BŁACHUCKI, M., ed., (2021)
International Cooperation of Competition Authorities in Europe: from Bilateral Agreements to Transgovernmental Networks.
Warsaw: Publishing House of ILS PAS
DOI: 10.5281/zenodo.5012046
pp. 209–228.

COOPERATION IN THE FIELD OF COMPETITION ENFORCEMENT: TAKEAWAYS FOR NATIONAL COMPETITION AUTHORITIES FROM THE PREVAILING INTERNATIONAL LEGAL LANDSCAPE

DAVID VIROS

Abstract:

Competition authorities are liable to cooperate with one another on many levels, through formal and less formal channels, with exchanges ranging from general policy considerations to case-specific intelligence and evidence. Where applicable, the legal bases for such cooperation vary in nature, scope and depth. The state of play as regards cooperation arrangements outside the EU provides a useful backdrop against which to assess the specificities and limitations of enabling instruments at the EU level. In particular, the glaring gap between existing frameworks for cooperation among NCAs in, antitrust and merger control matters does not necessarily reflect the prevailing situation outside the EU, or models advocated in international fora such as the OECD. This underscores the specific historical and political underpinning of the current EU legal framework. As regards the particularly potent instruments for cooperation established under Regulation 1/2003, there is also room for deepening and expanding, as illustrated by the recently adopted Directive 2019/1. Again, non-EU international arrangements can inform and have indeed informed, perhaps surprisingly, the course chosen to improve these cooperation instruments.

Keywords:

International Cooperation, EU, Exchange of information, Antitrust, Merger control

INTRODUCTION

The focus of this contribution is on the legal framework within which competition authorities cooperate, with an emphasis on the ability to exchange information, which is the cornerstone of any meaningful cooperative relationship between enforcers. The approach taken by the author consists in exposing the state of play on the international scene before looking at the specific features of the European Union legal order and distinguishing between the vastly different features of antitrust enforcement on the one hand, and merger control on the other.

The main objective is to evaluate the extent to which existing cooperation mechanisms between national competition authorities within the EU (hereafter, 'NCAs') differ from those found in arrangements struck between or with third countries, as well as from model arrangements espoused among others by the OECD. Where applicable, the question is then whether these discrepancies, especially when the EU legal framework is found lagging behind in terms of the ability given to NCAs to cooperate, can be explained by certain policy choices or objective factors that are specific to the EU.

This contribution begins by touching upon the drivers of international cooperation, before looking at the particular means by which such cooperation is enabled, which depends in turn on the type of information that competition authorities are seeking to exchange. The insights gained with this brief overview are then applied to the evaluation of the existing frameworks governing cooperation between NCAs in the fields of antitrust enforcement and merger control.

WHY DO COMPETITION AUTHORITIES COOPERATE?

Widely shared objectives feed stakeholder support for greater international cooperation among competition authorities. In Europe, other factors pertaining to the organisation and articulation of enforcement at EU and Member State levels are equally decisive in shaping policy choices with regard to cooperation.

The worldwide impetus for international cooperation in the field of competition

Worldwide, the consensus around the need for competition authorities to tackle hard core cartels is firmly established. The OECD's Recommendation of the Council concerning Effective Action against Hard Core Cartels which dates back to 1998 was a significant milestone in that respect, serving as a potent advocacy tool to entrench the view, among stakeholders, that hard core cartels are inherently bad and worthy of punishment. This acknowledgment of the nature of hard core cartels came hand in hand with the equally decisive recognition that "effective action against hard-core cartels is particularly important from an international perspective (because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive) and particularly dependent upon co-operation (because they generally

operate in secret, and relevant evidence may be located in many different countries)."[1] Thus, the need for cooperation between competition authorities in fighting hard core cartels was seen as a function of the particularly egregious nature of cartels, as well as of the evidence-gathering challenges that these pose.

As regards mergers, the justifications set out within the relevant fora for cooperation among cooperation authorities are concerned with mitigating costs and enhancing the efficiency and effectiveness of the merger review procedure to the benefit of all concerned, firms and authorities alike.[2]

Beyond these specific reasons, the broader context, associated with the growth in the number of national competition law regimes and the globalisation of trade, firms and supply chains, is the backdrop against which the imperative of cooperation has grown ever stronger, for fear of otherwise inconsistent or conflicting outcomes reached by competition authorities regarding the same practice or transaction. This need for co-operation is even more pressing when one acknowledges the potential extraterritorial reach of national competition rules, which further compounds the risk of situations arising where coordination between several competition authorities is decisive. Indeed, the introduction[3] and refinements of the 'effects doctrine', especially both sides of the Atlantic, have increased the odds that multiple authorities will be dealing with the same crux of facts under their respective enforcement regimes.[4] It is the same for merger control, where the largest transactions of the past few years have attracted an unparalleled number of filings.[5]

1 Recommendation of the Council concerning effective action against hard core cartels, OECD, 1998

2 See OECD (2005) *Recommendation of the OECD Council on Merger Review*. Available from: http://www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm [Accessed September, 12 2020]. See also recommended practice X (interagency enforcement cooperation) of MWG (2017) ICN Recommended practices for merger notification and review procedures. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [Accessed September, 12, 2020].

3 See Judgement of US Court of Appeals for the 2nd Circuit *United States v. Alcoa* [1945] 148 F.2d 416. Available from: https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/ [Accessed September, 12 2020]: "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."

4 The recent judgment in Intel confirms the «qualified effects» test as being an alternative to the «implementation» test which, if fulfilled, suffices to establish the European Commission's jurisdiction: see Judgment of the Court (Grand Chamber) [2017] *Intel Corp. v European Commission*, C-413/14 P, ECLI:EU:C:2017:632, para. 41-46. Moreover, the judgment has important implications in allowing the Commission to assert jurisdiction in the context of a single and continuous infringement with regard to the 'qualified effects' of the conduct viewed as a whole, irrespective of whether certain components of the single and continuous infringement do not, in and of themselves, qualify as holding such 'qualified effects'. See Ibid, para. 55-57.

