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National competition law – time to say goodbye?

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Abstract

The paper responds to observed circumstances that holistically analysed give rise to a question whether substantive national competition law should be still retained as under Regulation 1/2003. The analysis includes – *inter alia* – Court of Justice adjudication in pure internal cases, interstate trade criterion, double punishment, principle *ne bis in idem*, the same interests and objectives pursuit by EU and national competition law, specific rules established in Directive 2019/1 and Directive 2014/104 as well as margin of flexibility entrusted to National Competition Authorities. By and large those factors are presented so as to assess on which stage of development EU competition law is and whether another step should be retiring of national competition law. There are also considerations on straddling principles pertaining to competition law, EU freedoms and internal market. Major counter-arguments against altering *status quo* are not overlooked either. Finally, some desiderata are proffered backed up with gathered and elaborated arguments.

Keywords:

EU competition law, national competition law, NCAs, European Commission, intertrade criterion

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I. Introduction

It has been almost two decades since decentralised application of EU competition law became a mainstay of this EU law field under Regulation 1/2003[2]. This shift enabling NCAs and national courts to apply entirely Articles 101 and 102 TFEU[3] was much welcome. Vesting NCAs with a competence to award an exemption from EU competition law restrictions was deemed the major representative of new EU regime that obtained functional capabilities responding to unprecedented enlargement of the European Community. Aside the significance of this change, the other one seemed to be underestimated for many years – the core rule governing the administration of competition law within EU consisting in bifurcated method of application of pertinent competition norms. The established delineation introduced a possibility to apply Arts. 101/102 TFUE concurrently with their national counterparts or Arts. 101/102 TFEU alone. An increasing number of sound arguments can be put forward in favour of retiring – dare to say at this stage – artificial and temporary division of so-called "pure domestic cases" and "EU dimension cases". Challenging of this bold statement is the main purpose for this paper so as to (attempt to) answer the very question of its title whether it is indeed time to say goodbye[4]. It will be crucial to consider whether it would be more justified than retaining *status quo*.

II. General remarks to EU and national competition law division

The application of both the EU and national competition law is not mandatory. Nonetheless almost all NCAs follow this approach in accordance with statutory laws. Therefore in an absolute majority of NCAs' decisions stating breach of 101/102 TFUE, the domestic counter-parts are also applied. Given that nowadays decisions of the Commission comprise, quantitatively, a minor contribution to the whole collection of the enforcement acts at hand,[5] it remains unquestionable that most decisions in EU regime encompass application of substantive Union and national provisions. Thus the issue discussed does not concern peripheries of competition legal system but one of its actual paradigms. Moreover, taking into account cases involving sole application of domestic competition altogether, it turns out that there are more decisions based on national competition law than EU law. It is intriguing why then theoretical withdrawal of the former ones is worth considering at all. Clearly, only the qualitative assessment can espouse that if whatever can.

The legal premise laying down the division at issue is related with the (inter)jurisdictional criterion of interstate trade (i.e. the concept of effect on trade between Member States[6]). Its satisfaction is a *conditio sine qua non* for Arts. 101/102 TFEU. Whenever the anticompetitive practices may affect trade between the Member States, NCAs (and national courts) are obliged to apply Article 101/102 TFUE. However, point 8 of preamble of Regulation 1/2003[7] uses partially reversed construction: "it is necessary to oblige the competition authorities and courts of the Member States to also apply [101/102 TFEU] where they apply national competition law to agreements and practices which may affect trade between Member States". This should be interpreted as a prohibition addressed to NCAs against resigning from applying EU norms while they employ their domestic counter-parts in EU dimension cases. The whole architecture of this section of competition law in the EU is based on the presumption that (substantive) national norms are identical or very similar to 101/102 TFUE so that the latter ones have to be also applied in all cases with ascertained fulfilment of interstate criterion. The substantive closeness between them gives rise to apply them both. It shall be reconsidered whether the substantive closeness shall not motivate the question why it cannot be limited to one legal basis then instead of two as today.

The first reason explaining why that division was established in the first place shall be searched in Article 3 TFEU that provides that "the establishing of the competition rules necessary for the functioning of the internal market" belongs to areas in which the Union was conferred exclusive competences upon.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002], OJ L 1/1 (Regulation 1/2003).
[3] Consolidated version of the Treaty on the Functioning of the European Union [2012], OJ C 326/47 (TFEU).
[4] Opposite positions can be found though, see eg Franco Rizzutto, Monika Lynch, 'PZU Życie: National Competition Law Is Alive and Kicking Thanks to the Threefold Test for Idem (C-617/17 Powszechny Zakład Ubezpieczeń na Życie)' (2020) 4 ECRLR, 236-242.
[5] Further on that and statistics: Annalies Outhuijse, 'Effective Public Enforcement of Cartels: Rates of Challenged and Annulled Cartel Fines in Ten European Member States' (2019) 2 WC, 171 ff.
[6] As it is in Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004], OJ C 101/81.
[7] Regulation 1/2003, art 3 (1) alike.

Interestingly "internal market" is marked as an area of a shared competence. EU is not entitled to set out competition rules that would not be necessary for the internal market. It had been determined that the national competition law lies beyond the ambit of the concerned exclusive competence in contrast to the sheer EU norms. A current perception of the scope in question, namely regarding "pure domestic cases", has to be re-examined to verify whether it touches upon the matter which importance for the functioning of the internal market amounts to the "necessary" state. Besides what might have been reasonable years ago, does not need to be necessarily still valid.

