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Unveiling the Evolution of EU Competition Law Enforcement: Achievements, Challenges and Emerging (Digital) Questions

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Abstract

This paper offers a reasoned and up-to-date reconstruction of the competition law enforcement system in the EU. It aims to explain what the architecture of competition law enforcement in the EU is, what the main achievements of the system are, as well as the challenges still threatening effectiveness of enforcement. The study covers three pillars of enforcement: public enforcement by the European Commission and competition authorities of EU Member States, private enforcement by national courts and merger review. The analysis scrutinizes various aspects of the constructional complexity of the relationship between the central (EU) level of enforcement and the decentralized (national) level. The paper discusses some of the challenges encountered by EU competition law enforcement, also focusing on the increasingly systematic application of competition law in digital markets by the European Commission and national competition authorities. The analysis undertaken proves that the enforcement of EU competition law offers interesting lessons for other areas of EU law, in particular in terms of the effectiveness of the overall system, the institutional choices made and the procedural approaches developed.

Keywords:

Enforcement, competition law, antitrust, EU law, digital markets

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1. Introduction

Enforcement of European Union (EU) competition law has one of the longest traditions out of all areas of EU law discussed in this volume. The reason is obvious. Substantive EU competition rules are part of EU primary law since the very beginning, that is, the adoption of the EC Treaty in Rome in 1957 (TEC). Since EU competition law was seen by the Treaty drafters to play an important market integration function, there was a clear need for strong, centralized enforcement. Therefore, the TEC set the basis of the enforcement framework for competition rules and assigned the task of enforcing EU competition rules to the European Commission (Commission). Regulation 17/62/EEC complemented these general rules by specifying the powers of the Commission, listing the types of decisions it can adopt, naming its investigatory tools as well as setting a framework for the imposition of fines. Some basics rules concerning the cooperation between the Commission and EU Member States were also introduced.

Under this architecture, the Commission established a workable enforcement mechanism. In particular, enforcement was characterized by the frequent use of comfort letters under Regulation 17/62/EEC: the Commission provided guidance to firms on whether the agreements they were about to enter in could be deemed anticompetitive. At the same time, the Commission adopted decisions sanctioning cartels and abuses of dominance. Such a model of enforcement was clearly of a centralized nature: the Commission was a primary enforcer and the enforcement of EU competition rules by the competition authorities of Member States (national competition authorities (NCAs)) was limited. At the same time, EU enforcement revealed extraterritorial characteristics: in some decisions, the Commission found infringements of competition by firms which were not operating, formally speaking, in the EU single market, but whose actions produced effects (or, to use the Court of Justice of the European Union (CJEU) language, 'were implemented') on the EU single market (see Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Wood Pulp;* Lange and Sandage 1989).

As it will be discussed in detail in the paper, the enforcement of EU competition law became far more decentralized after 1 May 2004, namely when Regulation 1/2003 entered into force. Although, overall, such an enforcement system was considered a success (Commission 2009; Wils 2013), scholars have recently been calling for improvements. While Directive 2019/1/EU (ECN+ Directive) aims to remedy some of the current challenges, there are doubts on its real potential in this respect (Botta 2017; Bernatt 2022).

Against this backdrop, the following sections aim to explain the architecture of EU competition law enforcement, what the main advances in the EU system are, as well as the remaining challenges to

the enforcement of competition law. To do so, first we describe the regulatory framework for the three pillars of competition law (Section 2), namely (1) public enforcement of Articles 101-102 of the Treaty on the Functioning of the European Union (TFEU, formerly Articles 81-82 TEC) and national competition laws, (2) merger review, and (3) private enforcement, which refers to the application of Articles 101 and 102 TFEU in disputes between private parties in the courts of EU Member States (Section 2). Second, we describe the public and the private enforcement models as far as institutional choices and delimitation of competences are concerned (Section 3). Third, we assess the achievements and the challenges facing competition law enforcement in the EU (Section 4). Fourth, we discuss some of the challenges encountered by EU competition law enforcement in digital markets by the European Commission and NCAs (Section 5). The EU state aid law is not subject to discussion in this chapter.

The analysis developed in this paper aims to demonstrate that the enforcement of EU competition law can offer interesting lessons for other areas of EU law in terms of the effectiveness of the overall system as well as developed procedural approaches. Among others, the chapter explains why building the relations between the central level of enforcement (by the Commission) and the decentralized one (by the NCAs) is a complex task.

2. Legal framework

Competition law enforcement in the EU is built around three pillars.

The first pillar is public enforcement of competition rules in the EU provided in Article 101 (a prohibition of anticompetitive agreements) and Article 102 TFEU (a prohibition of abuse of a dominant position) by the Commission and the NCAs. In addition NCAs enforce national competition laws, which contain provisions similar to Articles 101-102 TFEU.

As far as enforcement of Articles 101-102 TFEU is concerned, a key legal source is Regulation 1/2003/EC (Regulation 1/2003), the adoption of which represented a momentous reform that completely overhauled the previous enforcement procedures of Articles 101 and 102 of the TFEU (Gippini-Fournier 2008). Indeed, it introduced an enforcement system based on the direct application of EU competition rules in their entirety. It gave NCAs and national courts the power to enforce all aspects of EU competition rules, alongside the Commission. It also introduced new and close forms of cooperation between the Commission and NCAs. Crucially, Regulation 1/2003 abolished the *ex ante* notification system to the Commission of potentially restrictive agreements, which ended, as a

result, the Commission's monopoly in granting exemptions. On top of that, Regulation 1/2003 established a mandatory system of Articles 101 and 102 of the TFEU enforcement by NCAs, once a particular practice is deemed capable of affecting trade between Member States. The rules empowering the Commission to regulate certain aspects of proceedings for the application of Articles 101 and 102 TFEU, contained in Regulation 1/2003, were supplemented by Regulation 773/2004/EC, which contains the rules on the initiation of proceedings by the Commission.

