Authority for Consumers & Markets

ACM's input to the Call for evidence Regulation 1/2003

1.1 Introduction

Regulation 1/2003 marked a turning point in EU competition law enforcement by both national competition authorities ("NCAs") and the European Commission ("Commission"). It established a decentralised system, focused on the 'particularly well-placed authority', which has proven highly effective over the past two decades. By creating a framework for coordination and parallel enforcement between the Commission and NCAs, the Regulation ensured consistent and robust application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") across the Union. The current model has delivered well on its primary objective: providing a solid basis for case allocation as well as enabling all competition authorities to contribute meaningfully to the enforcement of EU competition law.

Throughout the years of applying Regulation 1/2003, experience has also revealed certain challenges in the system as it currently operates. Due to the success of the internal market and the improved enforcement roles of the NCAs, more 'regional cases' appeared on the NCAs' radar screens. Regional cases are cases regarding agreements, concerted practices or abuse that do not have an EU-wide effect but that only affect two or more – often geographically close – Member States. These cases make coordination between NCAs and the Commission increasingly important. While coordination of EU enforcement among the authorities has generally worked well, parallel EU or national competition law investigations into identical or similar conduct by the same companies often lead to inefficiencies and even the risk of diverging or unsatisfactory outcomes. Moreover, the Commission and NCAs currently face resource constraints, which have only been accentuated by the significant new duties (including the DMA and FSR regimes) they have assumed over the past decade. Finally, many regional market problems require the use of tools by Member States other than the 'traditional application'[1] of Articles 101 and 102 TFEU. Whereas Regulation 1/2003 clearly provides opportunities for working together in that traditional application of Articles 101 and 102 TFEU, these 'other' investigative tools add another layer of complexity, potentially amplifying differences in approaches across jurisdictions.

Against this background, there is now an opportunity for building further upon the achievements of Regulation 1/2003. By means of this paper, the Netherlands Authority for Consumers and Markets ("ACM") aims to identify and advocate for ways to deepen cooperation between the NCAs and the Commission:

(i) creating opportunities for cooperation on national competition-law tools
(ii) increasing opportunities for cooperation between authorities during investigations
(iii) introducing the option of joint decisions

ACM believes that moving beyond effective case allocation towards more integrated enforcement will maximise efficiency, ensure consistency, and strengthen the overall effectiveness of EU competition law in an increasingly complex and interconnected economy.

[1] By means of antitrust investigations that possibly lead to decisions establishing infringements of Articles 101/102 TFEU.

1.2 Creating opportunities for national competition-law tools

NCAs have introduced and have come to rely on a toolbox addressing modern market problems. These (national) tools, such as sector inquiries, contribute to the objectives of competition law and the enforcement thereof.

At the moment, there is asymmetry in the Regulation when it comes to the powers of the Commission on the one hand, and NCAs on the other, to conduct sector inquiries, which can create a gap: many distortions of competition are rooted in domestic or regional market structures or national regulatory frameworks, where NCAs are better positioned to investigate. Local (parallel) investigations by one or more NCAs could address competition concerns closer to their source, while also enriching EU-level policymaking with deeper insights. A harmonised minimum power to conduct sector inquiries would enable NCAs equally to diagnose systematic issues in national and regional markets and would allow for closer cooperation to address transnational problems. At the same time, such a minimum power leaves room for national powers that go beyond diagnostic inquiries, such as the power to impose binding measures like structural or behavioural remedies. This flexibility would both preserve coherence across the Union as well as enable NCAs to respond decisively to market failures and to strike collaborations tackling those market failures.

Furthermore, information exchange between NCAs and/or the Commission forms the backbone of the current framework of cooperation. Not only in the transmission of documents, but also coordinating cases through informing and consulting each other. To ensure the complementarity and consistency of the application of competition law across the Single Market, ACM is in favour of extending the option of coordination and information exchanges to other instruments that contribute to the objectives of competition law and the enforcement thereof, such as sector inquiries.

1.3 Increasing opportunities for cooperation between authorities during investigations

1.3.1 Extension of assistance requests and harmonised dawn-raid authorisation

The effective use of instruments from the entire toolbox NCAs have come to rely on requires access to the current robust fact-finding powers, such as sending out requests for information and dawn raids. The Regulation now provides for assistance in investigations into possible infringements of Articles 101/102 TFEU. ACM would be in favour of a clarification and perhaps extension of the legal framework to provide assistance to exercise fact-finding powers for the application of other (national) tools of NCAs.

