

European Competition Law Procedural Reform - Introduction

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Since the entry into force of Council Regulation (EC) No 1/2003, national competition authorities (“NCAs”), commentators and stakeholders have suggested numerous modifications to improve European competition enforcement and fairness. The European Commission’s (hereinafter the “Commission”) proposal to strengthen the powers of NCAs —the so-called “ECN (European Competition Network)+ Reform”—has the potential to introduce long-awaited changes that are likely to respond to a significant part of the demand for reform. The Commission has not addressed, however, other amply and sometimes hotly debated requests. More discussion on the merits and demerits of further procedural reform appears thus necessary. In what follows we first briefly summarize the process leading to the ECN+ Reform and outline the most salient requests for reform made during this process. We next outline the claims to improve fairness in European competition enforcement in the wider framework of Regulation 1/2003, and identify a few areas where improvement may be necessary. We conclude with a few ideas that may contribute to the debate on the right mix between enforcement powers and due process in competition law enforcement.

1. The Way Leading to the ECN+ Draft Directive

1.1 Regulation 1/2003.

The procedural changes brought about by Regulation 1/2003 significantly modified the landscape of European competition law

enforcement.¹ Since the entry into force of Regulation 1/2003, NCAs and national courts must apply Articles 101 and 102 TFEU. Regulation 1/2003 aimed to encourage a more consistent application of European competition rules across Member States by, in particular, defining the powers and the type of decisions that NCAs may take.² Regulation 1/2003, however, left to Member States the design of their institutional structure and means of enforcement.³ This policy choice facilitated an inconsistent level of independence, resources and enforcement across NCAs. It is precisely this divergence in enforcement throughout the EEA that the ECN+ Reform aims to address.

1.2 First Report on the Functioning of Regulation 1/2003.

Since its adoption, Regulation 1/2003 has been praised both for facilitating and enhancing convergence and for further and more decentralised enforcement of European competition rules.⁴ In 2009, the Commission prepared a first⁵ report on the functioning of Regulation 1/2003 for the Parliament and the Council.⁶ Overall, Regulation 1/2003 was seen

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1, p.1).

² Article 5 of Regulation 1/2003.

³ See e.g. Article 35 of Regulation 1/2003.

⁴ Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003 COM (2009) 206 final, at para. 142.

⁵ Pursuant to Article 17 of Regulation 1/2003.

⁶ Communication from the Commission to the European Parliament and Council - Report on the functioning of regulation 1/2003 of 29 April 2009, COM (2009) 206 final.

as a net improvement.⁷ However, some of the stakeholders who participated in the 2009 report's public consultation did voice a number of procedural concerns that still resonate today. In particular, some commentators raised concerns about the concentration of the powers to investigate, prosecute and adjudicate within the Commission, and the replication of such a model at the national level.⁸ In response to these concerns, the Commission stressed that its institutional design was and is compatible with due process, as confirmed by the case law of the European Courts and by its interpretation of the jurisprudence of the European Convention on Human Rights ("ECHR"), insofar as the European Courts are able to exercise unlimited jurisdiction over Commission decisions.⁹

The Commission acknowledged, however, that with a view to improving checks and balances, it would seek to widen the powers of the Hearing Officer and hence to strengthen procedural fairness, transparency and independence.¹⁰

In addition to due process concerns, there were increased calls for stronger harmonization of procedures and enforcement means at national level as the application of different procedural rules regarding sanctions, leniency, settlements, commitments, complaints, legal professional privilege, etc., could lead to diverging outcomes and harm legal certainty and due process.¹¹ The Commission took note of this criticism and called for further reflection to optimise the efficiency of procedures. The Commission left the door open to different means to achieve and enhance procedural efficiency, including soft law measures

and the adoption of certain minimum standards through legislation.¹²

1.3 Second Report on the Functioning of Regulation 1/2003.

Following the tenth-year anniversary of Regulation 1/2003, and in part building on its 2009 Report, the Commission published a report entitled Ten Years of Antitrust Enforcement under Regulation 1/2003.¹³ Although the Commission did not organise a public consultation prior to its publication, the Report did try to address the due process-related and fairness questions that arose in the context of the 2009 public consultation.¹⁴ The Commission stressed again the legality of its institutional design as well as its compatibility with the parties' rights of defence and the right to effective judicial review *ex* Article 47 of the EU Charter of Fundamental Rights.¹⁵ The Commission stated that it had actively worked to improve the fairness of competition proceedings,¹⁶ for example through the strengthening of the Hearing Officer's role as the guardian of parties' procedural rights during competition investigations,¹⁷ or through the issuance of best practices in competition proceedings.¹⁸ Regarding NCAs, the Commission underlined that, when implementing EU law, they must ensure procedural fairness and respect fundamental rights, including the EU Charter of Fundamental Rights and the ECHR.¹⁹ The Commission also noted that its own decisions as well as those of NCAs are subject to judicial review, oftentimes by multiple tiers of appeal.²⁰

