The Commission's 2017 EU Antitrust Draft Directive: addressing the public enforcement fragmentation

EU antitrust law – public enforcement – Regulation 1/2003 – Draft Directive – boosting domestic enforcement – national competition authorities – harmonisation

Catalin S. Rusu, Associate Professor of European Law at Radboud University Nijmegen, c.rusu@jur.ru.nl, 27 June 2017

Introduction

Sometimes it is wise not to act on your impulses and speak your mind before a cooling down period. The flipside of this statement may be 'better late than never'. Either way, a few months down the line after the Commission published the *Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the Internal Market* (hereinafter Draft Directive),[1] this blog post delves into the manner in which the exercise of boosting the national competition authorities' (hereinafter NCAs) institutional positioning and investigative, decision-making, and sanctioning powers will unfold. This endeavour to further empower the NCAs, which was signalled also in the Commission's 2014 Communication 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives',[2] is argued to lead to more effective and uniform enforcement of the EU antitrust rules. Is the Draft Directive really prone to deliver these results? Will this legislative proposal render the NCAs as truly effective EU law enforcers and, for that matter, proper European enforcement agencies?

Status quo

Before getting to the Draft Directive's set-up and contents, it is important to correctly identify and assess the context in which the boosting of the NCAs' powers of enforcing the EU antitrust rules will take place. The starting point is that since 2004, by virtue of Article 3 of Regulation 1/2003,[3] these domestic entities are obliged to apply Articles 101 and 102 TFEU, alongside the domestic competition rules, when trade between the Member States may be impacted.[4] This decentralisation exercise created a system of parallel enforcement of the EU antitrust provisions, in which the Commission and the NCAs allocate cases to the best placed authority, prioritise their

actions, cooperate and share the enforcement work in the context of the European Competition Network (hereinafter ECN).[5] This set-up resulted in over 1000 decisions being adopted by the Commission and the NCAs during the past decade (the large majority of the decisions were actually taken by the NCAs), in a broad range of sectors of the economy, and covering diverse horizontal, vertical, exploitative, and exclusionary practices.[6]

In this context, one must understand what the NCAs' prerequisites, when enforcing the EU antitrust rules, are. First, the Member States, by virtue of the institutional autonomy they enjoy,[7] are free to designate their NCAs as judicial or administrative bodies, as long as the provisions of Regulation 1/2003 are effectively complied with. When it comes to the actual enforcement work, one should distinguish between the types of actions the NCAs must engage in: investigations and fact-finding activities, decision-making, and sanctioning. With regard to decision-making, the discussion is rather straightforward: Article 5 of Regulation 1/2003 provides the NCAs with the necessary powers for the performance of the enforcement work, namely requiring that an infringement be brought to an end, ordering interim measures, accepting commitments, and sanctioning the infringers. Should the NCAs, after performing an antitrust investigation, reach the conclusion that the conditions of prohibition based on Articles 101 or 102 TFEU are not met, they should decide that there are no grounds for action on their part. These NCA decision-making powers match in substance, to a large extent, the powers that the Commission has when it enforces the EU antitrust rules, according to Articles 7, 8, 9, 23, and 24 of Regulation 1/2003. The odd one out seems to be the Commission's power to adopt the so-called 'negative decisions', of inapplicability of Articles 101 and 102 TFEU, when the EU public interest is at stake.[8] This power is reserved for the Commission only (as the authority best equipped to assess whether there is EU interest in a given case),[9] since Regulation 1/2003 does not bestow such a prerogative upon the NCAs. The more noticeable discrepancies come to light when it comes to the investigation powers of the Commission, on one hand, and of the NCAs, on the other hand. Regarding the former, Chapter V of Regulation 1/2003 provides the Commission with wide-ranging powers of investigation: performing sector inquires, requesting information, taking statements, performing 'dawn-raids'. This stands in contrast with the investigation powers of the NCAs, whose powers in this respect are not grounded in EU law, but rather are exercised via domestic procedures, by virtue of the procedural autonomy the Member States enjoy.[10] Of course, the EU principles of effectiveness and equivalence have to be observed in this context. The differences also carry over to the sanctioning powers of the Commission and the NCAs. Articles 23 and 24 of

