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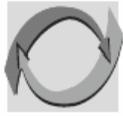


9<sup>th</sup> ASCOLA Conference Warsaw 2014 on  
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

# **The Effects of Antitrust Enforcement Decisions in the EU**

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW  
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# The Effects of Antitrust Enforcement Decisions in the EU

*Anton Dinev*<sup>1</sup>

1. Complexity is generally perceived as a rather negative feature since it often leads to actual or potential conflicts in a given political, social or economic system. While this is also true for any legal system, including antitrust law, necessary complexity is perhaps the most appropriate term for a neutral description of the enforcement system of rules and authorities that has developed across the European Union (EU) over the past decade. The cardinal procedural reform of 2004 certainly reinvigorated the activity of national competition authorities (NCAs), bringing it closer than ever before to the original model of decentralized, indirect administration already foreseen in the founding Treaty of Rome. At the same time, the present enforcement framework has revealed a significant diversity of approaches at the national level to basic issues of common concern that require, in turn, accordingly consistent uniform solutions at the Union level. Moreover, some fundamental principles of EU antitrust remain virtually unchanged since they were first considered in the formative jurisprudence of the European Court of Justice (ECJ).

2. Therefore, in order to draw more attention to this need for a systemic approach to individual cases where key rules and underlying principles of EU antitrust enforcement are to receive a uniform normative construction, it seems fitting (and timely) to address a topic that appears to have been fairly overlooked at the time of drafting Regulation 1/2003.<sup>2</sup> Indeed, a number of recent cases, EU and national, as well as landmark rulings of the ECJ, invite reconsideration, from a larger perspective, of the effects that may have enforcement decisions made by either the European Commission or the NCAs. These enforcement decisions can actually be approached from different but related angles, depending on their nature and their intended addressees, and yet each of them reveals at some point imperfections or deficiencies that might call into question the proper functioning, in light of the underlying enforcement goals, of the current antitrust system in the EU. Thus, the immediate purpose of this essay is to provide some insight and indicate possible steps to eventually piece together the fractured procedural landscape of decisions enforcing Articles 101 and 102 TFEU.

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<sup>1</sup> PhD Candidate, Dauphine University in Paris. Draft conference paper for the 9th ASCOLA annual conference in Warsaw, 26-28 June 2014. Do not cite nor circulate without the author's permission.

This paper is intended to provide a basis for further and more in-depth discussion of the problems outlined. It shall not be considered as either exhaustive or as an empirical study of this important topic; rather, it offers a prospective analysis in light of unclear or ambiguous legal texts and unconvincing jurisprudence.

<sup>2</sup> Council Regulation (EC) n° 1/2003, 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEU 2003 L1, 4 January 2003, p. 1.

3. The suggested systemic approach can be justified for at least one of several reasons. First and foremost, it is common ground that a single antitrust harm that occurs within any geographic market in the EU should receive equally uniform substantive analysis and an appropriate remedy by the competent authority. However, this consistency goal is hardly an absolute one as it faces important procedural caveats stemming both from the territoriality principle under public international law and from the EU principle of national institutional and procedural autonomy in implementing and applying the Union law. Secondly, time is a key factor not only from the standpoint of defining the scope of antitrust enforcement either by the Commission or the NCAs when acting upon the same facts, but because it also provides a clear divide between past and present proceedings regarding similar cases as well as between definitive decisions and those still under review, especially with respect to the primacy that enjoy EU judicial and administrative decisions over their national counterparts. Finally, another source of complexity is the increasing role of private enforcement and the corresponding need for its synchronization with the predominantly administrative public enforcement that has played a leading role in designing the conceptual frame of EU antitrust.

4. Accordingly, dealing with the complexity of EU antitrust requires that several variables be duly taken into account in order to properly examine the effects of decisions enforcing Articles 101 and 102 TFEU. That is why the meaning of an antitrust enforcement decision for the purposes of the present article needs to be broad enough but not all-inclusive. Since only EU law is discussed here, antitrust enforcement is understood as exclusive of merger control (unlike the taxonomy under U.S. antitrust). Furthermore, as the very term ‘anti-trust’ indicates (again regardless of its American legal background), protecting competition in a free market economy has always been essentially about weighing its importance against the underlying freedom of commerce and contract. EU antitrust enforcement is therefore basically about setting some (reasonable) limits to that fundamental freedom and hence applying a certain number of prohibitions. Each of these prohibitions, namely Articles 101 and 102 TFEU, is part of a repressive regime, and failure to comply with them could eventually lead to pecuniary sanctions of a criminal nature within the meaning of the European Convention on Human Rights (ECHR). Nevertheless, one should not confuse sanctions, or any other remedy for that matter, with the essence of antitrust enforcement – that is, whether or not there has been a breach of a controlling prohibition. Answering this question brings up another important distinction, one that is between: i) applicability, which determines *ratione materiae* and *ratione loci* jurisdiction, and ii) application, which deals with the substantive conditions for giving effect to the prohibition in question. Thus, decisions

finding a prohibition inapplicable *or* that it has not been violated are equally enforcing EU antitrust rules as decisions that establish applicability *and* find an infringement of those rules. On the other hand, for the sake of clarity, decisions that include no definitive assessment on the merits will not be considered here, even though remedies like commitments have become a valuable enforcement tool especially for the NCAs.

5. Unfortunately, these two distinctions – applicability/application and applying/remedying – are more often than not left without due consideration by the EU antitrust authorities at both national and European levels. But had these distinctions been thoroughly considered on a regular basis, one could easily identify a three-dimensional framework for a systemic approach to and study of the effects of antitrust enforcement decisions across the EU. First, an antitrust enforcement decision may determine the outcome of subsequent proceedings before one and the same competition authority, depending on whether the initial decision becomes definitive prior to or upon judicial review (I). Second, subsequent or simultaneous proceedings may take place before several competition authorities, in which case antitrust enforcement may have vertical or horizontal effects, respectively, between the Commission and one or several NCAs, or between the NCAs alone (II). Finally, a third line of effects delimits the impact of public enforcement on private enforcement, which varies considerably according to a previous finding of antitrust infringement or absence of such an infringement (III).

### **I. Proceedings before one and the same competition authority**

6. A first setting that illustrates the need for a systemic approach to antitrust enforcement decisions is where a competition authority, the Commission or an NCA, commences or continues proceedings against undertakings that have already been investigated by this same competition authority in application of Articles 101 and 102 TFEU. This could be the result of a subsequent complaint or an *ex officio* motion, whether or not a previous decision has established lack of jurisdiction or an infringement of the relevant prohibition. Should this new proceedings be allowed and, if yes, to what extent? The answer is of course largely dependent upon the strict identity of the cases, old and new, but even if they were completely identical as to subject-matter and parties, there could still be some room for debate about the scope and nature of the effects the previous decisions may have regarding the subsequent proceedings. This uncertainty is evidenced by the case-law of the ECJ which tends to treat alike different situations by providing increasingly similar solutions, respectively, for definitive decisions (appealed or not) that apply antitrust rules (A) and annulled decisions following judicial review (B).

## A. Effects of definitive decisions applying antitrust rules

7. While proceedings before the Commission and the judicial review of its decisions follow procedures that remain confined to the EU level, it is also true that the approach of the EU judicature to a given issue may impact, directly or indirectly, national authorities and procedures as well. This impact is direct where, in addressing a reference for a preliminary ruling, the ECJ redefines the principle of national institutional and procedural autonomy by transposing to the Member State level existing solutions regarding the Commission. More often, however, the influence is indirect (*par ricochet*) insofar as the General Court and, eventually, the ECJ confirm the legality of Commission decisions that interfere to a certain extent with powers and duties of the NCAs provided by Regulation 1/2003. But whether directly or indirectly defined, the effects of definitive decisions enforcing antitrust rules need not be amalgamated depending on issues of either jurisdiction or application of the substantive criteria in a controlling prohibition.