7 See e.g. Ailsa Sinclair, Vita Juknevičiute, Ingrid Breit "Regulation 1/2003: How has this landmark reform worked in practice?" Competition Policy Newsletter, Number 2 — 2009.
8 Commission Staff Working Document SWD (2014) 231 accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003 COM(2009)206 final, at para. 55. See also Donald Slater, Sébastien Thomas, and Denis Waelbroeck, (2008) "Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?", 5(1) European Competition Journal 22.
9 Commission Staff Working Document SWD (2014) 231 accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003 COM(2009)206 final, at para. 56, citing *inter alia* Cf. Cases 209-215 and 218/78, Heintz van Landewyck SARL and others v Commission (FEDETAB), [1980] and Case T-11/89, Shell International Chemical Company v Commission, [1992] ECR II-757, para. 39; as well as Article 263 TFEU and Article 31 of Regulation 1/2003.
10 *Ibid.*, at para. 57.
11 *Ibid.*, at para. 206.

12 *Ibid.*, at para. 207.
13 Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, of July 9, 2014, COM(2014) 453.
14 Commission Staff Working Document (SWD(2014) 230/2 - Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 223-228.
15 *Ibid.*, at para. 223.
16 *Ibid.*, at para. 224-226.
17 Terms of Reference of the Hearing Officer, Decision 2011/695/EU, (OJ L 275, 20.10.2011, p. 29), which enhanced the role of the Hearing Officer including as regards disputes about legal professional privilege disputes, deadlines to respond to requests for information, the right to be informed of one's procedural status.
18 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6).
19 Commission Staff Working Document - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, at para. 227 and footnote 317 citing Article 51(1) of the Charter of Fundamental Rights of the European Union and Case C-206/13 Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo, EU:C:2014:126.
20 Commission Staff Working Document SWD (2014) 230/2 - Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 228.

The Commission also devoted part of the Ten Years of Antitrust Enforcement under Regulation 1/2003 Communication and an accompanying staff working paper to a number of institutional and procedural issues revolving around NCAs, with a view to enhancing enforcement at national level.²¹ It focused on questions either not addressed by Regulation 1/2003 or only addressed in a general fashion.²² After analysing the health of the European competition enforcement system, the Commission concluded that further homogenisation of procedures of sanctions at national level would be necessary to guarantee a more effective enforcement of European competition law. The Commission underlined the need to guarantee that NCAs (1) act with independence and have sufficient resources, (2) have adequate investigative and decision-making powers, (3) may impose adequate fines, and (4) have leniency programs.²³ These are the four principles that would subsequently underpin the ECN+ Reform.

1.4 The 2015 Empowering NCAs Public Consultation.

Based on the conclusions of the second Report on the Functioning of Regulation 1/2003, the Commission launched the Public Consultation on Empowering the national competition authorities to be more effective enforcers (“Empowering NCAs public consultation”), at the end of 2015.²⁴ The public consultation questionnaire revolved around NCAs’ resources, independence, enforcement toolbox, fining powers and leniency programs. The responses included those of 181 stakeholders, 47 of whom were public authorities.²⁵ Of the respondents, 75% stated that NCAs could do more to enforce EU competition rules and 80% called for action to be taken. Of those calling for action, 19% called for action at EU level and 64% called for

action through a combination of EU and Member State efforts.

“[Regulation 1/2003] facilitated an inconsistent level of independence, resources and enforcement across NCAs”

Importantly—and in line with stakeholders’ responses to the 2009 public consultation—a majority of stakeholders called for the adoption of additional measures to those proposed by the Commission. Some noted that any enhancement of NCAs’ enforcement powers should be balanced by increased procedural guarantees and improved protection of procedural rights.²⁶ Indeed, both the public consultation and previous reports focused on the need to enhance convergence and enforcement at national level but barely acknowledged the need to improve due process and fairness in competition law proceedings both at the EU and national level.²⁷

1.5 The ECN+ Directive.

On March 22, 2017,²⁸ based on the results from the 2015 Empowering NCAs public consultation, the Commission tabled its Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (“Proposed Directive”).²⁹ The Proposed

21 Commission Staff Working Document SWD (2014) 231/2- Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues, at para. 1.

