YEARBOOK of ANTITRUST and REGULATORY STUDIES
www.yars.wz.uw.edu.pl

Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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Workshop – Reform of Regulation 1/2003: Effectiveness of the NCAs and Beyond. Warsaw, 28 April 2017

An International Workshop entitled 'Reform of Regulation 1/2003 – Effectiveness of the NCAs and Beyond' was held at the University of Warsaw, Faculty of Management on the 28 April 2017. It was organized jointly by the Competition Law Scholars Forum (CLaSF) and the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference focused on issues connected to Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

After Professor Alojzy Z. Nowak introduced Professor Barry Rodger (CLaSF) and Professor Alan Riley, Professor Giorgio Monti (European University Institute) delivered the keynote speech about amending Regulation 1/2003.

Professor Giorgio Monti started with stressing that the timing of the workshop could not have been better because the Commission proposed a new directive to empower NCAs (hereinafter, ECN+) only about a month before the workshop. Professor Giorgio Monti emphasised that when the Commission published its paper on assessing 10 years of the working of Regulation 1/2003, there was a sense of celebration. Notwithstanding the initial celebration, the Commission started to think how to make the system work even more efficiently – the ECN+ Project started with ideas to improve NCAs' enforcement tools, fining powers and leniency programmes and also to ensure their independence. Professor Monti pointed out that the project has taken the form of a questionnaire published by the Commission and that this was not the best manner of finding a way to design an optimal enforcement toolkit. Professor Monti also stated that the Commission's proposal was politically incorrect, because it basically suggested that NCAs should have similar powers to those of the DG Competition. Such proposal indirectly insinuates that the Commission has nothing to learn from the NCAs, and yet there are many examples that prove it wrong – for example, the whistleblowing policy in some countries, etc. In fact, some enforcement tools should be included in the Directive that originate from the Member States, not the Commission. Another point made in this context was that most NCAs take cases with domestic effects, so why do they need to apply EU competition law? Almost all actions taken by a NCA have an effect on trade, but NCAs predominantly apply national laws. Professor Monti also mentioned cross-border cartel cases (Flour Mills or Booking.com), stating that the way in which they are dealt with can be improved.

He criticised the Commission's proposal for more procedural convergence, stating that there are many obstacles to do so, for example national case-law. Professor Monti also stated that maybe we are rushing the Directive, while we have ECN's best practices. Professor Monti proposed strengthening cohesive action by NCAs, for example by issuing joint guidelines or working in joint case teams. In his view, there should be exclusive application of EU competition law above certain thresholds, and NCAs should have the power to issue non-infringement decisions.

Professor Alan Riley commenting on Giorgio Monti presentation underlined a severe asymmetry among NCAs when it comes to resources. Designing a perfect system should, however, be based on symmetry. He also pointed out that whatever procedural changes a given NCA makes, it still does not operate in the name of the Commission.

Miguel Sousa Ferro asked why we are not discussing moving into the European Cartel Office with regional delegations, where only the EU would have the power to apply EU competition law? Francisco Marcos went even further and asked why don't we get rid of national law, leaving just EU law? In his response, Professor Monti pointed out that in an ideal world such system would be right, but there are many procedural problems standing in the way of such reforms.

Adam Jasser (former President of the Polish NCA) stated that the central question we need to ask ourselves is to what extent is the system broken? Only then, we should ask are we fixing it because it's broken, or are we fixing it because some other things are happening? Adam Jasser pointed out the practical problems with working on a case in joint teams with other NCAs. This has lead, in fact, to situations where either one of the NCAs does the work by itself, or persuades the Commission to do it.

Ondrej Blazo referred to Slovakian experiences with implementing the Directive. He also spoke of the question of fines in Slovakia where, on the basis of national law, a settlement fine can be reduced by up to 15%. According to the speaker, the system works very efficiently, but the European Commission is against such approach, stating that such low fines can undermine the EU competition law system.

The first panel entitled 'NCAs Design and Context' was chaired by Angus MacCulloch, Lancaster University.