5 E.g. *Dow/Dupont* (25 jurisdictions) and *AB InBev/SABMiller* (28 jurisdictions), quoted in: GIDLEY, M., ROGER, A., DEKEYSER, K., CHAPSAL A. (2018) EU-US Antitrust Enforcement : the Atlantic Dialogue. Available from: https://www.concurrences.com/en/conferences/eu-us-antitrust-enforcement-the-atlantic-dialogue-en [Accessed September, 12 2020].

The specific rationales for cooperation in Europe

The rationale for bolstering cooperation internationally is naturally just as applicable, if not more so, with regard to the European Union. The economic integration at the heart of the single market means that potential restrictions to competition that flow from mergers or cartels are bound to exceed national borders and affect several Member States at once.

This being said, the specific legal and institutional make-up of the European Union with regard to competition enforcement provides extra justification for cooperation, and one that appears to have been decisive in bringing about the adoption of a gamut of cooperation tools that are unique in their comprehensiveness. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU][6] both allows and obliges NCAs to apply the provisions of the articles of the Treaty in full. This decision was taken to effect a necessary shift from a centralised system of enforcement under the former regulation with the European Commission at its helm to a decentralised system whereby NCAs would shoulder more of the burden of enforcement alongside the Commission.

While perceived as excessively resource-intensive and cumbersome, the former centralised system remains the relevant benchmark in terms of the consistent and unified enforcement of competition rules throughout the single market. There was a widely shared view in the run-up to the adoption of Regulation 1/2003 that the uniform application of EU law should not be a collateral victim of the effort to relieve the Commission and firms of the burden associated with the previous system. It was also foreseen that, with the decentralisation of the enforcement of EU competition rules, the issue of case allocation within the newly established European Competition Network would come to the fore. Hence, increased cooperation between the Commission and NCAs, on the one hand, and among the NCAs, on the other hand, was necessary both to maintain the level of uniformity and consistency witnessed under the previous, centralised, system, and to allow the smooth and efficient (re-)allocation of cases within the ECN to the authorities best placed to investigate and decide on the facts at hand.

Examining the additional rationales for cooperation within the European Union is important in view of the exceptionally powerful cooperation instruments available to its Members in the field of competition law enforcement. Indeed, delineating these specificities may help understand which factors matter most to goad national policymakers into stepping up the ability of their competition authorities to cooperate. It is interesting, for instance, to contrast the ability of Member States to cooperate with the near-absence of

6 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.04.2004, pp. 18–24.

cooperation tools between Switzerland and its neighbouring countries, especially France and Germany, even though these two countries are Switzerland's largest trading partners.[7]

As far as merger control is concerned, the EU-specific factors are less salient, which probably explains why the legal framework for cooperation is, in turn, less developed. Firstly, there is no single set of substantive rules shared by all Member States, even though the tests applied tend to be similar in practice. Secondly, there is no history of a centralised, EU-wide merger review predating national regimes. Indeed, when the first EU merger regime was introduced with Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[8] at least three Member States had functioning domestic regimes and had gathered, to varying degrees, some experience in the matter.[9] Thirdly, while the review of transactions may very well be transferred to another competition authority than that which would normally have jurisdiction, thus mirroring the mechanisms foreseen under Regulation 1/2003, as well as under the Commission Notice on cooperation within the Network of Competition Authorities,[10] such transfers are envisaged on a purely vertical, top-down[11] or bottom-up,[12] basis. Indeed, the glaring gap of the EU Merger Regulation with regard to horizontal cooperation has already been underscored.[13]

HOW DO COMPETITION AUTHORITIES COOPERATE?

While cooperation objectives and tools can vary greatly from one arrangement to the next, it is clear that incremental changes in the objectives of cooperation are matched by an evolution in the nature of the information being exchanged, enabled by a broad range of legal instruments.

7 However, it was reported in 2018 that Swiss and German authorities were negotiating an agreement to facilitate cooperation between their respective competition authorities, with the agreement to enter into force in 2020/2021. See BUCHS J.-P., Concurrence: projet d'accord avec l'Allemagne. Available from: https://www.bilan.ch/economie/concurrence_projet_d_accord_avec_l_allemagne [Accessed September, 12 2020].

8 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1–12.

9 United Kingdom (1965), Germany (1973) and France (1977).

10 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43-53 (hereafter, 'the Network Notice').

11 See Article 4, para. 4, and Article 9 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1, (EU Merger Regulation). See also Article 9 of Regulation (EEC) 4064/89 of 21 December 1989.

12 See Article 4, para. 5, and Article 22 of Regulation (EC) 139/2004 of 20 January 2004; see also Article 22 of Regulation (EEC) 4064/89 of 21 December 1989.

13 See calls for a 'European Merger Area' and the critique of the 'patchwork' of national merger review regimes in LASSERRE, B. (2015) Navigating Merger Regimes Across the Globe: What are the New Challenges?. *Concurrences Review*, 2, Art. No 72271, pp. 46-53.

From comity to investigative assistance

Comity in its traditional (or negative) understanding has long been a staple of cooperation agreements in the competition field. Abiding by principles of traditional comity entails exercising one's jurisdiction, while having due regard to the impact that the exercise has on the interests of other countries.[14] Specifically, a competition authority that seeks to abide by traditional comity principles will take care to inform its counterparts from another country of its enforcement actions that may affect that country's interests. The OECD has advocated early on[15] for compliance with such principles amongst the national authorities responsible for the enforcement of competition rules.[16] The scope of events triggering a duty to inform is broad and, if strictly adhered to, would entail a significant volume of notifications per year.[17]

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14 As stated by the Supreme Court in its seminal ruling in *Hilton v. Guyot* [1895] US Supreme Court, 159, pp. 113-159. "It is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other", but the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws".

