

Decentralisation and Recentralisation: An Institutional Analysis of EU Competition Law and the Digital Markets Act

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ABSTRACT

The recently enacted Digital Markets Act Regulation (DMA) has revitalised discussion regarding the engagement of national actors in the enforcement of EU competition law. Reversing a trend of consistent decentralisation since the ‘legal and cultural revolution’ of modernisation in 2004, the new Regulation concentrates the authority to apply specialised competition rules within the exclusive competence of the European Commission. Though somewhat necessitated by the peculiar conditions of digital markets, this Regulation reveals a familiar reluctance within the Commission to devolve responsibility to national competition authorities (NCAs), citing a ‘risk of divergence’ and fear of ‘fragmentation’ in defence of centralised enforcement. Little attention has been afforded to a further institutional divergence underlying the motivation and momentum behind decentralisation; a divergence occurring not between national authorities, but between central EU institutions. This article explores institutional tension between the Court of Justice of the European Union (CJEU) and the European Commission in the field of EU competition law. It seeks to demonstrate that the essential structural, economic, and political characteristics of EU competition law have been wrought by divergence between the jurisprudence of the former and policies and practice of the latter. Four phases of the development of EU competition law are identified, and the emergence of a fifth is suggested: ‘Centralisation’, ‘Decentralisation’, ‘Modernisation’, ‘Fragmentation’, and (potentially) ‘Recentralisation’.

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INTRODUCTION

The recent enactment of the Digital Markets Act (DMA)¹ has revitalised discussion regarding the engagement of national actors in the enforcement of EU competition law. Reversing a trend of consistent decentralisation since the ‘legal and cultural revolution’ of modernisation in 2004,² the new Regulation concentrates the authority to apply specialised competition regulations within the exclusive competence of the European Commission, resurrecting a centralised executive monopoly that harkens back to a former period in the history of EU competition regulation. Though somewhat necessitated by the peculiar conditions of digital markets, this Regulation reveals a familiar antipathy within the Commission towards the devolution of responsibility to national competition authorities (NCAs), citing a ‘risk of divergence’ and fear of ‘fragmentation’ in defence of centralised enforcement.³

Academic discourse in the field of competition law has sought to validate and substantiate this cardinal concern of the Commission. Significant research has been devoted to examining procedural and substantive divergence arising from the disparate application and enforcement of EU competition provisions by national institutions, studying the different attitudes, philosophies and constitutions of various national competition authorities.⁴ However, little attention has been afforded to a further institutional divergence underlying the motivation and momentum behind decentralisation; a divergence occurring not between national authorities, but between central EU institutions. This article explores the tension between the Court of Justice of the European Union (CJEU) and the European Commission in the field of EU competition law,

¹ Council Regulation (EC) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L 265/1.

² Claus-Dieter Ehlermann, ‘The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution’ (2000) 37 *Common Market Law Review* 537, 537.

³ See the explanatory memorandum to the DMA’s Proposal Document: Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final (Brussels, 2020).

⁴ See, for example, Rebecca Walker, ‘Procedural Divergence as a Barrier to Effective EU Competition Law Enforcement in Digital Commerce’ (2021) 42(8) *European Competition Law Review* 468.

examining the divergence between the jurisprudence of the former and the policies of the latter. It seeks to explain this institutional tension and assess the decentralised regime of competition law wrought thereby.

It is hoped that this examination of institutional discordance shall inform future analysis of decentralisation within EU competition law by providing an enriched understanding of an institutional dynamic pivotal to the definition and evolution of EU competition law. Whilst a wealth of academic literature thoroughly examines decentralisation as a *cause* of institutional divergence, it rarely assesses decentralisation as a *consequence* thereof.⁵ This article seeks to provide such an assessment through a detailed historical account of the development of the EU competition law regime, sketching the history of decentralisation in light of this conflict.

Following this introduction, the article identifies four discrete ‘phases’ in the development of European competition policy, and suggests the emergence of a fifth. Section II, examining ‘centralisation’, illustrates the collaboration of the Court and Commission in establishing an effective and comprehensive competition law regime. Section III, entitled ‘decentralisation’, analyses the tentative model of decentralisation prior to 1999, constructed around private enforcement. Section IV examines ‘modernisation’ and the Commission’s redefinition of decentralised competition enforcement. Section V assesses the resultant ‘fragmentation,’ and the contribution of the Court of Justice of the European Union (CJEU) thereto. Section VI discusses the apparent emergence of a new phase of ‘recentralisation’ in legislative policy. Section VII concludes. In examining decentralisation, a phenomenon necessarily involving the engagement of national actors, this article will also explore further institutional relationships influenced by, and directly connected to, this central dynamic. In analysing the Court’s promotion of private enforcement of competition law, Section III discusses the relationship between the CJEU and national courts. In assessing the Commission’s promotion of decentralised public enforcement to counteract the effects of private enforcement, Section IV

⁵ On divergent practices between the NCAs of different NCAs, see O Brook, ‘Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities’ (2019) 56 *Common Market Law Review* 121; Or Brook and Katalin J Cseres, ‘Member State 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 2018).

analyses the relationship between the Directorate-General for Competition (DG Comp or Directorate) and NCAs. Section V discusses consequent fragmentation and divergence between the practices of various NCAs. Section VI assesses the changing relationship between the Commission and NCAs in light of contemporary legislative developments. In line with its central thesis that tension between the CJEU and Commission has defined the evolution of EU competition law, the analysis of this article entails an examination of the wider institutional complex of EU competition law.

From the outset, it is worth noting that this article is primarily concerned with anticompetitive agreements prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101(1) sets out a blanket prohibition covering ‘all agreements between undertakings ... which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’. Article 101(3) exempts the application of this broad prohibition where such agreements contribute ‘to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’. Whilst merger control and state aid also constitute key components of EU competition law, they fall outside of the purview of these provisions and are not considered in this analysis.

I. CENTRALISATION

Notwithstanding the divergence in objectives, conflict of policies, and ideological institutional tension that catalysed the decentralisation of the EU antitrust regime (with which this article is concerned), the inception of EU competition law witnessed collaboration between the CJEU and the Commission. The novel regime was ushered onto the political landscape of a nascent European Union by an ambitious Commission and an aggressive Court. Battling economic nationalism and pursuing the ‘unification imperative’ of market integration,⁶ the two institutions navigated the inauguration of an inchoate antitrust system in harmony: developing doctrine, advancing application, and concentrating power within the central authority of the

⁶David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998) 347.

Commission. Whilst a ‘traditional administrative law-making model’⁷ was espoused in early EU antitrust legislation, the Court’s expansion of the application and objectives of Article 101 in the formative years of EU antitrust was instrumental in allowing the Commission to institute itself as the principal steward of EU competition law and policy. As a collaboration that shaped a formative era of EU competition law and contributed significantly to the landscape of enforcement from which proponents of decentralisation sought to depart, this institutional cooperation deserves analysis.

At the outset of EU competition law, Regulation 17/62 framed the development of competition policy as the exclusive prerogative of the Commission, conferring broad powers of investigation,⁸ prohibiting concurrent national enforcement activity⁹ and, most notably, designating exclusive competence to the Directorate in applying article 101(3) TFEU - the only mechanism by which an anti-competitive agreement may escape infringement.¹⁰ Indeed, this centralisation at the outset of EU competition law was seemingly envisaged by the Treaties¹¹ and was arguably necessitated by the breadth of the language in which the relevant provisions are couched. Owing in part to the general framework nature of the treaties and multilingual order of the EU, fundamental terms such as ‘restriction of competition’, ‘abuse’, and ‘dominant

⁷ Pablo Ibáñez Colomo, ‘Three Shifts in EU Competition Policy: Towards Standards, Decentralization, Settlements’ (2013) 20 *Maastricht Journal of European and Comparative Law* 363, 363.

⁸ Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13, Article 13.

⁹ *ibid* Article 9(3). Once the Commission initiated its investigation, NCAs were obliged to cease any enforcement activity on the same case.

¹⁰ *ibid* Article 9(1). Whereas Article 101(1) sets out types of prohibited agreements, Article 101(3) sets out that such agreements may escape prohibition where such concerted practice ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question?’.

¹¹ Article 105(1) of the Treaty appears to envisage a system of public competition enforcement, establishing that the European Commission ‘shall ensure the application of the principles laid down in Articles 101 and 192’. The General Court has interpreted this article as constituting a specific expression of the general supervisory role of the Commission conferred by article 17(1) TEU: see Case T-24/90, *Automec v European Commission* [1992] ECR II-2223, para 74.

position' lack definition, endowing EU antitrust law with innate flexibility. Whilst such obtuse provisions would be liable to distort the uniform application of competition law in a system of decentralised application before national courts or NCAs, the concentration of enforcement competence within the Directorate allowed for 'fundamental changes' to occur 'in a seamless way'. This was through the *ex-post* development of the discipline and its doctrine in the early stages of EU competition law.¹² Indeed, in many Member States, the promotion of industrial policies generally enjoyed greater political support than the imposition of rigorous competition policy, and the concentration of this 'considerable discretionary power'¹³ of the Commission proved necessary to strengthen 'competition culture' across the Community.¹⁴

The breadth and flexibility of these provisions afforded the CJEU significant discretion in the interpretation of elementary matters of competition law. This allowed the Court to exercise 'intellectual leadership' upon which the Commission relied throughout its centralisation, consolidation, and development of authority.¹⁵ In line with its recognition of the Directorate's 'general supervisory role' in the antitrust sphere,¹⁶ the Court adopted a remarkably pervasive interpretation of the application of Article 101, bringing

¹² Pablo Ibáñez Colomo and Adriani Kalintrini, 'The Evolution of EU Antitrust Policy: 1966-2017' (2020) 83(2) *Modern Law Review* 321, 322.

¹³ European Commission, 'XXIIIrd Report on Competition Policy' (*Publications Office of the European Union*, March 25 1995) <<https://op.europa.eu/en/publication-detail/-/publication/7db4a243-39f3-4ba4-a5b7-1cb48f8ca6d3>> accessed 9 March 2023, point 190.

¹⁴ Former Director General for Competition at the European Commission Claus-Dieter Ehlermann has remarked that in the first few decades of the European Community 'the presence and interference of the Member States in their respective economies was increasing, instead of decreasing': Ehlermann (n 2) 540. In challenging this economic nationalism, EU competition law has been understood to have acted 'as an instrument that is subordinate to the achievement of [the] overarching ambition' of integrating the economies of Member States: Colomo and Kalintrini (n 12) 322.

¹⁵ Assimikis P Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages' (2002) 39 *Common Market Law Review* 447, 447.

¹⁶ *Automec* (n 11) para 74, in which the General Court of the CJEU held that Article 105(1) TFEU was a specific expression of the supervisory role of the Commission conferred by Article 17(1) TFEU.

almost all collusive activity within the purview of Commission enforcement.¹⁷ Whilst some agreements are exempted from enforcement under the *de minimis* doctrine,¹⁸ the expansive interpretation by the Court means that it remains ‘very rare for the EU to lack jurisdiction’.¹⁹ Article 101 may apply where all parties to an agreement are from the same Member State,²⁰ where a restrictive practice has not yet been implemented,²¹ and where an agreement has not yet had an actual impact on the market.²² Furthermore, the CJEU facilitated and supported the Commission’s expansion of the set of objectives and aims that competition law may serve, often derogating from strict economic analysis when reviewing the Commission’s infringement decisions and assessing anticompetitive effects. This was initially observed in the Court’s endorsement of the Commission’s pursuit of the ‘indigenous objective’ of market integration through competition law.²³ Whilst the Commission has continuously reiterated that this fundamental imperative and the goal of promoting competition are economically complementary,²⁴ early cases show a dearth of economic analysis in the unwavering prohibition of any practice creating barriers between Member

¹⁷ Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 337 249 established that Article 101 applies if it is possible ‘to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States’.

¹⁸ Agreements will not be caught if they do not have an appreciable impact on competition or on inter-state trade: see Case 5/69, *Franz Volk v J Vervaecke* [1969] ECR 295. In an official publication, the Commission has set out that agreements will not be held to appreciably restrict competition where the aggregate market share held by the parties thereto does not exceed 10% on markets where the parties are actual or potential competitors: European Commission, ‘Commission Notice on Agreements of Minor Importance Which Do Not Appreciably restrict Competition Under Article 81(1) (*de minimis*)’ [2014] OJ C291/01, para 13.

¹⁹ P Craig & G De Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 1059.

²⁰ Case 8/72, *Cementhandelaren BV v Commission* [1972] ECR 977.

²¹ Case T-77/92, *Parker Pen v Commission* [1994] ECR II-549.

; Case T-66/92, *Herlitz AG v Commission* [1994] ECR II-531.

²² Case 19/77, *Miller International Schallplatten GmbH v Commission* [1978] ECR 131.

²³ Ariel Ezrachi, ‘EU Competition Law Goals and the Digital Economy’ (2018) Oxford Legal Studies Research Paper No. 17/2018, 2.

²⁴ See, among others, European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97 [13]; European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ [2009] OJ C 45/02, paras 1.5-7.

States. Without regard to any anti-competitive effect,²⁵ all agreements prohibiting,²⁶ or even disincentivising²⁷ cross-border sales were held to be in breach of Article 101.

The economic laxity of the Court's jurisprudence subsequently allowed Article 101 to advance an even broader range of Commission objectives, with the CJEU loosening requirements of economic justification for the determination of an Article 101(3) exemption in the case of *Metro I*.²⁸ Through a teleological interpretation of Article 101, read in conjunction with Article 3 of the Treaty of Rome (EEC),²⁹ the Court held that the requirement in both articles that competition be undistorted 'implies the existence on the market of workable competition'.³⁰ According to this novel standard, the degree of competition protected under Article 101 is that which is 'necessary to ensure the observance of the basic requirements and the attainment of the objectives under the treaty'.³¹ The Court went on to hold that this requirement of 'workable competition' could be reconciled with 'the safeguarding of objectives of a different nature'.³² This judgment provided the Commission with a 'window of opportunity',³³ allowing the Directorate to grant Article 101(3) exemptions on

²⁵ See Joined Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.

²⁶ Case 19/77 *Müller International Schallplatten GmbH v Commission* [1978] ECR 131.

²⁷ *GlaxoSmithKline* (n 27); see also Case 27/76, *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207.

²⁸ It is to be recalled that Article 101(3) provides for an exemption to the blanket (and widely interpreted) prohibition of collusive agreements under Article 101(1). Whereas Article 101(1) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have, as their object or effect the prevention, restriction or distortion of competition within the internal market', Article 101(3) declares this former limb inapplicable in the case of an agreement 'which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit...'

²⁹ Article 3 EEC, whilst not included in the Lisbon Treaties, laid down a list of Community 'activities'.

³⁰ Case C-26/76, *Metro v Commission* [1977] ECR 1875, para 20.

³¹ *ibid* para 20.

³² *ibid* para 21-22.

³³ Daniel G. Goyder, *Goyder's EC Competition Law* (Oxford University Press 2009) 413.

the basis of indirect economic or non-economic objectives.³⁴ Following *Metro I*, the Commission exempted agreements on account of its objectives regarding the development of sports,³⁵ various industrial policy considerations,³⁶ the scarce allocation of resources among states³⁷ and, particularly, environmental protection.³⁸ Indeed, the Commission's 2000 guidelines³⁹ and 1995 report on competition policy⁴⁰ expressly recognise the possibility of an Article 101(3) exemption on environmental grounds. The Commission has even exceeded the parameters of the *Metro I* judgment, indistinctly applying Article 101(3) to objectives without a legal basis under the treaties, such as the survival of traditional trades.⁴¹ Indeed, this aggressive teleological reasoning and doctrinal flexibility in the Courts' economic analysis began to garner criticism,⁴² eventually leading the CJEU to demand more evidence of economic effects from

³⁴ See O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 Common Market Law Review 121.

³⁵ *EBU/Eurovision System* (Case IV/32.150) Commission Decision 93/403/EEC [1993] OJ L 179/22.

³⁶ *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC [1992] OJ L 20/28.

³⁷ *International Energy Agency* (Case IV/30.525) Commission Decision 94/153/EC [1983] OJ L 376/30.

