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ON THE PHENOMENON OF INTERNATIONAL COOPERATION OF NCAS: FROM NETWORKS OF AUTHORITIES TO NETWORKS OF PEOPLE – INTRODUCTION

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International cooperation between national competition authorities (NCAs) has developed leaps and bounds in recent decades. It takes various forms, depending on the needs and the goals of the participating authorities. It began with bilateral cooperation and often transformed into much more complex structures. The significant propagation of fora devoted to the development of competition law cooperation at an international level – such as the International Competition Network (ICN), OECD or UNCTAD, and at a regional level – such as the European Competition Network (ECN), Merger Working Group (MWG UE), European Competition Authorities (ECA) or Nordic Co-operation, is currently an undeniable fact.

Competition law and the international cooperation of NCAs seem to be a particularly appealing case choice for studying the functioning of international cooperation of public administration. It is emphasised that the expression ‘competition law’ and the adjective ‘international’ have never been as closely connected as they are now. Although the implementation of competition rules remains a national matter, substantive competition law reflects an almost unanimous global consensus on the benefits of free and competitive markets. This state of affairs allows for the intensification of the process of harmonisation of substantive and procedural national competition rules. This harmonisation takes various forms and affects different competition law institutions to varying degrees, with international law cooperation being a condition for harmonisation, without which it will

never be full or effective.¹ This cooperation is best developed within the transnational networks of NCAs.

The growing importance of transnational networks reflects the increasing importance and value of international cooperation between NCAs. It can be observed that the development of the networks results in a network effect, i.e. a situation in which the effectiveness of cooperation increases with the number of entities involved in this cooperation. In the past, it was emphasised that the failure of the OECD's efforts to enact an international antitrust cooperation agreement was due to the fact that the OECD was creating a fairly limited network of antitrust authorities under its auspices.² The example of the ICN shows, however, that increasing the number of members of this network has led to the fact that, after more than a decade of its existence, virtually all functioning competition authorities in the world are its members.³ At the same time, it is rightly noted in the literature that an important feature of international administrative cooperation is its evolution, consisting in the transition from soft cooperation or automatic cooperation (e.g. based on data transferred periodically and automatically and available on a common European platform) to cooperation collaboration.⁴ Currently, it is not only about obtaining information from a foreign authority, but often about active cooperation and undertaking formal administrative actions.

Neither bilateral cooperation nor networks of competition agencies are static; they evolve together with developments in international cooperation between competition authorities. Some cooperation arrangements or networks are successful, whereas others have ceased to exist. At the same time, cooperation between the competition authorities within networks has now become more intense, which has had a direct impact on other networks and bilateral cooperation. The divergence in international cooperation in antitrust and merger cases is also visible. It is notable that global competition networks have reached their limits. With no prospects for an internationally accepted competition agreement, they will not be able to expand. At the same time, continental networks are becoming stronger and are involving more far-reaching methods of enhanced cooperation. The best example is the ECN. After the adoption of Directive 2019/1,⁵ one may expect a new period of strengthened cooperation between European NCAs in antitrust cases.

1 EZRACHI, A. (2012) Setting the scene. The scope and limits of 'international competition law'. In: Ezrachi, A. (ed.) *Research Handbook on International Competition Law*. Cheltenham–Northampton: Edward Elgar, p. 3.

2 LLOYD, P.J., VAUTIER, K.M. (1999) *Promoting Competition in Global Markets. A Multi-National Approach*. Cheltenham–Northampton: Edward Elgar, pp. 49–50.

3 The most notable exception being the competition authority of the People's Republic of China.

4 CISOWSKA-SAKRAJDA, E., WEGNER-KOWALSKA, J. (2015) Współpraca międzynarodowa państw a standardy pomocy w sprawach podatkowych. In: Czarnik, Z., Posłuszny, J., Żukowski L. (eds.), *Internacjonalizacja administracji publicznej*, Warsaw: Wolters Kluwer, p. 389.

5 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, pp. 3–33.

Another area that is looked it is the underdevelopment of cooperation in the merger control area (more in the contribution of David Viros in this volume).

