences: (i) it may create problematic dominant positions of some members over the others; (ii) it may undermine the network stability; (iii) it may distort the natural interdependencies among actors.

Dominance makes network members, especially the less prestigious, unwilling to share their experiences and mistakes.[187] Moreover, the hierarchical structure and

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[185] C. SABEL and J. ZEITLIN, 'Learning from Difference: The New Architecture of Experimentalist Governance in the Eu' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 9-10.

[186] F. CENGIZ, 'Multi-level governance in competition policy: the European Competition Network' [2010], ELR, 1-16.

[187] F. CENGIZ, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' EUI Working Papers, 7; O. GERSTENBERG and C. SABEL, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002), 291-2; Y. SVETIEV, 'Networked Competition Governance in the EU: Delegation, Decentralisation, or Experimentalist Architecture?' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 102-4, 110-4.

the absence of a resolution mechanism leads to other problematics. In case of disagreement within the network, there are two options: either the EC directly takes charge of solving the case, thus causing a new centralisation of power going against the spirit of the reformed 'decentralised regime'; or conflicting decisions, express or implied, are inevitable.

The hierarchical structure also undermines the network stability and the interdependencies among ECN's members. As also noted by Cengiz, contrarily to typical multi-level international institutions which produce policies based on agreement and consensus, within the ECN the EC holds a managerial position with powers not shared with the NCAs.[188] Hence, to avoid unequal situations as mentioned in Paragraph 2.2., all ECN members should have identical status and powers, and decisions should be taken based on a consensus-agreement mechanism.

In this scenario, empowering network members to create a level playing field among themselves is key to making the network run effectively and efficiently. In the ECN currently, a degree of harmony in resources, powers, experiences and independence is still not present.[189] Thus, the recent initiative of the EC to harmonise and empower NCAs is heartily welcomed.[190] However, this may not be enough. To ensure a full network functionality, network members' accountability should be strengthened by compelling them to explain each decision and its impacts

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[188] F. CENGIZ, 'Multi-level governance in competition policy: the European Competition Network' [2010], ELR, 1-16.

[189] European Commission, 'Communication from the Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM (2014) 453; European Commission, 'Summary report of the replies to the Commission's Public Consultation on Empowering the national competition authorities to be more effective enforcers' (2016).

[190] European Commission, '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' COM(2017) 142 final.

on others. There is also the danger of retaliation and externalities as a result.[191] Transparency and peer review control are essential for discouraging beggar-thy-neighbour strategies.[192] Fox correctly argued that Regulation 1/2003's rules, such as article 11(6), are there to encourage the MSs to consider externalities.[193] The problem with this is that externalities considerations are the result of a hierarchical and heterarchical threat[194] which has significant consequences on ECN members' spirit of inclusion and perception-conception of those externalities. The hierarchical and heterarchical approach undermines the NCAs' consideration of the ECN as a

[191] C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13.

[192] In economics, a beggar-thy-neighbour policy is an economic policy through which one country attempts to remedy its economic problems by means that tend to worsen the economic problems of other countries. On this see F. SCHARPF, 'European Governance: Common Concerns Vs. The Challenge of Diversity' in Christian Joerges, Yves Mény and Joseph Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, vol Jean Monnet Working Paper No. 6/01 (Robert Schuman Centre for Advanced Studies, EUI 2001), 10. See also C. SABEL and J. ZEITLIN, 'Learning from Difference: The New Architecture of Experimentalist Governance in the Eu' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 12; A. VERDUN, 'Experimentalist Governance in the European Union: A Commentary' 6 R&G, 390; U. BÖGE, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the EU Network of Competition Authorities* (Hart 2002), 113-5); F. CENGIZ, 'Management of Networks between the Competition Authorities in the EC and the US: Different Polities, Different Designs' ECJ, 415-6; and Y. SVETIEV, 'Networked Competition Governance in the EU: Delegation, Decentralisation, or Experimentalist Architecture?' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 114-5).

[193] E. FOX, '*The Elusive Promise of Modernisation: Europe and the World*' 28 Legal Issues of Economic Integration, 144-5.

[194] M. RHODES and J. VISSER, 'Seeking Commitment, Effectiveness and Legitimacy: New Modes of Socio-Economic Governance in Europe' in Adrienne Héritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave Macmillan 2011), 127.

single body and of being a part of it. In other words, considering externalities should not be the consequence of a heterarchical and hierarchical threat but the result of an internal self-valuation.

b. Lack of transparency

The second endogenous matter is the transparency of the policy, case allocation discussions, and exchanges of information. Starting with general policy, to reflect societal concerns and the democratic structure of the legal order, '*deliberation must not take place behind closed doors*'.[195] It is possible that closed groups are needed to build the required mutual trust. By opening them up, there is some risk of endangering this. But, with luck, transparency will 're-politicise' these issues, shifting them from a 'technocratic' domain.[196]

Case allocation decisions should also be publicly available. Of course, here a balance is needed. There is a tension between the need for secrecy, so as not to obstruct ongoing investigations, and the need to publicise the reasoning behind a jurisdiction decision to ensure the right of defence. Although some ECN information, concerning ongoing investigations, is commercially or procedurally sensitive and must not be disclosed, it seems that the current balance of the two interests is all to the advantage of the former. Jurisdiction in one MS instead of another has consequences on the defendant's side. Therefore, it seems appropriate to revise the current balance to obtain the publication and consequent appealability of that decision.

Finally, it must be noted that information exchanges between ECN members, which are a key tool for the efficient functioning of the network, take place without the companies affected by the information being aware of the direction of the exchange,

[195] C. JOERGES and J. NEYER, '"Deliberative Supranationalism" Revisited' EUI Working Paper Law No 2006/20, 4.

[196] C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13.

nor can they in any way block the flow of data collected. Such system seems even more contestable after the adoption of the European General Data Protection Regulation (so-called GDPR)[197] and the additional guarantees that it has introduced in terms of collection, storage, exchange, and treatment of personal information.[198]

c. Parallel investigations

The third endogenous issue is the absence of any incentive to conduct parallel investigation between NCAs. Currently, according to para 12, ECN Cooperation Notice (2004), parallel action by two or more NCAs may be appropriate where an infringement of Art. 101 TFEU (i) has substantial effects on competition mainly in their respective territories and (ii) the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or (iii) to sanction it adequately.

Unsurprisingly, so far the number of parallel investigation has been limited. The existing work allocation mechanism was established to minimise the number of authorities involved in a single case as a caution against departures from the EC's line.[199] However, discouraging parallel investigations raises the probability of

[197] 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), OJ L 119, 4.5.2016, p. 1–88.

[198] Reassuring for NCAs on this point is the opinion released by the EU Data Protection Authority, *Investigative activities of EU institutions and GDPR*, WW/OL/sn/ D(2018)2422 C 2018-0632, Brussels, 22 October 2018, available at: https://edps.europa.eu/sites/edp/files/publication/18-10-30_letter_investigative_activities_eui_gdpr_en.pdf.

[199] A. ISRAEL, J. M. LANG, F. HÜBENER, 'A Practitioner's View on the Role and Powers of National Competition Authorities', European Parliament (2016). See also European Council and European Commission, 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', (2002), (15435/02 ADD 1 RC 22), para 16.

conflicting decisions.[200] The current allocation mechanism, in fact, is structured in a way to ensure that traditional cases can be handled by NCAs, whereas cases posing new legal questions ought to be treated by the EC.[201] This responsibilities allocation shows the intent to distinguish between the EC and NCAs' role even in the new decentralised system. The EC dictates the line, solves new competition issues, and the NCAs are degraded to mere performers of the former's directions. Uniformity and consistency were considered the result of a hierarchical imposition by the EC and not as a shared horizontal co-enforcement action whereby parallel investigation could have weakened the primacy of the EC. Therefore, they were bound to be used only in rare situations where all the above-mentioned conditions were satisfied. Ironically, the digital revolution has consistently increased those 'rare situations'.

d. Resolution Mechanism

The final endogenous issue is the absence of a resolution mechanism to solve intra-network disagreements. Due to this lacuna, situations in which the NCAs would struggle to assume jurisdiction or cases of conflicting decisions, either explicit or implicit, cannot be solved when they occur. Currently, the only available 'safety valve'[202] to prevent these disagreements is Art. 11(6), Regulation 1/2003, which states that the EC has the power to advocate cases and thus relieve the NCAs of their jurisdiction in that cases. However, this power cannot be considered as a 'safety valve' since it is an expression not of a horizontal, cooperative, consensus-based mechanism but of a hierarchical one. This kind of solution may undermine

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[200] F. CENGIZ, 'An Academic view on the Role and Powers of National Competition Authorities', European Parliament, (2016).

[201] A. ISRAEL, J. M. LANG, F. HÜBENER, 'A Practitioner's View on the Role and Powers of National Competition Authorities', European Parliament (2016). See also European Council and European Commission, 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', (2002), (15435/02 ADD 1 RC 22), para 16.

[202] M. MONTI, 'The Network Concept, Competition Authority Networks and Other Regulatory Networks' [2004], European Competition Law Annual 2002, 8.

the trust-based relationships between ECN's members, and cause an advantageous centralization of power to the EC contrary to the 'decentralisation'. Unsurprisingly, this power has never been used so far.

Whereas it is self-evident why explicit conflicting decisions across MSs undermine the uniformity of EU competition law,[203] as in the *Booking.com* case,[204] implicit conflicting decisions deserve deeper analysis. These decisions exist when the EC or an NCA runs and closes a case adopting an infringement (or non-infringement, for the EC) decision not shared in its substance by other ECN actors. They are as damaging as the former for consistency because, should an NCA decision not be shared by other NCAs, it would engender a conflict between an NCA's decision and other NCA's non-decisions, capable of destabilising the consistency of EU competition law by subjecting the same behaviour acted by the same operator to different treatment among different MSs. For visual purposes, it could be thought of as the interaction between electromagnetic fields as described by Maxwell's equations, Faraday's Law and the Ampère-Maxwell Law. Faraday and Ampere's Laws particularly fit for present purposes. The former may be roughly stated as '*a changing magnetic field creates an electric field*'. The latter is the opposite: '*a changing electric field creates a magnetic field*'. The same goes for the interaction between National markets within the Single Market. A competition enforcement changing in a National market creates a 'new market', misaligned by others National markets which also distort the Single Market's harmony.

e. Safeguards and guarantees in respect of undertakings' right of defence

As anticipated above in Paragraph 2.2.3.1. and 2.3.2.1.-let. (a), the ECN presents several shortcomings with respect to the protection of the right of defence of undertakings object of proceedings.

[203] See below Paragraph n. 2.3.2.4., let b).

[204] See below Paragraph n. 2.3.2.4., let b).

The first network's shortage is that under the rules laid down by Regulation 1/2003 and the Commission Notice, undertakings have no right to challenge intra-network case allocation decisions.[205] The absence of such right was confirmed by the General Court in the *France Télécom* Case[206] where the Court held that 'Regulation No 1/2003 does not establish a system for allocating competences'[207] and that 'the Notice does not create individual rights for the companies involved to have the case dealt with by a particular authority'.[208] More recently, as it will be shown in Paragraph 2.3.2.4.- let. (a), the GC has reaffirmed the same approach in the *VIMC Case.*[209] This situation is particularly problematic since jurisdiction in one MS instead of another has significant consequences on the defendant's side considering

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[205] On this point see B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28; F. GHEZZI, and B. MARCHETTI, la proposta di direttiva in materia di Rete europea della Concorrenza e la necessità di un giusto equilibrio tra efficienza e garanzie, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 1015-1076; L. TORCHIA, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo*, Il Mulino, Bologna, 2006, p. 27 ss; M. MEROLA and D. WAELBROECK, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003?, *Bruylant*, Paris, 2010, p. 307; M. MACCHIA, L'attività ispettiva dell'amministrazione europea in materia di concorrenza, *Riv. trim. dir. pubbl*., 2007, 173; A. TONETTI, La dimensione autoritatva del diritto amministrativo europeo: i poteri ispettivi in materia di tutela della concorrenza, *Riv. trim. dir. pubbl*., 2005, p. 83; S. BRAMMER, Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation, *CMLRev*., 2005, p. 42, 1383; D. WAELBROECK, Twelve feet all dangling down and six Necks exceeding long. The EU Network of Competition Authorities and the European Convention on Fundamental Rights, *European Competition Law Annual*, 2002; G. DI FEDERICO, The Impact of the Lisbon Treaty on EU Antitrust Enforcement: Enhancing procedural Guarantees Through Article 6 TEU, *Dir. Un. Eur*., 2010, 4, p. 805; L. DE LUCIA, Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts, *Review of European Administrative Law*, 2012, 2, p. 17.

[206] Case T-339/04, *France Télécom SA v European Commission* [2007], ECR II-00521.

[207] Case T-339/04, *France Télécom SA v European Commission* [2007], ECR II-00521, para 82.

[208] Case T-339/04, *France Télécom SA v European Commission* [2007], ECR II-00521, para 83.

[209] Case T-431/16, *VIMC – Vienna International Medical Clinic GmbH v Commission*, Judgment of the General Court of 26 October 2017, ECLI:EU:T:2017:755.

the different procedural rules and sanctioning powers which may be in force across the different national regimes.

The second network's shortage consists in the fact that while the ECN network is considerably developed in terms of co-operation and investigative assistance activities among NCAs, it is not equally developed to provide safeguards and guarantees with respect to undertakings' right of defence correlated with its intra-network activities. This dual system has several consequences: (i) the different safeguards and guarantees recognised and applied by NCAs means that undertakings are subject to different rules and procedural guarantees according to which NCA deals with a given investigation or investigative measure; (ii) in the absence of a homogeneous procedural law, it will be necessary to ascertain on a case-by-case basis whether the information circulated within the ECN have been collected in accordance with the relevant (specific) national procedural rules; (iii) it will be necessary to establish the subject guaranteeing the legitimacy of the circulated information and their correct collection.[210] Such scenario, has correctly argued by Laurence Idot, poses several practical problems not solved neither by Regulation 1/2003 nor by Directive 1/2019. Among others, for instance, how is the network equipped to prevent the circulation of unlawfully collected information? what tools do companies contesting the illegitimate acquisition of information have to prevent it from being transmitted to the other network's nodes? Could an NCA base a decision on information collected by another NCA having powers which it could not have exercised? And, in the event of differing procedural rules, could it be the case that unlawfully collected information could be used by the receiving NCA on the grounds that its national law would consider it lawful? Finally, what

[210] B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28.

consequences does the finding that the evidence is unlawful have on the subsequent decision that has been taken in the meantime?[211]

Paragraph 27 of the Commission Notice only states that 'the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information, the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested'. Such provisions seems particularly dissatisfying since while on the one hand it favours the efficiency of antitrust procedure over considerations of legality and substantive justice;[212] on the other, it seems to be contrasting with the provision contained in paragraph 4 of the Notice, which provides that it is the acting NCA the authority that 'remains fully responsible for ensuring due process in the cases it deals with'.

Although there is a tension between the need for secrecy and informality, so as not to obstruct ongoing investigations, and the need to ensure a serious protection of the undertakings-defendants' right of defence, the absence of transparency, legal certain, and law predictability concerning the regime regulating case allocation decisions as well as the way in which information are collected, exchanged, and used within the ECN, seem to tilted that balance all to the advantage of the former. Hence, it seems appropriate to revise the current balance to obtain more clarity and a better protection of due process and undertakings' right of defence.

f. The merger lacuna

Finally, the last major ECN's problem is that it only regards 101 and 102 cases. Merger cases, indeed, are left out by Regulation 1/2003 since their discipline is left

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[211] See L. IDOT, Pluralism normatif et droit communautaire. L'exemple des pouvoir d'investigation des autorités de concurrence, in C. BAUDENBACHER *et al.* (eds.), *Liber Amicorum in honor of Bo Vesterdorf*, Bruxelles, 2007, p. 394.

[212] This is the case considering that the transmitting NCA is not only not obliged to block the transmission of the contested information in its own system but is not even obliged to inform the receiving authority of the process of contestation underway at national level.

to the so-called 'merger regulation'.[213] Since merger control represent one of the main tasks assigned to competition enforcers across Europe, the exclusion of merger cases from the ECN's competences constitutes a significant limitation of the system. Limitation that is becoming more and more relevant since other competition regional frameworks do not present such a lacuna. In this sense the new 'Nordic Co-operation Agreement' is particularly innovative. The latter is more far-reaching than the ECN framework since, differently from Regulation n. 1/2003, it allows the exchange of third parties' confidential information also in merger cases, and in cases exclusively having a national dimension.[214] The 'Nordic Co-operation Agreement' was prepared after the adoption of the OECD 2014 Recommendation, and it explicitly considered it in the preamble: '*Having regard to the Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings of 16 September 2014.*'[215]

[213] Council Regulation No. 139/2004, of 20th January 2004, OJ L 24, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en.

[214] See Articles 3 and 4 of the 2017 agreement on Cooperation in Competition Cases signed by the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the Government of the Republic of Iceland, the Government of the Kingdom of Norway, and the Government of the Kingdom of Sweden is available at the following link: http://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf.

[215] See preamble of the 2017 agreement on Cooperation in Competition Cases signed by the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the Government of the Republic of Iceland, the Government of the Kingdom of Norway, and the Government of the Kingdom of Sweden is available at the following link: http://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf.

2.3.2.2. Exogenous criticalities

a. Art. 3(2) of Regulation n. 1/2003

Art. 3(2) of Regulation 1/2003 expressly states: ‘Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’.[216] This clause is the result of pressures exercised by some MSs, mainly Germany, who wanted to preserve a well-developed body of case-law on otherwise compromisable matters.[217] In detail, Germany (and other MSs, such as France and Italy) already has a stratified case-law on cases of ‘abuse of economic dependency’ which was and still is fully applied. Denying market actors the possibility of using such case-law would deprive the society of established fundamental rights.[218] Defenders of the current system also argue that in the USA, States retain the power to have stricter antitrust laws than the Sherman Act. In fact, at the time of its enactment, this Act was conceived as a means of supplementing the previously adopted States’ antitrust laws.[219] These are the justifications behind the differentiated regime between Arts. 101 and 102. However, they do not seem to be strong arguments for at least three reasons: (i) the same benefits can be obtained without having the Art. 3(2) differentiation’s drawbacks; (ii) it risks undermining the effectiveness and uniformity of EU competition law on abuse of dominance; (iii) it jeopardises the Commission’s role as Guardian of the Treaty.

[216] Regulation n. 1/2003, Art. 3(2).

[217] BGH, judgment of 7 June 2016 – KZR 6/15; Autorité de la Concurrence, Décision n. 10-D-08 du 3-mars-2010; Tribunale di Milano, Sent. n. 7638 del 2016. See also International Competition Network, ‘Report on Abuse of Superior Bargaining Position’ (2008).

[218] Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013], ECR I.

[219] B.E. HAWK and L.L. LAUDATI, ‘Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison’ [1996] 1 Fordham International Law Journal 18, 20.

Although related, ‘abuse of economic dependency’ and ‘abuse of dominance’ are two distinct and independent infringements. Therefore, to save the former’s benefits, there is no need to create a different national regime for the latter. MSs could adopt specific provisions and develop dedicated case-law on ‘abuse of economic dependency’ without the necessity to link it with the decision practice and case-law on Art 102 TFEU. In this way, MSs could still preserve the acquired case-law on ‘abuse of economic dependency’ without creating discrepancies on Art. 102 TFEU enforcement. Of course, considering the relationship between the two kinds of abuse, it is foreseeable that, with time, the former will converge and follow the solutions adopted for the latter, but this is not necessarily bad. It is only the effect of the convergence and alignment of National markets.

Moreover, the current Art. 3(2) differentiation risks undermining the effectiveness and uniformity of EU competition law. When an NCA applies stricter national provisions on unilateral conduct without applying Art. 102 TFEU in parallel, it creates a situation where: (i) there is no exchange of information among NCAs according to Arts. 11 and 12 of Regulation 1/2003 because EU law is not applied, which creates situations where ECN members cannot control other NCAs’ enforcement activities. It can lead to situations where new competition issues are addressed by one authority without them being discussed within the ECN and without other NCAs having the possibility of making their contributions. (ii) The Commission, in case of disagreement, cannot adopt Art. 11(6) power, weakening the role assigned to the Commission by Art. 17 TEU and specified by para 43 of the ‘ECN Cooperation Notice’ as guardian of European law, including European competition law.[220] According to the ‘ECN Cooperation Notice’, this Commission’s role leads to ‘*the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency*’.[221] This position

[220] European Council and European Commission, ‘Joint statement of the Council and the Commission on the functioning of the network of competition authorities’, (2002), (15435/02 ADD 1 RC 22), para 9.

[221] European Commission, *supra*, para 43.

seems challenging without the Commission having any power, except informal pressures (which create transparency problems), to orient an NCA's actions in a case of disagreement when it exclusively applies National law. An example of this situation is the German *Facebook* case.[222] The fact that the EC is supporting the Bundeskartellamnt's initiative is purely accidental.[223] Therefore, either the Commission does not have a guardian role when it comes to competition law, or legislation on unilateral conduct should not be considered part of competition law. Alternatively, the current Art 3(2), Regulation 1/2003, should be modified. Given the absurdity of the first two scenarios, only the third seems available.

In favour of a National Legislations alignment on 'abuse of dominance', the ECJ's judgement on *Melloni* is also relevant.[224] In that case, the ECJ was asked to determine whether Art. 53 of the Charter gives States a margin to grant more extensive protection of fundamental rights to the accused than that afforded by EU law. The Court held that no such margin existed, citing the principle that 'rules of national law, even of constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State'.[225] This reasoning can be extended to legislations on unilateral conduct although, depending on the viewpoint, they have the effect either of producing a more extensive protection for claimants (a situation similar to the one of *Melloni* case) or a tougher enforcement for defendants. However, what matters according to *Melloni*, is the misalignment between EU and National provisions which, when it exists, can undermine the effectiveness and/or uniformity of EU law, and should be removed. This conclusion is also supported by Art. 3 TFEU, which states that the European Union has

[222] In this sense see also W. WILS, The obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt, *Concurrences*, n. 3, 2019.

[223] See: https://www.theguardian.com/technology/2016/mar/07/facebook-privacy-data-protection-investigation-germany-eu.

[224] Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013], ECR I, paras 55-64.

[225] Ibid, para 59.

exclusive competence in establishing competition rules.[226] Therefore, MSs have already accepted a devolution of powers at a superior level in this field and this devolution should be completed for the reasons stated.

b. Co-operation among National Courts: a network yet to be built

From the perspective of undertakings-defendants' right of defence, the EU enforcement system presents a third and final shortage to be added to the two already mentioned in Paragraph 2.3.2.1.- let. (e): the absence of a network of National Competition Courts and the limited scope of national jurisdictional protection.

The limited scope of national jurisdictional protection is a consequence of the dual system designed by Regulation 1/2003 and Directive 1/2019. Indeed, while on the one hand both legislations provides for close cooperation among NCAs (which not only assist in the preparatory and information-gathering phases, but also become the executive branches of the other authorities); on the other NCAs acts are still subject to the national law of reference and the related jurisdiction. NCAs' acts, therefore, are monitored by the concerned National courts responsible for monitoring their legality. National courts which, across MSs, are distinct, separate, and apply different procedural rules. This separation of jurisdictional competences and variation of powers can be problematic considering the link which may exist among the acts that NCAs can adopt thanks to the ECN (think at the link existing between investigative and final measures or between fine-imposing decisions and executive measures whether adopted by different NCAs).[227]

For instance, an appeal against an enforceable measure before the court of the requested NCA could call into question the validity of the upstream sanctioning

[226] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, Art. 3.

[227] As established by Article 26, Directive 1/2019, which provides that disputes concerning decisions imposing fines or periodic penalty payments are to fall within the jurisdiction of the courts of the requesting State, while any disputes concerning notification or enforcement measures are to be heard by the courts of the State in which the requested NCA operates.

decision, but the absence of co-ordination mechanisms among national courts prevents the courts from examining the case as a whole, requiring the party concerned to appeal both decisions before different courts at the same time, with the risky unpredictable consequences from the perspective of undertakings-defendants' right of defence.[228] For example, what happens if a decision is challenged alleging the unlawfulness of the investigations carried out by a different ECN member? What happens to proceedings pending before an NCA in a MS if simultaneously a court in another MS annuls the investigative measures already incorporated into the sanctioning procedure? Which powers of review does a National or Community court have with regard to investigative measures carried out by an NCA of another MS but relevant to decide whether quoshing the contested penalty?[229]

In conclusion, the third and final 'ECN shortage' is that while Regulation 1/2003 and Directive 1/2019 move the NCAs' network towards a strongly integrated and decentralised European enforcement system, on the contrary, a rigid separation of the jurisdictions continues to exist, prohibiting possible co-operation or joint actions. In other words, the ECN regulatory and administrative integration is not followed by a judicial integration, except for the preliminary ruling mechanism, the application of which, however, remains confined to vertical relations between national courts and the Court of Justice.

Although the topic is extremely complex, it is worth mentioning that some commenters have already provided some solutions.[230] Regardless from the options

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[228] On this point see H.C.H. HOFMANN and M. TIDGHI, Rights and remedies in implementation of EU policies by multi-jurisdictional networks, 20 *European Public Law*, 2014, p. 147.

[229] B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28.

[230] B. MARCHETTI, le garanzie procedurali e processuali delle imprese nella rete europea della concorrenza, *Rivista della Regolazione dei Mercati*, (1) 2014, p. 5-28.

already provided, further discussions and additional actions seem surely needed on this front.

2.3.2.3. ECN's criticalities in the 'Digital Era'

The 'digitalisation of the economy' seems challenging the proper functioning of ECN or, at least, compromising the Network's ability of fully achieving its aims: ensuring the uniformity of European competition law as well as guaranteeing communication and co-operation among NCAs, and between the NCAs and the EC.

The digitalisation of the economy, indeed, as mentioned already in Paragraph 1.2., demands more cooperation between countries, for two reasons. Firstly, numerous large corporations function within digital markets between many countries. Collaborating together across borders would make many things easier, such as gathering evidence, coordinating remedies and sanctions, and resolving disputes of policy. Second to this, there is a good chance of conflict regarding methodologies and results between competition enforcers. This could arise owing to the nature of issues encountered when digital firms are being challenged on competition, these ranging from algorithmic collusion, network effects, two-sided markets to artificial intelligence.[231]

Digital markets in the EU have grown steadily over the past years. Between 2000 and 2014, the EU online total retail sales grew at an annual average rate of

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[231] See A. CAPOBIANCO and A. NYESO, Challenges for Competition Law Enforcement and Policy in the Digital Economy, (2017), 1, *JECL & Pract* 1; J. MANYIKA, S. LUND, J. BUGHIN, J. WOETZEL, K. STAMENOV and D. DHINGRA, Digital Globalization: The New Era of Global Flows, (McKinsey Global Institute February 2016), available at: https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows, last accessed 26 February 2019 ("*Remarkably, digital flows—which were practically nonexistent just 15 years ago—now exert a larger impact on GDP growth than the centuries-old trade in goods*"); UK Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March 2019, p. 122-123 (recommended action n. 19), available at: https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

approximately 22%.[232] Since 2014, the annual growth rates have exceeded 9%.[233] The percentage of individuals making an internet purchase increased from 30% in 2007 to 55 % in 2016.[234]

National markets are not uniform. E-commerce in the EU is geographically concentrated: the United Kingdom, Germany and France account for more than 60% of EU online sales.[235] The highest percentage of online buyers can be found in the United Kingdom and the lowest in Romania.[236] Data shows that there is a correlation between the percentage of online-engaged customers and the internet penetration rate.[237]

[232] N. DUCH-BROWN and B. MARTENS: The European Digital Single Market: its Role in Economic Activity in the EU, Joint Research Centre of the European Commission, Institute for Prospective Technological Studies, Digital Economy Working Paper 2015/17, *JRC* 98723.

