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EU competition law enforcement in digital markets – reasons for a more centralized approach

Egzekwowanie prawa konkurencji UE na rynkach cyfrowych – argumenty na rzecz bardziej scentralizowanego podejścia

Abstract

The current system of decentralized enforcement of Art. 101 and 102 TFEU sets up a flexible system of parallel enforcement competences of the European Commission and National Competition Authorities. This article discusses the current phenomenon of increasing NCA activity in the field of competition enforcement against EU-wide practices implemented by global market players operating in the digital environment. NCAs' overactivity in this field leads to multiplication of legal investigations and raises legitimate questions of the effectiveness of competition enforcement, as well as predictability and proportionality. Based on such arguments, the article suggests to introduce a more centralized, consistent approach in reference to EU-wide infringements and, complementarily, to reform fining rules, which should ensure proportionality of fines for such competition restrictions.

Keywords: competition law, Regulation 1/2003, EC, NCA, ECN

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Introduction

Regulation 1/2003¹ established a system of decentralized enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) by National

Streszczenie

Obecny zdecentralizowany system egzekwowania unijnego prawa konkurencji oparty jest na równoległych kompetencjach Komisji Europejskiej i organów ochrony konkurencji państw członkowskich UE do stosowania art. 101 i 102 TFUE. Artykuł analizuje zjawisko rosnącej aktywności krajowych organów ochrony konkurencji w zakresie egzekwowania prawa konkurencji wobec praktyk oddziałujących na cały obszar UE stosowanych przez podmioty działające globalnie na rynkach cyfrowych. Odnotowana nadaktywność organów krajowych w tego rodzaju sprawach może prowadzić do multiplikacji postępowań, rodząc wątpliwości z punktu widzenia efektywności, jak również przewidywalności i proporcjonalności interwencji podejmowanych w interesie ochrony konkurencji. Z tych względów autor postuluje przyjęcie bardziej scentralizowanego i jednolitego podejścia do opisanej kategorii naruszeń o wymiarze unijnym, a także reformę zasad nakładania kar pieniężnych za naruszenia zakazów praktyk ograniczających konkurencję w imię zapewnienia ich proporcjonalność.

Słowa kluczowe: prawo konkurencji, rozporządzenie 1/2003, Komisja Europejska, NCA, ECN

Competition Authorities (NCAs) and the European Commission (EC), through mechanisms of cooperation and case allocation within the European Competition Network (ECN). After over 20 years of functioning, the system is generally acclaimed for the enhancement of a common

competition culture in Europe and for realizing objectives of uniform, intensified enforcement, while maintaining consistency in the interpretation of Art. 101 and 102 TFEU (Wils, 2023, p. 7).² On the other hand, Regulation 1/2003 requires verification for possible adjustment in the era of digitalized economy.³

This article is focused on the current approach to the mechanism of case allocation and cooperation between ECN members resulting from Art. 11 of the Regulation 1/2003 and from EC's Cooperation Notice.⁴ These rules generally attribute to NCAs a crucial role of the best-placed authorities mostly for infringements materially linked to the territory of their countries, in order to enable the EC to focus on the most serious infringements affecting the entire EU. However, the growing activism of NCAs can be observed in the field of competition enforcement against EU-wide practices implemented by global market players who operate worldwide in the digital environment and who use uniform business policies throughout the EU (global digital players, GDPs). This article attempts to demonstrate that NCAs' engagement in such cases may raise concerns in terms of effective enforcement, its predictability, and proportionality. A single NCA – due to its limited jurisdiction – cannot in principle effectively resolve EC-wide competition issues, while the multiplication of legal intervention by various authorities rises concerns from the perspective of legal certainty and proportionality of legal intervention.

Based on such arguments, it is suggested to reconsider the role of NCAs in reference to EU-wide infringements in the digital environment and to introduce a more centralized approach in that regard, in line with the actual reading of already enforced rules on case allocation and cooperation within the ECN. Complementary proposals for the reform of fining rules are proposed herein, which should ensure proportionality of fines for EU-wide competition restrictions.

Competition enforcement under Regulation 1/2003

Reasons and objectives for decentralization

The main objective of the decentralization of the EU competition law system was to boost the effectiveness of the enforcement of Articles 101 and 102 TFEU while securing that the EU competition law is applied uniformly within the whole territory of EU. This aim was realized by Regulation 2003, which simplified and reduced administrative burden of EC, ensuring universal and consistent enforcement of the EU competition law within Member States (Art. 35 and Art. 3(1)) through convergence rules (Art. 3(2)), cooperation among EC, NCAs and national courts (Art. 11–16), flexible case allocation system (Art. 11) and securing a particular role of the EC as

a “guardian of the Treaty” with “the ultimate but not the sole responsibility for developing policy” and safeguarding consistent application of EU competition law (Cooperation Notice, par. 43).

The role envisaged for the EC in the White Paper preceding Regulation 1/2003⁵ was to enable the EC to re-focus on “fields of activity where it can operate more efficiently than national bodies” (para. 9), meant as to combat the most serious threats to market integration (para. 45). On the other hand, NCAs were expected to concentrate on local markets and national operators, which was justified by NCAs' better ability to carry out investigations rapidly in their natural territories (para. 46) and expert knowledge about local condition of competition (para. 95). Consequently, NCAs were associated “only with cases that are mainly national in character” (Siragusa, 1999, p. 1105).

