



EUROPEAN COMMISSION

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Completing Convergence

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Es gilt das gesprochene Wort

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Competition

Completing convergence

After ten years of Regulation 1/2003 it is time to look back and see how well the new system has worked, and to see where there is room for improvement.

VP Almunia has discussed this already this morning. I would like to take the opportunity to go into a bit more detail.

This summer, in July, the Commission adopted the Communication on Ten Years of Regulation 1/2003. This document takes stock of enforcement over the last decade.

The involvement of the NCAs has made it possible to cover many more antitrust cases than the Commission would have been able to do on its own.

Simple numbers make this clear: according to our latest data (30 Sept), we have taken "only" 134 decisions out of a total of 870. The NCAs an impressive 736.

The second eye-catching success is the great level of convergence in the enforcement of competition law across the continent. Over ten years a close and dynamic system of cooperation has become established, based on the following formal building blocks.

Building blocks for cooperation

First, the joint enforcement of the same substantive rules, namely articles 101 and 102 TFEU.

Second, the creation of a formal cooperation mechanism to exchange information. Nowadays we take it for granted that Member States and Commission share information about cases, but ten years ago this was almost impossible.

A third building block is the efficient division of labour within the ECN. NCAs usually initiate proceedings in cases dealing mainly with their own Member State. The Commission starts investigations when there is a European dimension. Obviously there are grey areas where the best way forward is not immediately clear from the outset. But the fact that very few cases are reallocated, proves the system works well.

A fourth key element of our common competition enforcement system are the notifications of envisaged decisions sent by NCAs to the Commission.

If there is a serious risk that EU competition rules could be applied contrary to established case law and practice, the Commission has the prerogative to take over the case. But we have not done so to date. We do, however, make comments. The fact that NCAs take these comments seriously further enhances convergence.

Ten years of cooperation on these foundations has created a culture of dialogue based on mutual trust and respect, of which today's meeting is another example. This culture of cooperation means that the authorities are in constant contact, learning from each other and exchanging views.

Examples of substantive convergence

Vice President Almunia has already mentioned food and payments as examples of sectors with good degrees of substantive convergence. But there are many more.

Take the basic and manufacturing industries. These sectors are of key importance to consumers and the European economy as a whole. These sectors are also particularly prone to cartels. In consequence, these are the sectors most examined by both ourselves and the NCAs.

We have convergence in these sectors in several ways.

First, in the joint enforcement of Article 101 by the Commission and NCAs against hard-core cartels. A European single market requires a single legal area, a common enforcement area for competition law. Applying the same law everywhere helps to create a level playing field and provides legal certainty for businesses. Here the Courts, too, play a role, in establishing convergence. An example is the crucial concept of "single and continuous infringement", which has been developed by case law over the years.

Second, our common focus on fighting hard-core cartels is underpinned by formal and informal cooperation between the NCAs and the Commission. An example is the exchange of information about such cases. Sharing evidence is essential to help NCAs to detect and pursue infringements.

So, we are not just applying the same law.

By working together, we are also fine-tuning the application of the law.

This is, of course, also the case under Article 102. The postal services form a good second example of convergence. Here, the NCAs and

Commission closely coordinated action using Article 102 against former monopolists.

Here too, working together in the ECN and exchanging views helps to level the playing field. The vast majority of cases in this sector tackled by the NCAs concerned infringements of Article 102, such as discrimination, anticompetitive rebates and discounts imposed by the incumbents.

In two cases the Commission exercised its right under Article 106 of the treaty to strike down anti-competitive provisions in national legislation.

In Germany, the Postal Law induced incumbent BDKEP/Deutsche post to abuse its dominant position. It granted discounts to bulk suppliers of mail to its sorting offices. But it barred commercial firms that prepared mail for others from these discounts.

For Slovakia, the Commission ruled in 2008 that an amendment to Slovakia's postal legislation infringed Treaty rules under Article 102 because it extended the monopoly of the incumbent operator, Slovenská Pošta, to the delivery of hybrid mail services. This area had previously been open to competition.

A third and very good example of convergence are the liberal professions, such as architects, lawyers and accountants.

This example perfectly illustrates our division of labour in achieving convergence. Liberal professions are regulated on the national level, and so it is usually the NCAs that tackle them. They do so, however, based on a precedent set by the Commission, aided by a framework drawn up in close collaboration with the NCAs.