8. First of all, delimiting overlapping jurisdiction between EU and national law has proved to be of utmost importance, essentially for procedural reasons.<sup>3</sup> On the other hand, clarifying the scope of the respective Commission and NCA powers is crucial for ensuring consistent public enforcement of EU antitrust. There is, in effect, a sort of mutual dependence or a correlation, based on the general duty of sincere cooperation, and also highlighted by Regulation 1/2003,<sup>4</sup> between the Commission and NCA proceedings, which results in the need for the national authorities to duly establish their EU jurisdiction in order to allow potential control by the Commission pursuant to Article 11(6) of the Regulation. Nevertheless, the EU judicature seems reluctant to recognize *expressis verbis* a formal obligation similar to that in merger control, where the NCAs must first ascertain lack of EU jurisdiction in order to proceed under national law. That reluctance is indeed justified in light of the multi-agency system of parallel enforcement set up by the Regulation; otherwise, the obligation in question would give rise to corresponding individual rights for complainants that seek relief from a particular competition authority.<sup>5</sup> Consequently, from the EU standpoint, both the Commission and NCAs should retain comparable latitude as to commencing antitrust enforcement through the European Competition Network (ECN), including instances in which

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<sup>3</sup> See. e. g. the French *Jet Fuel Cartel* case : French Supreme Court (Cour de cassation), Judgment n° 200 FS-P+B, Joined Cases n° J09-72.655, M09-72.657, P09-72.705, Z09-72.830, U09-72.894, 1st March 2011, *Total Réunion* e.a.; Anton Dinev, The French Supreme Court clarifies the appreciable effect on trade concept contained in Art. 101 and 102 TFUE (Jet Fuel Cartel), *e-Competitions*, n° 35149, [www.concurrences.com](http://www.concurrences.com).

<sup>4</sup> See. Recitals 8 and 17 in the preamble to Regulation 1/2003 and ECJ Judgment, 3 May 2011, Case C-375/09, *Tele2 Polska*, [2011] ECR-I 270, para. 26

<sup>5</sup> For a discussion, see CFI Judgment, 8 March 2007, Case T-339/04, *France Télécom*, [2007] ECR-II 521

they first dismiss a complaint for lack of jurisdiction but later re-open the case against the same undertakings and alleged practices, either *ex officio* or acting upon another complaint. At the same time, that means disregarding national legislations whereby, given the principle of procedural autonomy, some NCAs lack equally broad discretion as the Commission when handling complaints and must instead issue a reasoned decision justifying they have no EU jurisdiction. Accordingly, one may hesitate whether such decisions would not have the effect of preventing further investigation or re-opening of the case, inasmuch as the duty to apply Article 101 and 102 TFEU where applicable has also been supplemented with an increased protection of legitimate expectations.

9. In contrast to issues related to antitrust jurisdiction, the effects of application *stricto sensu* have been considered more thoroughly by the EU judicature and were eventually construed more favorably to prosecuted undertakings. These can now invoke and rely on a supposed auto-binding nature of the findings made by the Commission and the NCAs. Actually, strengthening the self-binding effects of antitrust enforcement decisions derives from the principle of legal certainty, which has shaped a well-established jurisprudence on the so-called Commission ‘soft law’ in competition matters, typically on issues related to sanctioning.<sup>6</sup> A more recent trend, however, is to extend, somewhat mechanically, that jurisprudence to also include the substantive assessment in individual cases before the NCAs. This approach builds upon the view that, where the Commission states in advance its course of action in future cases, it cannot depart from such a rule of conduct unless it provides good reasons for the contrary. The self-binding effect of such rules of conduct is of course limited to those parts of guidelines and notices that contain a genuine Commission decision pursuant to its enforcement discretion, and not just a restatement of existing case-law that is binding by virtue of its own *res judicata* (decisional) and/or *res interpretata* (jurisprudential) authority. Likewise, it has been held that “precise assurances” by a competent NCA could eventually provide an undertaking with legitimate expectations as to the *application* of EU antitrust or the *sanctioning* of illegal conduct.<sup>7</sup> Of course, application in this case is understood solely as the formal finding of an infringement,<sup>8</sup> even though such a finding is just a possible outcome of applying the substantive conditions for prohibition, meaning *a contrario* that a finding of non-infringement is also possible, regardless of whether it is stated with sufficient precision as

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<sup>6</sup> ECJ (Grand Chamber) Judgment, 28 June 2005, Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri*, [2005] ECR I-5425, paras 211 and 213, and recently, GC Judgment, 21 May 2014, Case T-519/09, *Toshiba Corp.*, [2014] ECR-II 0000.

<sup>7</sup> ECJ Judgment, 18 June 2013, Case C-681/11, *Schenker* ECR-I 0000, para. 41

<sup>8</sup> *Ibid.* para. 42

grounds for a no-further-action decision or as a clause in the operative part of a formal non-infringement decision. In any event, it seems unclear whether finding an infringement, as such, without it leading to imposing a penalty,<sup>9</sup> could still be relied upon by the undertakings concerned seeking to block subsequent proceedings against them before the same competition authority, administrative or judicial, unless of course there is new evidence. An affirmative answer, however, might be quite problematic from a systemic perspective, including the underlying close cooperation between the Commission and NCAs.

**10.** Indeed, given that the ECN has been designed as a dynamic system of close cooperation, actions and decisions of the several competition authorities cannot remain isolated from one another and need instead to be considered all together inasmuch as the Commission and the NCAs may enjoy different degrees of discretion in either applying antitrust or establishing their EU jurisdiction. This means in practice that self-binding effects opposable to the Commission could also impact enforcement at the Member State level, and *vice versa*, such that self-binding effects preventing a case to be re-opened before the same NCA could also block preemptive action by the Commission. The latter scenario is illustrated by the *Expedia* case in which the ECJ recognized that, provided with good reasons, an NCA may depart from a soft-law rule of conduct that already binds the Commission.<sup>10</sup> However, this ruling appears to disregard the difference between application and jurisdiction as well as the latter's procedural consequences, since the *de minimis* thresholds in question determine the scope of application by the Commission while their French counterparts delimit subject-matter jurisdiction of the French NCA. Consequently, it seems unlikely that the Commission could still intervene pursuant to Article 11(6) of Regulation 1/2003 when a case it had already bound itself not to investigate eventually ends up in the ECN through the broadened jurisdictional discretion of NCAs. Conversely, the need to ensure effectiveness of Article 11(6) has led the ECJ in *Tele2 Polska* to consider, arguably in light of the *ne bis in idem* principle,<sup>11</sup> that possible self-binding effects of NCA non-infringement decisions might block a preemptive action of the Commission in the same matter.<sup>12</sup> Beyond the apparent contradiction between those two rulings, but in line with *Schenker*, it can be argued that final decisions of administrative NCAs might have been given 'negative effects' that resemble, at least functionally, those of judicial *res judicata* authority. Perhaps, this view could also

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<sup>9</sup> *Ibid.*, para. 50

<sup>10</sup> ECJ Judgment, 13 December 2012, Case C-226/11, *Expedia*, [2012] ECR-I 0000, para. 31

<sup>11</sup> Opinion Mazak, 7 December 2010, Case C-375/09, *Tele2 Polska*, [2010] ECR-I, para. 30

<sup>12</sup> ECJ Judgment, 3 May 2011, Case C-375/09, *Tele2 Polska*, [2011] ECR-I 03055, para. 28

explain the ECJ's stance on the effects of annulling Commission decisions following judicial review.