Allocation of cases

The framework for case allocation provided in Regulation 1/2003 and Cooperation Notice sets up a flexible system of parallel enforcement competences of the EC and NCAs, which retain full discretion in deciding whether to investigate a case (Cooperation Notice, para. 5). The mechanism of cooperation, set up as part of the general principle of sincere cooperation,⁶ prioritizes choosing a single authority (the EC or an NCA) as a well-placed authority (Regulation 1/2003, motive 18). However, depending on the circumstances, cases can be also dealt with parallelly by several NCAs (Cooperation Notice, para. 5). The choice of a well-placed authority is guided by the following factors: the territory affected by a suspected infringement (or from where it originates), the authority's ability to bring an end to the infringement, the authority's ability to gather required evidence. In order to find the most efficient way of handling a case, Regulation 1/2003 allows its re-allocation if either that authority considers itself not to be well placed or other authorities consider themselves well placed to act (Cooperation Notice, para. 6 and 8–15). However, reallocations of cases from NCAs to the EC occurs only very exceptionally⁷.

European Commission

In the decentralized competition enforcement system, the EC was entrusted with a particular role towards NCAs in clarifying the law and ensuring its consistent application (Whish, 2021, p. 303; Gerber & Cassinis, 2006, pp. 14–15).⁸ Regulation 1/2003 attributed to the EC the sole competences to declare inapplicability of Art. 101 and 102 TFEU (Art. 10), and its decisions determine the assessment of the same conduct in a later NCA's decision (Art. 16(2)). Moreover, only the EC's decision to open an investigation in a given case relieves NCAs of their competence to deal with the same case (Art. 11(6)), i.e., to act on the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant market (Cooperation Notice, para. 51).

For its particular position, the EC was considered as best placed to investigate infringements with broad territorial effect(s) on more than three Member States (Cooperation Notice, para. 14) and infringements closely linked with “other EU provisions which may be exclusively or more effectively applied by the EC” or when it is required by the EU interest – to develop EU competition policy or to ensure effective enforcement (Cooperation Notice, para. 15).

National Competition Authorities

An NCA will normally be well placed to act when the presumed infringement is materially linked to the territory of a Member State, when a substantial effect of an infringement occurs mainly within its Member State’s territory, and an NCA is able to gather relevant evidence, effectively bringing the entire infringement to an end (Cooperation Notice, para. 9–10). Individual NCA’s intervention may also be sufficient in cross-border cases with companies from different Member States engaged, if a single NCA may bring the entire infringement to an end, e.g., because the relevant evidence is located mainly in its Member State (Cooperation Notice, para. 11).

Parallel investigations

The case allocation system established by Regulation 1/2003 does not exclude parallel investigations by many ECN members. Reasons for such multiplied proceedings may be twofold, establishment of a well-placed authority to handle a case or a collective legal response to a cross-border infringement.

At the outset of the investigation, the scope and further characteristics of the presumed restrictive practice may not be clear in order to determine a well-placed authority and parallel investigations conducted by more competition authorities against the same conduct may be necessary. Once it is established, authorities that are not well-placed may discontinue their investigation or suspend it (Regulation 1/2003, Art. 13). Conversely, when the EC opens its investigation, NCAs are obliged to discontinue their proceedings (Regulation 1/2003, Art. 11(6)), but only if they concern the same alleged infringements of Articles 101 and 102 TFEU, committed by the same undertaking(s) on the same product market(s) and the same geographical market(s) during the same period(s).⁹

Parallel action by two or three NCAs can be also an appropriate response to a cross-border agreements or practices with substantial effects on their respective territories, where one NCA could not by its action sufficiently “bring the entire infringement to an end” or “sanction it adequately”, e.g., when two companies from different member States recreate national fragmentation of markets in these countries (Cooperation Notice, para. 12). A competition authority can also carry on an investigation in reference to only part of certain competition matter so as to not overlap with the part that is already dealt with by another authority (Cooperation Notice, para. 24).

The current approach to multiple intervention is ambiguous. On one hand, jurisprudence and the EC advocate for caution when multiple investigations are carried out in the same matter. The EC assessed that “scenarios where several authorities pursue the same conduct in parallel are not ideal from a point of view of efficient use of enforcers’ resources, increased risk of conflicting outcomes and legal costs for the undertakings under investigation as well as third parties”.¹⁰ Meanwhile, the courts explained that parallel application of EC competition rules “cannot be at the expense of undertakings”.¹¹ On the other hand, the current case law is developing towards justification of the multiplication of investigations against the same anti-competitive conduct of a company that affects various EC territories:

1) First, the notions what constitutes the same anticompetitive conduct or infringement are interpreted very narrowly. Various competition authorities can investigate and sanction the same undertaking for the same anticompetitive conduct in different Member States not violating the *ne bis in idem* principle,¹² provided that their assessment is limited to separate EU territories (states).¹³

2) Similar reasons allow for parallel investigations of the same anticompetitive conduct on different product markets¹⁴ or during different periods.¹⁵

3) The Court also confirmed that when an NCA conducts proceedings against competition restriction(s) affecting its Member State’s territory, the EC can open its own, complementary investigation, regarding the remaining EU territory, or its parts.¹⁶

4) The Cooperation Notice confirms that in case of infringements affecting various national markets the EC can choose only “one national market so as to create a ‘leading’ case”, which can open NCAs doors to deal with the same restrictive conduct’s effects on other national markets (Cooperation Notice, para. 14. Example 5).