15 Council Recommendation concerning co-operation between Member Countries on restrictive business practices affecting international trade [C(67)53(Final)] of October, 5 1967.

16 See OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade, 27 July 1995, C(95)130/FINAL, para. I.A.1. Available from: https://www.oecd.org/daf/competition/21570317.pdf [Accessed September, 12 2020]:
"When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices."
It is worth noting the particular insistence on advance information, as a means to ensure a fruitful exchange and the possibility for the notifying authorities to take account of the receiving authorities' observations, where applicable.

17 Guiding principles for notifications, exchanges of information, cooperation in investigations and proceedings, consultations and conciliation of anticompetitive practices affecting international trade Appendix to the OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade of July, 27 1995 C(95)130/FINAL. Available from: https://ec.europa.eu/competition/international/multilateral/oecd_recommendation_1995.pdf [Accessed September, 12 2020]:
"3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:
a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;
b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed

Positive comity is a more recent addition to cooperation instruments, with the Agreement of 1991 between the European Communities and the United States being the first of its kind[18] to include provisions whereby either party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory which affects the important interests of the requesting party.[19]

Whether it is traditional or positive comity, it seems that the use of formal instruments underlying the enactment of these principles has not, and has never really been, sustained. One reason lies in the extensive use amongst authorities enjoying a sufficient level of reciprocal trust of informal mechanisms of information and consultation. This, together with potential media coverage of the case at hand, means that the usefulness of formal notifications in keeping authorities abreast of investigations affecting their jurisdiction can be somewhat limited. As regards formal cooperation instruments buttressing positive comity, recourse to these appears even more marginal.[20] One explanation, beyond the prevalence of informal exchanges, may reside in the fact that firms falling victim to such behaviour will have the incentive to complain or otherwise

to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries."

18 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 57. Available from: https://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf [Accessed September, 12 2020].

19 Article V.2 of the Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (OJ L 95, 27.04.1995, p.47) provides:

"If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide."

20 The only known instance of a positive comity request being lodged by one the parties was with respect to the US DOJ's request to investigate several (mostly European) airlines regarding an alleged discrimination against SABRE, an American computerised reservation system. See EC (2000) *Commission acts to prevent discrimination between airline computer reservation systems* [Press release IP/00/835]. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_00_835 [Accessed September, 12 2020].

contribute to the initiation of an investigation, without the need to set in motion a formal request by the competition authority of their own country.[21] Interestingly, notifications retain some value in the field of merger control, in bringing to light transactions that do not require notifications in the addressee's jurisdiction, while still possibly raising competition issues. It should be mentioned that, beyond the scope of authority-to-authority cooperation, comity may continue to act as a self-restraining principle, informing a court's review of jurisdiction over behaviour carried out abroad.[22]

In order to maximise the effectiveness of competition enforcement in the face of multijurisdictional anticompetitive behaviour, it has been recognised for some time that competition authorities should be entrusted with the ability to provide one another with investigatory assistance, as well to exchange information. However, this type of cooperation goes one step further than the implementation of positive comity principles: it falls to be used much more frequently and is likely to be seen as impinging to a greater extent on the requested state's sovereignty. Indeed, by following-up on a request by another state to launch or extend enforcement actions, the requested state remains firmly in control of the proceedings and their outcome, conducted under its own laws and subject to its prioritisation choices. Conversely, by assisting a requesting authority in the latter's own investigation, the requested authority is an accessory to the former's investigation and does not control the conduct of the investigation – its influence, if any, rests only with the conditions it may impose on the use made of the evidence it has provided.

Such a departure from a stricter sovereign-to-sovereign approach may explain why the OECD Recommendation of 1995 on international cooperation in the field of competition couched the possibility of exchanging information in guarded and unspecific terms: [member countries] "should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose."[23] The suggestion that states should adapt their laws and introduce

21 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 59-60.

22 Judgement of US States Court of Appeals (9th Circuit) [1976] *Timberlane Lumber Co. v Bank of America*, 549 F.2d 597. Available from: https://law.resource.org/pub/us/case/reporter/F2/549/549.F2d.597.74-2813.74-2812.74-2354.74-2142.html [Accessed September, 12 2020]. The so-called jurisdictional rule of reason test based on comity principles put forward in this judgment was later rejected by the US Supreme Court in [1993] *Hartford Fire Insurance Co. v California*. *US Supreme Court*, 509, p. 764.

23 Article I.A.3 of the OECD (1995) Revised recommendation of the Council concerning cooperation between Member countries on anticompetitive practices affecting international trade, 27 July 1995, C(95)130/FINAL. However, Article 6 of the appendix to the recommendation is more specific on what such exchange of information might entail in practice, e.g. "employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority". Throughout the appendix remains the proviso that an exchange occurs only "in a manner consistent with the national laws of the countries involved.".

enabling legislation allowing for such an exchange of information is hinted at in the 1995 Recommendation, but only, it seems, through an implicit reference to blocking statutes that hinder the cooperation of foreign undertakings in national proceedings.[24]

The 1998 OECD Council's Recommendation Concerning Effective Action Against Hard Core Cartels is more straightforward in advocating the elimination or reduction of legal obstacles to cooperation through investigative assistance,[25] while encouraging the conclusion of arrangements or the adoption of instruments enabling such cooperation.[26]

Consistent with the gradual build-up of momentum for enacting legal changes, where necessary, to allow for investigatory assistance, the 2005 OECD Best practices for the formal exchange of information between competition authorities in hard core cartel investigations go yet one step further by setting out a blueprint for enabling legislation or international agreements, while also focusing on more operational concerns. The basic principles for cooperation, which have been reflected in national and international legal instruments adopted hereafter, include: (i) discretion to refuse cooperation; (ii) pre-existing safeguards to protect confidential and privileged information that is exchanged against improper disclosure or use; (iii) consideration of the interests of leniency applicants and informants.[27] Before a request for information is lodged, the requested authority should make it known to the requesting authority whether it is under disclosure requirements towards the source of the information.[28] The Best Practices contemplate that such notice to the source of the information should be avoided.[29] The requesting authority should on the other hand provide sufficient information for the requested authority to act upon the request,[30] as well as map out its own laws and practices relevant to the protection of the confidentiality of the information exchanged.[31] A decisive requirement for cooperation under the Best Practices is that, unless other-

24 "Should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests." Ibid.