## **B. Effects of annulling decisions upon judicial review**

**11.** The extent to which the Commission is allowed to re-adopt a decision that has been annulled by a review court offers a useful perspective on the respective effects of administrative and judicial public enforcement of EU antitrust. In this regard, notwithstanding how descriptive and close to common sense, the concept of '*chose décidée*', which has been suggested as a sort of administrative equivalent to the judicial '*chose jugée*', need not be given a meaning it does not bear. As the very term *autorité de chose décidée* indicates, this concept has its roots in French administrative law and has been conceived to describe the immediate effects of administrative decisions concerning their addressees, also known as '*privilege du préalable*'. In other words, administrative decisions have the authority to unilaterally change the legal situation of individuals without or prior to judicial review. Although the same authority characterizes Commission decisions as well, and appeals against them do not suspend their execution, one should still have regard for the crucial distinction between the findings of infringement and their corresponding remedies, such as injunctions or sanctions. Only the latter actually have the capacity to introduce a legal change, and the former merely declare an already existing situation by virtue of the applicable law, namely, that its rules have or have not been broken. By contrast, *res judicata* covers precisely such findings of law and makes them binding upon the parties. Departing from this difference of principle, current jurisprudence on *ne bis in idem* in EU antitrust appears to consider that annulling a Commission decision has virtually the same effects regarding the competition authority in either review of legality or unlimited jurisdiction contexts.

**12.** Typically, Commission decisions are reviewed on the ground of legality – that is, whether they have lawfully proved the existence of an antitrust infringement and have imposed sanctions according to the applicable rules, standards and soft-law provisions.<sup>13</sup> This does not mean, however, that judicial review is only on points of law or entirely differential. On the contrary, it has been made clear that challenges before the General Court may lead to a scrutiny of both fact and law, provided it does not interfere with the Commission's assessment of complex economic matters.<sup>14</sup> Therefore, at first instance, the issue or cause of action is whether the relevant facts – as authoritatively construed by judicial interpretation of the

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<sup>13</sup> Article 263 TFEU. See also e.g. ECJ Judgment, 8 December 2011, Case C-272/09 P, *KME Germany*, [2011] ECR-I 12789, para. 106; ECJ Judgment, 6 November 2012, Case C-199/11, *Otis*, [2012] ECR-I 0000, para. 63

<sup>14</sup> ECJ Judgment, 24 October 2013, Case C-510/11 P, *Kone Oyj*, [2013] ECR-I 0000, paras 25 and 27 ; ECJ Judgment, 8 December 2011, Case C-386/10 P ; *Chalkor*, [2011] ECR-I 13085, para. 62

applicable rules – are correctly established and proved to the requisite standards by the Commission. Consequently, *res judicata* of General Court judgments consists either in confirming or infirming the challenged decision's a priori legality, without judging on the merits, i.e. whether or not antitrust laws have been violated. From this standpoint, it seems dubious that both finding an infringement and controlling the legality of such a finding could equally trigger the *ne bis in idem* prohibition<sup>15</sup> since these are different issues and only the latter is covered by *res judicata*. Moreover, given that review of legality may not deal *ipso jure* with all points of law and fact<sup>16</sup> as these are determined *inter partes*,<sup>17</sup> it would not make a difference when an enforcement decision is annulled for procedural reasons or because of unlawful appraisal of substantive criteria and relevant facts, including insufficient evidence, since neither would qualify as an acquittal in criminal matters<sup>18</sup> where *res judicata* of meritorious judgments is either conditional upon confirmation by a review court or where that same review court re-decides the merits of the case, after which its own findings would produce *res-judicata* negative effects. Conversely, where the EU judicature simply annuls a Commission decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty, the competition authority may re-open the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties.<sup>19</sup>

**13.** The second standard for judicial review of decisions enforcing EU antitrust is the so-called 'unlimited jurisdiction', which has been the object of numerous debates, including before the European Court of Human Rights (ECtHR). At the EU level, the unlimited jurisdiction allows the General Court, in addition to examining the legality of a fine imposed by the Commission, to substitute its own appraisal for that of the Commission and thereby reduce or even increase the total amount of the contested penalty.<sup>20</sup> By contrast, at the

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<sup>15</sup> ECJ Judgment, 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P, *Limburgse Vinyl Maatschappij (PVC II)*, [2002] ECR I-8375, para. 60

<sup>16</sup> *Ibid.*, para. 47

<sup>17</sup> ECJ Judgment, 24 October 2013, *Kone Oyj*, [2013] ECR-I 0000, Case C-510/11 P, para. 30, ECJ Judgment, 8 December 2011, Case C-386/10 P; *Chalkor*, [2011] ECR-I 13085, para. 64

<sup>18</sup> Compare with ECJ Judgment, 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P, *Limburgse Vinyl Maatschappij (PVC II)*, [2002] ECR I-8375, para. 62, in which the Court held that an annulment decision which had been reached without any ruling on the substance of the facts alleged could not be regarded as an acquittal giving rise to the application of the *ne bis in idem* principle.

<sup>19</sup> *Ibid.*, para. 693

<sup>20</sup> Article 31 of Regulation 1/2003 and Article 261 TFEU. See also e.g. ECJ Judgment, 10 April 2014, Joined Cases C-247/11 P and C-253/11 P, *Areva*, [2014] ECR-I 0000, para. 171, GC Judgment, 27 February 2014, Case T-128/11, *LG Display*, [2014] ECR-II 0000, para. 255, ECJ Judgment, 18 July 2013, Case C-501/11 P, *Schindler*, [2013] ECR-I 522, para. 36

Member State level some review courts are empowered to not only adjust the amount of the fines but, even more importantly, also to re-decide the merits of the case before them.<sup>21</sup> Although more conform to the principle of *nulla poena sine crimine*, meaning that reforming a sanction implies the power to re-decide the substance as well, the second type of unlimited jurisdiction is actually not indispensable for ensuring effective judicial protection in EU antitrust.<sup>22</sup> Proceedings before administrative competition authorities may indeed vary in more than one respect from strictly criminal enforcement while applying the same procedural guarantees pursuant to Article 6(1) ECHR.<sup>23</sup> Nevertheless, the issues related to unlimited jurisdiction appear in a different light against the background of the *ne bis in idem* prohibition, at least as it is understood by the ECJ. Since altering the amount of a fine presupposes that the Commission has lawfully established a violation of antitrust laws, but does not itself rule on liability, then it would be virtually impossible that, at the EU level, unlimited jurisdiction results in a meritorious finding with *res judicata* effects opposable to re-opening the case before competition authority. On the other hand, such meritorious findings, especially ‘acquittals’ within the meaning of the ECHR, are not to be ruled out at the national level. In the end it is, therefore, questionable whether the ECJ’s interpretation of the *ne bis in idem* principle could apply equally to judicial review of Commission and NCA decisions.

**14.** The above uncertainty about the effects of annulling antitrust enforcement decisions only highlights some of the risks associated with mechanically transposing to the NCAs solutions that have been tailored for the Commission and its practice. As already seen, the two levels of antitrust enforcement, European and national, are largely interdependent, and a specific approach to one should not dismiss possible spillover or *par ricochet* effects on the other. Moreover, both the Commission and the NCAs are bound to observe the same procedural guarantees that investigated undertakings may invoke as a general principle of EU law<sup>24</sup> or pursuant to the Charter of Fundamental Rights (CFR)<sup>25</sup>. Accordingly, although the Commission has been the institutional model for the vast majority of NCAs, the discussion and construction of procedural standards and concepts in review proceedings against

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<sup>21</sup> See e.g. Paris Court of Appeal (*Cour d’appel de Paris*), 23 September 2010, Judgment No. 148, Case No. 2010/00163, *Orange Caraïbe*.

