ARTICLES

SHAPING THE FUTURE OF EUROPE – SECOND PART
*edited by* Sandra Hummelbrunner, Lando Kirchmair, Benedikt Pirker, Anne-Carlijn Prickartz *and* Isabel Staudinger

# THE ECN+ DIRECTIVE: AN EXAMPLE OF DECENTRALISED COOPERATION TO ENFORCE COMPETITION LAW

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ABSTRACT: Present *Article* deals with Directive 1/2019 which intends to harmonise public enforcement regimes of EU competition law in the Member States. The Directive does so by harmonising and complementing the existing decentralised system of competition law enforcement and empowering the competition authorities in the Member States to be more effective enforcers. In light of the overall topic "Shaping the Future of Europe", the Directive will be tested regarding its possibilities to contribute to more effectiveness, acceptance and ultimately deeper integration. It is concluded that the system complemented by Directive 1/2019 can overall be considered a success, multiplying enforcers and thus strengthening enforcement. With the preconditions of uniform – and uniformly interpreted – substantive law, well-equipped expert authorities as well as close cooperation within a network, it could, furthermore, even contribute to an ever closer union and serve as a role-model for other areas, too.

KEYWORDS: EU competition law – ECN+ Directive – competition authorities – networks – public enforcement – ever closer union.

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ISSN 2499-8249
doi: 10.15166/2499-8249/510

## I. Introduction

Present *Article* deals with Directive 1/2019 that intends to empower the Member States' competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market.[1] The Directive had to be transposed by the Member States until February 2021.

Directive 1/2019 is commonly referred to as "ECN+ Directive" or simply "ECN+", whereby ECN stands for "European Competition Network".

This network as such is no novelty but was already established in 2004 (as a complementation of Regulation 1/2003; see *infra*, section II.2). It constitutes a network of cooperation between the EU's Competition Authorities (CAs), *i.e.*, the European Commission (Commission) and the National Competition Authorities (NCAs).[2] In essence, the ECN is designed as a complex forum for exchange of experience on EU competition law.

The ECN+ Directive obviously intends to put a "plus" to this existing network, aiming at achieving a uniform all-European competition culture, the former system could not provide for. The ECN+ keeps up and seeks to improve the decentralised system of EU competition law enforcement. The ECN+ does so by harmonising public enforcement regimes in the Member States and complementing the existing system of decentralised enforcement of competition law in the EU. This is noteworthy, it being the first attempt to harmonise public enforcement of competition law in the EU.

Despite this obvious novelty – the Commission is even deemed to have entered somehow "uncharted territory"[3] – and the fact that Member States are currently dealing with its implementation, one could possibly ask how this Directive can be linked to the general topic "Shaping the Future of Europe".

In the view of the author, the answer to this question can be first of all summarised with the expression "looking back and thinking forward" and is closely linked to the stance competition law has in the overall EU law context: albeit priorities shifted over time,[4]

[1] Directive (EU) 1/2019 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.

[2] Notice C 101/43 from the Commission of 27 April 2004 on cooperation within the Network of Competition Authorities.

[3] S Thomas and M Dueñas, 'The Draft Provisions on Antitrust Fines in the Commission's ECN+ Proposal' (2018) Zeitschrift für Wettbewerbsrecht 1.

[4] For an overview see *e.g.*, PJ Slot, 'A View from the Mountain: 40 Years of Developments in EC Competition Law' (2004) CMLRev 443 ff. With regards to legal theories on EU competition law see also T Jaeger, 'Wirtschaftliche Betrachtungsweise im Wettbewerbsrecht' in WiR – Studiengesellschaft für Wirtschaft und Recht (ed.), *Wirtschaftliche Betrachtungsweise im Recht* (Linde Verlag 2020) 69, 76 ff.

competition policy was and is fundamental to the purposes of the EU, described as *conditio sine qua non* for the EU's economy, growth and employment.[5] Once designed as an economic community, the aim of bringing down trade barriers and establishing a common market was linked to strong competition laws from the start. These strong competition laws should eliminate obstacles to trade between Member States, enhance integration and thereby reinforce the unity of the Community. Competition policy was and is even considered as one of the EU's key policies that must remain a priority if the EU wishes to achieve the objectives laid down in the Treaties.[6]

It seems reasonable to include fundamental policies when seeking models for the future. This holds especially true in present times when the EU is called to rely on its fundamentals in order to prepare for upcoming challenges.[7] The internal market lies at the heart of the EU and competition law and policy undoubtedly contribute to its functioning.[8]

But this *Article* seeks to extract even more from the ECN+: the Directive shall ultimately be analysed regarding its ability to shape Europe's future by testing whether the system it introduces can be considered as a contribution to more effectiveness, acceptance and ultimately, deeper integration – under the assumption that integration in a sense of closer cooperation and harmonisation is in principle desirable. Therefore, the system installed by the ECN+ must be examined and followed by a discussion on how this could possibly contribute to an ever closer union and whether it can serve as a role-model beyond competition law.

In order to do so, the present *Article* will start by outlining the road that eventually leads to the ECN+, then presenting the most pertinent provisions introduced by this act of secondary law and finally concluding by a couple of hypotheses analysing whether the system established by this Directive could ultimately be used as an example of cooperation with the outlook of contributing to an ever closer union in the future.

## II. The road to the ECN+

Before talking about the ECN+ Directive, it is inevitable to put the Directive into context by retracing the road that led to its adoption.

[5] P Akman and H Kassim, 'Myth and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) Journal of Common Market Studies 111, 117 with recourse to former Commission Presidents and Commissioners.

[6] *Ibid*. 116 with further references.

[7] See *e.g.*, White Paper COM(2017) 2025 final from the Commission of 1 March 2017 on the Future of Europe.

[8] B Widmer, 'Wenn der Wandel alleine das Beständige ist: Die EU-Wettbewerbspolitik und ihre Umsetzung' (2015) Zeitschrift für Europarechtliche Studien 295, 296.

### II.1. Regulation 1/2003

Regulation 1/2003 is considered as the starting point on the road to the ECN+.[9]

In 2004, Regulation 1/2003 created a complete shift in the EU's competition law enforcement, calling NCAs competent to apply the TFEU's competition laws in their entirety for the first time. Regulation 1/2003 replaced the former system of centralised application of EU competition law with the Commission as the only authority competent to apply these norms. It introduced the still existing decentralised system where the NCAs are, alongside the Commission, co-enforcers of the EU competition law.

This required *i.a.*, that all Member States set up respective authorities capable of applying the laws. However, Regulation 1/2003 granted full discretion to the Member States on how to install these authorities and how to shape the new national systems.[10] Regulation 1/2003 only provided for detailed competences of the Commission whereas it contained no obligations for NCAs, except for their duties to cooperate with the Commission.[11]

The importance of this shift can hardly be overrated: the Commission accepted to give up on its monopoly on what was considered its "sharpest sword"[12], namely EU competition law. In light of this consideration, it is noteworthy that the Commission agreed to transfer its duties at least partially onto the Member States and their NCAs.

Regulation 1/2003 was adopted against the backdrop of increasing competition law cases[13] that rendered the former centralised system impossible to perform.[14] With the establishment of the decentralised system, Regulation 1/2003 enabled a much broader application of EU competition law, making more authorities competent to enforce it.[15] At

[9] Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty.

[10] N Harsdorf, E Ummenberger-Zierler and A Reidlinger, 'Europäische Vorgaben für Befugnisse und Unabhängigkeit von nationalen Wettbewerbsbehörden: Eine erste Analyse der am 3.2.2019 in Kraft getretenen ECN+-RL' (2019) Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht 63, 63.

[11] *E.g.*, Editorial, 'Public Enforcement of EU Competition Law: Why the European Antitrust Family Needs a Therapy' (2015) CMLRev 1191, 1192.

[12] A Von Bogdandy and F Buchhold, 'Die Dezentralisierung der europäischen Wettbewerbskontrolle, Schritt 2 – Der Verordnungsvorschlag zur dezentralen Anwendung von Art. 81 III EG' (2001) Gewerblicher Rechtsschutz und Urheberrecht 798.

[13] See *e.g.*, in the Proposal COM(2000) 582 final from the Commission of 19 December 2000 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty and amending Regulations (EEC) n. 1017/68, (EEC) n. 2988/74, (EEC) n. 4056/86 and (EEC) n. 3975/87.