To create a level playing field in terms of NCAs' power and to set the conditions for strengthening cooperation between NCAs during the investigation and enforcement phases (for example, on the collection of fines from firms located in different Member States), the ECN+ Directive was adopted in 2019 (Directive 2019/1/EU). It aims to provide a minimum standard with respect to NCAs' independence, resources, as well as enforcement and fining powers. In other words, the basic idea is that any NCA should be able to apply EU competition law effectively, and that consumers and undertakings are not put at a disadvantage by national laws and measures which prevent NCAs from being effective enforcers of EU competition law (see Article 1 ECN+ Directive). More in general, the ECN+ Directive intends to increase the level of deterrence (giving NCAs more investigative powers, tougher remedies, more fines, an aligned leniency programme, etc).

The second pillar of competition law in the EU is a merger review governed by Regulation 139/2004/EC (EUMR). It is conceived as an *ex ante* control of transactions meeting the quantitative threshold criteria that qualifies the transaction of "community dimension" as defined in Art. 1 of EUMR, which provides the relevant rules for merger review. The Commission scrutinizes the notified concentrations under the SIEC test aiming to establish whether the notified transaction will significantly impede effective competition, in particular by establishing or strengthening a dominant position. The concentrations below the "community dimension" thresholds are subject to merger review under national laws of EU Member States.

The third pillar of EU competition law is private enforcement governed by Directive 2014/104/EU (Damages Directive), which regulates civil actions for damages resulting from the violation of Articles 101-102 TFEU before national courts. The Damages Directive harmonizes rules aimed to ensure that anyone who has suffered harm from an infringement of competition law by an undertaking can effectively exercise the right to claim full compensation for that harm from the infringer.

Soft law plays an important role in the competition law framework, with respect to all the three pillars of competition law enforcement. Their importance is evident, since they provide guidance, for businesses and legal practitioners alike, in clarifying many aspects of the legislation mentioned above (Georgieva 2019). The main soft law documents include the "Commission Notice on the definition

of relevant market for the purposes of Community competition law" of 1997 which is crucial every time that EU competition law is enforced; the "Commission Notice on cooperation within the Network of Competition Authorities' of 2004, which provides details on the cooperation mechanisms for enforcement under Regulation 1/2003; and 'Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' of 2004, which aims to provide guidance to individuals and undertakings that are seeking relief from suspected infringements of EU competition rules. Regarding the quantification of fines, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' published in 2006 are also relevant.

As far as the application of the provisions of Articles 101 and 102 TFEU is concerned, relevant soft laws include: 'Guidelines on the effect on trade concept contained in Articles 81 and 82 [now 101 and 102] of the Treaty' of 2004; 'Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU' of 2011; and the 2005 'Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty [now 101 and 102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004'. With respect to the enforcement of Article 101 TFEU, one should recall 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' of 2006; block exemption regulations issued pursuant to Article 101(3) TFEU, which specify the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) TFEU; and 'Guidelines on the application of Article 81(3) [now 101(3)] of the Treaty' of 2004, which are currently under revision (the draft revised Horizontal Guidelines will enter into force on 1 January 2023).

NCAs adopt their own soft law which guides firms with respect to enforcement of national competition laws.

With regard to EU merger review, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' of 2004 are relevant as are 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' of 2008.

NCAs adopt guidelines which find application in reviewing mergers under national laws.

As far as private enforcement is concerned, soft law, such as the 'Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' of 2013 supplement the Damages Directive.

3. Enforcement Model: Institutional Choices

3.1. Public enforcement

Public enforcement of substantive rules prohibiting anticompetitive agreements and abuses of a dominant position (Articles 101-102 TFEU and their counterparts in national legislation) is carried out by the Commission and by NCAs. It is possible to distinguish three categories of situations in public enforcement of competition law (Bernatt 2012), two of which involve the application of EU law:

1) The Commission applies Articles 101-102 of the TFEU under Regulation 1/2003 (centralized EU competition proceedings).
2) A NCA applies Articles 101-102 of the TFEU (usually in parallel with substantive rules of their own national competition law) under the procedural framework prescribed in national law (decentralized EU competition proceedings) within the competence framework provided in Article 5 of Regulation 1/2003.
3) A NCA applies substantive rules of their own national competition law under the procedural framework prescribed in national law (national competition proceedings).

Within the decentralized system of enforcement of EU law (case 2), the NCAs apply Articles 101-102 TFEU in parallel with their domestic provisions. The similarity of the substantive provisions of EU and national competition laws, and the competence of both the Commission and NCAs to apply Articles 101-102 of the TFEU, do not correspond to the way these substantive provisions are enforced. The enforcement system of competition law (institutions, procedures and sanctions) is regulated separately by national laws of the EU Member States (when it comes to proceedings before NCAs) and separately by EU law (when it comes to proceedings before the Commission). This is a general rule stemming from the principle of procedural autonomy of the EU Member States. The ECN+ Directive harmonizes some aspects of procedural standards applicable to competition proceedings within the decentralized system of EU law enforcement, but complete harmonization is not present yet.

As to procedural matters, Regulation 1/2003 contains provisions on the allocation of cases among NCAs and the Commission (Article 13) as well as rules on the cooperation among NCAs and the Commission, and among NCAs themselves (Articles 11-12). Article 35 of Regulation 1/2003 obliges Member State to designate a competition authority responsible for the effective implementation of Articles 101-102 of the TFEU. Additionally, Article 5 of Regulation 1/2003 lists the types of

decisions that can be issued on the basis of Articles 101-102 of the TFEU. The CJEU has specified that the list contained in Article 5 is 'exhaustive'; that is, NCAs are entitled to issue these, and only these types of decisions in this context. It precludes NCAs from the application of a domestic rule which would require them to terminate competition proceedings by a decision stating that a breach of Article 102 of the TFEU had not occurred (Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska, para 35). In other words, the NCA is not entitled to issue a non-infringement decision with respect to Article 102 of the TFEU and Article 101 of the TFEU (Svetlicinii et al. 2018). Additionally, Article 12(1) of Regulation 1/2003 gives the Commission and NCAs, for the purpose of applying Articles 101-102 of the TFEU, the power to provide one another with, and to use in evidence any matter of fact or of law, including confidential information. Thus, both in centralized (category 1) and decentralized competition proceedings (category 2), the Commission and NCAs may use evidence that was collected by other NCAs by means of their national procedures (Kalintiri 2020).