5) Finally, the courts already have clearly stated that the EU law does not establish any right, for the benefit of an undertaking, to have a case dealt with in its entirety by a particular authority,¹⁷ which allows the EC to freely limit its assessment to selected countries.¹⁸

Competition enforcement against GDPs

The development of EU competition law enforcement through multiple investigations carried out by a combination of authorities against anticompetitive conducts affecting the entire EU territory is seen in GDPs-related cases. Examples of different approaches to such enforcement actions are presented below.

Booking platforms

The attention of many NCAs was caught by parity clauses (*Most Favoured Nation*, MFN) introduced by various

online hotel booking platforms (for more, see: Cipolla, 2015; Colangelo, 2017; Dobosz, 2019, pp. 270–278). NCAs questioned the requirements imposed on hotels and other owners of sleeping accommodations not to offer better conditions (price, room availability or other) on competing booking platforms (in case of the German Competition Authority (*Bundeskartellamt*), also in the hotel's own sales channels). After having identified this competition problem, some NCAs (German, French, Italian, Swedish) conducted formal investigations, others (e.g. the Polish NCA) carried out explanatory proceedings,¹⁹ which led bookings platforms to change their contractual terms, mostly accepting commitment.²⁰

While assessing the same pattern introduced by the booking platforms in various countries, NCAs conducted their investigations in reference to respective relevant market for services of hotel online travel agencies²¹ geographically considered national²² or “at least national”²³. NCAs limited their competition assessment to the effects on their respective national territories (e.g., Italian commitments concern bookings made for accommodations located in Italy²⁴), taking note, however, of clearly cross-border effects of the platforms' policy, affecting both national and foreign consumers.²⁵

Apple

One of the recent examples of parallel actions taken by various NCAs in response to the same business policy affecting the entire territory regards Apple's App Tracking Transparency (ATT) framework: privacy rules introduced by Apple within its iOS mobile operating system, requiring third-party developers of apps distributed in the App Store to obtain specific user's permission for the collection and linking of data for advertising purposes. The ATT framework, part of Apple's global strategy, raised competition concerns of various NCAs. Already in 2025, French and Italian NCAs concluded their proceedings finding an infringement of Art. 102 TFEU.²⁶ Other investigations are pending in Poland,²⁷ Germany²⁸ and Romania²⁹.

In the light of decisions issued to date and information regarding pending proceedings, NCAs recognized the global dimension of the questioned conduct,³⁰ its global impact on other global players (Meta),³¹ and wider than national dimension of relevant markets.³² At the same time, NCAs' competition assessments concentrate on the anticompetitive effects of the questioned practice in their respective national territories.³³

Meta

Yet another configuration of competition authorities investigating a pan-European antitrust issue can be seen in reference to Meta's policy of preventing “third party AI providers from offering their services through WhatsApp in the EEA, while Meta's own AI service, ‘Meta AI’, would remain available through WhatsApp in the EEA”.³⁴ Separate proceedings were opened in 2025 by AGCM³⁵ and

subsequently by the EC,³⁶ both of which concerned the same globally introduced policy which could presumably violate Art. 102 TFEU.

The two investigations had separate geographic scopes. While AGCM concentrated on the Italian territory,³⁷ EC's investigation covered “the EEA with the exception of Italy”,³⁸ in order to avoid an overlap with the ongoing investigation in Italy.³⁹

This division did not correspond to the probable geographical scope of relevant market that was initially defined by AGCM as the market for consumer communication services via apps of EU-wide or national dimension,⁴⁰ and by the EC as the EEA-wide market for consumer communication applications.⁴¹ Finally, the EC extended the geographic scope of its investigation to Italy,⁴² which left AGCM no space for other decision than to cease its own proceedings.⁴³

More cases to come

It is safe to assume that more such cases will emerge, as NCAs are increasingly active in matters concerning the digital economy. Also, the above register of multiple investigations opened by various competition authorities against the same GDP's activity is not exhaustive.⁴⁴ The examples provided above only illustrate various ways such cases are now being handled by ECN members.

A separate list could be created for cases in which only a single NCA deals with a specific infringement despite its wider than national scope. Such territorially limited enforcement actions may eliminate EU-wide restrictive practice only partially (from the territory of NCA's jurisdiction),⁴⁵ while an interested parties (e.g., harmed by the anticompetitive practice in other states), may still be interested in a comprehensive EU-wide investigation to bring to an end the questioned conduct in the entirety of Europe.⁴⁶

All of the above-discussed peculiarities justify a critical reflection on the current decentralized competition law enforcement effectuated by NCAs against anticompetitive practices of GDPs, despite the fact that they affect the entire EU territory or most of it.

Why a more centralized approach is appropriate in reference to GDPs

The specificity of EU-wide competition infringements in digital markets justifies specific, more centralized enforcement of Articles 101 and 102 TFEU. Objections to fragmented competition enforcement in digital economy matters were already expressed, e.g., by the European Court of Auditors⁴⁷ and by the business side in the course of the evaluation of Regulation 1/2003.⁴⁸ I further present arguments in that regard from the perspective of the effectiveness of enforcement of competition law, its predictability and proportionality.

Effectiveness of public enforcement

The effectiveness of the current approach to competition enforcement against GDPs' practices implemented uniformly throughout EU (or its predominant area) is questionable. The EC was already formally recognized a well-placed authority to handle investigations concerning more (than three) Member States (Cooperation Notice, par. 14). The following reasons confirm the validity of maintaining this principle in cases referred to in the article.