III. The cracks on the division's good standing

According to a collection of preliminary rulings[8], CJEU is willing to assist national courts[9] even in pure domestic cases. This approach is supported by spontaneous harmonisation of national competition law with the EU one.[10] The distinctions between them are steadily vanishing in sense of the wording and interpretation. The Court of Justice maintains that a necessity to adjudicate in pure domestic cases is "clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply"[11]. In other areas CJEU adjudicates in pure internal situations too. Not once though a lack of cross-border element triggered objections with regard to admissibility of the preliminary requests.[12]

Ain't no prerequisite to oblige the Court to deal with pure domestic cases. Thereby the Court accelerates the spontaneous harmonisation *via* the application of law, providing that the referring courts requests so. It lies within the judicial discretion but the judicial constraints let the Court of Justice rule in a limited number of cases, only in response to concrete requests. Given a size of spontaneous harmonisation, courts would need to submit preliminary questions for all dubious instances in pure domestic cases. The case-law will continue to be put at risk becoming merely casuistic. Assuming that substantive national laws appear to be at least inspired by EU norms, the ulterior problem is that the national jurisdictions in which courts are willing to submit preliminary requests are seemingly in minority. It may result in charting more and less integrated jurisdictions with EU role model. The preliminary requests in pure internal cases were submitted only from courts of Hungary, Latvia, Portugal and the Netherlands. The intensity of convergence in this respect may be dependent on non-objective grounds. It may undermine the effect that is desired by the Commission – a level-playing-field; just to pose here a risk of impaired rights of defence, mainly, in administrative proceedings[13] as well as a theoretic threat of forum shopping since allocation rules, that are not appealable,[14] apply to EU dimension cases only.

Despite explicit or implicit acknowledgement from the referring court to abide by the preliminary ruling, no legal obligation can be inferred to this end. For sake of warranted uniformity, the referring courts have to follow the preliminary rulings insofar as they stick to EU rules in line with the competences conferred on the Union. In pure internal situations, the referring courts are not authorised to obey then. That legal basis

[8] See Cases C-32/11 *Allianz Hungária Biztosító Zrt. and Ors v Gazdasági Versenyhivatal* [2013], EU:C:2013:160; C-542/14, *SIA 'VM Remonts'(formerly SIA 'DIV un KO') and Ors v Konkurences padome* [2016], ECLI:EU:C:2016:578; C-345/14 *SIA „Maxima Latvija" v Konkurences padome* [2015], ECLI:EU:C:2015:784; C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014], ECLI:EU:C:2014:2411; C-306/20 *SIA „Visma Enterprise" v Konkurences padome* [2021], ECLI:EU:C:2021:935.

[9] It seems to be symptomatic that those courts are rather from smaller Member States.

[10] The spontaneous harmonisation has seemingly affected not only substantive norms but somewhat procedural law as well when it comes to inspirational legal sources setting out the way the Commission operates. However partially this approach has been superseded by the recent secondary law.

[11] *Allianz Hungária*, para. 20, reiterated in subsequent judgements.

[12] Please refer eg to Joined Cases C-159/12 to C-161/12 *Alessandra Venturini v ASL Varese and Ors Maria Rosa Gramegna v ASL Lodi and Ors and Anna Muzzio v ASL Pavia and Ors* [2013], ECLI:EU:C:2013:791, along with Opinion of AG Wahl, ECLI:EU:C:2013:529.

[13] Kamil Dobosz, 'W stronę unifikacji systemów prawa konkurencji Unii Europejskiej i państw członkowskich - uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej w zakresie spraw o charakterze czysto krajowym' 2017 EPS 10, 36.

[14] Katalin Cseres, Annalies Outhuijse, 'Parallel enforcement and accountability: the case of EU competition law' in Miroslava Scholten, Michiel Luchtman (eds.) *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar 2017).

can hardly be the principle of loyal cooperation either.[15] As concerns the binding effects, *Expedia*[16] may be evoked as the Court drew a line then what is mandatory for EU and for the national bodies. Therefore this sphere predominantly rests on the dialogue between the courts but does not produce binding legal effects.[17]

National provisions are pushed to be construed in the possibly exact fashion as EU counter-parts. As regards other EU competition rules than Arts. 101/102 TFEU, this conclusion may be different. In *Visma Enterprise*, the Court of Justice noticed that as long as only Arts. 101/102 TFUE and their counter-parts are under consideration, the uniform application thereof is a pivotal purpose. Nonetheless the Court[18] was not that confident when another EU act was at stake, namely Regulation 330/2010[19]. Seemingly the Court was not even aware whether corresponding domestic act existed. Even if the Court was aware, it might have been infeasible to deal with the legal act located so remote from the ambit of the Treaty substantive norms. Possibly due to those circumstances, the Court concentrated on Article 101(3) TFEU[20] and provided a combined answer for three questions altogether, including that related with Regulation 330/2010. It shows that "copy-paste" approach cannot be by default implemented as a remediating measure to reconcile EU and national competition law. The alignment on the current stage of development of those legal orders is sufficiently advanced to deal with many cases, however the continuation must take a form of legislative actions.