Regulation 1/2003 grant the Commission the power to impose fines and periodic penalty payments. Although Article 5 of the same Regulation empowers the NCAs to impose similar penalties, this may happen only to the extent that these penalties are provided for in the national laws. A first conclusion that may be drawn here is that due to these discrepancies when it comes to the investigation and sanctioning powers pertaining to the NCAs, the EU antitrust enforcement performed by these domestic bodies may be labelled as rather fragmented.[11]

Still, as pointed out above, a great deal of the EU antitrust enforcement work is performed in the domestic ambits. This is bound to increase in the future, if one takes into account the conclusions stemming from the more or less recent *Si.mobil, easyJet, Trajektna luka Split*, and *Agria Polska* rulings of the General Court.[12] According to these judgments, more deference is afforded to the enforcement work performed by the domestic bodies, since the Commission may rightfully decline to act on a complaint, when the same case is, or has been dealt with by the domestic authorities in the Member States, even if the NCAs decided to reject the complaint based on priority grounds specific to their jurisdictions, or based on review performed solely on domestic competition laws, if this is consistent with an analysis in light of the EU antitrust provisions. What is more, the General Court gave the Commission a *carte blanche* when deciding whether to take on a case or not, by acknowledging a new ground for rejecting a complaint, based on Article 13 and Recital 18 of Regulation 1/2003: essentially, when not acting on a complaint, the Commission must no longer engage in a cumbersome *Automec*-type of balancing analysis, in order to establish whether there is an EU interest at stake, and whether it is feasible for it to establish an infringement. All these developments are believed to build trust between the Commission and the NCAs, and among the NCAs themselves, that the enforcement of the EU antitrust rules is properly performed in the domestic ambits.[13] At the end of the day, the deference to the domestic enforcement work and the trust established in this respect within the ECN makes sense, having in mind that all authorities concerned work with the same EU substantive rules: Articles 101 and 102 TFEU.[14]

Yet, if more EU antitrust enforcement work is expected to be pushed towards the domestic authorities, the trust established between the enforcers has to be supported by the reassurance that effective and uniform enforcement can indeed be deployed in the domestic jurisdictions. After all, if one expects the NCAs to carry the enforcement 'burden', one needs to make sure that these authorities enjoy the necessary institutional guarantees to act independently, and have the proper tools

readily available to carry out their tasks.[15] In my opinion, it is in this context that the Draft Directive is proposed.

Discussion

The goal of the legislative proposal may be summarized in the following terms: given the enforcement fragmentation discussed above, there is untapped potential for the NCAs to perform more effective enforcement of the EU antitrust rules. The Draft Directive is meant to further empower the NCAs to become more effective in their enforcement work, while at the same time creating a genuine common competition enforcement area in the EU. In this respect, the proposal aims at creating a level enforcement playing field in the EU, by striking down the national obstacles that hinder the NCAs in their enforcement and by removing distortions to competition in the Internal Market, all for the benefit of the consumers and businesses active in this environment.[16] All in all, the Draft Directive is intended to make a real difference in making the economy work more fairly for everyone, by making sure that the competition rules are applied evenly for all Europeans, regardless of the Member State where they live, work or shop.[17]

But, how is the Draft Directive construed in order to achieve the ambitious goals listed above? First, when it comes to the choice of legal instrument, one may inquire from the outset, why use a directive and not a regulation? As I will detail in the next paragraphs, the legal basis chosen for this legislative proposal allows for both types of instruments to be used. Specifically, given that the decision-making powers of NCAs when enforcing the EU antitrust rules are already present in Regulation 1/2003, one could have argued that amending this Regulation in order to match the NCAs' investigation and sanctioning powers to those of the Commission (powers which are already embedded in the Regulation), could be a first solid choice for achieving the stated goals. Actually, this could have been quite a reasonable solution, given that the 'amended' Regulation's provisions would have been directly applicable, making things more straightforward for the domestic entities concerned. Yet, the preferred approach seems to be a directive. This is likely because of the multitude of objectives pursued by the proposal. Also, a directive allows taking into account the Member States' legal traditions and institutional specificities, it leaves them the choice of implementation means, and gives them room to adopt higher standards of protection if they wish to do so.[18]

