Boosting the Enforcement of EU Competition Law at the Domestic Level

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Edited by

Anne Looijestijn-Clearie, Catalin S. Rusu and Marc Veenbrink

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The editors of this volume would like to express their gratitude to a number of persons without whose help both the conference and this volume would not have been possible.

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Anne Looijestijn-Clearie, Catalin S. Rusu and Marc Veenbrink

Nijmegen, December 2016

LIST OF ABBREVIATIONS

Authority for Consumers and Markets	ACM
Act on the Protection of Competition	APC
College van Beroep voor het bedrijfsleven	CBb
Court of Justice of the European Union	CJEU
Czech Competition Authority	CCA
Compagnie méridionale de navigation SA	CMN
De Nederlandsche Bank (Netherlands Central Bank)	DNB
Dutch General Administrative Law Act	GALA
European Competition Network	ECN
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Union	EU
General Block Exemption Regulation	GBER
Legal Professional Privilege	LPP
National Competition Authority	NCA
Netherlands Authority for the Financial Markets	AFM
Netherlands Competition Authority	NMa
Netherlands Independent Post and Telecommunications Authority	OPTA
Services of General Economic Interest	SGEI
Small and Medium-Size Enterprise	SME
Société Nationale Corse-Méditerranée and the Compagnie Méridionale de Navigation	SNCM
Trade and Industry Appeal Tribunal	TIAT
Treaty on the Functioning of the European Union	TFEU

FOREWORD

EFFECTIVE ENFORCEMENT AT THE DOMESTIC LEVEL: A CLOSER LOOK AT THE ENFORCEMENT OF COMPETITION LAW IN THE NETHERLANDS

MONIQUE VAN OERS*

"The world is changing rapidly". This cliché, so often heard, also applies to competition law enforcement. Enforcement of the competition rules in the Netherlands is still relatively new: less than 20 years old. However, the enforcement practice has evolved amazingly rapidly in this period.

In the early years, working for the competition authority meant dealing with applications for exemptions. A job often carried out by lawyers; something they were good at. There was little time for *ex officio* investigations and enforcement actions were rare. This changed dramatically, when Regulation 1/2003[1] entered into force in 2004 and applications for exemption were replaced by self-assessment. Competition Authorities within the European Union, such as the Netherlands Competition Authority (NMa), could dedicate more of their time to enforcement. The composition of the NMa's staff became more diverse, with more economists and other professionals joining the authority. In those days, public support for free markets and competition was wide-spread and fines were regarded as the appropriate response to cartel infringements. This was also the case when the NMa developed its fining policy and leniency policy. Enforcement peaked with the issuing by the NMa of 1,300 fining decisions from 2005 to 2007, totaling fines of more

* Director Legal Department, Authority for Consumers and Markets in the Netherlands.

[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 L1/1, 04.01.2003.

than 250 million Euro, for bid-rigging in the Dutch construction industry.

Fines are for punishment and deterrence; a warning and stimulation for undertakings not to engage in similar behaviour. That fines are an important enforcement tool was stressed again recently by the Dutch Parliament when it passed a bill increasing the maximum fines for undertakings and individuals substantially. Nowadays, high fines, up to 40 percent of the annual turnover of undertakings involved and 900,000 Euro for individuals, may be imposed for sufficiently serious competition infringements. Not only the rules on fines but also the approach to market problems in the Netherlands have evolved over the years. This development was stimulated by the merger of the NMa with the Consumer Authority and the Netherlands Independent Post and Telecommunications Authority (OPTA) in 2013. The new Authority for Consumers and Markets (ACM) is a multifunctional authority that is charged with competition oversight, sector-specific regulation and the enforcement of consumer protection laws. The goal of ACM is to promote well-functioning markets and orderly and transparent market processes that serve consumers well. Faced with market failures, ACM aims at tackling the underlying causes of the market problem at hand. Depending on its analysis of such market problems, ACM may choose to approach a case on the basis of competition law, consumer law, or regulation. For example, low levels of competition in a regulated market may be an indication of collusion which may justify a fining decision for cartel behaviour by the undertakings involved. It may also be the result of restrictions, which consumers either perceive or actually encounter when wanting to switch from one provider to another. In such a case, empowering the consumers by informing them of their rights, and stimulating providers to be transparent about their offer may result in a boost to competition.

