Editorial: the (in)effectiveness of parallel antitrust investigations

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Editorial

The (In)effectiveness of Parallel Antitrust Investigations

In early September 2024, amidst the buzz surrounding the seminal rulings delivered by the Court of Justice on EU merger control (*Illumina v Commission*), antitrust (*Google Shopping*) and State aid (*Commission v Ireland*), the European Commission discreetly published the results of its evaluation of the EU antitrust enforcement framework. The evaluation aimed to assess whether the current procedural rules, in place for over two decades, are still fit for purpose. During the inquiry, the European Commission collected extensive evidence on the functioning of Regulation 1/2003 and its implementing Regulation 773/2004 through a broad consultation process and an external support study. Based on this empirical data, the Commission sought to determine whether updates to the current rules might be needed.

It was evident that any decision to propose legislative changes would be deferred to the new Commission taking office later this year. Yet, after such a comprehensive 30-month review, there is a palpable sense of anticlimax. The staff working document, said to "reflect the findings and views" of DG Competition,[1] is descriptive rather than analytical. It primarily reports that national competition authorities (NCAs) and stakeholders generally agree that the framework has led to an "effective", "efficient", and "uniform" application of Articles 101 and 102 TFEU. Unfortunately, the report lacks clarity regarding the normative standards used to evaluate these claims, relying instead on factual but often inconclusive summaries of stakeholders' opinions on various procedural matters. This draws all the more attention to the tiny section in the 250-page report that, in just a few paragraphs, highlights the two critical lessons learned. The first is that there is a pervasive need for faster decision-making – an issue also raised by the recent Draghi report on the future of European competitiveness.[2] No single factor is solely to blame for the long duration of antitrust investigations, which of course can be highly complex. However, throughout the evaluation, the Commission identified certain areas where its tools and powers have become inefficient as they no longer align with the realities of a more digitised economy. These include provisions related to the access to the file procedure and the collection and preservation of digital evidence (outside of an inspection context). Procedural innovations introduced by the Digital Markets Act Implementing Regulation, such as retention orders or the confidentiality ring system, are likely to serve here as model for potential reform. The second lesson is that coordination within the European Competition Network (ECN) could be further optimised, especially regarding the concurrent application of different legal frameworks, including stricter national competition rules, and case allocation. The re-

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1 Commission Staff Working Document, *Evaluation of Regulations 1/2003 and 773/2004* (SWD (2024)) 216 final.

2 Mario Draghi, *The future of European competitiveness: in-depth analysis and recommendations* (2024).

port firmly emphasises the importance of flexible, non-binding case allocation principles and behind-the-scenes consultations to preserve mutual trust among ECN members. At the same time, it recognises the unpredictability that comes with this approach and highlights the need to minimise the risk of unnecessary parallel investigations by multiple NCAs addressing the same conduct, as this can lead to conflicting outcomes and higher legal costs for the undertakings being investigated and third parties.[3] This raises an important question that is left unanswered: what exactly constitutes "unnecessary" parallel proceedings, and how can they be avoided?

In response, I would like to put forward three simple propositions (1) the likelihood of parallel antitrust enforcement action is set to increase; (2) consecutive parallel proceedings are the least advantageous; and (3) we should explore the potential for strategically coordinated actions.

1. As NCAs increasingly assert their role in addressing cross-border anti-competitive practices, often involving large online platforms, it is expected that parallel enforcement actions by two or more competition authorities will become more prevalent. In a mature, decentralised EU antitrust enforcement system, this trend is unavoidable. While the European Commission remains particularly well-placed to effectively deal with conduct that impacts multiple Member States, it cannot handle all such cases.

2. Parallel antitrust enforcement, where two or more NCAs pursue action against the same company for identical behaviour within their own jurisdiction, can occur along a continuum ranging from simultaneous to consecutive investigations. It is crucial to distinguish between these variations. Simultaneous parallel investigations remain quite rare. The coordinated efforts seen in the hotel booking cases – where the French, Italian, and Swedish authorities worked closely together on all aspects of their investigations alongside other members of the ECN - have not been repeated on that scale since. Today, most (coordinated) simultaneous investigations are regional in scope and focus on local issues, typically cartels.[4]

   What we are seeing more frequently, however, are consecutive parallel investigations that are isolated from one another. For instance, while the Spanish competition authority imposed a record fine on Booking.com this summer for abusing its dominant position, the Italian competition authority launched an investigation into the same conduct. Meanwhile, the Spanish authority initiated an investigation into Apple for imposing unfair conditions on app developers for access to the App Store. These types of parallel actions are particularly disadvantageous because they are

3 SWD (n 1) 240-247.

4 See for example Competition Council Republic of Latvia, 'Latvian and Lithuanian competition authorities join forces for investigation of cross-border infringements' (press release, 4 March 2020) <https://www.kp.gov.lv/en/article/latvian-and-lithuanian-competition-authorities-join-forces-investigation-cross-border-infringements> accessed 23 September 2024; Autoridad da Concorrência, 'The AdC and CNMC reinforce their strategic cooperation' (press release, 20 October 2022) <https://www.concorrencia.pt/en/articles/adc-and-cnmc-reinforce-their-strategic-cooperation> accessed 23 September 2024.