First, the EC unlike NCAs, has a prerogative to establish an infringement encompassing the entire Union and to sanction its anticompetitive effects throughout the EU. NCAs may apply Articles 101 and 102 TFEU against anti-competitive conduct that affects their domestic markets, regardless of where an agreement was concluded or where it took place and from where originate undertakings involved (this "effect doctrine" is commonly supported by national antitrust laws (Nettesheim & Thomas, 2025, pp. 389–429) and is not limited by Regulation 1/2003 (Brammer, 2005, p. 1383–1424). However, the "effect doctrine" does not give NCAs the prerogative to assess and to sanction anticompetitive effects of a given practice in other countries. Even if it were desirable (Dobosz, 2018, p. 249), **it is more than doubtful whether an NCA could formally establish an infringement encompassing territories of other Member States and the liability of persons against whom proceedings were brought for the infringement's anticompetitive effects in territories of different Member States.** As stated by AG Bobek, except for "mere indirect hints that extraterritoriality was contemplated in the design of Regulation 1/2003 (...) [it] does not therefore constitute a sufficient legal basis for an NCA to adopt an extraterritorial decision when such a basis is not provided for in national law".⁴⁹ This means that an NCA could not prosecute and sanction undertakings for the extraterritorial anticompetitive effects in the absence of specific provisions in the national legislation and such legal solutions do not exist, for example, in German law⁵⁰ and in Polish law.⁵¹ Also, it means that for the EU-wide infringement, parallel legal actions taken by only some NCAs in selected jurisdictions will hardly eliminate competition problems connected with this infringement throughout the EU (Dobosz, 2019, pp. 254–257).

Regardless of their jurisdictional limitations, **NCAs are also not well equipped to investigate and determine anticompetitive effects of a given practice throughout Europe.** Despite the assistance of other NCAs to collect relevant evidence from various territories guaranteed by provisions of Regulation 1/2003 and Directive 1/2019,⁵² NCAs are not well-placed to determine precise effects of a multi-jurisdictional practice in other member states. Establishing an infringement would require the collection of specific facts and data on an economic and legal context of a given practice in various countries, including actual conditions of the functioning and structure of all affected markets. This is eminently inconsistent with the NCAs' role of expert authorities for their own Member States.

Concentrating competition enforcement in relation to GDPs in the hands of NCAs does not follow the goals of Regulation 1/2003, which aimed at allowing the EC to focus its activities on the most serious infringements of EU interest,⁵³ including challenges of the globalization of the economy and related competition restrictions, "generally complex in nature" and "harmful to the economy and consumers because of the vast geographical scale involved".⁵⁴ These aims perfectly fit cases involving big-tech companies operating globally. Moreover, while certain GDPs have a status of gatekeepers in the meaning of Digital Markets Act,⁵⁵ antitrust investigations regarding them are evidently closely linked to EU provisions which may be exclusively or more effectively applied by the EC, and it is in the EU interest to adopt decisions to develop EU competition policy – a condition which according to the Cooperation Notice indicates the EC's better position to handle a case.⁵⁶

A more centralized approach against GDPs' EU-wide competition restrictions would be beneficial to ensure the proper functioning of the internal market. As much as the complicated and fragmentized regulatory landscape (or a "piecemeal landscape of standards and regulations across the Union" – Letta, 2024, p. 125), also the fragmented enforcement of EC competition rules against GDPs may be disadvantageous to market integration. Interventions of single NCAs against EU-wide infringements may result in fragmented compliance with EU competition rules, limited to member states whose NCAs investigated them. As noted by the OECD, "digital platforms generally seem to only implement the required changes in the relevant jurisdiction, and so far rarely extend these changes to other jurisdictions on a voluntary basis".⁵⁷ From this perspective, centralization of competition enforcement against infringements that are pan-European by definition can contribute to promoting a uniform level of protection throughout the Union.

Apart from the above, prioritization of combating EU-wide GDPs' infringements by NCAs poses a risk of neglecting national or local competition restrictions that may also be important for the economy of a given country but may never be a priority for EC, even if the infringements affect trade between Member States.

Proportionality of legal intervention

Although the EU law does not provide strict rules on the allocation of cases, as presented above, it is reasonable to claim that the choice of a well-placed competition authority should be analysed in the context of the principle of proportionality (Art. 5(1) TEU). This principle requires that acts of EU institutions "should not exceed the limits of what is appropriate and necessary to attain the aim pursued, and when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".⁵⁸

The principle of proportionality supports the EC's leading role in competition enforcement regarding EU-wide

infringements. The alternative, i.e. multiple proceedings conducted by various competition authorities, cannot fully guarantee that the same allegedly anticompetitive conduct will be assessed throughout the EU for all affected territories and for the same period. It also increases risk of conflicting outcomes, which could be seen in the booking platforms cases. Multiplication of investigations of the same anticompetitive conduct also means higher legal costs for the undertakings under investigation (without a doubt, handling several or even dozen proceedings in many countries and languages may generate higher costs than one EC proceedings) (see also: Błachucki, 2019, p. 483).