Not only has the sphere of ACM's activities been enlarged over the years, also its toolbox has been enriched. Apart from fines, ACM may impose orders subject to periodic penalty payments, an instrument ACM often uses in the field of consumer law. Commitment decisions are also an important element in ACM's toolbox. In addition, ACM has powers to impose binding instructions and structural remedies. Hence, ACM has various angles from which it can approach a case and it also has a wide range of instruments.

In today's world, the authority's task is as simple as it is complex: how to use all these options in practice to boost competition and contribute to consumer welfare? To give an example: in 2013, ACM fined the airline company Ryanair for using online ticket prices that did not include all the foreseen surcharges. The impact of this illegal behaviour goes beyond

consumers' missing out on necessary information. It also affects market dynamics. As a result of ACM's intervention, competition in the market is sharpened and all players are playing by the same rules. Another example: in 2015 ACM issued fining decisions for market sharing agreements in the *Cold Storage cartel* cases. ACM reduced the fines by 10 percent for parties not disputing the facts of the case. In other cases, ACM reduced the fines even further because the company involved had compensated their consumers for the damage suffered. In 2016, ACM accepted commitments from undertakings active in the market for construction materials, more specifically ready-mix concrete. In ACM's view, harm to competition could arise due to the structure of the sector combined with the close ties between the various firms and/or their employees (resulting, for example, in jointly-used plants, managed by competitors). Seven undertakings made extensive commitments stating that where they have a combined market share of 40 percent or more in a particular region, they will cease their collaboration within three years, so that the joint operation of plants will no longer take place. ACM believes that, due to this intervention, possible harm to competition is avoided.

These examples show that the optimal use of its instruments gives the authority the means to contribute to restoring the position of undertakings and consumers in the market, and thus to contribute to the well-functioning of markets. While developing and using their instruments, authorities must be alert to the importance of maintaining their credibility. Transparency, respect for the rights of defence of the parties involved and the for the interests of third parties are important elements for consideration. ACM finds it, therefore, important that all its decisions may be challenged before the court. In fact, most enforcement decisions are reviewed by the court. The court's review extends to the selection of the instrument (could ACM reasonably choose a certain instrument?) and in the case of fines, their proportionality.

Notwithstanding ACM's large working scope and large toolbox, one may pose the question whether the authority is sufficiently armed to tackle the market problems not only of today but also of tomorrow? The world is transforming rapidly as a result of digitalization. Platformisation, the sharing economy and big data stimulate new business models which are very different from those we know from the past. New business models create new opportunities but also new uncertainties. In the sharing economy and with the use of big data, it is not always clear anymore who is the producer and who is the consumer. Consumers are paying for products and services with their data rather than with their pockets. Are our laws and tools fit to detect possible harmful developments and are our

tools flexible enough to accommodate new business models? And even if we do have an adequate toolbox, there is another question. Are we capable of delivering timely solutions to today's market problems? Are our traditional procedures not too slow in view of the dynamics of this new digitalized world? How can we offer legal certainty in this rapidly changing world?

Looking at the evolution of competition law enforcement and the dynamics created by the integration of oversight over the years, I am optimistic that we are fit to face this challenge as well. However, if we are to facilitate evolution, we need to be open to discussion. We need to be willing to innovate. Here, an important role is also played by universities and academic debate. The evolution of competition law enforcement, and market oversight in general, are hugely dependent upon academic analysis of new developments and innovative thinking. I am therefore very grateful to the authors who have contributed to this book, and who in their contributions show that they have the discernment and determination needed to facilitate this analysis in our dynamic world.