[14] For the sake of completeness, it has to be added that Regulation 1/2003 also changed the system of prior application (where undertakings had to notify any intended cooperation with the Commission, which would then authorise it or not). With Regulation 1/2003 undertakings were now obliged to self-assess whether their intended behaviour is in compliance with EU competition law. For the purpose of present *Article*, this part of Regulation 1/2003, however, won't be elaborated further.

[15] O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) CMLRev 121, 122.

the same time it allowed the Commission to save resources and use them in areas considered key for the functioning of the internal market.

Nevertheless, in order to ensure uniform application of EU competition law in this new decentralised system with a maximum of discretion left to the Member States, Regulation 1/2003 was complemented by a set of soft-law instruments.[16] One of these instruments was the already mentioned European Competition Network (ECN) aiming at close cooperation and giving the CAs the possibility to align on substantive matters but also avoid disputes on competences.[17] Albeit being an important source of influence – just like the other notices and guidelines published by the EC[18] – alignment of the application of EU competition law depended to the vast extent of the Member States' willingness to implement the soft-law instrument.[19]

### II.2. Success and shortcomings of Regulation 1/2003

The evolution from Regulation 1/2003 to the ECN+ suggests that Regulation 1/2003 left room for improvement. In fact, the general system established by Regulation 1/2003 is considered a success in the effective enforcement of EU competition law. However, the Commission identified a couple of major deficits it seeks to compensate with the ECN+.

A mere look at the statistics on competition law decisions reveals that since the adoption of Regulation 1/2003 not only the overall number of decisions increased dramatically, but also 85 per cent of all decisions that applied EU competition rules were then taken by NCAs.[20] These numbers allow two conclusions: first, enforcement of EU competition law is now taking place on a scale which the Commission could never have achieved on its own[21] and second, NCAs proved to play a decisive role in enforcing EU competition law. Still, it remains unclear if it was the decentralisation that eventually led to these numbers. Some authors state that it is simply not known how many of the reported cases and decisions of the NCAs were "national-turned-into-EU cases and how many of them represent a genuine increase in enforcement activity owed to the advantages of being part of a system of decentralized enforcement".[22] However, it is beyond doubt that EU competition law enforcement is taking place on a larger scale with NCAs at the heart of it.

[16] For an overview see European Commission, *European Competition Network (ECN)* ec.europa.eu.

[17] Notice C 101/43 cit.

[18] O Brook, 'Struggling with Article 101(3) TFEU' cit. 123.

[19] Editorial, 'Public Enforcement of EU Competition Law' cit. 1195.

[20] European Commission, *European Competition Network (ECN)* ec.europa.eu. In absolute numbers: whereas the Commission dealt with 377 cases in the years 2004 to 2018, the NCAs dealt with 2149 cases in the same period.

[21] A Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' (2017) Journal of European Competition Law & Practice 625.

[22] Editorial, 'Public Enforcement of EU Competition Law' cit. 1196.

Despite the impressive overall increase of competition law decisions, statistics also show that not all Member States contribute equally to the growth of investigations and decisions. Numbers provided on antitrust cases investigated in each Member State between 2004 and 2018[23] show that they are not proportionate to the actual size (in terms of inhabitants) of the respective state. Just to highlight some aspects, whereas large EU countries, such as Germany, France, Italy and Spain are on top of the list, former EU Member State United Kingdom was severely lagging behind.[24] The same holds true for the "new MS" that acceded the EU in 2004 and later (with the exception of Hungary), resulting *i.a.*, from a historically weaker awareness for competition law as such, combined with lacking independence of the NCAs from political influence as well as insufficient human resources and budget.[25] On the other hand, small countries such as Austria or Hungary[26] proved to have investigated a large number of potential competition law infringements compared to their actual size. It cannot be assumed that the numbers actually correspond to the real allocation of competition law infringements in the EU. Similar observations can be found in surveys conducted by the Global Competition Review.[27]

The numbers and statistics left the Commission to conclude that the system, despite being successful by and large, was not flawless. As one explanation already mentioned, the Commission found that (some) NCAs simply lacked guarantees and instruments, preventing them from fulfilling their potential.[28] Additionally, shortcomings resulted from the fact that apart from Regulation 1/2003 itself, all other instruments to ensure the well-functioning of the decentralised system were mere soft law, with no hard law ensuring its compliance.

The system of parallel competences introduced by Regulation 1/2003 hence led to *e.g.*, a mostly free allocation of cases within the ECN combined with differences in national rules of procedure and different national sanction regimes and tensions within the network.[29]

Thus, the discretion granted to the Member States under Regulation 1/2003 that focused on giving the NCAs the general power to co-enforce EU competition rules while not addressing the means and instruments of NCAs to do so, proved to be counterproductive. Although NCAs were obliged to enforce the same substantive rules, their means and instruments depended on national law.[30] The new system of parallel enforcement consequently

[23] Available at European Commission, *European Competition Network (ECN)* ec.europa.eu.

[24] France: 280 cases (rank 1), Germany: 227 cases (rank 2), Italy: 117 cases (rank 3), Spain: 159 cases (rank 4), United Kingdom: 109 cases (rank 8).

[25] A Geiger, 'Das Weißbuch der EG-Kommission zur Art. 81, 82 EG – eine Reform, besser als ihr Ruf' (2000) Europäische Zeitschrift für Wirtschaftsrecht 165, 168.

[26] Hungary: 140 cases (rank 5), Austria: 121 cases (rank 6).

[27] Global Competition Review, *Rating Enforcement* globalcompetitionreview.com.

[28] A Sinclair, 'Proposal for a Directive' cit. 626.

[29] K Ost, 'Die Richtlinie 1/2019: Ein Meilenstein für die Rechtsdurchsetzung im European Competition Network' (2019) Neue Zeitschrift für Kartellrecht 69.

[30] A Sinclair, 'Proposal for a Directive' cit. 626.

posed an inherent risk to uniformity and legal certainty of enforcement. Especially since the application of EU competition law merits a wide margin of discretion, the NCAs' national "economic, and political traditions are prone to lead to a fragmented application".[31]

### II.3. Actions taken to address the shortcomings

In fact, the Commission was not surprised that shortcomings emerged but rather anticipated them when adopting Regulation 1/2003:[32] Mario Monti, Competition Commissioner at the time, even stated during the debates on Regulation 1/2003 in the European Parliament (EP) that it would be "desirable to have common procedures and sanctions"[33] in order to prevent fragmentation and legal uncertainty. However, the Commission took the approach to "introduce a substantial framework first, leaving the possible introduction of common procedures and sanctions to a later stage. Once experience of operating the system has been acquired, it will be easier to identify the areas that give rise to practical problems and draw up rules to deal with them effectively".[34]

Roughly ten years after its adoption, the Commission carried out an assessment on the functioning of Regulation 1/2003, reacting to calls from stakeholders to ensure that NCAs are equipped with the means and instruments to enforce effectively.[35]

Based on the results of this analysis, the Commission issued in 2014 the Communication *Ten Years of Antitrust Enforcement under Regulation 1/2003*[36] and concluded that the new system considerably increased the enforcement of EU competition rules, with the NCAs now being a key pillar of the system. However, the Commission found that there is room for NCAs to become more effective enforcers and identified a number of areas for action to be taken shortly.

Following the 2014 Communication, the Commission thus carried out an extensive data collection in cooperation with all NCAs to gain a detailed picture of the *status quo*. This was completed by a public consultation in 2015 in order to get feedback from interested stakeholders. The aim was to identify the existing system's shortcomings and the measures necessary in order to render enforcement of EU competition law even more effective. The survey revealed that a vast majority was in favour of actions to be taken in order to boost enforcement by the NCAs.[37]

[31] O Brook, 'Struggling with Article 101(3) TFEU' cit. 122.

[32] *Ibid*. 122 ff.

[33] M Monti, speech in European Parliament, *Debate of 5 September 2001* www.europarl.europa.eu.

[34] *Ibid*.

[35] See *e.g.*, A Sinclair, 'Proposal for a Directive' cit. 625.

[36] Communication COM(2014) 453 final from the Commission to the European Parliament and the Council of 9 July 2014: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives.

[37] The various steps taken as well as their corresponding documents can be found online at European Commission, *Antitrust, Empowering National Competition Authorities* ec.europa.eu.

As a consequence, the Commission presented in 2017 its Proposal for the ECN+ Directive[38] followed by an extensive impact assessment[39] that listed which competences, means and instruments were available in the respective Member States and where improvement is required to truly ensure an effective enforcement of EU competition law.