The Court of Justice has faced difficulties with keeping its case-law internally coherent when it comes to pure domestic cases. Just take note of *Cogeco*[21] when Court of Justice noted that the subject matter of that case before the referring court was not an action for damages brought following a final decision finding an infringement of Article 102 TFEU issued by a national competition authority – this time it was not deemed indispensable to provide answer. On the one hand, it is true that, unlike the Autoridade da Concorrência, Portuguese courts found that Article 102 TFEU was not applicable on the ground that it had not been shown that the business practice at issue might have affected trade between Member States. On the other hand, it does not necessarily need to constitute a discounting premise so as to steer away from advising whether national legislation in question was (potentially) incompatible with EU law. Needless to say, future application will be uncertain. The incongruence may cast a shadow on the more complicated cases when for example competition issues straddle the sectoral regulatory ones.[22] The way in which the Court of Justice selects and justifies cases is sometimes confusing and unconvincing.[23] It demonstrates that it becomes more demanding to ascertain relationship between them both whilst their mutual approximation is finally drifting to an amalgamation.

IV. Delineation of jurisdiction and beyond

[15] cf Miguel Sousa Ferro, 'Institutional Design of National Competition Authorities: EU Requirements' (2018) 2 CLR, 118.

[16] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Ors* [2012], ECLI:EU:C:2012:795.

[17] Alas the Court of Justice has never endeavoured to legitimise its jurisdiction in the internal situations indicating that ensured uniform application of national competition law with EU one is necessary for the proper functioning of the single market (*vide* art 3 TFEU). On the other hand, the contrary viewpoint was presented neither.

[18] ibid, para 49.

[19] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1 (Regulation 330/2010).

[20] Divergences in utilising this EU legal institution have been also spotted. It may be concerning because the divergent approaches are likely to occur in internal situations when EU norms are not binding. See more: Or Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 CMLR, 121-156.

[21] Case C-637/17 *Cogeco Communications Inc v Sport TV Portugal SA and Ors* [2019], ECLI:EU:C:2019:263

[22] A conflict between the national competition law and (EU) sectoral regulatory law will be more likely in future as the touchpoints are visible in CJEU case-law frequently in recent years, just see Opinion of AG Ćapeta in Case C-721/20 *DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH* [2022], ECLI:EU:C:2022:288 and recalled cases in para 77.

[23] As regards *Cogeco*, it is even more striking as the Court decided to answer some referring questions which had been preceded by reformulating them while, on no account, application of Art. 102 TFUE was possible.

Several researches demonstrated[24] that some NCAs went exclusively for domestic norms in spite of (most probable) interstate trade occurrence. The exemplary reasons standing behind the wave of dubious cases of exclusively domestic dimension could be (have been) as follows: (i) NCAs in smaller countries may comprehend the criterion through the wrong lens, namely, of size of their economy in opposition to the EU one in general, (ii) scarce or extremely limited Commission's oversight over the cases that are not notified by NCAs thereto, (iii) easier and more independent procedure and adjudication, (iv) no difference in terms of sanctions while EU rules have been also applied,[25] (v) custom to rely on the national norms only (especially in respect of lately acceded Member States), (v) efficiency factors argued in favour of rejection of EU norms, (vi) no rule established to explain a choice of application of sole domestic provisions in NCAs' decisions, (vii) doubts arouse around the interstate trade criterion in terms of its applicability. The nature of this catalogue is not exhaustive.[26] However it shall be principally observed that that corroborated trend emerged owing to similarities between substantive norms of both regimes.

One caveat has to be made in relation to Article 3 (2 and 3) Regulation 1/2003. The ratio thereof consists in shaping the relationship between Articles 101/102 TFEU and national competition laws. It sets out certain room for Member States to retain peculiar rules. Paragraph 2 states that Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings. Paragraph 3 generally precludes applicability of paragraphs 1 and 2 when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101/102 TFEU. They outline the margin of flexibility for national bodies in enforcing national law that would not amount to a violation of EU law. Notwithstanding the commendable intentions, the impact of concerned provisions may be appreciable for EU dimension cases and lead to diminish the interstate trade criterion. Therefore it should be under review of CJEU.

The magnitude of uncertainty that Article 3 (2/3) entails is manifested in widely criticised[27] German *Facebook*[28]. In course of the judicial review, Oberlandesgericht Düsseldorf had doubts and referred preliminary questions[29]. They are rather aimed at challenging the NCA's *modus operandi* through the prism of data protection regulations instead of capturing *stricte* the competition law perspective. Unfortunately the admissibility to step aside Article 102 TFUE, invoking specific paragraphs of Article 3 Regulation 1/2003 which enable enforcing specific national rules along with shifting to data protection regulation, has not comprised the referred questions. Notwithstanding the unlikely scenario that the Court will "stretch" the given questions to rule, it may, by the way, decide to take a stance in some ruling's paragraph(s).

It is of utmost importance to assess whether the national law should be entitled to take measures in EU dimension cases overreaching what can be enforced by EU competition rules. The legal reality in which there are pure internal cases, pure internal cases to which EU law can be however applied in terms of interpretation guidelines, EU dimension cases, EU dimension case to which national law may envisage different legal treatment, is far away from being in order and ensuring certainty of law.

[24] In particular see: Marco Botta, Aleksandr Svetlicinii, Maciej Bernatt (2015), 'The Assessment of the Effect on Trade by the National Competition Authorities of the "New" Member States: Another Legal Partition of the Internal Market?' (2015) 5 CMLR, 1247-1276; Jurgita Malinauskaite, 'Public EU competition law enforcement in small 'newer' Member States: addressing the challenges' (2016) 1 CLR; Maciej Bernatt, 'Stosowanie reguł konkurencji UE przez polski, czeski i słowacki organ ochrony konkurencji' in Tadeusz Skoczny (ed.) *Prawo konkurencji. 25 lat* (Wolters Kluwer 2016), Kamil Dobosz, *Jednolitość stosowania prawa konkurencji Unii Europejskiej przez organy i sądy Państw Członkowskich* (Wolters Kluwer 2018).