Given the different national requirements for dawn-raid authorisations and procedural inconsistencies, the differences in content of dawn-raid authorisation and the differences in the scope of the authorisation, ACM considers the harmonisation of the dawn-raid authorisation processes across the EU an option. Establishing a uniform standard could increase the enforcement effectiveness as well as streamline cross-border investigations. This would bring legal certainty both for NCAs and for businesses subject to such investigations.

1.3.2 Confidentiality throughout investigations

The growing coordination between NCAs and the Commission has considerably increased the amount of shared documents, both within and outside of case files. This development underscores the necessity of clear and harmonized provisions on how such documents are to be handled that have priority over national rules. Disparities in the level of protection of confidentiality could undermine the trust in cross-border cooperation and discourage open exchanges of information. Ensuring uniform treatment across jurisdictions is essential not only for procedural consistency and the free dialogue between NCAs and/or the Commission, but also for

safeguarding the integrity of the investigative process in all Member States. Confidentiality is as strong as the weakest link.

1.3.3 Cooperation in joint investigative teams

Competition cases are becoming increasingly complex, particularly in digital and cross-border markets where investigations demand significant expertise and resources. At the same time, the Commission is faced with limited resources and an expanding range of duties (including the DMA and FSR regimes), which force the Commission to focus its enforcement efforts primarily on cases with clear EU-wide market relevance. While this approach is understandable, it risks creating an enforcement gap or inefficient allocation of resources in regional cases. ACM sees a clear structural solution in strengthening cooperation among NCAs and the Commission in such cases through Joint Investigative Teams ("JITs"). This would furthermore negate the potential inefficiencies of multiple NCAs performing parallel investigations (see also 1.4 below).

JITs form a promising avenue to enhance cooperation among NCAs and the Commission. NCAs already work together with the Commission in JITs under the DMA, allowing for the effective pooling of resources and expertise in specific geographic and product markets. By analogy, extending this model to antitrust cases could provide significant benefits, especially given the inherently cross-border nature of many competition concerns. Such cooperation can be set up for cases concerning traditional antitrust cases, but also for the application of other (national) instruments with a regional dimension (such as sector inquiries, etc.).

Flexibility in JIT models and cooperation among NCAs and the Commission allow them to tailor the form of cooperation to the needs of each case. More integration would necessitate stronger communication channels, clear coordination mechanisms (which will also provide clarity for undertakings involved in the case) and careful planning to avoid duplication and gaps in responsibilities. A balanced approach provides NCAs and the Commission with a menu of cooperation options that would help JITs remain efficient, cost-effective and proportionate to the nature of the case.

1.4 Introducing joint decisions

At the moment, the coordination mechanism among NCAs and the Commission focuses on case allocation and information exchange during and before the investigation. However, closer cooperation in investigations (see section 1.3) and decision-making has the potential to significantly improve consistency, efficiency and legal certainty in cases that concern cross-border conduct. Such coordinated action might go hand in hand and reinforce the benefits that come with the previously discussed JIT cooperation. In this respect, ACM perceives a range of possible types of joint decision-making.

Option 1: One (JIT) investigation or multiple NCA investigations, one Commission decision
The first option to address conduct with cross-border elements in decisions would follow a centralised model inspired by the DMA. In this option, multiple NCAs would start a (coordinated or joint) investigation into conduct with a cross-border element. On the basis of this investigation by NCAs, the Commission adopts a single decision under Articles 101/102 TFEU, enforceable in the entire EU. This would ensure uniformity and avoid conflicting outcomes and legal procedures, while relying on NCAs for evidence-gathering and analysis.

Option 2: One (JIT) investigation by multiple NCAs, multiple but identical individual NCA decisions
The second solution for joint decisions would allow multiple NCAs to jointly investigate a case, preferably through a JIT, with each NCA adopting its own decision based on Articles 101/102 TFEU at the national level, with a nearly identical text and ideally at the same time. This decentralised model fully preserves national autonomy in decision-making and procedure, and could be adapted to national specificities, while remedies could be adapted to local contexts.

Option 3: One JIT investigation by multiple authorities, one joint decision
The third way cooperation between NCAs could be improved would be a truly joint decision model. Several NCAs, possibly joined by the Commission, conduct a JIT investigation and adopt a single decision based on Articles 101/102 TFEU collectively, enforceable in the entire EU or in all participating Member States. This would enhance NCA ownership and foster genuine joint enforcement, though it would require a new procedural framework to govern joint decision-making.

The three options discussed highlight some innovative ideas for improving ECN cooperation with different trade-offs between centralisation, national autonomy and shared enforcement, providing a starting point for the debate on the modernisation of EU competition law.

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