It may seem that publishing a book on cooperation in times when national borders are being re-established and restrictions in free movement of goods, people and services are being raised is not the most appropriate. However, I believe that it is precisely the most apt time. Cooperation is needed more than ever in times like this, to prove that retaining mutual confidence and reliance is necessary and beneficial to all. Extraordinary measures undertaken in the recent months will surely change the world as we used to know it, but in order to overcome what Carl Schmitt calls the 'state of exception' and return to normal life, international cooperation based on mutual trust is crucial. Even though cooperation in competition matters is probably not of the of the highest priority for European governments, at the moment of writing, it will be critical in order to secure a smooth transition and the prompt elimination of anticompetitive behaviours or mergers that may seemed to have been justified under the current extraordinary circumstances.

The book begins with a preface prepared by Professor Stephen Calkins. I am very grateful for his reflections upon all the contributions assembled in this volume. He combines extensive experience and knowledge as an academic and enforcer, and his thoughts provide an excellent framework from which to approach the book.

The book consists of fourteen contributions accompanied by a selection of documents. The papers assembled in the book are diverse in nature, there are articles, essays as well as case studies. It should be emphasised that many of the topics covered by the papers have never been presented and analysed in such detail. Thanks to the professional background of all the contributors, readers may expect to apprehend some interesting insights into the international cooperation of NCAs.

In the first contribution, Cleo Alliston presents a case comment showing the Three/O2 UK merger in the context of cooperation between NCAs and the European Commission. This is followed by an essay by Andreas Bardong. This may be especially interesting for readers, as it documents his personal perspective on the establishment and works of the MWG and provides rare insight into the functioning of a closed and informal transnational network of European NCAs. The third contribution analyses the problem of supervision over the international activities of NCAs, taking Poland as a study example. It points to an interesting conclusion, namely that the vivid development of international cooperation between NCAs is not accompanied by a similar expansion of supervisory mechanisms. This condition leads to a situation where an important sphere of the activities of NCAs escapes any effective supervision. The fourth contribution, by Wolfgang Heckenberger, discusses the general requirements for an effective antitrust compliance programme, taking into account the new policy of the US Department of Justice. It also highlights the need for a more common approach to compliance from NCAs and some efforts undertaken by the networks to address this issue. The next paper, prepared by Erika Lovasova and Daniela Lukáčová, summarises the experience of the Antimonopoly Office of the Slovak Republic regarding international cooperation,

identifying existing obstacles to closer cooperation, together with proposing solutions for those hurdles. The sixth article has been written by Adriana Vidal Meijide and Marta García Álvarez. It focuses on trends in merger control in Spain, presenting the position of the Spanish Competition Authority on the current issues in merger control in Europe. It is followed by a paper from Marta Michalek setting out the perspective of undertakings on the new ECN+ Directive with regard to the protection of fundamental rights. The conclusions of the article are not terribly optimistic, as it highlights that EU institutions have missed an excellent opportunity to enforce and unify the protection of the rights of companies involved in competition law investigations and proceedings. The next contributor is Michele Pacillo. The author presents the Italian experience with regard to international cooperation and the role of multilateral organisations. Interestingly, the article concludes that formal and informal cooperation can be viewed as complementary, and that informal cooperation may be a step in the process that ends with formal cooperation. The ninth article has been prepared by Fabian Pape and Martin Sauermann. It is devoted to the very timely issue of merger control thresholds and the need to review potentially problematic transactions that fall outside exclusively turnover-based thresholds. The article expands on the German-Austrian cooperation with regard to the development and understanding of new transaction value thresholds in the context of the EUMR's case referral system and the German-Austrian Guidance Paper. The next author, Eduard Paulus, presents a legal historical analysis on the correlation of public and private enforcement affecting the international cooperation of competition authorities in Europe. It is followed by the paper written by Rita Prates and Ricardo Bayão Horta. They analyse and present the ECA notice mechanism used by European NCAs to cooperate in multijurisdictional merger filings. This mechanism has hardly ever been discussed in such detail. Then there is a contribution prepared by Rafał Stankiewicz. The author discusses the ECN+ Directive in the context of the compulsory implementation of this act in the Polish legal order. The article focuses on the need to secure the political and jurisdictional independence of the Polish Competition Authority. The next article has been written by Maarit Taurula. It presents the background and benefits of the co-operation agreement between the Nordic competition authorities. This is one of the longest existing forms of cooperation between NCAs, but surprisingly it has hardly ever been analysed. The article presented here will surely help to fill that gap. Last but not least is a contribution by David Viros. The article discusses drivers and instruments of international cooperation of NCAs, together with the evaluation of the existing frameworks governing cooperation between NCAs in the fields of antitrust enforcement and merger control.

