ERA Forum (2023) 24:317–325
https://doi.org/10.1007/s12027-023-00762-9

EDITORIAL

The role of the national judge for the enforcement of EU antitrust law twenty years since the entry into force of Regulation No 1/2003

Avgustina Dorich[1]

Accepted: 17 August 2023 / Published online: 20 September 2023

The European Union ('EU') antitrust rules date back to 1957 when the Treaty establishing the European Economic Community ('the EEC Treaty') introduced Articles 85 and 86 (now Articles 101 and 102 of Treaty on Functioning of the European Union) laying down the rules applicable to restrictive agreements, decisions, and concerted practices, on the one hand, and the rules prohibiting the abuse of dominant position, on the other.

In 1962, the Council of the European Union ('Council') adopted Council Regulation No 17 of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty [1962] OJ P 013/204 ('Regulation No 17/1962'), which set out the rules for the application of Articles 85 and 86 EEC. Those rules were applied for more than 40 years without any significant modifications. The antitrust enforcement system established by Regulation No 17/1962 was based on the direct applicability of the prohibition rule set out in Article 85(1) as well as on the prior notification mechanism regarding restrictive agreements and practices that could be exempted under para. 3 of the same provision. While the European Commission ('Commission'), national courts and national competition authorities could all apply the first paragraph of Article 85, the power to apply the third paragraph was granted exclusively to the Commission. Therefore, Regulation No 17/1962 established a highly centralised authorisation system for all restrictive agreements that could be exempted. By contrast, the prohibition of the abuse of dominant position has always been enforced in parallel by the Commission, national courts and national authorities.

In 2023, we mark 20 years since the antitrust enforcement system of the EU underwent the most significant reform since its creation – a modernisation and decentralisation reform introduced with the adoption of Council Regulation (EC) No 1/2003

✉ A. Dorich
adorich@era.int

[1] Deputy Head of Business Law Section, Academy of European Law (ERA), Trier, Germany

of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L 001/01 ('Regulation No 1/2003'). The reform replaced the system operating under Regulation No 17/1962 and established a directly applicable exception system in which the competition authorities and national courts of the Member States have the power to apply not only Art. 101(1) and Art. 102 TFEU,[1] but also Art. 101(3) TFEU.[2]

The decentralisation reform was aimed at addressing the two main deficiencies of the old system: 1) the Commission's monopoly on the application of Article 101(3) which was identified as a significant obstacle to the effective application of the rules by national competition authorities and courts, and 2) the excessive burden on the undertakings related to increased compliance costs and to the impossibility to enforce their agreements without prior notification even in cases where they fulfil the conditions of Article 101(3). By granting to national competition authorities and national courts the authority to apply Articles 101 and 102 in their entirety, Regulation No 1/2003 reinforced the EU antitrust enforcement system and created a possibility for the Commission to focus its efforts on the detection of the most serious competition law infringements. This decentralisation of competencies, combined with the expansion of the Commission's powers of investigation was aimed at the ultimate objective of achieving more efficient protection of competition in the EU.[3]

Twenty years after the decentralisation reform, the national judge plays an important role in the EU antitrust enforcement system, with respect both to public and private enforcement of Articles 101 and 102 TFEU. The recognition, in Article 6 of Regulation No 1/2003 of the competence of national judges to apply Article 101 TFEU in full, and the obligation, introduced by Article 3(1) of that Regulation for national competition authorities and national courts to apply Articles 101 and 102 TFEU whenever they apply national competition law to agreements, decisions by associations of undertakings or concerted practices that fall within the ambit of Article 101 (1) TFEU which may affect trade between Member States, or to any abuse prohibited by Article 102 TFEU, has led to increased application of EU competition rules by the national jurisdictions and to strengthening of their role in the decentralised system.

1 The role of the national judge in public enforcement of EU antitrust law

While public enforcement of EU antitrust law is primarily entrusted to the Commission and the national competition authorities of the Member States, national judges take an important place in the public enforcement system and their involvement in the application of Articles 101 and 102 TFEU can take several forms.

[1] Which as per the case law of the Court of Justice of the European Union (CJEU), Case 127/73 *BRT v SABAM*, EU:C:1974:6, para. 16, have direct effect.

[2] Articles 5 and 6 of Regulation No 1/2003.

[3] Explanatory Memorandum to Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 /* COM/2000/0582 final - CNS 2000/0243 */, Sect. 2.C.1.