PART 1 –

INTRODUCTION

CHAPTER ONE

DOMESTIC ENFORCEMENT OF EU ANTITRUST AND STATE AID RULES: STATUS QUO AND FORESEEN DEVELOPMENTS

CATALIN S. RUSU
AND ANNE LOOIJESTIJN-CLEARIE*

1. Introduction

The role of the EU competition law rules in shaping the EU Internal Market can hardly be overstated. Furthermore, competition law has served over time the achievement of various goals: economic efficiency, proper allocation of resources, consumer welfare, and more recently, fostering innovation for the purpose of boosting growth, according to the Europe 2020 agenda.[1] Yet, much of the success of EU competition law in achieving these goals is owed to the practical enforcement of the substantive rules on cartels, abuse of dominance, and State aid. EU competition law has come of age. For quite some time now, it has no longer been regarded as a 'stand-alone only' legal area. Particularly when talking about the enforcement of the EU antitrust rules (Articles 101 and 102 TFEU) and of the EU State aid rules (Articles 107-109 TFEU), a great deal of reliance has been placed on domestic law. In this respect, competition law is nowadays part of domestic administrative law, while

* Catalin S. Rusu is Associate Professor of European Law at Radboud University Nijmegen. (www.ru.nl/english/people/rusu-c). Anne Looijestijn-Clearie is Senior Lecturer of European Law at Radboud University Nijmegen (www.ru.nl/english/people/looijestijn-clearie-a).

[1] See Jones and Sufrin, *EU Competition Law* (2016); Patel and Schweitzer, *The Historical Foundations of EU Competition Law*; Petersen, "Antitrust Law and the Promotion of Democracy and Economic Growth"; Sauter, *Coherence in EU Competition Law*; Mooij and Rusu, "Innovation and EU Competition Law".

also simultaneously impacting greatly domestic private law.[2] Furthermore, especially in the recent past, certain competition law mechanisms seem to be developing quite an interesting relationship with criminal law,[3] and tax law.[4] Last but not least, the network of enforcement entities, that has been put together for the purpose of ensuring that the EU competition law rules are properly enforced in practice, pertains greatly to the EU multi-level governance dynamic.[5]

Within this mix of legal disciplines, that touch upon competition law in a more or less evident manner, it is safe to say that EU antitrust and State aid law have fought their biggest battles on the enforcement front. The substantive rules on cartels, abuse of dominance, and State aid have not changed much since their inception in the late 1950s. It is true though, that when talking about substance, the role of the EU Courts has been instrumental over the years: think, for example, of the recent discussions about object and effect, and appreciability in the context of Article 101 TFEU,[6] or of the development of various types of exclusionary abuses in the context of Article 102 TFEU.[7] In the field of State aid, illustrations can be found in seminal rulings of the CJEU on the topic of services of general

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[2] See, for example: Van Bael, *Due Process in EU Competition Proceedings*; Hüschelrath and Schweitzer, *Public and Private Enforcement of Competition law in Europe*; Komninos, "Public and Private Antitrust Enforcement in Europe"; Korah, *EC Private Enforcement*; Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages".

[3] See Whelan, *The Criminalization of European Cartel Enforcement*; Wardhaugh, *Cartels, Markets and Crime.*

[4] Nicolaides, "State aid Rules and Tax Rulings", p. 428; Moreno González, "State aid and Tax Competition", p. 556; Gunn and Luts, "Tax Rulings, APAs and State aid", p. 119; Luja, "Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?", p. 312.

[5] See also Caranta, Andenas and Fairgrieve, *Independent Administrative Authorities*; Cengiz, "Multi-level Governance in Competition Policy"; Cseres, *Questions of Legitimacy*; Fox and Trebilcock, *The Design of Competition Law Institutions;* Wilks, "Agencies, Networks, Discourses".

[6] See for example CJEU 14 March 2013, C-32/11, ECLI:EU:C:2013:160 (*Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*); CJEU 11 September 2014, C-67/13P, ECLI:EU:C:2014:2204 (*Groupement des cartes bancaires v. European Commission*); CJEU 13 December 2012, C-226/11, ECLI:EU:C:2012:795 (*Expedia Inc. v. Autorité de la concurrence and Others*); CJEU 20 January 2016, C-373/14P, ECLI:EU:C:2016:26 (*Toshiba Corporation*).