Legality and predictability of sanctions

Handling cases regarding EU-wide competition restrictions by multiple competition authorities also creates doubts in the context of the principle of the legality of sanctions and their predictability. The principle of the legality (*nullum crimen, nulla poena sine lege*), which is one of the general principles of EU law, implies that legislation must define in a clear, precise manner offences and penalties which they attract,⁵⁹ and the result of the law enforcement must be reasonably foreseeable.⁶⁰ It applies to sanctions imposed by competition authorities, which are considered *quasi-criminal* in nature⁶¹ due to the “intrinsic nature of the offence” and “the degree of severity of the penalty”.⁶² **In a system of decentralized EU competition law enforcement, this principle should be the basis of an assessment of an overall legal response by the authorities enforcing EU law against the same EU-wide competition infringement.**⁶³

In the current case allocation system, an undertaking can never be sure whether its questioned restrictive conduct, even if implemented unilaterally in the entire EU, will be assessed independently in one investigation or in parallel investigations by various ECN members. This state of uncertainty is reinforced by the current interpretation of the *ne bis in idem* principle, which permits multiplied penalties imposed for the same anticompetitive conduct, provided that anticompetitive effects in separate EU territories are penalized.⁶⁴ It is currently no longer true that “a violation of the principle of *ne bis in idem* could not be avoided with the argument that each national competition authority was only taking into account the effects of the violation of Article [101 TFEU] on its own national territory” (Wils, 2004, para. 126). Moreover, the Court gave a green light to NCAs – when they decide on the infringement of Articles 101 or 102 TFEU – to impose separate fine(s) for the infringement of national competition law (provided that both fines, taken together, are proportionate to the nature of the infringement).⁶⁵ In effect, the same EU-wide infringement can be sanctioned once or several times, if the case attracts the attention of more ECN members. Notably, no violation of the *ne bis in idem* principle has been so far found in reference to case allocation within ECN (Kowalik-Bańczyk, 2024, p. 455).

Consequently, neither the number nor the overall amount of sanctions that can be imposed for a EU-wide anticompetitive conduct can be predicted prior to the case final allocation. The predictability of sanctions does not exist when the number and the maximum level(s) of fines is determined not by the nature of the infringement but by the EC’s and NCAs willingness to take up the case, depending on their current assessment of priorities, resources and other factors beyond the entrepreneur’s control.

Proportionality of sanctions

As already explained, the same EU-wide anticompetitive conduct can be sanctioned either with one penalty imposed by the EC or with multiple fines imposed by various competition authorities for territorially separate effects. The EC may impose fines on the charged undertaking in an amount up to 10% of its total annual turnover, on the basis of Art. 23(2)(a) of Regulation 1/2003 and EC Fining Guidelines.⁶⁶ When the same conduct is investigated by various NCAs, they may impose fines for the infringement of Articles 101 and 102 TFEU provided for in their national laws. As specified by the Directive 2019/1, the maximum amount of such fine imposed by NCA shall not be lower than 10% (Art. 15).

In any case, it is required⁶⁷ that the severity of penalties is not disproportionate to the gravity of the infringement. Even though it is “deterrence” a *leitmotiv* of EC’s Fining Guidelines (Gilliams, 2014, pp. 435–458), the EU Court confirmed that such fines “must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole”.⁶⁸ The EU Court also approved the 10% fine cap as the maximum level of fine “designed to prevent excessive and disproportionate fines”.⁶⁹

The principle of proportionality applies as well to fines imposed by NCAs for the infringement of Articles 101 and 102 TFEU. Member States shall ensure that such fines will be “effective, proportionate and dissuasive” (Directive 2019/1, Art. 13), also when imposed in conjunction with fines related to a violation of national competition law.⁷⁰

I am of the opinion that parallel investigations leading to multiple fines imposed by many competition authorities against the same EU-wide conduct of the same undertaking(s), separated according to the basis of the conduct’s territorial effects, generate a real risk of disproportionality of the overall penalties for that conduct.

Firstly, the maximum 10% of the annual global turnover per undertaking was already accepted in Regulation 1/2003 (Art. 23(2)) as proportional and deterrent fine. Such level should be therefore seen as a measure of proportionality when penalized conduct extends throughout the EU, regardless of which competition authority applies sanctions. Consequently, it is difficult to accept that

proportionality requirements are met when the same EU-wide anticompetitive conduct is penalized with multiple (up to 27) separate fines⁷¹ imposed by several NCAs (each within at least 10% cap) (see also: Dobosz, 2019, p. 259). Even if such a multiplication of fines were to have the court's approval, at least from the perspective of *ne bis in idem* principle (provided that they regard anticompetitive effects in separate EU territories), it cannot be accepted in the current form, for the lack of clear rules ensuring the proportionality of the combined sanctions.

Secondly, the risk of disproportionality of the overall level of sanctions imposed in the described situation is generated by the lack of the harmonized method of calculation of fines among the EC and NCAs. The Directive 2019/1 is insufficient in this respect. It provides only general rules, referring to effectiveness, proportionality and dissuasive effect of fines imposed by NCAs (Art. 13(1)) and requiring that such fines are determined in reference to the gravity and to the duration of the infringement (Art. 14(1)). It, however, does not provide a uniform methodology for the calculation of fines. In effect, the EC method of conditioning the amount of fine by the value of sales of goods or services to which the infringement relates (EC Fining Guidelines, paras 13 and 19) is not a general measure. Taking Poland as an example, the basic amount of fine is not based upon the value of the affected goods or services, but rather, is based upon a percentage of the undertaking's global turnover in the financial year preceding the year of imposition of the fine.⁷²

The above arguments confirm that the overall sanctions for EU-wide competition restriction imposed by a coalition of NCAs could extremely surpass the EC in the value of sanctions when penalizing one and the same EU-wide anticompetitive conduct. This puts the principle of proportionality of penalties at great risk.