The first panellist, (University of Lisbon), considered the question what are the current institutional design obligations derived from EU law (before the Proposed Empowering Directive reshapes the system). He started by presenting the institutional design obligations for national authorities in other areas of EU law. Miguel Sousa Ferro explained that there are several obligations already arise from Regulation 1/2003: the design of a NCA must (in light of national constitutional law) allow it to adopt certain types of decisions and measures and have certain powers, it must comply directly with obligations to cooperate with the EC as well as be able to protect confidential information. Furthermore, distributing enforcement tasks between national administrative and judicial authorities, as well as separating prosecution/decision phases is explicitly allowed. Some other obligations arise also from Articles 101 and 102 TFEU together with general principles of EU law, such as the principle of

equivalence, the principle of loyal cooperation and the principle of effectiveness. To the extent that certain institutional design characteristics are necessary to ensure the effectiveness of Articles 101–102 TFEU, Member States must set up their NCAs accordingly. By analysing and drawing analogies from ECJ case-law relating to other regulated sectors, Miguel Sousa Ferro pointed out that there seems to be a rather extensive range of specific obligations which derive from the principle of effectiveness. The logic that led the Court to impose those requirements in those sectors is exactly the same as what would have to be followed for NCAs. Such obligations relate to adequate financial and human resources as well as financial autonomy, impartiality and incompatibility regime, appointment and dismissal of board members and staff, accountability and judicial review of NCAs decisions. It was stated that despite the fact that such obligations can be derived from the principle of effectiveness, the EU should legislate on the institutional design of NCAs. That is because the 'mere principle' approach has been insufficient and it cannot be used to impose as high of a degree of design requirements as would be possible via the legislative path.

Marek Martyniszyn (Queen's University Belfast) and Maciej Bernatt (CARS, University of Warsaw) delivered a presentation on the introduction and development of modern competition law in Poland in the context of new competition law regimes. It was emphasised that assessing the success of new regimes is not an easy task. According to some authors and the theory of lifecycles, it can take up to 25 years for a NCA to be able to achieve the goals of competition law. Some of the tentative focal points identified in the speech were the issues of independence and autonomy. There are three key features of independence: organisational, functional and budgetary. It was noted that there is no requirement under EU law for any formal independence of NCAs, and that, for instance, the Bundeskartellamt is supervised by the Federal Minister of Economy and Technology. The speakers presented in details the appointment process of the President of UOKiK (Polish NCA) and listed names of former UOKiK Presidents. The second part of the presentation focused on meritocratic enforcement in the following two areas: state or state-owned enterprises and cartels. The speakers stressed that state-owned enterprises were inherited from the communist era, and were the main addressees of the actions of the Polish Authority in the years 1990–1995. The Authority adopted a more structural approach at that time, supervising changes in the ownership structure of state- enterprises, even dividing them. The years 1995–2015 saw active enforcement against state-owned enterprises, in particular in infrastructure markets. Most common were excessive pricing practices, limitations of consumer choice, or foreclosure of potential competitors. Numerous anticompetitive contract clauses were identified that were used by dominant, state-owned firms. The latter included, for example, PGNiG (oil and gas mining), PKP Cargo (rail freight), Orlen (oil refiner and petrol retailer), Polski Zakład Ubezpieczeń (insurances), PGE (energy supplier), Enea (energy supplier), Poczta Polska (post services), PKP (railways) or Polish Airports State Enterprise (airport services) and, especially, Telekomunikacja Polska which was repeatedly investigated for tying (telephone and Internet services), excessive prices (international phone calls) and

foreclosure (lowering quality of foreign data transmission services). The end of the speech focused on the issue of cartel enforcement. Since 2000, the UOKiK is equipped with modern investigatory powers, including independent searches both on business and private premises. Yet enforcement is very limited in this field (the cement cartel being a notable exception). Since 2014, lessening focus on vertical agreements was observed, but there has been no significant improvement in the field of hard-core cartels. New tools were introduced in 2014, such as leniency plus or fines on managers, but detection has not improved.

In the following discussion, Eva Lachnit asked that if data protection institutions should be independent, why should the same not apply to competition authorities? Marek Martyniszyn noted that under Article 35 Regulation 1/2003 there can be no formal criticism of the Polish situation. If there was an issue, the Commission should say something. He also noted that the principle of effectiveness would be a better basis than Article 35 Regulation 1/2003 for such an evaluation. Professor Giorgio Monti emphasised that it is unclear how to concretise the principle of effectiveness. Adam Jasser also added that while sector regulators deal with a number of different values, and competition is not their main goal, competition agencies deal with only one value, that is competition.