<sup>22</sup> ECJ Judgment, 24 October 2013, Case C-510/11 P *Kone Oyj*, [2013] ECR-I 0000, para. 22, ECJ Judgment, 8 December 2011, Case C-386/10 P ; *Chalkor*, [2011] ECR-I 13085, para. 64

<sup>23</sup> ECtHR Judgment, 27 September 2011, Case 43509/08, *Menarini*, para. 62

<sup>24</sup> Article 6(3) TEU

<sup>25</sup> Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR.

Commission decisions need to integrate the likely interferences with national procedural autonomy as a source of potential complexity or reduced system effectiveness. This is all the more important where the same case ends up before several competition authorities.

## **II. Proceedings before several competition authorities**

**15.** Effective close cooperation had been the underpinning rationale for setting up the ECN, and the proper functioning of the network depends heavily, first, on avoiding conflicting competence to deal with a given case and, then, on ensuring consistency between the enforcement decisions of the several competitions authorities. While the former has been clarified in a ‘soft-law’ instrument,<sup>26</sup> supplemented by a mutually binding common declaration<sup>27</sup>, the latter goal is pursued by a directly applicable provision – Article 11(6) of Regulation 1/2003. However, neither text can be invoked by investigated undertakings in ongoing proceedings.<sup>28</sup> The *ne bis in idem* principle, on the other hand, may be relied upon and, actually, has also served as a procedural device for regulating overlapping competence between competition authorities in the EU, even before the ECN.<sup>29</sup> Yet the network itself seems to have been designed without integrating the *ne bis in idem* parameter in every possible configuration of intra-system cooperation. As a result, the ambiguity surrounding the scope of *ne bis in idem* in Commission proceedings could also amplify the risks of inconsistent enforcement. Such inconsistency risks may occur either vertically, with respect to the effects of Commission decisions regarding the NCAs (**A**), or horizontally, concerning the effects of NCA decisions regarding other NCAs (**B**).

### **A. Effects of Commission decisions regarding NCAs**

**16.** Given the pyramidal structure of the ECN, antitrust enforcement by the Commission is supposed to set a leading example for the national competition authorities. In order to achieve this essential goal, the whole system has been set up so that the Commission could: i) choose, with in absolute discretion, what cases to investigate, typically those having a Community or EU dimension; ii) control enforcement at the national level by revoking, where necessary, NCA cases following compulsory notification pursuant to Article 11(4) of Regulation 1/2003; and finally, iii) adopt enforcement decisions that bind the NCAs as

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<sup>26</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJEU C 101, 27 April 2004, p. 43-53

<sup>27</sup> Joint Statement regarding the Commission Notice on Co-operation within the Network of Competition Authorities, Doc. 15435/02 ADD 1

<sup>28</sup> CFI Judgment, 8 March 2007, Case T-339/04, *France Télécom*, [2007] ECR-II 526, para. 85

<sup>29</sup> Opinion Kokott, 8 September 2011, Case C-17/10, *Toshiba*, [2011] ECR-I 552, para. 106, referring to the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings presented by the Commission on 23 December 2005 (COM[2005] 696 final).

regards the outcome of the proceedings. On the other hand, it has been made clear that preemptive action by the Commission may only put on hold but does not permanently deprive the NCAs of their competence under national law.<sup>30</sup> Nevertheless, parallel enforcement of two sets of antitrust prohibitions, national and European, is not without consequences from a *ne bis in idem* perspective, especially in case of an ‘acquittal’ by the Commission. Thus, another viewpoint reveals a somewhat hidden discrepancy between the consistency provision of Article 16(2) and the convergence rule in Article 3(2) of Regulation 1/2003.

17. As the Regulation sought to codify the case-law on the binding effects that antitrust enforcement by the Commission may have upon private litigation before national courts,<sup>31</sup> a similar consistency mechanism has been provided for situations where a single case is being decided simultaneously by the Commission and the NCAs. It should be noted, however, that the scope of the consistency provision in Article 16(2) depends on the respective competences for applying EU and domestic antitrust in either public or private enforcement proceedings. Unlike courts in private actions, whose powers to apply both Articles 101 and 102 TFEU and their national equivalents are by no means affected by public actions in parallel<sup>32</sup>, subject of course to the principle of legal certainty and the duty of sincere cooperation with the EU authorities,<sup>33</sup> NCAs are said to be effectively deprived of their competence to apply the Treaty antitrust rules following a Commission action pursuant to Article 11(6) of the Regulation; they may, however, resume enforcement of domestic rules once a final decision has been issued at the EU level.<sup>34</sup> Apparently, such a solution derives from a supposedly reciprocal applicability of EU antitrust and its national counterparts,<sup>35</sup> but it also overlooks the meaning of application in what would qualify as a final decision in order to comply with Article 16(2). Indeed, the fact that lack of jurisdiction implies no powers to apply the substantive antitrust rules does not mean the contrary is equally true so that lack of powers would be a necessary consequence of having no jurisdiction under Articles 101 and 102 TFEU; in fact, it is precisely because the Treaty provisions are applicable that they cannot be applied by the NCAs as long as the Commission is about to enforce them instead. Therefore, according to Article 16(2), a final decision on the merits at the EU level is to determine the residual

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<sup>30</sup> ECJ Judgment, 14 February 2012, Case C-17/10, *Toshiba*, [2012] ECR-I 72, paras 75 and 79.

<sup>31</sup> ECJ Judgment, 14 December 2000, Case C-344/98, *Masterfoods*, [2000] ECR-I 1412, para. 52

<sup>32</sup> *Ibid.*, para. 47 *in fine*, ECJ Judgment, 30 January 1974, Case 127/73, *BRT I*, [1974] ECR 52, para. 20

<sup>33</sup> *Ibid.*, paras 49 and 51, ECJ Judgment, 28 February 1991, Case C-234/89, *Delimitis*, [1991] ECR-I 977, paras 47 and 53

<sup>34</sup> ECJ Judgment, 14 February 2012, Case C-17/10, *Toshiba*, [2012] ECR-I 72, para. 80

<sup>35</sup> *Ibid.*, para. 77

enforcement at the national level,<sup>36</sup> but it remains unclear to what extent the *ne bis in idem* principle might come into play.

**18.** Should enforcement of EU and national antitrust be mutually dependent, as a logical consequence of the view that action pursuant to Article 11(6) not only deprives NCAs of their EU powers but also (at least temporarily) of their powers under domestic rules,<sup>37</sup> and possibly *vice versa*, then resuming proceedings under national law once the Commission has decided the case would most likely not be possible without the NCAs applying afresh Articles 101 and 102 TFEU.<sup>38</sup> On the other hand, such a subsequent application following a Commission enforcement decision could trigger the *ne bis in idem* prohibition, inasmuch as this fundamental procedural safeguard has been construed in a fairly broad manner by the ECtHR and, hence, could apply irrespective of the legal provisions that are being applied.<sup>39</sup> In other words, since new investigation against the same undertakings concerning the same allegedly anti-competitive conduct is to be banned as such, it would not matter if the NCAs are to apply either or both EU and national antitrust laws. For this reason, in addition to redefining the *idem* part of the *ne bis in idem* principle, it has been suggested that Article 16(2) needs to be understood broadly as not requiring full identity of fact and offender for the NCAs to comply with its consistency provision.<sup>40</sup> However, this interpretation risks blurring the line between consistency and convergence, especially where only the operative part of a Commission decision is to be considered as ‘EU law’ within the meaning of Article 3(2) of the Regulation. As a result, it is likely that, on the one hand, observing a previous Commission decision becomes a preliminary step to complying with the convergence rule, but on the other hand, that could undermine the rationale behind the convergence rule governing unilateral conduct where, in particular, Article 102 TFEU is declared inapplicable pursuant to Article 10 of the Regulation. Moreover, it appears that, from an NCA standpoint, the convergence rule not only prevents normative conflicts between substantive rules but may also impact the decision-making powers under Regulation 1/2003 and national procedure, respectively, and thereby finding no infringement of EU antitrust could eventually lead to a formal non-infringement decision concerning domestic antitrust.