The specification presented above shows that in the EU model of public competition law enforcement, a different procedure is used, although the same substantive rules are applied (category 1 v category 2), and that different procedures are applied even though that the substantive rules in national competition laws of EU Member States and those of the EU are highly similar (category 3 v category 1) (Bernatt 2012). Such a framework raises several complex questions concerning, among others, different levels of protection of defence rights in the proceedings before the Commission and NCAs (Bernatt et al. 2018), as well as questions on the allocation of work between the Commission and NCAs in a way that the *ne bis in idem* principle is respected (most recently Case C-151/20 Nordzucker).

One of the key elements of the enforcement system in the EU is the notion of 'effect on trade', a jurisdictional criterion determinative for the application of Articles 101-102 of the TFEU (Botta et al. 2015). This applies to both the Commission (Case 56/65 Société Technique Minière) and NCAs. In the latter case, Article 3(1) of Regulation 1/2003 specifies that a NCA must apply Articles 101-102 of the TFEU when the anti-competitive practice in question 'may affect trade between Member States'. In 2004, to facilitate NCAs' assessment in this respect, the Commission published the mentioned Notice on the concept of effect on trade. The Notice attempts to systematize CJEU case law, referring to the Court's jurisprudence on 'indirect' and 'potential' effect on trade (paras 34-43). In addition, the Commission put forward quantitative criteria for the assessment of the '*appreciability'* of the effect on intra-community trade. According to the Notice, an agreement does not have an effect on intra-community trade when two conditions are satisfied: 1) the aggregate market share of the parties on any relevant market within the Community affected by the agreement

does not exceed 5%; and 2) in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million Euro (para 52). The finding that intra-community trade may be affected has significant procedural consequences. Under Article 11(3) of Regulation 1/2003, a NCA must notify the Commission of the opening of a formal investigation for a potential infringement of Articles 101-102 of the TFEU. In addition, it is required to communicate to the Commission any envisaged infringement or commitment decisions based on Articles 101-102 of the TFEU.

While public administration (Commission and NCAs) plays a key role in the enforcement of Articles 101-102 of the TFEU, the role of the judiciary, both the CJEU and national courts, is paramount also. Judicial review ensures that a competition agency (be it the Commission or a NCA) stays within the limits prescribed by law, and limits the likelihood of an abuse of power by an agency (Bernatt 2019). In addition, full judicial review of both questions of facts and of law provides for a safeguard of the correctness of the decision, as well as for the procedural correctness of the administrative proceedings leading to its adoption, and by doing so, it secures the accountability of competition agencies (Bernatt 2019). Therefore, under Article 31 of Regulation 1/2003, Commission decisions are subject to judicial review before the General Court. Similar national rules establish judicial review of NCAs' decisions by national courts. Indeed, Article 3 of the ECN+ Directive requires that effective judicial protection is to be ensured by EU Member States. Judicial review is of crucial importance for safeguarding the rule of law as Article 2 of the TEU values in the EU competition law system (Bernatt 2021).

However, the intensity of judicial review (the depth of the reviewing courts' scrutiny) is a key factor in finding a balance between effective enforcement by competition authorities and the external check of their actions. Therefore, this topic has been very much debated in the EU competition law (Ibáñez Colomo 2018; Castillo De La Torre and Gippini-Fournier 2018; Kalintiri 2016; Bernatt 2016b; Nazzini 2012, Gerard 2011). In particular, the question whether the EU courts should defer to the Commission's complex economic assessment was often asked, as the EU courts developed a formula of 'margin of appreciation' in this respect, in particular in abuse of dominance and merger cases (see, for example, Joined Cases C-204, C-205, C-211, C-213, C-217 and C-219/00 Aalborg Portland A/S and Others v Commission). While the intensity of judicial review continues to evolve (the recent judgment in Case T-286/09 Intel is illustrative in this respect), it is clear today that the margin of appreciation does not dispense the EU courts from reviewing the substance (law and facts) of the Commission's decision. At the same time, judicial review must not be pushed too far. At the very end, the EU courts are not primary decision-makers establishing economic facts but rather bodies responsible for reviewing the Commission's assessment (Craig 2012). As far as the national level of enforcement is concerned, the intensity of judicial review has not been debated extensively but the

existing studies suggest that in some Member States judicial review tends to be superficial as far as the merits of NCA's findings are concerned (Bernatt 2016a).

As mentioned, the second pillar of public enforcement of EU competition law involves the merger review system regulated in the EUMR, the idea being that an administrative check is needed as to whether a planned transaction raises risks of significantly impeding effective competition on the relevant market in the post-merger scenario (Levy 2003). The Commission scrutinizes whether the notified concentration will significantly impede effective competition (SIEC test).

More specifically, transactions of 'community dimension' meeting quantitative thresholds related, among others, to the turnover of the relevant firms need to be notified to the Commission (a one-stop-shop system, Article 4 of the EUMR), which can give its consent and clear a transaction, clear a transaction subject to conditions; or outright prohibit it (Article 2). A merger cannot be implemented before the necessary decision is adopted (Case C-633/16 Ernst & Young).

The merger enforcement system is different from the one concerning Articles 101-102 of the TFEU. It is fully centralized and only in rare circumstances, specified in the EUMR, a NCA is competent to review a merger meeting the intra-community trade thresholds mentioned above. The merger decisions of the Commission are subject to judicial review before the CJEU. A concentration below the intra-community thresholds may still be subject to notification to the relevant NCAs, which assess the transactions under national competition law. In such a case, NCAs rely only on their national laws. In other words, in the merger field there is no place for parallel application of EU merger rules and national provisions (as it is the case of anticompetitive practices). However, the CJEU is prepared to accept preliminary questions concerning the interpretation of national merger rules. This is due to the similarities between the two, as well as the history behind the adoption of national merger review rules, which is linked to the EU (Case C-633/16 Ernst & Young).

3.2. Private Enforcement

National courts are responsible for private enforcement of EU competition law. As mentioned above, a very important reform was enacted with the adoption of the Damages Directive. Previously, private enforcement was marginal in most of the EU Member States. However, establishing a functioning private antitrust enforcement system was crucial both for deterrence (the damages paid increase the 'cost' of participating in an illegal behaviour), and for justice (restitution of the wrongdoing suffered). It is now widely recognized that private antitrust enforcement plays an essential and complementary function to public enforcement (Pais 2015; Wils 2003).