The last part of the book provides a selection of documents. There are soft law acts adopted by two networks: Merger Working Group (EU) and its functional predecessor the European Competition Authorities. It is added in the interest of the readers. Many of the articles contained in this book invoke those documents. It therefore enables readers to confront the theoretical background with the actual wording of the soft law

documents. In any case, I believe these documents are not publicised enough and need to be brought to the wider attention of all interested and involved in competition law enforcement.

All the authors of this book were or are still involved in the international cooperation of NCAs, performing various functions in this process: members of transgovernmental networks of competition authorities, non-governmental advisors to those networks, academics advising networks and NCAs, officials conducting proceedings, legal representatives of companies involved in those proceedings or members of other institutions involved in this process. Sometimes, for particular authors, those roles have evolved in time. Thanks to this, their papers benefit extensively from their various professional experience and result in a comprehensive overview of the international cooperation of European NCAs.

The majority of contributors to this book come from former or current members of the EU Merger Working Group. The book also aims to document and appraise the work that has been achieved while they were participating in the MWG. The MWG started as an *ad hoc* solution, but soon turned out to prove the accuracy of the Polish saying that ‘temporary solutions are the most permanent ones’. Thanks to support from the all executives of the EU NCAs involved and Commissioner Almunia, the MWG has been officially recognised as the only official network of European NCAs devoted to cooperation in merger control. Even though the status of the MWG is rather informal, it plays a very important yet less conspicuous role in the cooperation in merger cases across Europe. I refer readers to the excellent essay by Andreas Bardong, one of the founding fathers of the MWG, to learn more about the function and achievements of the MWG. Throughout the years, the MWG has proved to have been an excellent forum of close cooperation and the exchange of experience and ideas between all the individuals and authorities involved. Most importantly, it connected people from all NCAs, extending their relations beyond their official roles. This is the best example of the main *leitmotiv* of this book – from networks of authorities to networks of people. It proves that official engagement in cooperation with time extends to personal links and relations.

At the end of these introductory considerations, it is worth pointing to one more important, though often poorly understood source of the success of international cooperation between NCAs. The success of the cooperation, regardless of whether it is bilateral cooperation or through a network, is determined by the human factor. Mutual respect, trust and openness are among the basic conditions for effective cooperation between authorities and institutions, and are crucial for the success of a given network.⁶ Although this may seem like a truism, without well-developed relations between the officers of NCAs involved in international cooperation, the latter could not develop

6 HAWK, B., BEYER, J. (2005) Lessons to be Drawn from the Infra-national Network of Competition Authorities in the US. The National Association of Attorneys General (NAAG) as a Case Study. In: Ehlermann, C.-D., Atanasiu, I. (eds.), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*. Oxford: Hart, p. 110.

so well. International cooperation between NCAs is largely deformed, as networks often operate without a physical dimension, not to mention a secretariat or other permanent structure. Without commitment based on the mutual respect and trust of those responsible for this cooperation in NCAs, neither bilateral cooperation nor transnational networks of NCAs would certainly have developed so much.

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Last but not least, I would like to thank all the authors for their contributions. I am well aware that it has not always been easy for them to find time to prepare their work. Therefore I am really grateful for their papers and I hope that readers will also appraise and appreciate their efforts.

Warsaw, July 2020