25 Article I.B.3 of OECD (1998) C(98)35/FINAL: Recommendation of the Council concerning effective action against hard core cartels (adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]):
"Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests."

26 Ibid, Article I.B.2, last indent.

27 OECD (2005) Best practices for the formal exchange of information between competition authorities in hard core cartel investigations, Recital 5. Available from: https://www.oecd.org/competition/cartels/35590548.pdf [Accessed November, 2 2020].

28 Ibid, Article II.A.1.

29 Ibid, Article II.D.

30 Ibid, Article II.A.2.

31 Ibid, Article II.B.1.

wise agreed, "the exchanged information should be used or disclosed by the requesting jurisdiction solely for the purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction."[32]

To conclude this general overview, it is worth noting that the OECD's efforts to encourage the adoption of legal instruments enabling the exchange of confidential information between competition authorities reached their acme in the form of a call on Member States to adopt so-called information gateways in the field of competition taken as a whole. This was done in the context of the 2014 OECD Council's Recommendation Concerning International Co-operation on Competition Investigations and Proceedings. This recommendation is a result of the 2013 OECD/ICN Survey on International Enforcement Co-operation, the findings of which pointed to the lack of a legal basis for the exchange of information between competition authorities as a key structural defect hindering greater international cooperation,[33] one that is only partially addressed by the use of confidentiality waivers.[34]

The ability to share information in relation to the nature of the information being exchanged

International cooperation encompasses a wide variety of actions, which can more often than not be executed without an explicit legal basis. The possibility for authorities to engage in general policy discussions is, of course, uncontroversial. The same can be said of more specific exchanges on particular issues (e.g. a contemplated takeover or recent developments in a given industry) relying solely on publicly available information.

A greyer area, it seems, concerns what is known as agency-internal information, namely information related to proceedings being conducted or contemplated by a competition authority, but which are not necessarily known to the public, e.g. because transparency requirements as regards the various procedural steps vary from jurisdiction to jurisdiction.[35] The notion also covers staff assessments of substantive issues in a given case, from

32 Ibid, Article II.B.2.

33 OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, pp. 164 et seq.

34 Ibid, p. 140: "Confidentiality waivers are often relied upon by the large majority of agencies to address, when possible, limitations to the exchange of confidential information. The use of waivers, however, has its limits: agencies cannot mandate waivers, which remain at the discretion of the parties; and parties' incentives to grant waivers differ significantly between merger and cartel cases; in cartel cases their availability largely depends on whether the party has applied for amnesty/leniency. Respondents identified areas of possible improvement to the waiver system, referring to the need to further standardise their scope, and the terms and conditions under which the information may be exchanged."

35 Communication around the conduct of dawn raids is one such example. While a long-established practice for the European Commission, the French competition authority committed to publishing a press release in the wake of a dawn raid relating to a suspected cartel as of 2015: see Autorité de la concurrence (2015) Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français, para. 14. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/cpro_

determining the relevant product and geographic market, to the applicable theory of harm. This kind of exchange is viewed by many authorities as not requiring a prior legal basis.[36] The rationale for this view stems from the fact that such exchanges do not entail confidential information as regards a third party, and that they are conducted on an informal basis.[37] This being said, the confidentiality of investigations is often protected under national laws,[38] and the duty to preserve that confidentiality falls not only on the parties, but also on the civil servants involved or made aware of the investigations in performing their tasks.[39] Moreover, the existence of procedural waivers granting authorities the right to exchange information exclusively in connection with procedural, and not substantive, matters, signals, at least in some jurisdictions, that the communication of agency-internal information does indeed require a legal basis.[40]

Finally, there is a category of information towards which the 'default position', absent any safeguards or framework, is to oppose free exchange among authorities.

In that respect, it is worth distinguishing information whose communication is hindered by virtue of the fact that the communication would impinge on the source's or the concerned party's rights of defence, notably information covered by legal professional privilege or liable to infringe the privilege against self-incrimination. These do not, and indeed should not, be open to use by an authority, and a fortiori to transmission among authorities. However, without a harmonised definition of what such privileges cover, discrepancies between legal systems may raise barriers to cooperation that cannot easily be surmounted.

Conversely, the case for enabling the exchange of confidential information is strong. Obstacles to cooperation stemming from the confidential nature of the information at

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autorite_clemence_revise_0.pdf [Accessed September, 12 2020].

36 See OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, p. 120. See also DEKEYSER, K. (2018) Statements in EU/US Antitrust Enforcement: the Atlantic Dialogue, 26 February 2018. Available from: https://www.concurrences.com/en/page/backend/?id_auteur=39997 [Accessed September, 28 2020]: "Formal agreements are not necessary for international cooperation to be a reality. Many agencies collaborate by sharing so-called agency information, i.e. the timing of their investigations, the orientation of the case, the provisional conclusions, etc."

