

The temptation of “Per-se”: What is wrong with the EU competition enforcement

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🔑 keywords to be inserted by the indexer

The enforcement of competition law in the EU is at historic heights, with numerous cases and high-profile decisions which made it, without any doubt, the “star” of EU law. Due to its perceived success, EU competition law and enforcement became a model followed by an increasing number of emerging and developing economies outside the Union itself—a “beacon” for the enforcement of competition rules across the world.

Such an enviable position does not preclude but, on the contrary, warrants more scrutiny of the way the EU competition law is enforced. Is the EU system fully compliant with the requirements of due process, what is the quality of the decisions, and how prone is this system to errors—all these are valid and more meaningful questions than ever.

This article aims to sketch out an analysis of the way the EU competition law is enforced, and I intend to delve into this analysis in future contributions. For the time being, this endeavour is limited to outlining certain aspects of the enforcement of the EU competition rules that have been and are raising concerns. Thus, I shall focus this preliminary analysis on cartels, as perhaps the most important part of the competition law, in terms of number of cases and effects on consumer welfare.

I consider that this is the appropriate moment to discuss flaws and their possible fixes, given that the European Commission is approaching the end of the legislative process¹ for a new directive aimed at switching the enforcement of the EU competition law into a higher gear, through the empowering of the national competition authorities with the right tools in order to achieve a fully effective enforcement of these rules (“a genuine common competition enforcement area”, in the words of the Commission), a process dubbed as ECN+. Whilst I mostly agree with the contemplated changes, I am of the opinion that they do not cover the main concerns raised with regard to the EU competition enforcement.

There are early claims in various forums for a reform of the enforcement structure which was established in 1962.² Even if the EU competition enforcement structure proved to be mostly effective over time, due to a changing landscape of both the economy, where new challenges arose, especially in the digital economy, and of the legal background, where the fundamental rights have come to prominence in the case law of the European Court of Human Rights and of the European Court of Justice, the reform thereof appears to be worth considering at this point.

I argue in this article that the need for a reform of the EU competition enforcement became stringent, even if it does not necessarily entail major structural changes, which are more difficult to implement. I am pragmatic and I advocate for, at least, a more careful analysis of the factual circumstances in order to avoid the per-se trap—using the by-object box too frequently and considering too easily that such an infringement exists, based on only a slim layer of facts.

The prohibition of cartels

The founders of the European Communities instated from the very beginning an outright prohibition of agreements and concerted practices which would have the object or the effect of distorting the competition on the then nascent common market of the European Communities, the current internal market of the EU. Notwithstanding the rationale and the objective pursued through such a prohibition, from protection of the free market, to enhancing consumer welfare or achieving a fully operational common market, the impact of the legal provision embedded in the current art. 101 of the Treaty on the Functioning of the European Union (“TFEU”) is unquestionable:

- “1. The following shall be prohibited as incompatible with the internal market: 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, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive

* Many thanks to my colleague Magdalena Popescu for her valuable contributions to this article.

¹ <http://ec.europa.eu/competition/antitrust/ncs.html> [Accessed 5 October 2018].

² See Ian S. Forrester, “Due process in EC competition cases: A distinguished institution with flawed procedures” (2009) 34 E.L.R. 817–843; Frank Montag, “The Case for a Radical Reform of the Infringement Procedure under Regulation 17” (1996) 8 E.C.L.R. 428, 430; Donald Slater, Sebastien Thomas and Denis Waelbroeck: *Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*, The Global Competition Law Centre Working Papers Series GCLC Working Paper 04/08.

disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

However, as noted in the doctrine,³ the same legal norm providing the prohibition left some leeway for the undertakings, by allowing them to demonstrate that the benefits of their apparently negative actions outweighed the potential harm to competition—art.101, para.3 TFEU.