[25] However please see subchapter "Double punishment threat and ramifications".

[26] For further information refer particularly to the literature listed above.

[27] See eg Wouter P. J. Wils, 'The obligation for the competition authorities of the EU Member States to apply EU antitrust law and the Facebook decision of the Bundeskartellamt' (2019) 3 Concurrences, 58-66 and Giuseppe Colangelo, Mariateresa Maggiolino, 'Antitrust Über Alles. Whither Competition Law after Facebook?' (2019) 3 WC, 355-376.

[28] Decision of Bundeskartellamt, 6 February 2019, B6-22/16, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568.

[29] Registered as C-252/21 *Facebook Inc. and Ors v Bundeskartellamt*.

Speaking of jurisdiction and application of competition law, a number of EU dimension decisions of NCAs is steadily growing. To illustrate[30] – referring only to last year – Polish NCA rendered 10 decisions regarding multilateral anticompetitive practices, among which six were pure domestic cases and four were based also on TFEU. EU dimension was mostly ascertained by the central office of Polish NCA while the Delegation office was mainly involved in applying national norms only. Similar calculations and conclusions pertain to decisions adopted in 2020.[31] What is intriguing, nowadays whenever the central office deals with the multilateral anticompetitive behaviours, it is very probable to encounter Article 101 TFEU legal basis of the decision at hand. Earlier Polish NCA seemed to not have been that eager to apply EU competition norms but when it did, the perpetrators predominantly used to be the biggest companies operating in major industries. As a result of either "stretched" interstate criterion or eventually properly applied, the decisions applied in 2020 and 2021 do not necessarily embrace misconducts of mentioned huge companies but stuck to practices covering, at least, most territory of Poland. It means that EU rules can be successfully enforced (mandatorily in parallel with the national ones) and the latter ones no longer act as an exclusive legal arsenal.

V. Double punishment threat and ramifications

On the basis of *PZU*[32], NCAs might have been released to impose separate sanctions due to infringed national and EU competition norms.[33] It has been first launched when Polish Competition Authority imposed separate pecuniary sanctions for breach of Article 101 TFEU and its counterpart from national statutory law. Since then four decisions[34] of Polish NCA were issued in which the authority invoked that ruling to justify its power for double sanctions, although eventually single sanctions were imposed therein. It is worth mentioning that considerations on imposition of a joint sanction or separate ones would be to no avail searched in the former decisions of the Polish NCA. Given that the Polish NCA did not have that many occasions to examine infringements of the EU dimension since then, the adumbrated course of actions of merely recent two years may signal that double punishment is likely to return in future decisions.

Generally speaking the fines perpetrators pay are principally assigned to Member States' budgets. Therefore it is a matter of time when other NCAs will switch to this new approach. It is cautiously predictable in spite of the fact that a cap for fines in national legislations in many instances is set as 10% of undertaking's total turnover in the preceding business year and only some NCAs are authorised to adopt more severe rules. The possible implications of *PZU* may be an overall increase in total pecuniary sanctions ordered to pay by NCAs. This possibility is yet conditioned so as to ensure the proportionality rule but, step by step, the inclusionary efforts may be implemented towards most serious anticompetitive practices, shifting then to more "ordinary" ones. Thus saying goodbye to national competition law would exclude potential doubts on proportionality with regard to double sanctions.[35] For years the maximum possible size of fine has been a subject of the national lawmaker[36] so a threat to sufficiently deterrent/repressive sanction is not viable.

VI. The question on legal interests and objectives

It still remains unsettled whether (or when) EU and national competition law pursue the same interest(s)/objective(s). Article 3(3) Regulation 1/2003, as already explained, generally grants a wider margin of flexibility to NCAs when they (and national courts) apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued

[30] The study on decisions of Polish NCAs was performed utilizing a search engine available at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf

[31] Year 2020 brought 4 EU dimension cases and 10 pure domestic ones solely.

[32] Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes UOKiK* [2019], ECLI:EU:C:2019:283.

[33] See more: Rizzutto, Lynch, PZU Życie…, Mario Libertini, 'Cumulative Enforcement of European and National Competition Law and the Ne Bis In Idem Principle Case Comment to the Judgement of EU Court of Justice of 3 April 2019 Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów (Case C-617/17)' (2019), 20 YARS, 231-243, Kamil Dobosz, 'Od Walt Wilhelm do PZU? O relacji między krajowym i unijnym prawem konkurencji – krytyczna ocena nakładania odrębnych kar antymonopolowych' (2018) 9 EPS, 35-42.

[34] DOK-8/2021 of 23 December 2021, DOK-5/2020 of 3 December 2020, DOK-6/2021 of 16 December 2021; DOK-6/2020 of 30 December 2020.

[35] For broader considerations on proportionality of fines cf Krystyna Kowalik-Bańczyk, 'Intensity of Judicial Review of Fines in EU Competition Law' (2019) 19 YARS, 19.

[36] As in line with Directive ECN+, art 15 (1).

by Articles 101/102 TFEU. It can be *a contrario* deduced that, in principle, national counter-parts pursue common objectives as Articles 101/102 TFEU. Still a straightforward contention from the Court of Justice is missing though.