These last statements already signal the next two points I would like to touch upon: the legal basis used and the type of harmonisation employed by the Draft Directive. First, the existence of multiple objectives to be pursued makes it reasonable to expect a choice for dual legal basis, similar to the approach adopted under the Private Damages Directive.[19] Recital 8 of the Draft Directive explains that Articles 103 and 114 TFEU are used in this respect, since the Draft Directive covers the parallel application of Articles 101 and 102 TFEU and the national competition law provisions, and also the gaps and limitations in the NCAs' tools and guarantees to apply these provision, which negatively affect both competition and the proper functioning of the Internal Market. With regard to the former issue, Article 103 TFEU allows the adoption of measures to give effect to the EU antitrust principles, designed in particular to ensure compliance with the prohibitions laid down in Article 101, par. 1 and 102 TFEU, by making provision for fines and periodic penalty payments, and to determine the relationship between national laws and the EU competition law provisions. With regard to the latter issue, Article 114 TFEU is used because the Draft Directive aims to also bolster the functioning of the Internal Market, for example by preventing the reinforcement of market distortions in the EU, and by covering the various gaps in domestic legislation which prevent effective enforcement.

Second, one needs to be aware of the type of harmonisation that the Draft Directive puts forward. In most respects, the proposal uses the minimum harmonisation technique, by imposing minimum standards to empower the NCAs to effectively enforce the EU antitrust rules. Recitals 7, 9, 12 and 19 of the Draft Directive speak in this context about the Member States needing to ensure the existence of: *minimum* guarantees of independence for the NCAs, of appropriate enforcement safeguards which *at least* meet the standards of the general principles of EU law and of the Charter of Fundamental Rights of the EU, and of a *minimum* set of common investigative and decision-making powers to be able to enforce Articles 101 and 102 TFEU effectively. Once again, putting in place minimum guarantees to ensure effective enforcement is without prejudice to the ability of Member States to maintain or introduce more extensive guarantees of independence and resources for NCAs, and more detailed rules on the enforcement and fining powers of these authorities, beyond the core set provided for in the Draft Directive, to further enhance their effectiveness. The Draft Directive therefore attempts to balance the realisation of its objectives, on one hand, with respecting national specificities regarding, for example, the design, organisation, and funding of the enforcement activities, on the other hand,[20] thus also appeasing those Member States which for specific reasons have intentionally designed their public enforcement model so as not to mirror the EU

prototype.[21] Last but not least, in the context of the harmonisation discussion, again similar to the Private Damages Directive, the Draft Directive entails non-exhaustive harmonisation, since not all aspects of public enforcement are harmonised: only certain specific institutional, staff and funding matters, and enforcement powers issues are harmonised, while criminal penalties imposed on natural persons[22] (among other issues), are left outside the Draft Directive's scope.

Getting to the actual contents of the legislative proposal, it is structured in 10 chapters, dealing with: subject matter, scope, definitions, fundamental rights, independence and resources of NCAs, investigation and decision-making powers, fines and penalty payments, leniency, mutual assistance, limitation periods, and general and final provisions. It goes beyond the scope of this blog post to thoroughly address the content of all the provisions in the Draft Directive. Instead, I will focus on those issues which illustrate the harmonisation discussion above, and in the context of aiming to ensure a more effective and uniform enforcement of the EU antitrust rules by the NCAs, those which raise interesting issues which nuance the already existing provisions of Regulation 1/2003.