37 Cartel Working Group. Subgroup 2: Enforcement techniques anti-cartel enforcement manual (2013) Chapter on international cooperation and information sharing, p. 9. Available from: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMInternationalCooperationInfosharing.pdf [Accessed September, 12 2020] The scope of informal cooperation overlaps with the scope of agency-internal information. Moreover, by identifying when the need for formal cooperation is triggered, the Manual provides a negative delimitation of the scope of (informal) agency internal information: "Generally speaking, when competition agencies wish to exchange more sensitive information, or wish to use information formally in their proceedings, they must exchange such information through formal avenues."

38 See, e.g. Article L. 463-6 of the French Commercial Code. Ordonnance n° 2010-1307 du 28 octobre 2010 relative à la partie législative du code des transports, JORF 2010 n°0255, item 113.

39 E.g. Under a general duty to preserve professional secrecy.

40 Cartel Working Group. Subgroup 2: Enforcement techniques anti-cartel enforcement manual (2013) Chapter on international cooperation and information sharing, p. 7.

stake mean that the commercial interests of the source or subject of the information are pitted against the public interest of effectively suppressing/preventing anticompetitive behaviour. However, the conciliation of both interests can be achieved through reciprocal arrangements aimed at guaranteeing that the information is only disclosed by the receiving authority in accordance with what the transmitting authority had foreseen and accepted. Of course, the issue goes beyond the existence of effective legal and operational mechanisms that prevent the undesired divulgation of confidential information once it is received, e.g. monitoring the internal dissemination of the information, limiting the scope of addressees to those who actually need to be acquainted with the information, providing for deterrent penalties in the case of unauthorised disclosure, etc. As with the legal privileges referred to in the previous paragraph, the remit of confidential information, as well as the scope and number of instances where disclosure is legally required, vary from one jurisdiction to the next. Ultimately, reciprocal transparency on the authorities' respective legal regimes regarding confidentiality and exceptions thereto appears to be of paramount importance.

This being said, before the authorities discuss the terms of their exchange of (confidential) information, the mere ability to proceed with such an exchange must be secured, which in turn depends on the existence of a relevant legal basis.

The ability to share information in relation to the legal instrument supporting the exchange

To date, it appears that most MoUs, arrangements and agreements entered into between (bilaterally) or among (multilaterally) competition authorities or States do not so much provide for new and hitherto absent powers to exchange information as they seek to encourage cooperation and, in particular, information exchange, within existing laws and regulations. A near-ubiquitous proviso in both MoUs and bilateral arrangements/agreements is that no provision should be construed as requiring a competition authority to act in a manner inconsistent with the laws of its jurisdiction, or requiring changes in those laws. Any contemplated cooperation is generally subject to the laws and regulations in force in the parties' respective jurisdictions.[41]

The exceptions to this are second-generation agreements providing for 'information gateways' enabling the exchange of confidential information between the parties involved without seeking the consent from the source of information, though there are very few of these. For instance, the EU Commission is involved in bilateral relations supported by a bilateral cooperation instrument, in one form or another, with over 30 non-EEA jurisdictions: of these, only five are competition-specific bilateral agree-

41 See OECD (2015) OECD inventory of international co-operation agreements between competition agencies (MoUs). Available from: https://www.oecd.org/competition/inventory-competition-agency-mous.htm [Accessed September, 12 2020]; OECD (2017) Competition co-operation and enforcement inventory of international co-operationmous between competition agencies. Provisions on Existing Law. Available from: https://www.oecd.org/daf/competition/mou-inventory-provisions-on-existing-law.pdf [Accessed September, 12 2020].

ments,[42] and of these five the 2014 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws is the only second-generation agreement. Outside Europe, the 1999 Australia-US Agreement on mutual antitrust enforcement assistance also provides for such potent mechanisms of information exchange. Conditions set out for the information exchange reflect the different objectives pursued by the two latter agreements. While the Australia-US Agreement contemplates investigative assistance being provided through the exchange of information compulsorily obtained at the request of the other party, the EU-Switzerland Agreement only foresees the exchange of information already in the possession of either party, in the context of parallel proceedings concerning the same or related conduct or transaction.[43]

If one puts aside the specific mechanisms for information exchange that exist within the ECN, it appears that the more widespread legal bases for the formal exchange of confidential information for use as evidence are either ad hoc waivers granted by the source of the information,[44] or national enabling provisions.[45] With regard to the latter, an analysis of the British and French 'information gateway' provisions points to the need to have due regard to such common factors as (i) reciprocity, (ii) equivalent safeguards against disclosure in the receiving jurisdiction and (iii) overriding public interests that oppose the exchange.[46] In addition, these enabling national provisions impose, or at least contemplate, entering into bilateral arrangements with potential receiving authorities in order to further frame future information exchanges.[47]

42 LAITENBERGER, J. (2017) Closer Together: the Case for International Cooperation, *Concurrences Review Event*, September, 14 2017. Available from: https://ec.europa.eu/competition/speeches/text/sp2017_12_en.pdf [Accessed September, 12 2020].

43 Article 7, para. 4, a) of the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. Available from: https://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf [Accessed September, 12 2020].

44 Waivers are mentioned as the primary legal basis for international cooperation in general in the OECD (2013) *International Enforcement Co-operation Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation*, 2013, p. 13

45 Six respondents to the *OECD/ICN Survey on International Enforcement Cooperation* indicated, in 2013, that their national framework included such enabling legislation serving as an 'information gateway'. One such legal basis (Part 9 of the UK Enterprise Act 2002) was used to exchange information between the OFT and the ACCC in the Marine hose case.

46 For the UK, see Section 243 of the Enterprise Act 2002, UK Public General Acts c.40; for France, see Article L. 462-9 of the French Commercial Code: Ordonnance n°2000-912 du 18 septembre 2000 relative à la partie Législative du code de commerce. Available from: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069441?etatTexte=VIGUEUR [Accessed September, 12 2020].