[233] Ecommerce News Europe, Annual retail sales via internet are up, 4th February 2019, available at: https://ecommercenews.eu/annual-retail-sales-via-internet-are-up/.

[234] Eurostat Community Survey on ICT usage in households and by individuals (2016). See also Flash Eurobarometer 397 (2015), Consumers attitude towards cross-border trade and consumer protection.

[235] N. DUCH-BROWN and B. MARTENS: The European Digital Single Market: its Role in Economic Activity in the EU, Joint Research Centre of the European Commission, Institute for Prospective Technological Studies, Digital Economy Working Paper 2015/17, *JRC* 98723.

[236] Ibid.

[237] Eurostat Community Survey on ICT usage in households and by individuals (2016). See also Flash Eurobarometer 397 (2015), Consumers attitude towards cross-border trade and consumer protection.

In 2018, the number of users buying goods or services for private use over the internet in Europe had increased to 69%.[238] Of this, 36% was cross-border.[239] This was reached even though: (i) companies establish barriers to cross-border online trade;[240] (ii) only around 40% of websites allow cross-border purchases;[241] (iii) companies selling cross-border encounter many cost-related difficulties.[242] Cross-border purchases also vary significantly between MSs. While 70% of residents of Luxembourg engage in cross-border online shopping, only 2% of Romanian residents do the same. Ordinarily, the intensity of cross-border e-commerce is inversely related to population size.[243]

Digital contents in the EU accounted for 32% of personal online purchases in 2014.[244] A total of 40% of individuals used the internet to access media content online in 2014, up from 21% in 2007.[245] Consumer spending on digital video

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[238] Eurostat, E-commerce statistics for individuals, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals. See also Eurostat Community Survey on ICT usage in households and by individuals (2016) and Flash Eurobarometer 397 (2015), Consumers attitude towards cross-border trade and consumer protection.

[239] Eurostat Community Survey on ICT usage in households and by individuals (2014).

[240] Flash Eurobarometer 413 (2015).

[241] Mystery shopping survey on territorial restrictions and geo-blocking in the European digital single market, (2016). See also M. CARDONA and B. MARTENS, 'Supply-side Barriers to Cross-border e-Commerce in the EU Digital Single Market', Joint Research Centre of the European Commission, Institute for Prospective Technological Studies, Digital Economy Working Paper 2014, JRC 92294.

[242] Flash Eurobarometer 413 (2015).

[243] N. DUCH-BROWN and B. MARTENS: The European Digital Single Market: its Role in Economic Activity in the EU, Joint Research Centre of the European Commission, Institute for Prospective Technological Studies, Digital Economy Working Paper 2015/17, *JRC* 98723.

[244] European Commission, Digital Agenda Scoreboard.

[245] Eurostat data on internet usage in the EU-28.

increased by 400% between 2010 and 2013.[246] In 2013 alone, spending on digital video subscriptions increased by 147%.[247] Consumer spending on video subscription services rose by 113% per year between 2010 and 2014.[248] The number of users grew by 56% between 2014 and 2015.[249]

Based on this data, some features of these markets can be understood: (i) 'Digital Markets' are growing very fast, transforming markets' business strategies and the society in their entirety; (ii) 'Digital Markets' are not uniformly developed across Europe; (iii) the most prominent players of this 'Digital World' are usually huge multinationals which end up forming a new kind of 'natural monopoly' due to the relevance played by network effects and data storage and processing skills;[250] (iii) 'Digital Markets' are highly concentrated, fast-evolving, and *require a timely enforcement*;[251] (iv) "Digital Markets" present a new range of challenges for competition enforcers; (v) 'Digital Markets' do not respect national borders; (vi) public enforcement in a 'National Digital Market' will most probably produce effects also in other MSs. This effect is reinforced by Regulation 1/2003, which does not impose territorial limitations to the Commission or NCAs' enforcement

[246] See https://www.google.co.uk/#q=Creating+a+Digital+Single+Market+Bringing+down+barriers+to+unlock+online+opportunities.

[247] Ibid.

[248] See http://mouillere.com/universconvergents/wp-content/uploads/2017/03/PortabilityfactsheetDSMpdf.pdf.

[249] Ibid.

[250] J. NAUGHTON, 22nd May 2017, conference on '*Online Markets and Offline Welfare Effects'*, Oxford Centre for Competition Law and Policy.

[251] Z. M. BEDDOES, The world's most valuable resources: data and the new rules of competition, (2017) 4th May, The Economist.

powers, i.e. they can investigate cases and apply fines for effects beyond their national markets.[252]

Competition Authorities are fully aware of the complex, supra-national dimension of the challenges brought on by the digitalisation of the economy. Unsurprisingly, over the last decade, several NCAs have increased their degree of co-operation and mutual assistance. Evidence of this phenomena are: (i) the increased ECN's activities, most of which took place since 2012 onward;[253] (ii) the first samples of parallel cases;[254] (iii) the first samples of joint sector inquiry on implications of

[252] OFT, Guidance as to the appropriate amount of a penalty, OFT423, September 2012, para 2.10.

[253] See: http://ec.europa.eu/competition/ecn/documents.html.

[254] *Booking.com* case: (i) AGCM (2015), Provvedimento n. 25940; (ii) Autorité de la Concurrence (2015), Decision available at: http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf; (iii) Konkurrensverket (2015), English Decision available at: http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf; (iv) Bundeskartellamt (2015), Press release of 23 December 2015 and English Decision available at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3; the *Amazon* case: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html%3Fnn%3D3599398 and https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices; the *Adidas* case: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/02_07_2014_adidas.html and http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2 and http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671; the Online Ticketing case:http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/22_03_2016_DFB.ht ml?nn=3599398 and http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/30_01_2014_Fahrkartenvertrieb_DB.html and https://www.ccpc.ie/business/ccpc-commences-formal-investigation-suspected-anti-competitive-conduct-ticketing-sector/.

algorithms and big-data on competition.[255] The European Commission itself explicitly acknowledged in its Sector Inquiry on E-commerce that '*in the light of the results of the e-commerce sector inquiry, the Commission will broaden the dialogue with national competition authorities within the European competition network on e-commerce-related enforcement to contribute to a consistent application of the EU competition rules as regards e-commerce-related business practices*'.[256]

In conclusion, it appears that the digitalisation of the economy has increased the need for co-operation to ensure consistency and to develop better solutions. 'Digital Markets' vary across MSs, but this does not necessarily justify the adoption of different enforcement regimes by NCAs. Of course, different solutions across different MSs maybe justified given National markets' differentiation. Different solutions, however, are only justified to the extent that real reasons require so. Different solutions, therefore, are transitory and should be treated as an exception. Contrarily, in the long term, uniform solutions are needed for the creation of a level playing field across MSs and, ultimately, of a 'Single Digital Market'. Secondly, admitting that different solutions can exist does not mean that the competition enforcement system should be devoid of any mechanism to prevent them where they are not strictly necessary.

[255] See http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf; http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html; https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/19_06_2018_Algorithmen.html.

[256] European Commission, 'Sector Inquiry on E-commerce' COM(2017) 229 final, para 75.

2.3.2.4. Some practical examples of the ECN's criticalities

a. The *VIMC Case*[257]

In the present case, the GC upheld a Commission decision[258] rejecting a complaint by VIMC[259] *ex* Article 13(1), Regulation 1/2003, since the Austrian competition authority (*Bundeswettbewerbsbehörde*, 'BWB') was actively dealing with the case. This case shows that NCAs and EC enjoy parallel powers, and their respective positions and related investigations are 'formally' equated. The problematic aspects of the case seems to emerge when the GC recalled that '*ni le règlement n.1/2003 ni aucune autre disposition du droit de l'Union ne crée de droits ni d'attentes pour une entreprise pour ce qui concerne le traitement de son affaire par une autorité de concurrence donnée. Dès lors, même à supposer que la Commission ait été particulièrement bien placée pour traiter l'affaire et que la BWB n'ait pas été bien placée pour le faire, <u>la requérante ne disposait d'aucun droit à voir l'affaire traitée par la Commission</u>.*'[260]

The absence of transparency on 'case-allocation-discussions' within the ECN might generate a violation of the right of defence. Indeed, jurisdiction in one MS (or at

[257] Case T-431/16, *VIMC – Vienna International Medical Clinic GmbH v Commission*, Judgment of the General Court of 26 October 2017, ECLI:EU:T:2017:755. In this case, as mentioned already in Paragraph n. 2.3.2.1.-let. (e), the GC re-established and reinforced what held in the *France Télécom* Case, where it stated that 'Regulation No 1/2003 does not establish a system for allocating competences' and that 'the Notice does not create individual rights for the companies involved to have the case dealt with by a particular authority' (Case T-339/04, *France Télécom SA v European Commission* [2007], ECR II-00521, para 82 - 83).

[258] Commission Decision C(2016) 3351 final of 27 May 2016 (Case COMP/AT.40231 – VIMC/WK&FGB).

[259] Vienna International Medical Clinic GmbH.

[260] Case T-431/16, *VIMC – Vienna International Medical Clinic GmbH v Commission*, Judgment of the General Court of 26 October 2017, ECLI:EU:T:2017:755, paras 33-34.

EU level) instead of another has consequences on the defendant's side.[261] Of course, as already explained in Paragraph 2.3.2.1., here a balance is needed between the need for secrecy, so as not to obstruct ongoing investigations, and the need to publicise the reasoning behind a jurisdiction decision to ensure the right of defence. Although some ECN information, concerning ongoing investigations, is commercially or procedurally sensitive and must not be disclosed, it seems that the current balance of the two interests is all to the advantage of the former. Therefore, it would seem appropriate to reconsidering the current balance. Also, the 'ECN Plus Directive' was criticised for having missed the opportunity of harmonizing/improving the right of defence protections across Europe.[262]

b. The *Booking.com case(s)*

This case(s) is particularly significant as it simultaneously expresses the strength and weakness of the ECN. It represents the ECN's strength as it shows the network's potentials in terms of 'enabling parallel proceedings'. Notably, the French, Italian and Swedish authorities closely co-operated both at the investigation and closure stages of the case. The three authorities, indeed, concluded the case simultaneously in April 2015, adopting three identical commitment decisions, allowing the so-called 'narrow parity clauses'.[263] Then, the Franco-Italian-Swedish

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[261] See M. BERNATT, M. BOTTA, and A. SVETLICINII, The Right of Defence in the Decentralized System of EU Competition Law Enforcement: a call for harmonization from Central and Eastern Europe. *World Competition*, Vol. 41(2018)/Issue 3, pp. 309-334.

[262] Ibid.

[263] Narrow parity clauses links the price and terms quoted on an online platform to those available directly on the upstream supplier's website, ensuring that the former will not be less attractive than the latter. Wide parity clauses, instead, provides for similar protection on a wider scale, aiming to ensure that the price and terms quoted through the platform in question will not be higher than the price available directly on the upstream supplier's website or on any other platform. In this sense see A. EZRIACHI, The competitive effects of parity clauses on online commerce, *European Competition Journal*, 2015, 11:2-3, 488-519, available at: https://www.tandfonline.com/doi/pdf/10.1080/17441056.2016.1148870?needAccess=true. The theory of harm for 'narrow parity clauses' is that they have the effect of preserving the restriction of

approach was followed by several other competition authorities in Europe, which closed their proceedings accepting commitments modelled on those agreed by the mentioned three NCAs.[264] Consequently, in July 2015, *Booking.com* decided to change EU-wide its 'wide parity clause' to a 'narrow parity clause', which Expedia also did from August 2015.

Simultaneously, however, the case also expresses the ECN's inability to ensuring consistency and uniformity in the application of EU competition rules. Indeed, the initial approach of allowing 'narrow parity clauses' was respectively: (i) not followed in, among others countries,[265] Germany,[266] Belgium,[267] and Austria;[268] (ii)

competition caused by wide parity, because they reduce the incentive for hotels to offer differing room prices on different OTAs.

[264] Among others, see the example of the commitments decision adopted by the Irish NCA at the following link: https://www.ccpc.ie/business/commission-secures-5-year-commitments-booking-com/.

[265] Narrow Parity clauses were banned also in Australia and New Zealand. In this sense see Trivago Business Blog, What's happening with rate parity in the hotel industry?, March 2019, available at: https://businessblog.trivago.com/rate-parity-hotel-industry-status/.

[266] Narrow Parity clauses were banned also in Germany due to the December 2015 Bunderskartellamt's infringement decision ordering *Booking.com* to remove all parity clauses from its contracts before January 31, 2016. A temporary injunction filed in May 2016 by *Booking.com* was unsuccessful; the decision remained in force till it was annulled in appeal by the Higher Regional Court (OLG) Dusseldorf in June 2019. The Court argued that *Booking.com*'s narrow parity clauses were not restrictive of competition, but necessary to prevent "*a disloyal diverting of customer bookings*'', (Az .: VI - Kart 2/16 (V)). In this sense see the following link: https://www.tellerreport.com/news/2019-06-04---bundeskartellamt-disappointed--booking-com-may-prohibit-hotels-lower-prices-in-the-network-.Sy_YZeVRV.html.

[267] In November 2017 the Council of Ministers adopted the draft law of the Consumer Affairs Minister, allowing hotels to freely publish their own rates on their websites. Hotels are now no longer bound by price agreements with popular booking sites such as Booking.com.

[268] 'Narrow parity clauses' have been banned by Austria in November 2016 by an amendment to the law on unfair competition (99.*Bundesgestz: Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb* 1984 – UWG *und des Preisauszeichungsgesetzes:*

overturned in France,[269] Italy,[270] and Sweden.[271] Recently, both the decisions of the Bundeskartellamt and of the Stockholm's Patent and Markets Court both prohibiting '*Booking.com*'s narrow parity clauses' were overturned, respectively,

https://www.bmdw.gv.at/WirtschaftsstandortInnovationInternationalisierung/Allgemeine_Wirtschaftspolitik/Documents/BGBLA_2016_I_99.pdf.)).

[269] 'Narrow parity clauses' have been banned by France due to the August 2015 *Loi Macron* (Article 133 of the *Loi* n. 2015-990 *du* 6 *août* 2015 *pour la croissance, l'activité et l'égalité des chances économiques*: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030978561&categorieLien=id)).

[270] 'Narrow parity clauses' have been banned by Italy with the adoption of the Law n. 124/2017 (http://www.cng.it/comunicazioni/concorrenza_legge.pdf.)).

[271] In July 2018 the Stockholm's Patent and Markets Court prohibited *Booking.com* from using narrow parity clauses. This judgement extended a 2015 decision from Sweden's Competition Authority which had barred *Booking.com* from using wide rate parity clauses. The company was given three months to comply. However, the ruling of the first instance Swedish Patent and Market Court was overturned on 9th May 2019 by the second instance court. The decision cannot be appealed further (see https://www.jdsupra.com/legalnews/price-parity-clauses-and-booking-com-a-29466/).

by the Higher Regional Court (OLG) of Dusseldorf[272] and the Second Instance Court.[273]

The case is also particularly important since, for the first time in Europe, the merits of the different enforcement approaches were considered through an ex-post assessment exercise conducted by the European Commission and a group of ten national agencies. The outcomes of the exercise, however, have been quite inconclusive since it diplomatically suggests only that both types of enforcement '*which are based on a converging theory of harm (...) go in the right direction*'.[274] Based on these results, the ECN agreed: (i) to keep the online hotel booking sector under review and to re-assess the competitive situation in due course; (ii) to subject new enforcement actions or market investigations to the coordination of the ECN; (iii) to establish an early warning system to ensure consistency in future cases. These conclusions, for the reasons stated above, seem unsatisfactory.

[272] The Bundeskartellamt's decision was annulled by the Higher Regional Court (OLG) Dusseldorf in June 2019. The Court argued that *Booking.com*'s narrow parity clauses were not restrictive of competition, but necessary to prevent '*a disloyal diverting of customer bookings*', (Az .: VI - Kart 2/16 (V)). In this sense see the following link: https://www.tellerreport.com/news/2019-06-04---bundeskartellamt-disappointed--booking-com-may-prohibit-hotels-lower-prices-in-the-network-.Sy_YZeVRV.html. Notably, the German *Booking.com* decision followed the Bundeskartellamt's parity clauses *HRS* decision (December 2013) which, differently from the former, was upheld by the Düsseldorf Higher Regional Court in January 2015. The *HRS* judgement is now final since it was not subsequently appealed.

[273] The ruling of the first instance Swedish Patent and Market Court was overturned on 9th May 2019 by the second instance court. The decision cannot be appealed further (see https://www.jdsupra.com/legalnews/price-parity-clauses-and-booking-com-a-29466/).

[274] Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, available at: http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf. Though interestingly, consistent with the German concern, many hotels reported that they did not offer cheaper prices on competing platforms because they did not want to undercut their own website.

At the moment, while clarity and consistency on this matter in Europe are all but close, what can be observed is that the narrow clauses that were removed in a number of different countries since 2015 have not led to *Booking.com* exiting the market, suggesting that the narrow clauses were not, in fact, essential to ensuring the viability of the platform business model.[275] Additionally, a recent empirical study of Mantovani, Piga, and Reggiani shows that while there was a general *Booking.com* price drop between 2014 and 2015, followed by a price increase between 2015 and 2016, among France and Italy, only France - that already in 2015 totally banned parity clauses through the *Loi Macron* - managed to keep 2016 prices at a lower level than 2014.[276] Notably, these prices' drops were not accompanied by a fall in quality. Among others, for example, Booking.*com* introduced: (i) the *BookingSuite system* to help independent hotels to build innovative and user-friendly websites (April 2015); (ii) the *RateManager platform* to suggest optimal room prices depending on a number of factors, such as expected demand, weather forecast, special events, and so on (March 2016); (iii) the *Booking Experiences Tool*

[275] Notably, a temporary injunction filed in May 2016 by *Booking.com* against the Bundeskartellamt's decision was unsuccessful, and the decision remained in force till it was annulled in appeal by the Higher Regional Court (OLG) Dusseldorf in June 2019. In this sense see the following link: https://www.tellerreport.com/news/2019-06-04---bundeskartellamt-disappointed--booking-com-may-prohibit-hotels-lower-prices-in-the-network-.Sy_YZeVRV.html.

[276] A. MANTOVANI, C. A. PIGA, C. REGGIANI, On the economic effects of price parity clauses – what do we know three years later?, *ResearchGate*, available at: https://www.researchgate.net/publication/328107343_On_the_Economic_Effects_of_Price_Parity_Clauses_-_What_Do_We_Know_Three_Years_Later. For other empirical studies on the topic, see: M. HUNOLD, R. KESLER, U. LAITENBERGER, F. SCHLUTTER, 'Evaluation of Best Price Clauses in Hotel Booking', 2017, ZEW Centre for European Economic Research Discussion Paper No. 16-066, available at: http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf; S. ENNIS, M. IVALDI & V. LAGOS, 'Price-Parity-Clauses on Hotel Room Booking: Empirical Evidence from Industry Data', in progress; A. CAZAUBIEL, M. CURE, B. O. JOHANSEN & T. VERGE, 'Substitution between Online Distribution Channels: An Empirical Evaluation on the Scandinavian Hotel Industry', available at: https://konkurransetilsynet.no/wp-content/uploads/2018/10/Rapport-nr-5-2018-Substitution-Between-Online-Distribution-Channels-Evidence-from-the-Oslo-Hotel-Market.pdf.

enabling users to browse a full list of things to do in the selected destination and book tickets in advance (July 2016).[277]

From this case, however, some conclusions can be drawn: (i) explicit conflicting decisions are possible due to the lack of a resolution mechanism within Regulation 1/2003; (ii) the EC did not use Art. 11(6) to avoid undermining the trust-based relationship between ECN's actors; therefore, Art 11(6) cannot be considered an effective resolution mechanism; (iii) the existence of different ex-post solutions increases experimentation and allows a better and deeper understanding of the competition issues; however: (a) identical results could have been reached thanks to ex-ante experimentation without undermining consistency; (b) this inconsistency undermined the authority of some NCAs' decisions which were overruled by the national legislators; (c) this inconsistency undermines the principle of legal certainty making it very difficult for companies to understand what an infringement is; (e) this inconsistency creates a situation where the same company should change its business strategy from one EU Member State to another creating cost for that business (consider not only the direct costs of applying different business strategies across MSs but, also, the indirect costs caused in terms of quality and revenues of the services offered) and disorienting consumers (because it is unclear in which MS the prices published on Booking.com are the lowest available); (f) this inconsistency allows companies not directly subject to an infringement decision to maintain a competitive timing advantage compared to their competitors (consider Expedia which is still applying 'narrow parity clauses' in Germany. In markets such as those affected by the mentioned decisions, an advantage of this kind has an enormous economic value);[278] (g) this inconsistency cannot exclusively be justified by the peculiarities of one national market, considering that a significant percentage

[277] A. MANTOVANI, C. A. PIGA, C. REGGIANI, On the economic effects of price parity clauses – what do we know three years later?, *ResearchGate*.

[278] This is because competitors of the company punished will try to take advantage of the existing conflicting solutions and they will try to use them as long as possible to support their different and more economically convenient business strategy.

of consumers taking advantage of each national decision are foreign. This specifies how in digital markets each NCA's decision has ultra-national effects and demonstrates the higher need of cooperation due to the blurred distinction between national markets; (h) all these proceedings against *Booking.com* (12 in total) which have in common the same subject and object create an intolerable investigation burden with its related costs over the defendant company; (i) all these proceedings also create an unbearable financial burden from a public expenditure point of view, which could have been lessened.

2.4. *Unus pro omnibus, omnes pro uno*

'*Unus pro omnibus, omnes pro uno', 'un pour tous, tous pour un', 'einer für alle, alle für einen', 'uno para todos, todos para uno', 'uno per tutti, tutti per uno'* are, respectively, the Latin, French, German, Spanish, and Italian translation of the motto 'one for all, all for one'. This motto is known to the wider public thanks to the famous novel '*Les Trois Mousquetaires'* by Alexandre Dumas *père*, and it, better than any other expression, explains concepts such as unity, equality, solidarity, teamwork. According to the author of this thesis, it should become the official motto of the ECN, and act as a flyer or '*leitmotiv'* of the reform about to be presented.

The 'E-challenges' of the 'Digital Revolution' have proved to be too testing for National answers and solutions should instead come from a complex, reciprocal coordination between Supra-National (the EC) and National institutions (the NCAs). Interestingly, the consequences of each enforcer's action are not limited to their geographical scope of intervention but can produce cross-border effects. Hence, an ordered governance of these 'E-challenges' can only be, to borrow symbology from Kissinger,[279] the result of a balance of local, national or regional partial orders. That is because national partial orders have effects on other national partial orders with the consequence of producing a reciprocal unbalance.

[279] H. KISSINGER, *World Order* (Penguin Books 2015).

Order is a binary concept. Either there is order, or there is not. *Tertium non datur*. Order from a sum of partial national orders cannot exist without these National orders being coordinated, balanced and merged each other. The solution lies in the coordination and reciprocal convergence of National partial orders. This is the ECN's object: to balance the unbalanced, to transform externalities into internalities through a process of convergence and fusion. Externalities should not be considered because of a hierarchical and heterarchical threat, but they should be internalised.[280] NCAs should not only act in defence of their National interests or consumers but should pursue one single goal: the protection of European interests, consumers. '*Un pour tous, tous pour un'*. The ECN should be the medium capable of organising, converging and merging National orders to a point where the interest of each MS is aligned. They coincide. Unifying National Orders into one, bigger, Single European Order and National Markets into one, bigger, 'Single European Market' should be the '*Grundthe-ma'*[281] of the ECN. To reach these objectives, the ECN should be reformed in such a way that the so called 'single co-enforcement' level, described in Paragraph 2.3.1., would be realised.

The reform is based on three pillars. The first will be presented in Paragraph 2.4.1, and it is based on the creation of the 'ECN Grand Chamber'. The second pillar will be introduced in Paragraph 2.4.3., which consists of a modification of the parallel investigation regime. The third was thoroughly examined in Paragraph 2.3.2.2., and it concerns the abolition of the differentiation created by Art. 3(2), second sentence, Regulation 1/2003. Therefore, it will not be discussed again in the present section. It should be noted that the reform is structured without direct correspondence between 'ECN's problematics - objectives to be realised - proposed solutions'. By contrast, their combination is highly complex.

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[280] See Paragraph 2.3.2.1. let. a).

[281] 'Fundamental theme'.

2.4.1. The ECN Grand Chamber

From previous paragraphs a complex reality emerged where there is no Sovran State or Sovran organisation capable of governing the Single Market. By contrast, a sharing or pooling of powers among different subjects exists. There is a governance without governments[282] or a '*form des Beharrens'*[283] to use a German concept, which is the result of a complex interconnection and interaction between NCAs and the EC, and between NCAs themselves. This complexity can be represented by the Jackson Pollock's painting 'Number 5, 1948'. Pollock, also known as 'Jacks the dripper',[284] was one of the fathers of a new painting technique: the 'drip painting'. In this sense, the European competition law is the result of the 'dripping' of National and European enforcements which, intersecting and interconnecting with each other, create a reality as complex as the lines in 'Number 5, 1948'. This chaotic complexity needs to be balanced. The only subject which can do so is the ECN.

However, how should the ECN be restructured in a way to be able to perform its task and, at the same time, (i) sponsor diversity to ensure experimentation and innovation of solutions;[285] (ii) drive and control diversity to guarantee consistency and legal certainty; (iii) equalise the position of every ECN's member within the network by abolishing its hierarchical structure; (iv) achieve the 'single co-enforcement' level of integration; (v) reduce the costs of public enforcement both for private companies and for NCAs; (vi) increase deterrence, effectiveness, and efficiencies of EU competition public enforcement; (vii) increase the positive

[282] J. N. ROSENAU, E.O. CZEMPIEL, *Governance without Government Order and Change in World Politics* (eds. Cambridge: Cambridge University Press, 1992).