1.1 Conducting review of national competition authorities' decisions

The first role of the national judge in public enforcement of Articles 101 and 102 TFEU is related to the review of national competition authorities' decisions. In the majority of EU Member States there is a reduced number of instances (only two and sometimes even one) of appeal of such decisions.[4] The first instance judges have to conduct a complete review of the respective competition authority's decision (i.e. both in terms of law and facts, including economic aspects). In a few Member States, the national judges are competent to take the infringement decision itself. The higher instance jurisdictions usually examine the national competition authorities' decisions on points of law only.[5]

1.2 Exercising the powers of a national competition authority

Article 35(1) and (2) of Regulation No 1/2003 foresees that national courts can be fully or partially entrusted with the powers of a national competition authority conferred by Article 5 of the same Regulation. This means that a national court that has been designated as a competition authority in accordance with Article 35, could take the following decisions: 1) requiring that an infringement be brought to an end; 2) ordering interim measures 3) accepting commitments, 4) imposing fines, periodic penalty payments or any other penalty provided for in their national law 5) deciding that there are no grounds for action where on the basis of the available information the conditions for prohibition are not met.

In a few EU Member States, national courts have been entrusted with some of the powers of a national competition authority. This is the case of Austria and Ireland where the Vienna Court of Appeal acting as Cartel Court and the Irish High Court are responsible for adopting infringement decisions on the cases brought before them by the respective national competition authority. In Finland and Sweden, the infringement decision is taken by the national competition authority, but the latter must call upon the court to impose a fine.[6]

According to Article 35(3) of Regulation No 1/2003, when a national court is exercising the powers of a national competition authority, the initiation by the Commission of proceedings for the adoption of a decision under Articles 7 to 10 shall relieve the court of its competence to apply Articles 101 and 102 TFEU as foreseen in Article 11(6) of the same Regulation. These effects of Article 11(6) do not extend to courts acting as review courts.[7] In cases when a national competition authority brings an action before a judicial authority that is separate and different from the prosecuting authority, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.[8]

[4] ERA, Study on judges' training needs in the field of European competition law, p. 23.

[5] ERA, Study on judges' training needs in the field of European competition law, p. 64.

[6] ERA, Study on judges' training needs in the field of European competition law, p. 22.

[7] Article 35(3) of Regulation No 1/2003.

[8] Article 35(4) of Regulation No 1/2003.

1.3 Imposing criminal sanctions for competition law infringements

In several jurisdictions (Denmark, Estonia, France, Greece, Ireland, Romania), certain competition law infringements lead to criminal liability and the criminal courts are therefore involved in the public enforcement of EU competition law. In France and Romania, the criminal courts can impose a prison sentence and/or a fine once a competition law infringement has been found by the national competition authority. In Denmark and Ireland, the national competition authority can initiate or instruct the prosecution service to bring a criminal prosecution for a competition law infringement. In all cases, such actions may be brought before any of the criminal courts in the respective Member State.[9]

1.4 Providing judicial authorisations

While most national laws require that a national competition authority has received judicial authorisation in order to enter the premises of an undertaking for the purposes of an investigation of an infringement of national or EU competition law, the conduct of inspections by the European Commission does not in principle require prior judicial authorisation.[10]

However, Regulation No 1/2003 foresees certain situations in which a national judge might be involved in the public enforcement of Articles 101 and 102 TFEU by being called upon to provide a prior judicial authorisation in relation to a Commission inspection.

According to Article 20(6) and (7), where Commission officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered by decision of the Commission, the Member State concerned shall grant them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection. If this assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

In addition, Article 21(1) and (2) stipulate that if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 101 TFEU or Article 102 TFEU, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can conduct an inspection in such premises only with prior authorisation from the national judicial authority of the Member State concerned.

Where authorisation as referred to in Article 20(7) is applied for, the national judge shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In the case of judicial authorisation of "other premises"

[9] ERA, Study on judges' training needs in the field of European competition law, p. 25.

[10] Case C-583/13 P *Deutsche Bahn AG*, ECLI:EU:C:2015:404, para. 32-37.

under Article 21, this assessment is carried out by the judge with regard to: 1) the seriousness of the suspected infringement; 2) the importance of the evidence sought; 3) the involvement of the undertaking concerned; and 4) the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judge may ask the Commission, directly or through the respective national competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged. However, the national judge may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision can be reviewed only by the Court of Justice of the European Union (CJEU).[11]

2 The role of the national judge in private enforcement of EU antitrust law

Recital 7 of Regulation 1/2003 highlights the essential role of the national courts in private enforcement of EU antitrust rules. It underlines that when deciding disputes between private individuals, national courts protect the subjective rights under EU law by awarding damages to the victims of infringements, thus have a complementary role to that of the competition authorities of the Member States and should therefore be allowed to apply Articles 101 and 102 of the Treaty in full. In fact, as it stems from the "travaux préparatoires"[12] one of the aims of the Commission's proposal for Regulation No 1/2003 was to promote private enforcement by national courts through the abolition of the Commission's monopoly on the application of Article 101(3).