This time, the Commission chose a different approach that it somehow already announced when adopting Regulation 1/2003: whereas so far the Commission used different sets of soft-law instruments in order to achieve "soft convergence" or "autonomous harmonisation"[40] it now opted for a hard law instrument to harmonise enforcement regimes in the Member States. The Commission thus seems to have given up its hope that soft law instruments would suffice to lead to the emergence of best practice role models and ultimately to uniformity.[41] Apparently hard law is the only way to protect undertakings from "arbitrary differences in the enforcement of arts 101 and 102 TFEU, depending on whether their case is handled by a "weak" or by a "strong" authority, or whether national rules on enforcement offer loopholes or not".[42]

ECN+ is thus the next milestone on the road to effective enforcement of EU competition law, taking into consideration that Regulation 1/2003 has improved enforcement across the EU while there is still untapped potential for the NCAs to do even more.

## III. The ECN+ Directive

First of all, it has to be emphasised that the ECN+ is not a repealing instrument of Regulation 1/2003 but a mere complementation thereof – somehow aligning the competences of NCAs to the competences of the Commission.[43] Furthermore, the ECN+ does not make any changes regarding substantive law but only tries to cover shortcomings in its enforcement. The aim shall be an effective enforcement of arts 101 and 102 TFEU with NCAs equipped with suitable instruments to reveal and end competition law infringements.[44]

[38] Proposal for a Directive COM(2017) 142 final from the Commission of 22 March 2017 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.

[39] Staff Working Document SWD(2017) 114 final from the Commission of 22 March 2017 on an Impact Assessment, accompanying the document "Proposal for a Directive of the European Parliament and the 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".

[40] K Ost, 'Die Richtlinie 1/2019' cit. 69.

[41] *E.g.*, Austria, where the Federal Competition Authority adopted the ECs leniency programme.

[42] Editorial, 'Public Enforcement of EU Competition Law' cit. 1195.

[43] H Achenbach, 'Die "ECN+"-Richtlinie (EU) 2019/1 und das deutsche Kartellordnungswidrigkeitenrecht' (2019) Zeitschrift für Wirtschafts- und Steuerstrafrecht 257, 258.

[44] N Harsdorf, E Ummenberger-Zierler and A Reidlinger, 'Europäische Vorgaben für Befugnisse und Unabhängigkeit' cit. 64.

The ECN+ tried to, however, not touch upon national individual procedural peculiarities wherever possible, *i.a.*, to prevent non-acceptance of the proposal in the Council.[45] This is also one of the reasons the EU legislator opted for a Directive instead of continuing the path of Regulations, complying with the principle of proportionality and ideally enhancing acceptance of the measures in the Member States and among the citizens.

Consequently, the ECN+ Directive does not impose a "one size fits all" approach but allows Member States to take into account their legal traditions and institutional peculiarities.

In light of the second part of present *Article*, only a few aspects of the ECN+ Directive shall be highlighted in the following.[46] Overall, the provisions present a vast set of measures to ensure that NCAs will become even more effective enforcers in the future, equipped with sufficient resources and securities. On the other hand, at the moment it remains questionable whether these provisions are really suited to compensate the criticised non-uniform application of EU competition law.

### III.1. Institutional security of NCAs

A cornerstone of the ECN+ is to ensure independence and sufficient resources for all NCAs (Chapter I and III of the Directive) since some NCAs are currently not able to set their priorities autonomously and free from external influence.

Therefore, Member States shall in the future ensure that NCAs perform their duties and exercise their powers impartially in the interest of effective and uniform application of the Directive (art. 4 of the Directive 1/2019). NCAs must be accorded the right to set their own priorities, including the right to decide which cases shall be pursued and which cases shall be closed. Member States shall, as a minimum, ensure that NCA staff is independent of external influence and shall receive no instructions by governments or public or private entities, not precluding general policy rules. Staff shall be protected against dismissal and selected transparently (art. 4 of the Directive 1/2019).

Furthermore, NCAs shall be equipped with a sufficient number of qualified staff as well as sufficient financial and technical resources (art. 5 of the Directive 1/2019).

However, the ECN+ stays very vague at this point. Rather than giving concrete numbers or guidelines, this non-justiciable provision seems more of a programmatic kind – the only guideline being that resources shall be sufficient in order to effectively enforce arts 101 and 102 TFEU (see *infra*, section IV.1).[47]

[45] Including, *e.g.*, that in some Member States (*e.g.*, Germany) NCAs are at the same time investigating and sanctioning authorities whereas in other Member States (*e.g.*, Austria) NCAs are mere investigating bodies whereas sanctions can only be imposed by the courts.

[46] The structure of following paragraphs is inspired by the grouping suggested by K Ost, in its paper 'Die Richtlinie 1/2019' cit. 69 ff.

[47] Cf. N Harsdorf and A Koprivnikar, 'Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden – Eine Reform der kleinen Schritte' (2019) Ecolex 919, 920 ff.

### III.2. Harmonised power to investigate and sanction

As a second pillar, the ECN+ provides in its Chapter IV for extensive rules on what powers NCAs shall have which were formerly not granted to all of them.

This includes the known right to inspect business premises (the right to enter the premises, examine books, make copies, seal and interview; art. 6 of the Directive 1/2019), possibly under the condition of prior judicial authorisation. the ECN+ extends this right to inspections of all premises the NCAs deems necessary (art. 7 of the Directive 1/2019). NCAs must be able to access any information accessible to the undertaking concerned, irrespective of the medium in which the information is stored.

This is complemented by the NCAs rights to request information, whereas such requests may be addressed to undertakings as well as associations of undertakings and third parties (art. 8 of the Directive 1/2019).

In regards to the power of sanction, under the ECN+, all NCAs will have the power to impose behavioural as well as structural remedies to end a conduct that is in breach of art. 101 or art. 102 TFEU (art. 10 of the Directive 1/2019). Furthermore, NCAs will have the possibility to issue interim measures (upon request by a complainant and on their own initiative) and to accept commitment decisions (arts 11 and 12 of the Directive 1/2019).

### III.3. Dissuasive fines

The next very important pillar of the ECN+ is its Chapter V on fines imposed by NCAs. This part of the Directive can be considered particularly relevant since not all NCAs were formerly able to impose dissuasive fines, especially to sanction non-compliance with the NCA during investigations. Fines were furthermore often not enforceable, *e.g.*, because the undertaking had no subsidiary or not sufficient assets in the sanctioning Member State.

Therefore, the Directive now provides effective, proportionate and dissuasive fines that shall be determined in proportion to the undertakings total worldwide turnover, either for the competition infringement itself or for non-compliance with NCAs during investigations (art. 13 of the Directive 1/2019). Fines will be calculated on the basis of gravity and duration of the competition law infringement and shall be no less than 10 per cent of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision (arts 14 and 15 of the Directive 1/2019). Recital 46 of the Directive 1/2019 further elaborates that "undertaking" shall designate an economic unit. Therefore, NCAs will be able to fine a parent company liable where this company and its subsidiary form a single economic unit.

These provisions reveal two things: firstly, the Directive acknowledges the CJEU's case-law[48] according to which parent companies can be held liable.[49] Secondly, the wording of art. 15 leaves no doubt that the amount of fines is designed as a minimum harmonisation clause. Therefore, while fines shall in future be dissuasive throughout the EU, national legislator may nonetheless opt for very different maximum amounts and thus maintain the formerly expressed criticism that there will always be "cheap" *vs* "expensive" Member States when it comes to sanctioning competition law infringements.[50] At least, the ECN+ makes clear that fines will always be calculated on the basis of worldwide turnover which was not uniform in all Member States.

### III.4. Leniency programmes

In its Chapter VI, the ECN+ provides for the first time for rules governing leniency programmes that are not only soft law.[51] This was considered particularly important since the Commission is convinced that effective leniency programmes would considerably increase incentives for undertakings to disclose cartels and thereby contribute to their ending.

The Directive differentiates between leniency applications leading to total immunity from fines and applications that will only lead to a reduction of fines (*e.g.*, where the undertaking applying is not the first applicant; arts 17 and 18 of the Directive 1/2019). Member States shall introduce both options.

The ECN+ also provides for conditions for leniency, *e.g.*, the undertaking's obligation to end its cartel involvement and to genuinely cooperate with the competent CA.

Furthermore, the ECN+ will introduce summary applications in all Member States, meaning that undertakings that apply for leniency with the Commission can submit a short version (summary application) of their application to relevant NCAs (art. 22 of the Directive 1/2019).