Meeting all the positive and negative conditions provided by art.101, para.3 TFEU is a very difficult endeavour, making it a truly “*probatio diabolica*” but, however, it is not an impossible process and, although very rarely, these conditions were met. The mere existence of the exoneration conditions and their persistence over time, without being challenged on reasons such as lack of practical usefulness, flags an important principle—that the authors of the treaties did not intend for the prohibition to be absolute and the by-object presumption to be irrebuttable, even in case of what has been later considered in the case law of ECJ as “hard core”: price fixing, market sharing and limitation of production. This means that art.101, para.1 may never be applied in an indiscriminate manner and by disregarding the case-by-case realities and circumstances and that due care must be taken to perform a thorough enough analysis of each behaviour prior to reaching the conclusion that it “may affect trade”.

The simple things

The main issue with the enforcement of art.101 TFEU is probatory, meaning that whenever an infringement occurs, its existence and harmfulness must be proved beyond any reasonable doubt in every and each individual case. This is a basic principle of liability in any legal system in the world and it requires the accusation to support the charges with evidence that the specific details of the case amount to an infringement of the prohibition of cartels.

The burden of proof for a competition infringement lies in the first place with the competition enforcement agency—the undertaking is presumed innocent and the competition authority suspecting the opposite must gather sufficient evidence proving the infringement beyond reasonable doubt. The enforcer should seek to avoid any confirmation bias in the process of investigation—the subjectivity and the tendency to rather come to the conclusions that guilt exists, given the considerable amount of agency resources and time spent in an investigation. The confirmation bias is often present in the activity of the competition enforcers and is one of the most negative elements of the activity of a competition agency, which should be vigorously fought.

The concept of by-object (per-se) infringement originates outside the competition law, in the criminal law, and is due to a pragmatic need to punish behaviours which are clearly harmful, at the lowest possible cost and in the shortest time, based on the precedents. Wherever in past cases a certain behaviour resulted in negative consequences, it is justified that its occurrence in any other situation in the future will be considered equally negative and punished as if the actual harm had occurred. The rationale behind this concept is to enhance deterrence, especially since most cartels produce major harm to consumers and are also difficult to detect, given the secret way they operate. There is an imbalance between the larger number of potential cartels in the economy and the possibility to detect and sanction them, which justifies the existence of a tool which can facilitate the work of the competition agencies.

Eventually, all the infringements of the cartels’ prohibition are based on harm to the market and the consumers and the only difference is that in case of by-object breaches, the harm may be only potential and does not have to be demonstrated, whilst for by-effects violations, the full process for demonstrating the harm and the causal link with the wrongdoing must be followed.

The “per-se” infringement is based on a (“induction based”) presumption that the wrongdoing exists, provided that a minimal set of facts were identified, without the need to proceed into a throughout analysis of the case or to prove the actual consequences. However, the existence of rules of thumb, which incorporate the previous experiences and the economic rationale that certain behaviours will most likely result in anti-competitive consequences, does not exempt the investigators from making any analysis of the specific facts and their circumstances. There is often a thin line between a behaviour which can certainly distort competition and a benign behaviour, and this imposes a duty on the competition agencies to carefully weight all the elements and resist the temptation to call the shots too soon.

As difficult as it is for this presumption to be rebutted, it cannot go counter to the basic presumption of innocence and it does not exclude the obligation for the competition agency to provide sufficient evidence of the wrongdoing. If the presumption that the infringement exists in cases of by-object deeds would be a floor on which a competition agency may base its accusation, the presumption of innocence would be ceiling, which always needs to be supported on sufficiently strong pillars. The per-se concept allows competition agencies to jump to conclusions but it does not change the nature of the infringement, nor does it allow enforcers to be complacent and avoid the need to sit on a minimum layer of facts and specific analysis before making the jump.

To conclude, the use of the per-se infringements is justified by the pragmatic need to facilitate the sanctioning of the wrongdoers, building on experience and sound

³ See, for instance, Okeoghene Odudu, “The boundaries of EC Competition Law. The Scope of Article 81” [2012] *Oxford Scholarship Online* 128–159.

⁴ O. Odudu, *The Boundaries of EC Competition Law The Scope of Article 81* (Oxford: OUP, 2006), p.114.

economic analysis. This advantage comes with the risk that the competition agencies might become complacent and might see per-se infringements of the cartel prohibition all around, even where the infringement could be by effect or could not exist at all.