22 *Ibid.*, at para. 7.

23 Communication from the Commission COM (2014) 453 - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, of July 9, 2014, at para. 46.

24 See Commission Press Release - Antitrust: Commission consults on boosting enforcement powers of national competition authorities, November 4, 2015, IP/15/5998.

25 Commission Staff Working Document SWD (2017) 114 final – Impact Assessment Annexes accompanying the document Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Annex II, p. 9.

26 *Ibid.*, p. 12.

27 See *Ibid.*, p. 12. The stakeholders’ criticism goes beyond the need to reinforce the rights of defense in parallel with the strengthening of the NCAs’ powers: they also requested greater coherence in the application of the EU competition rules, the recognition of legal professional privilege for in-house lawyers, the consideration of compliance programs as a mitigating factor in the imposition of fines, and the abolition of the power of NCAs to apply stricter rules on unilateral conduct.

28 See Commission Press Release - Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth, March 27, 2017, IP/17/685.

29 Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure

Directive intends to enhance the independence and resources of NCAs³⁰ to provide NCAs with core investigative and decisional powers,³¹ to enable NCAs to use fines as an enforcement tool,³² and to regulate national leniency programs.³³

Taking into account the results of the consultation,³⁴ the Commission acknowledged that there was a “clear demand” by the private sector to establish increased procedural guarantees in order to offset NCAs’ improved enforcement powers.³⁵ As a result, it has included an article (Article 3) on procedural safeguards in Chapter II on fundamental rights. This article subjects the exercise of the powers set out in the Proposed Directive to “appropriate safeguards” including rights of defense, and to effective judicial review. Further, NCAs must respect EU law principles and the EU Charter of Fundamental Rights. This provision thus confirms Member States’ obligation to comply with EU law fundamental rights including the EU Charter of Fundamental Rights.³⁶ This clarification may prove helpful for national legislators, NCAs and national courts.

The Proposed Directive includes other specific procedural guarantees.³⁷ For instance, inspections of non-business premises (including means of transport or the homes of directors, managers, and other members of staff) must be carried out subject to prior judicial authorization (Article 7(2)). Likewise, the imposition of remedies, fines, and periodic penalty payments must be proportional to the infringement (Articles 9, 12, and 15). The Proposed Directive also states that remedies, requests for information, and inspections must be necessary (Articles 9, 8, and 6).

1.6 Conclusion.

Despite ongoing calls for deeper reform, the Proposed Directive does not purport to amend let alone to replace in any way the Regulation 1/2003 institutional and due process framework,

but rather to strengthen the enforcement powers of NCAs.³⁸ The scope of the reform is narrower than requested and does not address the actual or perceived due process shortcomings affecting the workings of the wider ECN, including the Commission. The reform focuses on the enhancement of enforcement efficiency, and not so much on due process or fairness.

While Regulation 1/2003 and the Proposed Directive will no doubt reinvigorate the enforcement of European competition law, the Commission should not be reluctant to open and lead further discussion and analysis about further procedural reform beyond the scope of the Proposed Directive, or to tackle any actual or perceived due process and fairness limitations of current enforcement procedures at both EU and national level.

2. Procedural Reform: Beyond the Proposed Directive

2.1 The Scope of Judicial Review

The Commission not only investigates, prosecutes and adjudicates on competition matters, but it also has the power to propose legislation and to set priorities in the EU public interest. When confronted with requests to embark upon a deeper review of the institutional framework of competition law enforcement, the Commission has traditionally dismissed those claims by arguing that the ECJ has upheld the current institutional design:

“The EU system of competition enforcement has throughout the years guaranteed high standards of fairness and impartiality. The European Court of Justice has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial. The system respects the undertakings’ fundamental right to effective judicial protection under Article 47 of the Charter of Fundamental Rights since the European Courts undertake a full review of the Commission’s decisions, including the fines imposed.”³⁹

the proper functioning of the internal market, COM (2017) 142 final.

30 *Ibid*, Chapter III.

31 *Ibid*, Chapter IV.

32 *Ibid*, Chapter V.

33 *Ibid*, Chapter VI.

34 *Ibid*, Explanatory Memorandum, p. 11.

35 *Ibid*, Explanatory Memorandum, p. 15.

36 See in particular the Judgment of 26 February 2013 in Case C-617/10 Åklageren, v Hans Åkerberg Fransson, at para. 16-29.