Aforementioned *PZU* prompted those contentious questions anticipating definite response from the Court of Justice. However the Court eventually did not find it necessary to address those issues. It was possible since the question on protection of the same interest was filtered through the principle *ne bis in idem* which requires[37] the cumulative criteria to be satisfied: the facts are the same, the offenders are the same and the legal interest protected is the same[38]. Similar approach was taken in *Nordzucker*[39] in which the ascertainment of different geographical scopes of the infringements (and respectively NCAs' decisions) led to legitimise the proceedings brought against an undertaking while a different territory was affected by the anticompetitive delict. That finding could have been expected.[40] More importantly, the Court of Justice admitted that if two NCAs were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Article 101 TFEU and the corresponding national provisions, those two authorities would pursue the same objective of general interest of ensuring that competition in the internal market is not distorted by agreements, decisions of associations of undertakings or anticompetitive concerted practices.[41] It was the first time the Court of Justice took such a bold stance regarding the protection over the same objective of general interest (in EU competition case) in respect of simultaneous application of EU and national law that was the prime factor. Thereby the Court provided an answer to the question "[d]oes the same protected legal interest exist in such a case of parallel application of European and national competition law?"[42]. The reservation has to be made as the answer could have been different if the question pertained to parallel application by one NCA and sole application of national competition law by the other. Unfortunately, the Court did not follow the advisement from AG Bobek[43] who explicitly stated that EU and national competition laws protect the same legal interest[44]. References were made by AG to the landmark judgement *Walt Wilhelm*[45], so as to present the paths of the evolution that the competition law in EU went through in last decades. The Court did not allude that ruling narrowing significantly optics to the principle *ne bis in idem*. Nor was an incongruence with *Menci*[46] elaborated. For these reasons there is still a question mark whether attainment of the legal interests and objectives are shared by both competition regimes.[47] Agreeing that there are no discrepancies in terms of legal interests/objectives on both sides would be a giant step to conclude that further alignment or amalgamation is unavoidable. But still the process to assess whether national and EU norms protect the same legal interest should not be automatic. AG Bobek sets forth[48] conditions to focus on the specific interest or purpose that the provision being applied pursues, what that provision penalises and why. On the other hand, retiring of the substantive national competition rules, alternatively except for the legal manoeuvre enshrined in Article 3 (2/3) Regulation 1/2003, would eliminate potentially complicated analysis of Article 101/102 TFUE and the mirroring national provisions. Thereby Member States would not loose competences to regulate specifically the same situations as it is possible nowadays.

[37] See also Case C-117/20, *bpost SA v Autorité belge de la concurrence* [2022], ECLI:EU:C:2022:202, para 16 along with Opinion of AG Bobek, ECLI:EU:C:2021:680 gathering voices of criticism in para 52.
[38] There's a demand to modernise this three elements test, see eg Marc Veenbrink, 'Bringing Back Unity: Modernizing the Application of the Non Bis In Idem Principle' (2019) 1 WC, 67-86.
[39] Case C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG and Ors* [2022], ECLI:EU:C:2022:203.
[40] Such situation I analysed elsewhere with the same conclusions – Dobosz (n 24) 111-112.
[41] *Nordzucker* (n 39), para 56.
[42] ibid, para 25.
[43] Opinion of AG Bobek, C-151/20 *Bundeswettbewerbsbehörde v Nordzucker AG and Ors* [2021], ECLI:EU:C:2021:681.
[44] *Nordzucker* (n 39), para 44.
[45] Case 14/68 *Wilhelm and Ors* [1969], EU:C:1969:4.
[46] Case C-524/15 *Luca Menci* [2018], ECLI:EU:C:2018:197. Particularly see para 36: "[…] the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another."
[47] Apparently a different view, although focused even on application of sole EU competition law, is presented here: Valentina Sansonetti, Pierpaolo Rossi, 'Untangling the inextricable: The notion of "same offence" in EU competition law' (2020) 3 Concurrences, 67.
[48] *Nordzucker* (n 39), para 44.

Another remark can be prescribed to the limited effects of the first sentence of Article 11(6) Regulation 1/2003 which even recently in *Slovak Telekom*[49] was examined by the Court of Justice who rightly ruled that it must be interpreted as meaning that NCAs are relieved of competences to apply Articles 101/102 TFEU in the case where the Commission initiates proceedings for the purposes of adopting a decision finding an infringement of those provisions in so far as that formal act relates to the same alleged infringements of Article 101/102 TFEU, committed by the same undertaking(s) on the same product market(s) and the same geographical market(s) during the same period(s) as those concerned by the proceeding(s) previously brought by those authorities. Those conditions are constituents of the principle *ne bis in idem*.[50] What however evades these findings is application of sole national provisions mirroring Arts. 101/102 TFEU since NCAs, under the current norms, are not deprived/relieved of competences to apply them when the Commission initiates proceedings pertaining to EU competition rules – providing that NCAs consider the case as pure internal situation. Insofar as the national norms will not be found protecting the same legal interest as EU ones, there are no procedural obstacles to proceed for NCAs. CJEU's adjudicating in *Slovak Telekom*, *Bpost* and *Nordzucker* did not produce any milestone rulings. Taking into account the principles of EU competition regime, national bodies should have reached the same conclusions on their own, at least from the substantive angle.