The second panel entitled 'NCAs Institutional Setting and Relation with Courts' was chaired by Barry Rodger (CLaSF). The first presentation by Annalies Outhuijse (University of Groningen) focused on the effectiveness of Dutch cartel fines in the context of judgments delivered by two specialized Dutch Courts. Annalies Outhuijse introduced the Dutch system of competition enforcement, presenting the Authority for Consumers and Markets (ACM) and the two specialised courts: the District Court Rotterdam and the Trade and Industry Appeal Tribunal (TIAT). In the analysis, she found that the Dutch system of public enforcement of the cartel prohibition is not efficient. Such conclusions arise from the amount of ACM decisions that end up annulled by the District Court and the TIAT. The main points of the disagreement are often related to evidence, both factual and economic, and the proportionality of the fine.

The next presentation by Maciej Bernatt assessed the intensity of judicial review of NCAs' decisions with particular emphasis on Central-Eastern Europe. First, the speaker introduced the concept of judicial deference and made some general remarks concerning the institutional design of courts in Poland, Slovakia, Czech Republic and Hungary. According to Maciej Bernatt, judicial deference relates to respecting the choice made by a NCA. The analysis of judicial review in Poland showed that there is very little place for judicial deference to the findings made by the Polish NCA at the moment. However, the expertise of the UOKiK (market studies revealed in the justification of UOKiK decisions) and the UOKiK playing an active role during contradictory judicial proceedings may be of relevance in the future. In the Czech Republic, there is an intense review on merits, which may often lead to the annulment of the decisions issue by the NCA. Unlike Polish Courts however, less emphasis is put on reducing fines. It was then said that judges in Slovakia have been found to often lack specialised knowledge and that it is common for them to repeat

the positions of the parties. Many decisions are also repealed on formal grounds in Slovakia. In Hungary, similarly to Poland, courts lower the fines imposed by the NCAs but a deferential approach regarding economic findings is possible. Maciej Bernatt concluded his presentation by stating that there is need for some institutional changes during administrative proceedings which could make space for a more deferential style of judicial review. In particular, internal walls can be introduced in Poland, Slovakia and the Czech Republic, meaning that the same case handlers should not investigate and work on draft decisions. Such a solution proves itself effective in Hungary, where case handlers investigate specific practices while the decisions are issued by the Competition Council.

The last panellist, Francisco Marcos, IE Business School, spoke about dissenting opinions in competition authorities. He started by introducing the idea of collegiate bodies in competition law enforcement. Such decision-making bodies within NCAs are generally comprised of several members and are in many ways more effective than individuals. Collegiate bodies have a larger pool of knowledge, more diversity of ideas and they allow for a critical assessment and the identification of flaws. Later, the concept of separate judicial opinions was presented. It is an institutional feature available in judicial multi-member bodies in most judicial systems. It provides an outlet for a lack of consensus on a given case, be it in the assessment of the facts or in the interpretation of the law, and is a sign of integrity and independence of judges. This concept is of huge relevance in courts of last resort (such as the ECHR, or Constitutional and Supreme Courts) but is also useful in lower courts where it introduces an additional element that may help reviewing a majority decision in the case of an appeal. Francisco Marcos asked whether it would be useful to extend the same concept to administrative bodies and to competition authorities. In the case of the latter, this can constitute a challenge to institutional legitimacy, affect legal certainty and enhance judicial activism. Adopting specific rules for dissenting opinions within competition authorities would probably be necessary.

Professor Alan Riley suggested giving Dutch courts the power to increase fines. He also said that in the EU we don't have a deep antitrust culture that makes dissent tolerable. Marek Martyniszyn added that in the history of Japan there have only ever been 2 dissenting opinions due to cultural consideration. Professor Giorgio Monti stated that opinions which are not overruled by higher courts are often the cause for a promotion of a judge from a first instance courts. This may be the reason why first instance courts cut fines more often.

The third panel was chaired by Adam Jasser (President of the Polish Competition Authority in 2014–2016), and it was dedicated to the toolbox available to NCAs.

