

Article

Case (re-)Allocation Against the Backdrop of Procedural Convergence: Time for a Regulation ‘2’ Upgrade?

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I. Introduction

Regulation 1/2003 obliges all Member States’ competition authorities (NCAs) to apply Articles 101 and 102 TFEU.¹ To avoid all too many overlapping or parallel enforcement cases, a balanced case (re-)allocation mechanism had been envisaged.² Allocation decisions essentially take place within the framework of the European Competition Network (ECN).³ The ECN operates in the shadow of EU competition law and does not have the power to adopt legally binding decisions. This short article argues that, in light of the NCA procedural convergence realised since the entry into force of Regulation 1/2003, the networked case allocation mechanism is becoming ever more difficult to keep in place as such (2.). The article therefore calls for a potential Regulation ‘2’ proposal that allows for a moderate administrative and judicial review of allocation decisions (3.).

1. Network-based case allocation against the backdrop of procedural convergence

The ECN case (re-)allocation mechanism has operated consistently so far without hard law rules (2.1.). However, it is submitted that EU competition law enforcement has since undergone significant evolutions, culminating in the adoption of Directive 2019/1. The initiatives increasingly call into question the ECN’s case allocation approach and no longer justify it being maintained in its present form (2.2.).

Key Points

- Regulation 1/2003’s case (re-)allocation mechanism is based on an informal, network-based governance model;
- This article submits that this network-based model is ever more difficult to justify in light of NCA procedural convergence put in place by Directive 2019/1;
- It therefore calls for an upgraded Regulation ‘2’ case (re-)allocation framework that better reconciles the beneficial features of network governance with undertakings’ and interested parties’ fundamental rights to procedural fairness and to an effective remedy.

A. The current Regulation 1/2003 framework

Article 11 of Regulation 1/2003 confirms that Commission and the competition authorities of the Member States are to apply Articles 101 and 102 TFEU in close cooperation. To that extent, an ECN has been set up.⁴ The purpose of that network has been not only to (re-)allocate cases, but also to foster exchanges of information, to streamline enforcement policy (leniency included), and to integrate NCAs in a Commission-led policy coordination network.⁵

As far as case (re-)allocation is concerned, no strict and binding allocation criteria had been developed, partly for lack of agreement between the Member States on this point and in order to ensure a flexible application and

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1 See Article 3 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

2 On that mechanism, see Silke Brammer, ‘Concurrent jurisdiction under Regulation 1/2003 and the Issue of Case Allocation’ (2005) 42 *Common Market Law Review* 1383–1424.

3 See in that regard <https://ec.europa.eu/competition/ecn/documents.html> (accessed 8 July 2020).

4 Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (accessed 8 July 2020, hereafter referred to as Joint Statement).

5 As confirmed by the Commission in its Staff Working Document SWD 2014(230) on 10 years of Regulation 1/2003, https://ec.europa.eu/competition/antitrust/legislation/swd_2014_230_en.pdf (accessed 8 July 2020), para 243; Mislav Mataija, ‘The European Competition Network and the Shaping of EU Competition Policy’ (2010) 6 *Croatian Yearbook of European Law and Policy* 75–101.

enforcement of Articles 101 and 102 TFEU.⁶ NCAs have to inform the network as soon as possible the commencing of investigative measures in a case.⁷ In general, the case will remain with that authority, as long as a credible link with the NCA's territory can be found.⁸ However, nothing excludes either the re-allocation of a case or the start of parallel proceedings for the same kind of behaviour on a different territory by other NCAs.⁹ In the latter case, either one NCA takes the lead or enforcement will be coordinated among different NCAs.¹⁰ An NCA can reject a complaint or close a case or suspend proceedings for the sole reason that another authority is dealing with the same case.¹¹ In case the behaviour concerned covers three or more Member States, the Commission may be a better placed authority.¹² In any case, the Commission retains the (so far unused) power to relieve NCAs from a case, thus leaving it at the helm of the network.¹³