This being said, it must be noted that the ECN+ does not introduce a one-stop-shop system.[52] This means that undertakings applying for leniency will also in the future have to submit their applications to all CAs that might be competent to investigate the cartel. Another fact is that the ECN+ limits its rules on leniency programmes to horizontal, secret cartels, whereas it does not preclude Member States to provide for leniency programmes

[48] *E.g.*, case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204 para. 38; case C-668/11 *Alliance One International v Commission* ECLI:ECU:C:2013:614 para. 36 ff.; case C-97/08P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536 para. 58 ff.

[49] Cf. H Achenbach, 'Die "ECN+"-Richtlinie (EU) 2019/1' cit. 258 ff.

[50] *Ibid*. 259 ff.

[51] Formerly, the ECN Model Leniency Programme of 2012 was used as a guideline for the MS; see thereto *e.g.*, N Harsdorf and A Koprivnikar, 'Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden' cit. 921 ff.

[52] C Potocnik, 'One-Stop-Shop für Kronzeugen?' (2016) Ecolex 599 ff.

*e.g.*, for vertical cartels (which is the case *e.g.*, in Austria),[53] too. This will consequently keep a certain degree of non-uniformity across the EU.[54]

### III.5. Mutual assistance

As a last pillar presented in this context, Chapter VII of the Directive provides for rules governing mutual assistance amongst the CAs, including close cooperation within the ECN+.

Alongside general principles of cooperation (art. 27 of the Directive 1/2019), the ECN+ provides for a couple of provisions governing the cooperation between NCAs. As such, it will be, e.g., possible for NCAs to take part in investigations in other Member States and receive, upon request, relevant information and documents from other NCAs (arts 24 and 25 of the Directive 1/2019).

Furthermore, NCAs will be able to request that their decisions be imposed in other Member States (art. 26 of the Directive 1/2019), calling upon all Member States to ensure that cross-border enforcement of fines and collection of evidence works well, to compensate the former problem of fines that could not be enforced.

## IV. Decentralised cooperation as a role-model leading to an ever closer union?

Looking at the road that led to the *status quo*, it must be noted that this was not the only path the Commission and eventually the EU and its Member States could have chosen. Especially the shift from the centralised to the decentralised system must be questioned.

This shift must be seen against the backdrop of not only increasing workload for the Commission preventing it from concentrating on major competition obstacles, but also of overwhelming the Commission with small competition law cases that could be better treated by NCAs that are "on the ground"[55] and have particular knowledge of the markets in the respective Member State. The ECN+ was also adopted in the light of the Member States' unwillingness to further equip the Commission and especially the Commission's Directorate-General for Competition (DG Comp) and somehow create a "mammoth"[56] DG dealing with all competition law cases across the EU. This would have entailed a massive increase of the DG's budget, on which the Member States would not have agreed. Some authors claim that decentralisation was not put on a well thought out idea of optimal

[53] N Harsdorf and A Koprivnikar, 'Die Richtlinie zur Stärkung der nationalen Wettbewerbsbehörden' cit. 921 ff.

[54] F Rizzuto, 'The ECN Plus Directive: Empowering National Competition Authorities to Be More Effective Enforcers of EU Competition Law' (2019) European Competition and Regulatory Law Review 96 ff.

[55] M Vestager, answer during the Debate in the European Parliament of 13 November 2018 www.europarl.europa.eu; see also A Geiger, 'Das Weißbuch der EG-Kommission zur Art. 81, 82 EG' cit. 168.

[56] See European Parliament, *Debate of 5 September 2001* www.europarl.europa.eu.

antitrust enforcement but as the only promising solution at a time where it became obvious that the Commission could not maintain the existing system.[57]

One could assume that under the pretext of relieving the Commission, Member States supported this approach and took the chance to regain power over one of the EU's core policies with major importance for the functioning of the internal market. Accordingly, it was argued that Regulation 1/2003 would not even lead to a decrease of workload for the Commission, when taking the Commission's coordination role within the ECN seriously, which implies dealing with a case initially left to a NCA, dealing with requests on consultation or appearing as *amicus curiae* in front of national courts and the like.[58]

The danger of renationalisation and fragmentation of competition policy including the undermining of the internal market was noticed at the time Regulation 1/2003 was introduced[59] and the Commission was called to have a close look at the NCAs in order to protect not only the undertakings active in this new system but above all, to protect consumer welfare.[60] In that regard it has also been argued that uniform application and interpretation of EU law is of crucial importance for the EU which might be endangered when opting for a decentralised system.[61]

An even heavier argument presented against the shift to a decentralised system is linked to the allocation of competences between the EU and its Member States: competition law is one of the few areas of EU law where primary law empowers the Commission, *i.e.*, an EU organ, to directly enforce the laws – against the general rule of Member States enforcing EU law.[62] In this context, it has been questioned whether the EU was even competent to such a transfer of Union competences. In an area of shared competences between the EU and its Member States, it is undisputed that Member States shall exercise their competences where the EU does not exercise its competences (anymore) (art. 2(2) TFEU). But competition law is an area of exclusive competence (art. 3(1)(b) TFEU) and as the other side of the coin of the principle of conferral (art. 5(2) TFEU) it is questionable whether the EU is entitled to re-transfer competences to Member States. Some authors argue that even in an area of exclusive EU competence, a re-transfer of competences to the Member

[57] Editorial, 'Public Enforcement of EU Competition Law' cit. 1195 ff.

[58] As provided for in Regulation 1/2003 cit. and the Commission Notice on cooperation within the Network of Competition Authorities cit.; see also F Koenigs, 'Die VO Nr. 1/2003: Wende im EG-Kartellrecht' (2003) Der Betrieb 755, 758.

[59] *E.g.*, W Durner, 'Die Unabhängigkeit nationaler Richter im Binnenmarkt – Zu den Loyalitätspflichten nationaler Gerichte gegenüber der EG-Kommission, insbesondere auf dem Gebiet des Kartellrechts' (2004) Zeitschrift Europarecht 547, 551.

[60] See European Parliament, *Debate of 5 September 2001* www.europarl.europa.eu.

[61] G Hirsch, 'Dezentralisierung des Gerichtssystems der Europäischen Union?' (2000) Zeitschrift für Rechtspolitik 57, 59.

[62] HCH Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy' (2006) CMLRev 153.

States must be possible, provided that the EU's competence is not totally undermined.[63] This argument is based on art. 2(1) TFEU allowing the EU to empower Member States to legislate and implement EU acts. Other authors claim that art. 2 in conjunction with art. 103 TFEU does not allow the EU to implement laws with which the EU releases itself from an enforcement competence provided for in the treaties.[64] If so, the solution can be found in Regulation 1/2003 allowing the Commission to step in any time, deciding a case and thus remaining the keeper of competition proceedings – thereby creating a somehow "controlled decentralization".[65] This is complemented by the information exchange between the CAs allowing the Commission to concentrate on major cases.

It is not to be expected at this stage that the Member States or the Commission will take the initiative to reinstall a centralised system to enforce competition law.[66] Nevertheless, this *Article* argues that this is not even necessary, if close cooperation among the CAs proves that the decentralised system can all the same be an important contribution to an eventually ever closer union, overcoming diverging interpretations and application of EU law and maybe even facilitating things in terms of acceptance amongst citizens. This has also been argued in other contexts (*e.g.*, when talking about national courts applying EU law, seeing them as somehow extended arm of the CJEU),[67] highlighting that the principle of subsidiarity is a major principle enhancing acceptance of and in the EU.[68]

The argument of fragmentation of law and endangering uniform application and interpretation is exactly the consideration that drove the Commission to present the new ECN+ Directive: There is awareness that a decentralised system can only function with a maximum degree of uniformity in every respect ensuring a level playing field.[69]

In this context, a couple of hypothesis shall be discussed in the following, starting with the question *i)* whether the decentralised system of enforcing competition law after the ECN+ can be considered as a well-functioning system; continuing by broadening the view and asking *ii)* whether a decentralised system can be considered as a contribution to an ever closer Union at all, and concluding by asking *iii)* whether the system under the ECN+ could serve as a role-model for other areas, too.

[63] R Priebe, 'Rückverlagerung von Aufgaben – ein Beitrag zu besserer Akzeptanz der Europäischen Union?' (2015) Europäische Zeitschrift für Wirtschaftsrecht 697, 698.

[64] J Brauneck, 'Europäisches Wettbewerbsnetz 2.0 – Unabhängige nationale Wettbewerbsbehörden mit weitreichenden EU-Befugnissen?' (2017) Europäisches Wirtschafts- und Steuerrecht 199, 202.

[65] *Ibid*.

[66] F Rizzuto, 'The ECN Plus Directive' cit. 96.

[67] F Koenigs, 'Die VO Nr. 1/2003' cit. 758.