³⁸ The Commission exempted a cartel on the basis of environmental benefit in *International Fruit Container Organisation* (Case IV/34.415) Commission Decision 97/48/EC [1997] OJ L 48/2. See also *2CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [2000] OJ L 187/47; see also Damien Geradin, 'EC Competition Law and Environmental Protection: Conflict or Compatibility?' (2002) 2 Yearbook of European Environmental Law 117, 124.

³⁹ See European Commission 'Notice - Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements' [2001] OJ L 3/02.

⁴⁰ European Commission, 'XXV Report on Competition Policy' (*European Commission*, 1995) <https://ec.europa.eu/competition/publications/annual_report/1995/en.pdf> accessed 9 March 2023.

⁴¹ *Grobe's distribution system* (Case IV/30.299) Commission Decision 85/44/EC [1985] OJ L 19/17, para 25-27; see also *Ideal-Standard's distribution system* (Case IV/30.261) Commission Decision 85/45/EC [1985] OJ L 20/38.

⁴² The Court was, for instance, accused of eroding a 'juridical' conception of the law: Gerber (n 6) 351.

infringement findings of the Commission,⁴³ and even annulling decisions on the basis of a lack thereof.⁴⁴

Whilst permitted by the ‘open-textured’ and ‘programmatic’ nature of the ‘Treaties,’⁴⁵ the ‘very broad’⁴⁶ interpretation of the ‘effect on trade between Member States’ requirement under Article 101(1), and the striking margin of flexibility afforded to the Commission in its application of Article 101(3) exemptions by the doctrinal laxity of the Court, demonstrates coordination between the CJEU and Commission in the development of an expansive and dynamic centralised competition regime; a coordination reflecting coinciding integrationist objectives. As a ‘motor of integration,’⁴⁷ the CJEU sought to further the Commission’s objectives of market integration, consumer welfare, and ‘maximise’ the scope⁴⁸ of EU competition law in a manner characteristic of the ‘activist’⁴⁹ CJEU in this era of its development.⁵⁰

The divergent approaches of the two institutions began to emerge, however, as the burgeoning system of EU antitrust enforcement and the limited capacity of the Directorate necessitated systematic redesign. Whilst both the Court and Commission sought to delegate enforcement duties to national actors, different models of decentralisation, and their implications for the distribution of power between the two EU institutions, gave rise to the judicial and executive tension with which this article is concerned. The following section analyses the CJEU’s attempt to facilitate the partial decentralisation of the

⁴³ See Jean-Francois Verstryngne, ‘Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy’ in Barry Hawk (ed), *1984 Corporate Law Institute: Antitrust and Trade Policy in International Trade* (Bender 1985) 673.

⁴⁴ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

⁴⁵ Renaud Dehousse, *The European Court of Justice* (MacMillan 1998) 78.

⁴⁶ Joanna Goyder and Albertina Albers-Llorens, *Goyder’s EC Competition Law* (5th edn, Oxford University Press 2009) 101.

⁴⁷ Gerber (n 6) 351.

⁴⁸ Goyder and Albers-Llorens (n 46) 101.

⁴⁹ H Rasmussen, *On Law and Policy in the European Court of Justice – A Comparative Study* (Nijhoff 1986) 298.

⁵⁰ See, for instance, the Court’s expansive interpretation of the ‘all measures of equivalent effect’ requirement in the context of freedom of movement of goods in Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837. See also the subsequent more restrictive reading on the same issue in Joined Cases C-267 and C-268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithonard* [1993] ECR I-6097.

enforcement of EU competition law. By clarifying the competence of national courts to rule on breaches of Article 101 (notwithstanding the Commission's exclusive prerogative over Article 101(3) and recognising a Union right to damages) the CJEU sought to encourage private enforcement before the national courts of Member States, to reduce systemically unimportant complaints before the Commission, and to partially relieve the Directorate's dossier.

II. DECENTRALISATION

The Commission's centralised approach led to an 'absurd discrepancy between the Commission's theoretical jurisdiction and its capacity to generate the decisions called for by its over-broad interpretation of Article [101(1)]'.⁵¹ The accession of new Member States accompanied by a marginal increase in resources strained the Commission's investigatory and enforcement capabilities.⁵² Despite this, the Commission sought to maintain its competence over the development of antitrust policy and continuously emphasised the risk of divergence arising from a disparate application of EU competition law across Member States. Indeed, prior to entertaining decentralisation, the Commission sought to alleviate its workload through a variety of approaches, including the publication of soft-law instruments,⁵³ comfort letters and the reorganisation of the Directorate.⁵⁴ Despite such efforts, long delays continued to persist⁵⁵ and the unwieldy system attracted much criticism from non-EU corporations.⁵⁶

⁵¹ Ian Forrester and Chris Norall, 'Competition Law' (1990) 10 Yearbook of European Law 407, 409.

⁵² Between 1988 and 1998, only 13% of cases were initiated of the Commission's own volition, see European Commission, 'White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty' (1999) Commission Programme No 99/027, para 44.

⁵³ These were designed to assist firms. See the European Commission's Notice on Patent Licensing Agreements [1962] OJ 139/2922; Notice on Exclusive Dealing Contracts with Commercial Agents [1962] OJ 139/2921; Notice on Cooperation Agreements [1968] OJ C75/3.

⁵⁴ See James S Venit, 'Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law' (1987) 10 Boston College International and Comparative Law Review 17, 40.

⁵⁵ Christopher Bellamy and Graham D Child, *Common Market Law of Competition* (Sweet and Maxwell, 1987) 135.

⁵⁶ See William J Kolasky, 'Antitrust Compliance Programs: The Government Perspective', Address delivered before the Corporate Compliance Conference, July 2002.

Consistent with the foregoing exercise of its leadership, the CJEU responded. By outlining and clarifying the jurisdiction of national courts to rule on breaches of Article 101 (without encroaching upon the Commission's Article 101(3) exemption monopoly), the Court of Justice sought to stimulate antitrust actions before the courts of Member States, to reduce the traffic of disputes before the Commission, and to provide the Directorate with a mechanism through which it could remit cases of little jurisprudential significance to national courts. Circumventing the Commission's concerns regarding decentralised public enforcement, the Court sought to construct a system of decentralised private enforcement complementary to the Commission's policy prerogative.

Broadly concurrent with this initiation of decentralisation was the incorporation of subsidiarity into the EU legal order through the Maastricht Treaty.⁵⁷ Introduced to counteract potential federalist shifts,⁵⁸ the principle, now governing the 'the use of Union competences',⁵⁹ is understood as 'establishing a rule [by which] issues should be addressed at the level where they can be addressed most effectively'⁶⁰ based on an assessment of both qualitative and quantitative indicators.⁶¹ Accordingly, competences should be exercised at the EU-level only where the 'objective can be better attained at European level by reason of the scale or effects of the proposed actions'.⁶² Whilst not technically binding upon EU institutions in the sphere of competition law,⁶³ the principle has, according to former Commissioner Sir Leon Brittan, 'always underpinned' EU competition policy and encouraged the Commission to 'look afresh at the institutional balance between the Community and Member State's competition authorities to determine whether the existing system of jurisdiction allocation

⁵⁷ See Article 5(2) TEU.

⁵⁸ Paul Craig, 'Subsidiarity: a Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72.

⁵⁹ Article 5(1) TEU.

⁶⁰ Joel Trachtman, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity' (1992) 33 *Harvard International Law Journal* 459, 469.

⁶¹ Article 5(1) TEU.

⁶² Carlo Petrucci, 'Subsidiarity in Directive 2014/104 EU on Damages Actions for Breach of EU Competition Law' (2017) 23(2) *European Public Law* 395, 400.

⁶³ Competition law is an area which falls within the exclusive competence of the EU and thus Article 5(2) TEU does not apply.

can be further refined'.⁶⁴ However, as the DG Comp's docket expanded, this theoretical ambition became a pragmatic necessity.⁶⁵ The notion of subsidiarity provides a convenient prism through which the decentralisation of EU competition law and the involvement of national courts in the enforcement of EU antitrust law can be assessed.

In accordance with the definition of subsidiarity under the Treaties, such national enforcement must be 'efficient, effective and adequate' in order for national courts to 'sufficiently achieve the objectives' of Articles 101 and 102.⁶⁶ The Commission's centralised regime prevented such enforcement due to: (i) the possibility of contradictory rulings between the national courts and the Commission, and (ii) the absence of effective relief available before national courts. By redefining the 'division of competence'⁶⁷ between national courts and the Commission, the CJEU addressed both obstacles, thereby empowering national courts, relieving the Commission of inconsequential cases, and promoting subsidiarity in the context of EU antitrust law.

(i) Contradictory Rulings

Whilst the Commission's monopoly over the granting of Article 101(3) exemptions constituted the biggest obstacle to national enforcement of Article 101, various mechanisms under Regulation 17 preserving the Commission's capacity to intervene in the course of national proceedings further deterred suits before the courts of Member States. National courts lost the jurisdiction to adjudicate claims as soon as the Commission initiated its procedures of negative clearance,⁶⁸ termination of infringement,⁶⁹ or exemption.⁷⁰ Considering the

⁶⁴ Speech by Sir Leon Brittan in Roger P Alford, 'Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws' (1004) 27 *Cornell International Law Journal* 2, 272.

⁶⁵ *ibid.*

⁶⁶ *ibid.* 292.

⁶⁷ Case C-234/89 *Delimitis v. Henninger Bräu* [1991] ECR I-935, para 47.

⁶⁸ Regulation 17 (n 8) Article 2.

⁶⁹ *ibid.* Article 3.

⁷⁰ *ibid.* Article 6. Exemptions under Articles 2, 3 and 6 were cumbersome, and took considerable time. The Commission rarely issued more than a dozen each year: See Frances Graupner, 'Commission Decision-Making on Competitive Questions' (1973) 10 *Common Market Law Review* 291 and Valentine Korah, 'The Rise and Fall of Provisional Validity - The Need for a Rule of Reason in EEC Antitrust' (1981) 3

possibility of exemption by the Commission following a national court decision voiding an agreement under Article 101(1) or (2)⁷¹ and the ‘material injustice’ arising therefrom,⁷² it had previously been held that notification to the Commission had a suspensive effect on national proceedings, greatly disincentivising claims before national courts.⁷³ This ‘suspensive effect’ was, however, subsequently lifted by the Court of Justice.⁷⁴ The Court thereafter continued to deconstruct barriers to national private enforcement by (i) clarifying the ‘division of competence’⁷⁵ between the Commission’s monopoly in Article 101(3) and national courts’ jurisdiction, and (ii) bypassing recourse to Article 101(3) by undermining a strict approach in the application of Article 101(1).

In *Delimitis*, the CJEU distinguished between clearly prohibited agreements with regard to which national courts could make findings, and agreements which may merit an exemption under Article 101(3). In response to this, national courts were obliged to ‘stay proceedings or adopt interim measures’ until the Commission reached its verdict.⁷⁶ This reasoning differentiated antitrust cases before national courts along a continuum of complexity, ranging from the ‘pedestrian’⁷⁷ to the ‘highly complex’.⁷⁸ Similarly, in *Automec*, the Court, whilst emphasising the role of the Commission as an administrative authority acting in the ‘public interest’,⁷⁹ upheld the Commission’s refusal to investigate certain complaints where an adequate remedy was available

Northwestern Journal of International Law and Business However, the prospect of such a decision nonetheless disincentivised litigation: see Richard Whish and Brenda Sufrin, ‘Article 85 and the Rule of Reason’ (1987) 7(1) Yearbook of European Law 1.

⁷¹ Article 101(2) TFEU provides that any agreement prohibited by article 101 shall be deemed automatically void. This has been termed the ‘Euro-defence’ in competition law: see Richard Whish, *Competition Law* (4th edn, Oxford University Press 2001) 266.

⁷² European Commission, ‘The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States’ (*European Commission*, 18 July 1997) <<https://op.europa.eu/en/publication-detail/-/publication/03d808bf-3928-4793-bcfc-72bb63da27dd>> accessed 9 March 2023, 281.

⁷³ John Temple Lang, ‘EEC Competition Actions in Member States’ Courts - Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law’ (1984) 7 Fordham International Law Journal 389, 407.

⁷⁴ Case 48/72, *SA Brasserie de Haecht v. Wilkin-Janssen* (No. 2) [1973] ECR 77.

⁷⁵ *Delimitis* (n 67) para 47.

⁷⁶ *ibid* para 52.

⁷⁷ Alford (n 64) 281.

⁷⁸ Temple Lang (n 73) 246.

⁷⁹ *Automec* (n 11) para 63.

before a national court. Furthermore, the Court articulated a test determining the circumstances in which the Commission should launch an investigation, including a requirement for the directorate to have regard to whether there is ‘sufficient Community interest’.⁸⁰ While this approach was welcomed by the Commission as providing authority for its remittal of burdensome and jurisprudentially insignificant complaints to national courts,⁸¹ it also defined, and arguably restricted, the Commission’s role in a hierarchy of antitrust adjudication to assessing ‘important questions of legal precedent’ and necessitated the application of the subsidiarity principle in the Directorate’s practice.⁸²

Whilst this development in the case law was of indisputable benefit to the Commission by increasing antitrust enforcement before national courts⁸³ and decreasing the Directorate’s workload,⁸⁴ it is worth noting the Court’s concentration on the importance of facilitating parties’ claims, and implicit emphasis on ensuring adequate compensation. In *Automec*, the Court relied upon the postulation of the Treaty ‘that national law gives the court power to preserve the rights of enterprises which are victims of anti-competitive practices’.⁸⁵ In *Brasserie de Haecht*, the Court’s abrogation of the suspensive effect of notification to the Commission was based on national courts’ ‘obligation of deciding on the claims of interested parties’.⁸⁶ The CJEU’s reasoning in *Delimitis* and *Automec* appears to be firmly undergirded by an endorsement of subsidiarity and an emphasis on the rights of antitrust victims; motives difficult to reconcile with the Commission’s monopoly over Article 101(3). This reasoning went so far as to prompt the Commission to publish guidance to national courts in the months following *Automec* clarifying the deference owed by national courts to

⁸⁰ *ibid* para 98.

⁸¹ Speech by Sir Leon Brittan in Alford (n 64).

⁸² Alford (n 64).

⁸³ European Commission, ‘Thirteenth Report on Competition Policy’ (*European Commission*, 1 August 1996).

<<https://op.europa.eu/en/publication-detail/-/publication/161bd425-29e6-4ac0-9b3d-0766eccdda8cd>> accessed 9 March 2023, 217.

⁸⁴ European Commission, ‘Sixteenth Report on Competition Policy’ (*European Commission*, 18 April 1990)

<<https://op.europa.eu/en/publication-detail/-/publication/21ec96eb-ff7d-49e1-bfd3-6c56a4846e5c>> accessed 9 March 2023, 52.

⁸⁵ *Automec* (n 11) para 93.

⁸⁶ *Brasserie da Haecht* (n 74) para 11.

the former decisions,⁸⁷ comfort letters,⁸⁸ and exemption contemplation⁸⁹ of the Commission.

Furthermore, whilst the foregoing analysis concerns exemptions under the third limb of Article 101, it is also of note that agreements may also escape Article 101 by failing to come within the provisions of Article 101(1) to begin with.⁹⁰ Whilst the broad terms of the treaty and generous interpretation afforded thereto⁹¹ encompassed the vast majority of collusive arrangements, it seems that the court covertly undermined this broad, indiscriminate application of Article 101(1) by gravitating towards a ‘rule of reason’ approach in the application of Article 101.⁹² This approach imports an assessment of the pro- and anti-competitive effects of an agreement into the initial determination of the satisfaction of the test of Article 101(1) rather than allowing such effects to weigh in favour of an Article 101(3) exemption at the subsequent stage of analysis, undermining the Commission’s exclusive competence over an analysis crucial to its policy prerogative and threatening to afford unprecedented discretion to national courts.⁹³ Although the merits of such an approach have garnered both academic scepticism and support,⁹⁴ the consistency of this doctrinal laxity with the Treaties is dubious.

The satisfaction of Article 101(1) requires that agreements have ‘as their object or effect the prevention, restriction or distortion of competition within the internal market’. Deeming these criteria to be disjunctive,⁹⁵ earlier decisions of the CJEU strictly delineated the boundary between anti-competitive

⁸⁷ European Commission, ‘Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty’ [1993] OJ C 39/6.