47 See Article L. 462-9 of the French Commercial Code.

THE STATE OF PLAY OF COOPERATION IN EUROPE: LESSONS TO BE LEARNT FROM EXISTING FRAMEWORKS FOR COOPERATION WITH THIRD COUNTRIES

Let us now examine the existing frameworks for cooperation amongst NCAs with respect to antitrust enforcement and merger control against the international context we have just outlined.

Antitrust enforcement: are any gaps left?

Article 22 of Regulation 1/2003 provides a legal basis for the reciprocal provision of investigative assistance between NCAs, as well as between the latter and the Commission. All 'fact-finding measures' are concerned, i.e. interviews, inspections and written requests for information. Article 12 of Regulation 1/2003 acts, in turn, as a legal conduit through which information collected through these fact-finding measures can be transmitted back to the requesting authority. In addition, Article 12 allows for the exchange of information already held by the requested authority. Exchanges can cover 'any matter of fact or of law' and include confidential information.[48] It follows that the scope of Article 12 is far-reaching: it covers and legally secures the exchange of agency internal information as well as confidential information.

Article 12 is, in essence, an 'information gateway' provision that reflects the specific nature of the EU legal order, grounded in principles of mutual recognition and trust. While the exchange of information between NCAs remains a faculty and not an obligation, additional conditions present in corresponding national enabling legislations or model frameworks such as those espoused by the OECD, pertaining in particular to reciprocity, confidentiality safeguards[49] and the absence of overriding public interests, are not to be found. On the other hand, Article 12 foresees restrictions in relation to the use as evidence of information exchanged when such use is intended to support the imposition of a sanction on an individual:[50] these restrictions are in keeping with the regard generally given, in the context of 'information gateways', to the nature of the proceedings being conducted by the receiving authority, and whether defence rights are protected in equal measure in the receiving and transmitting jurisdictions.[51] Finally, there is at least one aspect *vis-à-vis* which the EU legislator has taken a somewhat more restrictive approach. Article 12 provides that "information exchanged shall only be used in evidence for the purpose of applying Article [101] or Article [102] of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority."

48 Article 12, para. 1 of Regulation 1/2003 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1-25.

49 Article 28 of Regulation 1/2003 provides for a common minimum standard in terms of protection of confidential information.

50 Article 12, para. 3 of Regulation 1/2003.

51 See Section 243 (6) (b) of the Enterprise Act 2002

While international cooperation agreements mention, as a rule, the possibility for the transmitting authority to spell out restrictions on the receiving authority's use of the information thus transmitted, Article 12 is rather unique in pegging *ex ante* the use of the information received to a specific legal and substantive application. The legal and practical significance of such a limitation to the scope of cooperation is not to be overlooked, and is at least twofold.

Firstly, Article 12 allows for cooperation only in the event that Articles 101 and/or 102 TFEU apply, and does not therefore foresee cooperation with the sole[52] view of applying the equivalent national competition rules. It is true that the extensive understanding of the concept of effect on trade in the context of Articles 101 and 102 TFEU makes it rather unlikely that an investigation requiring information located in another Member State would concern behaviour falling outside the remit of Articles 101 and/or 102 TFEU. This being said, such a condition incentivises firms to argue that EU rules are not applicable in national proceedings, in order to exclude as inadmissible the evidence obtained pursuant to Article 12.[53]

Secondly, the requirement that the information should only be used in evidence 'in respect of the subject-matter for which it was collected' raises specific issues in situations in which the information was not collected in the first place, as a result of a request for investigative assistance under Article 22 of Regulation 1/2003. Indeed, if the transmitting authority is to provide another NCA with information it has already collected pursuant to its own procedure for the application of Articles 101 and/or 102 TFEU, both NCAs must satisfy themselves that their respective procedures have the same 'subject-matter'. This, in turn, begs the question of what is covered by the notion of 'subject-matter'. It seems this notion is to be construed in a strict manner, and derives from the case-law of the Court of Justice prohibiting the use by the Commission of incidental evidence, i.e. evidence in relation to conduct other than that which is the object of the investigtions and

52 Information exchange to further an investigation based on the concurrent application of EU and national rules is allowed under Article 12, para. 2 of Regulation 1/2003: "where national competition law is applied in the same case and in parallel to (EU) competition law, and does not lead to a different outcome, information exchanged under this article may also be used for the application of national competition law."

53 See the French NCA's Decision 08-D-30 of 4 December 2008 (Le Conseil de la concurrence, Décision n° 08-D-30 du 4 décembre 2008 relative à des pratiques mises en œuvre par les sociétés des Pétroles Shell, Esso SAF, Chevron Global Aviation, Total Outre Mer et Total Réunion. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//08d30.pdf [Accessed September, 12 2020]) concerning a cartel in the tendering of Air France's aviation fuel supplies in the Reunion Island. A large portion of the supporting documentary evidence was held at the premises of the condemned oil companies' subsidiaries in the UK, and obtained through cooperation with the British OFT on the basis of Article 12 Regulation 1/2003. On appeal, the parties argued that there was no effect on trade. In a ruling of 24 November 2009, the Court of Appeal allowed the appeal on the basis that there was no effect on trade, before being overturned by the Civil Supreme Court (Cour de cassation).

obtained 'incidentally' during the investigations.[54] This is confirmed by the practice of the Commission, which appears to equate the same subject-matter with same infringement.[55]

All in all, the breadth of the cooperation tools offered to ECN members by Regulation 1/2003 is such that the Commission did not suggest strengthening these as part of its ECN+ initiative. The reinforcement of cooperation was only sought indirectly, by seeking to reduce divergence in national regimes, which dampen incentives to cooperate in the first place.[56] However, this position evolved, to some extent, between the publication of its 2014 Communication and its proposal for a directive three years later, by contemplating some moderate changes to the existing legal framework for cooperation among ECN members. These reflect, in particular, stakeholder contributions made in the meantime, as well as fruitful discussions carried out within the ECN.