The full effectiveness of Articles 101 and 102 of the TFEU requires that anyone (be it an individual, including consumers and undertakings, or a public authority) can claim compensation before national courts for the harm caused to them by an infringement of those provisions (Case C-295/04, *Manfredi*). Therefore, private enforcement of EU competition law concerns the direct effects that Articles 101 and 102 TFEU produce in relations among individuals, thus creating individual rights and obligations to be enforced by national courts. In this sense, national courts protect subjective rights, for example by awarding damages to victims of competition law infringements. This is the case both where an earlier decision of a competition authority exists, which has established a violation of Articles 101 or 102 of the TFEU (so-called follow-on actions), and in cases where a prior infringement decision was not adopted at all (stand-alone actions).

The Damages Directive pursues two main goals (Toritto 2015). First, it facilitates the exercise of the right to compensation for victims of antitrust violations, by ensuring the disclosure of evidence relevant to the claim, recognizing binding effects of NCA decisions, introducing a presumption of harm in the case of a cartel violation, and empowering national courts to estimate damages. Second, it preserves and implements the complementary role of public and private enforcement by safeguarding effective access to evidence from NCAs. It also introduces a unique discovery system facilitating plaintiffs' access to evidence of an anticompetitive conduct, which is in possession of the defendant and other entities. This confirms that public and private enforcement are not alternative but complementary enforcement instruments, and that they contribute to the same goal of making competition law effective.

In light of this framework, and almost ten years after the adoption of the Damages Directive, the question is whether there has really been an increase in the use of path of enforcement; whether damages were awarded; and whether consumers, and not just businesses, have been successful in obtaining damages (see in this regard section 4 below). Moreover, for stand-alone cases, where, by definition, there are no prior decisions of a competition authority to rely on, the degree to which national courts are deferring to the principles established by the CJEU should be tested.

4. Practice: Achievements and Challenges

4.1. Achievements

Regarding public antitrust enforcement prior to 2003, as mentioned in the introduction, the EU system was centralized: the Commission applied Articles 101(1), 101(3) and 102 TFEU, while the NCAs, if

they existed, mainly applied national competition laws. Moreover, a mechanism was in place whereby potentially restrictive agreements, subject to assessment under Article 101(3), had to be notified to the Commission. With the adoption of Regulation 1/2003, a paradigm shift took place – competition law enforcement within the EU got de-centralized.

Regulation 1/2003 abolished the *ex ante* notification system of potentially restrictive agreements, putting an end to the Commission's preliminary control and possibility to grant individual exemptions. Furthermore, as explained above, Regulation 1/2003 obliged Member States to designate a national authority competent to apply Articles 101-102 TFEU. This change marked another trend: the end of a formalistic methodology under Article 101(3) and the beginning of a more flexible, case-by-case approach.

One of the major justifications for such change was the need to reduce the burden placed on the Commission by the sheer number of notified agreements, and to increase the number of enforcement authorities responsible for enforcing EU competition law. As a result, since the entry into force of Regulation 1/2003, the total number of decisions taken under Articles 101 and 102 TFEU is more than tenfold higher than before. Moreover, approximately 90% of these decisions were taken by NCAs (Commission 2022a). To help illustrate the shift – there were 102 cases under investigation by the Commission in 2004 and 200 by NCAs; in 2021, the Commission was investigating 18 cases while NCAs were looking into 127.

The Commission was then able to focus on the few 'crucial' cases. Moreover, the system did not raise major problems in terms of case allocation (with some exceptions), and guaranteed a certain degree of consistency. This was the result of the establishment of the ECN, a network between NCAs and the Commission meant to allocate cases, coordinate investigations (when necessary), inform each other of new cases and envisaged enforcement decisions, help each other with investigations, exchange evidence and other information, and discuss various issues of common interest (Brammer 2009). However, one can observe that the intensity of enforcement by NCAs does vary between jurisdictions. Some NCAs, such as France, Germany, Italy and Spain, adopted more than 100 decisions under Articles 101-102 of the TFEU, while others, including Belgium, Czech Republic and Poland, adopted less than 30 (Commission 2022a). While the size of the national economy could serve as one explanation in this respect, other factors play a role here too (Svetlicinii et al. 2018).

A key factor which makes competition law enforcement effective relates to the powers of the competition authorities (Ottow 2015). Clearly, their toolbox today is far-reaching, as they have vast investigatory and sanctioning powers. They include the power of competition authorities to request information from firms, run unannounced inspections and impose heavy fines. What's more, the

effectiveness of the system is promoted by the leniency programmes whereby a competition authority may annul or reduce fines for cooperating firms. Whistle-blower programmes for individuals complement this. Moreover, an exchange of know-how takes place among NCAs and the Commission on how to investigate practices occurring on new markets, such as in the digital economy or those committed by means of new technologies (Brammer 2009; Cengiz 2010).

The ECN+ Directive aims to further strengthen the investigatory and sanctioning powers of NCAs, and create a greater level playing field among various NCAs, in particular by forcing Member States (those which have not done so earlier) to equip their NCAs with appropriate tools. One has to welcome this EU initiative, which speaks to the concerns signalled by NCAs themselves. The ECN+ Directive shows that the EU has the potential to push for changes, which otherwise are not likely to happen quickly at domestic level, and by doing so, to create potential for more effective enforcement at the national level. At the same time, one needs to keep in mind that the availability, in itself, of various enforcement tools is not enough to ensure effective enforcement (Bernatt 2022).With regard to the public enforcement path of merger control, the notification system as per the EUMR is well-functioning (on this point, see, *inter alia*, Duso et al. 2011). Over the past decade, an average of just over 300 transactions were notified per year, about 90% of which were cleared unconditionally at the end of Phase I (ie 25 days from the notification of the merger in which the Commission analyses the transaction); about 4% were cleared conditionally at the end of Phase I; 3% proceeded to Phase II (i.e. the investigation that can be opened after Phase I); 3% were withdrawn; and less than 1% were determined to be outside the scope of the EUMR (Elliott et al. 2020). Looking at most recent figures, in 2021 the Commission cleared 13% more transactions in Phase I than in 2020; at the same time, it opened seven Phase II investigations, one less than in 2020. Furthermore, no prohibition decisions were taken in 2020 or in 2021. The Commission did, however, block one transaction in the shipbuilding sector in January 2022 (for more details, see Fountoukakos et al. 2022). With 309 cases examined under the simplified procedure in 2021, the Commission reached another record figure with a 10% increase as compared to the 278 simplified cases examined in 2020 (Commission 2022b). This trend may continue as the Commission has expressed the intent to further simplify merger control procedures (Commission 2021).