[7] See, for example CJEU 16 July 2015, C-170/13, ECLI:EU:C:2015:477 (*Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*); CJEU 17 February 2011, C-52/09, ECLI:EU:C:2011:83 (*Konkurrensverket v. TeliaSonera Sverige AB*).

economic interest[8] and on that of the market economy investor principle.[9] Yet, the enforcement of the EU antitrust and State aid substantive rules is the legal realm that has faced the most interesting challenges, to say the least in the recent past. This is so, especially when taking into account the diversity of the domestic legal mechanisms used by the national bodies in the context of their enforcement activities.

While, as stated above, a big part of the enforcement of the EU competition law rules takes place in the domestic ambits, a valid question that may be posed is whether the national authorities performing the enforcement work have the adequate tools to get the job done. In other words, is the enforcement of the EU antitrust and State aid rules, performed by the national competition authorities and the domestic courts, prone to be boosted? Or better yet, to what extent would boosting the domestic enforcement of the EU competition law rules aid the ambition of more forceful, better targeted, and more resource-efficient EU competition law enforcement in the Internal Market? Answering these questions is important, since efficiency, coherency, and uniformity in the enforcement activities are key attributes of the development of the EU competition law area, especially in this day and age, when the scarcity of (enforcement) resources calls for a pragmatic approach on behalf of all entities concerned, be them EU institutions, or domestic entities.

To this end, the volume at hand raises certain key points in connection with the areas where the boosting of the domestic enforcement of the EU antitrust and State aid rules seems more challenging than ever. Thus, the contributions included in this volume critically discuss important elements relating to the domestic enforcement of the said rules, in order to place the discussion of further boosting this enforcement exercise in the correct context. In the eyes of the editors of and the contributors to this volume, such discussions are necessary in order to ensure that the domestic enforcement of the EU competition law rules develops in a consistent and uniform manner. If the endeavour is to ensure more forceful and effective enforcement, while making an even greater use of the domestic enforcement capabilities, a coherent and transparent approach must be adopted, so that added value is created, for the benefit of all stakeholders involved.

With this in mind, the volume at hand contains diverse contributions touching upon topical practical aspects: the sufficiency of the enforcement

[8] CJEU 24 July 2003, C-280/00, ECLI:EU:C:2003:415 (*Altmark*).

[9] See for example, CJEU 3 April 2014, C-224/12 P, ECLI:EU:C:2014:213 (*Commission v. Netherlands and ING Groep NV*) and CJEU 4 September 2014, Joined Cases C-533/12 P and C-536/12 P, ECLI:EU:C:2014:2142 (*SNCM and France v. Corsica Ferries France*).

toolbox of national competition authorities, the interaction between fundamental rights and competition law, the link between the Private Damages Directive[10] and public enforcement tools in domestic ambits, the interplay between EU State aid law and domestic enforcement activities, and the duties of domestic bodies in this context. Generally speaking, these contributions may be categorized as relating to either EU antitrust law (enforcement), or EU State aid law (enforcement). Consequently, this volume is structured in two main parts, dealing with enforcement aspects relating to these two areas of EU competition law. In the same respect, the following two sections of this introductory chapter briefly touch upon the *status quo* and the foreseen legal developments, in the field of EU antitrust and State aid law enforcement, respectively.

2. The domestic (public) enforcement of the EU antitrust rules

2.1 Status quo

Regulation 1/2003[11] brought about significant changes with its entry into force on 1 May 2004 to the enforcement of the EU antitrust rules.[12] A so-called 'decentralized' enforcement system was put into place, in which not only the European Commission, but also the national competition authorities and the domestic courts, were charged with the task of enforcing Articles 101 and 102 TFEU, when the trade between Member States is impacted.[13] In this respect, a network of enforcement entities was created (the so-called European Competition Network), in the context of which exchanges of relevant enforcement information take place, thus ensuring also a valuable forum for discussion between the competition enforcement agencies in the EU.[14]

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[10] Directive 2014/104/EU 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, OJ L 349/1, 05.12.2014.