On the one hand, the proposal extends the scope for cooperation to the recovery of fines and the notification of procedural acts in another Member State.[57] On the other hand, it completes the existing legal basis for investigative assistance through inspections, by foreseeing that the assisting NCA can allow representatives of the requesting NCA

54 See reference made to para. 17-20 of the Court of Justice's judgment of 17 October 1989 in case 85/87 in footnote 10 to para. 28, b) of the Commission Notice on cooperation within the Network of Competition Authorities OJ 2004, C 101, 27.04.2004, p. 43.

55 See para. 353 of the French NCA's Decision 11-D-17 of 8 December 2011 (Autorité de la concurrence, Décision n°11-D-17 du 8 décembre 2011relative à des pratiques mises en œuvre dans le secteur des lessives. Available from: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//11d17.pdf [Accessed September, 12 2020]). The Commission is quoted a refusing the transmission to the French NCA of evidence held in its file in case COMP/39579, in relation to the same sector, for the reason that 'it concerns an infringement other than that examined in the French case.'

56 See EC (2014) Communication from the Commission to the European Parliament and the Council: *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* {SWD(2014) 230}_{SWD(2014) 231} (COM(2014)453). Available from: https://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020]; Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (COM(2017) 142 final) {SWD(2017) 114}{SWD(2017) 115} {SWD(2017) 116}, p. 7. Available from: https://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf [Accessed September, 12 2020]:
"One of the main elements of Regulation (EC) No 1/2003 is that it provides for cooperation mechanisms that allow NCAs to investigate alleged infringements beyond the borders of their Member State. [...] this mechanism does not work well if not all NCAs have effective powers to carry out inspections or to request information".
See also Ibid, recital 6:
"Gaps and limitations in NCAs' tools and guarantees undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU which is designed to work as a cohesive whole based on close cooperation within the European Competition Network. This system depends on authorities being able to rely on each other to carry out fact-finding measures on each other's behalf. However, it does not work well when there are still NCAs that do not have adequate fact-finding tools."

57 Ibid, Articles 24 and 25.

to participate and actively assist in the conduct of the concerned inspections.[58] Among the additions made to the content of the directive during the legislative procedure is a specific reference to interviews alongside inspections. There is also a new paragraph extending the application of existing investigative assistance mechanisms under Article 22 of Regulation 1/2003 to procedural infringements, e.g. a failure to comply with a request for information or opposition to an inspection.[59] The latter amendment should be seen in the context of the growing importance of procedural infringements in the overall enforcement strategy pursued by competition authorities, as illustrated by the eye-catching fines imposed in recent years, with respect to both antitrust and merger procedures.[60]

Interestingly, the inclusion of an enabling legislation for cooperation amongst NCAs with regard to the notification of procedural acts mirrors a similar arrangement contained in the exchange of notes between the Mission of Switzerland to the EU and the Commission of 17 May 2013, adopted alongside the EU-Switzerland Agreement.[61] This is justified in view of the objectives underlying the arrangement found in the EU-Swiss context, which may also be relevant to an EU-internal context: to overcome a national legal hurdle to direct notification (in particular 'blocking statutes') and to ensure an undisputable starting point for the calculation of key time limits (e.g. for replying to an SO or lodging an appeal against a decision issuing a fine). Moreover, the Commission's practice of notifying such acts to EU subsidiaries of third country firms means that, in practice, the situation contemplated in the exchange of notes is quite limited, i.e. a situation in which a firm has no subsidiary in any Member State. Conversely, the absence of such a practice or possibility in (most) Member States may make this new cooperation tool for the notification of procedural particularly relevant for NCAs.

58 Ibid, Article 23.

59 See Article 24, para. 1 and 2 of 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, 14.09.2019, p. 3.

60 See Commission Decisions of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003 for a failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 [Case COMP/C-3/39.530 – *Microsoft* (tying). Available from: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf [Accessed September, 12 2020]. See also Commission decision of 17 May 2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 –*Facebook / Whatsapp*. Available from: https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf [Accessed September, 12 2020].

61 See Swiss Confederation, Federal Department of Economic Affairs, Education and Research EAER (2014) Note Competition: Questionnaires sent by the European Commission to Swiss companies. Available from: https://www.weko.admin.ch/dam/weko/en/dokumente/2014/09/questionnaires_sentbytheeuropeancommissiontoswisscompanies.pdf.download.pdf/questionnaires_sentbytheeuropeancommissiontoswisscompanies.pdf [Accessed September, 12 2020].

Merger control: is there a case for deeper cooperation instruments?

To date, the NCAs and the Commission have agreed on a series of non-binding frameworks providing guiding principles for cooperation in specific situations, such as upward referrals[62] and multijurisdictional filings.[63] On the other hand, there are no legally binding norms at EU level enabling the NCAs to exchange information, let alone provide investigative assistance to each other in the context of a merger review. Provisions of the kind contained in the EU Merger Regulation only relate to unilateral, vertical, cooperation, whereby an NCA assists the Commission at the latter's request.[64] A specific legal basis also exists to allow for the Commission to send case-related material to the NCAs, in connection with an obligation to "carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States."[65]

The 2011 Best Practices drawn up by the EU Merger Working Group reflect this state of affairs. They reaffirm the role of the ECA notices, introduced in 2001[66] as the sole systematic information mechanism on which the NCAs rely when cooperating in multijurisdictional filings. They foresee cooperation in certain limited instances where comparable jurisdictional or substantive issues arise in the event of a merger being reviewed by two or more competent NCAs.[67] The nature of the cooperation is akin to that foreseen under 'traditional' competition-specific international agreements, i.e. the exchange of procedural/agency-internal information to facilitate coordination and the exchange of confidential information subject to the grant of a waiver by the concerned parties.