Lastly, looking at the private antitrust enforcement path, there is no doubt that the Damages Directive has promoted private enforcement by clarifying the rules on access to evidence, standards for determining fault and for calculating damages. This new active enforcement role that both businesses and consumers have taken on is reflected in a recent study, which shows that there were 299 cartel damages cases from mid 1998 to 2020 (of which 58 with compensatory outcomes and 93 with liability determinations) in 30 European countries (27 Member States, plus Norway, Switzerland and the

United Kingdom; Laborde 2021). It is important to observe that the overall number of cartel damages cases was 50 in 2014, and that the entry into force of the Damages Directive led to an exponential increase (Commission 2020). More generally, there is a trend showing growing public awareness of the economic and social purposes of market competition, which also leads to an increase in compliance programmes, and an increase in wider public attention to competition law (Anzini et al. 2021).

More generally, the success of EU competition law enforcement framework is related to its contribution to protection of fundamental rights in EU law. This is represented by the case-law on the proportionality of inspections and standards of judicial review governing them (Case C-94/00 Roquette Freres, Case T-135/09 Nexans France, Case C-583/13 Deutsche Bahn, see Andersson 2018; Michałek 2015), Legal Professional Privilege (Case C-550/07 Akzo Nobel, see Turno, Zawłocka-Turno 2012), Privilege against self-incrimination (Case C- 374/87 Orkem, see Turno and Zawłocka-Turno 2012) and ne bis in idem principle (Case C-17/10 Toshiba, Case C-151/20 Nordzucker, see Rosiak 2012, Van Cleynenbreugel 2022). Recently, Case T-791/19, Sped-Pro is a perfect illustration how competition law enforcement helps in developing EU legal framework of protection of EU law values and in particular rule of law (Bernatt 2023). At the same time, the case-law in EU competition law serves as a platform for confronting and in many instances integrating the standards of the European Convention on Human Rights (ECHR) into EU law. The application of Article 6 ECHR standards of judicial review of administrative action by the CJEU in antitrust case-law as represented by Case C-272/09 P KME Germany AG v European Commission is a good example in this respect (Bernatt 2016c).

4.2. Challenges

Despite the overall potential for successful enforcement under the existing framework provided for in Regulation 1/2003, significant challenges persist with respect to the enforcement of Articles 101-102 of the TFEU. This is particularly true as far as the enforcement by NCAs is concerned. Since the institutional and procedural structure of enforcement by NCAs was left for national legislators to decide, the approaches existing in the various Member States are different. As already hinted above, NCAs vary when it comes to the resources at their disposal and their level of independence. Consequently, some NCAs may not be able to investigate anticompetitive practices materializing in certain industries or sectors (due to lack of financial or personal resources, or because of their links with the State/government). Moreover, some NCAs lack important investigative and sanctioning powers, or have not had experience with applying tools that formally exist.

As mentioned, the ECN+ Directive intervenes in this context by ensuring a minimum standard for the independence, resources and powers of NCAs. However, several challenges in terms of effective enforcement of competition law at the national level persist and are not addressed by the ECN+ Directive in a satisfactorily manner. Most of them are also true as far as the enforcement of national competition law is concerned, both with respect to the enforcement of the ban on anticompetitive practices and the national merger review system.

The first relates to the independence of NCAs. Existing studies demonstrate that actual independence of individual NCAs is weak in those Member States that are ruled by populist governments, which follow an illiberal political and economic agenda; low level of independence of NCAs may affect the intensity of competition law enforcement by such NCAs (Bernatt 2022). Since challenges in this respect can exist in other Member States too, one can ask in this context if the instructions given in the ECN+ Directive are sufficient. The ECN+ Directive obliges Member States to ensure that their NCAs staff and persons who take formal decisions 'are able to perform their duties and to exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence'; 'neither seek nor take any instructions from government or any other public or private entity'; 'refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers for the application of Articles 101 and 102 TFEU and are subject to procedures that ensure that, for a reasonable period after leaving office, they refrain from dealing with enforcement proceedings that could give rise to conflicts of interest' (Article 4(2) of the ECN+ Directive). The Directive does not specify how these objectives are to be achieved by the Member States. There is room for discretion and the risk exists that the provisions of the Directive will merely be transposed in a formal, textual way, with limited impact on the actual independence of NCAs. While the norms introduced may play a role in some extraordinary cases, by giving the CJEU space for purposive interpretation of the provisions at hand, they are not likely to play a major role in the day-to-day practice of NCAs. In a similar vein, the rules on appointment of a head and members of the decision-making body of NCAs, contained in Article 4(4) of the ECN+ Directive, are general, and they do not impose substantive criteria which should be considered during the selection process. The only precise safeguard contained in the Directive is the ban on dismissals of decision-makers in NCAs for reasons related to the proper exercise of their duties or the proper exercise of their powers, as set out in Article 4(3). This provision has the chance to force improvements in those Member States where the national law does not provide for an appointment for a specified term in case of the members of their NCA's decision-making body or the authority's head.

The second challenge relates to the resources of NCAs. Crucially, NCAs need to have sufficient financial and personal resources to fulfil their mission, and limits in this respect often explain weak

enforcement records. The experiences of NCAs from Central-Eastern Europe and those in smaller Member States can serve as an illustration here (Malinauskaite 2016; Martyniszyn and Bernatt 2020). The ECN+ Directive stipulates that Member States are obliged to ensure that their NCAs 'have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers for the application of Articles 101 and 102 TFEU'. This provision is very general: the Directive does not specify or try to quantify when the resources are deemed to be sufficient. It only explains that they should be sufficient for the agencies to be able to conduct investigations, to adopt decisions under Articles 101-102 of the TFEU, to cooperate within the ECN, to undertake advocacy activities *vis-à-vis* anticompetitive regulatory measures and to promote competition culture. It has been argued that the listing of these tasks does not offer added value seeing as NCAs are normally expected to perform them under their own national competition laws, which does not necessarily mean that the resources they have are in practice sufficient (Bernatt 2022).