[283] G. H. MEAD, *Philosophie des Geldes*. Georg Simmel [1901] 9, Journal of Political Economy, 4, 616-619.

[284] See: http://www.nytimes.com/2008/03/09/style/tmagazine/09turnpage.html?mcubz=1.

[285] C. SABEL and J. ZEITLIN, 'Learning from Difference: The New Architecture of Experimentalist Governance in the Eu' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010), 9-10.

synergies of the interaction between public and private enforcement? The solution is the introduction of the 'ECN Grand Chamber'.

The 'ECN Grand Chamber' would work as a 'resolution mechanism' capable of replacing Art. 11(6), and of pushing forward the current 'Advisory Committee' *ex* Art. 14, Regulation 1/2003. Its structure should be similar to that of the ECJ when called upon to decide a matter of law in its Grand Chamber conformation. The 'ECN Grand Chamber' should be made up of a President, one or more Vice-Presidents, and, a minimum of one representative for each ECN member with full authority to act on behalf of its NCA. The President and Vice-Presidents should be chosen randomly, respecting a rotation order to guarantee each NCA representative has an equal chance of being selected. The President and Vice-Presidents must control, coordinate, and lead the ECN Grand Chamber's activities, in particular ensuring that each NCA and the EC have the same rights and duties within the Grand Chamber. Moreover, it is up to the President to decide whether, when, and how the ECN Grand Chamber hearings should be public and/or the related discussions publicised.

The EC should oversee referrals to the Grand Chamber, which could be convened for two different purposes:

(1) either to solve a jurisdiction issue in case of disagreement during case allocation discussions, or to solve a conflict between NCAs or between the EC and NCAs and vice versa, regarding: (i) how new competition issues should be addressed; (ii) whether competition law should be applied in a particular sector; (iii) whether an investigation should be stopped or carried out in a different way. Therefore, the ECN Grand Chamber could be called on for every kind of dispute within the ECN (Type 1 scenario). In this first scenario, the ECN Grand Chamber may be convened upon request of the EC or at least five NCAs. This convocation mechanism is deliberately devised to avoid an overuse of this procedure and should be used with

caution and parsimony, only where the conflict cannot be solved otherwise.[286] It should be considered as an '*extrema ratio*' procedure.

(2) To expand the territorial effects of an NCA's decision across Europe (Type 2 scenario), in which case the ECN Grand Chamber could be convened upon request of the sole acting NCA. An acting NCA could convene the ECN Grand Chamber to have its line of enforcement and conclusions shared by its colleagues. Should the '*a quo*' NCA be successful, its decision would produce effects across Europe and be binding for all National Courts of each MSs within the meaning of Art. 9(1), Damages Directive.[287] However, were the '*a quo*' NCA not successful, it would have to undergo and comply with the solution adopted by the ECN Grand Chamber.

To make sure that the current hierarchical ECN structure is abolished, and to favour participation of each NCA, even the less experienced, the ECN Grand Chamber's decisions should be taken according to a voting system very similar to the one adopted by the European Council on 1st November 2014. According to this procedure for Qualified Majority Voting, a proposal would be approved if 55% of ECN members vote in favour - in practice this means 16 out of 29 (28 NCAs + DG Comp). Each competition authority's vote would have the same value to ensure equality. The solution or the position of the Authority presenting the strongest argument and most agreed on by the ECN's members would be the one adopted.

In exceptional cases where not all ECN members participate in the vote, a decision would be approved if 55% of the participating ECN members voted in favour. An abstention under qualified majority voting would count as a vote against.

[286] In this sense, for the US, W. E. KOVACIC, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' *Competition Law International*, 10.

[287] Under the current regime, according to Art. 9(2), Damages Directive, a final decision of an NCA does not have a binding effect before National Courts of another Member State but it is downgraded to a prima facie evidence that an infringement of competition law has occurred. Therefore, extending the binding effect of decisions of NCAs outside the national jurisdiction of the authority which has taken the decision will boost private enforcement actions.

Abstention is not the same as not participating in the vote.[288] Any ECN member could abstain at any time. The existence of a blocking minority should also be considered. It would exist when the EC, plus more than 40% of the ECN members, ie 12 NCAs at least, voted against the proposal. Whether a QM was not reached after the first round or if it was, but a blocking minority existed, the ECN members would be called to a second-round voting. In the second-round voting, the EC would enjoy an extraordinary vote power, and the proposal will be approved by a simple majority of 51%. Notably, the EC vote would count for as many as three votes of an NCA. This mechanism will ensure that: (i) stall situations will be overcome; (ii) the EC will drive uncertain situations; (iii) the EC will preserve its role as 'Guardian of the Treaties'.

To give the reader a better understanding of the described mechanism, let's assume that the proposed reform was already applicable to the *Booking.com* case. After the adoption of the French, Italian, and Swedish commitment decisions, when the Bundeskartellamt was about to publish its infringement decision, these three authorities, plus two more, or the EC itself, could have convened the ECN Grand Chamber to avoid conflicting decisions (type 1 scenario). Once the Grand Chamber was convened, every NCA and the EC could have had its opportunity to explain and justify its favoured position between 'narrow', 'wide', or even a third option still not presented by practice. This debate would have promoted diversity at a higher level than that under the current system, since every NCA, even the less experienced, would have been asked to present their view. The different solutions therefore, would not only have been down to the actions of the strongest authorities. Secondly, the ECN Grand Chamber decision would have guaranteed consistency across Europe since only the selected approach would be the one enforced. Thirdly, the ECN Grand Chamber decision would have affected all of Europe, thus protecting the consumers of those MSs with inactive NCAs. Fourthly, the ECN Grand Chamber decision would have prevented the 12 proceedings that

[288] The difference is that being present influences the quorum of 55% while being absent can reduce that quorum.

Booking.com has been the subject of, with their related costs both for public resources and for the company.

Another example of the working mechanism of the offered reform could be the German *Facebook* case. Considering the novelty of the issues presented by that case, it would have been possible for some NCAs to have tried to convene the ECN Grand Chamber to discuss and/or to stop the German NCA's enforcement actions (type 1 scenario). By contrast, where the Bundeskartellamt was self-confident of the appropriateness of its enforcement actions, it could have convened the ECN Grand Chamber upon its initiative to expand the territorial scope of its investigation (type 2 scenario). Indeed, if the German position had been agreed by a QM of the ECN members, the German decision would have had effects across Europe, so offering the same privacy protection level to all European consumers.

There are other situations where the ECN Grand Chamber could provide additional benefits. Firstly, it could be used, for instance, by NCAs to force the EC to review some of its positions, a power not offered by the current system as designed by Regulation 1/2003. This possibility would increase the debate, therefore, diversity, also for situations where under the current system no experimentation at all is allowed to NCAs when the EC handles a case. Thus, the proposed reform: (i) would boost diversity and experimentation; (ii) would eliminate the hierarchical structure of the current system by equalising the NCAs with the EC, without undermining its role as 'Guardian of the Treaties'. This Guardian position, indeed, would be ensured by the fact that: (i) the EC would oversee the applications for convening the ECN Grand Chamber; (ii) the EC could convene the ECN Grand Chamber by itself; (iii) the EC would have special vote power during the second-round voting.

Secondly, the Grand Chamber could be used by the EC to stop action by an NCA believed to be premature, unnecessary or wrong. Also, this power is not available under the current regime ex Regulation 1/2003. Under Art. 11(6) the Commission can advocate a case, so relieving the acting NCA of its power, but the EC cannot stop it exclusively. This may be an additional tool at the EC's or other NCAs' disposal to slow down enforcement activities when the understanding of the competition issues or solutions behind that case is still not clear.

In conclusion, it seems to the author of this thesis that the proposed reform is a good compromise to ensure the sorely-needed upgrade of the ECN. The ECN Grand Chamber mechanism, while preserving all the benefits of the current system as designed by Regulation 1/2003, also seems able to fulfil all the objectives mentioned at the beginning of this section.

2.4.2. Defeating prejudices and myths: Informal vs Formal procedures.

When describing the auspicated reform, it is appropriate to evaluate its pros and cons. This exercise will be done by comparing the current enforcement, as designed by Regulation n. 1/2003, with the system here proposed. The main difference between the two is that, while the former is based on informal procedures, as every contrast is solved by informal pressures exercised behind closed doors, the latter formalises and disciplines the resolution mechanism as well as increasing the transparency of those discussions and the equality among NCAs.

The defenders of the current system will probably argue, firstly, that the current system is cleverly designed in a way to favour more active authorities as it leaves them the freedom to act, and they can neither be forced into non-acting by other NCAs nor by the EC even in a case where the EC can use art. 11(6). Indeed, even if the EC advocates a case *ex* art 11(6), it cannot advocate a case only to stop it. Secondly, the current system favours the authorities which raise higher standards because the system, as designed, always gives them one chance to enforce their stricter line. Consider the *Booking.com* case. The Bundeskartellamt had its opportunity to raise the standard without any other authority or the Commission being able to stop this. For the defenders of the current system, consistency and uniformity are also not a problem. They are ensured by the system thanks to the final intervention of the ECJ, which will be the final subject in charge of deciding which enforcement line should be followed. In other words, the current system guarantees an *ex-ante* uniformity thanks to an informal procedure where informal pressure is exercised among NCAs and between them and the EC. In addition, where this *ex-ante* uniformity is not possible, it provides *ex-post* uniformity thanks to the ECJ case law, directly or through the preliminary reference procedure *ex* art. 267 TFEU.

The defenders of the current informal system support their conclusions quoting the US model, which also has multiple players to enforce the same law. Indeed, both the Department of Justice and the States' Attorney Generals can bring actions based on the Sherman Act[289] so that an initiative to develop US antitrust doctrine can originate both from the state and the federal level.[290] Notably, also in the US, it is not unheard of for federal and the state level to diverge on very basic questions, such as the prohibition of resale price maintenance. In this sense, whereas the United States Supreme Court reversed in 2007 the rule that a resale price maintenance agreement is a per se violation of Section 1 of the Sherman Act,[291] the reversal met stiff resistance at state level.[292] Subsequently, Maryland amended its own state law to reinstate the rule,[293] the Kansas Supreme Court upheld a ban on

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[289] State enforcement takes the form of actions for the recovery of damages for loss suffered either by the state itself or by its citizens (*parens patriae* lawsuits); see D.H. GINSBURG, 'Comparing Antitrust Enforcement in the United States and Europe' [2005] 1(3) *Journal of Competition Law and Economics* 427, 429.

[290] In addition, the Federal Trade Commission can bring cases based on violations of the Federal Trade Commission Act. All violations of the Sherman Act also violate the Federal Trade Commission Act, resulting in overlapping authority of the Department of Justice and the Federal Trade Commission which led the authorities to set out a clearance procedure between them; see DH GINSBURG, 'Comparing Antitrust Enforcement in the United States and Europe' [2005] 1(3) *Journal of Competition Law and Economics* 427.

[291] See *Leegin Creative Leather Products v PSKS, Inc*., 551 U.S. 877 (2007) which overruled the long-honored precedent of *Dr. Miles Medical Co. v. John D. Park & Sons, Co*., 220 U.S. 373 (1911).

[292] See the letter from 38 state attorneys general of 27 October 2009 calling on the United States Congress to reinstate per se illegality by statute, available at http://naag.org/assets/files/pdf/signons/20091027.S_148.pdf.

[293] MD. CODE ANN., Com. Law §§ 11-201 et seq.

resale price maintenance under Kansas law,[294] and New York, Illinois, Michigan[295] and California[296] continued enforcement against resale price maintenance under their respective laws. However, this parallelism is only partially meaningful due to the many existing differences between the US and EU public enforcement systems; even in the US few claims are being made that the de-centralised approach to resale price maintenance in the United States restricts businesses, or the overall development of the economy, to an extent that would justify a more centralised approach.

Although the arguments from the defenders of the current system are not totally devoid of substantiation, they cannot be accepted. A closer look at the system reveals its intrinsic weakness. Firstly, these informal procedures, based on informal pressure, used as methodology to reconcile dissent have several problems: (i) not every NCA is able to exercise informal pressure, i.e. this is a tool within the reach of few NCAs; (ii) the absence of a formal procedure prevents the existence of a mechanism which makes sure that the voice of every NCA is correctly and equally heard and balanced with that of the others; (iii) the absence of a formal procedure reduces the transparency of all the network's discussions; (iv) the existence of a formal procedure will spur diversity as not only the most powerful NCAs, but all of them will have the occasion to have their say without having to face excessive costs and the embarrassment of contrasting other more powerful NCAs in solving new issues. In other words, proceduralising diversity is the only way to ensure both the best debate and, consequently, the best outcome for every new competition issue. Conflicting solutions will pass from the exception to the rule. Presenting dissenting opinions will be natural and transparent. In the absence of this kind of procedure, diversity will only remain the expression of the actions of the strongest

[294] *O'Brien v. Leegin Creative Leather Products*, 294 Kan. 318 (Kan. 2012).

[295] *State of New York, et al. v. Herman Miller, Inc.*, No 08-cv-2977 (S.D.N.Y. Mar. 21, 2008).

[296] *California v. DermaQuest Inc.,* No RG10497526 (Cal. Super. Ct., Alameda Cty., February 23, 2010) and *California v. Bioelements, Inc.*, No 10011659 (Cal. Super. Ct., Riverside Cty., January 11, 2011).

authorities. Only they will have the power and resources to run identical cases and close them in different ways, while the less powerful authorities would only follow one of the approaches taken by the others as they interpret their role as mere executors. This will happen because they have no expertise, self-confidence or resources to react to the informal pressure received by the EC or other stronger NCAs around which they orbit.

Secondly, it does not seem so efficient and effective from an enforcement perspective leaving the responsibility of consistency and uniformity of EU competition law to the ECJ. Of course, the ECJ can have this role; but it should be left to '*extrema ratio'* situations. In other words, leaving to the ECJ the responsibility of consistency and uniformity of EU competition law should be an exception for exceptional circumstances and not the rule. This is for several reasons:

(i) since the ECJ exercises a judicial review and not a revision on the merit, it cannot ensure consistency and convergence of results when the conflict is related to a policy matter. For example, has the ECJ enough discretion to decide whether competition law should be applied to privacy issues? Again, has the ECJ enough discretion to decide which is the best solution between 'narrow' and 'wide parity clauses'? it seems to the author of this thesis that when the ECJ is asked to solve these kind of conflicts, it cannot give an answer without risking expanding its review over the EU treaties' limits of its jurisdiction. These kinds of decisions, indeed, are political in nature and, as such, they should be solved by the subjects appointed for these purposes by the EU treaties. Policy decisions, from a strict judicial review perspective can all be considered correct. Therefore, the ECJ cannot be a place to find compensation for conflicting solutions which should be solved elsewhere;

(ii) since, as partially already demonstrated, this is not the right role of the ECJ. Indeed, if consistency must be ensured by the ECJ what would be the purpose of having the ECN? Should this body be degraded to being a mere facilitator of the exchange of information? Why should the function to ensure consistency be left to a judge and not be handled directly by the ECN, which ought to be the natural subject to solve these problematics? If the ECN abandons this function, it will lead to some extra costs: it will extend the time within which the conflict is solved, with the risk of damaging companies affected by the multiple enforcement actions and undermining the principle of legal certainty.

(iii) It is not certain that every time it is needed, the proceedings will arrive in front of the ECJ in a way that it can exercise its judicial review. Indeed, the ECJ will only do so either when an EC's decision is appealed or when an NCA decision is appealed, and a preliminary reference is made. Especially in the latter scenario, that process cannot be taken for granted. It is uncertain, costlier for companies, and it takes more time than an *ex-ante* solution provided by the ECN. The mentioned situation where the ECJ is not called on to decide is not so unlikely. Indeed, this is what happened in the German *HRS* case. The Düsseldorf Higher Regional Court confirmed the ruling of the Bundeskartellamt without a preliminary reference being made. Therefore, in *HRS* there is no chance of seeing that conflict solved at the present stage because the time to appeal the Düsseldorf Higher Regional Court judgement in front of the Federal Court of Justice has elapsed and with it the possibility of making a preliminary reference *ex*. Art. 267 TFEU.

(iv) The ECJ's solutions will only have effects for the '*a quo*' and future claims but they cannot fix the legal position of other companies where they have been affected by previous and different enforcement actions, compared with the one blessed by the ECJ.

Thirdly, proceduralising diversity will also produce economic efficiencies both for public and private subjects and increase the fundamental human rights protection allowed to defendants. Economic efficiencies are the result of saving public resources by the public enforcers in discharging their investigation activities. Indeed, thanks to the ECN Grand Chamber decisions, especially in the type 2 scenario, there will no longer be a need for multiple and repeated investigations against the same subject and for the same facts, as happened in *Booking.com,* which was the victim of 12 investigations. Therefore, the reform will also reduce costs, resources and energies which companies subject to investigations must pay. These conclusions, moreover, will support an interpretation-application of the EU-wide principle of *ne bis in idem* [297] more in line with the case law developed by the Court of Justice on art 54 CISA[298] and the jurisprudence of the European Court of Human Rights on Article 4, Protocol 7 ECHR.[299] According to this case law, and in contrast with that on the principle of *ne bis in idem* in competition law matters: (i) two infringements are the same offence when they are constituted by the same or inextricably linked facts;[300] (ii) to apply the EU principle of *ne bis in idem* in competition matter, the identity of the legal interest protected should not also be required.[301] This requirement should be reviewed and brought in line with the case

[297] The *ne bis in idem principle* as well as being a fundamental human right which protects individuals from the risk of double-jeopardy, it also disciplines prosecuting authorities in acting efficiently (S TRECHSEL, *Human Rights in Criminal Proceedings* (Oxfrod: OUP, 2005) 384; HG SCHERMERS, '*Nos Bis in Idem'* in F Capotorti et al (eds), *Du Droit International au Droit de l'Integration,* Liber Amicorum Pierre Pescatore (Baden-Baden: Nomos Verlagsgesellshaft, 1987) 604; WOUTER WILS, '*The Principle of Ne Bis in Idem in EC Antitrust Enforcement'*, 138-40; VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law*, 27.) The bar against further proceedings, indeed, once the defendant has already been acquitted (if the prosecutor is the EC) or convicted, forces the public authorities to investigate, prosecute, and punish offenders as competently as the can, because they know that, as a general rule, they will not have a second opportunity to prosecute. This complexity of rationalities explains the existing tension in the EU jurisprudence on this principle.

[298] Case C-150/05, *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië*, paras 48 and 53; Case C-436/04, *Leopold Henri Van Esboroeck*.

[299] *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009).

[300] "*a set of facts which are inextricably linked together in time, in space and by their subject-matter"* Case C-367/05 *Criminal proceedings against Norma Kraaijenbrink* (2007) ECR I-06619, paras 23-26; Case C-288/05 P *Criminal proceedings against Jürgen Kretzinger* (2007) ECR I-06441, paras 29-31.

[301] To be applicable in competition law, the *ne bis in idem* principle required a threefold test to be satisfied: (i) same offenders; (ii) same facts; (iii) same legal interest protected (Joined Cases C-204-05/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P Aalborg Portland, para 338). Therefore, in virtue of the third requirement, the *ne bis in idem* principle is not applicable to offences committed by the same offender and arising out of the same facts in different legal systems, as different legal systems are assumed to protect competition within their own national markets (Case

C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië* (2006) ECR I-9327). The Grand Chamber of the Court of Justice confirmed this conclusion and, consequently, the requirement of the identity of the legal interest protected in *Toshiba* (Case C-17/10, *Toshiba v Úrad pro ochranu hospodárské souteže*, para 97, even if the Court then decided the case on the ground that the facts were not identical: see paras 98-103). In that case, however, the AG Kokott forcefully invited the Court to adopt a criterion based only on the identity of the facts, which the Court itself applies in other areas of EU law (Case C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië*, paras 48 and 53; Case C-436/04 *Leopold Henri Van Esboroeck*; Case C-288/05 P Criminal proceedings against Jürgen Kretzinger (2007) ECR I-06441, paras 29-31; Case C-367/05 Criminal proceedings against Norma Kraaijenbrink (2007) ECR I-06619, paras 23-26) and which the European Court of Human Rights applies under Article 4, Protocol 7 ECHR (*Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009)). The AG relied on the identity of the rationales for the *ne bis in idem* principle in different areas of EU law and in Article 4, Protocol 7 ECHR (Opinion AG Kokott in Case C-17/10 *Toshiba v Úrad pro ochranu hospodárské souteže*, paras 116-118). First, the AG emphasized the shared free movement rationale between the *ne bis in idem* principle in EU competition law and the same principle in Article 54 CISA and under the Framework Decision on the EAW. Then, she pointed to the need to ensure that the protection under EU law did not fall short of the minimum standard of protection under Article 4, Protocol 7 ECHR. Thus, it is the right-based rationale that requires homogeneity of results under EU law and Article 4, Protocol 7 ECHR. The Opinion of the Advocate General in *Toshiba* sets out the correct approach and it is to be regretted that the ECJ refused to follow it. Indeed, the requirement of the identity of the legal interest protected reduces significantly the scope of protection enjoyed by the defendant and runs counter to the rights-based foundation of the *ne bis in idem* principle. It is for this reason that the ECHR rejected this requirement under Article 4, Protocol 7 ECHR (*Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009) para 82). The Court reached this conclusion notwithstanding the use of the word 'offence' in article 4, Protocol 7 (para 80), emphasizing that the approach based on the legal characterization of the offence 'is too restrictive of the rights of the individual' and 'risks undermining' the principle of *ne bis in idem* (para 81)). Same considerations apply with equal force to the principle of *ne bis in idem* under EU competition law. In this sense, AG Ruiz-Jarabo in his opinion in *Van Esbroeck* stated that '*if, instead of the acts alone, account were taken of the offences or of the rights protected by the prohibition of the said acts, the* ne bis in idem *principle would never function at international level*'. This is the reason why, in *Van Esbroeck*, the ECJ decided that art. 54 CISA applies regardless of the legal classification of the offence (Case C-436/04 *Leopold Henri Van Esbroeck*, para 38; Case C-467/04 Criminal proceedings against *Giuseppe Francesco Gasparini* (2006) ECR I-09199, para 56; Case C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië*, para 52). The only requirement is the identity law of the Court of Justice on art 54 CISA in other areas of EU law,[302] the Framework Decision on the EAW,[303] and the jurisprudence of the European Court of Human Rights on Article 4, Protocol 7 ECHR.[304] Indeed, if a person must be free to exercise his right to freedom of movement without the fear of being prosecuted or punished again for the same offence in different Member States, the principle should be applied to all offences across all Member States that arise from the same or inextricably linked facts. Different legal characterizations or the possibility of dividing a single offence depending, for instance, on where the effects of the conduct are felt, would make the *ne bis in idem* principle devoid of purpose and run directly counter to the freedom of movement rationale.[305]

Fourthly, proceduralising diversity will increase deterrence and effectiveness of EU competition public enforcement by extending the effects of an NCA's decision beyond its National jurisdiction. In this way, the beneficiaries of an NCA's decision will not only be the consumers of the Member States where the acting NCA is incardinated but also consumers of other Member States of less active authorities. This will also have the positive effect of speeding up convergence among National Markets for the purpose of creating the Single Market. In other words, thanks to ECN Grand Chamber's decisions, consumers from the whole of Europe can take

of material facts, understood as '*a set of facts which are inextricably linked together in time, in space and by their subject-matter'* (Case C-436/04 *Leopold Henri Van Esbroeck*, paras 27-28). This conduct-based definition is also consistent with the Framework Decision on the EAW (Framework Decision on the EAW, Art 2(2)).

[302] Case C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië*, paras 48 and 53; Case C-436/04 *Leopold Henri Van Esboroeck*; Case C-288/05 P Criminal proceedings against *Jürgen Kretzinger* (2007) ECR I-06441, paras 29-31; Case C-367/05 Criminal proceedings against *Norma Kraaijenbrink* (2007) ECR I-06619, paras 23-26.

[303] Opinion AG Kokott in Case C-17/10 *Toshiba v Úrad pro ochranu hospodárské souteže*, paras 116-118; Framework Decision on the EAW, Art 2(2).

[304] *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009).

[305] In the same sense, see RENATO NAZZINI, *Competition Enforcement and Procedure* (OUP 2016).

advantage of the enforcement actions of each NCA. This benefit of the proposed reform should not be underestimated. Indeed, according to ECN's data,[306] the enforcement actions taken among different Member States vary significantly. From May 2004 to December 2015 only 4 NCAs out of 28, i.e. 14% (German, French, Italian, and Spanish NCAs) had reached the threshold of more than 100 envisaged case decisions and only 9, i.e. 32% (the four mentioned NCAs, plus Romanian, Dutch, Hungarian, Greek, and Danish NCAs) reached a threshold of 30%. In this sense, the EC's initiative to empower NCAs in order to reduce the enforcement gap between them is very important and most welcome. However, increasing the integration between NCAs in the way proposed here could offer an alternative and supplementary solution to reach the same objective.

Finally, in addition to the multiple reasons stated, the formal procedure set forth here should be preferable to the informal system currently existing because the two are not mutually exclusive. Indeed, the presented reform will not deprive the current system of its present benefits. In other words, convening the ECN Grand Chamber will not be compulsory. It will be done only where so desired by five NCAs or by the EC in type 1 scenarios or by the acting NCA in type 2 scenarios. Furthermore, the admission of the Grand Chamber applications will be decided by the EC itself. Therefore, if NCAs would prefer to proceed by using the means of informal coordination or informal pressure, they will be free to do so. Again, if they wish to leave the resolution of consistency to the *ex-post* action of the ECJ this will also be their decision. If the EC or other NCAs do not consider it opportune to stop a case initiated by another NCA, they will remain free to act accordingly. The reform will only offer additional possibilities of solutions in order to enrich the tool-box at the disposal of the EC and NCAs. Its concrete practical benefits will vary according to the way in which the reform is understood and applied by the ECN's members. However, it is a reform from which the EU competition enforcement system can only gain without the risk of losing anything.

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[306] Available at: http://ec.europa.eu/competition/ecn/statistics.html.

2.4.3. Parallel Investigations

As shown in Paragraph 2.3.2.1.-(c), the existing work allocation mechanism was established to minimise the number of Authorities involved in a single case, as a caution against departures from the EC's line.[307] It is structured in a way to ensure that cases posing new legal questions are addressed by the EC only.[308] So, while the EC dictates the lines and solves new competition issues, the NCAs are degraded to mere performers of the former's directions. In other words, uniformity and consistency are considered as the result of a hierarchical imposition by the EC over the other NCAs and not as shared, horizontal, and consensus-based co-enforcement. This leads to the additional disadvantage that externalities considerations are the result of a hierarchical and heterarchical threat.[309] Incentivising parallel investigations could be a solution to both problematics.