The signals from the EU courts

The European Court of Justice has started, as early as the 2000s, to clearly signal that by-object infringements should not be treated superficially and that the presumption of innocence remains applicable, so that due care must be given to evidence of the wrongdoing and of the potential to harm the competitive process and the consumers:

- “(60) Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.”⁵
- “(45) In that latter situation, it is necessary to take account of the presumption of innocence, as it results in particular from Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’), which is one of the fundamental rights which, according to the settled case-law of the Court of Justice, also reaffirmed in Article 6(2) EU, constitute general principles of Community law. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies, inter alia, to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176).⁶
- “(72) According to the case-law, the Commission must prove the infringements which it has found and adduce evidence capable of

demonstrating to the requisite legal standard the existence of the facts constituting an infringement.”⁷

In 2011, the matter of the evidence in the competition law has been tackled also by the European Court of Human Rights in *Menarini*.⁸ This decision confirmed the equivalence of the EU competition law with the criminal law, due essentially to the severity of the penalties which may be applied to the wrongdoers.

In *Menarini*, ECHR established that the equivalence of the EU competition law with the criminal law should go beyond mere acknowledgement, and into concrete and enhanced rights for the undertakings and corresponding obligations for the competition authorities to demonstrate beyond any reasonable doubt that the infringement truly existed, even in cases of “per-se” infringements of the prohibition of the anti-competitive agreements and concerted practices in the EU.

After the ECHR landmark decision in *Menarini*, the ECJ continued to send even more vigorously the message that the benefit of doubt prevails in competition law matters, including in cases of alleged per-se infringements:

- “(72) Moreover, where the Court still has a doubt, *the benefit of that doubt must be given to the undertakings accused of the infringement* (see, to that effect, Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, paragraph 265). Indeed, the presumption of innocence constitutes a general principle of European Union law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union.”⁹ [Emphasis added.]
- “(38) In so far as the referring court has doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, it must be recalled that the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in *E.ON Energie v Commission*, C-89/11 P, EU:C:2012:738, paragraph 72), which the Member States are required to observe when they implement EU competition law (see, to that effect, judgments in *VEBIC*, C-439/08,

⁵ *Dresdner Bank AG and others v Commission of the European Communities* (T-44/02P, T-54/02, T-56/02, T-60/02 & T-61/02) EU:T:2006:271.

⁶ *Siemens AG v European Commission* (T-110/07) EU:T:2011:68.

⁷ *Dresdner Bank* EU:T:2006:271 at [59], and the case law cited.

⁸ *A. Menarini Diagnostics S.r.l. v Italy*, application no. 43509/08.

⁹ *E.ON Energie AG v European Commission* (C-89/11 P) EU:C:2012:738.

EU:C:2010:739, paragraph 63, and *N*, C-604/12, EU:C:2014:302, paragraph 41).¹⁰

Furthermore, after *Menarini*, the ECJ, in a landmark decision in 2014, brought the level of demands to the next level—there is a need to produce an analysis of the behaviour on a case-by-case basis and, while proving actual anti-competitive effects is not required for by-object infringement, the capacity of the deed to produce actual anti-competitive effects is a must. The competition agencies should clearly explain the harmfulness; this harmfulness must be determined and not just presumed.

As tempting as it may be, the presumption of anti-competitive by-object infringements can be applied only in restrictively determined and carefully analysed cases and only where there is no other possible explanation for the facts in the case. All these require an *in concreto* analysis of the facts, even if the actual effects do not have to be analysed, nor proved.

The breakthrough decision in this respect is *Cartes Bancaires*, where the ECJ found that:

- “(53) According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition ‘by object’ within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 36 and the case-law cited).
- (58) Secondly, in the light of that case-law, the General Court erred in finding (...) that the concept of restriction of competition by ‘object’ must not be interpreted ‘restrictively’. The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, (...).
- (86) Although the General Court found, in paragraph 198 of the judgment under appeal, that the measures at issue

encouraged the members of the Grouping not to exceed a certain volume of CB card issuing, the objective of such encouragement was, according to its own findings in paragraphs 245, 247 and 327 of that judgment, not to reduce possible overcapacity on the market for the issue of payment cards in France, but to achieve a given ratio between the issuing and acquisition activities of the members of the Grouping in order to develop the CB system further.