The third challenge relates to the question of procedural fairness in competition proceedings. To safeguard effective legal protection and the rule of law, the powers of NCAs need to be balanced against the guarantees of procedural fairness: the right to be heard, the right to equal participation in the proceedings, the right of defence, the right to protect business secrets and other confidential information, and the right to judicial review and judicial control over administrative proceedings (Bernatt 2011). Arguably, these safeguards are not only important for Article 19 of the TEU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights to be respected in the domestic competition proceedings. They also contribute to the effectiveness of enforcement as they mitigate the risks of misguided or erroneous enforcement by NCAs. However, existing findings suggest that the level of protection of these procedural rights varies across the EU Member States and, in case of Central and Eastern European countries, tends to be lower than in the competition proceedings before the Commission (Bernatt et al. 2018). Article 3 of the ECN+ Directive states that 'Proceedings concerning infringements of Article 101 or 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union'; it also provides that the exercise of the powers of NCAs is subject to appropriate safeguards with respect to undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal. Against this background, the ECN+ Directive is likely to be insufficient to harmonize proceedings before the NCAs. It is not likely to bring a level playing field with respect to procedural rights across the EU. In particular, the possibility of 'forum shopping' behaviour is not eradicated.

The fourth problem relates to accountability and judicial review. In the ECN+ Directive, the accountability of a NCA is correctly perceived as a necessary 'companion' requirement of that agency's independence. Indeed, accountability promotes an agency's responsiveness to societal and economic challenges. While the obligation of NCAs to periodically report on their activity, as envisaged by the Directive, is important, it has limitations; it normally refers to an agency's past activity and presents that agency's successes rather than its failures. What's more, such reports often do not attract external attention of a broader public. Therefore, also for this reason, full judicial review, that is, a comprehensive check on an agency's actions by courts, is crucial. However, the ECN+ Directive addresses the judicial review of the actions of NCAs only to a very limited extent. In Article 3(2), it only restates the provisions of Article 19 of the TEU and recalls that the exercise of powers by NCAs under Articles 101-102 of the TFEU is subject to appropriate safeguards with respect to undertakings' right to an effective remedy before a tribunal. In the light of the rule of law crisis in the EU, which shows itself in the weakening of the independence of national judiciaries (Bernatt 2019), as well as other problems in national courts which impair full judicial review (such as lack of judges' expertise) (Bernatt 2016a), the EU legislator should attach greater attention to the situation of the courts exercising judicial review in competition proceedings, instead of focusing almost exclusively on the NCAs.

A related problem is linked to the fact that convergence between EU law and national laws with respect to the substance of competition law is not complete. While national and EU laws are similar in general, differences remain. Each Member State has its own court system, with administrative or civil courts in charge. Moreover, there is a language issue, while decisions of NCAs are sometimes translated into English, it is very difficult to find translations of judgments by national courts. Additionally, the practices of the different NCAs continue to differ on several crucial aspects, such as rules on the setting of enforcement priorities (Brook and Cseres 2021).

In a broader sense, what arises is the question of the coherence of the interpretation of competition law at the national and the EU levels (Dobosz 2018). As far as the prohibition of anticompetitive practices is concerned, it relates primarily to the situation when NCAs apply, exclusively, to national competition law (Article 101 or Article 102 of the TFEU are not applied in parallel with national provisions). In such a case, due to the lack of oversight by the Commission under Article 11 of Regulation 1/2003 (and more limited chances for an interaction with other NCAs), there is a risk that similar provisions of national and EU competition law will be interpreted in different ways. A narrow interpretation of the 'effect on trade' jurisdictional criterion, an interpretation that provides NCAs with a broad scope of discretion, may lead to such an outcome (Botta et al. 2015). The German Facebook case, where the NCA concluded that Article 102 of the TFEU did not apply to the case at

hand, can be seen as an example in this respect (Bundeskartellamt 2019, see also Witt 2020). However, in these circumstances, it is only thanks to the willingness of national courts to refer cases decided by their NCA under national law to the CJEU that it is possible to verify whether the national approach is in line with EU law (Bundeskartellamt 2019).

The risks of inconsistent interpretations at the EU and the national level exist also as far as merger review is concerned, since transactions below community dimension thresholds are decided by NCAs without the oversight of the Commission. For example, the January 2021 decision by the Polish NCA in the Agora/Eurozet case shows that this NCA may be tempted to interpret the domestic version of the test of a significant impediment of effective competition in a different way than the Commission does.[†]

However, the risk of inconsistency is not limited to situations when NCAs apply their national competition law exclusively. This may also be the case in proceedings where the Commission misses the opportunity to open a Articles 101-102 of the TFEU case of novel character, and so the NCAs decide to act instead. The Booking.com saga is an evident example in this respect (Akman 2016). The difference in approach among various NCAs relates to the assessment of anticompetitive risks of Most-Favoured Nation (MFN) clauses applied by Booking.com. In 2015, the French, Italian and Swedish NCAs accepted commitments from Booking.com to replace 'wide' MFN clauses with 'narrow' MFN clauses, stating that the latter do not have sufficient anticompetitive characteristics (Voss 2020).[‡] By contrast, the German NCA took a stricter approach and found that both wide MFN clauses and narrow MFN clauses violate competition law (Chowdhury 2021).

As far as private enforcement of antitrust rules is concerned, the Damages Directive has substantially improved the legal position of victims of infringements of European competition law. However, while it can be said that companies are now pursuing antitrust infringement cases in significant numbers, and are quite successful in obtaining antitrust damages, the same cannot be said for consumers (Sousa Ferro 2022).

More in general, crucial issues, such as the determination of liability in civil cases, remain unresolved and many provisions of the Damages Directive have had difficulties being translated into national law (see more in Rodger et al. 2019; Parcu et al. 2018; Piszcz 2017).