Parallel investigations would transform NCAs from mere executors to independent developers and enforcers of EU Competition Law by increasing the accountability of decision taken by more authorities together. This would: (i) increase diversity; (ii) ensure consistency and better outcomes by enlarging the debate existing around each new competition issue. Secondly, within parallel investigations, externalities would no longer be perceived as the result of a hierarchical and heterarchical threat, but as common interests which deserve to be protected and guaranteed by all acting authorities.

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[307] A. ISRAEL, J. M. LANG, F. HÜBENER, 'A Practitioner's View on the Role and Powers of National Competition Authorities', European Parliament (2016 See also European Council and European Commission, 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', (2002), (15435/02 ADD 1 RC 22), para 16.

[308] A. ISRAEL, J.M. LANG, F. HÜBENER, 'A Practitioner's View on the Role and Powers of National Competition Authorities', European Parliament (2016).

[309] M. RHODES and J. VISSER, 'Seeking Commitment, Effectiveness and Legitimacy: New Modes of Socio-Economic Governance in Europe' in Adrienne Héritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave Macmillan 2011), 127.

Therefore, the paradigm should change. It should move from a system where cases, as far as possible, are investigated by one competition authority only,[310] to a new one where cases, as far as possible, are run by several NCAs in parallel. Single investigations should be the exception, not the rule. This would require NCAs to set out their enforcement priorities at the beginning of each year. Indeed, to boost the number of parallel investigations a convergence of competition policy priorities among NCAs is essential.

Parallel investigations also deserve a better understanding and stricter rules. Different kinds of parallel cases exist. The first example of parallel case can be seen in the *Booking.com* case, where there is identity of facts and offenders among different MSs (Type A). The second concept of parallel cases exists where different NCAs handle two cases which are factually 'identical', but the subjects involved do not entirely overlap (Type B). An example of this second scenario is the *Milk cartel* saga.[311] To distinguish between the two scenarios, it must be questioned whether a second investigation should be considered as barred by the principle of *ne bis in idem*, as interpreted by the case law developed by the ECJ on Art. 54 CISA[312] and the jurisprudence of the European Court of Human Rights ('ECHR') on Art. 4, Protocol 7 ECHR.[313] According to the author of this paper, in cases where the principle of *ne bis in idem* applies, ie type-A scenarios, parallel investigation should be made compulsory.

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[310] European Council and European Commission, 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', (2002), (15435/02 ADD 1 RC 22), para 16.

[311] ECN, 'Recommendation of the High-Level Group on Milk aimed at improving the bargaining power of dairy farms'.

[312] Case C-150/05, *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië* [2006] ECR I-09327, paras 48 and 53; Case C-436/04, *Leopold Henri Van Esboroeck* [2006] ECR I-02333.

[313] *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009).

According to the mentioned case-law of the ECJ and ECHR, the EU principle of *ne bis in idem* should be reinterpreted as follow: to be applicable the *ne bis in idem* principle only requires (i) identity of facts and (ii) identity of offenders. The identity of the legal interest protected is no longer a requirement of the test. Considering that identity of offenders is self-evident, understanding when there is identity of facts is key. As correctly stated by Nazzini, although the test to establish when facts are identical or inextricably linked is case-based, two areas are adequately typified in the jurisprudence.[314] First, there is a single offence under Art. 101 TFEU when a single overall infringement is detectable. The single continuous infringement test demands that facts are closely related and, therefore inextricably linked for the *ne bis in idem* principle.[315] Secondly, whenever the effects of anticompetitive conduct are due to the same behaviour or are dependent on each other, the facts are inextricably linked, and there is, therefore, a single offence even if the mentioned effects are suffered in different MSs. This happens, for example, when at the same meetings the parties agree to increase their product prices in different MSs or when the parties agree to raise the price of an input sold in one MS, which has the additional effect of raising the cost of an output being sold in several MSs.

Therefore, in the described scenarios of identity of facts, parallel investigations should be made compulsory. This conclusion, as an alternative to the ECN case allocation mechanism to avoid duplication of proceedings, appears to be even more convenient on efficiency grounds, as it allows diverse features of what may constitute a single infringing conduct to be allocated to various Authorities. These conclusions are in line with the need for stricter *ne bis in idem* rules to regulate multiple proceedings, considering the parties' non-involvement in the case

[314] R. NAZZINI, *Competition Enforcement and Procedure* (OUP 2016).

[315] Case C-441/11P, *European Commission v Verhuizingen Coppens NV* [2012] ECR I; Case T-15/89 *Chemie Linz v Commission of the European Communities* [1992], ECR II-1275, para 308; Case C-49/92 P, *Commission v Anic Partecipazioni SpA* [1999] ECR I-04125, para 113; Joined Cases T-25-26/95, T-30-32/95, T-34-39/95, T42-48/95, T-50-65/95, T-68-71/95, T-87-88/95, and T-103-04/95 *Cimenteries CBR v Commission* [2000] ECR II-00491, paras 4025 et seq.

allocation procedure and the impossibility of appealing those case-allocation decisions. Moreover, the reader should keep in mind that, according to the reform here proposed, given the auspicated abolition of differentiation of National Legislations on unilateral conducts, under Art. 3(2) second sentence of Regulation 1/2003, parallel investigation may also be adopted for conducts infringing Art. 102 TFEU.

2.5. Conclusions

Despite the overwhelming view that EU competition law should be uniformly applied, within the EU enforcement system there is too much room for inconsistency and the 'Digital Revolution' has deteriorated the situation. The 'E-challenges' have proved to be too testing for National answers, and solutions should instead come from a complex, reciprocal and Supra-National coordination which should take place within the ECN. However, the current ECN conformation makes it unable to fulfil this task. Therefore, it should be reformed in a way to guarantee that seated concerns of the strongest protagonists are not masked behind arguments such as efficiency, effectiveness, and legal certainty.[316]

Equality, transparency, unity, solidarity, and teamwork should be the key words of the reform. Encouraging and respecting diverse substantive views, also of the less experienced NCAs, will allow enhanced uniformity without the risk of the eradication of diversity. Diversity, indeed, creates better quality policies and enforcement actions. Although the antithesis of one another, uniformity and diversity are both essential. The reformed ECN should encourage the latter and, simultaneously, bridle it to ensure the former. The way to do this is the introduction of the ECN Grand Chamber within which all ECN members have equal status and power.

The ECN Grand Chamber would sponsor diversity and control it to avoid inconsistency. Though the EU Courts will continue to lay down the law, this

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[316] S. WILKS, 'Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement' 3 ECJ 442, 79.

mechanism would allow the EC and the NCAs' experimentation in the meantime as well as preventing that experimentation from producing non-homogeneous results. This, besides enhancing uniformity, would reduce the public and private cost of multiple-conflicting enforcements while increasing their effects. Furthermore, the ECN Grand Chamber is flexible enough to allow local solutions when differentiation is a necessity. In addition, the benefits produced by the ECN Grand Chamber should be extended to the application of Art. 102 TFEU thanks to the abolition of the Art. 3(2), second sentence, Regulation 1/2003, differentiation.

The EC and the strongest NCAs will not appreciate losing their independence and leading role, and may oppose my proposals but other NCAs may desire to have greater input on substantive policy issues.[317] I hope that in the end the EC and all the NCAs will stand together for the protection of the European consumers, that national externalities will be transformed into European internalities and that national (digital) markets will merge into one, Single European (digital) Market. '*Un pour tous, tous pour un*'.

[317] U. BÖGE, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the EU Network of Competition Authorities* (Hart 2002), 21; D. J. GERBER, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (2003), 349; C.D. EHLERMANN, 'Implementation of EC Competition Law by National Anti-Trust Authorities' [1996] 17 ECLR, 62; M. DE VISSER, *Network-Based Governance in EC Law* (Hart 2009), 154.

3. The principle of uniform application of EU competition law within the EU private enforcement system

3.1. Introduction

This Chapter intends to suggest a revision of the legal value recognized to the decisions of the European Commission in the field of competition law '*when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision*' pursuant to Art. 16 (1), EU Regulation no. 1 of 2003.

The suggested *revirement* will be the result of an analysis that addresses not only the legal regime of the Commission's decisions *strictu sensu*, but also includes a broader reflection on the relations between *Public* and *Private Enforcement*, aimed at enhancing the importance of the uniform application of European competition law. The latter, in fact, is the product not only of the *Public Enforcement* operated by the EU Commission and by the various NCAs, but also of the *Private Enforcement* carried out by National Courts.[318] Regulation n. 1/2003 itself is aware of the role played by the latter as it states in recital 7 that '*National courts have an essential part to play in applying the Community competition rules'*. The same, again, at Art. 6 states that '*National courts shall have the power to apply Articles 81 and 82 of the Treaty* (now Articles 101 and 102 TFEU)'.

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[318] In this sense, see G. CUMMING, 'Procedural Consequences of the Crehan Judgment in Enforcement of EC Competition Law by the English Courts', (2005) RLC nº 5, 109, and E. PAULIS, 'Nouvelles procédures et méthodes de coopération entre institutions', in G. Canivet (Ed.), La modernisation du droit de la concurrence (Paris, 2006), p. 41. The latter, in particular, states that '*The (national) judge plays an important role as decision-maker and as such is called upon to contribute to the development of Community law ... (it) is not merely an executor of Community law* ...' (translation by the author). On this point see also S. BRAMMER, Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation, *CMLRev*., 2005, p. 42, pp. 1383-1384; H. NYSSENS and N. PECCHIOLI, Il regolamento n. 1/2003: verso una decentralizzazione ed una privatizzazione del diritto della concorrenza, *Dir. Un. Eur*., 2003, 2-3, p. 357.

The *revirement* that is meant to be suggested, according to the author of this thesis, would be necessitated by the importance that must be given to the value 'of the uniform application of European competition law'. Importance not completely understood in the past, but extremely topical and exponentially growing, in consideration of the osmosis phenomena the markets are subject to, due to globalisation and the digitalisation of the economy. The value of the uniform application of European competition law is recognized and protected with different techniques by Regulation n. 1/2003. It is indirectly protected by the 'norms on cooperation' and directly by the 'rules on the uniform application of European competition law *strictu sensu*'. Both the 'norms on cooperation' and those 'on uniform application *strictu sensu*' have a triple level of existence. There are rules of both types purely internal to '*Public Enforcement*',[319] rules of both types purely

[319]Think about the existing Network between National Competition Authorities: the European Competition Network (ECN). For a critical analysis of the European Competition Network, see: G. CAROVANO, The ECN Grand Chamber: Updating the ECN to Face the Challenges of the Online World. (2018) *European Competition and Regulatory Law Review*, Volume 2, Issue 3, page 166-186; S. WILKS, 'Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement' 3 European Competition Journal; S. WILKS, 'Understanding Competition Policy Networks in Europe: A Political Science Perspective' in Ehlermann CD and Atanasiu I (eds), Constructing the EU Network of Competition Authorities (Hart 2002); C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13; Y. SVETIEV, 'Networked Competition Governance in the Eu: Delegation, Decentralisation, or Experimentalist Architecture?' in Sabel C and Zeitlin J (eds), Experimentalist Governance in the European Union: Towards a New Architecture (OUP 2010); MONTI M, 'The Network Concept, Competition Authority Networks and Other Regulatory Networks' [2004], European Competition Law Annual 2002; A. ISRAEL, J.M. LANG, F. HU̇BENER, A Practitioner's View on the Role and Powers of a National Competition Authorities (2016), European Parliament; B. HAWK and L.L. LAUDATI, Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison [1996] 1, *Fordham International Law Journal* 18; D.J. GERBER, 'The Evolution of a European Competition Law Network' in Ehlermann CD and Atanasiu I (eds), Constructing the Eu Network of Competition Authorities (Hart 2002); FOX E, 'The Elusive Promise of Modernisation: Europe and the World' 28 Legal Issues of Economic Integration; C.D. Ehlermann, Implementation of EC Competition Law by National Anti-Trust Authorities [1996] 17 *ECLR*; F.

internal to '*Private Enforcement'*,[320] and norms of both types, which operate in the intersection of the two microsystems. Precisely with reference to this last plan, at European level, the provisions of Articles 15[321] (cooperation norm) and 16(1) (norm

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CENGIZ, 'An Academic view on the Role and Powers of National Competition Authorities' [2016], European Parliament; F. CENGIZ, 'Management of Networks between the Competition Authorities in the Ec and the Us: Different Polities, Different Designs' European Competition Journal; F. CENGIZ, Multi-level governance in competition policy: the European Competition Network [2010], *European Law Review*; F. CENGIZ, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' EUI Working Papers.

[320] Relevant in this regard was the establishment in 2002 of the 'Association of European Competition Law Judges' aimed at creating a room for discussion and debate for judges of national courts on competitive issues.

[321]Art. 15 provides for various types of cooperation between the Commission and national courts (note that this cooperation works directly between the Commission and national courts and not between the Commission and the parties to a single dispute. On the contrary, if during a legal dispute, one of the parties should contact the Commission; this is required to immediately notify the competent national court (Co-operation Notice, para. 19)). A first form of cooperation is that sanctioned by Article 15 (1). This establishes that, for the purposes of the application of Articles 101 and 102 TFEU, the Member States national courts may request the Commission to transmit to them the information in its possession (for this purpose it must be considered that a national court may request from the Commission documents or information in its possession concerning the procedure to determine whether it is examining a particular case, whether it has initiated proceedings or has already decided on the matter. Note that the Co-operation Notice, para. 22, provides that the Commission must give its opinion within one month from the request) or its opinions (in this sense the *Co-operation Notice* points out that any national court could ask the opinion of the Commission about economic, practical and juridical issues, without prejudice, of course, for the proceeding Court to make a preliminary reference to the ECJ on the interpretation or validity of European law/acts *ex* of Art. 267 TFEU. In the event of an opinion, the Commission limits itself to communicating to the national court the practical information or clarifications of an economic or legal nature required, without ruling on the substance of the case, on which the national Court is required to rule (Co-operation Notice, para 29). The Commission's opinion is not legally binding for the national court and must be sent within four months from the request (Co-operation Notice, para 28). Note, however, that, *ex* Article 339 TFEU, the Commission is not obliged to transmit information covered by the obligation of professional secrecy (capable of including both confidential information and trade secrets). Specifically, the Commission may refuse to transmit such information when the

about the 'uniform application *strictu sensu*') of the Regulation n. 1/2003 stand out, jointly with the *Notice on co-operation between the Commission and the Courts of the EU Member States* adopted by the Commission.[322] Since this Chapter focuses on the 'norms on uniform application *strictu sensu*', the norms on cooperation will not be examined.[323]

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national court cannot guarantee the protection of confidential information and business secrecy. The Commission can also refuse to transmit information to national courts for reasons related to the need to safeguard the interests of the EU (Co-operation Notice, paras 23-25). The Commission will not transmit to the national Courts information obtained from a leniency applicant, without the consent of the latter (Co-operation Notice, para 26)).

[322] Commission Notice on Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ [2004] C 101/54.

[323] An increasing form of cooperation is that provided for in Article 15(3), which provides that the 'Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations' (On this point, see Case C-429/07 *Inspecteur van de Belastingdienst v X BV* (2009) ECR I-4833). To allow such cooperation, the power of the NCAs and the Commission to request and obtain from national courts the necessary documentation for a proper assessment of the case is foreseen. On the basis of this provision, the Commission and the NCAs assume that role which has been defined in doctrine as '*Amicus Curiae*'. However, Regulation 1/2003 does not provide procedural rules identifying how such observations should be submitted. Therefore, the rules and jurisdictional practices of each Member State will apply on this point. The recent 'Damages Directive' (Directive no. 2014/104/EU of the European Parliament and of the Council of 26 November 2014) is also along these lines. Article 6 (11) states that '*to the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought'*. This second form of cooperation is becoming more and more supported by national legislations of some Member States in accordance with the provisions of Article 15(4) of Regulation 1/2003. In France, for example, the Autorité de la Concurrance may issue an 'expert testimony' in civil proceedings (see Commission's White Paper on modernisation

of the rules implementing (Articles 101 and 102 TFEU) OJ (1999) C132/1, para 107, available at: http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf). Further on, in Italy and Spain, the National Competition Authorities have been given the power not only to intervene in a case already initiated by third parties (as expressly recognized by Art. 15, paragraph 3, of Regulation No. 1/2003), but even to promote an autonomous case themselves. As far as Italy is concerned, reference is made to the power *ex*. Art. 21-bis of Law No 287 of 1990 and, as regards Spain,to the power, *ex. artículo 12.3 de la Ley n. 15 del 2007 consistente en la legitimación para impugnar ante la jurisdicción competente actos de las Administraciones Públicas sujeto a derecho administrativo y disposiciones generales de rango inferior a ley de los que se deriven obstáculos al mantenimento de una competencia efectiva en los mercados*. For an analysis of Article 21-bis of Law No 287/1990, see: A. D'ANNA; G. CAROVANO (2016). Article 21-bis of Law. n. 287 (1990): an analysis of recent administrative case law. *Italian Antitrust Review*, 2; M.A. SANDULLI, Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990, in www.federalismi.it, n.12/2012; F. SATTA, Intorno alla legittimazione dell'Autorità Garante della concorrenza e del mercato a chiamare in giudizio pubbliche amministrazioni, in www.apertacontrada.it, del 26 novembre 2012; G. GRECO, Il modello comunitario della procedura d'infrazione e il deficit di sindacato di legittimità dell'azione amministrativa in Italia, in Riv. It. Dir. Pubbl. comun., 2010; R. GIOVAGNOLI, Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM *ex* art. 21-bis della legge 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato, Relazione al Convegno «Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21 bis, l. n. 287 del 1990», tenutosi presso l'Università degli Studi di Milano il 27 settembre del 2012, pubblicata in www.giustamm.it, n. 10 del 2012; F. CINTIOLI, Osservazioni sul ricorso giurisdizionale dell'Autorità Garante della Concorrenza e del Mercato (art. 21-bis della legge n. 287 del 1990), in www.giustamm.it, 2012; M. CLARICH , I poteri di impugnativa dell'Agcm ai sensi del nuovo art. 21-bis l. 287/90, intervento al Convegno «Evoluzioni del ruolo e delle competenze delle autorità antitrust», Auditorium Autorità Garante della Concorrenza e del Mercato, Roma, 27 marzo 2013, in www.giustiziaamministrativa.it; R. CHIEPPA, Speciale legittimazione a ricorrere della Autorità Garante della Concorrenza e del Mercato e patrocinio dell'Avvocatura dello Stato, in Giur. cost., n. 1/2013; M.S. MARINI, Il ruolo istituzionale dell'Autorità Garante della Concorrenza e del Mercato e l'art. 21-bis della legge 287 del 1990, in www.giustamm.it, Anno XI - N. 6/2014; F. ARENA, Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'Autorità antitrust italiana, contributo per la X edizione del Convegno "Antitrust fra Diritto Nazionale e Diritto dell'Unione Europea", Treviso, 17-18 maggio 2012; H. SIMONETTI, l'art.21-bis della Legge 287/1990 ed il potere d'impugnazione dell'Agcm: è ancora il secolo della «giustizia nell'amministrazione», in Riv. Dir. Pubbl., n.2, 2014. Relazione al convegno organizzato dall'Autorità Garante della Concorrenza e del

Specifically, this Chapter aims to overcome the prevailing interpretation given to the ECJ *Masterfoods*[324] ruling and to its legislative transposition (Article 16 (1), Regulation n. 1/2003) which establishes that EU Commission decisions bind national courts not to conflict with them.

In the opinion of the writer, the prevailing interpretative reconstruction of the Art. 16 (1), Regulation n. 1/2003, should be rejected for a number of reasons. Firstly, because it reduces the potentials of Art. 16 (1). The latter, in fact, as it is predominantly interpreted, would end up becoming a mechanism purely suitable for resolving what a-technically could be defined as a contrast between '*res iudicatae'*. Art. 16 (1), on the contrary, could be better used to obtain, in addition to those described, also additional purposes non-contrasting with the formers. Art. 16 (1), in fact, as well as to avoid the contrast between '*res iudicatae'*, it could (should) also be used to protect the interest in the uniform application of European competition law. Secondly, because the traditional reading of the Art. 16 (1) does not respond to its literal datum, nor to the reasoning used by the ECJ in *Masterfoods* when, for the first time, it has devised the mechanism then transposed into Art. 16 (1).

Mercato su "Concorrenza e crescita: il ruolo delle Autorità antitrust", Roma, 13 febbraio 2014; R. POLITI, Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM *ex* art.21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè, in www.federalismi.it, 2012; S. REBECCHINI, Il ruolo dell'Autorità Garante della Concorrenza e del Mercato, intervento al Convegno «Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21 bis legge n. 287/90», tenutosi presso l'Università degli Studi di Milano, Sala Napoleonica - Palazzo Greppi, il 27 settembre 2012, in http://www.agcm.it/traspstatistiche/ doc_download/3417-milanoset2012.html; A. ARGENTATI, Concorrenza e liberalizzazioni: i nuovi poteri dell'Autorità Garante della Concorrenza e del Mercato, in Rivista Trimestrale di Diritto dell'Economia, n./2012; A. HEIMLER, L'autorità garante della concorrenza e del mercato e i decreti del governo Monti, in Merc. conc. reg., n. 2/2012.

[324] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

Thirdly the new suggested interpretation would also present the additional benefit of boosting the European competition law private enforcement that, so far and especially before Directive 104/2014[325], experienced a limited development compared to the US which registered a diametrically opposed situation, where about 90% of antitrust proceedings are promoted by private parties.[326]

It should be noted that the analysed topic involves a series of interests and principles typical of the rule of law. In particular, it regards the separation of powers, the principle of legality and the principle of independence of the Judge. It also concerns the system of sources of law and the issue of identifying normative acts. Thus it implies a verification of the criteria for ordering a polycentric and multilevel legal system. In consideration of these warnings, the Chapter will try to give account, as far as possible, also of these issues.

Based on these premises, this Chapter will be structured as follows: (i) in Paragraph n. 3.2.1., the new interpretation to be supported will be immediately anticipated and its practical relevance will be clarified; (ii) in Paragraph 3.2.2., a presentation of the contents of Art. 16 (1) will be provided, and the predominantly accepted interpretation will be described in detail; (iii) in Paragraph n. 3.2.3., the reasons that led to the adoption of Art. 16 (1) will be analysed; (iv) in Paragraph n. 3.2.4., it will be clarified if Art. 16 (1) establishes a real 'primacy' of the decisions of the Commission on the decisions of the national courts and whether there is any

[325] Directive 2014/104/EU 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 (Damages Directive), OJ L 349, 5.12.2014.

[326] See D. WAELBROEK, D. SLATER, and G. EVEN-SHOSHAN, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Bruxelles, 2004, available at: *http://www.ec.europa.eu/competition/antitrust/actionsdamages/study.html*; R. PARDOLESI, Privatizzare l'antitrust? Verso una nuova dimensione del private enforcement nel diritto della concorrenza, in G. BRUZZONE (a cura di), *Poteri e garanzie nel diritto antitrust. L'esperienza italiana nel sistema della modernizzazione*, Il Mulino, Bologna, 2008.

differentiation between the various types of decisions that the Commission might adopt; (v) Paragraph n. 3.2.4.1. will identify among those in theory possible the interpretation of Art.16(1) that is most consistent with the real reasons that led to its adoption as identified in Paragraph n. 3.2.3.; (vi) in Paragraph n. 3.3.1., a historical-constitutional reflection on the interpretation of Art. 16(1) will be developed; (vii) Paragraph n. 3.3.1.1. will assess the boundaries of the binding effects of Art. 16 (1), ie if such binding effect refers to the sole operative part of a Commission's decision or to its entire content;(viii) Paragraph n. 3.3.2. will investigate the existing relationship between the binding effect of the Commission decisions *ex* Art. 16(1) with the possible '*res judicata' medio tempore* formed and, (ix) lastly and for completeness, in Paragraph n. 3.3.3., an attempt will be made to understand whether the binding effect pursuant *ex* Art. 16 (1) involves the violation or otherwise of the principle '*nemo iudex in causa sua*' for the cases in which the Commission acts *ex* Art. 335 TFEU before a national court asking for compensation of the damages unjustly suffered by itself or by the European Union, following an infringement decision issued by the Commission itself.

3.2. *Actus iudicialis potentior est extraiudiciali*

3.2.1. Un revirement nécessaire

For the purpose of a simpler understanding of the subject dealt with, it is considered appropriate to anticipate the *revirement* that this thesis intends to suggest, even if its precise scope and its historical and legal motivations will be better analysed in the following paragraphs.

According to the prevailing interpretation, the binding effect *ex* Art. 16 (1), would occur regardless of: (i) the type of decision adopted by the Commission; (ii) the fact that the Commission decision conflicts with a first degree sentence;[327] (iii) the fact that the Commission's decision was suspended in appeal.[328] According to this

[327] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52.

[328] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 53.

thesis, in order for the binding effect to occur, it is necessary that the object of the Commission decision and that of the national procedure coincide. Furthermore, the binding effect would come into existence only in relation to either those direct addressees of the decision or those parties that, in any case, would have had interest and legal qualification to challenge the Commission's decision, but did not do so.[329] The two requirements of subjective and objective identity must coexist. The reason for this stringent interpretation for the purposes of delimiting the boundaries of the binding nature of Commission decisions is the protection of third parties' right of defence. In other words, this interpretation of Art. 16(1) wants to avoid that third parties that are not parties to a Commission procedure or that, in any case, would not have had the opportunity to challenge a Commission decision's conclusions, are bound by it. Unsurprisingly, the only extensive interpretation of the binding effect of a Commission's decision has been taken where this binding effect was used in favour of a third party who started a national proceeding against a subject which was part within the Commission proceeding.[330]

The present thesis, instead, intends to promote a different reading of the Art. 16 (1), capable of better protecting the interest of the uniform application of European competition law, without however affecting further interests. Compared to the traditional interpretation of Art. 16 (1) described above, the one here suggested would have the double effect of: (i) extending the cases of application of the binding effect deriving from the Commission decisions, (ii) reducing the objective scope of the mentioned binding effect. Specifically, with regard to the former, the author of this thesis considers that, for a previous Commission decision to be binding in a

[329] In this sense, see *Crehan v Inntrepreneur Pub Co (CPC)*, (2006) UKHL 38, (2007) 1 AC 333, para 69 (for Lord Hoffman). On the test to be conducted to identify who could and should have challenged the Commission's decision in order to avoid its binding effect, see Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, paras 23 - 24.