VII. Institutional conundrum

From the institutional point of view, the line between the competences of national bodies and Commission is clear. Nothing could be more wrong. Essentially NCAs can decline, under no control, EU dimension of the case and rely only on domestic rules. This conclusion can be particularly[51] drawn from *Trajektna*[52]. General Court generally affirmed that NCAs (and national courts) are independent in establishing sole internal nature of competition cases. It should be recalled that EU law has vested the competition authorities with the discretion to choose which cases to pursue and which to disregard.[53] In consequence, NCAs for various reasons may come up with handling the case on the basis of domestic competition law to release from whatsoever burden the EU dimension entails and no external body can double check that. The Commission would not be entitled to act as *amicus curiae* in the subsequent judicial proceedings either.

Conceiving the NCA's decision stating an infringement of – exclusively – national norms, the national review court is not authorised to extend its operative part adding breach of Article 101/102 TFEU. Regardless of national procedural rules[54], the court reviewing NCA's decision is not – pursuant to Article 35 Regulation 1/2003 – the competition authority designated by Member State responsible for the application of Articles 101/102 TFEU. Although judicial authorities can be designated as competition authorities as well[55], review courts in respect of the types of decisions foreseen in Article 5 Regulation 1/2003 are institutionally (or at least functionally) separated from NCAs. Thus review courts in the best scenario may overturn the decision in entirety and reallocate the case to NCA. Even if national procedural rules empower review courts to change the decisions in the manner in question, the architecture of the EU competition law proscribes so. Technically speaking, review courts are not placed to rectify wrong legal basis due to a lack of EU norms applied.

Trajetkna additionally demonstrated that the Commission would not be specially eager to delve into the details of the case which had been already examined by NCA on the basis of national competition law. Once the Commission considers national provisions as the equivalent of Articles 101/102 TFEU, it may follow a logic that NCAs examination constitutes a good indication and the likelihood for establishing the existence of an infringement of Article 101/102 TFEU.[56] Thereby the Commission avoids repeating similar analyses.[57]

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[49] Case C-857/19 *Slovak Telekom a.s. v Protimonopolný úrad Slovenskej republiky* [2021], ECLI:EU:C:2021:139.
[50] Considerations in line with this approach I shared with elsewhere - Dobosz (n 24) 114-115.
[51] cf Naida Dzino, Catalin Rusu, 'Public Enforcement of EU Antitrust Law: A Circle of Trust?' (2019) 1 REALaw, 137 and 138 whose conclusions are relatively similar but anchored also in other judgements.
[52] Case T-70/15, *Trajektna luka Split d.d. v EC* [2016], EU:T:2016:592.
[53] Or Brook, 'Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy' (2020) 4 JCL&E, 484.
[54] Such as a rule *reformatio in peius*.
[55] Regulation 1/2003, art. 35 *in fine*.
[56] *Trajektna* (n 52), paras 30-31.
[57] Ibid, para 32.

From those theses stem the findings which are congruent with aforementioned aspects. The NCAs are independent in determining the interstate criterion and the national law may be deemed interchangeable with EU law (given exclusively substantive norms). To a very limited degree, it could be possible to deduct from *Sped-Pro*[58] that the Commission is able/obliged to verify NCAs' decisions but the grounds in this case differ to what has been seen in *Trajektna*, so potential *mutatis mutandis* reference is highly abstract. Nevertheless it shows that NCAs' operations should be more and more under control of i.a. Commission. For sake of the principle of effectiveness, remodelled competition law would need to fall under the Commission's radar.

VIII. Input from Directive 2019/1[59] and Directive 2014/104[60]

This section will give a glimpse of recent secondary law that links with the questions posed in the paper. At the outset, it shall be noted that Directive 2019/1 ("Directive ECN+"), to a certain limited extent, recognises the necessity to equalise the pure domestic cases with EU cases.[61] It especially applies to leniency programmes and the preliminary phase of inquiring of the new case. Besides the participation of a party in the national leniency programme may entail a preclusion of a declaration of the infringement of both EU and national competition law by the competition authority due to the principle *ne bis in idem*.[62] What is left unanswered is whether the same conclusion would be reached if the considered second proceedings pertained to projected application of national substantive norms alone. At the same time, Article 2 p. 6 Directive ECN+ distinguishes national competition law that predominantly pursue the same objective as Articles 101/102 TFEU. Luckily in terms of procedural and institutional aspects with regard to EU dimension cases and pure domestic ones, the risk of dual transposition[63] of Directive ECN+ did rather not occur.

To compare, Directive 2014/104 by no means bifurcate into two sets of rules, however Member States generally decided to not differentiate domestic and EU cases albeit application of e.g. sole Polish competition provisions by national authority/court may not constitute legitimate evidence in the proceedings before Finnish courts. Application of national provisions in such situations may be of limited legal value and scope then. In light of an integrative function of competition law, this is not desirable. The portfolio of legal profits for harmed parties would for sure grow with one EU competition law order.