[11] 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 L1/1, 04.01.2003.

[12] See also Cseres, "The Impact of Regulation 1/2003 in the New Member States"; Parret, *Side Effects of the Modernisation of EU Competition Law.*

[13] See Article 3 of Regulation 1/2003. For further details, see also Lenaerts and Gerard, "Decentralisation of EC Competition Law Enforcement".

[14] See also the Notice on cooperation within the network of competition authorities, OJ C 101/43, 27.04.2004.

The consequences that the entry into force of Regulation 1/2003 brought about have been debated extensively.[15] To summarize the contribution of Regulation 1/2003 to a stronger enforcement of the EU competition rules, one may mention the following:[16] first, a larger number of infringements has been tackled by the national competition authorities after 2004, than the Commission could have handled by itself; second, this gave the Commission more room to prioritize its enforcement activities by devoting more resources to the more important inquires. As a by-product of this joint enforcement of the EU antitrust rules, a process of 'soft harmonisation' has occurred between the domestic and the EU substantive rules on anticompetitive agreements and abuses of dominant positions.[17] Consequently, Articles 101 and 102 TFEU have become the law of the land throughout the EU.[18] Furthermore, the joint enforcement of the EU antitrust rules by the Commission and the domestic bodies, has rendered the latter as solid enforcement pillars of the EU antitrust rules. All in all, Regulation 1/2003 has created the premises for a proliferation of the antitrust law enforcement in the EU. Still, has this enforcement expansion reached its outer limits? In other words, is there more that can be done with the system put in place by Regulation 1/2003?

In particular, when talking about the enforcement performed by the national competition authorities, the above-mentioned proliferation has its roots in the decision-making powers that Article 5 of Regulation 1/2003 grants to these domestic bodies: requiring that an infringement of the EU antitrust rules be brought to an end, ordering interim measures, accepting commitments, and sanctioning the infringers. Yet, these administrative powers are not as far reaching as originally thought, since according to the provisions of Article 10 of the same Regulation, and as further explained in the *Tele2Polska* CJEU ruling,[19] it is only the Commission that can adopt a decision stating that the EU antitrust rules have not been infringed. Thus,

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[15] See also Wils, "Ten Years of Regulation 1/2003"; Rusu, "The Commission Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003".

[16] For a more thorough analysis on this matter, see Cseres, "Multi-Jurisdictional Competition Law Enforcement". See also Italianer, "Completing Convergence"; Italianer, "The Independence of National Competition Authorities"; Almunia, "Looking Back at Five Years of Competition Enforcement in the EU".

[17] Vedder, "Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law".

[18] Communication from the Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453, 09.07.2014.

[19] CJEU 3 May 2011, C-375/09, ECLI:EU:C:2011:270 (*Tele2Polska*).

negative enforcement decisions are off-limits for the domestic entities, for the simple reason of avoiding the risk of undermining the uniform application of Articles 101 TFEU and 102 TFEU. Moving on, when it comes to the investigative powers of the national competition authorities, the prerogatives for performing antitrust investigations are not grounded in EU law (as is the case for the Commission, whose investigative powers are embedded in Chapter V of Regulation 1/2003), but rather are exercised by making use of domestic procedures. It is true that the use of these domestic procedures has to be in accordance with the EU law principles of effectiveness and equivalence, yet this control is rather light.[20] Similarly, the control that EU law exerts on the Member States' institutional autonomy is again limited, since there is a large degree of flexibility that EU law leaves to the Member States in the design of their competition regime. When designing the features of their national enforcement agencies, the Member States must comply only with the rather permissive obligation contained in Article 35 of Regulation 1/2003, to observe that the provisions of the Regulation are effectively complied with. Last but not least, recent research[21] put forward by the European Commission shows that the institutional positioning of the national competition authorities, their staffing and funding policies, and the powers allotted the them in relation to day-to-day enforcement activities lack the desired strength for these entities to be labelled as truly effective EU antitrust law enforcers. All in all, these issues demonstrate the rather fragmented nature of the EU antitrust domestic public enforcement activities performed by the national competition authorities.