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ It is to be recalled that Article 101(1) contains the general prohibition of anticompetitive agreements, whilst Article 101(3) provides for the exemption of such agreements on various (and broadly couched) grounds.

⁹¹ See *Société Technique Minière* (n 17), the test of which is set out above.

⁹² See *Standard Oil v US* 337 U.S. 293 (1949) (US Supreme Court).

⁹³ At the emergence of this approach, commentators observed the potential for a ‘rule of reason’ side-step to Article 101 to stimulate private claims before national courts: see Korah (n 70) 350.

⁹⁴ See E Fox, ‘The Modernization of Antitrust: A New Equilibrium’ (1981) 66 *Cornell Law Review* 1140; Korah (n 70) 310; Whish and Sufrin (n 70).

⁹⁵ *Société Technique Minière* (n 17).

agreements ‘by object’ and ‘by effect’.⁹⁶ The former type of agreement is prohibited ‘by its very nature’,⁹⁷ to be determined by reference to its content, objectives, and economic and legal context.⁹⁸ In the case of the latter type of agreement, where anti-competitive quality is not evident from its object,⁹⁹ the Court has incorporated economic analysis of the effects of the agreement on the market when determining the satisfaction of Article 101(1),¹⁰⁰ utilising Article 101(1) as a provision of economic assessment rather than a provision of jurisdiction.¹⁰¹ Whilst the ‘rule of reason’ was deemed ‘difficult to reconcile with the rules prescribed by [Article 101(1)]’ by the Court of First Instance,¹⁰² this ‘more nuanced analysis’¹⁰³ under Article 101(1) became prominent in the jurisprudence of the European courts, with agreements imposing selective distribution schemes,¹⁰⁴ exclusive licences,¹⁰⁵ non-compete clauses,¹⁰⁶ exclusive purchasing obligations,¹⁰⁷ and even territorial protection in franchising arrangements,¹⁰⁸ evading Article 101(1).¹⁰⁹ However, despite the emergence and academic support of this more flexible approach,¹¹⁰ the Commission failed to follow suit, and continued ‘mechanically applying’¹¹¹ Article 101 to agreements

⁹⁶ *ibid*; *Consten Grundig* (n 25).

⁹⁷ Case C-67/13 P, *Groupement des Cartes Bancaires v European Commission* [2014] EU:C:2014:2204.

⁹⁸ *GlaxoSmithKline* (n 27).

⁹⁹ *Brasserie de Haecht* (n 74); *Volk* (n 18).

¹⁰⁰ *Consten Grundig* (n 25).

¹⁰¹ *Goyder* (n 46) 111.

¹⁰² Case T-112/99 *Metropole Télévision v Commission* [2001] ECR I-7945; cf Case T-374/94, *European Night Services v Commission* [1998] ECR II-03141.

¹⁰³ James S Venit, ‘Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty’ (2003) 40(3) *Common Market Law Review* 545, 551.

¹⁰⁴ Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986] ECR 3021.

¹⁰⁵ Case 258/78 *Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015.

¹⁰⁶ Case 42/84 *Remia BV and others v Commission* [1985] ECR 2545.

¹⁰⁷ Case C-250/92 *Gottrup-Klim e.a. Grovareforeninger v Dansk Landbrugs Grovarelselskab AmbA* [1994] ECR 5641.

¹⁰⁸ Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

¹⁰⁹ Note, however, that the Court maintained a strict application of Article 101 in certain cases, such as in regard to agreements seeking to resurrect territorial borders between Member States: see Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015.

¹¹⁰ See Valentine Korah, ‘Critical Comments on the Commission’s Recent Decisions’ (1987) 12(1) *European Law Review* 18.

¹¹¹ Whish and Sufrin (n 70) 22.

which did not, in reality, distort competition.¹¹² Indeed, this gravitation towards a ‘rule of reason’ undermined the Commission’s monopoly, and, as will be discussed below, was expressly recognised as a threat to the utility of Article 101(3) in the Commission’s White Paper on Modernisation — a document representing the Directorate’s concession to the pressure of decentralisation.¹¹³ Akin to the Commission’s refusal to pursue a ‘rule of reason’ style of analysis in the context of Article 101(1), the Directorate similarly disliked the disruption posed by the recognition of a Union right to damages to the successful Leniency scheme. As discussed in Section IV, the cumulative effect of these developments instigated systemic redesign from the Commission.

(ii) Effective Relief

The foregoing mechanism for remittal to national courts is, however, based upon the availability of effective relief. Whilst required in principle by the uniform application of Community law and subsidiarity, the Commission’s ability to remit claims to be adjudicated by national courts established in *Automec* is postulated upon effective judicial enforcement in Member States. As stated by Advocate General Edwards in that case, the Commission cannot simply ‘repeat a ritual formula to the effect that relief is available in the national courts’.¹¹⁴ In the seminal 2001 *Courage v Crehan* case, the ECJ established the right of ‘any individual’ to bring an action to obtain compensation for harm suffered as a result of anti-competitive practice.¹¹⁵ Considered ‘strictly linked’¹¹⁶ to the effective application of EU law, the ECJ required national courts to ensure the protection of this right. This promotion of the private enforcement of

¹¹² See, in the context of Research and Development agreements, *Vacuum Interrupters* agreement [1977] 1 CMLR D67 and *Rockwell/Iveco* [1983] CMLR 709. See, however, the less indiscriminate approach of the Commission in the context of franchising agreements: *Pronuptia* (Case IV/30937) Commission Decision 87/17/EEC [1986] OJ L 013.

¹¹³ Commission Programme No 99/027 (n 52). It should be noted that, recently, the Court has undermined the distinction between object and effect.

¹¹⁴ Opinion of Advocate General Edwards in *Automec* (n 11) para 116.

¹¹⁵ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297. This followed the prior confirmation of the CJEU that Articles 101 and 102 create relations between and rights for individuals in Case 127/73 *Belgische Radio en Televisie and Society Belge des Auteurs, Compositeurs et Editeurs de Musique v SV SABAM and NV Fonior* [1974] ECR 313.

¹¹⁶ Roberto Cisotta, ‘Some Considerations on the Last Development on Antitrust Damages Actions and Collective Redress in the European Union’ (2014) 10(1) Competition Law Review 81, 85.

competition law proved incongruous with mechanisms of public enforcement, exposing divergent priorities and objectives of the Court and Commission in their navigation of decentralisation.

Whilst the Commission, through the publication of various reports,¹¹⁷ studies,¹¹⁸ and notices,¹¹⁹ had timidly emphasised the desirability of private damages actions in the sphere of antitrust for decades prior to *Courage*, the interaction of this right with its ‘Leniency’ mechanism proved difficult. Introduced in 1996¹²⁰ and subsequently adapted,¹²¹ the Leniency Notice allows cartel participants to provide competition authorities with ‘presentations regarding that participant’s knowledge of, and role in, the cartel’ in exchange for immunity or a fine reduction.¹²² This programme has been particularly effective in the prosecution of cartels,¹²³ yielding staggering fine revenues while requiring less investigative effort from the Directorate. The appeal of the leniency scheme was undermined, however, by the emergence and subsequent clarification of a Union right to damages. Whilst an undertaking may escape fines from the Commission in lieu of cooperation, the leniency programme could not exempt private suits. A thread of jurisprudence following *Courage* exacerbated this effect.

In *Pfleiderer*, the Court of Justice held that EU law does not preclude national law from granting a litigant access to documents compiled under the leniency programme.¹²⁴ The Court further held that the act of balancing the

¹¹⁷ Rapport Deringer, Assemblée Parlementaire Européenne, Documents de Seance 1961–1962, 7 Septembre 1961, Document 57, para 123.

¹¹⁸ See the study examining the available remedies in the national laws of Member States for competition law infringement: *La Réparation des Conséquences Dommageables d’une Violation des Articles 85 et 86 du Traité Instituant la CEE*, Serie Concurrence No. 1 (Brussels, 1966).

¹¹⁹ European Commission Notice C39/6 (n 87).

¹²⁰ First adopted in the European Commission, ‘Commission Notice on the non-imposition or reduction of fines in cartel cases’ [1996] OJ C 207/4.

¹²¹ Replaced in 2002 ([2002] OJ C 45/3). The current policy is in the new notice published in 2006 (Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17).

¹²² Article 2(15) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (Damages Directive).

¹²³ See Declan Walsh, ‘Carrots and Sticks - Leniency and Fines in EC Cartel Cases’ [2008] 1 ECLR 30.

¹²⁴ Case C-360/09 *Pfleiderer AG v BundesKartellamt* [2011] ECR I-5161.

right to compensation against the imperative of protecting the leniency programme's effectiveness fell within the competence of national courts. Moreover, in *Donau Chemie*, the Court held that EU law precludes national law from requiring all parties to consent to the disclosure of documents lodged by a public authority in the context of a national leniency programme 'without leaving any possibility for the national courts of weighing up the interests involved'.¹²⁵ The Court based this reasoning on the obligation of undertakings to 'compensate for the harm resulting from an infringement' of Article 101.

Following *Pfleiderer*, national courts granted access to leniency files contrary to the *amicus curiae* advice of the Commission,¹²⁶ and the General Court permitted access to documents compiled in leniency cases.¹²⁷ This subversion of the confidentiality and protection of leniency material has impeded the effectiveness of the Commission's leniency programme,¹²⁸ and remains an issue for practitioners to this day. Some studies estimate a subsequent 50% reduction in leniency applications even following the Damages Directive (discussed below)¹²⁹ and 83% of practitioners have reported a decreased interest amongst clients in applying for leniency.¹³⁰

It may thus be seen that by permitting the delegation of trivial cases to national courts, circumscribing the scope of the Commission's exemption monopoly, undermining the exclusive function of this exemption prerogative, and promoting litigation amongst victims of antitrust infringement, the first movement towards decentralisation of the enforcement of EU competition law occurred through successive doctrinal advancements of the CJEU. This was

¹²⁵ Case C-536/11 *Bundeswettbewerbshilfebehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366.

¹²⁶ See *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2012] EWHC 869 (Ch).

¹²⁷ See Case T-437/08 *CDC Hydrogen Peroxide v European Commission* [2011] ECR II-8251. See also Case C-365/12 P *Energie Baden-württemberg AG v European Commission* [2014] ECLI:EU:C:2014:112.

¹²⁸ Johan Ysewyn and Siobhán Kahmann, 'The Decline and Fall of the Leniency Programme in Europe' (2018) 1 *Concurrences* 44.

¹²⁹ Global Competition Review, 'European Union's Directorate-General for Competition: Rating Enforcement 2016/2017' (September 2017).

¹³⁰ Wouter Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (2017) 40(1) *World Competition: Law and Economics Review* 3, 42.

underpinned by notions of compensatory rights and an implicit endorsement of subsidiarity, but informed by the contemporaneous exigency of the Commission's unsustainable caseload. In accordance with the widely accepted view that extra-legal considerations have considerably influenced the pace of the CJEU's integrationist jurisprudence,¹³¹ the Court exercised its role as the 'principal engine in the integration process'¹³² in engaging national actors in the enforcement of EU competition law despite persistent aversion within the Commission to decentralisation across NCAs.¹³³ Similarly seen in the context of its promotion of a right to equal pay under Article 157 TFEU in response to national legislative lacunae,¹³⁴ and recognition of a right to establishment under Article 49 TFEU in the context of inert Union harmonisation efforts,¹³⁵ the CJEU attempted to remodel EU competition law through the recognition of a directly enforceable right under Article 101 and design of an effective remittal mechanism. Whilst ostensibly in line with the Commission's aspirations for the increased engagement of national courts in the enforcement of competition law,¹³⁶ the pernicious effect of private enforcement upon the Commission's

¹³¹ Dehousse (n 45) 78. Whilst some integration theorists view the case law of the court as merely giving effect to broader political objectives (Geoffrey Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market', (1992) 41 *International Organization* 533; Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31(4) *Journal of Common Market Studies* 473) such assertions seem reductive. Whilst recognising that the Court is, indeed, an autonomous judicial institution (see Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 40 (2) *European Law Review* 135) the influence of 'extra-legal considerations' upon the European judiciary is widely accepted (albeit to various extents) (see Renaud Dehousse and Joseph H.H. Weiler, 'The Legal Distinction' in W Wallace (ed) *The Dynamics of European Integration* (Pinter 1990) 242).

¹³² Dehousse (n 45) 76.

¹³³ See Alexander Schaub, 'EC Competition System: Proposals for Reform' (1998) 22 *Fordham International Law Journal* 853, 876.

¹³⁴ In Case 43/75 *Defrenne v Sabena* [1976] ECR 455, a case concerning a lacuna in Belgian rules, the Court held that Article 157 TFEU, requiring equal pay for men and women, does not only impose obligations on Member States, but also confers a right on individuals which can be invoked before national courts.

¹³⁵ In Case 2/74 *Reyners v Belgian State* [1974] ECR 631, the Court adopted a similar tactic to that in *Defrenne* in the context of freedom of establishment. In response to a failure of the EU legislators to harmonise measures concerning non-salaried activities, the CJEU held that Article 49 TFEU contains a prohibition on discrimination on the basis of nationality which could be invoked by individuals before national courts.

¹³⁶ See Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ [1993] C 39/6.

‘especially important’¹³⁷ leniency mechanism (contrary to the wishes of the Directorate and its central objectives of efficiency and consumer welfare¹³⁸) and the threat posed to the Commission’s policy monopoly over Article 101(3) necessitated systematic overhaul. In a manner reminiscent of the Court’s catalysis and acceleration of the 1972 merger regulation,¹³⁹ the foregoing jurisprudence culminated in the novel regime of Modernisation.

III. MODERNISATION

The promotion of private enforcement, the impediment to public implementation, and the reallocation of authority posed by the Court’s recognition of a Union right to damages necessitated systematic overhaul from the Commission. With ‘parameters for the future choices of the legislature’ irreversibly oriented by such jurisprudence, the scope for reform was limited.¹⁴⁰ Though previously deemed ‘taboo’,¹⁴¹ the Commission chose to embrace the ‘heresy’¹⁴² of decentralisation on its own terms, adroitly fashioning a novel regime in which it remained a ‘dominant voice and the control organ’.¹⁴³

¹³⁷ Neelie Kroes, ‘Tackling Cartels – a never-ending task. Anti-Cartel Enforcement: Criminal and Administrative Policy’ (2009) (SPEECH/09/454).

¹³⁸ Wils (n 130) 42.

¹³⁹ In response to Member State objections to an EU merger regulation regime and a lack of Treaty provision for mergers and acquisition control, the Court, taking a teleological interpretation of Article 102 TFEU in Case 6/72, *Continental Can v Commission* [1975] ECR 495 permitted the Commission’s use of Article 102 to address market dominance arising from mergers. Subsequently, the Court held in Joined Cases 142 and 156/84 *Phillip Morris* [1987] ECLI:EU:C:1987:490 that mergers arising from agreements between companies might be prohibited by Article 101 TFEU. The uncertainties arising from this jurisprudence afforded ‘sufficient salience’ to the necessity of an EU-wide merger regime and precipitated the 1972 EU Merger Regulation: Simon Bulmer, ‘Institutions and Policy Change in the European Communities: The Case of Merger Control’ (1994) 72(3) *Public Administration* 423, 432.

¹⁴⁰ Roberto Cisotta, ‘Some Considerations on the Last Development on Antitrust Damages Actions and Collective Redress in the European Union’ [2014] 10(1) *Comparative Law Review* 81, 99.

¹⁴¹ Alexander Schaub, ‘EC Competition System: Proposals for Reform’ (1998) 22 *Fordham International Law Journal* 853, 876.

¹⁴² Ehlermann (n 2) 538.

¹⁴³ David Gerber, ‘Two Forms of Modernization in European Competition Law’ (2007) 31 *Fordham International Law Journal* 1235, 1242.