By stipulating in its Article 6 that the national courts are competent to apply Articles 101 and 102 TFEU in full, Regulation No 1/2003 created an obligation for the national judge having found that the conditions of Article 101(3) are satisfied, and in the absence of other objections, to hold that the agreement in question is valid with effect *ab initio*. It must then enforce the agreement and reject any claims for damages based on an alleged violation of Article 101 TFEU. If, on the other hand, the conditions of Article 101(3) TFEU are not met, national courts must rule that the respective agreement or decision or, as the case may be, part of it, is void under Article 101(2). In any such case they may order damages or take any other decision that legally follows from the violation of Article 101(1) TFEU.[13] In any case, in any national or EU proceedings for the application of Articles 101 and 102 TFEU, the burden of proving

[11] Articles 20 (8) and 21(3) of Regulation No 1/2003.

[12] Explanatory Memorandum to Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 /* COM/2000/0582 final - CNS 2000/0243 */, Sect. 2.C.1.

[13] Explanatory Memorandum to Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 /* COM/2000/0582 final - CNS 2000/0243 */, Sect. 2.C.4.

that the conditions of Article 101(3) are fulfilled rests on the party or the authority alleging the infringement.[14]

That being said the private enforcement of EU antitrust law, as noted by some authors, is not in itself rooted in Regulation No 1/2003.[15] As a matter of fact, it was as early as 1974 that the CJEU recognised in its *BRT*[16] judgment that "[a]s the prohibitions of Articles [101] (1) and [102] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard."[17] In 2001, approximately a year before the adoption of Regulation No 1/2003, the CJEU, in its judgment in *Courage and Crehan* has went on to explicitly proclaim the right for any individual to claim damages for harm caused to them by an infringement of Article 101(1).[18] Accordingly, national courts have jurisdiction to apply Article 101(1) TFEU in particular in disputes governed by private law, this jurisdiction deriving from the direct effect of that article.[19]

The adoption of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1 ('Damages Directive') has played an essential role for the development of private enforcement of EU antitrust law. The Damages Directive pursues two complementary goals: 1) optimising the interaction between the public and private enforcement of competition law; and 2) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered.[20] For the attainment of these two objectives, the Damages Directive codified in its Article 3 the right to full compensation for damages suffered as a result of competition law infringements, and introduced rules on disclosure of evidence,[21] effect of national infringement decisions, limitation periods, joint and several liability,[22] passing on of overcharges[23] quantification

[14] Article 2 of Regulation No 1/2003.

[15] Meeßen, G.: Private enforcement in: Dekeyser, K., Gauer, C. (eds.) Regulation 1/2003 and EU Antitrust Enforcement. A Systematic Gide, Kluwer Law International B.V., The Netherlands (2023), p. 157.

[16] Case 127/73 *BRT v SABAM*, EU:C:1974:6, para. 16.

[17] Case C-819/19 *Stichting Cartel Compensation and Equilib Netherlands*, EU:C:2021:904, para. 48 and the case law cited.

[18] Case C-453/99 *Courage and Crehan*, EU:C:2001:465, para. 26.

[19] See, to that effect, Case 127/73 *BRT v SABAM*, EU:C:1974:6, para. 15. In the recent Case C-637/17 *Cogeco Communications*, EU:C:2019:263, para.39, this right was for the first time explicitly recognised by the CJEU in relation to infringements of Article 102 TFEU.

[20] Explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union /* COM/2013/0404 final - 2013/0185 (COD) */, Sect. 1.2.

[21] Chapter II of the Damages Directive.

[22] Chapter III of the Damages Directive.

[23] Chapter IV of the Damages Directive.

of harm,[24] and the effects of consensual dispute resolution.[25] The Commission has also issued a number of guidance documents aimed at supporting national judges in their task to apply these rules.[26]

Since the adoption of the Damages Directive in 2014, the number of damages actions before national courts has significantly increased and damages actions have become much more widespread in the EU.[27] The Directive has therefore significantly strengthened the role of the national judges for the enforcement of EU antitrust rules in particular with respect to private antitrust enforcement. It has also led national judges to interact more actively with the CJEU, in particular, by making preliminary references for the purposes of the interpretation of some essential provisions of the Damages Directive.[28]

In most Member States antitrust damages actions are treated in the same way as other commercial disputes and can be brough before any civil court. There are some exceptions, whereby in some Member States there are a limited number of courts or specialised chambers specifically assigned to deal with such actions.[29]

3 Coherent and consistent application of EU antitrust law by the national judges

The uniform and consistent application of EU antitrust rules is of crucial importance for the proper functioning of a decentralised antitrust system where the Commission and the national competition and judicial authorities of 27 Member States are competent for applying Articles 101 and 102 TFEU in their entirety.