First, Chapter III of the Draft Directive provides detailed rules which should ensure that NCAs act impartially in the interest of the effective and uniform enforcement of the antitrust rules, and while doing so, that they are sufficiently endowed with human, financial, and technical resources. In this respect, Articles 4 and 5 of the proposal aim to provide more legitimacy to the NCAs' enforcement work, while seemingly giving substance to the rather permissive Article 35 of Regulation 1/2003, the only requirement of which is ensuring that the Regulation's provisions as effectively complied with. The Draft Directive thus remodels the domestic institutional autonomy of the Member States, an issue which I briefly touched upon in the previous section of this blog post. When it comes to acting impartially, the NCAs are neither to seek nor to take any instructions from any government or other public or private entity when carrying out their duties, however, without prejudicing the right of the Member States' governments to issue general policy or priority guidelines that are not related to specific proceedings for the enforcement of Articles 101 and 102 TFEU.[23]

Second, the leniency topic occupies a rather prominent role in the Draft Directive. Chapter VI transposes the main principles of the ECN Model Leniency Programme[24] into law, thus ensuring that all NCAs can grant immunity and reduction from fines, and accept summary applications under the same

conditions.[25] The leniency provisions (Articles 16-22) differ from the main body of the Draft Directive's text, where minimum harmonisation is the preferred approach: the leniency rules seem to be more precise and demanding, when it comes to the (general) conditions to obtain immunity or reduction of fines, the form of leniency applications, the marker for immunity applications, summary applications, and the protection against criminal and administrative sanctions for the directors and employees of the companies applying for leniency. All in all, the leniency provisions of the Draft Directive are bound to bring uniformity to the rather scattered leniency programmes currently functioning in the Member States. This should level the playing field, increase legal certainty, and, generally speaking, make life somewhat easier for those companies that contemplate breaking cartels operating in more Member States.

Third, when it comes to the NCAs' decision-making powers, Articles 9-11 of the Draft Directive, deal with finding and termination of infringements, interim measures, and commitments. They are supposed to give more meaning to the requirements of Article 5 of Regulation 1/2003, by ensuring that the NCAs' decision-making powers are fully respected and elaborated on.[26] However, in my opinion, these provisions of the Draft Directive do not bring anything new to the table, when compared to what Regulation 1/2003 already provides for the NCAs. In fact, I think that the Commission missed an opportunity here, when talking about rendering the NCAs as more effective EU antitrust enforcers: it could have tackled the *Tele2 Polska* limitative approach of NCAs not being able to adopt non-infringement decisions relating to Articles 101 and 102 TFEU. The Commission could have 'shared' its 'finding of inapplicability' power (Article 10 of Regulation 1/2003), thus making available for the NCAs the full array of decision-making powers for enforcing the said EU rules. This 'hands-off' approach to this prerogative will probably continue to keep the NCAs yearning for that 'truly effective European enforcement agencies' status they were somewhat 'tempted' with.

Fourth, when talking about investigation and fact-finding powers, the Commission seems more generous, since Articles 6-8 of the Draft Directive are meant to empower the NCAs to inspect business and other premises, and request information from the undertakings under investigation. These provisions, although framed again in minimum harmonisation terms, are intended to match the investigative powers which the Commission has under Chapter V of Regulation 1/2003. However, one may observe that the power to take statements in Article 19 of Regulation 1/2003 is not mentioned in the Draft Directive. This should not necessarily be a problem though, since the added value of this prerogative is in any case rather questionable. In any

case, by ensuring that all NCAs have at least the investigation powers embedded in Articles 6-8 of the Draft Directive, a level enforcement playing field is bound to be created, with all the consequences that stem from this.