In 1999, the Commission proposed a complete devolution of the Article 101(3) exemption in its Modernisation White Paper, empowering national authorities to apply Article 101 TFEU in its entirety.¹⁴⁴ Ultimately leading to the enactment of Regulation 1/2003, this document, promoting the diffusion of power across the vast network of national competition authorities, has been described as ‘the most important policy paper the Commission has ever published in more than 40 years of [EU] competition policy’.¹⁴⁵ However, whilst ending the procedural bifurcation of Article 101, this ‘big bang’¹⁴⁶ may not have been the ‘subsidiarity revolution’ envisaged by certain commentators.¹⁴⁷ Indeed, in line with the Commission’s ‘almost religious belief’ in the centralised concentration of power,¹⁴⁸ this ‘brave new world’ of competition enforcement¹⁴⁹ has been subsequently interpreted as amounting to an ‘extraordinary coup’,¹⁵⁰ allowing the Commission to consolidate and reaffirm its power. This section seeks to establish that the Commission achieved such a reassertion of authority despite decentralised enforcement in three ways: The Directorate (i) prioritised public enforcement to the detriment of private claims, (ii) limited the assessment of ‘benefit’ under Article 101(3) to objective economic analysis, and (iii) developed the European Competition Network.

(i) Prioritising Public Enforcement

Through the enactment of Regulation 1/2003 and the supplementary 2014 Damages Directive, the CJEU’s promotion of national courts as agents for competition enforcement has been counteracted by legislative delegation of Article 101(3), a devolution positioning national competition authorities as the ‘principal mechanisms for applying and enforcing community law’.¹⁵¹ Although

¹⁴⁴ Commission Programme No 99/027 (n 52).

¹⁴⁵ Stephen Wilks, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’ (2005) 18(3) *Governance* 431, 435.

¹⁴⁶ Ivo Van Bael, ‘A “Big Bang” in EC Antitrust Enforcement Procedure’, in P. Demaret, I. Govaere and D. Hanf (eds), *30 Years of European Legal Studies at the College of Europe* (PIE Peter Lang 2005).

¹⁴⁷ Alford (n 64) 296.

¹⁴⁸ Ehlermann (n 2).

¹⁴⁹ Venit (n 103) 545.

¹⁵⁰ Wilks (n 145) 437.

¹⁵¹ David Gerber, ‘Modernising European Competition Law: A Development Perspective’ (2001) 22 *European Competition Law Review* 122, 128.

this novel regime also appears to empower national courts, provisions protecting leniency material and prioritising public enforcement have sought to limit national actions to follow-on private suits, rendering damages for antitrust violation a mere supplement to fines imposed by NCAs and the Commission.

At first glance, the Damages Directive ostensibly facilitates private actions. The findings of NCAs are accorded an enhanced probative value before courts. Article 9 renders an infringement finding of an NCA irrefutable proof of such infringement before a national court,¹⁵² and ‘*prima facie*’ proof before the courts of other Member States.¹⁵³ Furthermore, Article 17 imposes a rebuttable presumption that collusive activity causes harm.¹⁵⁴ Indeed, the Directive was drafted in consideration of the lack of effective rules on private enforcement in some Member States,¹⁵⁵ the general paucity of judgments resulting in awards,¹⁵⁶ and the inconsistency of such awards across Member States.¹⁵⁷ Furthermore, empirical evidence suggests that the Damages Directive has succeeded in promoting private actions; with 239 such cases coming before national courts in 2019 compared to a mere 50 in 2014.¹⁵⁸

However, practice also suggests that the vast majority of these actions merely follow the infringement findings of public authorities.¹⁵⁹ Whilst the Directive facilitates ‘follow-on’ litigation, its protection of leniency material has the opposite effect on ‘stand-alone’ suits. National courts are forbidden from

¹⁵² Damages Directive Article 9(1).

¹⁵³ *ibid* Article 9(2).

¹⁵⁴ *ibid* Article 17.

¹⁵⁵ Commission, ‘Commission Staff Working Document Impact Assessment Report, Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’ COM (2013) 404 final, 23.

¹⁵⁶ Denis Waelbroeck, Donald Slater, and Gil Even-Shoshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report’ [2004] Ashurst Report.

¹⁵⁷ Barry Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer 2014).

¹⁵⁸ Jean-François Laborde, ‘Cartel damages actions in Europe: How courts have assessed cartel overcharges’ (2019) 4 *Concurrences* 7; See also Lukas Rengier, ‘Cartel Damages Actions in German Courts: What the Statistics Tell Us’ (2020) 11(1-2) *Journal of European Competition Law & Practice* 72.

¹⁵⁹ Rodger (n 157).

ordering the disclosure of leniency statements and settlement submissions,¹⁶⁰ and all other information prepared by parties during the course of a national competition authority's proceedings cannot be released until after the conclusion of the investigation.¹⁶¹ This is consistent with the Commission's concentration on the deterrent potential of private actions rather than their compensatory benefit.¹⁶² Indeed, before altering its stance in the White Paper and subsequent press releases,¹⁶³ the Commission's Green paper recognised that both public and private enforcement serve to 'deter anti-competitive practices forbidden by antitrust law'¹⁶⁴ and the Director General of the Directorate stated that 'compensation of victims should not be seen as an end in itself, but part of an overall strategy to enhance deterrence'.¹⁶⁵ Additionally, former Commissioner for Competition Neelie Kroes continuously referred to private litigation as a 'complementary'¹⁶⁶ system of enforcement which ought to work 'in parallel' with its public counterpart.¹⁶⁷ Whilst the compensation of victims of antitrust violations formed the basis of the CJEU's decentralisation efforts, it has been reframed as merely a beneficial by-product of the Commission's redefined system of public enforcement.

In addition to protecting the 'inherently superior' system of public enforcement in EU competition law,¹⁶⁸ this limitation of antitrust damages to follow-on awards, and the concomitant relegation of the role of private suits, has diminished the influence of both national courts and, by a consequential

¹⁶⁰ Damages Directive Article 6(6). Note also the broad definition of leniency statements in article 2(16).

¹⁶¹ *ibid* Article 6(5) and 7(2).

¹⁶² See Firat Cengiz, 'Antitrust Damages Actions: Lessons From American Indirect Purchasers' Litigation' (2010) 59 *International and Comparative Law Quarterly* 39.

¹⁶³ European Commission, 'Commission Recommends Member States to Have Collective Redress Mechanisms in Place to Ensure Effective Access to Justice' (Press release IP/13/524) 2.

¹⁶⁴ Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' COM (2005) 672 final 3.

¹⁶⁵ OECD, *Private Remedies*, DAF/COMP(2006) 34, 271.

¹⁶⁶ Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' [2005] Speech/05/533 3.

¹⁶⁷ Mario Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation' [2004] Speech/04/403.

¹⁶⁸ Wouter PJ Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26(3) *World Competition* 473, 484.

restriction of the scope of Article 267 references, the CJEU.¹⁶⁹ Not only does the protection of leniency materials greatly reduce the chance of stand-alone damages being awarded,¹⁷⁰ but the irrefutable probative value of a domestic NCAs' findings before a national court¹⁷¹ limits the role of the national judges to the mere assessment and calculation of damages, diminishing the role of jurisprudence in the development of competing policy and strategy. Indeed, such rules have been interpreted as operating to thwart artful judicial reasoning by 'limit[ing] national policymakers' room to manoeuvre to introduce more effective rules that could facilitate damages claims'.¹⁷² Furthermore, this residual jurisdiction of national courts has been encroached upon by soft-law and *amicus curiae* guidance by public enforcement authorities. The Commission has issued guidance on the calculation of quantum,¹⁷³ passing-on,¹⁷⁴ and confidentiality,¹⁷⁵ and has offered *amicus curiae* advice in cases concerning limitation periods,¹⁷⁶ the parallel application of EU and national law,¹⁷⁷ and optimal fining.¹⁷⁸

¹⁶⁹ Article 267 TFEU provides a mechanism by which national courts of Member States may refer questions of EU law to the CJEU. Note that the ECJ may also review the infringement decisions of public enforcement actors under Article 263.

¹⁷⁰ Wils (n 168).

¹⁷¹ Damages Directive Article 9(2). See also recital 34 which states that this binding effect 'cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court'. Note also that the original proposal for the Damages Directive rendered the decisions of foreign NCAs binding before national courts.

¹⁷² Carlo Petrucci, 'Subsidiarity in Directive 2014/104 EU on Damages Actions for Breach of EU Competition Law' (2017) 23(2) European Public Law 395, 408.

¹⁷³ European Commission, Communication from the Commission on quantifying harm in actions for damages based on breaches of Arts 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C167/19.

¹⁷⁴ European Commission, Communication from the Commission - Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] OJ C267/4, 43.

¹⁷⁵ European Commission, Communication from the Commission - Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law [2020] OJ C242/1.

¹⁷⁶ *Morgan Advanced Materials v. Deutsche Bahn* [2014] UKSC 24.

¹⁷⁷ *E.-P. v. Slovak Competition Authority*, 8Sžhpu/1/2012 [2012] (Slovak Supreme Court).

¹⁷⁸ *X BV v. Inspecteur Belastingdienst*, case 06/00252 [2010] (Gerechtshof Amsterdam, the Netherlands).

Many laud the Damages Directive as ‘exploit[ing] the synergies’¹⁷⁹ and ensuring optimal interaction between public and private enforcement. However, an analysis of its provisions in the context of the institutional tension underlying the decentralisation of EU antitrust law also reveals that the Commission and EU legislators have harnessed the efforts of private litigants to their own ends, restricting damages actions to a complementary sanctioning function. Private enforcement no longer threatens to supplant, but rather supplements its public counterpart. The Damages Directive has commandeered the CJEU’s promotion of national litigation and redefined its utility.

(ii) More Economic Approach

In addition to diminishing the role of national courts and the CJEU, the Commission has also sought to reassert a degree of control over the novel complex of decentralised public enforcement authorities. In order to do so, the Directorate needed to both maximise its influence over national competition authorities and limit their discretionary scope. The latter objective primarily relates to the Article 101(3) exemption procedure, a provision both particularly susceptible to the advancement of national interests and profoundly significant to policy.¹⁸⁰ The Commission has thus, in contradiction with its former practice,¹⁸¹ sought to redefine Article 101(3) as an ‘objective’ tool of economic analysis in order to marginalise the influence of national interests in the administration of Article 101(3) exemptions.¹⁸² This novel conception of Article 101(3) is generally known as the ‘more economic approach’.

Also known as the ‘effects-based’ approach,¹⁸³ this analytical framework is based on the benchmark of ‘enhancing consumer welfare and ensuring an efficient allocation of resources’.¹⁸⁴ Imported from the Chicago School of Economics, this approach to granting exemptions under Article

¹⁷⁹ Claudia Massa, ‘Sincere Cooperation and Antitrust Enforcement: Insights from the Damages and ECN+ Directives’ (2020) 16(1) *European Competition Journal* 126.

¹⁸⁰ Colomo (n 7).

¹⁸¹ Discussed below.

¹⁸² Brook (n 34) 136.

¹⁸³ See Lars-Hendrick Roeller and Oliver Stehmann, ‘The Year 2005 at DG Competition: The Trend towards a More Effects-Based Approach’ (2006) 29 *Review of Industrial Organization* 281.

¹⁸⁴ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97 para 33.

101(3) was introduced by guidelines accompanying Regulation 1/2003.¹⁸⁵ After first manifesting itself in the Commission's pivot to an effects-based approach in its guidelines on vertical restraints,¹⁸⁶ this strict economic philosophy was later evident in guidelines regarding horizontal agreements,¹⁸⁷ revision to the merger regulations,¹⁸⁸ and overhaul of policy regarding unilateral conduct by dominant firms.¹⁸⁹

Whilst criticisms of the Directorate's erstwhile forms-based approach certainly contributed to this conceptual pivot,¹⁹⁰ the adoption of these 'more objective standards of analysis',¹⁹¹ and the concomitant exclusion of public interest, has been necessitated by decentralisation. Whilst the prior centralised scheme of competition law demonstrated a laxity in economic analysis and the pursuit of an astounding variety of objectives, such flexibility would lead to remarkable fragmentation if devolved to national authorities. Indeed, this conceptual advancement largely offers a veneer of legitimacy and impartiality to what is effectively a reconsolidation of control on the part of the Commission. Although partially a development of principle, the 'more economic approach' is largely a necessity of pragmatism.¹⁹² The extent to which this novel conception has received NCA adherence and CJEU endorsement is discussed in Section V.

(iii) European Competition Network

Following the prioritisation of public enforcement and the promotion of an economic benchmark of analysis, the third method by which the Commission has sought to reconsolidate its power is through the organisation

¹⁸⁵ *ibid.*

¹⁸⁶ European Commission, 'Guidelines on Vertical Restraints' [2000] OJ C291/1.

¹⁸⁷ European Commission, 'Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements' [2001] OJ C3/02.

¹⁸⁸ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

¹⁸⁹ European Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' (Brussels, 2005).

¹⁹⁰ See Valentine Korah, 'From Legal Form Toward Economic Efficiency: Article 85(1) of the EEC Treaty in Contrast to US Antitrust' (1990) 35 *The Antitrust Bulletin* 1009.

¹⁹¹ Venit (n 103) 574.

¹⁹² Brenda Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51(4) *The Antitrust Bulletin* 915, 965.

of the European Competition Network (ECN). Having established a decentralised framework of multi-level governance, the Commission has designed an infrastructure for cooperation between the NCAs in order both to develop its influence and encourage procedural uniformity. By nurturing informal conduits of influence, the Commission has bolstered its dominant position in the guidance of EU policy. Indeed, some commentators suggest that the ECN has reinstated the Directorate as a ‘policy entrepreneur’,¹⁹³ enhancing the authority of its soft-law instruments and facilitating institutional harmonisation through osmosis. The European Competition Network represents not only an ‘innovative model of governance’,¹⁹⁴ but also an innovative model of centralisation.

Indeed, modernisation appears to be predicated on the ‘close cooperation’ of the Commission and NCAs in the application of competition law,¹⁹⁵ and the ECN was described by the Commission as a ‘core element’ of the new regime.¹⁹⁶ In addition to providing NCAs with ‘assistance’, facilitating the ‘efficient allocation of cases’, and organising the ‘mutual exchange of information’,¹⁹⁷ it was envisaged that this network would ‘promote consistency’¹⁹⁸ across the single market by encouraging the assimilation of common procedures and sanctions. By ensuring a ‘common competition culture in Europe’,¹⁹⁹ the ECN was designed to mitigate fragmentation arising from decentralisation. To a large extent,²⁰⁰ the ECN has succeeded in catalysing a degree of cultural and procedural assimilation. Commentators have observed the process of ‘institutional isomorphism’ across the Union, with the NCAs of certain Member States such as Italy, the Netherlands and Sweden being

¹⁹³ Giandomenico Majone, ‘The European Commission as Regulator’ in Giandomenico Majone (ed), *Regulating Europe* (Routledge 1996) 74.

¹⁹⁴ Alisa Sinclair, ‘Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)’ (2017) 8(10) *Journal of European Competition Law and Practice* 625, 625.

¹⁹⁵ Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1, recital 15.

¹⁹⁶ Commission, ‘*Proposal for a Council Regulation on the Implementation on the Rules on Competition*’ COM (2000) 582 final 6.

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ European Commission, ‘Draft Commission Notice on Cooperation within the Network of Competition Authorities’ OJ C101/43 [2003] para 3.

²⁰⁰ The ECN and procedural divergence are discussed below.

modelled on the Directorate.²⁰¹ Furthermore, the Commission is increasingly governing through soft law:²⁰² a manifestation of its 'steering activity' within the ECN.²⁰³

Some observers have analysed this system of 'dynamic delegation' through the lens of juridification, a theory concerned with the legal prescription or 'constitutionalisation' of economic systems by which economic behaviour is increasingly subject to legal rules.²⁰⁴ Accordingly, the ECN can be interpreted as transforming the relationship between the NCAs and the Commission into a 'wholly juridified relationship', in which politics is 'replaced with law supplanting power structures, decisions about competing resources, public opinion, pressure group lobbying and so on in determining the nature and content of that relationship'.²⁰⁵ Akin to the movement towards a more economic approach, the ECN is designed to minimise NCA discretion and mitigate fragmentation while consolidating the Commission's control over the complex of public competition enforcement.²⁰⁶ Indeed, by an adroit 'political masterstroke',²⁰⁷ the Commission has fashioned the decentralisation of European competition law into a Europeanisation of decentralised competition law.