Without the widespread existence of enabling legislation at Member State level, which would make up for the absence of 'information gateways' at EU level,[68] the prevailing legal situation with regard to cooperation between NCAs in the field of merger control thus denotes a level of ambition that stands below several existing international bilateral agreements, among which the EU-Switzerland agreement of 2014 and the Nordic Cooperation Agreement of 2019. It also marks a level of integration somewhat inferior

62 ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EU Merger Regulation.

63 ECA procedures guide on the exchange of information between members on multijurisdictional mergers (2001) and MWG (2011) Best Practices on Cooperation between EU National Competition Authorities in Merger Review. Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed September, 12 2020].

64 See Article 11, par. 6, Article 12 and Article 13, para. 5 of the EU Merger Regulation.

65 Article 20, para. 1 and 2 of the EU Merger Regulation.

66 Information notice sent out to all ECA members with regard to a merger case giving rise to a multifiling in Europe.

67 Para. 3.2 of MWG (2011) Best Practices on Cooperation between EU National Competition Authorities in Merger Review.

68 The 'information gateway' provided for under Article L. 462-9 of the French Commercial Code also applies in the merger control context. To the best of the author's knowledge, this is the exception rather than the rule amongst Member States.

to that advocated by the OECD's 2014 Recommendation concerning international cooperation on competition investigations and proceedings.

Some have already levelled criticism at the dearth of EU legal basis for horizontal cooperation in the field of merger control, calling for the introduction of cooperation tools akin to those that already exist for antitrust enforcement.[69] On the other hand, this lacunae was barely touched upon by the Commission's White Paper of 2014. While the more general issue of substantive convergence and consistent outcomes between NCAs in the context of multijurisdictional filings was mentioned,[70] the lack of an EU-wide legal basis for NCAs to exchange information was not specifically addressed. However, an indirect and partial response came in the form of a proposal to formalise the ECA notice system and to link it to the Article 22 referral mechanism.[71] DG COMP's public consultation on the 'evaluation of procedural and jurisdictional aspects of EU merger control' conducted at the end of 2016 did not mention any new proposals relevant to NCA cooperation.

At this stage it seems that, notwithstanding a clear international trend towards adopting, or at least advocating the establishment of, 'information gateways', including in the field of merger control, at EU level the momentum for securing the transmission of (confidential) information irrespective of the sources' consent in the field of merger control is lacking. This is notwithstanding the volume of multijurisdictional filings made every year to Member State authorities, which tends to underscore the potential expediency of such a cooperation tool.[72] While there is prima facie a valid argument to be made as regards the need to safeguard the confidentiality of data and documents submitted by the concerned undertakings and exchanged without their consent, the fact that such cooperation mechanisms already exist, not only in the antitrust field under Regulation 1/2003, but also in the merger field under Article 20 of the EU Merger Regulation, means that there is already a prevailing consensus that safeguards are sufficiently in place throughout the EU. As for the view that the parties are always forthcoming in the provision of waivers in merger cases, thus negating the need to exchange information without their consent, it glosses over the fact that the authorities' and the parties' interests may not necessarily be aligned. For instance, the parties may be tempted to delay the exchange of information between two authorities when by doing so they can benefit from the misalignment of the concerned authorities' procedural timetables.

69 French Competition Authority (2013) Making merger control simpler and more consistent in Europe – a 'win-win' agenda in support of competitiveness. Report to the Ministry for Economy and Finance– 16 December 2013. Available from: https://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf [Accessed September, 12 2020].

70 EC (2014) White Paper: Towards more effective EU merger control (COM/2014/0449 final), para. 6-22. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52014DC0449 [Accessed September, 12 2020].

71 Ibid., para. 71-73.

72 The French Competition Authority's report of 16 December 2013 provides estimates of more than 200 cases per year, based on ECA notices received.

Moreover, if competition authorities decide to step up the enforcement of procedural infringements in the context of a merger review, especially with regard to incomplete or misleading replies to requests for information,[73] then the information exchanged with their counterparts may lay bare any gaps in the filing parties' replies, and thus provide initial grounds for an infringement procedure. Recoiling at such an outcome, firms may grow more reluctant to grant waivers in the first place.

CONCLUSION

When it comes to the ability of NCAs to cooperate, it seems that the discrepancies witnessed between antitrust enforcement and merger control are, to a significant extent, by-products of the enforcement models retained for each field. Whereas nearly as early as the entry into force of the founding treaties, antitrust enforcement operated on a centralised, uniform, EU-wide basis, merger control functions were assumed by the Commission at a stage at which some Member States were accustomed to reviewing mergers, and were therefore loath to hand over, even if only partially, jurisdiction thereupon.

It is suggested that, as a result, the imperative of maintaining the benefits of the centralised enforcement of Articles 101 and 102 TFEU, while devolving its implementation in part to NCAs, was a key factor in establishing an enabling environment for cooperation among NCAs under Regulation 1/2003. Conversely, such a historic imperative does not exist in the field of merger control, even if maintaining consistency between the NCAs' approaches is naturally seen as desirable. As already mentioned above, the EU Merger Regulation contains a form of 'information gateway', but only in order to enable the Commission to liaise with NCAs in relation to the cases it is dealing with.

A brief overview of the non-EU legal context shows that 'information gateways' in the field of merger control have been included in several bilateral and regional agreements, as well in certain national laws. If and when a reform of the EU Merger Regulation actually takes place, it is submitted that policymakers should take stock of the application of these agreements and laws in order to ascertain whether these, rather than a system of ad hoc waivers, present the greatest benefit to NCAs cooperating in the review of a multijurisdictional merger.

73 See, e.g. Commission decision of 17 May 2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 –*Facebook / Whatsapp*.