Despite the existence of those guidelines, allocation decisions are being made very much on a case-by-case basis grounded in constant exchanges of information and dialogue between NCAs. In practice, few case (re-) allocation decisions have been taken and the practice is considered not to be problematic.¹⁴ Case allocation nevertheless raises fundamental questions from the point of view of the undertakings and other stakeholders (such as complainants) involved in the enforcement procedure. A (re-)allocation of a case may imply the closure of proceedings that had started at one NCA. In accordance with national law, such a closing decision or action may or may not be amenable to (some kind of) judicial review.¹⁵ Overall, undertakings and stakeholders have little say about where the case is going to be conducted. Given

the variety of administrative and judicial enforcement frameworks in place, the choice for one or another enforcement authority may have repercussions on the ways in which fundamental procedural rights of those stakeholders are safeguarded. Those concerns were also not explicitly taken into consideration in the ECN founding documents.

B. Procedural convergence: time to revise case (re-)allocation?

Since the creation of the ECN and the entry into force of Regulation 1/2003, undertakings' and stakeholders' fundamental procedural rights (right of access to the file, right to be heard, right to effective judicial protection to name but a few¹⁶) have returned increasingly into the spotlight. Both at NCA and EU level, questions have been raised as to the compliance of enforcement procedures with Article 47 of the EU Charter of Fundamental Rights and Article 6 ECHR.¹⁷ The Commission's monolithic enforcement procedure has been criticised¹⁸, in response to which the Hearing Officer's role has been upgraded.¹⁹ Emphasising the need for independent and fundamental rights-compliant authorities, the EU legislator has started to reflect on ways to streamline NCA procedures and operations.²⁰

Those reflections have culminated in Directive 2019/1, which harmonises NCAs' procedural frameworks and their functioning within the ECN (hence the name ECN + Directive²¹). The Directive imposes increased independence requirements on NCAs so as to ensure their effective functioning within the ECN.²² In addition, it also mandates those NCAs to comply with the EU Charter of Fundamental Rights. In addition, they have to maintain appropriate safeguards in respect of the

6 See A Schwab and C Steinle, 'Pitfalls of the European Competition Network—why better protection of leniency applicants and legal regulation of case allocation is needed' (2008) 29 *European Competition Law Review* 524.

7 Art. 11(3) of Regulation 1/2003; see also Joint Statement, para 12–13.

8 Commission Notice on cooperation within the Network of Competition Authorities, [2004] O.J. C101/43, para 8 (hereafter referred to as Network Notice).

9 Joint Statement, para 16–17; Network Notice, para 11–12.

10 Joint Statement, para 18; Network Notice, para 13. An example in that regard constitute the commitments issued at the same time by different NCAs in relation to Booking.com's price parity clauses, see <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-booking.com> (accessed 8 July 2020).

11 Article 13(1) of Regulation 1/2003. See also CJEU, Case T-201/11, *Si.mobil v Commission*, EU:T:2014:1096, para 47–50.

12 Joint Statement, para 19; Network Notice, para 14.

13 Article 11(6) of Regulation 1/2003.

14 As already confirmed by the Commission Staff Working paper accompanying the Communication from the Commission to the European Parliament and Council—Report on the functioning of Regulation 1/2003 [COM(2009)206 final], <https://ec.europa.eu/competition/antitrust/legislation/regulations.html> (accessed 8 July 2020), para 215–224.

15 See W Wils, 'Community Report' in Dermot Cahill (ed.), *The Modernisation of EU Competition Law Enforcement in the EU-FIDE 2004 National Reports* (CUP 2004), p. 703.

16 See W Wils, 'Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network' (2020) 43 *World Competition* 5, p. 8–9.

17 ECtHR, *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011; Marco Bronckers and Ann Vallery, 'Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after *Menarini*?' (2012) 8 *European Competition Journal* 283–299.

18 See I Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures' (2009) 34 *European Law Review* 817–843.

19 Decision 2011/695 of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, [2011] OJ L275/29.

20 For a critique that streamlining NCA operations alone is not always beneficial, see C Townley, *A Framework for EU Competition Law—Co-ordinated Diversity* (Oxford, Hart 2018), p. 221–244.