²⁰¹ See Frans van Waarden and Michaela Drahos, 'Courts and (epistemic) Communities in the Convergence of Competition Policies' (2002) 9 *Journal of European Public Policy* 913.

²⁰² Despite extensive debate regarding the effectiveness of soft law (See both Linda Senden, *Soft Law in European Community Law* (Hart, 2004) 112 and Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) *Modern Law Review* 19, 32) the ECN is widely regarded as a 'successful and innovative model of governance for the complementary implementation of EU law at both European and national levels': Kathryn Wright, 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive' (2016) 15 *Legal Issues of Economic Integration* 43.

²⁰³ Colomo and Kalintrini (n 12) 361.

²⁰⁴ Gunther Teubner, 'General Aspects' in Gunther Teubner (ed), *Juridification of Social Spheres* (De Gruyter 1987) 11.

²⁰⁵ Benjamin Morris, 'Juridification in the UK: The cases of the Office of Fair Trading and the Commission for Racial Equality' [2004] PhD Thesis, London School of Economics and Political Science 1, 23.

²⁰⁶ Thorough analysis of the ECN is difficult given its informal structure and lack of legal personality. The network does not issue decisions or any regulatory acts: See Ruben P Molleda, 'The ECN+ Directive and the Next Steps for Independence in Competition Law Enforcement' (2021) 12(3) *Journal of European Competition Law and Practice* 167.

²⁰⁷ Alan Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You!' (2003) 24 *European Competition Law Review* 604, 657.

IV. FRAGMENTATION

Since the modernisation efforts that re-established, re-instituted, and redefined public intervention as the primary constituent of EU antitrust enforcement, the Commission has reiterated that a ‘substantial level of convergence in the application’ of antitrust rules has been achieved²⁰⁸ and that decentralisation has, generally, been a success.²⁰⁹ NCAs have become a ‘key pillar’ of EU competition law taking approximately 85% of enforcement decisions²¹⁰ and the Commission now principally focuses on strategically significant cases.²¹¹ Several detailed analyses of the enforcement practices of various NCAs have, however, identified significant fragmentation in the national application of EU competition law.

The foregoing analysis has framed modernisation as an attempt by the Commission to consolidate authority and reinforce public enforcement as the primary component of EU competition law in response to the jurisprudence of a Court pursuing divergent policy objectives. Although a reallocation of competence was certainly desirable to relieve the Commission of an unrealistic caseload, the total decentralisation of competition law has always been overshadowed by a fear of divergence arising from the different ‘institutional, personal and financial settings’ of each NCA.²¹² Notwithstanding the Commission’s insistence that substantial convergence has been achieved, a comparison of the enforcement practices of certain NCAs appears to confirm such concerns. Divergence arising from the deficiency of safeguards in Regulation 1/2003 against domestic legislative interference, institutional discrepancies between NCAs, and the insufficiency of soft-law guidance, raises questions regarding the prematurity of modernisation.

Additionally, persistent obstacles to convergence erected by the case law of the CJEU prove that the Commission has not eliminated the Court’s influence over EU antitrust. In addition to catalysing divergence in its

²⁰⁸ Commission, ‘Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives’ COM (2014) 453 final, 8.

²⁰⁹ Commission, ‘Report on the functioning of Regulation 1/2003’ COM (2009) 206, 3.

²¹⁰ Sinclair (n 194) 625.

²¹¹ COM (2014) 453 final (n 208) 8.

²¹² German Monopolies Commission, *Cartel policy change in the European Union? On the European Commission’s White Paper of 28th April 1999* (Nomos Verlag 2000) para 40.

acceleration of modernisation, the Court has furthermore exacerbated such fragmentation through patterns of jurisprudence inconsistent with the aims of the Commission and the prior case law of the CJEU itself. This section explores divergences arising from: (i) the inconsistent application of Article 101, (ii) procedural and institutional differences between NCAs, and (iii) the disparate adoption between NCAs of the 'more economic approach' in the context of Article 101(3).

(i) Article 101(1)

Divergence in the application of Article 101(1)²¹³ has arisen for two reasons: legislative limitation and CJEU doctrine. Whilst the original legislative proposal for Regulation 1/2003 provided for the total exclusion of national law when an agreement fell within the scope of Article 101,²¹⁴ controversial reception by Member States saw the exclusion of this provision in the Modernisation White Paper.²¹⁵ National legislatures are thus permitted to limit the application of EU competition law. Whilst such legislation and the invocation thereof remains exceptional in some Member States,²¹⁶ other jurisdictions have introduced legislative limitations of Article 101 on a concerningly *ad hoc* basis. The Hungarian Parliament, for instance, has promulgated legislation exempting anti-competitive agreements in the agricultural sector in order to ensure a fair income for producers,²¹⁷ with the intention of exempting a specific anti-competitive agreement before the Hungarian NCA. This intervention led to the termination of proceedings in that case,²¹⁸ concurrent cases²¹⁹ and has seemingly deterred any subsequent

²¹³ Once again, it is to be recalled that Article 101(1) contains the blanket prohibition on anticompetitive agreements. According to the Treaties, and the CJEU's interpretation thereof (see *Société Technique Minière* (n 17)), exemption may only occur at a latter stage of analysis under Article 101(3).

²¹⁴ COM (2000) 582 final (n 196).

²¹⁵ Wouter PJ Wils, 'Ten Years of Regulation 1/2003: A Retrospective' (2013) 4(4) *Journal of European Competition Law and Practice* 293, 295.

²¹⁶ E.g. the UK Public Policy Clause examined below.

²¹⁷ Kati J. Cseres, "'Acceptable' Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic and Social Dimensions of (Strengthening Farmers') Bargaining Power' (2020) 65(3) *The Antitrust Bulletin* 401, 402.

²¹⁸ GVH (Hungarian NCA) [2012] *Watermelon* case (Vj-62/2012).

²¹⁹ GVH [2009] *Sugar Cartel* case (Vj-50/2009).

investigation in the agricultural sector. Similarly, the German legislature has amended the Federal Forests Act²²⁰ in response to a specific infringement finding of the German NCA regarding the sale and marketing of timber.²²¹ Such legislation leads to uncertainty in antitrust policy and has been criticised by both commentators²²² and the NCAs themselves.²²³

Secondly, the CJEU has developed doctrine to allow the exemption of the application of Article 101(1) in certain cases. Through adoption and interpretation of the ‘state action defence’ of the US Supreme Court,²²⁴ it is now established in the EU that the conduct of a Member State may be shielded from the application of Article 101 where the State engages in a *bona fide* exercise of its sovereign regulatory power.²²⁵ Furthermore, private entities may also enjoy protection under this defence where they pursue a ‘clearly articulated’ state policy and are subject to ‘active supervision’ by the state.²²⁶ Despite ruling in *INNO/ATAB* that national measures mandating anti-competitive practices would not generally be compatible with the Treaties,²²⁷ the CJEU has upheld such state measures.²²⁸ The three-step test governing this exception has, however, been repeatedly applied inconsistently by the European Courts, with the CJEU requiring cumulative satisfaction of all three criteria,²²⁹ satisfaction of selected criteria,²³⁰ and merging this three-pronged approach into a novel test on

²²⁰ Gesetz zur Erhaltung des Waldes und zur Förderung der Forstwirtschaft, Section 46(2) (German Forestry Legislation).

²²¹ Bundeskartellamt (German NCA) [2015] *Gemeinsame Rundholzvermarktung durch das Land Baden-Württemberg* (B1-72/12).

²²² Balázs Csepai, ‘The ceasefire is over’ (2015) 36(9) *European Competition Law Review* 404.

²²³ Brook and Cseres in Varju (n 5).

²²⁴ *Parker v Brown* 317 US 341 (1943) (US Supreme Court) para 5; *California Liquor Dealers v Midcal Aluminium* 445 US 97 (1980) para II, 3 (US Supreme Court).

²²⁵ See Damien Gerard, ‘EU Competition Policy after Lisbon: Time to Review the ‘State Action Doctrine?’ (2010) 1(3) *Journal of Competition Law and Practice* 202.

²²⁶ Timothy J Murris, ‘State intervention/State action—a U.S. Perspective’ in Barry E. Hawk (ed), *Fordham Corporate Law Institute* (New York, 2003) 531, 546.

²²⁷ Case 13/77 *INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115, para 35.

²²⁸ Case 267/86 *Pascal Van Eyncke v ASPA NV* [1988] 4769.

²²⁹ See *Van Eyncke* (ibid); C-2/91 *Meng* [1993] ECR I-5751; C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851.

²³⁰ Case C-185/91 *Reiff* [1993] ECR I-5801; C-35/96 *Commission v Italy* [1998] ECR I-3851.

occasion.²³¹ Recognising the uncertainty arising from this varied application of the doctrine, academics,²³² Advocate Generals,²³³ and, remarkably, the Commission itself²³⁴ have urged the Court to clarify its jurisprudence to no avail.

Moreover, the CJEU has also established an 'inherent restrictions exception' in cases where potentially anti-competitive state measures pursue a legitimate aim. While setting out a test based on the 'objectives', 'legitimate aim', and 'proportionality' of the measures,²³⁵ the Court failed to establish 'a specific framework that could guide the assessment of these exceptions', and has facilitated the development of 'ad hoc, sector-specific' jurisprudence in national courts, leaving 'an exceptionally large margin of discretion to national competition enforcers'.²³⁶ This open-ended exception to the application of Article 101 has allowed NCAs to balance various national interests against competition law interests, giving rise to discrepancies in their application amongst NCAs,²³⁷ and between NCAs and the Commission.²³⁸

(ii) Institutional Differences

Additionally, procedural differences and varying institutional arrangements between NCAs facilitate the permeation of domestic interests and political influences into antitrust enforcement. Differences in enforcement practices between Member States arising from varying procedures governing sanctioning, investigation prioritisation, judicial review, and insulation from government influence tend to reflect national political dispositions. This can be observed through a comparison of the enforcement practices of the German Bundeskartellamt (BKartA) and the UK Competition and Markets Authority

²³¹ See Case C-94/04 *Cipolla* [2006] ECR I-11421.

²³² Gerard (n 225).

²³³ See Advocate General's Opinion in C-180/98 *Parlov* ECLI:EU:C:2000:151, para 161: 'I do not find the case law ... very satisfactory'.

²³⁴ Reported and discussed by AG Maduro in his opinion in *Cipolla* (n 231).

²³⁵ Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 97. See also Case C-519/04 P *Meca-Medina v Commission* [2006] ECR I-6991.

²³⁶ Brook and Cseres (n 223) 201.

²³⁷ See Or Brook, 'Coding Non-Competition Interests Under Article 101 TFEU: A Quantitative and Qualitative Study' [2019] PhD Thesis, University of Amsterdam.

²³⁸ *ibid.*

(CMA),²³⁹ particularly in the context of the complex and rapidly emerging category of digital market infringements. It is important to note that analysis of the UK CMA is of purely historical significance given the UK's departure from the EU, and is included in the present discussion to exemplify Member State divergence. Cognisant of the harmful effects of hyper-enforcement on innovation, the CMA tends to adopt a reluctant approach to intervention in e-commerce cases,²⁴⁰ reflecting its 'liberal economy'²⁴¹ and 'neo-American' capitalist economic regime.²⁴² Conversely, the BKartA's more 'restrictive policy'²⁴³ focused on optimising social welfare has been attributed to its 'European Rhine model' of economics.²⁴⁴ The lack of procedural consistency across the NCAs of Member States permits and facilitates the permeation of such political values into competition enforcement, threatening the uniform application of competition law.

Divergence arising from such procedural incoherence is exemplified in the two NCAs' differing approaches to prioritising cases. Unlike the German BKartA in which there is no formal prioritisation procedure, the UK CMA may initiate investigation if there are 'reasonable grounds' for suspecting an infringement of competition law.²⁴⁵ Cases are chosen based on the CMA's prioritisation principles, which require a consideration of an investigation's impact on consumer welfare, strategic significance, probability of success, and demand on resources.²⁴⁶ This leads to divergent enforcement in certain e-commerce practices, such as online sales bans, which have both positive and negative effects on competition. While the BkartA's lack of a formal prioritisation procedure arguably allows it to afford undue weight to

²³⁹ An insightful analysis and comparison of the two authorities can be found in: Walker (n 4) 468. It must, however, be noted that analysis of the CMA is only of historical relevance given the United Kingdom's separation from the European Union.

²⁴⁰ Alex Schofield, 'Personalized Pricing in the Digital Era' (2019) 18(1) *Competition Law Journal* 35, 40.

²⁴¹ Christopher Townley, 'Coordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)' (2014) 33(1) *Yearbook of European Law* 194, 243.

²⁴² See Michel Albert, *Capitalism Against Capitalism* (Whurr Publishers 1993).

²⁴³ Marc Wiggers, Robin Struijlaart and Johannes Dibbits, *Digital Competition Law in Europe: A Concise Guide* (Kluwer 2019) 128.

²⁴⁴ Schofield (n 240).

²⁴⁵ Competition Act 1998, s 25.

²⁴⁶ Competition and Markets Authority, 'Prioritisation Principles for the CMA' [2014] CMA16.

anti-competitive effects, the CMA's prioritisation principles often prevent it from investigating conduct where the detriment of which is not immediately clear.

Furthermore, the divergent mechanisms used to quantify fines can lead to inconsistent sanctioning across Member States. The CMA sets fines on an *ad hoc* basis, with a cap of 30% of an undertaking's turnover in the geographic market affected by the infringement in the past year,²⁴⁷ whilst the harsher BKartA starts fines at 10% of the infringement's total turnover throughout the course of the infringement, and further multiplies in proportion to the undertaking's total global turnover.²⁴⁸ Moreover, the BKartA's aggressive enforcement strategy has led to enormous discrepancy in fine revenue between the two authorities. Whilst the BKartA issued a total of €5 billion in fines from 2004 to 2020, the CMA imposed a mere £589 million in financial sanctions during the same period. The CMA's reluctance appears to be attributable to its fear of disincentivising innovation, particularly in the case of small undertakings, having granted significant fine reductions based on the size of firms.²⁴⁹

Differing appellate procedures and standards of judicial review additionally demonstrate the permeation of national interest through procedural inconsistencies. Prior to Brexit, it had been contended that the UK was 'the best jurisdiction in the world to defend a competition case',²⁵⁰ owing in part to a three-tier system of appeal allowing both a full merits review before the Competition Appeals Tribunal (CAT)²⁵¹ and further review on points of law before the Court of Appeal and Supreme Court,²⁵² that often led to the significant reduction of fines. Rather dramatically, the German appellate procedure not only leads to a full merits review, but rather a reinitiation of investigation by the public prosecutor.²⁵³ The fine is recalculated without reference to the original sanction and, unlike in the UK, is often increased to the

²⁴⁷ Competition and Markets Authority, 'CMA's guidance as to the appropriate amount of a penalty' [2018] CMA75.

²⁴⁸ Bundeskartellamt, 'Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings' (2013) para II 1(6).

²⁴⁹ *Ping Europe Ltd v Competition and Markets Authority* [2018] CAT 13.

²⁵⁰ UK Competition Authorities, 'The UK Competition Regime' (Report by the Comptroller and Auditor General) HC 737, Session 2015-16 (February 2016) para 2.15.

²⁵¹ See, for example, *Freeserve.com Plc v Director General of Telecommunications* [2003] CAT 5.

²⁵² Competition Appeal Tribunal Rules 2015 (SI 2015/1648), s 9(1).

²⁵³ Ordnungswidrigkeitengesetz, s 67 (Germany).