[330] In this sense see Laddie J in *Iberian UK Ltd v BPB Industries Plc [*1996] 2 CMLR 601, paras 86 - 83 (the paragraphs of the judgement are wrongly numbered as paragraph 87 is followed by paragraph 82).

subsequent national jurisdictional procedure, the mere '*objective identity*' (and not even subjective) between the two procedures is sufficient. In other words, it should be avoided that a Commission decision that sanctions a given conduct X carried out by one or more subjects, has no binding value in a subsequent national jurisdictional proceeding that arises between different subjects where this concerns the same conduct X. With regard to the second effect, the author of this thesis believes that the binding effect *ex* Art. 16 (1) does not constitute a positive constraint, but a negative one, in '*not running counter to'* the decisions of the EU Commission. The decisions of the Commission, therefore, should not impose a specific '*facere*' on the Judge, but a '*non facere'* or, *rectius*, a '*non contradicere*'. In this sense, the Commission decisions are not suitable to produce rights or obligations towards individual persons or companies (other than their direct addressees), nor to bind the Judge to the specific conclusions established in them. On the contrary, such Commission decisions should simply constitute a limit for national judges who wish to depart from the conclusions reached by the Commission, which could not do so directly, but should invest the ECJ in every state and degree (in this extending the compulsory referral pursuant to Article 267 TFEU). Thus understood, the binding effect *ex* Art. 16 (1) would be addressed exclusively to National Courts, without direct repercussions on third parties, parts of national jurisdictional proceedings. With regard to the latter, in fact, the precedent of the Commission *ex* Art. 16(1), would have the same value of a presumption *de jure* and *iuris tantum*, producing the sole effect of reversing the burden of proof.

The different interpretation of Art. 16 (1) suggested is not a purely theoretical matter, but would produce multiple practical effects. In addition to reversing the burden of proof in national jurisdictional proceedings as just specified, the binding effect *ex* Art. 16(1), as reconstructed here, should also be extended to third parties who are not parties in the Commission's proceedings, without thereby causing a breach of their right of defence. The latter, in fact, could well in any case try to convince the National Court that the conclusions reached by the Commission are incorrect and invite it to promote a preliminary reference to the ECJ pursuant to Art.

267 TFEU. This shows the second practical effect of the suggested new interpretation, namely extending the number of cases in which the binding effect of Commission decisions would operate. Thirdly, the interpretation of Art. 16 (1) here suggested would also indirectly broaden the number of cases in which the preliminary reference to the ECJ is mandatory, thereby expanding the boundaries of the ECJ's control in competition law matters. This would be the case because of the combination of Article 16 (1) Regulation 1/2003, and Article 267 TFEU. The combination of the two mentioned provisions, indeed, would no longer make the preliminary reference to the ECJ mandatory only in cases where the referring court was a last instance court, but such referral would be mandatory in every state and degree anytime a National Court wishes to depart from the conclusions reached by the Commission in a factually identical case regardless of the subjective identity of the parties of the two proceedings.

In conclusion, the new interpretation proposed here would be likely to generate a mechanism that, in addition to preventing the occurrence of contrast between '*res iudicatae*', would also be able to better protect (with respect to the currently prevailing interpretation of Art. 16(1)) the interest of the uniform application of the European competition law.

Thus described the *revirement* here about to be suggested together with its practical effects, in the following paragraphs the historical and juridical motivations that would justify the desired *revirement* will be explained.

3.2.2. Art. 16(1), Regulation n. 1/2003: the uniform application of the European competition law

Art. 16 of Regulation n. 1/2003, paragraph 1, states that '*when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission*'. From the literal datum emerges how Art. 16(1), on one hand, directly implements Art. 288 TFUE[331] and, on the other hand, would do nothing but transpose the conclusions reached by the ECJ in *Masterfoods.*[332]

Art. 16(1), as anticipated in the preceding paragraph, has been interpreted as meaning that the EU Commission decisions bind National Courts not to conflict with them regardless of the fact that: (i) the decision of the Commission conflicts with a first degree sentence;[333] (ii) the Commission's decision was suspended in appeal.[334] In the first case, in fact, if a national court of appeal is called to the judicial

[331]Actually, the political role attributed to the European Commission pursuant to Article 17 of the TEU and to Article 105 of the TFEU does not attribute the value of precedent recognized to the rulings of the ECJ to the decisions of the Commission. Articles 17 TEU and 105 TFEU '*tell the Commission to apply, rather than make, Article 101 principles*'. In this sense see CHRISTOPHER TOWNLEY, "Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)" (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13. The topic will be discussed further later on.

[332]See C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, December 14, 2000 ECR I-11369. Among the various commentators of the judgement, in particular, see: L. MALFERRARI, "*New zur Kompetenzverteilung zwischen Kommission und nationaler Gerichtsbarkeit auf dem Gebiet des Wettbewerbs und zum Verhältnis zwischen der Nichtigkeitsklage und dem Vorabentscheidungsverfahren: Anmerkungen zum Urteil des EuGH in der Rechtssache Masterfoods* ", 36 EuR (2001), 605, 608–610; L. KJØLBYE, 39 CMLRev. (2002), 175, 177 et seq; J. BORNKAMM, "*Die Masterfoods-Entscheidung des EuGH: Bindung der Zivilgerichte a Kommissionsentscheidungen - Lehren für das neue Kartellverfahren?*", 1 ZWeR (2003), 73; W. DURNER, "*Die Unabhängigkeit nationaler Richter im Binnenmarkt - Zu den Loyalitätspflichten nationaler Gerichte gegenüber der EG-Kommission, insbesondere auf dem Gebiet des Kartellrechts*", 39 EuR (2004), 547, 555 et seq., I. MAHER, *Competition Law: Alignment and Reform* (Dublin, 1999), pp. 67–68, 140–141. A conflict between the Commission and the Irish High Court has also taken place in the *Magill case*. See also the cases: Case T-69/89, *Radio Telefis Eireann (RTE) v. Commission*, [1991] ECR II-485 and Case T-76/89, *Independent Television Publications Ltd. (ITP) v. Commission*, [1991] ECR II-575; Cases C-241 & 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. Commission*, [1995] ECR I-743.

[333] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52.

[334] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 53.

review of a first-degree (or a lower grade) judgement contrasting with a previous or subsequent decision of the Commission, said appellate court is obliged to quash the previous jugement in accordance with the Commission decision.[335] In the second case, in order to avoid a jurisdictional ruling in contrast with a Commission decision being challenged before the General Court (hereinafter also 'Court of First Instance' or 'GC') or before the Court of Justice, the National Court should suspend the proceeding pending before it and await the final ruling by the European Courts. *Medium tempore*, to avoid injury to the parties' protected interests, national courts could take precautionary measures.[336] In accordance with Art. 16(1), the same procedure should also be applied to avoid a contrast between a judicial decision and a pending Commission proceeding. The *ratio* is the same.

Finally, where a National Court considers a Commission decision invalid and it was not appealed before the European courts, the only option available to the National Court would be to make a preliminary reference to the ECJ pursuant to Article 267 TFEU.[337] Indeed, there is an exclusive competence of the EU judges to verify the legitimacy of the acts of the EU institutions.[338] The national courts, therefore, have

[335] For further information on this point, see R. NAZZINI, *Concurrent Proceedings in Competition Law (Oxford University Press)*, 2004 e A.P. KOMMINOS, *Effect of Commission Decision on Private Antitrust Litigation: Setting the Story Straight* (2007) 44 CML Rev 1387.

[336]The Co-operation Notice, para 14, on this point expressly states that '*When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties*.' In the same sense on this point, see also the ECJ judgment Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*, vedi *supra*, para 58.

[337] It should be noted that a reference for a preliminary ruling is mandatory under Article 267 TFEU only in the case of a national court or tribunal against whose decisions there is no judicial remedy under national law (Article 267(3)).

[338]See the case *Foto-Frost* (CGE, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, CGE, 22 October 1987, ECLI:EU:C:1987:452), where the ECJ has provided detailed guidance on the

in no case the power to declare EU acts invalid.[339] In this way the independence of the referring Court is safeguarded as well as the unity and coherence of the system of sources of EU law.[340] This conclusion responds to a need not only of legal certainty, but also to the mutual and general duty of cooperation *ex* Article 4 (3) of

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mandatory nature of the reference for a preliminary ruling if the validity of European Union acts is to be challenged: 'o*n the other hand, those courts do not have the power to declare acts of the community institutions invalid. As the court emphasized in the judgment of 13 May 1981 in case 66/80* International Chemical Corporation v Amministrazione delle finanze *((1981) ECR 1191), the main purpose of the powers accorded to the court by article 177 is to ensure that community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a community act is in question. Divergences between courts in the member states as to the validity of community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty. The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the community institutions. As the court pointed out in its judgment of 23 April 1986 in case 294/83 Parti Ecologiste "les verts" v European Parliament ((1986)) ECR 1339), "in articles 173 and 184, on the one hand, and in article 177, on the other, the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions ".'* For further information on this point, see cases C-224/01, *Gerhard Köbler v. Republik Österreich*, 30 September 2003, I-10239, ECLI:EU:C:2003:513; Case 283/81, *CILFT Srl vs Italian Minister of Health*, 6th October 1982.

[339] In this sense, see ECJ's judgements of 22nd October 1987, Case C-314/85, *Foto-Frost v. hauptzollamt lübeck-Ost*, 1987, ECR 4199, para 12-20 and of 6th November 2012, C-199/11, *Europese Gemeenschap v Otis NV*, para 53 e 54.

[340] See, *inter alia*, judgments of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* (C 143/88 and C 92/89, ECR I 415, para 17); of 21 March 2000, *Greenpeace France and Others*. (C 6/99, ECR I 1651, para 54); of 10 January 2006, *IATA and ELFAA* (C 344/04, ECR I 403, para 27); of 22 June 2010, *Melki and Abdeli* (C 188/10 and C 189/10, ECR I 5667, para 54); and of 21 December 2011, *Air Transport Association of America and Others* (C 366/10, ECR I 13755, para 47).

the TEU[341], which directs relations between the Commission and national Courts. However, it is worthy mentioning the constant jurisprudential orientation of the ECJ according to which, if a decision of the Commission had a specific addressee, for the purpose of a preliminary reference, it would be necessary that the latter had challenged its validity before the European Courts.[342] This latter circumstance always occurs in competition decisions. The same considerations would also apply to those individuals who are not direct addressees of a commission's decision, but who have a personal and direct interest in the matter for which they would have standing to present an action pursuant to Article 263 TFUE.[343] However, in order for this effect to occur, based on the *TWD* jurisprudence, it is necessary that the subjects who are not recipients, but directly and personally affected by the decision are '*fully aware of the Commission's decision and of the fact that it could without*

[341]Which states that '*pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.* In this sense, see cases: C-234/89 *Delimitis v Henninger Bräu* (1991) ECR I-935, para 53; C-319/93 *Hendrik Evert Dijkstra v Friesland (FRICO Domo) Coöperatie BA* (1995) ECR I-4471, para 34; C-2/88 *R Zwartveld* (1990) ECR I-3365, para 18 e C-275/00 *Commission v First NV and Franex NV* (2002) ECR I-10943, para 49.

[342] According to settled ECJ case-law, where a Commission decision has a direct and individual effect, the waiver of an appeal to the courts of the European Union would deprive the person concerned, in any subsequent court proceedings, of the possibility of requesting a reference for a preliminary ruling for an examination of the validity of that decision. If that were not the case, it would indeed be possible to circumvent unlawfully the mandatory time limit laid down in Article 263 TFEU for challenging the Commission's acts. See, *inter alia*, case 9th March 1994, *TWD Textilwerke Deggendorf*, C-188/92, I-833, para 23, and 14th September 1999, *Commissione/AssiDomän Kraft Products* e a., C-310/97 P, I-5363, para 60 e ss.; see also joined cases C-346/03 e C-529/03, *Giuseppe Atzeni et al. v. Regione autonoma della Sardegna*, [2006] ECR I-1875, para 30–34, where the CGE has interpreted the principles set out in TWD in an even more restrictive manner.

[343] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 23.

any doubt have challenged it'.[344] The described situation certainly occurs with regard to complaints,[345] due to the particular position they held and the specific guarantees they enjoy.[346] Not clear, instead, is the position of those individuals who would have had a legitimate interest in filing a complaint *ex* Article 7 (2), Regulation n. 1/2003, but did not do so.[347] In the opinion of the writer, the extension to these subjects of the above-described preclusion should be assessed on a case-by-case basis. This is because according to *TWD* the preclusive effect matures not simply for the subjects who have standing pursuant to Article 263 TFEU, but only for the more restricted number of subjects who have standing pursuant to Article 263 TFEU '*without any doubt*' and who are '*fully aware of the Commission's decision*'.[348]

3.2.3. The reasons behind the adoption of Art. 16 (1), Regulation n. 1/2003: a historical overview

Thus reconstructed the basic discipline of Art. 16 (1), Regulation n. 1/2003, it now seems appropriate to verify the reasons that led to its adoption in its current form.

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[344] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 24.

[345] R. NAZZINI, *the effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, n. 2 (2015), 77.

[346] In this sense, see R. NAZZINI, *the effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, n. 2 (2015), 77.

[347] In *Metro SB-Großmärkte GmbH & Co KG v Commission (Metro 1)*, the ECJ held that the subjects having standing to file a complaint before the EU Commission *'if their request is dismissed either wholly or in part,* (do also have standing to) *to institute proceedings in order to protect their legitimate interests'* (Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities* [1977] ECR 1875, para 13.

[348] See R. NAZZINI, *the effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, n. 2 (2015), 77.

Art. 16 (1), as described, is nothing more than the regulatory transposition of the jurisprudential principles established by the ECJ in the *Masterfoods*.[349] Before this ruling and already since the first decade of the introduction of antitrust law in Europe, the ECJ had begun to recognise the direct applicability of the Article 81 and Article 82 CE and the primary role national courts were having in applying EU competition law within a system of parallel competences. At the same time, however, the ECJ was well aware of the possible conflict problems that such a system could generate. To resolve these conflicts, the initial approach adopted by the ECJ from the 1970s to the 1990s was to 'invite' the national courts to suspend their proceedings in anticipation of the Commission's decision to avoid any kind of conflict. At the beginning, therefore, the deference of the national courts was not an obligation, but a 'desirable attitude' to guarantee legal certainty. Gradually, however, the ECJ changed its orientation to qualify in *Delimitis*[350] what was previously a mere 'desirable attitude', a 'due attitude'. This on the assumption that it was not only a question of protecting the interest in legal certainty but, on the contrary, there was also interest in orienting the '*Community competition policy'*.[351]

Later on, in *Masterfoods*, the ECJ went even further as far as to identify as a duty for national courts, not the mere suspension of the jurisdictional procedure, but the obligation not to adopt a decision running counter to that of the Commission where it had ruled on the same case. This even when the Commission's decision was subsequent to the pronouncement of a National Court.

In *Masterfoods*, the Irish High Court ruled on a case, stating that the exclusivity clause included in the freezer supply agreements entered into between *HB Ice Cream* and some ice cream retailers did not violate Articles 81 and 82 EC. Subsequently, while an appeal against this ruling was pending before the Irish Supreme Court, the Commission opened a proceeding on the same case and reached

[349] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

[350] Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, 1991, ECR I-935.

[351] Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, 1991, ECR I-935, para 44.

a conclusion completely opposite to that adopted by the Irish High Court. Subsequently, the Commission's decision was appealed before the General Court. Again, in consideration of the aforementioned subsequent decision of the Commission disrespectful of the High Court's conclusions, the Irish Supreme Court, called to carry out the judicial review, made a preliminary reference to the ECJ requesting: (i) whether, in light of the principle of loyal cooperation, it had to suspend its proceedings and wait for the Court's ruling (or any subsequent ruling before the ECJ) on the appeal pending against the Commission's decision; (ii) if the decision of the Commission (if it has become final) was capable of preventing the person against whom it is directed from requesting confirmation of a conflicting sentence pronounced in its favour and subject to appeal before the national judicial body of last instance.[352]

The ECJ, as anticipated, responded by giving positive results to both questions and thus affirmed the (negative) obligation for the national courts not to run counter to Commission decisions, obligation that persists even in cases where the Commission decision is subsequent to a ruling by a National Court (in this case, this obligation will be imposed on the appeal Court).[353] The ECJ has thus taken a step further than the previous case law.

There are essentially four reasons that led the ECJ to the *Masterfoods* ruling.

Firstly, the prevalence of Commission decisions would be justified by the fact that otherwise doing the role of implementation and orientation of the Community competition policy assigned to the Commission under Article 89, No. 1 EEC Treaty (which later became Art 85, No. 1, EC, currently 105 TFEU) would be

[352] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 18.

[353] For questions arising in cases where the Commission's decision follows a ruling by a national court of last instance or a court of last instance but whose ruling has become final, see below.

compromised.[354] Otherwise, in fact, the activities of the Commission would end up being bound by the decisions issued by the various national courts.[355]

Secondly, that prevalence would be a consequence of the obligation, under Article 5 of the EEC Treaty, existing on all the Member States (and consequently also on the national courts), to ensure the effectiveness of Community law.[356] Effectiveness that would be compromised where there was no protection of the uniform application of European competition law.

Thirdly, the ECJ justifies the primacy of the Commission's decisions by emphasising the exclusive competence of the EU courts to verify the legitimacy of the acts of the EU institutions.[357] If there were no so-called 'supremacy', indeed, a national court could potentially overcome a Commission decision, which may eventually also be validated by the ECJ, thus making the latter ineffective (or at least partially ineffective) in fact.

Finally, the ECJ has relied on the principle of legal certainty by recalling the *Delimitis* jurisprudence.[358]

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[354] Townley notes that Articles 17 TEU and 105 TFEU require the Commission to: '*apply, rather than make, Article 101 principles. In this sense, Regulation n. 1/2003 could tell the Commission to lay down detailed rules for applying Article 101 (3), but not Article 101(1)*.' In this sense, see C. TOWNLEY, 'Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33 Yearbook of European Law 1; King's College London Law School Research Paper No. 2014-13. In reality, however, it is very difficult to distinguish the two logical moments. This is because it is when it applies European competition law that the Commission creates European competition law, and vice versa. In competition law, in fact, the difference between substantive policies and enforcement actions is very subtle and nuanced, they are two sides of the same coin.

[355] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 46.

[356] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 49, 56.

[357] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost,* CGE, 22 October 1987, ECLI:EU:C:1987:452, para 12-20.

[358] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 51.

These are the reasons that led the ECJ to the *Masterfoods* ruling. It should also be noted that, given the particular moment in which this judgement took place (close to the adoption of Regulation No. 1/2003), it was so influential as to have the entire Art. 16 rewritten. This, in fact, in the old text of a draft regulation of September 2000, provided that the NCAs and the national courts should '*use every effort to avoid any decision that conflicts with decisions adopted by the Commission'*.[359] Only after *Masterfoods* the text of Art. 16(1) went as far as to impose that the National Courts could not adopt decisions running counter to those adopted by the Commission.[360]

Thus reconstructed the reasons that led to the adoption of Art. 16, Regulation 1/2003, in its current wording, it should be emphasises that the 'supremacy' of the Commission's decisions was not based on the principle of legal certainty but, above all, on Articles 89, n. 1 and 5 of the EEC Treaty. This means that the effectiveness and uniformity of European competition law are interests whose realisation, in a decentralised system of parallel competences, must not be compromised by national Courts or NCAs. Therefore, these are interests that justify limitations on the powers of these subjects. From this perspective, it should be noted how, pursuant to Art. 89, n. 1, EEC Treaty (currently Art. 105 TFEU), it is admitted that the political mission of the Commission can influence the jurisdictional activity of the national courts. In competition law, in fact, '*the difference between substantive policies and enforcement actions is very subtle and blurred, they are two sides of the same coin*'.[361]

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[359] *Commission 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 ("*Regulation Implementings Articles 81 and 82 of the Treaty*"), COM(2000)582 final, O.J. 2000, C 365E/284.

[360] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 60.

[361] G. CAROVANO, The ECN Grand Chamber: Updating the ECN to Face the Challenges of the Online World. (2018) *European Competition and Regulatory Law Review*, Volume 2, Issue 3, page 166-186.

3.2.4. Article 16(1), Regulation n. 1/2003 and the non-primacy of Commission decisions

Thus retraced the historical and logical excursus that led to the adoption of Art. 16 (1), Regulation n. 1/2003, it is now time to clarify whether this provision poses a real 'primacy' of the Commission decisions on the rulings of national courts and whether, for this purpose, there any differentiation between the various types of decisions that the Commission can to adopt.

From a first reading of the Art. 16(1), it may seem that it establishes a 'primacy' of the decisions of the Commission with respect to the decisions of the national Courts. Such a reading, however, would seem to present a series of constitutional problems since it could result in a breach of the principle of separation of powers[362] which would make the judiciary subject to the 'executive' power of which the Commission is expression. This could produce a violation of Art. 47 of the Charter of Fundamental Rights of the European Union,[363] which expressly recognises the right of each person to obtain an independent Judge.[364] For this reason alone, and

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[362] Contrarily on this point, see E. PAULIS, '*Coherent Application of EC Competition Rules in a System of Parallel Competencies'*, in C.D. EHLERMANN and I. ATANASIU (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 419-422, who argues that the principle of separation of powers is applicable only within the same legal order, and not in the intersaction between the EU and National legal orders.

[363] EU Charter of Fundamental Rights is available at the following link: http://www.europarl.europa.eu/charter/pdf/text_it.pdf.

[364] On the incompatibility of the bunding effect of Commission Competition decision under art 16(1), Regulation n. 1/2003, with the principles of independence of the Judge, separation of powers, and the system of parallel competences, see: G. MARENCO, "*The uneasy enforcement of Article 85 EEC as between Community and National Levels",* in B. HAWK (Ed.), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1994), p. 615 e ss.; C. JONES, E. SHARPSTON, "*Beyond Delimitis: Pluralism, illusions, and narrow constructionism in Community antitrust litigation"*, 3 CJEL (1996–97), 85, 92; G. MARENCO, "*Le régime de l'exception légale et sa compatibilité avec le Traité"*, 37 CDE (2001), 135; G. MARENCO, "*Does a legal exception system require an amendment of the Treaty?"*, in C.D. EHLERMANN *and* I. ATANASIU (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust*

regardless of others, such a reading of Art. 16(1) should not be endorsed, since it is the Regulation n. 1/2003 itself that in recital 37 states that '*This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles*'.

In addition to the given reasons, the thesis that Art. 16(1) establish a 'primacy' of the decisions of the Commission on the rulings of the national courts should be further rejected if the new system of parallel competences established by the same Regulation n. 1/2003 in Art. 6 and recital n. 7[365] is considered. It is not clear, in fact, why national courts would first be qualified as directly able to apply Articles 101 and 102 TFEU and, subsequently, limited in this competence.

Policy (Oxford/Portland, 2001), p. 172; H. SCHRÖTER, in H. SCHRÖTER, T. JAKOB *and* W. MEDERER (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), p. 324. Contrarily, see J. STUYCK, "*Competition Law in the EC and in the Member States",* in O. DUE, M. LUTTER *and* J. SCHWARZE (Eds*.), Festschrift für Ulrich Everling*, Vol. II (Baden-Baden, 1995), pp. 1514, 1517; A. SAGGIO, '*Competenze rispettive delle autorità comunitarie e nazionali in materia di controllo e repressione delle attività anticoncorrenziali delle Imprese*', 2 Dir.Un.Eur. (1997), 1, 12–13; C. KERSE, *EC Antitrust Procedure* (London, 1998), p. 442; E. PAULIS, "*Coherent Application of EC Competition Rules in a System of Parallel Competencies*", *supra* nota n. 28, p. 420; M. SIRAGUSA, "*The modernisation of EC competition law: Risks of inconsistency and forum shopping*", in C.D. EHLERMANN *and* I. ATANASIU (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 450–451.

[365] See Paragraph 3.1. above.

It is not a coincidence that many academics have refused a reading of Art. 16(1) as introducing a 'supremacy' of the Commission.[366] And others, again, have criticized the alleged 'supremacy' of the Commission as a form of bureaucratic arrogance.[367]

These criticisms, in reality, do not have reason to exist where the interpretation of Art. 16 (1) here suggested is accepted. This is because both Art. 16(1), and the *Masterfoods* ruling that is genesis and mother of the former, affirm not the supremacy of the Commission decisions but, on the contrary, the supremacy of the ECJ rulings, which is the only subject competent to pronounce on the validity of the Commission acts pursuant to Articles 263 and 267 TFEU.[368] This interpretation of the ruling is supported by the fact that both in *Masterfoods* and in the text of Art. 16, the national courts are not 'positively' bound by the Commission decisions, but are 'negatively' bound not to 'running counter to' the Commission decisions. Indeed, the ultimate objective of the system cerated in *Masterfoods* by the ECJ and then transplanted into Art. 16(1), would seem to be that of subjecting the national courts' decisions to the rulings that the ECJ itself makes on the Commission decisions (awaiting which the national Courts will suspend the proceedings pending

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[366]In this sense, see: Y. MOTTARD, E. PARTSCH, E. PITTIE e M. STRUYS, "*Chronique semestrielle de droit communautaire*", 120 JdT (2001) 809, 810; J.B. BLAISE, L. IDOT, "*Chronique concurrence (années 2000 et 2001)"*, 38 RTDE (2002), 103, 143; M. SIRAGUSA, E. GUERRI, "*L'applicazione degli artt. 81 e 82 del Trattato CE in seguito all'introduzione del Regolamento 1/2003*", (2004) *Il Diritto Industriale* 348, 352–353.

[367] In this sense, see: N. GREEN, *"Practical implications of reform*", in RIVAS and HORSPOOL (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000), p. 37, and L. TOFFOLETTI, "*Riforma del diritto antitrust comunitario: Giudizio di esenzione e diritti dei singoli*", 29 *Giurisprudenza Commerciale* (2002), 417/I, 434/I-435/I. For the former, in particular, the duty of sincere co-operation under Article 10 EC applies in both directions. As a result, the Commission would have to show deference to the rulings of the national courts if they were the result of exhaustive analyses, perhaps also in the light of information or facts unknown to the Commission.

[368] In this sense, see: E. PAULIS, C. GAUER, '*La réforme des règles d'application des articles 81 et 82 du Traité*', 11 JdT (Eur.) (2003), 65, 69.

before them). This would be the case both either when the ECJ has been called into action through the ordinary appeal procedure pursuant to Article 263 TFEU, or when the ECJ intervention is the result of a preliminary reference under Article 267.

Furthermore, if we consider that *ex* art. 267(3) TFEU, a preliminary reference is compulsory for Courts of last instance, the cases in which a Commission decision does not pass through the examination of the ECJ, in light of the *TWD Textilwerke Deggendorf* jurisprudence, are reduced to being only those in which the Commission decisions have not been challenged (and therefore accepted) by the direct addressees harmed by them.[369]

From this reading, it follows that national courts are not 'positively' bound directly by the decisions of the Commission, but they are bound by the indirect intervention of the ECJ to which they can (and in some cases must) always have access.[370] In this sense, a Commission decision becomes binding not by its nature, but by the fact that it was considered valid by the ECJ.[371] Thus, the rule according to which national courts cannot adopt decisions running counter to a Commission decision relating to Artt. 101 or 102 TFEU proceedings, is a specific expression of the division of competences existing within the European Union, between National Courts, on the one hand, and the Commission and the European Courts, on the other.