The first panellists, Evi Mattioli (University of Liège) and Tim Bruyninckx (European University Institute), considered the question why NCAs do not enforce EU competition law extraterritorially. They started by introducing the concept of extraterritorial enforcement of EU competition law. According to Regulation 1/2003, NCAs have a duty to apply EU Competition law extraterritorially and yet lack of such enforcement was identified. The speakers stressed that this could lead to ineffective and inefficient application of EU competition law, under-fining and in

some cases, risk of parallel intervention. These risks were explained on the basis of the following two cases: *Industriele Batterijen* from the Belgian competition authority and the *Online Travelling Agencies* case. The former case concerned a practice which had effects outside the Belgian territory, yet the fine was calculated based on the Belgian turnover. The latter case concerned parallel investigation of 'parity clauses' by several NCAs. The NCAs, by not fully cooperating with each other, risked an inconsistent application of EU competition law. Further on, the speakers presented the agency theory, and how it can apply to Regulation 1/2003. In the realm of EU competition law enforcement, the European Commission (principal) has different interests than the NCAs (agents). NCAs are very often driven by national priority policies and interests, purely within the national territory. It was concluded, that under Regulation 1/2003, the Commission monitors NCAs by means of, for example, the prior notification mechanism, information exchange through the ECN or various reports and studies, but lacks any instruments of intervention. The speakers suggested that the Commission could take over the enforcement, but this would be contrary to the spirit of Regulation 1/2003. The second suggestion was that the Commission should be able to force a NCA to apply EU competition law extraterritorially, and in the case of failure, its Member State could be brought before the ECJ.

The next panellist, Carsten Koenig (Georg-August-Universität Göttingen), spoke of the imposition of follow-on penalties on managers and employees. The author first presented the background of this issue, outlining that unlike NCAs, the European Commission is not empowered to impose penalties on individuals for competition law infringements. Carsten Koenig asked whether it would be legal for NCAs to impose penalties on individuals following a Commission decision prohibiting an anticompetitive practice and potentially fining undertakings. The analysis of Regulation 1/2003 rendered a positive answer in this context, namely that it is possible for a NCA to impose follow-on penalties on individuals. Neither Regulation 1/2003 not the principle of *ne bid in idem* preclude NCAs from doing so, and considering the added deterrence and preserved effectiveness and equivalence, imposing such follow-on penalties would be desirable.

The last panellist, Eva Lachnit (Utrecht University) presented individual guidance as an alternative tool of European competition law enforcement. In the beginning, the speaker introduced the relevant concept by defining it as advice given to (groups of) companies with regard to competition concerns about their proposed collaboration or other market behaviour. Various arguments were presented on whether such tool should be considered as 'enforcement' or 'advocacy'. Eva Lachnit described then the use of individual guidance by the European Commission and by NCAs (Belgium, the Netherlands, United Kingdom, France, Denmark). The European Commission has the power to issue 'Guidance Letters', concerning Articles 101 and 102 TFEU. This power is based on the European Commission Notice on Informal Guidance from 2004. To date, the Commission has not yet issued any guidance letters. Eva Lachnit emphasised that individual guidance should be recognized as a tool of European competition law enforcement, and that the debate on the reform of Regulation 1/2003 should be

extended to cover the merits of individual guidance and its desired procedure. After all, as she summarized, better enforcement means an improvement of all enforcement tools, both formal and informal.

In the following discussion, Professor Giorgio Monti noted some problems with the principle agent theory relating to the priorities of agents. Later, Maciej Bernatt suggested that when it comes to pursuing fines on individuals, the needs for procedural guarantees are even broader than on companies. Adam Jasser added that it is very difficult for a NCA to impose fines on individuals in a case which was handled by the Commission without conducting their own investigation.

The last panel of the workshop was dedicated to due process, proportionality and independence; it was chaired by Aleksander Stawicki, partner at WKB Wierciński Kwieciński Baehr (the sponsor of the workshop).