21 Wouter Wils, 'The European Commission's 'ECN+' Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers', *Concurrences* (2017), 60–80.

22 Article 4 of Directive 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, [2019] O.J. L11/3.

undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.²³ The Commission still maintains its overall primary role within a somewhat more streamlined enforcement framework.

The case (re-)allocation mechanism set up in the shadow of Regulation 1/2003 has not been included explicitly within the procedural convergence initiatives taken thus far. One of the reasons for this can be found somewhat counterintuitively in the amount of convergence aimed for by the Directive. In 2004, one of the main criticisms against the networked allocation mechanism was related to lack of procedural convergence among NCAs. In that context, the decision to confer a case to one or another NCA would have severe repercussions in terms of the way in which a procedure is organised, the possibilities of judicial review, and the respect for fundamental procedural rights. As such, an increase in convergence of NCA procedures and a streamlining of their respect for fundamental rights would counter that criticism and implicitly also diminish the need for an upgraded case allocation mechanism.

That argument, we submit, is not fully convincing at present. Important institutional and procedural differences remain between the NCAs and the judicial review procedures against their decisions. Those differences may have an impact on the procedural rights of the undertakings and stakeholders concerned. Within that framework, a case allocation decision still directly affects the legal position and fundamental rights of the undertakings involved and all other stakeholders. Although a preparatory step in the process leading to an ultimate Article 101 or 102 TFEU decision by the Commission or an NCA, a case allocation decision is not merely preparatory in nature in the same way as a Statement of objections or simple initiation of proceedings by one authority.²⁴ Having streamlined NCAs competences and governance procedures does not take away the fact that different authorities entertain different decision-making and review methods. Given those differences, it could be envisaged that stakeholders involved would want to raise a point as to procedural rights deficiencies in one or the other related authority at an early stage in the procedure. As a result, it would be perfectly understandable from a fundamental rights point of view, to at least have the decision allocating the case to a given authority reviewed at this stage.

In addition, (re-)allocation decisions can now even more explicitly be based on enforcement priorities. Article 4(5) of Directive 2019/1 explicitly allows NCAs to set

such priorities and to reject cases on the basis of them, in the same way as the Commission has done in the past.²⁵ It could be inferred implicitly from the Directive that NCAs retain a wide discretion to set their priorities, which are subject to only marginal judicial review. However, communicating priorities creates legitimate expectations that some cases will be dealt with by some authorities and other will not. As such, those priorities constitute additional yardsticks against which a decision to (re-)allocate a case can be evaluated. A decision not to (re-)allocate a case to one authority for priority reasons may thus be reviewed in the light of those communicated priorities. It can be argued, therefore, that the upgrading of the priority-setting framework offers an additional opportunity to review allocation decisions against the background of those priorities and to contest decisions that deviate from them without a valid reason. As Directive 2019/1 obliges NCAs to respect the right to an effective remedy, it may be necessary to envisage such remedy against decisions relating to the closing of proceedings in response to a re-allocation as well. The Directive does not impose this requirement at present. Given its emphasis on the right to an effective remedy, however, it is clear that allowing some (informal) decisions closing proceedings to remain under the judicial review radar becomes increasingly untenable.

II. Building blocks for a Regulation '2' case (re-)allocation upgrade

The procedural convergence developments and accompanying gaps analysed in the previous section in our opinion justify the need for upgrading the case (re-)allocation mechanism in order to make it more fundamental rights-proof. When contemplating such upgrades and in order to ensure compliance with the right to an effective remedy, modifications to the current framework are in order. However, we believe that those modifications can be reconciled to some extent with the beneficial features of flexible and dialogue-based network-based governance. Four observations can be made in this regard.