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<sup>36</sup> *Ibid.*, para. 86 *in fine*

<sup>37</sup> *Ibid.*, 78

<sup>38</sup> For a discussion, see. Anton Dinev, The European Court of Justice rules on parallel enforcement under Regulation 1/2003 while declining to redefine *ne bis in idem* within the ECN (Toshiba), *e-Competitions*, n° 49475, [www.concurrences.com](http://www.concurrences.com)

<sup>39</sup> ECtHR (Grand Chamber) Judgment, 10 February 2009, App. n° 14939/03, *Zolotoukhin*, para. 83 *in fine*, ECtHR Judgment, 4 March 2014, Apps n° 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens*, paras 220 and 224

<sup>40</sup> Opinion Kokott, 8 September 2011, Case C-17/10, *Toshiba*, [2011] ECR-I 552, para. 87

**19.** The potential discordance between Articles 16(2) and 3(2) of Regulation 1/2003 was, actually, predictable given the mechanical substitution of mutually exclusive enforcement under the initial proposal by a system of parallel enforcement under the current procedural framework, without however calculating possible outcomes of applying in parallel both substantive and procedural rules. Indeed, contrary to the original system that did not need any convergence rule at all, at present complexity is much greater and requires, accordingly, consistency: i) first, a) between proceedings before different authorities, Commission and NCAs, and b) between the application of different sets of substantive laws, EU and national; ii) but also, a) between different or partially similar (as subject-matter) cases, and b) cases of completely identical facts and offender(s). However, at the heart of this four-dimensional enforcement configuration resides a delicate balance of consistency and convergence which should not be tipped in either direction so that close cooperation between the Commission and the NCAs could eventually foster a ‘positive’ convergence beyond the ‘negative’ one, which merely prohibits divergence.<sup>41</sup> Such a ‘positive’ convergence, meaning in practice an ever increasing harmonization of national laws and their consistent normative construction, could prove essential for the overall effectiveness of public and private enforcement of EU and national antitrust, while also minimizing possible shortcomings of regulating the effects of NCA decisions regarding other NCAs.

#### **B. Effects of NCA decisions regarding other NCAs**

**20.** Perhaps the most notable innovation in the general scheme of EU antitrust enforcement was that, in addition to the more classic vertical cooperation, the ECN also set up for the first time a horizontal cooperation at the national level between the NCAs. While this additional dimension proved particularly useful and well-suited for collecting and exchanging evidence abroad, it remains to be seen to what extent it might determine the outcome of opening and/or closing enforcement proceedings by several NCAs regarding the same facts and undertakings. On the one hand, as it was already pointed out with respect to cases dealt with by a single NCA, the Regulation provided for broadening the enforcement discretion of the Member State competition authorities in so far as they have to apply EU antitrust. But this harmonization only sets out a minimum standard; national rules may provide for even broader discretion, regarding both national and EU antitrust prohibitions, inasmuch as that does not affect adversely the effectiveness of EU antitrust enforcement. On the other hand, there is no harmonization as to the scope of the *ne bis in idem* principle that would build upon the

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<sup>41</sup> *Ibid.*, para. 87 *in fine*.

distinction between finding and sanctioning an infringement, especially where final decisions enjoy *res judicata* status and effects.

**21.** Mindful of national procedural rules that could limit the enforcement discretion of NCAs, especially when acting upon complaints, the drafters of Regulation 1/2003 included a specific provision whereby NCAs may reject a complaint or suspend proceedings on grounds that the same case is being or has been dealt with by another NCA. This provision in Article 13 of the Regulation has been said to establish a strictly optional power for the NCAs insofar as the application of Articles 101 and 102 TFEU is concerned<sup>42</sup>, but it seems that, as with Article 16(2), no attention has been given to a situation where domestic antitrust is enforced in parallel. Should or must application of national law be dismissed or suspended as well? If yes, on what grounds? Unlike national courts in private actions and the Commission, NCAs are not bound among themselves by the duty of sincere cooperation, which only governs the vertical relations between national authorities and the EU institutions. On the other hand, compliance with the convergence rule could be seriously jeopardized if NCAs are to avoid so easily enforcement of EU antitrust and still proceed with the application of national rules. It is therefore necessary to distinguish existence of EU jurisdiction or competence from its exercise. Indeed, somewhat contrary to the view that Article 3(1) of the Regulation apply solely to parallel enforcement, it is instead more appropriate to consider this provision as related to the existence of EU competence and the corresponding duty to apply Articles 101 and 102 TFEU as long as interstate trade is affected to an appreciable extent. The exercise of that competence, however, may be subject to other provisions, like the convergence rule in Article 3(2) and of course Article 13 of the Regulation. Accordingly, rejecting a complaint or staying proceedings pursuant to Article 13 is without prejudice to Article 3(2), which would result in practice in the obligation to also stay the exercise of domestic competence until another competent NCA decides the case in application of EU antitrust. This is yet another example of the procedural implication of the convergence rule, but it remains unclear whether or to what extent it would be possible in such a situation to resume enforcement given the *ne bis in idem* prohibition.

**22.** In fact, perhaps even more important than its possible vertical dimension within the consistency mechanism for preventing conflicts between Commission and NCA decisions, the *ne bis in idem* principle is also applicable horizontally to parallel enforcement of EU antitrust by two or more NCAs at a time. Thus, in order to avoid paralyzing the whole system of trans-

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<sup>42</sup> ECJ Judgment, 14 February 2012, Case C-17/10, *Toshiba*, [2012] ECR-I 72, para. 90 and Opinion Kokott, 8 September 2011, Case C-17/10, *Toshiba*, [2011] ECR-I 552, para. 89

national cooperation and mutual assistance, it is indispensable to be more precise about the conditions that could trigger the *ne bis in idem* prohibition. A recent discussion before the ECJ placed more weight on the *idem* part and suggested to reconsider the required three-fold identity of fact, offender and protected legal interest by removing the latter.<sup>43</sup> In *Toshiba*, the Court did refer to a given conduct's anti-competitive effects within a relevant market as part of the *idem* condition<sup>44</sup>, but refrained from discussing the *bis* condition. Nevertheless, the latter is indispensable for deciding what would be a second investigation against the same undertakings for the same facts, irrespective of the applicable law. A closer look at the cases, not only in competition matters where the *ne bis in idem* principle has been considered either by the ECJ or the ECHR, could support the view that, more than the organic criterion – that is, a subsequent prosecution by *another* authority – what matters most is actually a material criterion – that is, the nature of the final decision in the first proceedings<sup>45</sup>. There is in effect a crucial difference between administrative and judicial enforcement decisions that emerges from the comparison of 'condemnation' and 'acquittal' decisions. Where a previous infringement decision imposes a penalty, then another administrative NCA need only take into account that penalty and its territorial reach determined by the respective *imperium*, but there is nothing to prevent it from formally finding again that Articles 101 and 102 TFEU have been violated.<sup>46</sup> By contrast, judicial findings on the merits enjoy *res judicata* authority<sup>47</sup>, which reflects the *juridictio* determined by the scope of the applicable law, and could, as such, trigger the *ne bis in idem* prohibition, especially where no infringement has been found. Therefore, given the diversity of NCAs, there may be some concerns about the level-playing-field enforcement of EU antitrust by the national authorities alone.