[†] In the case at stake the NCA adopted a strict approach by claiming that creation of quasi-duopoly structure at the market as the result of the notified transactions amounts per se to significant impediment of effective competition. It did not show, as the Commission under the CJEU case law would, that there is a risk that coordination between market players is likely in the post-merger scenario. The NCA's decision was overturned by the Warsaw competition court in 2022 but the judgment is not final.

[‡] Under narrow MFN clauses, accommodation at a hotel advertised on a platform such as Booking.com had to be offered at a price no higher than the price indicated on the hotel's own website. Under wide MFN clauses, such expectation applied also to other sales channels, in particular other booking platforms.

This leads to multiple risks of forum shopping between Member States' courts due to the different competences that they currently have in this area (that may lead to greater pro-activity in awarding damages), and to rules that are not fully harmonized or difficult to coordinate with existing national provisions (for more on these profiles, see Blazo 2017; Wolski 2018).

As an example, the distribution of liability between companies committing unlawful acts was unclear for a long time. In this context, the Skanska ruling (Case C-724/17), although criticized in some respects, innovates and clarifies the applicable law by stating that the question of determining liability in the context of a private action for damages, following an infringement of competition law, falls within the scope of EU law, and, by extending the concept of undertaking with significant practical impact, a national court can apply the principle of economic continuity and establish civil liability of the entity that took over the activities of a defunct company that committed the infringement (Wurmnest 2020). This solution has two significant consequences. First, assigning civil liability to such company has the potential to increase the effectiveness of private lawsuits for damages arising from competition law. The victim's burden of proof is eased if, instead of having to prove the parent company's misconduct, they can use the presumption of economic unity against the parent company for misconduct of a subsidiary. Secondly, the application of public enforcement objectives to private enforcement highlights the fact that these private cases also have a deterrence purpose against competition law violations. The deterrence objective mentioned in the Skanska case could open the door to an adaptation of the liability regime in national laws of the Member States. The approximation of the objectives of public enforcement to those of private enforcement could lead, in the future, to the establishment of a principle of damages in civil cases for violations of competition law (Moncuit 2020).

Moreover, the interaction between public and private enforcement should be kept under scrutiny because there are risks of discordant interests. Consider, in this context, leniency programmes and the ability of national courts to obtain documents from NCA proceedings. Leniency programmes are a very powerful and effective enforcement tool in the hands of NCAs and, at the same time, they are very useful for follow-up actions before a civil court. However, if civil courts can obtain evidence of the leniency application from a NCA, the leniency programme itself may lose all its attractiveness for companies. In this sense, leniency statements and settlement submissions do not have to be disclosed under the Damages Directive.

5. Public antitrust enforcement in the digital markets

Digital markets have emerged as a crucial area for competition law enforcement, presenting unique challenges for NCAs and the Commission. As the digital economy continues to expand rapidly, concerns regarding market dominance, data access, and competition in these markets have become increasingly prominent. This analysis does not pretend to exhaust the many digital-related challenges linked to the enforcement of competition law but focuses on three key aspects: defining market power in the digital context, addressing data-related issues, and ensuring effective enforcement across borders.

One of the primary challenges in enforcing competition law in digital markets is accurately defining and assessing market power. Traditional indicators, such as market share and barriers to entry, may not adequately capture the dynamics of digital markets. Digital platforms often operate in multisided markets, where they connect different user groups, such as consumers and advertisers, creating network effects and economies of scale. As a result, market power in digital markets may not manifest in a straightforward manner. Moreover, identifying relevant markets in the digital context can be complex. The boundaries of digital markets are often blurred, as platforms may offer a range of services and compete across various sectors. For instance, a platform that offers e-commerce services, online advertising, and cloud computing could potentially have market power in multiple markets simultaneously. Consequently, competition authorities face the challenge of accurately delineating relevant markets to effectively assess market power and anti-competitive behavior.

Data plays a crucial role in digital markets, and its collection, use, and control have significant implications for competition law enforcement. The extensive accumulation of user data by dominant digital platforms raises concerns regarding privacy, data protection, and potential anti-competitive practices. Digital platforms often leverage their access to vast amounts of data to gain a competitive advantage, personalize services, and engage in targeted advertising.

One challenge is determining whether data can be considered a relevant asset or a barrier to entry. The concentration of data in the hands of a few dominant players may impede market entry for potential competitors, hindering competition and innovation. Competition authorities must grapple with evaluating the anti-competitive effects of data accumulation and potentially imposing remedies to address these concerns, while still promoting data-driven innovation.

Furthermore, data sharing and access pose challenges for competition law enforcement. Access to data held by dominant platforms is crucial for effective competition investigations, but balancing the need for data access with privacy and data protection concerns is a delicate task. Developing mechanisms to ensure fair and non-discriminatory access to data, particularly for new entrants and smaller players, remains a significant challenge for competition authorities in the digital realm.

Digital markets transcend national boundaries, making enforcement efforts more complex. Competition authorities must grapple with jurisdictional challenges, as well as coordinating enforcement actions across multiple jurisdictions. The EU, with its member states and diverse legal systems, faces particular challenges in achieving consistent enforcement across the digital landscape.

Harmonizing competition law enforcement practices and procedures across the EU is crucial to ensuring a level playing field. Cooperation and coordination among national competition authorities, as well as effective use of existing tools such as the European Competition Network, are essential for addressing cross-border challenges. Harmonization efforts can contribute to consistent decision-making, avoid regulatory fragmentation, and enable efficient enforcement in digital markets.

5.1. A case-study: the Italian decision against Amazon

In December 2021, the Italian Competition Authority (ICA) fined Amazon 1,128,596,146 euros for violating Article 102 TFEU. The violation involved Amazon's abuse of its dominant position in the Italian market for intermediation services on marketplaces. The ICA identified two key aspects of Amazon's conduct that led to the fine (for a comprehensive analysis of the decision see Ghezzi, Maggiolino, 2023).

First, Amazon used its market power to coerce sellers on its platform to use its logistics service, FBA, instead of competing services. Amazon offered exclusive benefits, such as the use of the Prime label and exemption from strict performance indicators to sellers who chose FBA. These advantages were not available to sellers using other logistics operators. The ICA considered these features "non-replicable" and game-changing, as they enhanced sellers' visibility and sales on the platform, benefiting Amazon.