[20] See CJEU 7 December 2010, C-439/08, ECLI:EU:C:2010:739 (*VEBIC*) and CJEU 18 June 2013, C‑681/11, ECLI:EU:C:2013:404 (*Schenker*).

[21] See Communication from the Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453, 09.07.2014; Commission Staff Working Document SWD (2014) 230 – Ten Years of Antitrust Enforcement under Regulation 1/2003, SWD(2014) 230/2, 09.07.2014; Commission Staff Working Document SWD (2014) 231 – Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, 09.07.2014.

2.2 Foreseen developments

Remedying (at least some of) these enforcement inconsistencies seems to require an imminent revision of the system put in place by Regulation 1/2003. In this respect, the Commission initiated a public consultation in late 2015,[22] for the purpose of identifying the mechanisms to ensure that the national competition authorities are further empowered to be more effective EU antitrust enforcers. In the words of the Commission, the national competition authorities indeed have the potential to do much more. While Regulation 1/2003 gave these domestic agencies the competence to apply the EU antitrust rules, it did not tackle the means and instruments by which they apply those rules. As a result, the national competition authorities encounter various institutional, investigative, and decision-making difficulties in carrying out their work and in tapping their full potential, such as: the ability to act independently when enforcing EU antitrust rules and having the resources and staff needed to do their work; an adequate competition toolbox to detect and tackle infringements; imposing effective fines on companies which break the rules; applying leniency programmes that work effectively across Europe. Amending Regulation 1/2003 in order to ensure that such limitations on the enforcement work performed by the national competition authorities are removed, seems to be a good starting point in fulfilling the endeavour of more forceful and effective EU antitrust enforcement throughout the EU. Yet, this exercise tackles only one of the facets of enhancing the domestic enforcement activities in the national ambits, namely what the EU law instruments can do to further boost the domestic enforcement of Articles 101 and 102 TFEU.

A stronger and more coherent approach to boosting the domestic enforcement activities relates to much more than this. In this respect, the following three chapters of this volume critically assess specific enforcement points which are prone to improvement, from various standpoints: the contribution of domestic legal processes to boosting the EU antitrust enforcement, the consistency between investigation tools and fundamental rights, and the balance between various public and private enforcement mechanisms. While this list of improvement points is by no means exhaustive, it provides a colourful depiction of the diversity of actions which may be undertaken in connection with various legal fields,

[22] *ECN Plus: Empowering the national competition authorities to be more effective enforcers*, available at: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html, accessed on 05.12.2016.

for the purpose of boosting enforcement. On top of this, the selection of the domestic jurisdictions covered in these contributions constitutes a representative sample as far as enforcement experience and traditions, priorities, and breadth and availability of domestic investigative tools are concerned.

First, one has to ask the question what other avenues are available in the domestic settings to boost EU antitrust enforcement. In other words, is there something that can be done in the domestic proceedings to this end, after a national competition authority has established an infringement of the EU antitrust rules and imposed a fine? The contribution of Annalies Outhuijse in Chapter 2 deals with important aspects relating to the effectiveness of the public enforcement of the EU cartel prohibition in the Netherlands, by focusing on the success rate in appeal proceedings in front of the Dutch administrative courts, with regard to the fining decisions issued by the Netherlands Competition Authority. Her research shows that a large percentage of such decisions are overturned on appeal, thus calling into question the consistency of the approaches undertaken by the administrative enforcement agency, on one hand, and the judiciary, on the other hand, with respect to, for example the standard of due process and the proportionality of fines. What is more, according to Outhuijse, the fact that many decisions are challenged and annulled affects the effective enforcement of EU antitrust law, while also entailing other negative externalities of a quantitative and qualitative nature (e.g. high costs, legal uncertainty). Consequently, boosting the enforcement of the EU antitrust provisions pertains to a great extent also to how the domestic processes may be upgraded.