- (87) It follows that the General Court could not, without erring in law, characterise the measures at issue as restrictions of competition ‘by object’ within the meaning of Article 81(1) EC.
- (88) Since the intentions of the Grouping could not in themselves, in accordance with the case-law referred to in paragraph 54 above, be sufficient to establish the existence of an anti-competitive object (...), cannot justify such a characterisation and there is no need to examine the arguments put forward by the appellant on that point.”¹¹

The same conclusions were restated in subsequent decisions:

- “(18) As regards the concept of restriction of competition ‘by object’, the Court has held that it must be interpreted restrictively and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgment in *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 58).”¹²

In the EU, it looks like the “per-se” concept seduced also the investigators looking into potential abuses of dominant cases, which, by their intrinsic nature and as it appears from the wording of art.102 TFEU, should be treated always as effects-based infringements. The European Commission went on to say that there are behaviours which

“were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position”

¹⁰ *Euras*” *UAB and others v Lietuvos Respublikos konkurencijos taryba* (C-74/14) EU:C:2016:42.

¹¹ *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:2204.

¹² *SLA “Maxima Latvija” v Konkurences padome* (C-345/14) EU:C:2015:784.

(see, for example, paras 925 and 1760 of Commission Decision C(2009) 3726 of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement, (Case COMP/C-3/37.990 — *Intel*)).

In its decision of 6 September 2017 in the respective decision, the ECJ disagreed with the Commission and with the General Court, which previously upheld the view,¹³ sending an even clearer message to the European Commission that as efficient and comfortable such a formalistic approach could be, it is notwithstanding not desirable. In the light of the ECJ decision in *Intel*, the recent decisions whereby the European Commission found Google guilty for abusing its dominant position might well be a faux pas and the EU enforcer is facing an uphill battle in defending them in front of the EU courts. The problem is that the EC cannot afford to lose any of the Google cases, or otherwise its reputation would be seriously shattered. The biggest danger is that while EU courts do not perform a full review of the merits of a case and might not be expert in economic aspects, they are made of judges who are much more familiar with legal concepts such as the presumption of innocence and at ease in finding whether or not the fundamental substantive and procedural rights were respected. For instance, in *Cartes Bancaires* the judges simply wanted to communicate to the European Commission that even an alleged per-se infringement requires a minimal analysis and that the imputations made to the sanctioned undertakings should make sense.

It remains to be seen if the European Commission will pay due attention to what the ECJ has signalled so far. Beyond the passing glory brought by high-profile cases and ever-increasing fines, the European Commission should act responsibly.

The underlying structural problem

The superficial approach to the “per-se” infringements in the EU is fuelled and aggravated by a structural weakness of the EU Commission and almost all of the NCAs in the EU, which raises significant doubts as to whether or not these agencies fully comply with the principles of legality, independence, transparency, effectiveness, and responsibility—LITER.¹⁴

All these agencies are designed as administrative institutions, where the investigative and the adjudication functions are bundled under the same roof. Unlike the prosecutorial model, where the decision is taken by another institution than the one having conducted the investigation—a general or specialised court—the administrative competition agencies are more prone to errors due to a variety of reasons, from the confirmation bias to the need to report meaningful results.

The prosecutorial model has more advantages over the administrative model, from the avoidance of the confirmation bias, thus avoiding costly false positives, to increased transparency and credibility of the decisions issued in such a system.¹⁵ In the case of the European Commission, what makes things worse is that so far it has avoided calls for introducing guarantees for properly safeguarding the right of defence, such as organising hearings with the undertakings, before issuing a decision. The fact that the proceedings going to the final decision are supervised by a hearing officer is no longer enough to meet the requirements set in the case law of ECHR and ECJ.