Fifth, with regard to the sanctioning powers included in Articles 12-15 of the Draft Directive, a similar conclusion may be drawn as in the previous paragraph regarding investigation powers: the proposal matches the NCAs' powers to impose fines and periodic penalty payments to those of the Commission, as contained in Articles 23 and 24 of Regulation 1/2003. However, the discussion can be nuanced here: Article 5 of Regulation 1/2003 already empowered the NCAs to impose such penalties, however according to their (divergent) domestic laws. The novelty in the field of sanctioning is that Articles 12-15 of the Draft Directive (non-exhaustively) harmonise these powers of the NCAs,[27] thus giving more meaning to the provisions of Article 5 of Regulation 1/2003. One (somewhat odd, yet) interesting provision in Chapter V of the Draft Directive is Article 14, dealing with the maximum amount of the fines that may be imposed for infringing the EU antitrust provisions. This Article imposes a so-called 'minimum maximum' fine threshold: the maximum amount of the fine that may be imposed by a NCA should not be set at a level lower than 10% of the undertakings' total worldwide turnover. While this ensures a sufficient degree of deterrence, it may also result in interesting practical outcomes. If certain Member States will opt to implement a maximum amount of the fine at say 15% or 20% of the undertakings' total worldwide turnover, the infringers may receive higher fines from the respective NCAs, than those potentially imposed by the Commission under Regulation 1/2003. I am not saying that there is anything wrong with this scenario, I just find this provision somewhat surprising given the more moderated tone the Draft Directive exhibits in the rest of its provisions.

Lastly, when talking about all the enforcement powers discussed in the paragraphs above (i.e. fact-finding, investigation, decision-making, and sanctioning) certain generally applicable observations have to be mentioned. First, Chapter VII of the Draft Directive puts in place a system of mutual assistance among the NCAs. This system is meant to further the NCAs' cooperation within the ECN, and if you ask me, also build on the trust that these domestic bodies seem to be experiencing after the *Si.mobil, easyJet, Trajektna luka Split*, and *Agria Polska*rulings of the General Court. Furthermore, the mutual assistance system is bound to give proper practical meaning to the investigation and sanctioning powers embedded in the Draft Directive, and at the same time, full effect to the obligations contained in Article 22 of Regulation 1/2003, relating to NCAs performing investigations on behalf of other NCAs. Yet, there is a

flipside of the coin, at least for the Member States: this procedural uniformisation exercise that the Draft Directive puts forward will certainly remodel the Member States' procedural autonomy, in a similar fashion to the discussion about the domestic institutional autonomy provided above. At the end of the day, there is a trade-off for pretty much everything.

Conclusion

Summing up, will the Draft Directive reach the stipulated goal of achieving more effective and uniform enforcement of the EU antitrust rules? For those Member States that already have a solid domestic enforcement system, it will probably not add much value. However, for the Member States still struggling with certain institutional, investigative, and sanctioning limitations, the harmonisation put forward by the Draft Directive will probably bring them closer to the 'European enforcement model'. Therefore, the answer to this first question is at least a 'partial yes'.[28] Will the legislative proposal render the NCAs as truly effective EU law enforcers and, for that matter, proper European enforcement agencies? The answer here is probably less optimistic, since in my opinion, there are issues that continue to remain problematic, one of them being 'capping' the NCAs' decision-making powers according to the *Tele2 Polska* ruling, which as things stand, remains unaddressed. However, not everything is lost at the moment, since there is still sufficient room for amending the Draft Directive's provisions, during the negotiations on the Commission's legislative proposal which are currently taking place in the European Parliament and soon, in the Council.

[1] COM(2017) 142/2, 22.03.2017. See also the supporting documentation composed of the Explanatory Memorandum, the Impact Assessment, and the Implementation Plan, SWD(2017) 114, SWD(2017) 115, SWD(2017) 116.

[2] COM(2014) 453, 09.07.2014. This Communication is supported by two Staff Working Documents: 'Ten Years of Antitrust Enforcement under Regulation 1/2003', SWD(2014) 230/2, 09.07.2014; 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues', SWD(2014) 231/2, 09.07.2014. See also the 2015 public consultation 'ECN Plus: Empowering the national competition authorities to be more effective enforcers', available at: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html, accessed on 22.06.2017.

[3] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003.