From this follows two consequences. On the one hand, it follows that the Commission decisions must not be considered 'positively' binding (and therefore superior) National Courts. On the other, and simultaneously, it follows that the

[369] As will be seen below, the number of cases in which the ECJ does not rule on a Commission decision will be further reduced by the fact that the preliminary ruling under Article 267 will also be admissible in favour of third parties who are not direct addressees of the contested Commission measure.

[370] See S. O'KEEFFE, "*First among equals: The Commission and the national courts as enforcers of EC competition law*", 26 EL Rev. (2001), 301, 304; S. PREECE, *Annotation of Masterfoods*, 22 ECLR (2001), 281, 284–285.

[371] See J.D. COOKE, "*Centralised Subsidiarity: The Reform of Competition Law Enforcement*", 10 IJEL (2001), 4, 19.

supremacy and uniformity of Community law are protection-worthy interests that, as seen in the previous paragraph, cannot be limited or compromised by the National Courts' decisions. This assumes, of course, that the 'negative' constraint of the Commission's decisions exists as long as the factual (and not even subjective) circumstances of both proceedings (European and National) remain unchanged. Otherwise, the National Courts could rightfully consider themselves not bound by a Commission decision and reach different conclusions without thereby misapplying Art. 16(1), Regulation n. 1/2003 or the *Masterfoods* jurisprudence. A similar reading of Art. 16(1), indeed, does not infringe the principle of independence of the judge and better safeguards even the classic separation of power.

There may be cases, however, where a real 'supremacy of the Commission' would remain. To identify such scenarios, it is necessary to move to the second question that inspired this paragraph and distinguish between the various types of decisions that the Commission can adopt. A 'supremacy' of the Commission would exist only for those Commission decisions capable of producing a 'positive' binding effect. These decisions arise in matters in which the Commission retains exclusive competence.[372] Similar hypotheses in the present enforcement system could arise for those decisions with which the Commission withdraws the benefit provided by a block exemption regulation. The reasoning developed above to justify the 'negative' binding effect of Commission decisions could not be extended to these decisions. This is the case because in relation to this kind of Commission decisions,

[372]In this sense, see R. WHISH, "*The enforcement of EC competition law in the domestic courts of Member States*", in L. GORMLEY (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997), p. 84; L. HILJEMARK, "*Enforcement of EC competition law in national courts – The perspective of judicial protection*", 17 YEL (1997), 1, 117. In this sense, see also the judgments of the Court of Justice in the cases *HJ Banks & Co Ltd v British Coal Corporation* (Case C-128/92), 1994, ECR I-1209, para 23; C-18/94, *Barbara Hopkins et al. v. National Power plc and Powergen plc,* [1996] ECR I-2281, para 31; T-89/98, *National Association of Licensed Opencast Operators (NALOO) v. Commission*, [2001] ECR II-515, para 85.

it cannot be affirmed that what is binding is the supremacy of the ECJ, since these decisions cannot be directly challenged as they are decisions without a specific addressees and, therefore, not directly harmful to specific individuals.

It should also be noted that according to some, Art. 16(1) would operate differently depending on whether the Commission decisions are 'positive sanctioning decisions' or 'negative decisions of inapplicability' pursuant to Article 10, Regulation n. 1/2003. Although the *Masterfoods* jurisprudence does not differentiate on this point, the topic is debated in doctrine. While on the one hand there are those who believe that the binding effect under Art. 16(1) would apply equally to inapplicability decisions, giving importance to the fact that also this kind of decisions contain real and proper assessments.[373] On the other hand, there are those who find it difficult to recognise even a mere negative constraint on inapplicability decisions. This by virtue of the fact that these decisions do not constitute a definitive judgment, nor the adoption of a position on matters of exclusive competence of the Commission. In this sense, see the conclusions of Advocate General Van Gerven in the case of *HJ Banks & Co Ltd v the British Coal Corporation* which compares the inapplicability decisions to the Commission administrative letters (c.d. 'comfort letter'). Both, according to Advocate General Van Gerven, '*does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them*'.[374] From this reading, it would follow that in the

[373] In this sense see R. NAZZINI, *the effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, n. 2 (2015), 70.

[374] *HJ Banks & Co Ltd v British Coal Corporation* (Case C-128/92), 1994, ECR I-1209, *A.G.'s Opinion*, para 60. In this case, Advocate General Van Gerven has resumed what the Court of Justice has stated in *NV L'Oréal v PVBA De Nieuwe AMCK* (Case 31/80), 1980, ECR 3775, 3789-3790. Similarly on this point, see the judgement of the House of Lords *Inntrepreneur Pub Company (CPC) et al. v. Crehan (HL)*, [2006] UKHL 38, speech by Lord Hoffmann, para 58. For further judgments of the Court of Justice in this sense on this point, see the judgments: 10 July 1980, case 37/79, *Marty* (Rec. 1980, page 2481, point 13); 10 July 1980, Joined Cases 253/78 and 1 / 79-3 / 79, *Giry c*

face of inapplicability decisions, the national courts, by virtue of their parallel competence with regard to the application of Articles 101 and 102 TFEU, retain the full power to reach different conclusions. In the writer's opinion, the preferable solution would be to decide on a case-by-case basis by virtue of the type and degree of assessment contained in the inapplicability decision. The higher the assessment, the more likely it is to produce binding effects.

Again and lastly, as expressly recognised by recital n. 22 of Regulation n. 1/2003, the national courts must not consider themselves negatively bound by the Commission commitments decisions. The aforementioned recital n. 22 states, in fact, that '*Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty*'.

3.2.4.1. Article 16 (1), Regulation 1/2003 and the problematic nature of the notion of 'conflict': which interpretation to prefer

In this paragraph, based on the evidence gathered in the two previous paragraphs, it will be identified the 'real purpose' according to which the mechanism *ex* Article 16 (1) has been devised and, consequently, which is, among the possible interpretation of the Art. 16 (1), the one that best meets the purpose (or plurality of purposes) that generated Art. 16(1). Such operation will lead to the affirmation of the *revirement* anticipated in paragraph n. 2 and partially described in the previous paragraph.

There are at least three possible interpretations of Art. 16(1), Regulation n. 1/2003. The exegesis of the norm varies according to the notion of 'conflict' that one wants to accept. The choice of the most fitting notion of conflict depends on what the 'real

Guerlain (Rec. 1980, p. 2327, point 13) and Cases 99/79, *Lancôme* (Rec. 1980, p. 2511, point 11) and T-51/89, *Tetra Pak* (Rec. 1990, pp. II-345 and II-346, para 104). Contrarily, see R. NAZZINI, the effect of decisions by Competition Authorities in the European Union, *Italian Antitrust Review*, n. 2 (2015).

purpose' to be attributed to Art. 16 (1), also in light of its historical and motivational genesis.

Proceeding in a logical order, the different notions of conflict will be identified first, and then the different possible interpretations of Art. 16(1) will be analysed in turn.

Although Art. 16(1) would seem to be aimed at avoiding or resolving in root circumstances (if it can be borrowed in a non-technical sense an expression typical of civil-law doctrine) of contrast between '*res iudicatae*'[375] that potentially could occur between the Commission decisions and the judgements of national courts, it does not define the notion of 'conflict'. From the letter of the law, in fact, it does not appear at first sight whether 'conflict' means: (i) incompatibility between the operative part of a Commission decision and the conclusions reached by a national court, (ii) whether it exists even in cases where , in the presence of similar facts, there is an incompatibility of the logical-deductive reasoning used by the two pronunciations or (iii) if, faithfully to the civilian notion of conflict, it exists only when between the two incompatible decisions there is identity of object, facts, and subjects involved.

[375]Note that here the expression is intentionally used in a non-technical sense. The decisions of the Commission, in fact, must be considered as acts issued by a public-administrative authority, which do not have the same force and effects as a judicial decision. Therefore, they do not produce a *res judicata* (see M. FALLON, *Droit matériel général del'Union européenne* (Louvain-la-Neuve, 2002), p. 329, and Commission Decision 2005/480 / EC of 30 April 2004 (*Compagnie Maritime Belge SA*), OJ 2005, L 171/28, para 11) but, on the contrary, they represent administrative decisions which enjoy a presumption of legality (Case C-137/92 P *Commission v BASF and Others* [1994] ECR 1-2555, para 48), as legally effective as long as the competent judge does not rule on their legitimacy (in this sense see R. NAZZINI, *Concurrent Proceedings in Competition Law, Procedures, Evidence and Remedies* (Oxford, 2004), p. 156 et seq., and, R. NAZZINI, "*Parallel and sequential proceedings in competition law: An essay on the modes of interaction between Community and national law*", 16 EBLR (2005), 245, 270–271). Contrarily, see M. FALLON, *Droit matériel général of the Union européenne* (Louvain-la-Neuve, 2002), p. 329, and Commission Decision 2005/480 / EC of 30 April 2004 (*Compagnie Maritime Belge SA*), O.J. 2005, L 171/28, para 11), which in the case of the Commission decisions, the exclusively competent judge is the ECJ.

In the first case, there would be conflict only if 'object' and 'facts' of the case before the Commission and those present before the national Court were 'identical' and the operative part of the Commission decision was incompatible with that of the national Court ('intermediate interpretation/thesis').

In the second case, there would always be a conflict even when, in the presence of 'similar facts', there was also an 'inconsistency of reasoning' between the decisions of the Commission and the national Court ('extensive interpretation/thesis').

In the third case, there would be conflict if and only if, in addition to the identity of facts and object, there was also a subjective identity of the parties involved in the two proceedings ('restrictive interpretation/thesis').

Each of these different possible interpretations of Art. 16 (1), has advantages and disadvantages.

In order to identify the so-called 'authentic interpretation'[376] of Art. 16(1), we need to investigate the real rationale behind *Masterfoods* and Art. 16 (1). In other words, we need to understand the real purpose behind Art. 16(1). In particular, it is necessary to determine what is the equilibrium point identified by the ECJ in *Masterfoods* among the various interests involved: (i) the uniform application of EU competition law; (ii) the resolution of the 'conflict of judges' to protect the principle of legal certainty; (iii) the guarantee to the Commission of a margin of *maneuver* such as not to compromise the role of implementation and orientation of the Community competition policy assigned to it pursuant to Article 89(1) of the EEC Treaty (which later became Article 85(1), CE; currently Art. 105 TFEU) and, lastly, (iv) the protection of the decentralised system of parallel competences between the Commission, NCAs and National Courts for the implementation of the EU competition rules.

The ECJ in *Masterfoods* has established a negative obligation for the national courts to 'not running counter to' Commission decisions. As highlighted in the preceding

[376] Here the term is clearly used in a non-technical sense.

paragraphs, this obligation must not be seen as an indication in favour of the 'primacy' of the Commission on national courts but, rather, as a duty of the national bodies (including the National Courts) to respect the EU institutions (which includes the Commission) and laws under the final control of the ECJ.[377] This role of the ECJ seems to be particularly functional in protecting the decentralised system of parallel competences. From this point of view, therefore, the 'extensive interpretation' would not reconcile with the 'negative' obligation enshrined in *Masterfoods* and with the role played by National Courts within the decentralised system of application of EU law as expressly recognised by Art. 6, Regulation n. 1/2003. If the 'extensive interpretation' were accepted, indeed, there would be a risk of recognising to the Commission decisions' binding effect an excessively extended scope, thus violating the parallel competences of the National Courts as well as their independence.[378]

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[377] More extensively on this point see J. BORNKAMM, "*Die Masterfoods-Entscheidung des EuGH: Bindung der Zivilgerichte an Kommissionsentscheidungen - Lehren für das neue Kartellverfahren?*", 1 ZWeR (2003), 73.

[378] Despite these considerations, there has been no lack of rulings by national courts aimed at accepting the extensive interpretation here rejected. In this sense, see the following case law: *Hasselblad v. Orbison* (CA), [1985] QB 475; [1984] 3 CMLR 679, *MTV Europe v. BMG Records (UK) Ltd. et al.*, [1997] EuLR 100; *Iberian UK v. BPB Industries plc (Ch.)*, [1996] 2 CMLR 601. In particular, see the judgment *Bernard Crehan v. Inntrepreneur Pub Co. CPC* (CA), [2004] EWCA Civ 637, [2004] EuLR 693, of the English Court of Appeal (see G. CUMMING, "*Procedural Consequences of the Crehan Judgment in Enforcement of EC Competition Law by the English Courts* ", (2005) RLC No. 5 106). In that judgment, the said court overturned the decision taken by the High Court in the *Crehan v. Inntrepreneur Pub Company et al.* (Ch.D), [2003] EWHC 1510, [2003] EuLR 663, based on the existence of previous Commission decisions adopted in cases whose facts were similar to those of the main judgment and considered binding (see: Commission Decision 99/230 / EC of 24 Feb. 1999 (*Whitbread*), OJ 1999, L 88/26, Commission Decision 1999/473 / EC of 16 June 1999 (*Bass*), OJ 1999, L 186/1; Commission Decision 99/474 / EC of 16 June 1999 (*Scottish and Newcastle*), OJ 1999, L 186/28). In the present case, therefore, the Court of Appeal went further than *Masterfoods* until reaching a general principle of deference of the national courts in favour of the Commission, even when there is no conflict between the operative part of the Commission decision and that of the National ruling, and the parties to the two proceedings are not

Excluded the extensive interpretation, the intermediate and the restrictive one remain.

The latter, in particular, must also be rejected, although it seems to be the interpretation shared by the Commission in its *Co-operation Notice*[379] when it states that *'the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission'*.[380] The reasons why it should be rejected are multiple.

Firstly, because whether accepted, such interpretation would degrade the value of the interest in the uniform application of Community law in the field of competition, subordinating it to the interest of legal certainty. If the 'restrictive interpretation' is accepted and with it, the civil law notion of conflict, the mechanism envisaged by the ECJ in *Masterfoods* and then transferred to Art. 16 (1), would end up resolving

identical. The Court of Appeal, in particular, stated that '*the English court was obliged under the duty of sincere cooperation to give to the Commission much greater deference than that which the judge, with all respect to him, was prepared to give*'. Commentators talked about '*doctrine of consistency*'. The Court of Appeal's ruling, however, was in turn overturned by the House of Lords in the *Inntrepreneur Pub Company (CPC) et al. v. Crehan* (HL), *supra*. For a criticism of this judgement, see K. BEAL, "*Crehan and Post-modern Malaise*", 5 Comp.LJ (2007), 17, 24 et seq .; A. ANDREANGELI, "*The Enforcement of Article 81 EC Before National Courts after the House of Lords' Decision in Inntrepreneur Pub Co. Ltd. v. Crehan* ", 32 EL Rev. (2007), 260, 269–270.

[379]See Commission Notice on Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82, *supra*.

[380]See: *Commission Notice on Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82*, *supra*, para 8. For a different position of the same Commission, see *Commission's article-by-article Explanatory Memorandum to the 2000 draft Regulation, under Art. 16*, '*the potential for conflict depends on the operative part of the Commission decision and the facts on which it is based*'. On this point see also D. DALHEIMER, in D. DALHEIMER, C. FEDDERSEN and G. MIERSCH (Eds.), *EU-Kartellverfahrensverordnung, Kommentar zur VO 1/2003* (München, 2005), p. 120; and A. KLEES, *Europäisches Kartellverfahrensrecht mit Fusionskontrollverfahren* (Köln / Berlin / München, 2005), 300-301.

itself into a mere mechanism to solve the contrast between '*res iudicatae'*. The interest in the uniform application of EU competition law would end up being an interest protected only incidentally. Such interest, indeed, would be protected only in cases where there was a 'conflict' in a civil law sense. Such a conclusion cannot be shared. This is because the interest in the uniform application of EU competition law cannot be considered as having a secondary role. In this sense, the literal datum of the Art. 16, Regulation n. 1/2003, is eloquent. Said Article 16 is in fact entitled '*Uniform application of Community competition law*'. In favour of this reconstruction there would also be the fact that the ECJ in *Masterfoods* used the interest in legal certainty to motivate its decision only as a fourth and final reason, thus giving it a minor and secondary weight compared to the others weighted interests.

Secondly, for those not persuaded by the reasons given above, the 'restrictive interpretation' should also be rejected because among the reasons that led the ECJ to establish the obligation for National Courts to 'not running counter to' the Commission decisions, a major role was played by the interest in leaving the Commission with a margin of *maneuver*, such as not to compromise the role of implementation and orientation of the Community competition policy assigned to it under Article 89, No. 1 EEC Treaty (currently 105 TFEU). The ECJ expressly states this in *Masterfoods,* when it held that '*in order to fulfill the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court*'.[381] From this perspective, whether the 'restrictive thesis' was accepted, the National Courts would enjoy an excessive freedom capable of compromising the guiding role entrusted to the Commission in EU competition law matters. The acceptance of the 'restrictive thesis', in fact, would led to the absurd consequence that if a national court were to rule on a case whose facts and object were completely identical to a precedent already dealt with by the Commission (and potentially also validated by the ECJ), this could decide otherwise, departing from the Commission

[381] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 48.

conclusions, for the simple fact that the case pending before the national court concerns different subjects.[382] This situation occurred in the *Crehan v Inntrepreneur Pub Co (CPC) case*[383] where the House of Lords considered itself not bound by three previous Commission decisions[384] which had as their object '*the same factual and legal issue*' although between different subjects.[385] If such conclusions were shared, the interest in the uniform application of Community competition law would be highly prejudiced (which would also give rise to forum shopping phenomena). And, in order for the Commission to be able to play the role of guidance entrusted to it by the Treaties, thus 'negatively' binding the National Courts, it should pursue all the national Courts' judgements deviating from its precedents. A truly unthinkable and, above all, uneconomic and inefficient scenario. This is because the Commission could better spend its energies in new and more relevant cases, instead of returning on cases already discussed and treated at national level. Such a 'restrictive interpretation', therefore, would not be appropriate '*when examining the effects of Commission decisions in the competition field*'.[386]

Thirdly, because the notion of conflict endorsed by the ECJ in *Masterfoods* and contained in the conclusions of Advocate General Georges Cosmas would not prevent the adoption of the 'intermediate thesis'. Advocate General Cosmas, in fact, has expressly clarified that in order to have a contradiction, and therefore a conflict, between a Commission decision and a ruling by a National Court, it is not enough

[382] Case *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333.

[383] *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333.

[384] See. *Scottish & Newcastle* [1999] OJ L186/28; *Bass Holdings Ltd, Bass Lease* [1999] OJ L186/1; *Whitbread* [1999] OJ L88/26.

[385] See R. NAZZINI, *the effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, n. 2 (2015), 79.

[386] A.P. KOMMINOS, *Effect of Commission Decision on Private Antitrust Litigation: Setting the Story Straight*, *supra* nota n. 13.

that the legal problems dealt with are connected or resembling.[387] According to Advocate General Cosmas, there is no conflict if '*the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts*'.[388] Turning the sentence into a positive one, there is conflict if and only if there is absolute identity of the legal and factual context of the cases being examined by the Commission and the National Court(s). From this follows that the notion of conflict accepted by the Advocate General Cosmas and then endorsed by the ECJ in *Masterfoods*, does not require a subjective identity of the parties of the two proceedings, having this a purely incidental nature.[389]

From the above considerations, it seems that the point of balance between the various interests involved reached in *Masterfoods* by the ECJ wants that the Art. 16(1), is interpreted following what in this paper has been defined as 'intermediate thesis'.[390] In this way, all the interests involved are simultaneously protected. Indeed, the 'intermediate thesis' allows to reach the best protection possible for the following interests: (i) uniform application of EU competition law, (ii) legal

[387]Significantly, at the paragraph 16, footnote n. 5, of its conclusions, to better clarify when there is conflict, he has also provided an explanatory example. Cosmas has expressly stated that there is a lack of identity and, therefore, of conflict, when '*the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between a particular company and retailers 1, 2 and 3 in Ireland, whilst the Commission is monitoring a similar agreement in respect of the same products in the same market between another company and retailers 4, 5 and 6*.'

[388] See Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, *A.G.'s Opinion*, para 16. See also B. RODGER, "*The big chill for national courts: Reflections on market foreclosure and freezer exclusivity under Article 81"*, 11 IJEL (2004), 77, 108–109.

[389] Subjective diversity, indirectly, can only be relevant where this translates into objective differences in the factual context of the case under examination.

[390]In this sense on this point, see R. NAZZINI, "*Community and national antitrust procedures: On procedural profiles of the relationship between Community law and internal rights*", 11 Dir.Un.Eur. (2006), 97, 129 and ss; and A.P. KOMMINOS, *Effect of Commission Decision on Private Antitrust Litigation: Setting the Story Straight*, supra note n. 13.

certainty, (iii) preserving the leading role of the Commission to allow it to fulfil its leading mission as entrusted by the Treaties, (iv) the correct allocation of powers within a polycentric, multilevel enforcement system with parallel competences.

The acceptance of the 'intermediate thesis' implies that a Commission decision concerning a particular anticompetitive conduct will be in conflict, and therefore binding, in all those national jurisdictional proceedings that will have to rule on objectively identical cases, even when the addressees of the Commission decision are not the same subjects involved in the national judicial proceedings. In this sense, for example, the Court of Appeal of Brussels has established that, pursuant to Art. 16 (1), Regulation n. 1/2003, it was bound by a previous decision of the Commission (with which it declared anti-competitive a provision established by a Belgian Architects Association which identified the minimum recommended category fees)[391] since it concerned the same professional rule that was being examined in the national judgment.[392]

Last but not least, the acceptance of the 'intermediate thesis' would not be prevented by the objection that a National Court would not be bound by a Commission decision if it applies national competition law provisions rather than the European one, even though the factual component of the cases under scrutiny are identical.[393]

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[391]See Commission Decision of June the 24th 2004 (PO/*Barême d'honoraires de l'Ordre des Architectes belges*).

[392]See *Cour d'appel de Bruxelles*, sept 28[th] 2004, *Eddy Lodiso v. La SPRLU M.O.N.D.E.*, available at the following link: ec.europa.eu/comm/competition/antitrust/national_courts/index_en.html.

[393]It should be noted that the problem arises only in relation to cases of abuse of a dominant position pursuant to Art. 102 TFEU, as with regard to the cases referred to in Art. 101 TFEU is the same Regulation n. 1/2003 which in Art. 3 (2) states that '*The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty'*.

The assumption from which this objection is based is that the binding effect of the Commission's decisions should be excluded because, in this hypothesis, there would be a difference between the EU and the National proceedings, namely the legal interest protected. EU competition law in the former scenario, and National competition law in the latter. Such an objection is totally irrelevant in relation Art. 101 TFEU cases. This is the case because it is Regulation n. 1/2003 itself that in Art. 3(2) states that '*the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty.'*[394] . The above objection recovers a *raison d'être* only with respect to Art. 102 TFEU cases in favour of which does not operate the same limitation mentioned above under Article 3 (2), Regulation n. 1/2003. A similar conclusion, however, must be rejected as it would constitute a '*too easy escape*' for National Courts to wriggle from Commission precedents, which may have also been examined by the ECJ. A similar conclusion, moreover, besides being strongly detrimental to the interest of the uniform application of EU competition law, would also be in contrast with Art. 3 TFEU, which states that the European Union '*has exclusive competence in the following areas: (...)(b) the establishing of the competition rules necessary for the functioning of the internal market*'.[395] Finally, the overcoming of the aforementioned objection and the consequent acceptance of the 'intermediate interpretation' also for 102 cases, would offer an evolutionary reading more in line with the recent ECJ jurisprudence on Art. 54 CISA[396] and of the European Court of Human Rights on Art. 4, Protocol n. 7

[394]Article 3 (2), Regulation n. 1/2003.

[395]Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390, Art. 3.

[396]Case C-150/05, *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië*, paras 48 and 53; Case C-436/04, *Leopold Henri Van Esboroeck*.

ECHR.[397] According to this case-law '*two infringements are the same offence simply when they are constituted by the same or inextricably linked facts*[398] *without needing the identity of the legal interest protected being required*'.[399]

The acceptance of the 'intermediate thesis' (although, as we have seen, it is the interpretation more in line with the spirit of *Masterfoods* and therefore with the historical rationale that inspired Article 16 (1)), however, could raise concerns for the effects (in terms of impairment of the right of defence deriving from a violation of the right to be heard) that it could deploy for third parties who are not the direct addresses of the Commission's decision, but who have turned to a National Court for a matter factually and objectively identical to that decided by the Commission. Furthermore, this conclusion could be said to be in contrast with the wording of Art. 288 TFEU. The latter, as known, expressly states that if '*a decision (...) specifies those to whom it is addressed (it) shall be binding only on them*'.

On a closer look, both concerns are unfounded.

With regard to the former, in cases of this type, as highlighted by the Attorney General Van Gerven in *HJ Banks & Co Ltd v British Coal Corporation*, '*is self-evident that no obstacles may be placed in the path of third parties seeking to challenge before the national court findings which the Commission has arrived at in a decision of that kind*'.[400]This means that in the interest of these third parties,

[397]*Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009).

[398] '*a set of facts which are inextricably linked together in time, in space and by their subject-matter*' Case C-367/05 *Criminal proceedings against Norma Kraaijenbrink* (2007) ECR I-06619, paras 23-26; Case C-288/*05 P Criminal proceedings against Jürgen Kretzinger* (2007) ECR I-06441, paras 29-31.

[399] In this sense, see R. NAZZINI, *Competition Enforcement and Procedure* (OUP 2016); and G. CAROVANO, The ECN Grand Chamber: Updating the ECN to Face the Challenges of the Online World. (2018) *European Competition and Regulatory Law Review*, Volume 2, Issue 3, page 166-186.

[400] *HJ Banks & Co Ltd v British Coal Corporation* (Caso C-128/92), *A.G.'s Opinion*, para 60.

they should always be allowed to demand the referral of the case to the ECJ *ex* Art. 267 TFEU when, within a national jurisdictional proceeding, they see their claims limited by a previous Commission decision not addressed to them. This would allow them to have the validity of a Commission decision ascertained by the ECJ at any time, and therefore beyond the strict time limits established by Art. 263 TFEU (two months). Such an arrangement would enlarge the areas of control of the ECJ, thus implementing the function indirectly attributed to it by Art. 16 (1), Regulation n. 1/2003.

With regard to the second, it should be noted that the acceptance of the 'intermediate thesis' does not imply that a Commission decision becomes binding on third parties who are not its addressees. To them, as recognised also by the House of Lords in *Crehan v Inntrepreneur Pub Co (CPC)*, the Commission's decision '*is no binding but the duty of sincere cooperation nevertheless requires a national court not to give a conflicting ruling*'.[401] In other words, there would be no damage to the prerogatives of third parties, nor to the literal datum of Art. 288 TFEU, since, as explained in the preceding paragraphs, the binding effect *ex* Art. 16(1), Regulation n. 1/2003, is not a 'positive' constraint, but a 'negative' one to 'not running counter to'.[402] This binding effect would produce two consequences: (i) third parties wishing to wriggle from a Commission precedent negatively affecting them would have the burden of promoting a preliminary reference *ex* Art. 267 TFEU. It, therefore, appears that their defensive needs would not be compromised. (ii) The subjects (including third parties) who wish to use a previous Commission decision

[401] *Inntrepreneur Pub Company (CPC) et al. v. Crehan (HL)*, *supra*. Particularly, see Lord Hoffmann's speech, para 61. See also C. HANLEY in 44 CML Rev. (2007), 817–836.