Proposed solutions

The article's aim was to present concerns regarding the EU competition law enforcement practice in digital markets. Although the success of the decentralized competition enforcement system introduced by the Regulation 1/2003 is unquestionable, and although it is clear how growingly important role in the development of competition law enforcement in the EU is played by NCAs, diverse arguments call for a modification of case allocation and cooperation principles when the investigated practices concern globally introduced business decisions of companies operating in digital markets, which as a rule affect the entire EU territory. Definitely, greater EC's openness is required to step in and assess EU-wide competition restrictions which some NCA has already started to analyse (as the EC did in the Meta case, see above, section "Competition enforcement against GDPs").

The article demonstrates that the continuation of the current overactivity of NCAs in such cases raises legitimate

questions of the effectiveness of competition enforcement, as well as predictability and proportionality.

Case allocation and cooperation within ECN

For reasons presented in the article, in the discussed cases affecting the entire EU territory ECN members should take seriously and apply consistently the following rules clearly resulting from Regulation 1/2003 and the Cooperation Notice:

- The division of work within ECN should be driven by the objective to choose a single authority that will be the most appropriate to handle a case (Regulation 1/2003, motive 18).
- The EC is best placed to efficiently investigate and proportionally penalize EU-wide infringements (in more than three Member States) (Cooperation Notice, para. 14).
- The EC is best placed to ensure effective enforcement in cases closely linked with "other EC provisions which may be exclusively or more effectively applied by the EC", when new competition issues arise (Cooperation Notice, para. 15) – conditions clearly connected with digital markets.
- When a case is already investigated by a particular NCA in reference to its country's territory, the EC should be more open to step in and assess the entire case, including that territory.

This does not mean that NCAs cannot play important role in combating competition restrictions in digital markets. The impact of GDPs' practices on competition undoubtedly justifies the involvement of all ECN members in tracking their allegedly anticompetitive practices. NCAs may perceive competition issues more acutely manifest in their own countries and therefore, in certain cases NCAs can play important role at the initial investigative stage. **However, when parallel proceedings are already opened by various NCAs (or by NCAs and the EC), and the EU dimension of an alleged infringement is confirmed, the case should be re-allocated to the EC.** This will be consistent with the role of NCAs, which was intended from the outset, to be to track down infringements whose substantial effect(s) occurs mainly within their Member State's territory. For these reasons the fact that in the Meta case (see above, section "Competition enforcement against GDPs") the EC eventually took the entire responsibility for safeguarding competition in the EEA-wide markets for communication and AI services (after letting AGCM carry on its national investigation parallelly) is a step in good direction.

Moreover, an NCA's focus on infringements whose substantial effect(s) occurs mainly within that Member State's territory will not impede ambitious NCAs from playing an important role in the competition enforcement in the digital economy, as some infringements of competition may be country specific, affecting single national markets⁷³ or for other reasons, may be effectively brought to an end by a single NCA.

Fines for EU-wide competition restrictions

Changing the approach to case allocation according to the above proposals may not always eliminate the multiplicity of decisions concerning the same EU-wide infringement. Therefore, complementarily, the article calls for change of the fining rules in reference to EU-wide competition restrictions investigated and fined by various ECN members.

Consideration should be given to eliminate the vast difference of the level of fines which can be imposed against the same competition restriction covering the entire EU territory, dependent only on whether it is investigated and sanctioned individually by EC or in separate parallel proceedings conducted by a number of ECN members. Current rules do not protect against disproportionality of the overall penalties, if imposed in the latter situation.

It violates common sense that the overall maximum penalty for the same infringement may differ significantly only dependent on the result of case allocation. Therefore, I propose the following:

- Deepening the harmonisation of rules for calculating penalties by NCAs beyond what already results from the Directive 2019/1 (Art. 13–16), by introducing the requirement for NCAs to calculate penalties by referring to the value of the undertaking's sales of goods or services to

which the infringement directly or indirectly relates, limited to the territory where the NCA has a jurisdiction to assess anticompetitive market effects (i.e., if an NCA sanctions a company for its conduct's effects in Country A, the basic amount of the fine should be set by reference to company's relevant sales value in that country).

- Introducing a common methodology of calculating fines for all ECN members, which requires more specific rules for NCAs, going further than the current general but not specified obligation to take into account both the gravity and the duration of the infringement (Art. 14). Sanctions resulting from parallel investigations by various authorities would less probably lead to disproportion, if they more similarly assess consideration of factors such as gravity or duration of the infringement.

- Introducing one legal maximum overall level resulting from all penalties imposed on the undertaking for one EU-wide competition infringement independent of whether the fine is imposed by the EC or by various ECN members for territorially separate effects of anticompetitive conduct.⁷⁴

- Such a legal maximum should be paired with the direct obligation for ECN members, when determining the amount of financial penalties in the event of an infringement of Articles 101 or 102 TFEU, to take into account the sanctions imposed on the undertaking for the same breach in other Member States.

Notes/Przypisy

¹ Council Regulation (EC) 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (OJ L 1, 4.01.2003, pp. 1–25).

² Commission Staff Working Document. Evaluation of Regulations 1/2003 and 773/2004, Brussels, 5.09.2024 SWD(2024) 216 final, p. 48–49.

³ Evaluation of Regulations 1/2003 and 773/2004, p. 10.

⁴ EC Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, pp. 43–53).

⁵ White Paper on modernisation of the rules implementing Art. 85 and 86 of the EC Treaty, Brussels, 28.04.1999.