[4] Many interesting contributions have debated the value of the decentralisation of EU competition law enforcement. See, for example: H. Vedder, 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law', 1 *The Competition Law Review* 1, 2004; K.J. Cseres, 'The Impact of Regulation 1/2003 in the New Member States', 6 *The Competition Law Review* 2, 2010; W. Wils, 'Ten Years of Regulation 1/2003 – A Retrospective', 4 *Journal of Competition Law and Practice* 4, 2013.

[5] See Notice on cooperation within the network of competition authorities, OJ C 101/43, 27.04.2004.

[6] See the 2015 consultation press release, available at: http://europa.eu/rapid/press-release_IP-15-5998_en.htm, accessed on 22.06.2017 and the Explanatory Memorandum, *supra* n. 1, p. 1.

[7] Article 35 of Regulation 1/2003. See also the *VEBIC* case, C-439/08, ECLI:EU:C:2010:739.

[8] Article 10 of Regulation 1/2003.

[9] This setting was confirmed by the CJEU in the *Tele2 Polska* judgment, case C-375/09, ECLI:EU:C:2011:270.

[10] See also the *Schenker* ruling, case C-681/11, ECLI:EU:C:2013:404.

[11] See C.S. Rusu, A. Looijestijn-Clearie, 'Domestic Enforcement of EU Antitrust and State Aid Rules – Status Quo and Foreseen Developments', in A. Looijestijn-Clearie, C.S. Rusu, J.M. Veenbrink (eds), *Boosting the Enforcement of EU Competition Law at the Domestic Level*, Cambridge Scholars Publishing, 2017, p. 6-7.

[12] Case T-201/11 *Si.mobil v. Commission*, ECLI:EU:T:2014:1096; case T-355/13 *easyJet Airline v. Commission*, ECLI:EU:T:2015:36; case T-70/15 *Trajektna luka Split d.d. v. Commission*, ECLI:EU:T:2016:592; case T-480/15 *Agria Polska and Others v. Commission*, ECLI:EU:T:2017:339.

[13] See C.S. Rusu, 'Workload Division after the *Si.mobil* and *easyJet* Rulings of the General Court', 11 *Competition Law Review* 1, 2015.

[14] See also *Trajektna luka Split*, par. 30, 33, 50, 61.

[15] See Commission press release, available at: http://europa.eu/rapid/press-release_IP-17-685_en.htm, accessed on 22.06.2017.

[16] See Recital 7 of the Draft Directive and the Explanatory Memorandum, *supra* n. 1, p. 2-4.

[17] The Commission's Report on Competition Policy 2016, SWD(2017) 175 final, 31.05.2017, p. 16.

[18] See Explanatory Memorandum, *supra* n. 1, p. 9.

[19] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1, 05.12.2014. This Private Damages Directive uses the same legal basis as the Draft Directive: Articles 103 and 114 TFEU.

[20] Explanatory Memorandum, *supra* n. 1, p. 8-9.

[21] See, for example, M.C. Lucey, 'Public Enforcement of EU Competition Law in Ireland: Appraising Divergence', 12 *The Competition Law Review* 1, 2016.

[22] See Article 2 (4) of the Draft Directive.

[23] See Article 4, par. 2 (a) and Recital 17 of the Draft Directive.

[24] http://ec.europa.eu/competition/ecn/model_leniency_en.pdf, accessed on 22.06.2017.

[25] Explanatory Memorandum, *supra* n. 1, p. 17.

[26] *Ibid*, p. 4.

[27] Once again, sanctions in domestic criminal judicial proceedings are left out of the Draft Directive's scope. See Article 12 (1) of the Draft Directive.

[28] See also the interesting blog post of A. Outhuijse, 'The Shared Enforcement of Antitrust Cases: Effectivity Difficulties at the National Level', available at: http://eulawenforcement.com/?p=281, accessed on: 22.016.2017. The author argues that the Draft Directive will have significant influence on the enforcement of antitrust cases throughout the EU, since the Commission's proposal seems to cement the leading role of NCAs in European competition enforcement. Empowering the NCAs will however not solve all the effectiveness problems, since certain problems which are not caused by lack of investigative or sanctioning powers still remain.