both ineffective (from an EU perspective) and inefficient. Since a NCA's competence to enforce the EU and national antitrust rules is confined to its own territory, ad hoc, uncoordinated enforcement efforts typically have only minimal cross-border impact. For the companies concerned, it remains attractive to adjust their practices only in the Member State where the authority is acting. The likelihood that this subsequently triggers similar action in another Member State is uncertain and even if it does occur, the complete lack of coordination offers little assurance of consistency regarding the investigation or corrective measures. Consequently, we end up with purely domestic remedies.[5] For example, enforcement action by the Dutch competition authority against Apple brought about changes to its App Store rules for the distribution of dating apps exclusively in the Netherlands. Similarly, a more recent investigation into Ticketmasters' EU-wide practices led the company to offer commitments to facilitate the resale of mobile Ticketmaster tickets outside their own platform, but only in the Netherlands.[6]

3. A more promising strategy that merits further exploration is coordinated but non-simultaneous enforcement by multiple NCAs. In this scenario, two or more authorities collaborate closely in a consortium established with the shared intent to address a particular transnational competition law issue in their respective territories, but with one authority designated to take the lead. This model can draw inspiration from the cross-border enforcement of EU consumer laws. Regulation 2017/2394 established a framework for coordinated actions to combat practices impacting more than two Member States ("widespread infringement") or most Member States ("widespread infringement with a Union dimension").[7] Once such an action is initiated, national consumer authorities coordinate their investigations with the support of the European Commission. By working on a common position, they collectively increase pressure on multinational companies to make commitments and change their practices at the EU-level. This strategy often proves effective, because if that fails, the authorities resort to taking formal enforcement actions in a coordinated manner at the national level.[8] When enforcing the EU antitrust rules vis-à-vis transnational anticompetitive practices, a similar deterrent effect can arise from the fact that, in addition to the investigation by the lead NCA, other proceedings (still in a relatively early stage) have already been initiated by other consortium members or can be expected. If no EU-wide solution is reached, the risk of a domino effect with an uncertain outcome emerges. The company involved thus has an incentive to prefer a

5 There are notable exceptions. For instance, in 2021, the French competition authority found that Google had abused its dominant position in the advertising server market by giving preferential treatment to its own Ad Manager advertising services. Google committed to improve the interoperability with third-party ad server and advertising space sales platform solutions in France but indicated that it would roll out some of the changes more broadly.

6 Authority for Consumers & Markets, 'Commitments made by Ticketmaster: consumers have a choice in resale platforms again' (press release, 19 June 2024) <https://www.acm.nl/en/publications/commitments-made-ticketmaster-consumers-have-choice-resale-platforms-again> accessed 23 September 2024.

7 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1.

8 For an overview of successful coordinated actions see: <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions_en > accessed 23 September 2024.

one-stop-shop approach. Compared to consecutive parallel enforcement, and assuming the European Commission will not pursue the case, strategically coordinated actions by multiple NCAs will be far more effective in securing EU-wide remedies. This approach also improves efficiency, offering opportunities for smaller authorities to enhance their capacity through participation in a consortium, and conclude their procedures more quickly, for example, by making commitments binding.

The recent investigations by the Italian and German competition authorities into suspected abuse of dominance by Bosch, a manufacturer of e-bike systems, serve as an example of coordinated but non-simultaneous parallel enforcement. The German authority not only supported the Italian investigation but also initiated its own investigation to assess potential effects in Germany. Bosch committed to the Italian competition authority to grant all providers of anti-lock braking systems across Europe access to its e-bike systems. As a result, the German authority announced that it could terminate its own proceeding, which was still in the early stages.[9]

The evaluation of the EU antitrust enforcement framework has identified potential opportunities for increased effectiveness, particularly in terms of better coordination in the context of parallel investigations. While it is inevitable that NCAs take parallel enforcement action against "widespread infringements with a Union dimension," more can be done to scale up their remedial action and prevent internal market fragmentation. A consumer protection-inspired coordinated approach, where NCAs work together in changing coalitions, could be an effective strategy. This may in certain cases require additional resources from the participating authorities, but ultimately, it will provide greater value for each of them - and for all of us.

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In this issue of CoRe, the articles section features two interesting contributions on the interplay between both private and public regulation and EU competition law. In “The End of the Transfer System (?)”, Stefan Szymanski explores the potential consequences of an ongoing antitrust challenge to FIFA’s football transfer system. He analyses the economic rationale behind the transfer regulations, arguing they are both unnecessary and unjustified. In “Navigating the Intersection of AI Governance and EU Competition Law: A Critical Analysis”, Shazana Rohr examines the overlap between the European Artificial Intelligence Act and the role of EU competition law, identifying existing enforcement gaps and discussing remaining challenges. Additionally, in “Gun-jumping Enforcement and the Effect of *Illumina/Grail*”, Zeno Frediani, Lukas Šimas, and Heba Jalil assess how the Court of Justice’s recent judgement in *Illumina v Commission* may impact the European Commission’s approach to gun-jumping violations under the EU merger regulation.

9 Bundeskartellamt, “Bundeskartellamt discontinues proceeding against Bosch” (press release, 12 September 2024) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/12_09_2024_Bosch.html> accessed 23 September 2024.

The country reports section provides updates on competition and regulatory law developments at the national level, including an analysis of important amendments to the Danish Competition Act, the Portuguese NCA's decision prohibiting a merger in the telecommunications sector, the new FDI regime in Sweden, and the UK competition authority's market investigation into cloud services. Finally, this issue features a case note on the Court of Justice's ruling in *Scania AB and Others v Commission* (Case C-251/22 P) and *Romaqua Group SA v Societatea Națională a Apelor Minerale SA* (Case C-510/22), and a book review of *Fintech Competition: Law, Policy, and Market Organisation*, an edited volume by Konstantinos Stylianou, Marios Iacovides, and Björn Lundqvist.

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