First, we do not believe it would be necessary to set in stone detailed case allocation criteria. The ECN operations have shown that open-ended and broad allocation guidelines do not generate significant practical problems.²⁶ As such, in order to allow the network to continue to make (re-)allocation decisions on a flexible basis and

23 Article 3(2) of Directive 2019/1.

24 See to that extent, CJEU, Case 60/81, *IBM v Commission*, EU:C:1981:264.

25 CJEU, Case T-24/90, *Automec v Commission (Automec II)*, EU:T:1992:97, para 75–76.

26 See D Gerard, 'Public enforcement: the ECN—networked antitrust enforcement in the European Union' in Ioannis Lianos and Damien Geradin (ed.), *Handbook on European Competition Law—Enforcement and Procedure* (Cheltenham, Elgar 2013) 181, p. 205–206.

in light of the specific circumstance of a given case, the absence of overly detailed allocation criteria would be desirable. In our proposal, the lack of detailed criteria should nevertheless not justify the absence of any review whatsoever of the reasonableness and motivation of individual (re-)allocation decisions. Even without detailed criteria, network members should be expecting to have to justify their decisions in a more formalised setting.

Second, the current non-binding allocation decision-making framework is problematic from an effective remedy point of view. No formal decisions are taken at EU level and not all NCAs adopt a reviewable decision formally closing proceedings in case of reallocation. To meet the fundamental rights' safeguards, revising that framework would seem necessary. One way to move forward in that regard is to consider a decision ordering or rejecting the (re-)allocation of a case as a decision taken at EU level. It is true that the European Commission plays a significant role in the governance and operation of the ECN.²⁷ In convening the network and allowing it to decide on case (re-)allocation, one could therefore be inclined to say that any decision ordering or rejecting (re-)allocation is to be attributed to the EU level, even when not formally constituting a Commission decision. It may very well be possible to consider any case allocation decision primarily as an EU administrative decision of some sorts, taken by the Director-General for Competition or the competent Commissioner. As a matter of EU law, such a decision would need to be reasoned²⁸ and explain why, in this particular case, the specific (re-)allocation decision has or has not been decided on. If that were the case, guaranteeing effective remedies for undertakings and stakeholders would be easier to implement and coordinate as well.

The framework set up within EU financial market supervision could serve as a source of inspiration in that regard. Within that context, national supervisory authorities had also coordinated their policies within the context of an enforcement network. The financial crisis of 2008 triggered an upgrade of those networks into network-based European supervisory authorities (ESAs).²⁹ Formally European agencies, those ESAs essentially assemble all national supervisory authorities

in a decision-making Board of Supervisors.³⁰ The ESAs essentially leave day-to-day supervision and enforcement to national authorities, but can intervene in a binding way in case of conflicts between national supervisors. In such a conflict situation between different national authorities, the ESA shall set a time limit for conciliation between the competent authorities and shall act as a mediator. In case no conciliation can be attained, it shall take a decision requiring the national authorities to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.³¹ That framework is nevertheless imperfect from the point of view of the right to an effective remedy. When the conflict between national supervisory authorities can be resolved informally and without an ESA binding decision, one national authority may have to close the case in favour of another authority, leaving no or limited judicial review options against that closure decision. That situation resembles the current ECN allocation framework. In that situation, the right to an effective remedy would no longer be safeguarded. The adoption of a formal conflict resolution decision would thus appear to be a *conditio sine qua non* in order to safeguard national authorities' and supervisees' fundamental right to an effective remedy and, concomitantly, their right to be heard as far as the allocation decision is concerned. Setting up a similar mechanism in the context of competition law public enforcement in our opinion would thus require, in any case allocation situation, the adoption of a formal or implicit decision attributable to the EU (DG Comp, the competition Commissioner or the Commission). In order to guarantee the right to an effective remedy, the legal effects of an ECN re-allocation decision under EU law would have to be recognised.

Third, effective remedies need to be envisaged against those reasoned EU-level decisions confirming or rejecting case (re-)allocation. In the context of financial market regulation, ESA conflict resolution decisions are amenable to both administrative and judicial review. An independent internal Board of Appeal will be called upon in the first place to allow stakeholders directly and individually concerned by it to obtain a review. That review could result in the obligation to adopt new decision in compliance with the Board of Appeal's findings. Against the Board of Appeal's decision, proceedings before the EU Courts can be initiated. First, an action

27 Firat Cengiz, 'Multi-level governance in EU competition policy: the European Competition Network' (2010) 35 *European Law Review* 660, p. 676.