Second, the ICA found that Amazon's conduct had two structural effects. It excluded other logistics operators from the competitive market, as sellers were incentivized to choose FBA. Additionally, the costs of multi-homing (using different logistics operators for each marketplace) made it prohibitive for sellers to participate in other online marketplaces. By strengthening its positions in both the primary and secondary markets, Amazon gained the ability to increase prices and reduce the quality, variety, and innovation of its offerings. The ICA concluded that Amazon had used its market power to harm consumer welfare.

The ICA determined that Amazon failed to provide any valid justification for its conduct. Amazon could not demonstrate the efficiencies resulting from the link between FBA and the exclusive features of its platform. Moreover, Amazon could not prove that FBA was the superior logistics service or

that other services were inadequate. While Amazon could argue that linking these features to FBA protected the quality of its package-service, the ICA maintained that alternative measures, such as imposing objective quality standards on sellers using different logistics operators, would have been less anticompetitive.

This Amazon case is the perfect exemplification of the fact that the rise of the digital economy and the controversies surrounding self-preferencing cases have prompted discussions on whether discriminatory practices should be treated as a separate category from exploitative and exclusionary practices within the notion of abuse in competition law. While exploitative practices aim to ensure fairness and equal distribution of wealth, and exclusionary practices protect the competitive structure of markets, the question arises whether equal treatment should be an autonomous policy goal warranting standalone prosecution of discriminatory practices.

However, the CJEU decision in the MEO judgment in a secondary-line injury case ruled out this option. The Court of Justice clarified that not every dominant firm applying dissimilar conditions to equivalent transactions constitutes an injury that EU competition law must prevent. Instead, competition authorities and private plaintiffs must demonstrate, on a case-by-case basis, that the differential treatment caused a competitive disadvantage. Although the Court did not explicitly classify discriminatory practices as exclusionary conduct, any discriminatory behavior that affects the competitive structure of the market and produces strong anticompetitive effects would indeed cause a competitive disadvantage that EU competition law must address.

Conversely, the recent Google Shopping ruling acknowledged the general principle of equal treatment but stated that Article 102 TFEU applies to self-preferencing only if the conduct has exclusionary effects and a recognizable anticompetitive impact. This raises doubts about the internal consistency of the judgment: if equal treatment applies, why should competitive harm and exclusionary conduct specifically matter? If these are the criteria for applying Article 102, should discriminatory practices or self-preferencing practices be considered a separate form of abuse, distinct from exclusionary behavior?

In the absence of further rulings clarifying this matter, we argue against the notion that discriminatory conduct represents a distinct case of abuse. Instead, self-preferencing should be seen as one of the various forms of exclusionary and anticompetitive practices employed by dominant firms to alter the competitive structure of the market and harm consumers.

Furthermore, in the case of the ICA's investigation into Amazon's FBA, it is our view that the ICA did not solely charge Amazon with discriminatory conduct to evade parity of treatment. Rather, the ICA alleged that Amazon violated Article 102 through exclusionary and anticompetitive behavior

that, like any conduct falling under these terms, also involves discrimination. Exclusionary practices, such as exclusive contracts, tying practices, or refusal to deal, all entail differential treatment that, if capable of excluding disadvantaged rivals and reducing consumer welfare, results in a clear competitive disadvantage.

However, this conclusion is only partial. While recognizing discriminatory practices as a form of exclusionary and anticompetitive behavior, it remains debatable whether self-preferencing itself should be considered a distinct model situation, separate from tying practices and refusal to deal.

One further reason to comment on the ICA's decision in Amazon concerns the issue of convergence between decisions of competition authorities in the EU, since the parallel decision taken by the European Commission closed not with a sanction but with commitments, which do not apply in the Italian market.

5.2 Between competition law enforcement and the Digital Market Act

The EU has recently adopted the Digital Market Act, which aims to establish fair and competitive markets in the digital sector. The DMA addresses issues that impact competition in the market and also overlaps with competition law enforcement, such as self-preferencing conduct, that can also be discussed in the Amazon case framed above.

More in general, the DMA is based on Article 114 TFEU, which enables the harmonization of rules at the EU level to prevent fragmentation that could hinder the functioning of the Internal Market and serves as a complement to competition rules by addressing unfair practices by gatekeepers that either fall outside the scope of existing EU competition rules or cannot be effectively addressed by them. Antitrust enforcement focuses on specific markets, intervenes after the occurrence of restrictive or abusive practices, and involves time-consuming investigative procedures. In contrast, the DMA aims to proactively minimize the negative structural effects of unfair practices before they happen, while still allowing the possibility of subsequent intervention by EU or national competition law enforcement.

Conceptual challenges emerge at the intersection of the DMA and EU competition law because the DMA seeks to enhance competition rules by converting certain existing ex post enforcement obligations into ex ante regulatory rules that are applied automatically. However, in general terms, it is considered appropriate that in the event of a market failure that is not targeted by antitrust enforcement, the antitrust law should not be modified, but rather the regulator should proceed with an ex ante intervention as in the case of the DMA.

6. Conclusions

Enforcement of competition law in the EU is complex but effective. This statement is true with respect to all three of the enforcement paths: public enforcement of Articles 101 and 102 of the TFEU, merger review and private antitrust enforcement, especially regarding damages compensation. The statistics cited in the paper also show that.

The effectiveness of antitrust enforcement in the EU certainly depends on an advanced regulatory framework – but not only on that. Indeed, central to its success is the fact that enforcement is entrusted to independent institutions vigorously enforcing the law, while being subject to check by courts. Certainly, this paradigm holds as long as competition authorities are truly independent, a realization that suggests, in a broader sense, that safeguards of the rule of law are necessary for making competition law enforcement effective (Bernatt 2021). At the same time, it is necessary to ensure that the allocation of EU law enforcement tasks to competition authorities goes hand in hand with ensuring that they have sufficient resources and are accountable.

The success and challenges of competition law enforcement are lessons for other, less developed enforcement systems as well as for foreseeable schemes within the EU. For example, the application system of a 'media plurality test' in the EU, proposed in the 2022 draft of the EU Media Freedom Act (see European Commission 2022c), could benefit from the experiences the EU competition law offers to improve the envisaged enforcement system by making it more likely to be effective in practice.

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