Maciej Bernatt commenced the panel, speaking also on behalf of absent Marco Botta (Max Planck Institute for Innovation and Competition) and Alexandr Svetlicinii (University of Macau). Maciej Bernatt addressed the application of the right of defence by the European Commission and the competition authorities of the newer EU Member States. In the introduction, he presented the framework regulating the right of defence in EU competition law proceedings and the relevant case-law. The first subject of the analysis – the right to be informed – was found to be recognized in all jurisdictions (Poland, Czech Republic, Slovakia, Hungary, Bulgaria, Romania and Croatia). Its main guarantee is the Statement of Objections, but the notification of the opening of the proceedings could be considered as an alternative. The right to access the file was also found to be recognized in all of the analysed jurisdictions. A potential conflict with the protection of business secrets was particularly underlined. The right to an oral hearing is, in Poland, subject to the discretion of the NCA, unlike in other jurisdictions where it is obligatory either after the Statement of Objections is issued (Croatia), or if a party requests it (Bulgaria, Romania, Hungary). The privilege against self-incrimination (hereinafter, PASI) and the legal professional privilege (hereinafter, LPP) were also discussed. It was found that PASI was not directly recognized in any of the analysed jurisdictions, except Hungary but with a limited scope. The LPP was found to be recognized either by courts (Slovakia, Czech Republic and Poland) or expressly in the competition act (Croatia, Hungary). One of the conclusions of the research project and the presentation was that there is procedural divergence and some limitations to the right of defence in the analysed national jurisdictions. The degree of protection granted to the rights of defence was generally lower in the enforcement practice of NCAs than that of the European Commission. Article 3 of the 2017 Proposal for a Directive to Empower NCAs requires NCAs to respect the right of defence, but it does not clearly specify further steps in this context. The conclusion of the presentation was that enhanced investigatory powers of NCAs should be counter-balanced with a harmonization of the right to defence.

The next speaker, Antonio Robles (Universidad Carlos III de Madrid) delivered a presentation on effectiveness, proportionality and deterrence under Spanish competition law. Antonio Robles started by explaining that when fixing the amount of

the fines, the duration of the infringements must be considered, as the most important factor, as well as all other factors capable of affecting the assessment of the gravity of the infringements. Such reasoning stems from the Judgment of the Court of 7 June 1983 in joined Cases 100–103/80 *Musique diffusion française* and the fact that the 'duration' is mentioned separately therein. Later, the principle of proportionality was introduced through the definition provided by the Judgment of the Court of 12 January 2006 in Case C-504/04, *Agrarproduktion Staebelow GmbH*. According to the judgment, the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary. Moreover, if there is a choice between several appropriate measures, the least onerous one must be used and the disadvantages caused must not be disproportionate to the aims pursued. Antonio Robles also noted that it is not competition authorities who are able to set fines, but the legislator. Finally, various charts were analysed, such as the fining rate, dispersion fining rate, ratio fine/affected market turnover (deterrent effect) and ratio of fine imposed/optimal deterrent fine.

The last speaker of the workshop was Pieter Van Cleynenbreugel (University of Liège) who considered the independence of NCAs. The starting point of his presentation was the reform proposals of Regulation 1/2003, where the Commission acknowledged lack of harmonisation relating to functional independence (independence from politics), operational independence (independence from market) and procedural independence (segregated procedures). Pieter Van Cleynenbreugel noted that there are different degrees of accountability at the Member States level. In some Member States, there is parliamentary involvement in leadership appointments, others have ministerial oversight; generally there are variable reporting obligations. Segmented and separate attention to a variety of independence features result in three preliminary question being addressed: What kind of independence do we want from NCAs?; What kinds of legal standards/principles do we want to structure the operations of NCAs as a matter of EU competition law?; How should different accountability features interrelate in order to comply with EU expectations and legal standards? It was suggested that harmonisation is possible because the EU has powers to directly structure NCAs. Such intervention could be legitimized by the ECN framework. It could provide clear functional independence requirements, clear due process and judicial review requirements, as well as political independence. Furthermore, an alternative to harmonisation could be enhanced bottom-up convergence (Court of Justice-guided convergence of the functioning of NCAs when applying EU law), but it is slow paced and does not permit the full development of a convergence-focused framework, nudging NCAs to be structured in the same fashion.

On the notion of independence, Adam Jasser said that it is an illusion that one can assure independence by 'ticking a few formal boxes'. He also recalled the words of William Kovacic, who said that politics will always invade this space, because it is an important space. If politicians are not interested in a competition authority, it means that the authority is irrelevant. True independence comes from confidence, knowledge, creditability and due process. Aleksander Stawicki added budget to that list also. He explained that if you don't have money, you can't keep good people and therefore

you can't evolve, which is crucial for an effective functioning of a NCA. Małgorzata Modzelewska de Raad stated that effectiveness and independence are different and separate issues. There are many authorities that are very dependent and very effective.

Professor Stanisław Piątek, CARS, closed the seminar. He thanked CLaSF for its cooperation, the WKB law firm for sponsoring the event, and Maciej Bernatt and Nina Łazarczyk for the organization of the seminar.

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