Until ten years ago, liberal professions attracted relatively little antitrust scrutiny. In 2004, the Commission set a precedent by banning fixed minimum prices for Belgian architects.

Based on consultations in the ECN, the Commission then published two reports detailing the application of EU competition rules to liberal professions.

NCAs now use this framework to enforce competition rules at home.

Limits to (procedural) convergence

So, how satisfied can we be with the extent of convergence?

People sometimes complain that form triumphs over substance. You hear this complaint often in politics, in art, in culture. This looks like a philosophical debate. But it is a real one.

In competition law, we have the opposite.

We have convergence in substance, but less convergence in procedure.

An important explanation for this is the lack of provisions in EU law governing the institutional setup of NCAs. This makes it difficult for some NCAs to do their jobs.

Interestingly, in related areas such as telecoms or energy, EU law outlines detailed requirements for the independence of national supervisory authorities. But not in the field of Competition.

As a result, the independence of some authorities is at risk.

In one case, other government departments opened investigations into an NCA and examined its decision making in individual cases, even after they had been reviewed by the court. In other cases heads of NCAs have been dismissed suddenly, possibly as a result of political interference.

There are also no specific European rules requiring adequate human and financial resources, other than the general obligation to ensure the effective implementation of EU law. Which means a number of authorities are struggling because they lack adequate staff and budgets.

There are also no provisions in European law on required enforcement powers.

Some NCAs cannot set enforcement priorities and decide which cases they will dedicate resources to. Other NCAs are not able to impose remedies. Several NCAs do not have the power to ensure compliance with commitment decisions. Other NCAs cannot enforce the power to inspect, because they cannot call on the police if a company refuses to cooperate with an inspection.

Not all NCAs are able to impose effective and deterrent fines.

In one Member State, civil/administrative fines for breaches of competition law do not exist at all.

Several Member States allow fines only against subsidiaries, which means parent companies can escape liability.

In other Member States, corporate groups can avoid paying fines by moving assets around different corporate entities.

The "legal maximum" of the fine is normally intended as a cap, to limit its size. One Member State sees it as an upper limit, only suitable for the most serious violations

When fines are too low or can be escaped altogether, they cease to be effective.

Finally, we are regularly faced with attempts to roll back convergence. For example, to remove fundamental NCA powers such as inspections or fines. Up till now these threats have been averted, but without a clear EU legal framework to convince national legislators, it is an uphill struggle.

Conclusion

If NCAs are not independent, if they do not have the staff, finances or enforcement powers to fulfil their tasks, or cannot impose adequate fines, then this affects their credibility, their impartiality, and their capacity to properly enforce competition law.

And so, in a manner of speaking, form would truly triumph over substance. In a very negative way.

In conclusion,

The contradiction between form and substance is often a false one.

We need convergence both of substance and procedure.

The solution is to build on the successes of the ECN.

There is no European law on leniency, one of the most successful tools we use against cartels.

But thanks to work in the ECN, all but one of the NCAs operate leniency programmes.

So, at least we have almost full convergence in the existence of leniency programmes, even though they differ nationally, and in some cases are not altogether perfect.

Through the ECN we are also encouraging soft convergence on enforcement powers.

The ECN's seven recommendations at the very least show that we have a strong consensus on the tools we need for enforcement:

- Power to set priorities
- Investigative powers (inspections and RFIS)
- Power to gather digital evidence
- Ability of staff from other NCAs to assist with inspections
- Power to adopt interim measures
- Commitment procedures
- Power to impose structural remedies

Along these lines, the Commission identifies three areas for action in its Communication on Regulation 1/2003.

- First of all, guaranteeing the independence of the NCAs and making sure they have sufficient resources,
- Second, ensuring that all NCAs have a complete set of effective investigative and decision making powers at their disposal.
- Third, guaranteeing that all NCAs have powers to impose effective and deterrent fines, and ensure that well designed Leniency programmes are available in all member states.

The next Commission will, no doubt develop its own ideas about how to achieve these goals.

We know they will not be achieved overnight.

After all, Rome wasn't built in a day.

But we do know that whatever the Commission and NCAs will do, they will be building on the achievement of ten years of close cooperation within the ECN.