EU statutory limit.²⁵⁴ It has been observed that the tendency of the CAT to reduce fines and quash decisions of the CMA disincentivises the imposition of financial sanctions, encouraging the UK CMA to resort to alternative methods of competition enforcement.²⁵⁵ Additionally, a lower threshold governing the right of third parties to appeal in the UK²⁵⁶ further facilitates appeal and success before the CAT.²⁵⁷

The most significant factor facilitating the percolation of domestic interests into competition enforcement practices is, however, the institutional isolation afforded to NCAs. Aside from legislation, other conduits of influence can encroach upon the enforcement prerogative of NCAs. Although the UK Secretary for State may exempt agreements from infringement findings in exceptional cases,²⁵⁸ the CMA is also subject to the guidelines set out in the Department for Business, Innovation and Skills' 'strategic steer'.²⁵⁹ The German BKartA, while also subject to occasional and exceptional ministerial interference,²⁶⁰ lacks such express subordination to government policy. In practice, the CMA's subservience is manifest in its deference to governmental intervention in complex areas of competition law. On the question of the attribution of liability arising from collusive price-fixing by artificially intelligent algorithms,²⁶¹ whilst the BKartA has taken a strict approach dismissing any relief of liability,²⁶² the CMA has declined to pronounce its stance on the issue,

²⁵⁴ Fabian Badtke, Alexander Birnstiel, and Till Steinworth, 'The Cartels and Leniency Review: Germany' in John D Buretta and John Terzaken (eds), *Cartels and Leniency Review* (10th Edition, The Law Reviews, Law Business Research Ltd 2022).

²⁵⁵ See Walker (n 4).

²⁵⁶ See Competition Act, s 47(1) compared to the Gesetz gegen Wettbewerbsbeschränkungen, s 63(2).

²⁵⁷ This third party right to appeal notably resulted in a recent CMA finding in *Skyscanner Limited v Competition and Markets Authority* [2014] CAT 16 being quashed.

²⁵⁸ Competition Act, schedule 3 para 7.

²⁵⁹ See Competition and Markets Authority, 'Online platforms and Digital Advertising Market Study: Final Report' (2020) 420.

²⁶⁰ Gesetz gegen Wettbewerbsbeschränkungen, s 52.

²⁶¹ See, for example, the 'Posters and Frames' case: Competition and Markets Authority, 'Decision of the Competition and Markets Authority: Online Sales of Posters and Frames' (2016) Case 50223.

²⁶² Bundeskartellamt, 'Lufthansa tickets 25-30 per cent more expensive after Air Berlin insolvency' (*Bundeskartellamt*, 2018) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_05_2018_Lufthansa.html> accessed 11 March 2023.

highlighting that an answer ‘may be a task for government’.²⁶³ Similarly, on the issue of Big-Data, whilst the BKartA has found against Facebook’s conditions for the use and collection of data,²⁶⁴ the CMA has proposed government intervention and the introduction of a new enforcement body for such breaches.²⁶⁵

The effects of procedural divergence are moreover exacerbated by inconsistent jurisprudence from the CJEU, exemplified in case law arising from online sales bans and selective distribution schemes. The Court’s failure to conclusively reconcile an ‘object-based’ approach to such bans adopted in *Pierre Fabre*²⁶⁶ with an ‘effects-based’ approach demonstrated in *Coty*²⁶⁷ has permitted differing approaches among NCAs. The UK has seemingly adhered to the transition of the CJEU’s approach; applying the ‘infringement by object’ approach in cases prior to *Coty*,²⁶⁸ and adopting an ‘infringement by effect’ stance thereafter.²⁶⁹ The German BKartA has not, however, demonstrated such conformity, and has generally maintained an ‘object-based’ approach even following *Coty*.²⁷⁰ Whilst this lack of clarity may be addressed by the CJEU in future judgments, the confusion merely demonstrates issues posed by the procedural divergence between the practices of NCAs of the various Member States. Although the ECN has realised some degree of procedural convergence, procedural differences persist within NCAs and the broader legal systems of Member States.

²⁶³ David Currie, Chairman of Competition and Markets Authority, ‘David Currie on the role of competition in stimulating innovation’ (Speech given at the Concurrences Innovation Economics Conference, King’s College London, 3 February 2017) para 17.

²⁶⁴ Bundeskartellamt, ‘Decision on *Facebook* rendered by the Bundesgerichtshof’ [2020] BGH (KVR 69/19).

²⁶⁵ Competition and Markets Authority (n 215) para 9.7.

²⁶⁶ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence* [2011] ECR I-9419 [41].

²⁶⁷ Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:603 [60].

²⁶⁸ Office of Fair Trading, Roma-branded mobility scooters: prohibitions on online sales and online price advertising’ [2013] (CE/9578-12).

²⁶⁹ *Ping* (n 249).

²⁷⁰ Bundesgerichtshof decision, *Asics* [2017] KVZ 41/17.

(iii) Article 101(3)

The greatest divergence in competition enforcement has, however, arisen from the decentralised application of Article 101(3) exemptions. Whilst the delegation of the Commission's monopoly over this essential antitrust provision aimed to mitigate the 'application of multiple national standards which may be different in content or enforcement from the standard of [EU] competition law',²⁷¹ the 'considerable discretionary power'²⁷² inherent in its application has inevitably led to inconsistent application across jurisdictions. NCAs differ in the extent to which they abide by the Commission's 'more economic approach' and limit the provision of 101(3) exemptions to 'direct economic benefits'.²⁷³

Some national authorities have demonstrated an adoption of this more economic approach. The UK CMA,²⁷⁴ in reference to the Commission's guidelines, has expressly declared that it shall only take account of direct economic benefits in applying Article 101(3),²⁷⁵ and has declined to examine social benefits derived from the provision of services in deprived areas²⁷⁶ and the improvement of working conditions.²⁷⁷ Similarly, the Hungarian Gazdasági Versenyhivatal has only ever accepted direct economic benefits in awarding an exemption under Article 101;²⁷⁸ holding that education, promotion of research and employment could not constitute benefits within the meaning of the Article.²⁷⁹

Conversely, other NCAs have rejected this objective economic analysis. The French Autorité de la Concurrence has maintained the applicability of

²⁷¹ Progress report from the Presidency of the Council of the European Union to COREPER, 13563/01 [10].

²⁷² European Commission (n 13) point 190.

²⁷³ Brook (n 34) 129.

²⁷⁴ It must be noted that, following the UK's departure from the EU, analysis of the UK CMA is of purely historical significance, and is included here to exemplify divergence between Member State NCAs.

²⁷⁵ Competition and Markets Authority, *Tobacco* [2016] (CE/2596-03) para 7.58.

²⁷⁶ United Kingdom Office of Fair Trading, 'Short-Form Opinion on Rural Broadband Wayleave rates' [2012].

²⁷⁷ Competition and Markets Authority, *Modeling Sector* [2016] (CE-9859/14) para 4.170.

²⁷⁸ Brook (n 34) 129.

²⁷⁹ *ibid.*

Article 101(3) to benefits such as fair trade rules, employment protection,²⁸⁰ and culture.²⁸¹ Whilst the authority has asserted that its mandate is limited to ensuring the effective operation of markets for consumers and that the promotion of other public policies was a matter for government,²⁸² it has subsequently continued to consider a wide array of benefits in applying Article 101(3) such as public health, environmental considerations, and rural development.²⁸³

These divergent approaches tend to reflect political influence. For instance, the proceduralised practice of the Dutch Autoriteit Consument to exempt agreements of beneficial consequence from a sustainability perspective,²⁸⁴ in cases such as the coordinated closure of coal power plants,²⁸⁵ collusion regarding energy-neutral renovation practices,²⁸⁶ and limitations on the sale of livestock produced in an environmentally harmful manner,²⁸⁷ has been mandated by the Minister for Economic Affairs. This followed a parliamentary request²⁸⁸ arising from demands of the Minister for Agriculture for the consideration of animal welfare and environmental benefits in competition enforcement proceedings.²⁸⁹ The NCA has, nonetheless, seemingly courted governmental intervention, and has declared that it would not ‘take action against sustainability arrangements that enjoy broad social support if all parties

²⁸⁰ Autorité de la Concurrence (French NCA) *Bleach* (05-D-03).

²⁸¹ Autorité de la Concurrence (French NCA) *Digital books* (09-A-56).

²⁸² International Competition Network, *Competition Enforcement and Consumer Welfare: Setting the Agenda* (2011) 25.

²⁸³ Autorité de la Concurrence (French NCA) *Relay Masts* (11-A-20).

²⁸⁴ Authority for Consumers and Markets (Dutch NCA), ‘Vision Document on Competition and Sustainability’ [2014].

²⁸⁵ Authority for Consumers and Markets (Dutch NCA), ‘Analysis of the Planned Agreement on Closing down Coal Power Plants from the 1980s as Part of the Social and Economic Council of the Netherlands’ [2013].

²⁸⁶ Authority for Consumers and Markets (Dutch NCA), *De Troomversnelling* [2013] (ACM/DM/2013/205913).

²⁸⁷ Authority for Consumers and Markets (Dutch NCA), *Chicken for Tomorrow* [2014] (ACM/DM/2014/206028).

²⁸⁸ Dijkgraaf/Geurts Motion of 24 January 2013, Parliamentary Documents II, 2012/2013, 33 400 XIII, no. 99.

²⁸⁹ Letter from Henk Bleker (Minister of Agriculture) to the House of Representatives re sustainability initiatives and competition law (22.11.2011).

involved such as the government, citizen representatives, and businesses are positive about the arrangements'.²⁹⁰

Whilst governmental intervention and varying competition cultures have given rise to this divergence in the application of Article 101(3), the CJEU has exacerbated this discrepancy by failing to lend juridical support to the 'more economic approach'. When dealing with Article 101(3) exemptions, the CJEU has articulated little support for any ideological limitation of the provision to objective economic analysis. Preliminary rulings have generally elicited brief discussion as to the possibility of exemption, failing to outline the application of the conditions of the provision to the cases before the Court,²⁹¹ or merely reiterating the wording of the Article.²⁹² Judgments on appeal have generally upheld the reasoning of the Commission without further analysis²⁹³ or have focused on procedural matters.²⁹⁴

Moreover, beyond this judicial reticence, there are firmer indications of the CJEU's disapproval of the Commission's more economic approach. Preliminary rulings have continued to uphold the application of Article 101(3) exemptions to 'indirect and non-economic benefits'²⁹⁵ in areas such as regulated professions,²⁹⁶ financial services,²⁹⁷ and sport in practice,²⁹⁸ and in areas such as research and development,²⁹⁹ and culture³⁰⁰ in theory. Furthermore, even after the introduction of Regulation 1/2003, the CJEU has upheld prior Commission decisions entertaining the consideration of benefits regarding financial

²⁹⁰ Authority for Consumers and Markets (Dutch NCA), 'ACM sets basic principles for oversight of sustainability agreements' (*ACM*, 2016) <<https://www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements2016>> [accessed 11 March 2023].

²⁹¹ Joined Cases C-403/08 and C- 429/08 *Football Association Premier League Ltd* ECLI:EU:C:2011:631.

²⁹² Case C-238/05 *AsnefEquifax* [2006] ECR I-11125.

²⁹³ Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209.

²⁹⁴ Joined Case T-259/02 to T-264/02 and T-271/02 *Rajiffeisen Zentralbank Österreich AG* [2006] ECR II-5169.

²⁹⁵ Brook (n 34) 132.

²⁹⁶ Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECLI:EU:C:2006:734.

²⁹⁷ *Laurent Piau* (n 293).

²⁹⁸ *Premier League* (n 291).

²⁹⁹ Case T-168/01 *GlaxoSmithKline Services v Commission* EU:T:2006:2969.

³⁰⁰ Case T-451/08 *Stim v Commission* [2013] CLI:EU:T:2013:189.

services,³⁰¹ the environment,³⁰² and sport.³⁰³ Additionally, the General Court has declared that cross-sectional clauses under the Treaties can require the consideration of non-economic benefits under Article 101(3).³⁰⁴

The failure of Regulation 1/2003 to preclude national legislative intrusion upon the application of Article 101, the failure of soft-law instruments to restrict the discretionary national application of Article 101(3), and the lack of procedural convergence among NCAs all point to the prematurity of modernisation. Whilst, as set out above, this decentralisation and the fragmentation arising therefrom may, itself, be attributed to the aggressive case law of the Court, the CJEU has further exacerbated such divergence through inconsistent and contradictory jurisprudence.

V. RECENTRALISATION

Fragmentation in EU competition law appears to have prompted a new phase in its history. In contrast to prior subtle efforts to consolidate power through adroit decentralisation, the Commission has, through the recent enactment of both the 2018 ECN+ Directive and the 2022 Digital Markets Act (DMA), suggested a novel approach: recentralisation. Both the DMA and ECN+ Directive represent recentralisation in two distinct, yet complementary, respects: ‘soft’ recentralisation and ‘hard’ recentralisation. The former regards a strengthening of the European Competition Network and greater insulation of National Competition Agencies from domestic influence. The latter arises from the resurrection of the Commission’s exclusive enforcement prerogative in the sectoral sphere of digital markets. Additionally, the DMA exhibits a new legislative trend: the adoption of a regulatory regime independent of a competition law Treaty-basis to permit centralised enforcement, allow flexible economic approach, and evade administrative constraints and judicial oversight through a subversion of meaningful standards of review. It is argued that recentralisation efforts respond to crucial flaws in modernised EU competition law.

³⁰¹ Case T-259/02 *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169.

³⁰² Case T-419/03 *Altstoff Recycling Austria AG v Commission* [2011] ECR II-975.

³⁰³ *Laurent Piau* (n 293).

³⁰⁴ T-451/08, *Föreningen Svenska Tonsättares Internationella Musikbyrå v Commission* [2013] CLI:EU:T:2013:189.

(i) ‘Soft’ Recentralisation

The foregoing analysis of the landscape of EU antitrust enforcement identifies three principal issues arising from premature decentralisation: (i) institutional and procedural divergence between NCAs, (ii) domestic political interference with NCAs’ enforcement, and (iii) inconsistent adoption among NCAs of commission guidance. In light of the institutional dissonance between the Court and Commission (the history and effects of which this article has sketched), and obstacles to legislative intervention such as subsidiarity, a clear solution presented itself to the Commission: development of the ECN.

The ECN+ Directive³⁰⁵ has represented a considerable advancement in this regard. Requiring transposition by February 4th 2021, the Directive has sought to make NCAs ‘more independent and effective enforcers’;³⁰⁶ facilitating mutual cooperation, reaffirming and harmonising enforcement tools, and insulating NCAs from governmental interference. These provisions collectively amount to a fortification of the independence of NCAs. Whilst such independence is generally recognised as important for the good practice of competition authorities by the OECD,³⁰⁷ UNCTAD,³⁰⁸ and academics globally,³⁰⁹ it is noteworthy that the independence requirements ‘that are driving NCAs further and further away from the national governments’ influence are, curiously enough, counterbalanced by a broader power of the Commission³¹⁰

³⁰⁵ Council Directive (EC) 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 (ECN+ Directive) [2018] OJ L1/14.

³⁰⁶ Adriaan Dierx and Fabienne Ilzkovitz, ‘EU Competition Policy: an application of the failing forward framework’ (2021) 28(1) *Journal of European Public Policy* 1630, 1643.

³⁰⁷ Enrico Alemani and others, ‘New Indicators of Competition Law and Policy in 2013 for OECD and Non-OECD Countries’ (2013) OECD Economics Department Working Papers No. 1104.

³⁰⁸ See UNCTAD, ‘Independence and accountability of competition authorities’ [2008], Note by the UNCTAD secretariat referring to other international organisations including the World Trade Organisation, World Bank, International Monetary Fund and the Organisation for Economic Cooperation and Development.

³⁰⁹ See Tay-Cheng Ma, ‘Competition Authority Independence, Antitrust, Effectiveness, and Institutions’ (2010) 30 *International Review of Law and Economics* 226.

³¹⁰ Molleda (n 206) 173.

The Directive provides that NCAs are to be able to perform their duties, exercise their powers, and set their priorities free from government influence.³¹¹ National authorities are to be equipped with a sufficient number of qualified staff and are to be provided with sufficient financial and technical resources to effectively enforce Article 101.³¹² Additionally, NCAs are to be granted minimum powers of investigation and sanction, including the power to inspect business premises,³¹³ to request information from undertakings,³¹⁴ issue interim measures,³¹⁵ accept commitment decisions,³¹⁶ and impose effective, proportionate, and dissuasive fines.³¹⁷ While this standardisation of enforcement capabilities, along with minimum fining amounts,³¹⁸ contributes to consistency and uniformity in the application of competition law, it also frees NCAs from reliance on national conferral of such powers. The Directive furthermore promotes closer cooperation between NCAs. In addition to imposing a general principle of cooperation,³¹⁹ it empowers NCAs to partake in investigations, receive material from, and request that their decisions be imposed in other Member States.³²⁰ The ECN+ Directive also increases the coordination of leniency programmes throughout the Member States; allowing the submission of leniency applications to multiple jurisdictions,³²¹ providing for criminal immunity to compliant personnel,³²² and requiring that leniency statements and settlement submissions enjoy the same protection at national as at EU level.