37 Proposed Directive, Explanatory Memorandum, p. 13.

38 *Ibid*, Explanatory Memorandum, p. 4.

39 Commission Staff Working Document SWD(2014) 230/2 - Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 223.

The ECJ has indeed held⁴⁰ that the European competition enforcement system is in line with the procedural guarantees of Article 6 ECHR – including the right to a fair hearing⁴¹ – because the Commission's administrative action is subject to full judicial review.⁴²

“[N]othing would prevent the Union from improving the fairness and quality of due process over and beyond present standards.”

In *Menarini*, the European Court of Human Rights (“ECtHR”) upheld a similar competition enforcement system (the Italian one) where a single administrative authority not only investigated and prosecuted, but also imposed penalties of criminal nature, as long as there was the possibility of a subsequent full judicial review.⁴³ This full judicial review must entail the power of the court “to substitute its own views for those of the administrative authority in all matters of both fact and law”.⁴⁴ The ECtHR requires that the courts have the power to rehear evidence and substitute their own views to those of the administrative body to ensure that there is “the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute”.⁴⁵ The ECtHR concluded that, despite the institutional design of the Italian competition law enforcement system, the Italian courts could fully and in an unconstrained manner review the technical assessments of the Italian competition authorities and examine whether their appraisal was founded

and proportionate including, as mentioned, having the power “to substitute [their] own views for those of the administrative authority in all matters of both fact and law”.⁴⁶

The European system of judicial review encompasses two types of control: (1) unlimited jurisdiction over fines (*i.e.* the power “to substitute its own views for those of the administrative authority in all matters of both fact and law pertaining to the fine **and** to reform the decision of the Commission by striking out, lowering or increasing the level of the fine”) (Article 261 TFEU and 31 of Regulation 1/2003); and (2) a more limited control of legality that enables the EU courts to annul a Commission decision, but not to reform it (Article 263 TFEU). Under *Menarini*, the European Courts must nonetheless, and despite previous case law to the contrary, carry out a full review of the facts and of the legal and economic assessment of the facts, whether these assessments are economic or not, regardless of their level of complexity, with the power “to substitute [their] own views for those of the Commission”.⁴⁷

Indeed, historically the EU Courts’ review of competition cases has been heavily criticised because a long line of case law cast doubt on the ability of the European Courts to implement the *Menarini* standard of full judicial review. This case law interpreted Articles 263 and 261 TFEU as allowing the EU Courts to grant the Commission a margin of discretion (often a significant margin of discretion) in competition proceedings involving so-called complex economic or technical assessments,⁴⁸ as well as in the determination of remedies and fines, through the use of the manifest error of assessment standard and through the refusal “to substitute its own views for those of the administrative authority”.⁴⁹ In other terms, while acknowledging the theoretical unlimited jurisdiction of the EU Courts in the setting of the amount of the fine, this line of case law significantly curtailed the EU Courts’ powers of full judicial review of the establishment of the very infringement that underpinned the fine itself.

40 See T-156/94 *Siderurgica Aristrain Madrid SL v Commission* [1999] ECR II-645.

41 See App. Nos. 7299/75 and 7496/76, *Albert and LeCompte v Belgium*, [1983] 5 EHRR 533, at para. 29.

42 *Ibid.*, at para. 103.

43 *A. Menarini Diagnostics S.R.L. v Italy*, App. No 43509/08 (ECHR 27 September 2011), at para. 59.

44 *Ibid.*

45 See App. n° 60860/00, *Tsfayo v. U.K.*, (ECHR 14 November 2006) at para. 48.

46 *Ibid.*, at para. 64.

47 F.E. González-Díaz, B. Holles de Peyer, “EU judicial review: The Telefónica case”, *Concurrences* N° 4-2014, at para. 18.

48 See for example Case T-17/93, *Matra Hachette v. Commission*, [1994] ECR II-595-656, at para. 104.

49 See e.g. Case T-340/03, *France Télécom v. Commission*, [2007] II-00107 at para. 129. Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, at para. 57.

The ECJ attempted to address these concerns half a year after *Menarini* in *KME*⁵⁰ and *Chalkor*.⁵¹ In these judgments the ECJ held that:

*“As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”*⁵²

The ECJ established that the General Court’s references to the Commission’s ‘discretion’, ‘substantial margin of discretion’ or ‘wide discretion’ do not in fact prevent the General Court from “*carrying out the full and unrestricted review, in law and in fact, required of it*”.⁵³

While these judgements go a long way in the direction of complying with the *Menarini* standard of judicial review, it is submitted that there remains room for improvement as the ECJ has not clear and unconditionally held that the powers of the European Courts should not be limited to verifying the evidentiary support of the Commission’s economic assessment (“*whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*”) and/or its motivation, but should also include the power “*to substitute, based on the available evidence and the alternative economic analyses at play, its own views for those of the administrative authority*”.