**23.** In light of the above, it appears even clearer that the ECN and close cooperation within it have been designed as if all its members would be administrative authorities like the Commission and have similar powers. Although most of the NCAs are indeed a close match

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<sup>43</sup> *Ibid.*, paras 122 and 123

<sup>44</sup> ECJ Judgment, 14 February 2012, Case C-17/10, *Toshiba*, [2012] ECR-I 72, para. 99

<sup>45</sup> Concerning Article 54 of the Convention implementing the Schengen Agreement (CISA) : ECJ Judgment, 5 June 2014, Case C-398/12, *M.*, [2014] ECR-I 0000, paras 30, 31 and 40, ECJ Judgment, 22 December 2008, Case C-491/07, *Turansky*, [2008] ECR-I 11039, paras 34 and 35, ECJ Judgment, 28 September 2006, Case C-150/05, *Van Straaten*, [2006] ECR-I 9350, para. 61, ECJ Judgment, 10 March 2005, Case C-469/03, *Miraglia* [2005] ECR I-2009, para. 30. *Adde.* ECtHR (Grand Chamber) Judgment, 10 February 2009, App. n° 14939/03, *Zolotoukhin*, para. 83

<sup>46</sup> ECJ Judgment, 13 February 1969, Case 14/68, *Walt Wilhelm*, [1969] ECR 1, para. 11

<sup>47</sup> ECtHR Judgment, 4 March 2014, Apps n° 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens*, para. 222, in which the Court pointed out, in line with *Zolotoukhin*, that it is the moment of acquiring *res judicata* that determines whether one has already been finally acquitted or convicted within the meaning of Article 4 of Protocol n°7. At the EU level, AG Sharpston took the view that so far the ECJ's approach has not been dissimilar from that of the ECtHR (Opinion Sharpston, 6 February 2014, Case C-398/12, *M.*, [2014] ECR-I 0000, para. 35).

to the Commission in terms of powers and organization, there are still Member States where antitrust enforcement decisions are adopted by courts, and thus have *res judicata*. Furthermore, even in countries where administrative authorities are in charge of antitrust enforcement, subsequent judicial review may also include the power to re-decide the case on the merits, in which event the very finding that antitrust violations have or have not occurred would bear *res judicata* authority. In both of these cases, meritorious decisions by courts or tribunals are not subject to the cooperation and consistency mechanisms of the ECN that allow the Commission to step in and revoke the case; otherwise, they will no longer be considered as courts or tribunals for the purposes of referring preliminary questions to the ECJ<sup>48</sup>. On the other hand, not only can the *res judicata* of such enforcement decisions trigger the *ne bis in idem* prohibition and paralyze simultaneous or subsequent proceedings before several NCAs, but it may also call into question the ongoing efforts to synchronize public and private enforcement of EU antitrust where the parties to competition proceedings are also defendants in damages actions before civil or commercial courts.

### **III. Proceedings before competition and judicial authorities**

**24.** It is well established that from its inception the procedural reform introduced with Regulation 1/2003 aimed at giving more weight to private enforcement of Articles 101 and 102 TFEU. A decade later, the long awaited EU legislation on damages claims arising out of antitrust violations is about to become effective law.<sup>49</sup> As expected, one of the main concerns, which is now a key objective of the new harmonized rules, has been the balance between a largely dominant public enforcement and a still underdeveloped private enforcement.<sup>50</sup> Seeking complementarity rather than opposition or duplication between proceedings with different purposes,<sup>51</sup> the Draft Directive provides for procedural economy by decidedly easing proof of infringements before competent civil or commercial courts across the EU.<sup>52</sup> In so doing, it combines different approaches and solutions already existing in various legal

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<sup>48</sup> ECJ (Grand Chamber) Judgment, 31 May 2005, Case C-53/03, *Syfait*, [2005] ECR-I 4638, paras 34 and 36.

<sup>49</sup> Based on the Commission proposal of 11 June 2013 for a Directive 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 (COM(2013) 404 final, 'Commission Proposal'), the European Parliament and the Council agreed upon an amended text, which was adopted by the Parliament on 17 April 2014, pending final approval by Council (A7-0089/2014, 'Draft Directive').

<sup>50</sup> Recital 6 in the preamble to the Draft Directive. See also paragraph 1.2 of the Explanatory Memorandum to the Commission Proposal.

<sup>51</sup> See White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final), p. 3, Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules (SEC(2008) 404), paras 18 and 21.

<sup>52</sup> Recital 31 in the preamble to and Article 9 of the Draft Directive

instruments, such as the Regulation on judicial competence<sup>53</sup> or the Regulation on obtaining evidence abroad,<sup>54</sup> and of course Regulation 1/2003. Accordingly, the intensity of the effects of NCA enforcement decisions on private proceedings may vary, to a different extent, by comparison to those of Commission final decisions. Moreover, the Draft Directive considers all together public enforcement of both national and EU antitrust in order to delimit the binding authority of NCA decisions, which is a considerable extension of the scope of a consistency mechanism that had originally been designed solely for public enforcement of EU law. As a result, some of the problems discussed in the previous section are likely to reappear under the newly harmonized rules for damages claims, all the more so as these only regulate the effects of infringement decisions (A) to the exclusion of those of non-infringement decisions (B).

#### **A. Effects of infringement decisions**

25. The underlying reason for making final infringement decisions binding upon civil or commercial courts has been to bring about a more level-playing field for potential plaintiffs in private actions while ensuring consistent enforcement. This dual goal reflects the role of private enforcement in the EU, which transcends simple compensation for antitrust harm and seeks effective judicial protection of rights stemming from direct-effect provisions of EU law. The latter would indeed be seriously jeopardized without proper interaction with competition authorities. In addressing this need, both EU and national law provide mechanisms for assistance, by allowing preliminary references and *amicus curiae* submissions, as well as for coherence, by compelling national courts to observe the meritorious findings in public enforcement decisions. This observance, however, varies depending on the competition authority concerned. According to the Draft Directive, Commission and ‘national’ NCA decisions, without or upon judicial confirmation, share essentially the same preclusive effect as to further re-decision on the merits, with the notable exception that, at the national level, this effect may also cover enforcement of domestic antitrust. On the other hand, unlike the Commission Proposal<sup>55</sup>, ‘non-national’ NCA decisions, including instance in which they do not survive judicial review and the case is re-decided on the merits with *res judicata* effects,

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<sup>53</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1. This Regulation has been replaced by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1, which for the most part will enter into force on 10 January 2015.

<sup>54</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

<sup>55</sup> Article 9 of the Commission Proposal provided for the same territorial scope of binding effect of NCA decisions as already suggested in the White Paper, see Staff Working Paper, para. 162.

may only constitute a *prima facie* evidence of antitrust infringement on any market within the EU.

26. Building upon the seminal ruling in *Masterfoods*, first Article 16(1) of Regulation 1/2003 and now Article 9(1) of the Draft Directive prevent national civil or commercial courts from reconsidering the very finding of an infringement in a decision that apply Articles 101 and 102 TFEU. But the new Directive goes a step further in two respects. First, its latest version makes it clear that the NCA enforcement decisions merely establish an irrefutable presumption that antitrust violation has occurred. Second, this presumption is to apply in actions for damages under both EU *and* domestic antitrust when enforced in parallel<sup>56</sup>. Such a harmonized rule leaves, nonetheless, some room for uncertainty about the scope and the nature of the effects given to infringement decisions. On the one hand, it should be recalled that, like the NCAs, national courts also have a duty to apply EU antitrust as long as a private action under domestic law is brought against alleged anticompetitive behavior that may affect interstate trade. However, in a follow-on context it seems obvious that EU law already applies, irrespective of how many of the defendants are also addressees of an infringement decision. Consequently, there can be no action for damages harmonized by the Directive-to-be without prior public enforcement, and plaintiffs would typically invoke either a Commission or an NCA decision. Yet, in cases dealt with in parallel by the Commission and a given NCA, the discrepancy discussed above between Articles 16(2) and 3(2) of the Regulation might result in a differentiated, although not conflicting, enforcement of Article 102 and its national equivalent to the same set of facts. Indeed, since the NCAs must only avoid a decision that would run counter to the Commission's findings, they could eventually likewise adopt an infringement decision by applying stricter domestic rules to the conduct at issue. That would, arguably, not be without consequences for issues such as causation, which generally falls outside the scope of the Draft Directive, except for harm caused by cartel infringements.<sup>57</sup> Therefore, it is not unlikely that, in hearing actions for damages under both EU and domestic abuse-of-dominance prohibitions, national courts encounter a sort of non-harmonized gap between the binding effect of Commission decisions pursuant to Regulation

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<sup>56</sup> Recital 10 *in fine* in the preamble to the Draft Directive : “The provisions of this Directive should not affect damages actions for infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.”