⁶ ECJ judgment of 3.05.2011, C-375/09 Tele2 Polska, EU:C:2011:270, para. 26.

⁷ ECA Special Report 24/2020: The Commission's EU merger control and antitrust proceedings: A need to scale up market oversight, p. 34.

⁸ Opinion of AG Mazák of 7.12.2010, C-375/09 Tele2 Polska, EU:C:2010:743, para. 47.

⁹ ECJ judgment of 25.02.2021, C-857/19 Slovak Telekom, EU:C:2021:139, para. 38; ECJ judgment of 20.04.2023, C-815/21 P Amazon.com, EU:C:2023:308, para. 31; EU Court judgment of 2.10.2024, T-587/22 Crown Holdings, EU:T:2024:661, para. 20.

¹⁰ Evaluation of Regulations 1/2003 and 773/2004, p. 20.

¹¹ ECJ judgment of 25.02.2021, C-857/19 Slovak Telekom, EU:C:2021:139, para. 32; ECJ judgment of 20.04.2023, C-815/21 P Amazon.com, EU:C:2023:308, para. 28; ECJ order of 29.01.2020, C-418/19 P Silgan, EU:C:2020:43, para. 73; EU Court order of 14.10.2021, T-19/21 Amazon.com, EU:T:2021:730, para. 41.

¹² Art. 50 of the EU Charter of Fundamental Rights.

¹³ ECJ judgment of 22.03.2022, C-151/20 Nordzucker, EU:C:2022:203, para. 58.

¹⁴ ECJ judgment of 25.02.2021, C-857/19 Slovak Telekom, EU:C:2021:139, para. 38.

¹⁵ ECJ judgment of 20.04.2023, C-815/21 P Amazon.com, EU:C:2023:308, para. 31.

¹⁶ *Ibidem*, para. 36.

¹⁷ EU Court order of 14.10.2021, T-19/21 Amazon.com, EU:T:2021:730, paras 44–48; EU Court judgment of 17.12.2014, T-201/11 Si.mobil, EU:T:2014:1096, paras 36–39.

¹⁸ ECJ judgment of 20.04.2023, C-815/21 P Amazon.com, EU:C:2023:308, para. 36.

¹⁹ https://archiwum.uokik.gov.pl/news.php?news_id=11995

²⁰ However, Bundeskartellamt issued prohibition decisions (dec. B9-66/10 of 20.12.2013 and dec. B9-121/13 of 22.12.2015).

²¹ See: Bundeskartellamt dec. B9-66/10 of 20.12.2013, para. 108; French NCA (*Autorité de la concurrence*) dec. 15-D-06 of 21.04.2015, <https://www.autoritedelaconurrence.fr/sites/default/files/commitments/15d06.pdf>; AGCM dec. 25422 of 21.04.2015 in case I779, para. 9; Swedish competition authority (*Konkurrensverket*) decision 596/2013 of 15.04.2015, https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/beslut/13_0596e.pdf

²² Bundeskartellamt dec. B9-121/13 of 23.12.2015, para. 155; *Konkurrensverket* dec. 596/2013 of 15.04.2015, para. 15; French NCA dec. 15-D-06 of 21.04.2015, para. 101.

²³ AGCM dec. 25422 of 21.04.2015 in case I779, para. 12.

²⁴ *Ibidem*, para. 47.

²⁵ French NCA dec. 15-D-06 of 21.04.2015, para. 102.

²⁶ *Autorité de la concurrence* dec. 25-D-02 of 31.03.2025 (https://www.autoritedelaconurrence.fr/sites/default/files/attachments/2025-07/25d02_public_version.pdf); AGCM decision No 31772 of 16.12.2025, case A561 (<https://www.agcm.it/media/comunicati-stampa/2025/12/A561->).

²⁷ <https://uokik.gov.pl/en/is-apple-restricting-competition-president-of-uokik-brings-charges>

²⁸ https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2025/12_02_2025_ATTf.html