For as long as the General Court does not, **in practice** (as required by *Menarini*)⁵⁴ carry out and

show to have carried out a full jurisdictional review of the merits of the case, beyond a mere control of the evidence and/or of the motivation of the Commission decision, there will remain doubts about the compatibility of the European competition enforcement system with due process, fairness and the ECHR,⁵⁵ and there will thus continue to be increased pressure upon the Commission to modify its institutional design to redress the real and/or perceived imbalance between its significant enforcement and fining powers and due process.⁵⁶

“[T]here remains ample room to improve the current institutional framework.”

2.2 Improving fairness in the administrative procedure

For as long as the powers of competition authorities to investigate, decide, and fine and/or impose remedies is not or is not seen to be subject to full jurisdictional review, there will continue to be claims that the administrative procedure leading to the imposition of sanctions must abide in its entirety by Article 6 ECHR.⁵⁷

Although the EU Courts consider that Regulation 1/2003 proceedings are adequately fair given the current system of judicial review, the fact remains that under *Menarini*, what really matters

55 Note the EFTA Court rejected the manifest error standard of review of complex economic assessments in Case E-15/10, *Posten Norge As V EFTA Surveillance Authority* [2012] EFTA Ct Rep 246, at para. 102: “*the submission that the Court may intervene only if it considers a complex economic assessment of [EFTA Surveillance Authority] to be manifestly wrong must be rejected*”.

56 Although it is beyond the scope of this brief editorial, the dissatisfaction with the current state of judicial review relates not only to the standard of judicial review but also to the procedural aspects of Court proceedings, including the length of the briefs, the treatment of economic evidence and annexes, the organization of hearings, the use of evidence, witnesses and cross-examination, etc.

57 *Menarini*, at para. 59, citing *Chevron v. France*, App. No. 49636/99, at para. 77, ECHR 2003-III, and *Silvester’s Horeca Service v. Belgium*, App. No. 47650/99 (ECHR 4 March 2004), at para. 27.

50 Case C-272/09 P *KME Germany and others v. Commission*, [2011] ECR I-12789.

51 Case C-386/10 P *Chalkor AE Epexergasias Metallon v. Commission* [2011] ECR I-13085.

52 *KME*, at para. 94; *Chalkor*, at para. 54.

53 *KME*, at para. 108; *Chalkor*, at para. 82.

54 *Menarini*, Concurring Opinion of Judge Sajo.

is whether full judicial review has been carried out in practice. There is thus a risk that, given the weight of decades of case law acknowledging the Commission's margin of discretion in the assessment of so-called complex economic analysis (in fact there is no economic analysis which cannot be properly explained to and assessed by a judge as attested by the exercise of full judicial review over "complex economic assessments" around the world and in particular in the United States) and the apparent reluctance of the General Court to tackle this type of review, one day (assuming that the EU comply with its Treaty obligations and join the ECHR)⁵⁸ the compatibility of the Commission's administrative proceedings with Article 6 ECHR could be seriously put into question .

In any event, and even if current procedural rules did fully comply with the ECHR, nothing would prevent the Union from improving the fairness and quality of due process over and beyond present standards. The Commission should not thus close the door to exploring further the breadth and depth of due process and fairness concerns, and should be open to considering creative ways to improve the system.

2.2.1 *The institutional architecture*

The Commission and NCAs currently follow a number of different institutional models, including: (1) the system in which a single authority has all the powers of investigation, decision and redress (the Commission model); (2) the system in which there is a separation at the administrative level between the investigation and "prosecutorial" stage, on the one hand, and the decision-making stage, on the other (*e.g.* the Spanish NCA); and (3) the system in which the administrative body investigates and has the power to prosecute, and a court adjudicates on the imposition of the fine (*e.g.* the Austrian NCA). The institutional design of a competition authority is not innocuous, as it can lead to under-enforcement, over-enforcement or to a balanced enforcement system. This is why the Commission should assess what further steps it could take to ensure a level playing field not only across jurisdictions, but also in

its own enforcement action, by considering the introduction of specific procedural mechanisms to strengthen the rights of defense and appropriate checks and balances during the administrative proceedings.⁵⁹ These mechanisms could involve a rethinking of the roles of the Legal Service, the Hearing Officer and/or the Chief Economist or, more ambitiously, for instance, the possibility to entrust the responsibility of the competition portfolio to three or five commissioners rather than to one, and to make a more clear-cut distinction between the investigation and proposal stage of the procedure and the decision-making stage thereof, where the 3 or 5 commissioners would be given the power to assess the merits of the case and agree or disagree with DG Comp's proposals by analogy to the U.S. Federal Trade Commission.