28 See Article 41 of the Charter of Fundamental Rights in the European Union

29 See on the evolution of those networks into agencies, Pieter Van Cleynenbreugel, *Market Supervision in the European Union—Integrated administration in constitutional context* (Leiden/Boston, Brill 2014), p. 56–60.

30 Articles 40–44 of Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European supervisory authority (European Banking Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, [2010] O.J. L331/12.

31 Article 19 of Regulation 1093/2010.

for annulment on the basis of Article 263 TFEU can be introduced before the General Court. That judgment could be appealed subsequently on points of law before the Court of Justice.³²

That framework could be replicated in the context of competition law case (re-)allocation decisions. It could be envisaged to have in place a Board of Appeal composed of experts and (former) practitioners to review (re-)allocation decisions. The mandate of that Board would above all be to verify whether the Commission and NCAs as network partners have not overstepped the boundaries of reasonableness in taking a case allocation decision or have respected their respective enforcement priorities in making that decision. The Board could remit the case to the ECN for re-adoption in light of its own decision, prior to allowing judicial review against it before the EU Courts.

Fourth, a major difficulty related to upgrading and formalising case allocation would be the risk of abusive delay tactics by undertakings. When designing an upgraded allocation mechanism, the promotion or facilitation of such tactics should be avoided at all cost. To do so, the envisaged mechanism should not be envisaged as just an additional procedural layer meant to enable or facilitate such tactics. It is therefore crucial also to have a clear legal framework as to the consequences of initiating review proceedings against (re-)allocation decisions. A key issue to avoid delay tactics is to limit the suspension of ongoing enforcement proceedings when the allocation decision is still under administrative or judicial review. It is therefore key that the upgraded framework pays attention to the (lack of) suspending effect of review proceedings on ongoing enforcement actions.

One way to proceed could consist in the imposition of interim measures pending review proceedings. In that context, Article 11 of Directive 2019/1 obliges NCAs to have the power to adopt interim measures subject to expedited appeal procedures. Against that background, either the NCA to which the case has been (re-)allocated or the Commission could adopt such measures following discussion in the ECN. An undertaking would in that

context still have to comply with more or less extensive interim measures; in case it wants to use review procedures to delay infringement proceedings. Failure to do so may result in fines.

Decisions imposing interim measures are also subject to judicial review. It is not impossible that an undertaking could also ask for a review of those measures in addition to an ongoing review of the ECN (re-)allocation decision. However, to the extent that the designated NCA adopted those interim measures, any review of the interim measures would then have to take place that Member State before national courts. By contrast and per our proposal, the allocation decision would be reviewed at EU level. To avoid that two review procedures would have to be initiated on two different levels (EU and national), it appears necessary to envisage a larger role for the ECN in the adoption of interim measures. More precisely, any allocation decision at EU level would also have to be accompanied by appropriate interim measures coordinated within the ECN and attributable to the EU. Within the context of Directive 2019/1, the Commission has to investigate how the ECN could be involved in the interim measures process.³³ In that situation, it should be possible to require the envisaged Board and EU Courts both to review the aptness and reasonableness of allocation and of the coordinated interim measures.

The four observations made here are mere starting elements for upgrade reflections. If they are taken seriously, however, we believe that the benefits of network governance and the increasing attention to compliance with fundamental procedural rights could be reconciled. That would give undertakings and stakeholders the opportunity to be heard whenever they find themselves confronted with (re-)allocation decisions that affect them. It can therefore be hoped that any future Regulation '2' initiative would take the need for such renewed balance seriously and to proceed in finding a new case (re-)allocation balance.

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32 Articles 60–61 of Regulation 1093/2010.

33 See Article 11 of and the Declaration of the Commission annexed to Directive 2019/1, according to which the latter is going to examine this matter.