³¹¹ ECN+ Directive (n 305) Article 4. According to the ECN's Recommendation on the Power to Set priorities, less than half of NCAs had the power to set their own priorities prior to the Directive.

³¹² *ibid* Article 5.

³¹³ *ibid* Article 6.

³¹⁴ *ibid* Article 8.

³¹⁵ *ibid* Article 10.

³¹⁶ *ibid* Article 11.

³¹⁷ *ibid* Article 13.

³¹⁸ *ibid* Articles 14 and 15.

³¹⁹ *ibid* Article 27.

³²⁰ *ibid* Articles 24 and 26.

³²¹ *ibid* Article 22.

³²² *ibid* Article 23.

(ii) 'Hard' Recentralisation

Recently adopted and due to come into effect in early 2023, the Digital Markets Act seeks to ensure 'fair and open digital markets'³²³ by 'neutralis[ing] the competitive advantages enjoyed by gatekeepers'³²⁴ therein. Under this new regime, certain 'core platform service'³²⁵ providers classified as 'gatekeepers'³²⁶ shall be subject to a framework of prescriptive *per se*, *ex-ante* rules; representing a novel form of regulation and a significant 'paradigm shift' in EU competition law.³²⁷ This regulation purports to empower the Commission to identify and address structural issues in such markets at an early stage in order to prevent the entrenchment, exploitation, and leveraging of market power within gatekeepers to the detriment of third party adjacent activities and consumer welfare. Though lauded as a new 'gold standard' in the realm of digital market competition enforcement,³²⁸ the DMA also represents a stark pivot towards recentralisation in legislative policy.

In discussing the DMA, it is necessary to address its contentious interaction with EU competition law. Despite consistent academic reference to the Regulation's 'obvious proximity to EU competition law'³²⁹ and clear inspiration from antitrust cases and investigations,³³⁰ the Commission insists

³²³ Christopher Carugatti, 'The Role of National Authorities in the Digital Markets Act' (2022) 1 *Concurrences* 1.

³²⁴ Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12(7) *Journal of European Competition Law and Practice* 561, 568.

³²⁵ DMA (n 1) Article 2(2) provides for the identification and definition of 'core platform services'.

³²⁶ *ibid* Article 3(1).

³²⁷ Assimakis P Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Eleanor M Fox, *Liber Amicorum, Antitrust Ambassador to the World* (Concurrences 2022) 425.

³²⁸ Council of the European Union, 'DSA: Council Gives Final Approval to the Protection of Users' Rights Online' (*Council of the European Union*, 4 October 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/10/04/dsa-council-gives-final-approval-to-the-protection-of-users-rights-online/>> accessed 9 March 2023.

³²⁹ Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal' (2021) 3 *ZEuP* 503, 509.

³³⁰ See Commission Staff Working Document, 'Impact Assessment Report – Annexes' SWD(2020) 363 final (Brussels, 2020).

that the DMA ‘is not a competition law instrument’,³³¹ but rather pursues ‘an objective that is complementary to, but different from, that of protecting undistorted competition on any given market’.³³² This article partially agrees. Whilst unmistakably pursuing goals analogous to Articles 101 and 102 TFEU, the DMA is, formally, an entirely independent regulatory instrument, enacted on the unorthodox Treaty basis of Article 114 TFEU.³³³

This section analyses the legislative form of the DMA. Whilst conceding that its system of predominantly centralised enforcement is appropriate in the context of addressing gatekeepers of digital markets, a more critical analysis of the Regulations suggests that the novel regime is a reaction to crucial structural, ideological, and institutional flaws of the modernised regime of EU competition law. By resurrecting a centralised enforcement prerogative, omitting reference to objective economic criteria, and eschewing meaningful standards of review, the DMA seeks to avoid fractured application, dismiss the ‘more economic approach’, and evade judicial oversight. Whilst conveniently relieving the Commission of post-modernisation encumbrances in this sector, this artful drafting suggests that traditional competition law, based on Articles 101 and 102, is not adequate to deal with complexifying markets. Whilst section V examines the practical implications of modernisation in traditional markets, the present section discusses an apparent recent legislative reaction thereto.

Both Articles 5 and 6 of the DMA address market-entry issues such as transparency in advertisement intermediation, the mobility of both end-users and business-users, unfair pricing, self-preferencing, and the interoperability of software. The former provision prohibits certain ‘black list[ed]’³³⁴ anti-competitive behaviours, whilst the latter imposes less detailed obligations upon gatekeepers, requiring further specification by the Commission and

³³¹ Commissioner Margrethe Vestager, ‘Competition in a Digital Age’ (*European Commission*, 17 March 2021)

<https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcement/s/competition-digital-age_en> accessed 9 March 2023.

³³² DMA (n 1) Recital 10.

³³³ Article 114 TFEU is the central EU treaty provision for the harmonisation of EU law in Member States.

³³⁴ See Alexandre de Stree, ‘The European proposal for a Digital Markets Act: A first assessment’ [2021] Centre on Regulation in Europe <https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf> accessed 9 March 2023.

facilitating the structural redesign of concerned platforms. Whilst the prescriptive and *ex-ante* nature of these regulations represents, in and of itself, a groundbreaking deviation from prior form in EU competition law (discussed below), the DMA's conferral of exclusive enforcement authority to the European Commission represents a stark manifestation of a policy of recentralisation. Breaking from 'tradition' and suggesting 'a big step forward in European integration',³³⁵ Article 3 concentrates the power to designate 'gatekeeper' status, a prerequisite to the application of the DMA's obligations, within the exclusive (and seemingly unrestricted)^{332,336} competence of the Commission.

Evoking 'memories of the Commission's case overload ... under Regulation 17/62',³³⁷ the adoption of a system of centralised enforcement of the DMA has attracted much academic attention, with support for this legislative choice largely prevailing on account of the nature of the targeted undertakings, cost considerations, and a fear of fragmentation. Considering its focus on a remarkably small number³³⁸ of 'large, often global, firms'³³⁹ of 'pan-European reach'³⁴⁰ largely engaged in cross-border activity,³⁴¹ centralised enforcement is strategically obvious. In addition to mitigating the potential for capture by local operators and governments,³⁴² this model prevents needless duplication of enforcement efforts to address platforms that will remain similar in each Member State.³⁴³ Furthermore, centralised enforcement will avoid unnecessary coordination between NCAs and the Commission, cutting costs and preventing delays.³⁴⁴

³³⁵ Alexandre de Stree and Pierre Larouche, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) *Journal of European Competition Law and Practice* 542, 558.

³³⁶ See the discussion below on administrative constraints in the DMA.

³³⁷ Schweitzer (n 329) 535.

³³⁸ The DMA's Impact Assessment suggests that there may be 10-15 such gatekeepers.

³³⁹ Alexandre De Stree and Paul Larouche, 'The European Digital Markets Act: How to Improve a Regulatory Revolution' (2021) 2 *Conurrences* 46, 58.

³⁴⁰ Impact Assessment of the DMA.

³⁴¹ Almost 25% of total online trade in Europe is cross-border. By 2025, it is expected that online marketplaces will facilitate approximately 65% of cross-border online sales in Europe: European Commission, 'Digital Markets Act: Impact Assessment Support Study – Annexes' (2020-006380) 14.

³⁴² Carugatti (n 323).

³⁴³ Monti (n 167).

³⁴⁴ *ibid.*

Converse arguments in favour of decentralised enforcement cite the capacity of NCAs to effectively receive, filter, and analyse complaints. Considering sectoral emphasis on quick intervention³⁴⁵ in conjunction with the large number of businesses that the DMA purports to protect,³⁴⁶ it has been argued that NCAs might be better placed to receive complaints from small and medium sized businesses compared to the ‘large, vertical, and bureaucratic institution’ of the Commission.³⁴⁷ Additionally, given the resources and local expertise of most NCAs, it has been argued that national enforcers are suitably positioned to act as a ‘valuable radar-screen’ or ‘primary filter’ for complaints.³⁴⁸ Similarly, given the proximity of national enforcement bodies ‘to the field’³⁴⁹ and the expectation that gatekeepers may alter various aspects of targeted platforms between Member States, NCAs have been proposed as optimal institutions to monitor compliance with the suite of obligations contained in the DMA, as has been observed in the context of EU merger control.³⁵⁰

The advantages of NCA engagement in the enforcement of the DMA may not, however, require express legislative delegation of further enforcement responsibility. Indeed, as submitted by NCAs themselves, the optimal interaction between national actors and the Commission in the enforcement of the DMA may be achieved through enhanced cooperation.³⁵¹ Interestingly, the advisory role of NCAs in the sphere of digital market ‘gatekeepers’ maintained in the DMA suggests the potential for cooperative networking to play a more pronounced role in future centralised competition regimes, highlighting the complementarity of both ‘hard’ and ‘soft’ recentralisation. Though incapable of enforcing the DMA, NCAs may issue non-binding advice on the implementation of decisions,³⁵² request the commencement of market

³⁴⁵ In a joint submission to the Commission, NCAs stressed that ‘the ability to intervene quickly is recognised as an absolute necessity in digital markets’: see European Competition Network, ‘Joint paper of the heads of the national competition authorities of the European Union: How national competition agencies can strengthen the DMA’ [2021].

³⁴⁶ *ibid.*

³⁴⁷ Mollada (n 206) 177.

³⁴⁸ European Competition Network (n 345) 7.

³⁴⁹ Larouche and de Streel (n 342) 60.

³⁵⁰ Commission Decision, *NEWSCORP/TELEPIU* (COMP/M.2876) 23.

³⁵¹ See European Competition Network (n 345).

³⁵² DMA (n 1) Article 50.

investigations through the Digital Markets Advisory Committee,³⁵³ and are involved in the Commission's adoption of Delegated Acts to add new obligations to the DMA.³⁵⁴ Prior to the adoption of the DMA, some NCAs have played a significant role in the enforcement of competition law in the digital sector; with one study attributing 48 antitrust cases, 32 merger cases, 26 market investigations, 13 position papers and 36 reports in the digital markets sector to NCA activity.³⁵⁵ Indeed, some NCAs have exhibited particular dedication to digital market infringements, with five NCAs having dedicated digital economic units, and the German Bundeskartellamt having published the first study on the intersection of competition law and data protection in the *Facebook* antitrust case.³⁵⁶ Additionally, some NCAs are particularly skilled in particular digital market issues, such as the French NCA having taken 57% of total actions by NCAs in online advertising.³⁵⁷

As EU competition legislation advances and adapts to complex issues requiring centralised and harmonised enforcement, the skills, resources, and specialisations of various NCAs may be harnessed through cooperative networks such as the ECN and Digital Markets Advisory Committee. Though the subversion of domestic influence arising from the ECN+ Directive has, in and of itself, had a 'soft' recentralising effect, it also facilitates the Commission's black-letter prerogative in the enforcement of centralised competition regulations. In addition to mitigating divergence and fragmentation in the application of Article 101 and 102 TFEU, the strengthening of the ECN may further facilitate the involvement of NCAs in the context of emerging sectors in which EU competition legislation is suggesting a centripetal tendency. It is thus contended that, given its objectives, the DMA strikes an optimal institutional balance in its enforcement regime: maintaining centralised control whilst partially engaging the expertise and resources of national actors. However, a more critical analysis of the Regulation and the underlying concerns informing its drafting suggests the emergence of a concerning legislative technique,

³⁵³ *ibid* Article 41.

³⁵⁴ *ibid* Article 49(1).

³⁵⁵ See Carugatti (n 323) 3-4.

³⁵⁶ German Bundeskartellamt, 'Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources' (*Bundeskartellamt*, 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html> accessed 9 March 2023.

³⁵⁷ See Carugatti (n 323) 5.

especially if the DMA is perceived to be indicative of future drafting policy in complex sectoral spheres.

Described as its principal ambition,³⁵⁸ the centralised nature of the enforcement of the DMA seeks to address a fear of ‘fragmentation’³⁵⁹ and ‘risk of divergent regulatory solutions’.³⁶⁰ By ‘internalis[ing] interstate externalities that might create a rule from a State A on a State B’,³⁶¹ the DMA seeks to avoid ‘a complex, fragmented, and possibly contradictory regulatory landscape in Europe’.³⁶² Whilst the small number and pan-European nature of the market participants targeted has principally informed the DMA’s centralised enforcement regime, the fractured enforcement of EU competition law under Articles 101 and 102 is cited as an additional justification for the exclusion of NCAs and the adoption of an independent regulatory instrument.

Moreover, the legislative peculiarity of the DMA also appears to have been informed by the inappropriate constraints of the ‘more economic approach’.³⁶³ Given the ‘multisidedness’³⁶⁴ and complexity of the business model of targeted gatekeepers, the DMA ‘dismisses the consumer welfare test’ and recalibrates the Commission’s economic approach.³⁶⁵ By prescribing *ex-ante, per se* obligations with variable scope, enforcement under the DMA is not qualified by reference to stringent, effects-based consumer-welfare criteria, which are arguably unsuitable to digital markets. As previously argued by Ezrachi,³⁶⁶ a broad basis of enforcement criteria is of particular importance in tackling competition infringements in digital markets. Maintaining the goal of ensuring an effective competition structure supports the pursuit of infringements ‘which are detrimental to [consumers] through their impact on an effective competition

³⁵⁸ Schweitzer (n 329) 534.

³⁵⁹ *ibid.*

³⁶⁰ See the Explanatory Memorandum to the DMA (n 3) 15.

³⁶¹ Carugatti (n 323).

³⁶² Filomena Chirico, ‘Digital Markets Act: A Regulatory Perspective’ (2021) 12(7) *Journal of European Competition Law and Practice* 493, 498.

³⁶³ Note that the ‘more economic approach’ has also been incorporated into the Commission’s practice under Article 102 TFEU, addressing abuse of a dominant market position.

³⁶⁴ Schweitzer (n 329) 536.

³⁶⁵ *ibid.* 506.

³⁶⁶ Ezrachi (n 18).

structure³⁶⁷ and may help enforcers to target the anticompetitive use of networks, platforms, and data tools. Maintaining the objective of protecting efficiency in the allocation of resources for the benefit of the consumer is likely to protect and foster innovation in e-commerce.³⁶⁸ Maintaining the need to protect economic freedom, plurality and democracy through competition enforcement may allow competition authorities to target search engine manipulation, ranking biases, and data harvesting:³⁶⁹ all threats to a healthy political process against which competition law is an essential weapon.³⁷⁰

In prescribing immediately applicable obligations and providing mechanisms for addition to the existing suite,³⁷¹ the DMA is likely to remedy the petrification of economic analysis brought about by modernisation by allowing the Commission to adopt an elastic economic approach in the context of digital markets. In a manner reminiscent of the early stages of EU competition law, the Commission has shed the bridle of the ‘more economic approach’ in the digital market sector by abandoning enforcement under Article 101 and fashioning a novel regime based upon Article 114. This approach sets an interesting precedent, and further highlights crucial flaws in EU competition law brought about by the phenomenon of Modernisation.

It may thus be seen that the ‘more economic approach’ and fragmentation arising from modernisation have thwarted the flexibility and utility of the traditional EU competition law regime, rendering Articles 101 and 102 inappropriate to address gatekeepers in digital markets. This has prompted the Commission to adopt an independent regulatory regime based upon Article 114, potentially indicating a novel legislative technique. The next section examines the extent to which discordance between the Court and Commission has also contributed to the legislative technique evident in the DMA.

³⁶⁷ Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, para 26.

³⁶⁸ See Alan Devlin and Bruno Peixoto, ‘Reformulating Antitrust Rules to Safeguard Societal Wealth’ (2008) 13 *Stanford Journal of Law, Business and Finance* 225.

³⁶⁹ Robert Epstein and Ronald E Robertson, ‘The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections’ (*PNAS*, 2015) <<https://www.pnas.org/doi/10.1073/pnas.1419828112>> accessed October 20th 2022.