[402]Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 60.

to their advantage could make use of a presumption *iuris tantum*, capable of alleviating their burden of proof.[403]

At this point, only one concept remains to be clarified. Who should be considered a 'third party'? Certainly, as already mentioned, not the direct addressees of the Commission decision since, pursuant to Art. 288 TFEU, the decision is binding on them (positively binding). However, the concept of 'third party' should also exclude those who, although not direct addressees of the decision, would still have standing to challenge the Commission decision, since they a '*direct and individual concern'* to promote such an action and satisfy the test described above established by the ECJ in TWD.[404]

3.3. *Primus inter pares*

3.3.1. The European Commission and the original Cour de Cassation. The binding effects of the Commission decisions

As emerged from the above reflections, the most suitable interpretation of Art. 16 (1) is the one capable of finding the better point of balance between the conflicting multiple interests at stake. In particular, it has been chosen the 'intermediate thesis', which better guarantees the interest in the uniform application of EU competition law compare to the 'restrictive thesis', and that better protects the independence of

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[403]Similar conclusions, albeit for different reasons, were reached by Laddie J in *Iberian UK Ltd v BPB Industries Plc* [1996] 2 CMLR 601, paras 86 - 83 (The paragraphs in the sentence are not correctly numbered, in fact paragraph 87 is followed by paragraph 82).

[404] In this sense, see Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 23 and *Crehan v Inntrepreneur Pub Co (CPC),* [2006] UKHL 38, [2007] 1 AC 333, para 69 (for Lord Hoffman). In the latter, pronounced by the House of Lords, Lord Hoffmann in paragraph 61, states that '*who, for this purpose, is a third party? Obviously not the person to whom the decision was addressed and upon whom, in accordance with article 249, the decision is binding. In Banks, that would have been NALOO. But the notion of a third party also excludes persons to whom the decision is of "direct and individual concern" and who would have* locus standi *under article 225 or 230 to institute proceedings before the Court of First Instance or the Court of Justice for its annulment*.'

National Courts compare to the ‘extensive thesis’. The ‘intermediate thesis’, however, implies an application (and therefore a constraint) of the Commission’s decision beyond the single case in which it comes into existence and extends it to all identical cases even if between different parties. This is a consequence of the primary importance recognised to the principle of uniform application of Community law, as an essential corollary of the principle of effectiveness of the latter. Importance that brings it up to an equal level, if not above, compare to the interest in legal certainty.

What just said means that through Art. 16 (1), Regulation n. 1/2003, the system attributed to the Commission a function of indirect ‘*nomofilachia*’[405], limited to EU competition law, not so different from that carried out in the French legal system by the *Cour de Cassation* of the origins. If the historical origin of the latter is investigated, indeed, it turns out that the structural differences between current Commission and the *Cour de Cassation* of the origins are not so different. This therefore also unites them from the point of view of their intrinsic contradiction, a characteristic that, with regard to the Commission, increases in light of its hybrid technical-political nature.

To understand the meaning of these words, it is necessary to remember the origin of the *Cour de Cassation*. The latter received this denomination only in the Senate consultation of 28 *Floréal An XII* (18 May 1804). This new name, which occurred during the revolutionary period, consecrated the recognition of the jurisdictional nature of the supreme magistracy and its placement within the judiciary. However, unlike the way it is currently understood, for the revolutionary legislator the instituting body had the task of ensuring the legislator’s control over the judiciary. The *Cour de Cassation*, as a result, had to perform a control function against the rebellions that the judges could put in place to the detriment of the law.[406] This was

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[405] Indirect because as seen previously it is mediated by the intervention of the ECJ.

[406]The same name that recalled the judgment had to be avoided. To this end the terms of *Conseil National pour la conservation des lois,* or *inspecteurs de justice,* or *censeurs judiciaires* were proposed. This judicial control function resulted in the configuration of the appeal to the *Cour de*

nothing other than the consequence, on the one hand, of that anti-jurisdictional sentiment that spread at the time as a reflection of the immanent memory of the power of parliaments over the sovereign. On the other, it was consequence of the philosophical movements that culminated in the dogma of separation of powers that had conceived as a legitimate child the '*utopie de la Loi*'. The law personified and entrenched, exalted in its ability to regulate reality without intermediation of anyone, complete, self-sufficient, limpid and clear that does not require integration or interpretation. The consequences of this utopia are the codification and the *Cour de Cassation* itself. With the introduction of this, indeed, it could be thought that the revolutionary legislators were aware of the utopia they generated. This is because they seem to have understood that the law cannot get away from the judge and the judgment to ensure the observance of itself. Yet judges had to be controlled. The law thus became an order to be kept in practice, a good in itself, which had to be defended and protected. The mistake, however, was to try to tamper with the genetic characteristics of the body ordered for this purpose, to bring it back outside the judiciary and within the legislative. Such an attempt could only fail, since the only quality that an organ destined to preserve the law can have in practice, is the quality of Judge. Quality that was unconsciously recognised already in the *décret des 27 novembre et le 1er décembre 1790 portant institution d'un tribunal de cassation, et règlant sa composition, sa organisation et ses attributions*. Although this indeed, *dont l'Art. 1er* expressly acknowledged that the *Tribunal de Cassation* was *'établi auprès du Corps législatif'*[407] (it was therefore outside the judiciary), simultaneously it established a structure whose qualification could only be

Cassation as a judgment in which there was: the institutional prohibition of judging the merit of the case, with the consequent referral in case of reversal; the limitation that only the cases of express misapplication of the text of the law could be heard by the *Cour de Cassation*; the organisation of the referral judgment with a possible *référé* to the legislative body in case of double rebellion, and finally the appeal in the interest of the law.

[407]Dalloz – Répert, V. Cass. p. 22, note 1.

judicial.[408] In this lays the contradiction mentioned above of the *Cour de Cassation*. Denying the judgment and making of it a legislator has caused that irrational[409] split between the 'factual judgment' and the 'judgment of law' (only the latter attributed to the *Cassation*), the isolation of the law from the judgment, its programmatic abstraction from the concrete case.

So briefly described the reasons for instituting the *Cour de Cassation*, what is most interesting here are two aspects. The first is that, originally, behind the *Cour de Cassation,* there was the exercise of an exclusively political power. The second is the intrinsic contradiction that originally characterised it. Contradiction that was

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[408]The attempt to bring this structure back to the legislative function was done by P. CALAMANDREI in, *La Cassazione civile*, I, *Storia e legislazioni*, II *Disegno generale dell'istituto*, Torino, 1920. According to P. Calamandrei, indeed, the regulatory rules can stand out in two groups, the first comprising those provisions that would carry out the type of Cassation envisaged by the reformers, and are especially the institutional prohibition of judging the merit of the case, with the consequent postponement in the event of annulment, the limitation of the judgment of cassation to the cases of express contravention of the text of the law, the organization of the judgment of referral with the possible référé to the legislative body in case of double rebellion, and finally the appeal in the interest of the law; the second which includes the deviations of the aforesaid type, and would be the private impulse to the cassation (appeal) and the extension of the cassation to the errors in proceeding. According to S. SATTA, *Corte d'assise (premessa storica), Corte di cassazione (dir. proc. civ.)***,** [X, 1962], **'***questa distinzione appare artificiosa: perché se è vero che rimane qualche traccia delle teorizzazioni sulla sufficienza della legge nella formula adottata di «contravvenzione al testo», con riferimento più alla ribellione che non all'errore (formula di cui ci è del resto estremamente difficile comprendere la pratica realizzazione, se non addirittura il significato, e che comunque doveva essere immediatamente corretta: art. 20 della Costituzione del 1791); non è meno vero che la preclusione del giudizio di merito non è affatto incompatibile con la giurisdizione, mentre l'impulso di parte e l'estensione del giudizio agli* errores in procedendo *sono i centri focali dell'istituto. Nulla vi è nel* Tribunal de Cassation *che si possa ricondurre alla funzione legislativa (né reggono gli inconsistenti accenni di alcuni scrittori all'organo intermedio o di terzo tipo): la stessa cassazione nell'interesse della legge, con la sua irrilevanza sul giudicato, ne è una chiara conferma*'.

[409] Irrational because, as noted by S. SATTA, *Corte d'assise (premessa storica), op. cit.*, '*non si vede per quale ragione non debba essere censurabile l'errore di fatto o perché si debba preoccuparsi solo dell'errore di diritto quando il fatto è stato erroneamente accertato*'.

overcome when his qualification as Judge and not legislator was fully recognised. Aspects that, as anticipated, are both present in the current Commission based on the role assigned to it by Art. 16 (1), Regulation n. 1/2003.

The ECJ, on the other hand, in *Masterfoods*, has expressly recognised the political function of the Commission, both by referring to Art. 89, n. 1 of the EEC Treaty (now 105 TFEU), which establishes that the Commission '*is responsible for defining and implementing the orientation of Community competition policy*'[410], both ruling that '*when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission'*.[411] In doing so, the ECJ, on the one hand, affirmed the political character of the mission of the Commission and, on the other hand, according to this political prerogative, bound the judicial power of the National Courts. In other words, the ECJ attributed to the Commission the same political prerogative, originally given to the *Cour de Cassation* of the origins, namely: to verify that the National Courts do not 'rebel' against the European competition law.

Based on what has been stated, it can be inferred that the Commission performs a function of indirect '*nomofilachia'* with respect to EU competition law; while the direct '*nomofilachia'* function is left to the ECJ, which unsurprisingly has a jurisdictional nature. This causes a plurality of consequences. The first, as explained in the preceding paragraphs, is that Commission decisions have a meta-normative scope that goes beyond the solving function of the individual case. It should be noted, however, that this meta-normative scope is not endogenous to the Commission's decision, but rather it is an effect conferred to Commission decisions *ab externo* by Art. 16 (1), Regulation n. 1/2003. An effect that is functional to the pursuit of the European competition policy.The second is that the Commission's decisions are binding only with respect to their operative part, ie the principles of

[410] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 46.

[411] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52.

law in them affirmed. These principles of law, however, are binding (in negative) for national Courts only when they are judging a case insisting on the same facts on which was also based the adopted Commission decision. Indeed, it could not be otherwise. If the binding effect of the Commission decisions were to be extended to the 'factual judgment', the National Courts would be transformed in mere executors of the Commission's guidelines. This would end up depriving national courts of their authentic function: to judge. Such a result would be unacceptable and, above all, inconsistent with the decentralised system of parallel division of competences between the Commission and national Courts.

However, the stated similarity between the Commission and the *Cour de Cassation* has further effects. The mechanism created in the *Masterfoods* ruling, later translated into Art. 16 (1), Regulation n. 1/2003, embodies the same contradictory nature as the *Cour de Cassation* of origins. As seen in the preceding paragraphs, in fact, Art. 16 (1) arrangement poses problems with regard to the principles of separation of powers and independence of the Judge. Problems that can only be overcome if, as mentioned, Art. 16 (1), is read as intended to make the National Courts not positively constrained directly by the Commission decisions but, indirectly, by the intervention of the ECJ. In this way, the missing jurisdictional nature of the Commission, is recovered. Character, moreover, that cannot be eliminated. The interest in the uniformity of law, indeed, does not exist objectified and abstracted in positive law, but it is always subjectivised since it is an interest of a subject in relation to an act of a Judge who he/she assumes not complying with European competition law. The protection of such an interest, then, can only be attributed to a Judge. In other words, it seems that both the ECJ in *Masterfoods,* and the legislator of Art. 16 (1), lacked courage in not clearly stating what they confined themselves to indirectly imposing. In short, national Courts would be positively bound not by the decisions of the Commission but by the judgments of the ECJ. Art. 16 (1) *minus dixit quam voluit*. It would be nothing other than a timid translation into norms within the European Union of the common law principle of *stare decisis*. A principle that although not explicitly enshrined in the Treaties, is commonly accepted and operating in national legal systems.[412]

At this point, however, some might argue that Art. 16 (1), would then be a non-essential norm. Norm that adds nothing to the 'living law'. This is because the national Courts of the various Member States already recognise binding precedent value to the ECJ's rulings, and this both when these rulings are infra-procedural, or when they are external but concern similar cases. This last point is further confirmed in Art. 99 of the Rules of Procedure of the ECJ[413], which states that: '*where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a*

[412]In this sense, see E. CALZOLAIO, Il valore di precedente delle sentenze della Corte di Giustizia, consultabile al seguente link: http://www.jus.unitn.it/cardozo/review/2009/calzolaio.pdf. On this point see also causes C-52/76, *Benedetti c. Munari F.lli sas*, 3 febbraio 1977, 163;case 69/85, *Wünsche Handelgesellschaft Gmbh & Co. c. Repubblica Federale della Germania*, 5 marzo 1986; case C-283/81, *Cilfit srl e Lanificio di Gavardo spa c. Ministero della Sanità*, 6 ottobre 1982; case C-309/85, *Barra c.Stato Belga*, 2 febbraio 1988; Corte Cost., 8 giugno 1984, n. 170, in Giur. cost., 1984, I, p. 1098; Corte Cost., 23 aprile 1985, n. 113, in Giur. cost., 1985, I, p. 694; Corte Cost., ord. 23 giugno 1999 , n. 255, in Giur. cost., 1999, p. 2203; Corte Cost., 13 luglio 2007, n. 284, in Giur. cost., 2007, fasc. 4; Cass., sez. lav., 16 aprile 1999, n. 3830, in Orient. giur. lav., 1999, I, p. 503; Cass., SS.UU., 24 maggio 2007, n. 12067, in Guida dir., 2007, fasc. 31, p. 35; Cass., sez. lav., 30 dicembre 2003, n. 19842, in Foro it., 2004, I, c. 1095. For a picture of the effects of the EJC rulings in the English legal order, see G. BECK, *The U.K. Courts, the Common Law Approach and the Application of E.C. Law*, in Penn. St. Int. Rev., 2006, pp. 629 ss.

[413] The procedural Regulation is expressly provided for in the Treaty and, once approved by the Council pursuant to Article 253 TFEU, contains the procedural rules in force in the European judicial system. The Regulation was adopted on 19 June 1991, in OJ L 176, 4.7.1991, p. 7. The text has undergone numerous adjustments and updates. For the consultation of the consolidated edition, which takes into account the modifications made lastly, see the following link: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

proposal from the Judge- Rapporteur and after hearing the Advocate General, decide to rule by reasoned order'.

Such an objection, in truth, cannot be accepted. In the framework outlined, Art. 16 (1), although not shining for clarity of wording, retains a specific meaning. In fact, it would have the capacity to call the ECJ into question whenever a National Court deems a Commission decision invalid or incorrect and wishes to depart from it. If there was no Art. 16 (1), in effect, as already mentioned, *ex* Article 267 TFEU, the referral obligation would only exist if it were *'against whose decisions there is no judicial remedy under national law*'. *Ex* Art. 267 TFEU, therefore, if a Judge who is not a last instance Court wishes to depart from a Commission decision that he does not consider valid or applicable to the case pending before him, it would seem to be able to do freely. Under the Art. 16 (1), however, such behaviour would not be admissible. This is because, even in the case of a non-last instance Court, *ex* Article 16(1), it cannot adopt a decision running counter to that of the Commission concerning the same case or a case that is entirely identical but it has different parties. Also in such a case, the said Court, *ex* Article 16 (1), should he/she wish to depart from the Commission's decision, he/she would be obliged to make a preliminary reference to the ECJ for doing so.

In light of the above, it is to be hoped that *de iure condendo* the European legislator will review the current wording of Art. 16 (1), (which, as we have seen, at present raises many problems) in a more explanatory sense, to make the real scope of the law easily intelligible for legal practitioners.

3.3.1.1. The 'legal judgment' in the decisions of the European Commission and the freedom of the national courts

As pointed out in the previous paragraph, the (negative) binding effect of Commission decisions should not be extended to the entire ruling, but only to the 'judgment on matters of law' and to the legal principles contained in it. And indeed, it could not be otherwise. As we have seen, if the binding effect were also to cover the 'judgment on matters of fact', national courts would be reduced to simple executors and stripped of their true function. This conclusion is further supported, at systematic level, by the fact that when issuing a preliminary ruling pursuant to Article 267 TFEU, the ECJ can only rule on matters of law but not matters of fact. Indeed if no such limits were placed on the binding effect, the protection afforded to 'third parties' (as defined above) would end up being impaired. This is because the preliminary reference pursuant to Article 267 TFEU is the only action available to third parties to challenge Commission decisions that are addressed to others but restrict their prerogatives. In other words, if the binding effect of Commission decisions were not limited to the 'judgment on matters of law', but also extended to the 'judgment on matters of fact', such third parties would have no possibility of challenging issues set out in the 'judgment on matters of fact', as they are only permitted to file an application for a preliminary reference (and not a main application, which can only be filed by those to whom the order is addressed) which, as stated above, is limited to matters of law only.[414]

So coming back to this subject, what we now want to clarify is: what is meant by 'judgment on matters of fact' or 'judgment on matters of law'? Where does one begin and the other end?

According to authoritative legal theory, the distinction between a 'judgment on matters of fact' and a 'judgment on matters of law' is not in itself rational, as the judgment is unique in its essence. The only possible distinction that can be made is between the various steps through which the judgment is formed.

Now to understand which step is classified as 'judgment on matters of fact' it is firstly necessary to bear in mind that in the procedure by which the Commission reaches its decision (as in the judicial process) the facts only exist as allegation and finding. This means that the facts and the 'judgment on matters of fact' are bound together and that the judgement in itself inevitably creates the facts. In this regard

[414] On the substantive and procedural aspects of preliminary rulings, see D. DOMENICUCCI, *Il meccanismo del rinvio pregiudiziale*, Paper given at the study meeting organised by the CSM in Roma, 25-27 October 2010, in www.csm.it., and, *Il ruolo del giudice nazionale e la presentazione delle questioni pregiudiziali*, Paper given by Trier during the seminar on "Anti-discrimination directives 2000/43 and 2000/78 in practice", 9 -10 May 2011.

it is not necessary to cite the maxim *da mihi factum dabo tibi ius* or Article 112 and 113 c.p.c.[415] to underline that the facts and their legal classification are inseparably linked.[416]

That said, it must be presumed that the best way to identify the 'judgment on matters of fact' is to refer to the very structure of the rule/provision, which contains, or quite simply is, the prediction of a fact of which, because and only because of said prediction, it determines the legal relevance and effect. For example, when Article 102 TFEU states that '*any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*', it predicts a certain event, the existence of a given market, the existence within it of a dominant position, the abuse of such position, the effect on trade between Member States and this event qualifies as prohibited. Now, moving from the rule/provision to the judgment, the problem of the existence of the event arises and this problem is solved by a judgment which is unquestionably on matters of fact. However, when we analyse this judgment we realise that its apparent simplicity (to be or not to be) is extremely complicated, as it is the result of an endless series of presuppositions, some noticeable some less, each of which can be said to already contain the entire judgment. Which is the relevant market? What is meant by dominance? By abuse? When can dominance be regarded as abusive? When does abusive dominance affect trade between Member States?

In analysing these legal concepts it is immediately apparent that they are valid for all judgments. Instead when an event is affirmed (it happened or it did not happen) a historical judgment is made. The difference between a judgment on legal concepts (which from a logical point of view also constitute a judgment or the result of a judgment) and a historical judgment lies in the fact that while the latter is

[415] Italian Code of Civil Procedure.

[416] On the point see, among the many, F. ELEFANTE, *Pubblica amministrazione e validità dei regolamenti*, published by Jovene, Naples, 2008, 175.

bidirectional, in that it presumes a free choice between two possible realities, the former is unidirectional, in that the court only appears to have a choice between two possibilities, while in actual fact there is only one possibility, as the other is an error. Here lies the distinction between a 'judgment on matters of fact' and a 'judgment on matters of law', to use an improper expression as we have seen, as the only true judgment is the judgment on matters of fact.

It is important to clarify, however, that a 'judgment on matters of law' encompasses all the value judgments made by the court on the facts that it has established. So, for example, to continue on the subject of abuse of a dominant position under Article 102 TFEU, there is no doubt that the notion of 'abuse' is one of those absolute presuppositions that constitute a 'judgment on matters of law', just as establishing whether a 'margin squeeze conduct' (in general) falls within the concept of 'abuse' is a 'judgment on matters of law'. The point is whether it is a 'judgment on matters of fact' or 'on matters of law' to state that certain conduct in a specific case is or is not abusive. In this case the court makes a value judgment that cannot be disassociated from the general judgment on the margin squeeze conduct. So much so that the general judgment cannot be formed without the specific judgment, and vice versa. A 'judgment on matters of fact' is given by establishing the objective characteristics of the conduct, its individuality, but if, after this has been done and, due to the specific characteristics of the market in which it was implemented, the conduct in question was found by the court to be (or not to be) of an abusive nature, the judgment would undoubtedly be a 'judgment on matters of law'.

The above means that if the Commission decides to reconstruct the relevant market in one way rather than another, to assess the dominance taking into consideration some factors rather than others and to recognise certain conduct as abusive, these assessments by the Commission, which as we have said constitute 'judgments on matters of law', negatively bind the national court called to rule on the same case or on an identical case between different parties, as it cannot adopt decisions that run counter to the Commission's decision. That said, what the national court can and must do is assess the facts and if, with regard to such facts, it discerns the existence of a Commission precedent (because the case is the same or identical except for the parties) it can either rule in accordance with the precedent of the Commission or, if it wishes to challenge the validity of the Commission decision, it shall have to apply to the ECJ for a preliminary ruling pursuant to Article 267 TFEU. In light of the actual wording of Article 16(1), Regulation 1/2003, as it applies directly to national courts, it must be assumed that the described binding nature can be raised within any stage of proceedings (and therefore also in the second instance even if not specifically submitted in the grounds for appeal) and either upon application by a party or motion by the court.

Having clarified the extent to which the national court is bound by Commission decisions, greater clarification of the boundaries of its freedom is required. In actual fact national courts can depart from the Commission precedent in three specific cases without infringing Article 16(1), Regulation 1/2003.

The first case arises when the facts have changed substantially. This could occur when certain facts take place after a Commission decision and the court believes that they can justify its departure from the Commission decision. Such a case would not in fact infringe Article 16(1), as there would no longer be the identity of facts required for a conflict to exist.

The second case arises when the national court's finding of the facts differs from the findings underlying the Commission decision. Such a case would, in reality, be none other than a clear example of the national court's use of the renowned 'distinguishing' technique. Once again, there would be no infringement of Article 16(1), as there would be no identity of facts and therefore no conflict.

The third and last case arises when a 'judgment on matters of law' contained in a Commission decision that negatively binds national courts is superseded by a subsequent ruling of the Court of Justice. This effect could occur either when the ECJ ruled on a Commission decision or when the ECJ ruling was the consequence of a preliminary reference made by a national court called to rule on an identical case to the one handled by the Commission (even if the parties differ). In this case, if the Court did not comply with the Commission decision, using the ECJ precedent, it would not infringe Article 16(1), as said Article, as understood hereunder, does not enshrine the primacy of Commission decisions, but on the contrary the primacy of ECJ rulings.

This clarification needs to be expanded and linked to a number of principles established by ECJ case-law. It should be added that Commission decisions are not (negatively) binding in their entirety but, as clarified by the ECJ, only with regard to their operative part.[417] The recitals of the decision can instead be challenged before the ECJ only to the extent that and where they constitute '*the essential basis for the operative part*'.[418] Therefore, not all statements and assessments in the recitals of Commission decisions are binding on the addressees and, *a fortiori*, on third parties. Firstly, a recital is not capable of having a binding effect '*if does not contain a finding*'.[419] Secondly, even if a recital contains a finding, this is not capable of having binding effects unless it is '*the essential basis*' of the decision contained in the operative part of the decision.[420] Thirdly, if there is a contrast

[417] See also R. NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, no. 2 (2015), page 72.

[418] Case T-474/04 *Pergan Hilfstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR II-04225, para 73; Order of the Court in Case C-164/02 *Kingdom of the Netherlands v Commission* [2004] ECR I-1177, para 21.

[419] *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)* OJ [2000] L268/1, recitals 136 - 137 and Article 1 of the operative part; Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, paras 186 – 193, appeal dismissed in Case C-236/03 P *Commission v CMA CGM* [2004] ECLI:EU:C:2004:679 (order). See also on the point R. NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, no. 2 (2015), page 72.

[420] Order of the Court in Case C-164/02 *Kingdom of the Netherlands v Commission* [2004] ECR I-1177, paras 22 -24; Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, paras 186 – 193, appeal dismissed in Case C-236/03 P *Commission v CMA CGM* [2004] ECLI:EU:C:2004:679 (order); Case T-474/04 *Pergan Hilfstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR II-04225, paras 7 - 13 and 73 - 74. See also R. NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, no. 2 (2015), page 73.

between the recitals and the operative part of the Commission decision, the second prevails and the recitals are of no effect.[421] To conclude, the recitals of Commission decisions should only be used when '*there is lack of clarity in the terms in the operative part*'.[422] While this statement appears to suggest that recourse to the recitals is the exception rather than the rule, it should be noted that in practice, much of the information concerning the identified anticompetitive conduct will actually be in the recitals. The operative part of Commission decisions is normally very short. The findings are binding as long as: (i) they are within the boundaries of the finding set forth in the operative part of the decision; (ii) they are the essential basis of the finding set forth in the operative part of the decision, which means that by excluding them, a judgment finding that a given conduct infringes competition law could not be sustained or could be sustained only to a more limited extent.[423]

3.3.2. The European Commission competition law decisions and the 'res iudicata'

The *Masterfoods* judgment and, consequently, Art. 16 (1), Regulation n. 1/2003, in addition to the issues examined, leave a further problem unsolved. A problem of no little interest since it is one of the cardinal principles of continental legal systems, already explicitly recognised in Roman law. The author refers to that '*rule iuris*' that Ulpiano himself defined in its *Digestum* as '*res iudicata pro veritate habetur*'. It is therefore the principle of the '*res iudicata'*. Principle that over time has not always been understood uniformly. In Roman times and in the French doctrine of the seventeenth and eighteenth centuries,[424] it was considered as a 'presumption of truth'. Unsurprisingly, the principle of the '*res iudicata'* saw its inclusion in the

[421] Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, paras 40 - 46.

[422] Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, paras 42 - 46. See also R. NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, no. 2 (2015), page 74.

[423] See also R. NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, Italian Antitrust Review, no. 2 (2015), page 74.

[424] On this point see J. DOMAT, *Les lois civiles dans leur orde naturel*, Paris-Nyon, 1777, and R.J. POTHIER, *Traité des obligations*, in Oevres, Paris, 1830, I, n. 900.