The coexistence of investigative and adjudication branches and the need to finalise in a reasonable period of time a growing number of cases drive the administrative agencies into picking most often the lowest hanging fruit—the “by-object” infringements, which are preferred over effects-based infringements¹⁶—and further on, in considering that the infringement exists, based even on very little evidence. When the behaviour analysed may have a credible alternative explanation, there is a strong tendency that the EC or an NCA would consider it to be rather a violation, which contradicts the established case law of the ECJ and, even worse, it breaches the presumption of innocence and the requirements of a due process. I was myself a Board member of one of the NCAs in the EU and I can witness first hand that this tendency exists, and it is not easy to be fought only with internal safeguards. The explanation for the approach is a mix of justified self-confidence (but “Success is a lousy teacher. It seduces smart people in thinking they can’t lose”, per Bill Gates) and the need to produce quickly decisions with a public impact (i.e. “If all you have is a hammer, everything looks like a nail”, per Abraham Maslow). The immediate result is superficiality and perceived arbitrary decisions. The long-term result might be either a chilling effect on the increasingly confused business environment or a reduced effort by the undertakings to achieve full competition compliance, which are both detrimental to the goals of the competition rules.

The rebalancing

I am not the first and for sure not the last to advocate for an upgrade of the mechanisms used to enforce the EU competition rules in order to maintain the level of quality of the decisions and to respect the rights of the investigated parties, whilst preserving a robust level of enforcement.¹⁷

¹³ *Intel Corp v European Commission* (C-413/14 P) EU:C:2017:632.

¹⁴ See Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press, 2015), pp.45–94.

¹⁵ For more details regarding the advantages and disadvantages of the prosecutorial model see, for instance, Frederic Jenny, “The Institutional Design of Competition Authorities: Debates and Trends” in *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer International Publishing, 2016), pp.22–25.

¹⁶ See also Odudu, *The Boundaries of EC Competition Law The Scope of Article 81* (2006), p.177.

¹⁷ See Forrester, “Due process in EC competition cases: A distinguished institution with flawed procedures” (2009) 34 E.L.R. 840–842; Montag, “The Case for a Radical Reform of the Infringement Procedure under Regulation 17” (1996) 8 E.C.L.R. 428, 430; Slater, Thomas and Waelbroeck: *Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*, The Global Competition Law Centre Working Papers Series GCLC Working Paper 04/08.

The only thing I want to do is to relaunch this debate, at a crucial moment for the EU competition law and with the hope that the European Commission will realise that it needs to reflect on its proceedings and structure for the enforcement of the EU competition rule, in order to achieve its policy purposes and maintain its very good record in the EU courts. Since ECHR firmly settled in *Menarini* that competition law amounts to criminal law and since the ECHR is now part of the internal order of the EU, the courts based in Luxembourg intensified the frequency of the signals to the EU Commission that “something is rotten in Denmark” (no pun intended!) and it would be advisable that the Commission considers these signals. The *per se* approach to the hard-core cartel infringements is a powerful instrument in the weaponry of the European Commission and the national competition authorities and it must continue to be used, for the benefit of the EU economy and its consumers. What I argue is that powerful weapons should always be used with caution and nobody should pull the trigger unless this is justified.

What is meant is that the excesses of formalism in the enforcement of the cartel prohibition in the EU—and, by extension, also the rigid approach to abuse of dominance cases—should be corrected in order to ensure quality of the decisions, trust, and accountability.

In the short run, no change of the EU Treaties, which is a lengthy and complicated process, is required in order to achieve a better enforcement of the EU competition rules. A more careful analysis of the facts, going back to basics for the interpretation of art.101 TFEU, with the avoidance of superficial approaches and of confirmation biases, could be enough for the time being and might significantly improve the situation.

But in the long term, fundamental changes are necessary in the way the EU competition enforcers, and especially the European Commission, investigate and take decisions in cases regarding potential infringements of the EU competition rules, in order to fully ensure the requirements of the due process and the quality of the decisions. One possible solution would be to transfer the adjudication function from the European Commission to the European Tribunal, which will soon receive an additional number of judges and where there is already enough expertise in order to cope with such an attribution.