[68] *Ibid*. 758. The ECN+ is based on arts 103 and 114 TFEU.

[69] See European Parliament, *Debate of 5 September 2001* www.europarl.europa.eu.

### IV.1. Is decentralised enforcement of competition law after the ECN+ to be considered as a well-functioning system?

As a first step, the system after introducing the ECN+ shall be analysed, before turning to the broader picture.

In this regard, it must be borne in mind that not only the ECN+ Directive itself but also the whole system that was set up starting with Regulation 1/2003 is under scrutiny. This is because the ECN+ Directive forms a mere complementation of the existing system but does not repeal Regulation 1/2003.

Overall, the ECN+ can be considered as a consequential continuation, not only aligning the NCAs competences to the competences of the Commission but also realising the ECs announcement that Regulation 1/2003 might imply further harmonisation in order to ensure uniformity of competition law enforcement in the EU.

When answering the above-mentioned question, one could be tempted to easily refer to the numbers that show that the system is working well: the introduced decentralised system led to an extensive application of EU competition law, with the NCAs at the heart of it. Additionally, the ECN+ will address actual and potential flaws that hindered at least some NCAs to fully apply their potential so that an even more successful system can be expected in the future. Apparently, soft law instruments did not suffice to achieve this goal but with the ECN+, the Commission opted for hard-law to finally ensure more harmonisation.

But this picture might only be true at the outset. It seems indisputable that EU competition law enforcement is now taking place at a large scale with enforcement authorities that are the actual experts on the ground and thereby strengthen effective enforcement.

However, looking closely, it must be put into question whether the ECN+ can actually contribute to more uniformity and legal certainty that is not endangered by national particularities and tendencies to renationalisation. Albeit aiming at harmonisation, the ECN+ pays great attention to the principle of national procedural autonomy[70] and tries to intervene as little as possible in the actual national institutional structures.[71] The legislator took the decision to establish the ECN+ in a Directive, providing for harmonisation instead of uniformity.[72] Some authors even argue that such comprehensive national procedural autonomy comes in exchange for being bound to EU substantive law that must be enforced by the NCAs.[73] In that regard, a parallel can be drawn to federal states taking examples where

[70] To this expression see also case C-201/02 *Wells* ECLI:EU:C:2004:12 paras 65 and 67.

[71] One example therefore is the standing of NCAs within the national institutional structures and their structure of being mere investigating bodies or being able to impose sanctions at the same time.

[72] Cf. E Csatlós, 'The European Competition Network in the European Administrative System: Theoretical Concerns' (2018) Yearbook of Antitrust and Regulatory Studies 53, 69.

[73] J Brauneck, 'Europäisches Wettbewerbsnetz 2.0' cit. 203 with further references.

law-making lies within the competences of the federal government whereas the application and enforcement of said laws lies within the competences of the federal states.[74]

However, it seems that three essential prerequisites must be met in order to allow the ECN+ to eventually contribute to a better functioning system. Those are *i)* a common substantive legal framework and its uniform interpretation and application being ensured by a central court; *ii)* well-equipped national expert authorities in the Member States; and *iii)* close cooperation between the authorities and the Commission.

With regards to the first point, it has to be noted that so far the CJEU takes its role seriously in ensuring uniform interpretation and application of EU competition law.[75] In fact, apart from interpreting the substantive laws, the CJEU ensured a certain degree of convergences by even interpreting EU law in a way it requires Member States to reconsider their national competition law enforcement structures by imposing specific institutional requirements:[76] "In doing so, the Court directly envisaged the 'institutional assimilation' of national competition law enforcement structures to a supranationally attuned image".[77]

The second point is exactly what the ECN+ is aiming at, taking into consideration its actual provisions: the NCAs as expert authorities shall be equipped in a way that allows them to fully accomplish their duties.[78] This implies a vast degree of guarantees and securities to allow all NCAs to independently and effectively investigate competition law infringements.

This is a crucial point that turns out to be problematic: How can the Directive guarantee independent and well-functioning authorities? As stated above, the provisions on this point are rather programmatic and certainly non-justiciable. At the same time, there are currently examples of Member States showing tendencies of political influence in the recruiting of personnel for essential positions. Just to mention one example, the CJEU is currently or was recently dealing with proceedings against Poland regarding questionable independence and/or impartiality of judges as well as political involvement in the appointment of judges.[79] These proceedings are but one example of struggles the EU has with Member States who

[74] A Weitbrecht, 'Das neue EG-Kartellverfahrensrecht' (2003) Europäische Zeitschrift für Wirtschaftsrecht 69, 72.

[75] See recent examples case C-637/17 *Cogeco Communications* ECLI:EU:C:2019:263 para. 42 ff.; case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204 para. 38 ff.; case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 43 ff.

[76] *E.g.*, case C-439/08 *VEBIC* ECLI:EU:C:2010:739 para. 61 ff.; case C-74/14 *Eturas and Others* ECLI:EU:C:2016:42 para. 32 ff.; case C-681/11 *Schenker & Co and Others* ECLI:EU:C:2013:404 para. 46.

[77] CP Van Cleynenbreugel, 'Institutional Assimilation in the Wake of EU Competition Law Decentralization' (2012) The Competition Law Review 285.

[78] Assessing the importance of independence of national authorities see M Guidi, 'The Impact of Independence on Regulatory Outcomes: The Case of EU Competition Policy' (2015) JComMarSt 1195 ff.; JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' (2006) Utrecht Law Review 32 ff.

[79] Case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596; case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:615.

challenge fundamental EU values such as the rule of law.[80] Poland's leaders showed that they do not shy away from replacing judges even in the country's highest court and install courts loyal to the current government. It is thus the Commission as guardian of the Treaties and the CJEU that seek to ensure compliance with the EU's values.

It cannot be assumed that Member States will refrain from political intervention in the appointment of NCA staff or its dealing with the cases.[81] This is *per se* nothing new: "long-term political considerations"[82] are commonly linked to the implementation of competition law and structure of competent authorities.[83] However, it is "short-term political influence",[84] including political interventions in pending cases or politically motivated recruitment of staff, that hinders effective and independent enforcement of EU competition law and thus needs to be excluded.[85] Surely, compliance with competition laws and sanctioning of non-compliant undertakings is by far less attractive in political terms than (financial) support of national undertakings and economic branches or political measures in order to intervene in cartel or merger control proceedings.[86]

Even more, it cannot be assumed that all Member States actually want to improve or further deepen integration of the internal market. The opposite might even be true: there are tendencies of renationalisation and protectionism of national undertakings and economy – reinforced in the current situation of multiple crises.[87] Member States show more and more intentions to safeguard their national economy and undertakings and do not see them as part of the broader internal market.[88]

Consequently, the ECN+ is battling against centrifugal tendencies that emerge. Those tendencies also show in competition law.[89] Thus, the Directive hints to an even more dramatic problem the EU is dealing with at the moment: on many occasions we can see that

[80] See *e.g.*, M Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) Hague Journal on the Rule of Law 417 ff.

[81] M Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) Legal Issues of Economic Integration 345 ff.; C Harding, 'Enforcement Inconsistency in EU Competition Cases as Rule of Law Problem' (2019) LIEI 363 ff.

[82] JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 63.

[83] See I Malobecka-Szwast, 'The Appointment and Dismissal Procedure of the Polish NCA in the Light of EU and International Independence Standards' (2018) Wroclaw Review of Law, Administration and Economics 24, 32 ff. on potential current threats to NCAs' independence in certain Member States.

[84] JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 63.

[85] A Jasser, 'Independence and Accountability' (2015) Journal of European Competition Law and Practice 71; F Rizzuto, 'The ECN Plus Directive' cit. 96 ff.

[86] JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 64; A Jasser, 'Independence and Accountability' cit. 72; U Aydin and P Thomas, 'The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century' (2012) Journal of European Integration 531, 537 ff. and 540.

[87] P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers: the Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) Journal of Common Market Studies 178 ff.

[88] R Grzeszczak (ed.), *Renationalisation of the Integration Process in the Internal Market of the European Union* (Nomos Verlag 2018) 15 ff.

[89] *Ibid*.

the Member States are not able to agree on a common strategy for the EU's future.[90] In more concrete terms; whereas the Commission clearly intends to enhance close cooperation and further integration, this is certainly not desirable for all Member States.[91] In that regard, the ECN+ is not a solution but merely a continuation of the struggle.