<sup>57</sup> Recital 42 in the preamble to and Article 17(2) of the Draft Directive. In addition, the ECJ has recently established that national legislations may not exclude, categorically and regardless of the particular circumstances of the case, the existence of a direct causal link between the so called ‘umbrella pricing’ and alleged antitrust harm of cartel infringement, ECJ Judgment, 5 June 2014, Case C-557/12, *Kone*, [2014] ECR-I 0000, para. 33. By contrast, on causation and binding effects in an Article 82 EC case, see. the UK case *Enron Coal v. English Welsh & Scottish Railway*, [2011] EWCA Civ 2.

1/2003 and similar effects of applying national law. At the same time, this example highlights the evidentiary nature of the effects in question.

27. It should be noted that, albeit often approximate, the authority of Commission decisions within the ECN and their binding effect upon national courts are actually substantially different. Unlike the former, the latter is not intended to develop a certain antitrust policy throughout the EU, but to reduce asymmetrical access to and use of evidence since competition proceedings are particularly complex and fact-intensive.<sup>58</sup> From this angle, it is more appropriate to consider as identical the effects of public enforcement upon damages claims, while their magnitude may vary according to the competition authority concerned. In other words, both the ‘preclusive effect’ of Commission and ‘national’ NCA decisions, on the one hand, and the ‘effect of prima facie evidence’ of ‘non-national’ NCA decisions, on the other hand, have strictly the same evidentiary nature or “probative effect”,<sup>59</sup> which is also suggested by the use of a legal presumption<sup>60</sup> instead of a specific rule that controls the outcome of applying the law.<sup>61</sup> The difference, however, resides in the extent to which defendants, or even some plaintiffs, in actions for damages are allowed to incidentally challenge the findings of a competition authority, given that private enforcement derives from the direct effect of Articles 101 and 102 TFEU. Thus, in light of the principle of effective judicial protection, parties to proceedings before national civil or commercial courts who were not addressed an infringement decision of the Commission may request a reference to the ECJ in order to re-examine the legality of that decisions.<sup>62</sup> Similar mechanisms for extraordinary judicial review exist at the Member State level as regards enforcement decisions of ‘national’ NCA. By contrast, where findings of an infringement of EU antitrust are relied upon in another Member State, such decisions of ‘non-national’ NCAs may not be challenged incidentally; hence, they could only be considered *at least* as prima facie evidence, according to the Draft Directive. While it is true that the new rules provide for minimum harmonization, it remains to be seen how this minimally intense effect of prima facie evidence will contribute to a more level playing field for private actions sought in the Commission’s proposal or whether, instead, it might introduce an incentive for forum shopping in countries such as

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<sup>58</sup> Recital 13 in the preamble to the Draft Directive.

<sup>59</sup> Paragraph 4.3.1 of the Commission Proposal.

<sup>60</sup> A technique that only presumes the existence of a given fact and does not determine, as such, the authority of final judicial or administrative decisions.

<sup>61</sup> Such as Article 16(2) of Regulation 1/2003 and the *res judicata* and *res interpretata* authority of ECJ rulings.

<sup>62</sup> Opinion Van Gerven, 27 October 1993, Case C-128/92, *H. J. Banks*, [1994] ECR-I 1209, para. 60

Germany whose procedural rules, respectful of the equivalence principle, already recognize as binding the findings of ‘non-national’ NCAs.<sup>63</sup>

**28.** The German example is also interesting as it draws heavily upon the Commission’s analysis in previous public consultations, but ultimately departs from the Draft Directive by differentiating the effects of judgments reviewing the legality of NCA decisions from those of judgments re-deciding the case on the merits in lieu of an NCA. Indeed, first the definitions governing the new harmonized rules refer to ‘infringement decision’ as a decision of a competition authority or review court that finds infringement of competition law,<sup>64</sup> second, ‘review court’ is to be understood irrespective of whether that court has the power to find an infringement of competition law<sup>65</sup>, and finally, both the binding effect and that of *prima facie* evidence are equally applicable to, respectively, ‘national’ and ‘non-national’ review court judgments.<sup>66</sup> As a result, the evidentiary nature of the two effects as well as the binding authority of Commission decisions are somewhat assimilated to the *res judicata* of meritorious judgments. This is also supported by the view that not only the operative part but also its supporting grounds are to be observed by the courts in actions for damages, which is a direct reference to the scope of judicial *res judicata*. Nevertheless, it should not be overlooked that the *res judicata* authority is not evidentiary in nature but a defining characteristic of the judgment as an act of exercising *jurisdictio*. Likewise, it should not be confused with the *sui generis* binding effect of Commission decisions, which is the result of a specific provision, intended to preserve the primacy of EU law. Otherwise, should binding effects and *res judicata* be considered as interchangeable, it would be, instead, even more difficult to see why judicial findings of non-infringement need not be taken into account in follow-on actions, inasmuch as review courts are not part of the ECN and that no harmonization in this respect has been contemplated by the Draft Directive.

## **B. Effects of non-infringement decisions**

**29.** That non-infringement decisions are not given any consideration in the new Directive-to-be on damages claims is not surprising in light of the ECJ’s ruling in *Toshiba* that finding Articles 101 and 102 TFUE inapplicable in individual cases remains exclusively

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<sup>63</sup> §33(4) GWB: “Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority or court acting as such in another Member State of the European Community. The same applies to *such findings* in final judgments resulting from appeals against decisions pursuant to sentence 1” (emphasis added).

<sup>64</sup> Article 4(11) of the Draft Directive

<sup>65</sup> Article 4(10) of the Draft Directive

<sup>66</sup> Recital 31 in the preamble to the Draft Directive

with the Commission pursuant to Article 10 of Regulation 1/2003 whereas NCAs may only state no grounds for action by virtue of Article 5(2) thereof<sup>67</sup>. Accordingly, it could appear rather superfluous to set out common rules for the effects non-infringement decisions might have upon courts and private parties in follow-on actions.<sup>68</sup> Nevertheless, unless NCA decisions are to be reviewed merely on grounds of legality or even re-decided on the merits but only to find an infringement, it would not be uncommon for defendants in damages claims to invoke and rely on judgments of review courts that hold, with *res judicata* opposable to plaintiffs, that there has been no violation of EU antitrust. In fact, such *res judicata* findings of non-infringement are even more likely where a court acts as the decision-making body of the NCA. It is therefore not quite clear why applying the prohibitions in Articles 101 and 102 TFEU, by formally finding that they have not been breached, would jeopardize the proper functioning of cooperation under Regulation 1/2003 since the latter does not include public enforcement by judicial authorities. Besides the *ne bis in idem* argument, which could hardly apply to such findings by administrative NCAs, there seems to have been a confusion between non-infringement and inapplicability decisions that is even more visible in light of the respective effects these two types of decision may have on private enforcement. While both raise similar issues as to the exact scope of their authority upon subsequent determination of liability for antitrust damages, the inapplicability decisions are given strong binding effects whereas non-infringement decisions remain purely declaratory.