Directive ECN+ concurrently touches upon national competition law when it is applied in parallel (p. 3 of preamble). It predominantly pertains to institutional and procedural national law that may or might have been subject to less or more important amendments. Consequently the national law has been largely harmonised and the substantive law is literally the only missing part that features discrepancies. In this vein, enhanced independence of NCAs is one of the priorities that Directive ECN+ has brought. Various possibilities of influencing NCAs, the issue of populism[64] *et cetera* are vividly discussed as massive hurdles for the development of EU competition law. As long as NCAs will have a backdoor to slip away from EU regime and find their comfort zone within respective domestic law susceptible to steering competition policies unnecessarily in line with EU prism, the functioning of the internal market on this part will be prone to distortions. Directive ECN+ contains examples pertaining to national provisions and conditions which – eventually – may affect the way EU competition rules are enforced. Substantive national competition rules can be perceived alike. Furthermore while the domestic counter-parts are called to be construed in the consistent manner to EU provisions but no requirement to do so exists, they may be subject to interpretations contradictory to e.g. the findings of CJEU. Then the peril of selectivity cannot be eradicated since national

[58] Case T-791/19 *Sped-Pro S.A. v EC* [2022], ECLI:EU:T:2022:67.
[59] 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 [2018] OJ L 11/3 (Directive ECN+).
[60] 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 Text [2014] OJ L 349/1 (Directive 2014/104).
[61] Directive ECN+, arts. 1(1) *in fine* and 29(2). See also art. 31 (3/4) and Explanatory Memorandum, p. 6.
[62] *Nordzucker* (n 37), para 67.
[63] Giacomo Dalla Valentina, 'Competition Law Enforcement in Italy after the ECN+ Directive: the Difficult Balance between Effectiveness and Over-enforcement' (2019) YARS, 95-97.
[64] See more: Maciej Bernatt, 'Populism and Antitrust. The Illiberal Influence of Populist Government on the Competition Law System' (Cambridge University Press 2022).

bodies would raise that it is not in the scope of EU law. Such legal arrangement resembles *lex imperfecta* as there is no legal whip on adjudicating bodies to follow *acquis européenne*.

Directive ECN+ put an emphasis on the level-playing-field touchstone for determining whether undertakings undergo possibly the same regulatory requirements, regardless of country they operate in. This yardstick utilized to verify and ensure the capabilities of NCAs can work as a more universal instrument. Yet the national competition rules can be interpreted autonomously by national bodies in pure internal cases, the idea of uniform application also of these provisions as aligned with EU ones – what the Court of Justice advocates – cannot be guaranteed. Through the lens of repressive objectives that antitrust embraces and probably the perspective of many undertakings, it is often a collateral factor to perpetrate a domestic anticompetitive delict or EU one. Broadly speaking, cartel is cartel. From the side of facts, it is essentially irrelevant but not from the side of law. Just theoretically multinational corporations may take into account the global effects of the misconduct, unlike those which operation is going in a lesser scale. To attain the objective of the internal market and its functioning, it is unquestionable that EU and national competition rules play the same roles. They are indeed both necessary. Hypothetical deprivation of any of them would trigger a collapse of the whole architecture linking competition legal system and the internal market. Legal frames for EU freedoms were seriously extended which resulted in embracing the domestic situations in unprecedented way. It turned out it has to be perceived as a communicating vessels system. *Mutatis mutandis* the sole actual domestic entrepreneurial environment on the relevant market, intoxicated by anticompetitive practices, shall be orchestrated by set of rules provided on EU level. Twofold legal instruments will never be appropriately efficient.[65] The European integration through the economic means must not be underestimated.

The Directive ECN+ is aimed at ensuring the proper functioning of the internal market by empowering NCAs. A premise pursuant to which the anticompetitive practice has to be capable to affect trade between Member States is contained by Articles 101/102 TFEU. Nevertheless it would be logical to state that any distortion of the domestic market amounts to a distortion of the part of the internal market. Moreover it would be relevant for firms operating in other Member States as they might be inhibited from entering that market. Finally companies from other Member States already present on the market may be harmed by the anticompetitive practice or even complicit. These circumstances can be only qualified as inherent manifestation of the internal market *par excellence*. The anticompetitive delicts simultaneously impact or may impact the freedom of establishment, the freedom to provide services as well as freedom of movement of goods. It is of lesser importance that they are dependent on the actions taken by private parties as a realisation of internal market and its ultimate composition would not be approachable if limited to public entities perspective.

IX. Counterarguments against

Heeding the above observations, the revolutionary idea to remodel the architecture and administration of competition rules in EU evinces more arguments than ever, not to mention the outlined tendency sustaining a factual closeness of EU and national competition norms (including their application). It cannot be argued though that it would be that easy to proceed with the change. In addition, handful of counterarguments against considered concept have to be spotted and examined.

a) Management of uniform and effective application of law

The Commission is designed in the current model to perform ongoing tasks related with monitoring and managing the application of EU competition norms. It covers two gauges, precisely uniformity and effectiveness. The Commission, at least for formal requirements, is mandatorily involved in every case with 101/102 TFEU legal basis. Leastwise, national bodies have notification obligations to the Commission. It does not apply when NCAs take approach that the case is merely of domestic dimension; no oversight over that choice is envisaged.

The more the 101/102 TFEU decisions are issued by the NCAs, the more material has to be analysed by the Commission. A disappointing number of proceedings in which the Commission acts as *amicus curiae*

[65] Eg proving a breach of EU and national law entails more time and human resources.

is one of the example demonstrating a limited resources in the Commission's possession. Granted unaltered resources, the Commission would not manage to administer a significant increase in cases under oversight.