Again, it will rely on the Commission and ultimately the CJEU to somehow discipline non-compliant Member States and infringement proceedings or even proceedings according to art. 7 TEU seem inevitable.[92] This situation is even more complex since the ECN+ does – as already mentioned – not provide for justiciable norms in that respect. The only benchmark will be whether the national norms or decisions taken might hinder effective enforcement of arts 101 and 102 TFEU.[93] From this point of view, precondition *ii)* is closely linked to precondition *i)*: not only the substantive laws but also their enforcement and the NCAs themselves must be under constant scrutiny. This holds especially true in combination with historically weak awareness for competition law and its use. Thus again, the CJEU will probably be called upon to align the NCAs and their actual competences. It will, however, require a courageous interpretation of the Directive's provisions to do so.

In that regard, the ECN+ appears as a step in the right direction, ensuring guarantees and securities that will allow the NCAs to comply with their competences. Still, the Directive leaves broad spaces for national peculiarities and diverging approaches (see *supra*, section II.1 ff.) that will potentially hinder a creation of a real level-playing field.

Concluding, the ECN+ can basically only contribute to more uniformity and legal certainty through alignment of competences and guarantees granted to the NCAs, probably with a vigilant CJEU ensuring the latter. "[T]he more the enforcement powers of all ECN

[90] Most prominently this can be seen in the area of asylum and migration, see thereto *e.g.*, J Prantl, 'Shaping the Future Towards a Solidary Refugee Resettlement in the European Union' (2021) European Papers www.europeanpapers.eu 1027 ; I Goldner Lang, 'No Solidarity Without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) European Journal of Migration and Law 39, 41 ff. It can also be seen recently in the area of EU enlargement, *e.g.*, C Potocnik-Manzouri, 'Keine Beitrittsverhandlungen mit Albnien und Nordmazedonien – Das Ende der bisherigen Erweiterungspolitik?' (2020) Juridikum 45, 50 ff.; A Rexha, 'An analysis of the European Enlargement Policy Through the Years: the Case of Western Balkans' (2019) ILIRIA International Review 234, 249. To rule of law proceedings see *e.g.*, M Blauberger and V Van Hüllen, 'Conditionality of EU Funds: an Instrument to Enforce EU Fundamental Values?' (2020) Journal of European Integration 1, 3; F Gremmelprez, 'The Legal *vs* Political Route to Rule of Law Enforcement' (29 May 2019) Verfassungsblog verfassungsblog.de. In more general terms see also P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers' cit. 183 ff.

[91] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020) 4 ff.

[92] See *e.g.*, on the persistence of violations of European legislation T Hofmann, 'How Long to Compliance? Escalating Infringement Proceedings and the Diminishing Power of Special Interests' (2018) Journal of European Integration 785, 786 ff.

[93] Art. 5(1) of the Directive 1/2019 cit.

members converge, the less likely are shifts in the allocation of cases to cause violations of fundamental rights or the rule of law".[94]

As to the third prerequisite, it seems inevitable that networks are created in order to ensure and institutionalise real cooperation ultimately allowing an alignment of practices. In fact, the ECN was created expressly for this purpose and is now recognised as a successful and innovative model of governance for the complementary implementation of EU law at both European and national level.[95] The network was established to ensure a constant channel for systematic cooperation and data flow, whereby these activities shall be performed in an automatic way without the possibility of rejecting collaboration or retaining information which differentiates real networks from mutual assistance.[96]

The importance of close cooperation within the network is broadly highlighted, but has not always been received positively: already during the debates for the adoption of Regulation 1/2003, some members of the European Parliament perceived the network as implementation tool for the Commission, being able to use NCAs as its servants where it could supervise the NCAs that were installed and paid for by the Member States. The Commission was supposed to have created a network with the Commission at its heart where NCAs would be equipped by Member States but ultimately work for the Commission and implement EU law.[97] Additionally, the legislator's intention to have all Member States' courts to report cases to the Commission was perceived as the Commission's long-planned attempt to take influence on the Member States jurisprudence.[98]

On the contrary it has also been argued that cooperation within networks is a most promising mechanism in order to respect regional differences or national particularities (that a centralised system would not) and to hinder emergence of competitive differences (that a decentralised system might lead to). Thus, networks can be understood as tools ideally combining advantages of a centralised and a decentralised system.[99]

In the light of questionable adherence to the Directive's provisions on independence and sufficiently equipped authorities, the functioning of effective networks seems even more important, if understood as a tool to ensure the well-functioning or at least detect the non-functioning of coherent application and enforcement of EU competition law.

Irrespective of objections or welcomes, it must be emphasised that successful cooperation within a network requires close cooperation and exchange on experiences made on both sides: the Commission and the NCAs. In that regard, authors took the e-commerce

[94] Editorial, 'Public Enforcement of EU Competition Law' cit. 1192.
[95] A Sinclair, 'Proposal for a Directive' cit. 625.
[96] E Csatlós, 'The European Competition Network' cit. 58 ff.
[97] See European Parliament, *Debate of 5 September 2001* www.europarl.europa.eu.
[98] W Durner, 'Die Unabhängigkeit nationaler Richter im Binnenmarkt' cit. 551 ff.
[99] D Kugelmann, 'Kooperation und Betroffenheit im Netzwerk' (2020) Zeitschrift für Datenschutz 76.

sector inquiry by the Commission of May 2015 as an example where the Commission entered a field in which several NCAs have already been active.[100] The Commission could thus easily have profited from the knowledge and experiences that were already available within the network. Furthermore, this idea of networks must also include close cooperation between NCAs in cases where more than one authority is getting active.[101]

This leads to two further deficits of the ECN+: first, it does not provide for clear and binding rules on the allocation of cases eventually hindering legal certainty. Furthermore, decisions taken by NCAs are not binding for the whole Union.[102] So far, only the Commission's decisions are binding *erga omnes*, leading to requests that the Commission shall ultimately take the decision even though NCAs might seem better equipped.[103]

What remains open, furthermore, is the question how fit the system is to deal with future challenges. Competition policy is in a constant flow. Currently, especially digitalisation and phenomena linked thereto require new concepts and adaptations.[104] Again, it seems inevitable that those challenges are faced commonly within the network ensuring a real level playing field in the EU. So far, the EU has witnessed close cooperation between some CAs,[105] but lacks a real cooperation of all of them, eventually within the ECN.[106]

### IV.2. Can a decentralised enforcement system contribute to an ever closer union?

When answering this second question, it shall be assumed that shortcomings can be overcome and the decentralised system to enforce competition law is reasonable, since action is multiplied by a multiplicity of enforcers that makes it stronger, more effective and a better deterrent for undertakings to refrain from breaching EU competition law.[107]

The argument is brought forward that an ever closer union is largely influenced by common understanding of and respect for the laws. Whereas such legal communities can be created by common substantive law, it is arguably also possible to create such

[100] Editorial, 'Public Enforcement of EU Competition Law' cit. 1191 ff.

[101] *Ibid*. 1192 and 1197, taking the example of the investigations against Booking.com.

[102] EJ Mestmäcker, 'Versuch einer kartellpolitischen Wende in der EU – Zum Weißbuch der Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EGV a. F.' (1999) Europäische Zeitschrift für Wirtschaftsrecht 523, 529.

[103] Editorial, 'Public Enforcement of EU Competition Law' cit. 1198 ff.

[104] B Widmer, 'Wenn der Wandel alleine das Beständige ist' cit. 314.

[105] See *e.g.*, the cooperation of the French *Autorité de la Concurrence* and the German *Bundeskartellamt* on Algorithms (Autorité de la concurrence, Repot on Algorithms and Competition, November 2019 www.autoritedelaconcurrence.fr).

[106] C Massa, 'Sincere Cooperation and Antitrust Enforcement: Insights from the Damages and ECN+ Directives' (2020) European Competition Journal 126, 140.

[107] A Sinclair, 'Proposal for a Directive' cit. 625.

communities with more integrated enforcement of the laws.[108] Actually, the enforcement level is considered as "crucial element in the implementation of policies".[109] As such, the level under scrutiny is merely the legislator itself, but the level of enforcement thereby including all competent authorities, may they be EU institutions or national authorities.