In this regard, Regulation No 1/2003 contains a number of provisions aimed at maintaining the uniformity and consistency of the application.

[24] Chapter V of the Damages Directive.

[25] Chapter VI of the Damages Directive.

[26] Communication from the Commission - Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law [2020] OJ C 242/1; Communication from the Commission - Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] OJ C 267/4; Commission Staff working document, Practical guide - Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union {C(2013) 3440}.

[27] Commission Staff Working Document, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[28] See, for instance, Case C-267/20 *Volvo and DAF Trucks*, EU:C:2022:494, Case C-163/21 *PACCAR and Others*, EU:C:2022:863, Case C-312/21 *Tráficos Manuel Ferrer*, EU:C:2023:99 and Case C-25/21 *Repsol Comercial de Productos Petrolíferos* EU:C:2023:298.

[29] ERA, Study on judges' training needs in the field of European competition law, p. 35-46.

First, Article 16 (1) of that Regulation codifies the *Masterfoods*[30] case law of the CJEU[31] by stating that when national courts rule on agreements, decisions or practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.[32] They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations for addressing preliminary reference to the CJEU under Article 267 TFEU.

Second, Article 15 of Regulation No 1/2003 foresees a mechanism of cooperation between the Commission and the national courts of the Member States in proceedings for the application of Articles 101 and 102 TFEU:

- The courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.
- Member States shall forward to the Commission a copy of any written judgment of a national court deciding on the application of Article 101 or Article 102 TFEU.
- Where the coherent application of Article 101 or Article 102 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.[33] For the purpose of the preparation of its observations only, the Commission may request the relevant court of the Member State to transmit or ensure the transmission to it of any documents necessary for the assessment of the case.

The detailed rules governing the cooperation between the national courts and the Commission are laid down in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC 2004/C 101/04. When a national court has been designated as a competition authority of a Member State according to Article 35(1) of Regulation No 1/2003, the cooperation between the national courts and the Commission is also covered by the Commission Notice on the cooperation within the network of competition authorities 2004/C 101/03.[34]

With the aim to foster a coherent and consistent application of EU competition law by national courts by providing training to national judges, prosecutors, apprentice national judges, and the staff of judges' offices or of national courts in European

[30] Case C-344/98 Masterfoods and HB, ECLI:EU:C:2000:689, para. 51-52.

[31] See Case C-819/19 *Stichting Cartel Compensation and Equilib Netherlands*, ECLI:EU:C:2021:904, para. 56-57 and the case law cited.

[32] According to Recitals 13 and 22 of Regulation No 1/2003 this limitation does not apply in relation to commitments decisions adopted by the Commission under Article 9 of the same Regulation. See also, Case C-132/19 P *Groupe Canal + v Commission*, EU:C:2020:1007, para. 109 et seq.

[33] According to Article 15(3) of Regulation No 1/2003 national competition authorities can also make submissions to national courts in written or oral form, but this power is limited to the courts of their own Member State.

[34] See Article 2 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC 2004/C 101/04.

competition law and State aid law, the Commission entrusted the Academy of European Law (ERA), in May 2018, with the implementation of a large-scale project for Provision of training programme to national judges in EU Competition law.[35] The project was a follow-up of the Study on judges' training needs in the field of competition law prepared for the Commission by ERA, the European Judicial Training Network (EJTN), and Ecorys in 2016.

Thus, in the period May 2018 - December 2022 with the cooperation of the national judicial training institutes and with the support of the Association of European Competition Law Judges (AECLJ) and EJTN, ERA organised 24 face-to-face and online training events attended by a total of 639 judges from 25 EU Member States.

Each tailor-made training programme addressed the specific training needs of the judiciary in the respective Member State and covered the main principles of application of Articles 101 and 102 TFEU, private enforcement of EU competition law, as well as the role of national judges for the application of State aid law. The national judges were trained by high-level EU and national experts in their own language and the training materials and e-presentations of the project were prepared in 20 different languages.

The specific approach of this large-scale project implemented by ERA on behalf of the Commission aimed at providing training programmes tailored to the needs of the judiciary of each separate Member State, contributed to improving the understanding of the national judges of their role for the application of EU competition rules and to fostering the coherent and consistent application of EU competition law throughout the EU.

Funding Open Access funding enabled and organized by Projekt DEAL.

Declarations

Competing Interests The author declares no competing interests.

[35] Service contract DG COMP/2017/015 – SI2.778715.