There is little doubt that there remains ample room to improve the current institutional framework and thus to address the real or perceived due process, fairness and checks and balances concerns voiced over the years, and this regardless of the intensity and/or sufficiency of the current standard of judicial review. It is submitted that there are indeed good reasons to believe that these reforms can be carried out without undermining the effectiveness of antitrust enforcement in Europe. For instance, the separation of the investigation and the prosecutorial phase of the proceedings from the decision making one could not only be largely accommodated within the current institutional framework but, most importantly, would significantly reduce any perception of prosecutorial bias and greatly contribute to increasing transparency and accountability in competition proceedings which increasingly involve significant fines and remedies. The viability of these possible amendments to our current system of antitrust enforcement would however require an open and frank analysis of the different options, and a proper consultation on the options and on their effectiveness and operational implementation under the leadership of the European Commission itself.

In what follows, our contributors analyse both the Proposed Directive and its implications, as well as a set of some of the topics that have not been

⁵⁸ See Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, EU:C:2014:2454.

⁵⁹ Article 31, Regulation 1/2003.

addressed by the current proposal but that should be part of the agenda of any review of antitrust proceedings.

Kris Dekeyser, Anna Vernet, Ailsa Sinclair and Jurga Stanciute open the debate with an article explaining the Proposed Directive. After briefly outlining the process leading up to the Proposed Directive, the authors describe the four areas of improvement, namely, the need to guarantee NCAs' independence and adequate resources; the enhancement of the NCAs' enforcement toolbox both at the investigation and the decision-making levels; the need for convergence regarding fines across NCAs; and the need for an efficient interplay between different Member States' leniency programs. The authors conclude with a defence of the Proposed Directive, which they believe will have the ability to enhance the credibility and effectiveness of the ECN.

Giorgio Monti, in his article **The proposed Directive to empower national competition authorities: too little, too much, or just right?**, analyses the Proposed Directive from a wider policy perspective, testing the coherence of the different prongs of the reform. He takes the view that the reform is not particularly innovative and that it over-codifies fields that may be better left to soft law. The author suggests several instances in which the Proposed Directive could be improved, and outlines other measures to improve the workings of the ECN as well as new means to achieve more efficient cross-border enforcement, for example, by empowering an NCA to act on behalf of all those Member States where the cartel has anticompetitive effects or by strengthening the power of NCAs to disapply anticompetitive state regulation.

John Temple Lang's article on **Fundamental Rights and the Proposed Directive to Empower Competition Authorities of the Member States** outlines current shortcomings and the room for improvement regarding the fundamental rights of

companies in national authorities' procedures. In particular, it describes how the Proposed Directive should provide further guidance for national legislatures, authorities and courts, on a myriad of aspects including the interplay between rules governing the procedure of the NCA and rules ensuring sufficient judicial review; how to achieve effective independence and impartiality; and how to ensure that the rights of defense recognized in the EU Charter of Fundamental Rights or enshrined as principles of EU law be respected. The author concludes that to guarantee the success of the Proposed Directive in protecting fundamental procedural rights and the general principles of EU law, it should establish a common set of principles of administrative law and procedure across Europe.

F. Enrique González-Díaz and Paul Stuart's article **Legal Professional Privilege under EU Law: Current Issues** looks at a set of possible interpretations of the scope of legal professional privilege in the context of international investigations which, if endorsed, would unduly restrict the substance of this fundamental right, as it would fail to cover communications between lawyers and clients even when those communications would be protected under the rules in the foreign jurisdiction where the advice has been provided. The article focuses on the case law around legal privilege in the EU and the need to interpret it in light of public international law and comity. The article also discusses some problems of implementation of the principle of legal professional privilege in the digital era and the need to protect certain internal communications in light of the *Akzo* judgement.

We are grateful to the authors for their contributions and insights into the overhaul of NCAs and the wider procedural reform. The different views expressed in this issue amply demonstrate the need for further debate and cross-fertilization of ideas in the difficult task to strike the right balance in European competition law enforcement.