The background of this line of arguments is an increasing awareness of the importance of successful enforcement of EU rules, in order to comply with one of the central concepts of EU law, namely effectiveness.[110]

It seems as a logical prerequisite that an ever closer union is only possible where such enforcement is not only effective, but also conducted in uniformity, in order to guarantee legal certainty and thereby acceptance. Following the arguments presented under the first hypothesis, again the importance of networks cannot be neglected when talking about an ever closer union: it seems decisive that a decentralised system is designed in a way that combines its clear advantages while at the same time ensuring uniformity of law in the EU.[111]

Having said this, it seems reasonable to again get back on what an ever closer union actually means. Understood as one of the Treaties' objectives[112] an ever closer union amongst people would ultimately create real European citizens.[113] In the past, the idea of an ever closer union was inextricably linked to the idea of more integration.[114] From that point of view, the transfer of competences from the EU or its institutions to the Member States seems counterproductive in order to foster integration and ultimately an ever closer union.[115] This is not necessarily the case: authors have concluded that this link between more integration and the ever closer union is somewhat outdated[116] and others presented new concepts that seem more appropriate in the current EU context: "integration" could be replaced by the concept of building a "European legal space",[117] suggesting that a relation

[108] A Gavala, A Gutermuth and L Gyselen, 'The New ECN+ Directive: Towards an Even More Integrated Antitrust Enforcement in the EU' (20 December 2018) Arnold & Porter www.arnoldporter.com.

[109] M Scholten, 'Mind the Trend! Enforcement of EU Law Has Been Moving to "Brussels"' (2017) Journal of European Public Policy 1348.

[110] C Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) Journal of Consumer Policy 179.

[111] G Hirsch, 'Dezentralisierung des Gerichtssystems' cit. 60.

[112] On the concept of the ever closer union see *e.g.*, R Bellamy, 'An Ever Closer Union Among the Peoples of Europe: Union Citizenship, Democracy, Rights and the Enfranchisement of Second Country Nationals' in R Bauböck (ed.), *Debating European Citizenship* (Springer 2019) 47 ff.

[113] A Gavala, A Gutermuth and L Gyselen, 'The New ECN+ Directive' cit. *passim*.

[114] A Von Bogdandy, 'European Law Beyond "Ever Closer Union": Repositioning the Concept, Its Thrust and the ECJ's Comparative Methodology' (2016) ELJ 519, 527.

[115] R Priebe, 'Rückverlagerung von Aufgaben' cit. 697.

[116] *Ibid*. 697.

[117] A Von Bogdandy, 'European Law Beyond "Ever Closer Union"' cit. 528.

to specific spaces constitutes "a core element for developing political identities"[118] and ultimately European citizens. Such a European legal space would then be characterised by "thick communication, deep interlocking, and mutual dependency of all involved legal regimes".[119] Thus, this idea again relies on the ideal of close networks in multi-level governance with EU authorities and Member States authorities being competent to act.

In order to create a real closer union it seems not sufficient enough to have certain networks but rather that these networks benefit from a certain climate of trust.[120] The ECN is by far not the only existing network in the EU. It is, however, considered as the most advanced one[121] and a network that is actually based on a certain degree of trust among its members.[122]

The idea of trust or "mutual trust" has been introduced by the CJEU initially in the context of cases dealing with the internal market[123] and is now mostly known from the development of the Area of Freedom, Security and Justice (AFSJ).[124] It provides that, save in exceptional circumstances, Member States shall consider all other Member States to be complying with EU law.[125] By now the CJEU even included mutual trust among the founding principles[126] that characterise EU law as a new kind of legal order and put it alongside classic principles such as the autonomy, primacy and direct effect of EU law.[127]

[118] *Ibid*.

[119] *Ibid*. 530.

[120] V Pereira, J Capiau and A Sinclair, 'Union de Almacenistas de Hierros de España v Commission: Strengthening a Climate of Trust Within the European Competition Network' (2016) JIntL&Prac 117, 118.

[121] For more examples see *e.g.*, C Poncibò, 'Networks to Enforce European Law' cit. 178 ff., who firstly presents different networks (such as the ECC-Net or the EJN) stressing that they all have different actors and also distinguishes between the networks' functions: whereas there are networks for mere information exchange, there are others for standardisation purposes and lastly genuine enforcement networks such as the ECN.

[122] This climate of trust will also be required in order to implement certain provisions of the ECN+ such as the rules on mutual assistance, *e.g.*, when it comes to cross-border enforcement of fines.

[123] *E.g.*, case 46/76 *Bauhuis* ECLI:EU:C:1977:6 para. 38; case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* ECLI:EU:C:1996:205 para. 19.

[124] See *e.g.*, joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 paras 78 and 82; case C-486/14 *Kossowski* ECLI:EU:C:2016:483 para. 50, referring to case C-297/07 *Bourquain* ECLI:EU:C:2008:708 para. 37 and joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865 para. 83; see also T Von Danwitz and A Arbor, 'Der Grundsatz des gegenseitigen Vertrauens zwischen den Mitgliedstaaten der EU: Eine wertebasierte Garantie der Einheit und Wirksamkeit des Unionsrechts' (2020) Zeitschrift für Europarecht 61 and N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) European Papers www.europeanpapers.eu 95 ff.

[125] *Avis 1/17 - Accord ECG UE-Canada* ECLI:EU:C:2019:341 para. 128, see also F Maiani and S. Migliorini, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) CMLRev 7, 8.

[126] *Avis 1/17 - Accord ECG UE-Canada* cit. para. 128.

[127] F Maiani and S Migliorini, 'One Principle to Rule Them All' cit. 8 with recourse to *Avis 2/13 - Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454 para. 157 ff.

Mutual trust initially related to the legal systems of Member States, where the CJEU concluded that Member States can rely on the fact that other Member States value the fundamental rules upon which the EU is founded. Thus, has evolved and now comprises the implementation of values and ultimately enforcement of values and laws, too.[128]

It is obvious why the CJEU tends to grant such an importance to this principle: mutual trust is a major pillar for uniformity and effectiveness of EU law. The utility of EU law is maximised where it is applied uniformly and effectively[129] and where Member States can trust that other Member States comply with EU law, too.[130] Some authors have argued quite convincingly: no EU law without uniformity of EU law. No uniformity of EU law without uniform application of EU law. No uniform application of EU law without mutual trust in the other MS's uniform application of EU law (which can be stabilised *e.g.*, by close cooperation).[131]

It must be added that this also holds true for the Member States' enforcement of EU law.[132] Enforcement in that regard is nothing but the prevention or response to "the violation of a norm in order to promote the implementation of the set laws and policies".[133] Thus, enforcement is the level that is most present in the daily life of those who are subject to a substantive norm and thus plays a crucial role for acceptance and understanding amongst those subjects.

It seems thus fair to conclude that a decentralised system in which close cooperation is ensured can ultimately lead to an ever closer union.

It should be again emphasised in that regard that the actual success and acceptance of such a system will largely depend on effectiveness and its results.[134] Using the means of a multitude of authorities seems reasonable in order to detect even more competition law infringements and to uphold the system's overall motive that "full cooperation yields more than the sum of the parts".[135] Competition law as such might not seem as a topic capable of creating certain feelings of belonging or identity, but it can considerably contribute to the welfare of economy and especially consumers[136] and thereby enhance its acceptance and relaxation on a level-playing field.

[128] Case C-519/18 *Bevándorlási és Menekültügyi Hivatal (Regroupement familial - sœur de réfugié)* ECLI:EU:C:2019:1070 para. 43.

[129] T Von Danwitz and A Arbor, 'Der Grundsatz des gegenseitigen Vertrauens' cit. 75.

[130] *Ibid*.

[131] *Ibid*. 76.

[132] M Hazelhorst, 'Mutual Trust Under Pressure. Civil Justice Cooperation in the EU and the Rule of Law' (2018) NILR 103, 104.

[133] M Scholten, 'Mind the Trend' cit. 1350.

[134] R Priebe, 'Rückverlagerung von Aufgaben' cit. 702.

[135] AW Kist, 'Decentralisation of Enforcement of EC Competition Law: New Cooperation Procedures May Be Necessary' (2002) Intereconomics 36, 37

[136] LH Röller, GE Clemenz and M Janssen, 'Challenges in EU Competition Policy' (2011) Empirica 287, 288.

### IV.3. Does the system under the ECN+ serve as a role-model for other areas, too?

When answering this last question, it has to be emphasised again that competition law has a quite unique role in the EU context: enforcement of EU competition law does not only initially lie with the Commission, but it is also fundamental for the internal market and the European integration and therefore considered as one of the EU's key policies.[137] Even though this might seem exaggerated, it cannot be denied that competition law was ever since closely linked to the initial idea of creating the EU: an internal market has to be secured by sound competition law rules. Moreover, it must be remembered that in the end, competition law is not protecting competitors but competition and thereby ultimately consumers.[138]

Moreover, competition law is to be considered as a role-model for integration. Competition law was from the beginning on created as a central domain of EU competence[139] and thus against the overall claim of keeping direct enforcement as matter of national sovereignty with the MS,[140] considered as the EU's "first supranational policy"[141].