**30.** Unlike infringement decisions, whose personal reach is of course important but does not itself determine the outcome of subsequent private actions, a binding decision by a competition authority that declares Articles 101 and 102 TFEU either inapplicable or that their prohibitions have not been violated effectively bars further discussion of alleged personal liability for antitrust damages or any other civil claim for that matter. Accordingly, the exact scope of such enforcement decisions that clearly benefit potential defendants in follow-on private claims is most likely to be the focal point of debate before civil or commercial courts. As a general rule, administrative decisions, including those of the Commission, are binding in their entirety upon whom they are addressed to in the operative part.<sup>69</sup> On the other hand, considering a given anticompetitive behavior as such could place more weight on subject-matter findings of fact and widen protection against claims for damages. The issue has already appeared at the national level under the procedural framework

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<sup>67</sup> ECJ Judgment, 3 May 2011, Case C-375/09, *Tele2 Polska*, [2011] ECR-I 03055, para. 30

<sup>68</sup> Likewise, the White Paper did not consider non-infringement decisions, Staff Working Paper, para. 152

<sup>69</sup> Article 288 TFEU

prior to Regulation 1/2003<sup>70</sup> and cannot be ruled out at present as well, even though the Commission has not issued an Article 10 decision yet. That is because both inapplicability and non-infringement decisions share essentially the same evidentiary effects regarding private enforcement as infringement decisions: whether or not a relevant fact has been established for the purposes of proving a follow-on claim. However, where facts are found inexistent or not proven to the requisite standards, limiting the reach of the evidentiary effects of such findings by making them opposable *inter partes* also reveals potential inconsistency risks from a broader policy perspective. It is this perspective that, actually, draws the line between inapplicability and non-infringement decisions, depending on their binding authority as regards the competent civil or commercial courts.

**31.** As it is apparent from recital 14 in the preamble to Regulation 1/2003, Article 10 decisions are meant to be an *ex ante* means for ensuring consistency throughout the EU with respect to novel issues related to agreements or practices that, exceptionally, need not be prohibited any longer.<sup>71</sup> Accordingly, they are to be issued solely at the Commission's discretion, either *ex nihilo* or by revoking an NCA case which would otherwise find an infringement of Articles 101 and 102 TFEU. The latter scenario also suggests that, in addition to their *ex ante* authority, inapplicability decisions may as well contain an *ex post* declaration about the lawfulness of the conduct at issue. That *ex post* finding has the same declaratory nature as a formal finding of non-infringement; in both cases, administrative decisions merely state the law as it stands. As such, they could only produce binding evidentiary effects *inter partes*, had there been a provision, European or national, similar to Article 16 of the Regulation or Article 9 of the Draft Directive that would regulate the effects upon private litigation of non-infringement decisions by the NCAs. By contrast, the Commission's inapplicability decisions are also – and most notably – oriented *ex ante*, with regard to sufficiently similar *ratione materiae* but not identical *ratione personae* cases in the future – namely, those concerning the same markets and/or comparable agreements and practices – where Article 16(1) of Regulation will have the effect of extending their authority by making them binding upon the competent courts as to the very outcome of a private litigation. Arguably, in such cases deference to Article 10 decisions would appear quite like observing an *ad hoc* block exemption, including in abuse-of-dominance cases, which could also raise

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<sup>70</sup> UKHL Judgment, 19 July 2006, *Inntrepreneur Pub Company e. a. v Crehan* [2006] UKHL 38; EWCA Judgment, 21 May 2004, *Bernard Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ. 637

<sup>71</sup> Opinion Mazak, 7 December 2010, Case C-375/09, *Tele2 Polska*, [2010] ECR-I, para. 37. *Adde.*, Commission Staff Working Paper accompanying the Report on the functioning of Regulation No 1/2003 (SEC(2009) 574 final).

questions about the scope and applicability of the convergence rule in Article 3(2). On the other hand, NCA findings of non-infringement remain purely declaratory, as defendants in private litigation to whom they are opposed but who were not parties to public enforcement proceedings are generally entitled to challenge incidentally their legality. From this angle, the procedural regime of non-infringement decisions is evidently closer to that of decisions stating no grounds for action<sup>72</sup>, where NCAs are to issue a reasoned decision in every case upon an admissible complaint, than to that of the Commission declaring Articles 101 and 102 TFEU exceptionally inapplicable to a given type of conduct on the market.<sup>73</sup>

**32.** More generally, however, the ECJ's differentiated approach to inapplicability and non-infringement decisions could be said to reflect a remnant of the initial enforcement framework for the Treaty antitrust provisions – the classic vertical line of cooperation between the Commission and the national competition and judicial authorities, as opposed to the current horizontal line of coordination between public and private enforcement. Making the latter a workable model of complementary and mutually effective application of Articles 101 and 102 TFEU cannot do without a genuine decentralization of public antitrust enforcement since private enforcement takes place solely at the national level. Accordingly, NCAs need not be prevented or discouraged to apply the Treaty antitrust provisions in their entirety by thoroughly examining their substantive conditions and unequivocally declaring them broken or not. This is supported *a fortiori* by the fact that judicial authorities may already make the same findings with *res judicata* effects in both public and private actions. Therefore, formal non-infringement decisions not only better guarantee the rights of complainants in administrative proceedings but also add to further synchronization of antitrust enforcement by agencies and courts in order to give full effect to the legal exception system, introduced with Regulation 1/2003. That is all the more important as the Commission has concentrated its efforts on prosecuting large-scale cartels that could not possibly qualify for exemption. Conversely, apart from block exemption regulations, Article 101(3) TFEU is set to be applied chiefly by national authorities and courts. They are also the natural fora for the vast majority of Article 102 cases. As a result, in spite of lacking expertise in complex economic assessment, civil or commercial courts in stand-alone actions remain better placed to rule on the existence or not of an antitrust infringement than all the administrative NCAs

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<sup>72</sup> See e. g., in the context of Regulation 17/62, CFI Order, 17 October 2005, Case T-24/02, *First Data*, [2005] ECR II-4122, para. 50.

<sup>73</sup> See, to that effect, Anton Dinev, The Bulgarian Supreme Administrative Court upholds an NCA decision finding no infringement of Art. 102 TFEU in a case involving concurrent application of competition rules and communications regulation (BTC Cable Ducts), *e-Competitions*, n° 38336, [www.concurrences.com](http://www.concurrences.com)

across the Union whose final decisions on the merits, in view of the ECJ, may only find an infringement, no matter the appraisal of alleged objective justifications or Article 101(3) conditions. Decidedly, asymmetrical powers to enforce equally applicable provisions could eventually lead to disproportionate incentives for either follow-on or stand-alone private claims at the expenses of a more consistent approach to antitrust as a system of rules and decisions.

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**33.** In guise of conclusion, the effects of antitrust enforcement decisions in the EU are naturally multi-dimensional in the complex procedural aftermath of Regulation 1/2003, but could also call into question the effectiveness of EU antitrust. There are more or less obvious deficiencies in the procedural framework for applying Articles 101 and 102 TFEU in a consistent manner throughout the Union, irrespective of either the temporal or geographical scope of enforcement or its public or private nature. From a public enforcement perspective, reciprocal influences between proceedings, as well as the mutual interdependence of EU and national rules, may adversely impact the dynamics of either subsequent or simultaneous single- and multi-agency actions to an extent that reduced network efficiency of the ECN significantly increases the risk of inconsistency. But consistency is likewise at risk by non-ECN public enforcement within judicial review of administrative NCA decisions. Ultimately, the challenges before the ECN could be decisive for striking a workable balance between public and private enforcement as long as the former is to set the tone for applying Articles 101 and 102 TFEU in actions for damages. In any event, however, the evolving procedural landscape of EU antitrust over the past ten years has been a useful example of how a complex system interacts with its environment, legal and economic, in order to foster a truly European competition culture.