- ²⁹ <https://www.consiliulconcurentei.ro/en/comunicate/competition-council-investigates-the-advertising-market-through-apps-installed-on-apple-mobile-devices-ios/>
- ³⁰ See: *Autorité de la concurrence* dec. 25-D-02 of 31.03.2025, paras 66–71.
- ³¹ AGCM dec. No 31772 of 16.12.2025, case A561, paras 12–14.
- ³² *Autorité de la concurrence* dec. 25-D-02 of 31.03.2025, par. 389, 395, 421–430. Also, AGCM dec. No 31772 of 16.12.2025, case A561, paras 523–555.
- ³³ See: *Autorité de la concurrence* dec. 25-D-02 of 31.03.2025, par. 379; AGCM dec. No 31772 of 16.12.2025, case A561, paras 737–738; UOKiK press release of 25.11.2025, *Is Apple restricting competition? President of UOKiK brings charges*.
- ³⁴ https://ec.europa.eu/commission/presscorner/detail/en/ip_26_310
- ³⁵ <https://www.agcm.it/media/comunicati-stampa/2025/11/A576->; <https://www.agcm.it/media/comunicati-stampa/2025/12/A576->; <https://www.agcm.it/media/comunicati-stampa/2025/7/A576>
- ³⁶ Case AT.41034 Exclusion of AI competitors from WhatsApp. <https://competition-cases.ec.europa.eu/cases/AT.41034>
- ³⁷ AGCM resolution No. 31775 of 22.12.2025 in case A576, para. 12.
- ³⁸ EC dec. of 04.12.2025 on opening the proceedings AT.41034.
- ³⁹ https://ec.europa.eu/commission/presscorner/detail/en/ip_26_310
- ⁴⁰ AGCM resolution No. 31634 of 22.07.2025 in case A576, paras 20, 26, 27.
- ⁴¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_26_310
- ⁴² https://ec.europa.eu/competition/antitrust/cases1/202617/AT_41034_606.pdf
- ⁴³ AGCM resolution No. 31971 of 19.05.2026 in case A576.
- ⁴⁴ See, also decisions of AGCM and Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*, CNMC) regarding Amazon and Apple's restriction of sales of Apple products on Amazon. See: CNMC dec. of 12.07.2023, No. S/0013/21; AGCM dec. of 16.11.2021, No. 29889 in case I842.
- ⁴⁵ See: AGCM's decision regarding Ryanair's abuse of dominant position in Italy by blocking online travel agencies to offer Ryanair flights purchased through the company's website (AGCM dec. No. 31774 of 19.12.2025, case A568).
- ⁴⁶ In the Ryanair case, also non-Italian travel agencies called for a EU-wide investigation. See: *eDreams urges further Ryanair probes after airline's antitrust sanction*, 23.12.2025: https://content.mlex.com/#/content/1704757/eDreams-urges-further-ryanair-probes-after-airline-s-antitrust-sanction?referrer=search_linkclick
- ⁴⁷ ECA Special Report 24/2020: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight, p. 43.
- ⁴⁸ Evaluation of Regulations 1/2003 and 773/2004, p. 252.
- ⁴⁹ AG Bobek opinion of 2.09.2021 in case C-151/20 Nordzucker, paras 78–86.
- ⁵⁰ *Ibidem*, par. 85.
- ⁵¹ Art. 1 sec. 2 of the Act of 16.02.2007 on Competition and Consumer Protection.
- ⁵² 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, 14.1.2019, pp. 3–33), Art. 24–28; Regulation 1/2003, Art. 22.
- ⁵³ White Paper, paras 9 and 13.
- ⁵⁴ White Paper, para. 8.
- ⁵⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14.09.2022 (OJ L 265, 12.10.2022, pp. 1–66).
- ⁵⁶ Cooperation Notice, para. 15.
- ⁵⁷ Competition Policy in Digital Markets. The Combined Effect of Ex Ante and Ex Post Instruments in G7 Jurisdictions, OECD, 2024, p. 15.
- ⁵⁸ EU Court judgment of 8.03.2007, T-340/04 France Télécom, EC:T:2007:81, para. 146.
- ⁵⁹ ECJ judgment of 3.05.2007, C-303/05 Advocaaten voor de Wereld VZW, EU:C:2007:261, paras 49–50.
- ⁶⁰ ECJ judgment of 22.10.2015, C 194/14 P AC-Treuhand AG, EU:C:2015:717, paras 40–41.
- ⁶¹ AG Kokott opinion of 14.04.2011, C-109/10 P Solvay, ECLI:EU:C:2011:256, para. 255.
- ⁶² ECJ judgment of 22.03.2022, C-151/20 Nordzucker, EU:C:2022:203, para. 30.
- ⁶³ Per analogy, ECJ judgment of 3.04.2019, C-617/17 Powszechny Zakład Ubezpieczeń na Życie, EU:C:2019:283, para. 39.
- ⁶⁴ ECJ judgment of 22.03.2022, C-151/20 Nordzucker, EU:C:2022:203, para. 58.
- ⁶⁵ ECJ judgment of 3.04.2019, C-617/17 Powszechny Zakład Ubezpieczeń na Życie, EU:C:2019:283, para. 39.
- ⁶⁶ Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003 (OJ C 210, 2006, pp. 2–5), para. 4.
- ⁶⁷ Art. 49(3) of the EU Charter of Fundamental Rights.
- ⁶⁸ EU Court judgment of 26.10.2017, T-704/14 Marine Harvest, EU:T:2017:753, para. 580.
- ⁶⁹ ECJ judgment of 28.06.2005 in joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri, EU:C:2005:408, paras 280–281; EU Court judgment of 16.09.2013, T-364/10 Duravit, EU:T:2013:477, paras 379–382.
- ⁷⁰ ECJ judgment of 3.04.2019, C-617/17 Powszechny Zakład Ubezpieczeń na Życie, EU:C:2019:283, para. 39.
- ⁷¹ This number can be doubled, according to the ECJ judgment in case C-617/17, cited above.
- ⁷² UOKiK Guidelines regarding the determination of fines in cases involving violations of the prohibition of anti-competitive practices, 2024, paras 17–18, <https://uokik.gov.pl/bip/wyjasnienia>
- ⁷³ E.g., AGCM's decision regarding Alphabet's abuse of dominant position that harmed an Italian energy company. See: <https://en.agcm.it/en/media/press-releases/2021/5/a529>
- ⁷⁴ I am not commenting on the height of such a new maximum, which requires separate analyses.

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ZARZĄDZANIE RÓŻNORODNOŚCIĄ W POLSCE

w perspektywie instytucjonalnej:
między legitymizacją a izomorfizmem

Polskie Wydawnictwo Ekonomiczne

ELWIRA GROSS-GNIOT

ZARZĄDZANIE RÓŻNORODNOŚCIĄ W POLSCE W PERSPEKTYWIE INSTYTUCJONALNEJ: MIĘDZY LEGITYMIZACJĄ A IZOMORFIZMEM

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