The CJEU would need to anticipate receiving a higher number of requests of preliminary rulings if bifurcated competition law system were to be unified. Furthermore, it is high time CJEU casted a role in respect of unilateral and multilateral anticompetitive practices of possibly all kinds, as it is expected thereof on the grounds of the wider spectre of competition related regulations to attain horizontal unity.[66]

b) Political obstacles

The principle of conferral is a paramount EU institution whereby a brake thwarting a self-creation of competences by EU was enshrined. There are indeed political explicit and ulterior reasons staying behind the overall Member States' *consens* to restrain EU power. Obviously, Member States' interests are quite often competing and particular interests can be observed.[67] Due to a limited capacity of this paper, this comprehensive topic cannot be explained in details, however it shall be categorically noted that *in genere* competition law is an immense tool capable to influence on macro- and microeconomic processes. Providing that the interstate criterion cannot be interpreted in a different fashion than so far, the political will to amend Treaty's provisions is unmissable.

c) Conformity with the Treaty's scope

Regarding sheer cross-border aspects, EU contribution is the most efficient and justified in terms of principle of subsidiarity[68]. The Treaty reflects these observations. Hence "the establishing of the competition rules necessary for the functioning of the internal market" belongs to the far-reaching EU fields. The very assumption for this construction is that solely cross-border situations are qualified as sufficiently associated with the functioning of the internal market. Although this assumption is not *expressis verbis* laid down in the Treaty, for years it has not been contested. The balance point shall be then shifted to a reconfiguration that the (EU) competition rules became necessary for the functioning of the internal market also when by and large the circumstances of cases are narrowed to local/domestic scopes.[69]

X. Recapitulation and desiderata

Heeding the extent in which the national competition law was impacted by EU law, the question is whether there is *de iure* national competition law but it is *de facto* EU competition law? What however keeps the current legal order alive is –particularly – the Commission's safeguard role over EU competition system. Regulation 1/2003 sets out obligations for national bodies, especially for the Commission's benefit. Even if the Commission retains *primus inter pares* position, it is basically not exercised with regard to national courts. The Commission's oversight/control over EU competition system is somewhat disputable. The Commission does not possess resources to fulfil those duties efficiently and tightly. Therefore the requirements to submit national decisions/judgements regarding Treaty's provisions appear to be rather merely formal ones without a viable influence on the Commission's *modus operandi*. The notification system is not tantamount with actual involvement of the Commission in – for instance – judicial proceedings as *amicus curiae*. Such Commission's engagement is hardly a contribution at all. Of course, ECN acts as a forum for exchange of information between the Commission and national bodies. It could be enhanced by intensified recruitment to ECN Unit of Directorate-General Competition. Once theoretic proposals are proffered, staff recruitments are automatically rejected as a kind of taboo. A discussion on so rudimentary rules of decentralised system cannot be constrained though. As a trade-off, notification requirements can be preserved for nationwide infringements whilst notifications in local cases could be voluntary for emerging legal concerns.

[66] Kamil Dobosz, 'The Concept of Unity in the Competition Law System' (2018) 18 YARS, 198.

[67] Or Brook, Katalin Cseres, 'Member States' Interest in the Enforcement of EU Competition Law: A Case Study of Article 101 TFEU' in Marton Varju (ed.) *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019).

[68] Irrespective of non-application of this principle to exclusive competences.

[69] The admissibility to invoke interstate criterion in such instances exists even under the current regulations but the cross-border prerequisite has to be fulfilled either way.

Prior to delivering more systemic solutions, it is worth noting that the literature[70] offered some amendments to the decentralised system to streamline the current rules of administration and cooperation within ECN and to seal some jurisdictional elements through which EU competition law is not effectively enforced or not enforced at all. They are however not the large scale systemic refinements but rather addressing the specific points of the broader process leaving many defects untouched. The recommendation to withdraw from the national competition law[71] is a step forward only comparable with 2004 modernisation. What can be most likely attainable are the simplification of the competition law application and enforcement, less bureaucratic workload in justifying applicable norms, alongside the ameliorated level-playing-field, a strengthened principle of certainty of law for undertakings and consumers, ongoing breakaway from public policy imperfections, less concerns on the interjurisdictional interstate criterion, more accessible Court of Justice and full review of antitrust decisions conducted by the Commission acting as the Treaties' guard (which should compensate hypothetic difficulties with notifications).

Bald changes are never easy, nor popular. Opponents can mark a divergent application of Article 101(3) TFEU as the major argument against the change. Maintenance of *status quo* does not remediate this flaw either. The amalgamation of substantive norms, including approximation of common self-assessment rules governed by EU which leaves an adequate discretion's margin for national bodies, is apparently better administrable than isles of domestic legal solutions at which the Commission and/or EU courts are not even sufficiently oriented.

XI. Final remarks

Whilst Regulation 1/2003 might have been seen as a revolutionary one, the directives are follow-on refinements of a complementary feature. Given recent legislative initiatives with recalibrated rules on competition and digital markets[72], the Commission appears to have precise tools to administer the competition system of EU from that angle. Thus another natural step is to consolidate substantive competition rules across the Union.

Presented pros and cons, in my view, do not leave a space for doubts – it is the time to say goodbye to national competition law. Be it a total farewell, or skipping partially the sense of Article 3 (2 and 3) of Regulation 1/2003, EU competition law ought to remain the only one that governs the relationships of undertakings in this respect. As during the best parties we are used to say "goodbye" a couple of times before we eventually go, let's say it here for the first time.

[70] Alexandr Svetlicinii, Maciej Bernatt, Marco Botta, 'The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After Tele2 Polska (April 1, 2017)' (2018) 3 ELR, 424-446; Botta, Svetlicinii, Bernatt (n 25), Dobosz (n 25).

[71] Except for what is enshrined in article 3 (2/3) but with tighten review mechanisms in centre of which should be proactive Commission and/or CJEU.

[72] Oles Andriychuk, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition' (2021) 3 WC, 262.

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