³⁷⁰ Luigi Zingales, *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books 2012) 38.

³⁷¹ DMA (n 1) Article 49.

(iii) Isolation from Judicial Review

By eschewing an orthodox treaty basis for competition law, the DMA dispenses with any need for the Commission to engage with the inherent constraints of Articles 101 and 102, freeing the new regime from prior jurisprudence of the CJEU and insulating the Commission's enforcement activity from judicial review.

Articles 101 and 102 TFEU contain inherent constraints upon regulatory intervention and offer standards of review to prevent arbitrary enforcement. Infringement under the former provision demands evidence that an impugned practice has the restriction of competition as its object or effect, constraints bolstered by the case law of the CJEU. Indeed, the Court has established the necessity of case-specific legal and economic analysis in such an evaluation³⁷² and has outlined the dearth of circumstances in which practices are to be found *prima facie* unlawful irrespective of effect.³⁷³ Intervention under Article 102 requires evidence of both market dominance and the abuse of such dominance, entailing a definition of the relevant market and the examination of the features thereof in each case.³⁷⁴ These safeguards within the Treaty provisions act both to constrain and trigger the intervention of competition authorities, and offer meaningful standards to a reviewing court, delineating the parameters of what constitutes infringement under EU competition law.

Such constraints are practically absent, however, in the Digital Markets Act. Indeed, each peculiarity of the Regulation's drafting appears to subvert amenability to judicial review. Its *per se*, prescriptive 'straight-jacket'³⁷⁵ of obligations dispenses with the need or incentive for judicial clarification. Their automatic, *ex-ante* application relieves the Commission from its duty to perform specific legal and economic analysis in each case. Most significantly, the

³⁷² There is an established line of case law to this effect: See, for instance, Case C-307/18 *Generics (UK) Ltd v Competition and Markets Authority* EU:C:2020:52.

³⁷³ See Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank* [2020] EU:C:2020:265, paras 82 and 83.

³⁷⁴ On the impediments of such requirements, see Cabral and others, *The EU Digital Markets Act: A Report from a Panel of Economic Experts* (European Commission, Joint Research Centre, 2021).

³⁷⁵ Assimakis P Komninos, 'The Digital Markets Act: How Does It Compare with Competition Law?' [2022] Forthcoming in *Portale di Diritto Europeo ed Internazionale* 3.

Commission's designation of 'gatekeeper status' under Article 3, prerequisite and decisive for the application of the DMA, is subject to minimal legislative stipulation. To acquire such a classification, an undertaking must have a 'significant impact on the internal market', enjoy 'an entrenched and durable position in its operations', and provide 'an important gateway for business users to reach end users'. Though a rebuttable fulfilment of each criterion is established by reference to certain turnover and user thresholds,³⁷⁶ the Commission may alternatively designate 'gatekeeper' status to any 'core platform service' provider following a market investigation.³⁷⁷ Designation by such a market investigation merely requires the Directorate to have reference to 'some or all' of a number of elements such as the size, structure, and data-driven advantages of the undertaking. Furthermore, should the Commission fail to find such an 'entrenched and durable' position within the market by reference to such obtuse criteria, it may nonetheless designate 'gatekeeper' status if it is 'foreseeable that [the undertaking] shall enjoy such a position in the near future'.³⁷⁸ The DMA contains minimal constraints upon the application of its stringent regulations, permitting arbitrary application and undermining judicial oversight.

Moreover, unlike the Article 101(3) exception, the DMA provides no mechanism through which undertakings may be exempted from its rules on the basis of efficiency considerations or pro-competitive effects.³⁷⁹ A gatekeeper may merely submit 'sufficiently substantiated arguments' as to why the rules of the Regulation should not apply,³⁸⁰ the Commission's assessment of which is subject to no legislative stipulation. Furthermore, whereas any erstwhile competition law infringement required competition authorities to prove such a breach, the *ex-ante*, unconstrained application of the DMA instead obliges concerned undertakings to refute the application of stringent regulations, transforming and transferring a burden of proof upon the enforcer to a burden

³⁷⁶ DMA (n 1) Article 3(2).

³⁷⁷ *ibid* Article 3(8).

³⁷⁸ *ibid* Articles 3(1)(c) and 3(8)(g).

³⁷⁹ *ibid* recital 23 states that '[a]ny justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded'.

³⁸⁰ *ibid* Articles 3(5) and 17(3).

of rebuttal upon the enforced.³⁸¹ Combined with the financial³⁸² and structural³⁸³ sanctions available to the Commission designed to penalise ‘delays in the implementation of regulatory obligations’,³⁸⁴ this reversal further disincentivises legal proceedings regarding the application of the DMA. Thus, not only does the DMA deprive the Court of its power to effectively review enforcement, it also subverts litigants’ incentive to seek review.

It must be conceded that certain sector-specific efficiency considerations have informed and partially necessitated the unorthodox form of the DMA. Limitations to the *prima facie* prohibition of vertical integration and case law, widely permitting restrictions on access to platforms,³⁸⁵ render the regime provided by Articles 101 and 102 TFEU ill-equipped to address emerging challenges posed by the entrenchment of market power within digital gatekeepers. Furthermore, the length of formal investigations have arguably necessitated recourse to directly applicable, *ex-ante* prohibitions.³⁸⁶ However, other EU competition law instruments, also drafted to adapt to technological and economic change, have not evaded judicial oversight in the same manner. Indeed, the Telecoms Directive,³⁸⁷ another prescriptive and *ex-ante* regime, subjects competition authorities to more substantial restrictions on

³⁸¹ *ibid* recital 23 states that ‘The burden of adducing evidence that the presumption deriving from the fulfilment of the quantitative thresholds should not apply should be borne by that undertaking’.

³⁸² *ibid* Articles 30 and 31.

³⁸³ *ibid* Article 25.

³⁸⁴ Colomo (n 324) 572.

³⁸⁵ As Colomo (*ibid*) highlights, a substantial number of disputes in the context of core platform service providers relate to vertical integration, a phenomenon that is not recognised by the Commission to be anti-competitive *per se*. It additionally appears that the threshold for intervention under Articles 101 and 102 is higher in the case of restrictions on access to platforms: see joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743.

³⁸⁶ In Europe, a formal EU antitrust case takes an average of four years from registration to termination, with this average being protracted to seven years in many complex cases: see Digital Competition Expert Panel (lead by Jason Furman), *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Independent Report, HM Treasury, 2019) 104.

³⁸⁷ Council Directive 2018/1972 of the European Parliament and the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36. A detailed comparison between this instrument and the DMA can be found in Colomo (n 324).

enforcement. The regulator may only intervene in markets not ‘effectively competitive’ where an undertaking enjoys a position of ‘significant market power’,³⁸⁸ a notion expressly defined by the CJEU in *Hoffman-La Roche* prior to the introduction of the Directive.³⁸⁹ In addition to intervention being limited to instances in which ‘significant market power is enjoyed’, the definition of which is subject to Court of Justice jurisprudence, the Telecoms Directive also subjects regulators to notions of proportionality in their intervention.³⁹⁰ Whilst the DMA evades Court influence and authority, the Telecoms regime embraces it, subjecting enforcers to limits derived from established case law, and maintaining meaningful standards of review.

Thus, it may be seen that the Digital Markets Act ‘is based on the premise that competition law principles would not limit administrative action under the new regime’.³⁹¹ Through the formulation of prescriptive, *ex-ante* provisions, the maintenance of extensive executive discretion in the designation of ‘gatekeeper status’, and the allocation of a burden of rebuttal upon targeted undertakings, the drafters of the DMA have both disincentivised and impeded judicial review of this novel regime. Indeed, by eschewing enactment upon the treaty basis of Article 101 or 102, the DMA subjects itself only to its overarching objective of ensuring ‘fairness and contestability’ in digital markets,³⁹² ‘autonomous’ notions produced ‘wholly from scratch’ under the DMA.³⁹³ Lacking any established definition, these indeterminate concepts provide little but irony, for the Regulation espouses neither. Prescriptive to gatekeepers but not to the Commission, the DMA seems hardly ‘fair’ to undertakings, and minimally ‘contestable’ before the Courts.

Though limited, the Court’s role in the enforcement and development of the Digital Markets Act has not been entirely undermined. Indeed, the Commission shall remain reliant upon the Court to ensure a degree of uniformity in effect of the DMA across Member States. The extent to which the Court complies with the objectives of the Commission’s new regime shall

³⁸⁸ *ibid* Article 67(3).

³⁸⁹ Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 38.

³⁹⁰ Telecoms Directive (n 387) Article 68(2). The principle of proportionality is applicable to all Union action under Article 5(4) TFEU.

³⁹¹ Colomo (n 324) 563.

³⁹² DMA (n 1) recital 67.

³⁹³ Colomo (n 7) 590.

depend upon its interaction with and management of national courts in their dispensation of remedies to private litigants under Articles 5 and 6 of the DMA, and its preemption of existing national competition rules pertaining to digital market ‘gatekeepers’.

(iv) The Ball’s in your Court!

As an EU Regulation, the DMA shall have ‘direct effect’ in Member States, and will be ‘capable of creating individual rights which national courts must protect’.³⁹⁴ Despite its exclusion of all national actors in the designation of ‘gatekeeper’ status³⁹⁵ and textual silence on the role of private litigation in its enforcement,³⁹⁶ EU officials have stressed the ‘self-executing’ nature of the DMA,³⁹⁷ and private enforcement of regulatory obligations enshrined in Articles 5 and 6 is a certainty. Though litigation shall only provide *inter partes* relief, and shall lack an *erga omnes* effect similar to that of a decision of non-compliance by the Commission,³⁹⁸ it has been noted that national divergences in the application of available remedies, such as injunctions, specific performance, and restitutionary relief, shall lead to significant fragmentation in the enforcement of the DMA.³⁹⁹ Such divergence is likely to be compounded by the nature of the issues with which the DMA is concerned. Not only shall generalist national courts be faced with sophisticated questions of novel economic and legal complexity, but these actors shall lack any substantial body of precedence in the application thereof. Unlike the engagement of national courts under Modernisation in 2004, national judges will not be able to act in reference to 40 years of precedent developed by a specialised, centralised enforcer.⁴⁰⁰ Any divergence in the remedial practices of national courts is bound to differentiate the regulatory burden placed on gatekeepers between Member States, disturb the internal market, and diminish the effectiveness of the DMA.

³⁹⁴ Case 43/71, *Politi sas v Ministero Delle finance della Repubblica Italiana* [1971] ECR 039, para 9.

³⁹⁵ DMA (n 1) Article 3.

³⁹⁶ In a joint letter published in 2021, the Ministers for Finance of France, Germany and the Netherlands specifically called for clarity on the role of private enforcement in the context of the DMA: Bruno Le Maire, Peter Altmaier, and Monica Keijzer, ‘Strengthening the Digital Markets Act and its Enforcement’ (27 May, 2021).

³⁹⁷ Komninos (n 327) 427.

³⁹⁸ DMA (n 1) Article 29(1).

³⁹⁹ Komninos (n 327) 435.

⁴⁰⁰ *ibid.*

Furthermore, such inconsistency would be compounded by the parallel application of national regulatory frameworks in addition to the obligations imposed by the DMA. According to the principle of preemption, Article 1(5) of the DMA obliges national courts to set aside national regulations imposing 'further obligations on gatekeepers by way of laws, regulations, or administrative measures for the purpose of ensuring contestable and fair markets'. This broad prohibition is complemented, however, by a similarly obtuse exemption for national competition rules 'prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices, [and] abuses of dominant positions'.⁴⁰¹ Whilst one might presume that the latter acts merely as an exception to the general rule of Article 1(5), this legislative dichotomy places greater responsibility upon the Court of Justice to ensure the consistent application of the DMA. Indeed, it has been observed that certain national provisions, such as Section 19 of the German Competition Act, may avoid preemption under a particular interpretation of these provisions; permitting the introduction of additional regulatory measures through the 'back door' of competition law.⁴⁰²

Thus, a familiar circumstance presents itself. Akin to the institutional dynamic arising from the Commission's consolidation of authority and subversion of judicial influence following modernisation, the Court once again finds itself as the 'ultimate safeguard'⁴⁰³ in ensuring the consistent application of EU competition law. Though some observers cite examples of the CJEU prioritising consistent and effective public enforcement to the detriment of private enforcement in other sectoral spheres,⁴⁰⁴ the pattern of interaction between the CJEU and Commission illustrated in this article suggests the Court's tendency to the contrary. Typically lenient to the autonomous inclinations of Member States and protective of the rights of private litigants, the CJEU is likely to remain disruptive to the Commission's harmonisation efforts: a thesis to be tested as it encounters issues of preemption and remedial consistency in the context of the DMA.

⁴⁰¹ DMA (n 1) Article 1(6)(a).

⁴⁰² Komninos (n 375) 6.

⁴⁰³ Komninos (n 327) 437.

⁴⁰⁴ *ibid.*

Should this Regulation be indicative of future legislative policy, it heralds a new phase of EU competition law in which institutional dynamics are dramatically augmented: a phase of recentralisation. Recent legislative developments represent recentralisation in two respects. Firstly, as a specialised, sector-specific regime, the Digital Markets Act has resurrected the Commission's prerogative in the sphere of competition law pertaining to digital markets. As an express, unequivocal reallocation of regulatory competence within the exclusive competence of the Commission, this development demonstrates 'hard recentralisation'. Secondly, and more subtly, the ECN+ Directive insulates National Competition Authorities from domestic influence, and strengthens the network connecting these NCAs and the Commission in a manner of 'soft recentralisation'. Furthermore, the DMA's exclusion of NCAs from the enforcement of its provisions is complemented by a provision for the Digital Markets Advisory Committee, allowing the Directorate to harness the expertise of NCAs through the burgeoning European Competition Network. This renders influence in the enforcement of this novel regime contingent upon active participation with and cooperation through the ECN; neatly combining the momentum and machinery of both 'hard' and 'soft' recentralisation within one mechanism.

More critical analysis may also suggest that this new phase of competition law shall be characterised by a number of evasive legislative techniques. By fashioning sector-specific regulatory regimes, based on Article 114 TFEU, the Commission may be able to escape: (i) the constraints of the 'more economic approach', a mode of analysis necessitated by modernisation, and (ii) the fragmented application of novel instruments across a Union of divergent enforcement policies. This new phase of EU competition law may also be characterised by a removal of meaningful administrative constraints. By adopting prescriptive stipulations, *ex-ante* obligations, and insubstantial doctrinal foundations, the drafters of the DMA largely subverted the function of the CJEU: recalibrating the precepts of EU competition law, further diminishing the disruptive force of the Court, but failing to obviate its influence. As the CJEU encounters issues of remedial consistency and pre-emption, the extent to which the DMA implements an effective harmonised regime shall become apparent, determining the future of the institutional relationship between the European Commission and the Court of Justice. The Commission has made its move, now the ball's with the Court.

CONCLUSION

Conflict between the policies of the Commission and the jurisprudence of the Court has spurred the development of EU antitrust, resulting in a catalysis of which the decentralisation of competition enforcement has been the primary product. Whilst necessitated by the burdensome caseload of the Directorate, the particular form and fashion of this redistribution of competence reflects the stratagem of the Commission in response to the promotion of private enforcement and the elevation of judicial influence arising therefrom.

Not only has this conflict resulted in structural reform of the Competition law system, but the Commission's subsequent modernisation attempt to consolidate and extend its control over this decentralised regime has determined its position regarding legal, economic and political matters pivotal to competition policy. The adoption of an Americanised objective economic approach, the endorsement of subsidiarity, and the cultivation of a cooperative network to organise its system of multi-level regulatory governance have all had profound effects on the discipline of antitrust. Furthermore, as problems persist with the uniform application of competition law, the Commission has even deviated from the very foundations of EU antitrust in an effort to avoid disruptive judicial oversight: eschewing orthodox treaty bases and adopting unusual legislative tact in recent enactments. Indeed, the effects of this conflict pervade all elements of competition law. This article thus concludes on the ironic deduction that competition law is, itself, shaped by competition: not a competition between undertakings, but a competition between the Court of Justice and European Commission.