Napoleonic code in Art. 1350 between legal presumptions.[425] Later, this approach was abandoned. This is because the law does not pretend to impose as true the content of the Court's ruling, but only to ensure the incontestability of its effects.[426] This is due to a need for legal certainty. From the changed conception of the '*res iudicata'*, however, derives that its obligatory nature and its incontestability do not concern either the procedural[427] nor the substantive level, [428] but the level of the general juridical order at the point where the process and the substantive law merge. This produces an effect of constitutional significance, since it is at this point that the legal order configures the concrete case. The process reaches its end by giving application to the law, but immanent to the law is in turn its 'being' and 'being valid' in practice as the Judge declares it.[429]

Having clarified the scope and function of the '*res iudicata'*, the problem that needs to be solved is: what relationship exist between the binding effect of a Commission decision that intervenes on a case on which, *medium tempore,* a National Court has already adopted a ruling that has became final? Whether the two were conflicting, it would seem to be an insurmountable contrast. Contrast which, to be solved, would

[425]Said structure did not fail to be taken up by the Italian civil code of 1865 arts. 1350-1351, and from the Italian doctrine of the nineteenth century. For a historical-critical summary of this strand, see G. PUGLIESE, *Res iudicata pro veritate accipitur*, in *Riv. Trim. dir. Proc. Civ*., 1967, 503.

[426] G. CHIOVENDA, *Principii di diritto processuale civile*, 3° ed., Napoli, 1923.

[427] In representation of which see F. STEIN, K. HELLWIG, J. GOLDSCHMIDT, F. LENT, L. ROSENDERG, AND K.H. SCHWAB, *Zivilprozessrecht,* 13th ed., München, 1981 and G. PUGLIESE, *Res iudicata pro veritate accipitur*, supra note n. , 787 and 812.

[428] *Ex multis* see B. Windscheid, the Pandettists, J. Kohler, M. Pagenstecher and others. Among the Italians see CARNELUTTI, *Lezioni di diritto processuale e civile*, IV, Padova, 1931, n. 381; F. CARNELUTTI, *Diritto e Processo*, Napoli, 1958; E. REDENTI, *Il giudicato sul punto di diritto*, in *Scritti giuridici in onore di F. Carnelutti*, II, Padova, 1950, 700; F.D. BUSNELLI, *Considerazioni sul significato e sulla natura della cosa giudicata*, in *Riv. Trim. dir. e proc. Civ*., 1961, 1317.

[429] E.T. LIEBMAN, *Efficacia e autorità della sentenza*, rist., Milano, 1962; E.T. LIEBMAN, *Manuale di diritto processuale civile*, 4° ed., Milano, 1980-81.

necessarily require to establish whether the '*res iudicata'* resists in the presence of the constraint (in negative) of the Commission decisions. In truth, the problem is more apparent than real. Let us show why.

Firstly, it should be noted that, in light of the interpretation suggested here, the Commission decisions might also have effects outside the individual case in which they have been adopted. Therefore, two circumstances must be distinguished.

The first occurs when the Commission decision expresses its binding effect with respect to the '*res iudicata'* formed, not with respect to the case on which the Commission decision intervened, but with respect to identical cases, albeit between different parties. In this scenario, the problem does not arise. This is because the Commission's decision is binding only because of its 'meta-normative' scope as conferred *ab externo* by Art. 16(1). This circumstance, therefore, would be nothing other than a clear hypothesis of *ius superveniens*. As such, the Commission decision would not have the strength to affect the '*res iudicata'*.

The second occurs when, following a ruling by a national Court on a given case, the Commission decides to intervene in the same case and resolves it otherwise. Situation occurred in *Masterfoods*. This hypothesis must in turn be differentiated according to whether only the '*iudicatus internus*' occurred or the actual '*res iudicata'* itself. The '*iudicatus internus*' occurs when a first instance judgement has been appealed, without however expressly requiring that the appealed judgement should have been quashed since *medium tempore* has been adopted a contrasting Commission decision. In a similar case, no problem arises. This is because, as seen in the preceding paragraph, the objection of binding effects of a Commission decision is at all times proposable or automatically detectable by the Court itself. On the other hand, when the actual '*res iudicata'* was formed, one could fall into the error of thinking that the ECJ, called upon to pronounce (either directly pursuant to Article 263 or on a preliminary reference *ex* Article 267 TFEU) on the validity of the subsequent (with respect to the '*res iudicata'*) and contrasting Commission decision, *ex* the Art. 264(2), TFEU, which gives the ECJ the discretion to graduate the temporal effects of its ruling (power, indeed, for intuitive reasons of selflegitimation, of very little use), could extend the binding effect of the Commission decision to the entire legal relationship which it is inserted, thus overwhelming the previous judgement. In such a conclusion, indeed, an error lurks. The ECJ, in fact, *ex* Art. 264 TFEU, can '*retroactively annul*' but cannot '*retroactively validate*'. From this follows that there is no contrast with the '*res iudicata'*. The '*res judicata'*, in fact, only ascertains for the past and does not project its effects beyond. With regard to the future (meaning the post-judgment), it is the Commission itself that at the moment in which it issues its decision, thus reversing the substantive judgment of the ruling of the national court simoultaneously, on the one hand, acknowledges the '*ius novus*' (ie the *ius superveniens*) and, on the other hand, takes note of the '*ius novus*' by regulating the concrete case.

From the above considerations follow that was deceived the doctrine that in similar circumstances posed a problem of contrast between Art. 16 (1), and the principle of the '*res iudicata'*, concluding with the overcoming of the latter or limiting itself to giving to the '*res iudicata'* a merely nominal effect.[430] The incorrectness of the first statement was explained above. The second one will now be refuted.

The aforementioned doctrine, as anticipated, has argued that, with respect to a single case, if a Commission decision contrasting with a previous final judgment arises, the authority of '*res judicata*' of the latter would only be nominal and not substantial. This is because the winning party would not be able to request the execution of such a sentence, since the conduct contained in it would be incompatible with the Commission decision. In a similar way of reasoning, a double error lurks. The first is to confuse the effectiveness of a judgment with its authority of '*res judicata*'. Distinct features that come into existence at different times and for different reasons. The second error of the author of this affirmation lies in his inability to see the effects that the '*res iudicata'* is capable of exerting in the above circumstances. They are at least two.

[430] In this sense see A.P. KOMNINOS, *Effect of Commission Decision on Private Antitrust Litigation: Setting the Story Straight*, *supra*.

Firstly, the aforementioned '*res iudicata'* would produce the effect that, in the eventual new jurisdictional national proceeding that would be established between the same parties and having the same object following the Commission contradictory decision, the new national court is simultaneously bound to respect both the judgment of the previous ruling and not to adopt a judgement contrasting with the Commission decision. The two conditions, indeed, are not incompatible. Let us take an example. A sues B in court seeking damages for conduct X held by B and the national Court establishes, by a final judgment, that conduct X does not constitute an anticompetitive offense and denies compensation. Subsequently, the Commission intervenes and with its decision states that conduct X held by B is anticompetitive and, therefore, prohibits it. Subsequently and under the decision of the Commission, A again sues B seeking damages always for conduct X. At this point, the national Court will have to respect both the authority of the '*res iudicata'* and the binding effect of the Commission's decision. The national court, then, in the proceeding under examination, will recognise the unlawfulness of the conduct X (as an anti-competitive) held by B (and so will respect the constraint deriving from the precedent of the Commission) but, in calculating the *quantum* of the damages to be compensated, will keep in mind that the conduct X, up to the date of the final judgment was legally lawful. Therefore, the damages suffered by A will start to run from that moment. This shows that the effect of the '*res judicata'* is not merely formal, but is substantial.

Secondly, the '*res judicata'* will produce its effects not only with regard to the new national Court called to rule on the same matter following the subsequent and contradictory Commission decision, but also towards the Commission itself. The latter, indeed, cannot impose a penalty on the parties involved in the previous judgment. Or rather, when it goes to assess the duration of the infringement (conduct X) committed by B for the purpose of calculating the sanction, this duration cannot start before the formation of the '*res judicata'*. This is because, as seen, it is the '*res judicata'* that ascertains for the past. And if the '*res judicata'* has ascertained that the behaviour X was legitimate pro-past, in its successive intervention, the Commission cannot provide sanction whatsoever regarding the conduct X for the period covered by the '*res judicata'*. A similar arrangement, moreover, would be perfectly consistent with the decentralised system of parallel competences established by Art. 6, Regulation n. 1/2003.

3.3.3. The European Commission and the principle **'nemo iudex in causa sua'**

At this point in the discussion, only one node remains to be resolved. It consists in the following problem: the Commission, following one of its infringement decisions, can then act before a national court to demand compensation for the damages unjustly suffered by it or by the European Union itself under Article 335 TFEU. In fact, *ex* Article 335 TFEU, it is the Commission that represents the European Union. In such a scenario, some people may doubt that, due to the binding effect of the Commission decisions *ex* Art. 16 (1), there would be a violation of the principle '*nemo iudex in causa sua'*. The national Court would face, on the one hand, a compensatory damages request proposed by the Commission relating to an anti-competitive offense ascertained by the Commission itself and, on the other, a Commission decision which binds the national Court (in negative) as described above. This does not constitute a problem of mere abstract relevance but, on the contrary, is a circumstance already happened in practice (see case C-199/11, *Europese Gemeenschap v. Otis NV and others*[431]*)*.

In the cited case, the Commission, with a decision dated 21 February 2007[432], ascertained and sanctioned (for 992 million euros) some companies for having breached Art. 81, EC, by sharing public tenders and other contracts in Belgium, Germany, Luxembourg and the Netherlands. Subsequently, the Commission's decision was challenged before the GC. This, with a ruling dated 13 July 2011, rejected the appeal.[433] The GC judgment was subsequently appealed before the ECJ.

[431] Case C-199/11, *Europese Gemeenschap v Otis NV and others*, 6 November 2012.

[432] See Case COMP/E-1/38.823 – Lifts and escalators.

[433] Only the appeals proposed by the ThyssenKrupp group companies were partially accepted with reference to the amount of the fines imposed.

In the meantime, with an introductory act presented June 20th, 2008, the European Community, which became the European Union, represented by the Commission, proposed before a national Court the conviction of the defendants to pay a sum of about 7 million euros as compensation for the damages caused to the Union because of their anticompetitive behaviour as ascertained in its decision of the 21th February 2007. The European Union had awarded various public contracts to the defendants for the installation, maintenance and modernisation of lifts and escalators in various buildings of the Council of the European Union, of the European Parliament, of the Commission, and other EU institutions located both in Belgium and Luxembourg. During the trial, the defendants complained, among other things, an infringement of the principles of judicial independence and equality of arms[434] and the '*nemo judex in sua causa'* principle. Such defence was presented taking into account that *ex* Article 16 (1), Regulation n. 1/2003, the decision of the 21th February 2007 was binding for the national Court deciding the dispute. By virtue of the complexity of the issues, the national Court made a preliminary reference to the ECJ *ex* to Article 267 TFEU.

The ECJ rejected all the complaints described. In particular, in relation to the alleged violation of the principle '*nemo iudex in causa sua'*, the ECJ stated that: 'w*hilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court*'.[435] Thus ruling, the ECJ emphasised that, despite the binding nature of the

[434] According to the defendants, there would be a breach of the principle of equality of arms because the claim for damages was put in place by the same subject, the Commission, which conducted the investigation relating to the disputed infringement. Commission which, by virtue of this role, would find itself in a privileged situation that would have allowed to collect and use even confidential information, and therefore covered by commercial secrecy, inaccessible instead agreed for them.

[435] Case C-199/11, *Europese Gemeenschap v Otis NV e altri*, *supra*, para 65.

Commission's decision, '*it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages*'.[436] Concluding that '*Such an assessment is not contrary to Article 16 of Regulation No 1/2003*'.[437]

These statements by the ECJ deserve comment. Even if the conclusions reached by the ECJ are correct, these are not the reasons used by it. This is because, on the one hand, it is true that the national court retains a sphere of discretion that the principle '*nemo iudex in causa sua'* cannot be said to have been violated. On the other hand, however, saying that national courts are bound to adopt decisions that do not running counter to those of the Commission is not the same as saying that '*the national court is required to accept that a prohibited agreement or practice exists'*[438]. Art. 16(1) does not foresee such effect. Art. 16(1) cannot be interpreted in this way for all the reasons set out in the preceding paragraphs. The reasons given by the ECJ on this point, therefore, appear to be a bit superficial and not fully coherent with the spirit of the *Masterfoods* judgment. Here, although we do not want to re-address the issues already discussed, it seems appropriate, however, to use this Court's ruling to reaffirm the boundaries of the sphere of freedom and independence left to national Courts. Such independence is not compromised if we accept the interpretation of Art. 16 (1) here suggested. National Courts are not in a position of subordination with respect to the Commission, but they co-exist in a system of parallel competences. Art. 16 (1), Regulation n. 1/2003, in fact, as seen, simply places the obligation for national Courts (even if not of the last instance) to refer to the ECJ in cases in which they wishes to depart from a Commission decision. It is not clear, then, how such an obligation, if correctly understood, could, on the one hand, compromise the independence of national jurisdictions and, on the other, attribute to the Commission decisions a relevance and a binding effect so as

[436] Case C-199/11, *Europese Gemeenschap v Otis NV e altri*, *supra*, para 66.

[437] Case C-199/11, *Europese Gemeenschap v Otis NV e altri*, *supra*, para 66.

[438] Case C-199/11, *Europese Gemeenschap v Otis NV e altri*, *supra*, para 65.

to violate the principle *'nemo iudex in causa sua'*. Such allegations must be absolutely rejected as the ECJ expressly stated. However, these conclusions do not see their *raison d'être* in the reasons used by the ECJ.

It should be noted, however, that in the light of the above mentioned '*Damages Directive*'[439], in hypotheses like the one examined here, a positive binding effect for national courts to '*accept that a prohibited agreement or practice exists*'[440] should be acknowledged. This because, the said Directive, at Art. 9, expressly states that '*an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law*'.[441] Although this rule is addressed only to NCAs, *a fortiori*, it is the writer's opinion that it should apply to the assessments contained in the Commission decisions.[442] This positive constraint on the decisions of the Commission or the NCAs, however, is a consequence of Art. 9 of the '*Damages Directive*' and not of Art. 16 (1), Regulation n. 1/2003. In the presence of the new provision, therefore, care must be taken not to fall into a double error. On the one hand, it should not be believed that the new Article 9 of the '*Damages Directive*' has in some way modified the scope or the interpretation of Art. 16 (1), Regulation 1/2003. On the other hand, the consequences of the former must not be attributed to the latter and *vice versa*. The two provisions, indeed, have a totally different and only partly overlapping field of application. Art. 9 of the '*Damages Directive*', as expressly provided for by the provision itself, is valid only with respect to damages claims. Art. 16 (1), on the

[439] See Directive n. 2014/104/UE, *supra*.

[440] Case C-199/11, *Europese Gemeenschap v Otis NV e altri*, *supra*, para 65.

[441] See Directiv n. 2014/104/UE, *supra*, Art. 9(1).

[442] It should be noted that also as a result of Article 9 of the Damages Directive, the decision on the *an* and *quantum* of damages in civil proceedings (so-called follow-on) that follows the measure of a national Competition Authority is still entirely in the hands of the national court. And that could only be the case.

contrary, would produce its effects, not only in judgments where a tortuous liability arise, but also in those in which the applicant wants to assert merely the nullity of a contract or demand any remedy other than compensation for damages. In other words, Art. 16 (1) is applicable in all civil litigations, while Art. 9 of the 'Damages Directive' is applicable only for compensatory claims. Moreover, the latter cannot be used to support the argument that the system of division of parallel competences between national courts, Commission and NCAs has disappeared. It does not establish a general principle of primacy of the *Public Enfrocement* over the *Private Enforcement*, thus depriving the latter of its independence. Indeed, Art. 9 of the *Damages Directive* must be seen simply as an incentive for the development of the *Private Enforcement*. *Private Enforcement*, which so far had difficulty taking off due to the '*probatio diabolica*' requested to the victims of an anti-competitive offense. *Probatio* that is diabolical precisely because of the complexity of the evidences necessary to prove the existence of an antitrust offense. Art. 9 of the '*Damages Directive*', therefore, does not degrade the *Private Enforcement* in favour of the *Public Enforcement*. On the contrary, it is intended to strengthen the former in accordance with the reasons of economy of procedure. Principle under which it would be inappropriate to repeat a preliminary analyses before a jurisdictional authority when this has already been carried out by an administrative authority specialised for such investigations. For applying Art. 9 of the '*Damages Directive*', by virtue of the considerations concealed behind it, would be necessary an identity of facts and subjects between the decision of the NCA or Commission and those of the national jurisdictional proceeding. In other words, Art. 9 of the '*Damages Directive*' has different motivations, purposes and scope of application compare to Art. 16 (1), Regulation n. 1/2003 and the two instruments should not be confused.

3.4. Conclusions

The present Chapter has discussed and criticised the interpretation prevalently given to Art.16 (1), Regulation n. 1/2003. In light of the analysis carried out, it was concluded that the best interpretation of Art. 16 (1) is what has been here defined as 'intermediate interpretation', as it is the interpretation that best balances the conflicting dynamism of the multiple interests at stake. The replacement of the traditional interpretation of Art. 16 (1) with the one suggested here would entail the twofold effect of: (i) widening the number of cases in which the constraint (in negative) of the Commission's decisions *ex* Art. 16(1) applies by eliminating the requirement of 'subjective identity' (ii) reducing the objective scope of the binding effect *ex* Art. 16(1), which would no longer be a positive constraint, but would be a negative one. Since, based on the interpretation suggested here, for a previous decision of the Commission to be binding in a subsequent national jurisdictional procedure, the mere 'identity of facts' (without also requiring a subjective identity) between the two proceedings would suffice. With regard to negative constraint, this should be understood in the sense that the Commission decisions impose not a specific '*facere*' on National Courts, but a '*non facere*' or, *rectius*, a '*non contradicere*'. Consequently, the Commission decisions would simply constitute a mere limit for the national Courts without producing rights or obligations towards those subjects who are not the direct addressees of the Commission decision itself. Such a wider effect, indeed, can be attributed only to the ECJ rulings concerning Commission decisions. The Commission decisions, therefore, *ex* Art. 16 (1), Regulation n. 1/2003, would be nothing more than a '*jurisdictional parameter*' capable of leading to an extension of the ECJ competences.

With regard to the boundaries of the 'negative constraint' deriving from Art. 16(1), this should be limited only to the 'judgment of law' contained in the Commission decisions. These decisions, in effect, are not binding (in negative) in their entirety but, as clarified by the ECJ, only limitedly to their operative part. Since, however, the Commission decisions' operative part is normally very concise, it is admissible that also the Commission decisions' recitals can produce binding effects as long as these recitals: (i) do not exceed the boundaries of what was established in the decision's operative part; (ii) are the essential basis of what was established in the decision's operative part (ie their exclusion would not allow to support the finding of unlawfulness of the concerned anti-competitive conduct under consideration or to support it in a reduced and more limited way).

Thus understood, Art. 16 (1) poses no problem with respect to the founding principles of the rule of law mentioned in the introduction. It does not affect the principles of separation of powers, legality, exclusivity and the principle of independence of the Judge. This because, Art. 16 (1), as interpreted here, would be nothing but a procedural rule. A rule of extreme wisdom, capable of synchronising the application of EU competition law and leading it to uniformity from a two-dimensional perspective. Art. 16 (1), indeed, can simultaneously reconcile *Public* and *Private enforcement* (Commission - National Courts), on the one hand, and multilevel enforcements (European and national), on the other. The wisdom of the norm would reside in its ability to implement the EU decentralised and parallel system of competences without affecting the '*sovereignty*' proper to each actor involved. Sovereignty that is all in the old Latin maxim '*superiorem non recognoscens'*. There would be no violation of the sovereignty of each actor involved, as individual competences are not distributed according to a hierarchical scheme. Situation typical of the legal systems of the past. Yet, on the contrary, it is a multilevel system that leaves to each institutional subject involved its functional competences. A system of parallel competences indeed. A system in which each subject is required to play his part. And in this multilevel enforcement system, the sovereignty of each subject involved is not harmed, but simply evaporates. This is because, from the dislocation of the functions derived that each subject, in the territory of his competence, exercises the power connected to its functions. From the mentioned dislocation of functions, however, also derived that each of those powers is no longer sovereign (since it is no longer exclusive), although those powers are all still existing.

Finally, while it has been said that Art. 16(1) introduce a wise norm (as interpreted here), the same cannot be said for the provision contained in Art. 16 (1). The latter, contrarily, does not shine for intelligibility. In this sense, a clarification by the European legislator would seem appropriate and desirable. Such intervention would also offer an opportunity to introduce within the concept of 'National Courts' also the arbitration panels and the quasi-judicial bodies. Such extension, by expanding the area of application of Art. 16(1), Regulation n. 1/2003, would be functional in ensuring a most comprehensive protection of the uniform application of EU competition law.

4. Conclusions

This thesis has shown that competition enforcement, both at global and at EU level, needs increased international co-operation. This is due to (i) the digitalisation of the economy, (ii) the growing number of jurisdictions having adopted a competition law regime; (iii) market globalisation. In this perspective, the EU competition enforcement system has proven to be the supranational framework better equipped to answer the ‘international co-operation call’. The EU system, indeed, compared to other regional competition co-operation framework is the one ensuring the highest levels of co-ordination and collaboration among the subjects involved in enforcing EU competition law. While at global level inconsistent competition enforcement approaches might be tolerated and even encouraged in some circumstances, the same does not apply at EU level, where the uniform application of EU Competition Law across EU MSs is an essential and non-negotiable value to preserve the existence of the EU Single Market.

Although the EU competition enforcement system has functioned successfully during its initial stages and still represents one of the most developed co-operation competition frameworks of the world, this thesis demonstrates its inability to guarantee that EU competition rules are applied uniformly. Particularly, this thesis has proven that the EU enforcement system, as it currently stands, is unable to solve, *inter alia*, the issues of gaps and overlaps both from a *Public* and *Private* enforcement perspective. Revealing in this sense are, respectively, the *Booking.com* and the *Crehan v Inntrepreneur Pub Co (CPC)* cases.

Simultaneously, this thesis has strongly argued that ensuring uniformity within the EU should not lead to the eradication of diversity. Diversity, indeed, is a fundamental asset of the EU infrastructure, and deserves protection as it helps producing better quality policies and enforcement actions. Although the antithesis of one another, uniformity and diversity are both essential for a successful reform of the EU competition enforcement infrastructure. Based on those elements, this thesis has proposed a reform of the European Competition Network (‘*Public* *enforcement reform'*) and suggested a new interpretation of Art. 16(1), Regulation n. 1/2003 (*Private enforcement reform*).

Starting with the *Public enforcement reform*, this thesis has suggested the introduction of the so-called ECN Grand Chamber, which should be driven by the values of equality, transparency, unity, solidarity, and teamwork. Within the ECN Grand Chamber, indeed, all ECN members will have equal status and powers. The ECN Grand Chamber will have the task of proceduralising the highly amount of informal co-operation which currently is taking place behind close doors. By proceduralising informal co-operation, the ECN Grand Chamber will: (i) sponsor diversity by boosting internal debate, experimentation and innovation of solutions as well as participation also from less experienced NCAs; (ii) increase transparency; (iii) 're-politicise' the issues internally debated, shifting them from a pure 'technocratic' domain; (iv) avoid that that seated concerns of the strongest protagonists are masked behind arguments such as efficiency, effectiveness, and legal certainty; (v) control diversity to avoid inconsistency, thus ensuring a uniform application of EU competition law across Europe; (vi) reduce the public and private cost of multiple-conflicting enforcements while increasing their effects.

Concerning the *Private enforcement reform*, this thesis has proposed a new interpretation of Art. 16(1), Regulation n. 1/2003, to avoid the inadmissible situation that *de facto* could arise where a National Court, in a jurisdictional proceeding between subjects A and B, might consider a given conduct X not anti-competitive, although the same conduct X has previously been classified as anti-competitive by a Commission decision addressed to subjects who are different from those involved in the national proceeding. In other words, the new interpretation of Art. 16 (1), Regulation n. 1/2003, suggested by this thesis aims at avoiding that a Commission decision sanctioning a given conduct X, carried out by one or more subjects, has no binding value in a subsequent national jurisdictional proceeding concerning the same conduct X only because the latter regards different subjects from the Commission Decision's addressees.

The new interpretation here suggested will produce the effects of (i) widening the number of cases in which the negative constraint of the Commission decisions *ex* Art. 16(1) applies; (ii) reducing the objective scope of the binding effect *ex* Art. 16(1), which would no longer be a positive constraint, but would be a negative one, imposing not a specific '*facere*' on National Courts, but a '*non facere*' or, *rectius*, a '*non contradicere*'. The Commission decisions, therefore, *ex* Art. 16 (1), Regulation n. 1/2003, would be nothing more than a '*jurisdictional parameter*' leading to an extension of the ECJ competences in cases where national courts disagree with the Commission precedent.

With regard to the boundaries of the 'negative constraint' deriving from Art. 16(1), this thesis suggested that it should be limited only to the 'judgment of law' contained in the Commission decisions. These decisions, in effect, are not binding (in negative) in their entirety but, as clarified by the ECJ, only limitedly to their operative part. Since, however, the Commission decisions' operative part is normally very concise, it is admissible that also the Commission decisions' recitals can produce binding effects as long as these recitals: (i) do not exceed the boundaries of what was established in the decision's operative part; (ii) are the essential basis of what was established in the decision's operative part (ie their exclusion would not allow to support the finding of unlawfulness of the concerned anti-competitive conduct under consideration or to support it in a reduced and more limited way).

The author of this thesis believes that the above reforms, while being extremely needed to guarantee the uniform application of EU competition rules across Europe, also are one of the least distortive solutions to solve the EU competition enforcement system's issues. Indeed, from the reforms described in Chapters n. 2 and 3, the EU competition enforcement system can only gain without the risk of losing anything.

As Jean Monnet once argued, '*beyond differences and geographical boundaries, there lies a common interest*'. The 'common interest', back then as now, is the construction and protection of the EU Single Market and the related EU infrastructure. In this perspective, ensuring that EU Competition rules are applied uniformly across Europe represents a fundamental step to continue pursuing that 'common interest'. Therefore, as Amato once said, '*la bussola c' è, la visione c'è ancora per gli uomini e donne di buona volontà, c'è un gigantesco lavoro che ancora può essere compiuto in nome di ideali che hanno segnato positivamente la storia dei decenni trascorsi*'.[443] All that remains is to do it. Let us do it.

[443] G. Amato, Conclusioni al convegno organizzato dall'Autorità Garante della Concorrenza e del Mercato dal titolo: '*La tutela della concorrenza: regole, istituzioni e rapporti internazionali*', Rome, 20-21 November 1995.

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