Competition law thus enjoys a position within EU law where the general EU competence, supranationality and power of the Commission are not put into question.[142] This is an advantage other areas cannot claim.

Despite these differences, abstract criteria that can be deduced from the current the ECN+ system shall be found that might nevertheless be valuable for other areas, too.

As a first critical comment, one could note that the system established by Regulation 1/2003 and now somehow institutionalised by the ECN+ is a perfect example for the EU's crisis at the moment: it was not possible to uphold a centralised system – for obviously various reasons – so the outcome was that powers shifted to the Member States and their authorities. Thus, Regulation 1/2003 and the ECN+ could be understood as examples for disintegration with the provisions laid down in the ECN nothing but a desperate attempt to regain some control by the Commission. In that regard, also the ECN as a network would serve as a platform for control and observation in order to ensure implementation and enforcement of EU policies in a decentralised system.

However, the decentralised system proved to be successful and – as stated above – can ultimately even enhance deeper integration, including mutual trust and close cooperation between authorities. Thus, even if it were true that the system after Regulation

[137] A Von Bogdandy and F Buchhold, 'Die Dezentralisierung der europäischen Wettbewerbskontrolle' cit. 798.

[138] LH Röller, 'Challenges in EU Competition Policy' cit. 288.

[139] P Akman and H Kassim, 'Myth and Myth-Making' cit. 122.

[140] M Scholten, 'Mind the Trend' cit. 1350.

[141] P Akman and H Kassim, 'Myth and Myth-Making' cit. 128 with further references; see also M Cini and L McGowan, *Competition Policy in the European Union* (Bloomsbury Publishing 2008) 18.

[142] P Akman and H Kassim, 'Myth and Myth-Making' cit. 128.

1/2003 is an example of renationalisation, it does not necessarily harm a future of Europe that aims at an ever closer union. Furthermore, it seems that the decentralisation and therewith somehow renationalisation of competition law is against an observable trend of competences shifting to the EU that are complemented by the creation of networks and agencies to ensure their functioning.[143]

When talking about areas that could profit from similar systems as the one under Regulation 1/2003 and the subsequent the ECN+, it seems firstly reasonable to talk about areas of competition law that have been neglected in the present *Article* so far: whereas the application and enforcement of arts 101 and 102 TFEU has been transferred to the NCAs with Regulation 1/2003, there is nothing similar in the area of merger control.[144] Authors claim that merger control does not know any "substantial law to speak of, no common procedural scheme, and agencies may not even enjoy the same powers".[145] It appears as a logical consequence to include merger control into a similar system established by Regulation 1/2003 in order to really guarantee a level-playing field for competition across the EU[146] And to develop a "European Merger Area".[147]

Even apart from other areas of competition law, it seems reasonable to include areas that might be either included in the system after the introduction of the ECN+ or profit from similar considerations. In that regard, Commissioner Margrethe Vestager made clear that "the competition portfolio [is not] a lonely portfolio".[148] Again, speaking under the prerequisite that a decentralised system per se is not negative and either hindering deeper integration nor somehow hampering the EU's aims and values.

Classic examples of areas that are closely linked to competition law are consumer protection and data protection. In fact, this close link can even be witnessed when observing the general trend of emerging authorities that are competent for competition law and other areas, such as consumer protection, too.[149] As regards data protection, it is widely acknowledged that there is a close intersection between data protection and competition law, albeit

[143] KF Gärditz, '§ 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten' in HW Rengeling, A Middeke and M Gellermann (eds), *Handbuch des Rechtsschutzes in der Europäischen Union* (C.H. Beck 2014) 35 para. 27; M Scholten, 'Mind the Trend' cit. 1349 ff.

[144] JW van de Gronden and SA de Vries, 'Independent Competition Authorities in the EU' cit. 65.

[145] B Lasserre, 'The Future of the European Competition Network' (2013) Italian Antitrust 11 ff.

[146] See *e.g.*, U Von Koppenfels, 'A Fresh Look at the Merger Regulation? The European Commission's White Paper "Towards More Effective EU Merger Control"' (2015) Liverpool Law Review 7 ff.

[147] White Paper COM(2014) 449 final from the Commission of 9 July 2014 towards more effective EU merger control, para. 23.

[148] M Vestager, hearing before the European Parliament on 2 October 2014 multimedia.europarl.europa.eu.

[149] T Jaeger, 'Wirtschaftliche Betrachtungsweise im Wettbewerbsrecht' cit. 77 ff.; C Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the Case?' (2006) CMLRev 1381, 1386.

distinct methods and aims.[150] Again, it seems crucial that cooperation between authorities is maintained and even enhanced to create a coherent framework.[151]

It seems that this close intersection is enhanced by current developments: in a digitalised world, new emerging questions need a coherent, coordinated approach comprising all areas affected. In light of the consideration that competition law is not merely a portfolio, network cooperation should be enhanced in order to enable a harmonised approach.

## V. Conclusion

Directive 1/2019 is not only the latest milestone in attempting to harmonise public enforcement of EU competition law, but it also serves as an example of decentralised cooperation between the EU and the Member States. At the same time, it appears as an example for the constant struggle on how to allocate competences and powers.

For the enforcement of EU competition law, the legislator has chosen to implement and strengthen the system of decentralised enforcement where NCAs are competent to enforce EU competition law that seem more competent to deal with the cases on the ground and allowing the Commission to concentrate on major competition issues. The Commission, however, remains competent to step in.

Possibly, this setting can be seen as a compromise of allocation of powers between the EU and the Member States. This must, however, not be negative: testing the new Directive 1/2019 revealed that such a system can actually contribute to more effectiveness, acceptance and an ever closer union, provided that certain conditions are met. At the outset, a decentralised system seems reasonable, since action is multiplied by a multiplicity of enforcers that make enforcement much stronger, more effective and a better deterrent for undertakings to refrain from breaching EU competition law.

It must further be emphasised that the level of enforcement is equally important as the level of law-making. Acceptance of laws is largely influenced by a common understanding and respect for the laws as well as successful, uniform enforcement that fulfils one of the EU's central principles, namely effectiveness.

A precondition seems to be a common substantive law, the uniform interpretation and application of which is secured by a competent court, the CJEU. Furthermore, all authorities that contribute to the enforcement of EU laws must be expert authorities that are well-equipped in order to fulfil their duties. This is where the ECN+ comes in: the former system of soft law aiming at uniformity that depended on the willingness of the Member States did not lead to authorities that could fully expand their potential. It seems inevitable that such authorities are equipped with a minimum of institutional guarantees

[150] F Costa-Cabral and O Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) CMLRev 11 ff.; see also N Heilberger, F Zuiderveen Borgesius and A Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) CMLRev 1427 ff.

[151] D Kugelmann, 'Kooperation und Betroffenheit im Netzwerk' cit. 78 ff.

and securities as well as sufficient resources. At the same time, uniform enforcement requires uniform rules of the game across the EU.

Last, but certainly not least, the system can only work properly when set in an environment of constant exchange of experiences and close cooperation between the competent authorities. This purpose is served by the already existing European Competition Network.

Having said this, it must be borne in mind that this picture is somehow an ideal that the Commission pursues with its new instrument. In theory, this instrument and its complementation by existing Regulations and soft law seems adequate to ameliorate decentralized enforcement. But this conclusion is working under the assumption that all Member States adhere to the ECN+ and share the Commission's understanding of how important a well-functioning competition is for the internal market and consumer welfare. In practice, however, one cannot assume that the Member States agree or even unconditionally support the internal market or its deeper integration. It is thus questionable how the ECN+ may really contribute to more effective enforcement where it does, *e.g.*, not even provide for justiciable rules regarding the NCAs institutional guarantees but on various occasions leaves room for national particularities. Thus, the ECN+ serves as an example of the Commission's ideals and plans differing from at least some Member States whereas the functioning of the internal market largely depends on a common strategy and a common plan for its future. Only if those divergences can be overcome, the ECN+ will be even more able to respond to the EU's actual political situation and fully expand its potential, ultimately leading to an ever closer union.

Thus, decentralised enforcement – such as the system completed by the ECN+ – can work and ultimately contribute to an ever closer union thereby shaping the future of Europe. But only where a couple of preconditions are met and all NCAs are able to work to their full potential. Only then it can serve as a role-model for other areas, too, contributing to more effectiveness and deeper integration while at the same time leaving room for national peculiarities and being well-prepared for future challenges.