Second, boosting the enforcement of the EU antitrust rules relates also to the strength of the connection established between the national competition authorities making use of their investigative powers (provided by domestic law), on one hand, and the protection of the fundamental rights of the undertakings under investigation, on the other hand. Indeed, while ‘dawn raids’ are indispensable investigative tools of competition authorities, they may also entail profound fundamental rights intrusions. Michal Petr discusses in Chapter 3 the differences between the regime applied to the inspections performed by the Commission (which is governed by EU law – Regulation 1/2003), and those performed by the national competition authorities, under the – not yet harmonised – national rules. This two-sided setup yields different judicial review avenues, too: the former inspections are ultimately reviewed by the CJEU, while making use of the Charter of Fundamental Rights, while the latter are reviewed by the by the European Court of Human Rights, under the provisions of the

European Convention on Human Rights. While focusing on two recent infringement decisions issued by the Commission and the Czech Competition Authority, respectively, Petr aims to ascertain whether legislative changes are necessary in both the EU and the national legal regimes, for the purpose of bringing uniformity in the manner in which inspections unfold in various jurisdictions, and also in order to ensure stronger consistency with fundamental rights guarantees. With regard to the main question of this volume, establishing a solid rapport between investigative prerogatives of enforcement agencies and due process with respect to the parties investigated is prone to boost the quality of the EU antitrust enforcement process.

Third, a more encompassing enforcement of the EU antitrust rules necessarily pertains also to the manner in which the relationship between various public and private enforcement mechanisms is conceived. While this relationship was for decades unbalanced, the recent case law[23] and legislative developments[24] seem to have brought about a degree of equilibrium. Yet, this relationship is still rather fragile, since it is built on delicate institutional dynamics, which often seem to be pulling in opposite directions: while the Commission is highly protective of its leniency policy, the CJEU seems to be placing a great deal of importance on private enforcement. On top of all this, the incentives of market players to apply for leniency seem to have shifted in the recent past. Further, boosting the enforcement of the EU antitrust rules entails correctly setting the balance between all these interests. In Chapter 4, Manuel Contreras focuses on the obstacles which may continue to hamper the development of antitrust damage claims after the 2014 Private Damages Directive is fully implemented in Spain. In this respect, he tests the provisions of the Spanish draft proposal for the implementation of the Directive against (amongst others) the EU principle of effectiveness. Furthermore, the contribution of Contreras debates whether the prohibition to disclose leniency and settlement documents in court will remain a major obstacle to Spanish antitrust damage claims, and proposes a more daring alternative for incentivizing leniency applications: individual criminal responsibility of the directors of cartel offenders, who fail to cooperate with the Spanish

[23] See for example CJEU 14 June 2011, C-360/09, ECLI:EU:C:2011:389 (*Pfleiderer*); CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Bundeswettbewerbsbehörde v. Donau Chemie AG and Others*); CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone*).

[24] Directive 2014/104/EU 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, OJ L 349/1, 05.12.2014.

Antitrust Authority under the leniency program. All in all, such discussion points may very well be valuable avenues for boosting EU antitrust enforcement in the domestic ambits, or in any case, at least food for thought for the Commission, when reviewing the Private Damages Directive. According to Article 20 of the said Directive, this should happen no later than December 2020.

3. The domestic enforcement of the EU State aid rules

3.1 Status quo

The EU State aid rules, laid down in Articles 107-109 TFEU, are unique to the European Union and are specific to the Internal Market project. These rules are as old as the EU itself, but for a long time they stood in the shadow of the EU antitrust rules, which apply directly to undertakings. A number of recent developments, some of which are discussed in this volume, have, however, taken the State aid rules out of the shadow and put them into the spotlight. In this introductory chapter, we will focus on three such developments.

The first important development is that in May 2012 the Commission began adopting a major reform package, referred to as the State Aid Modernisation Programme (hereinafter the SAM programme).[25] As part of the SAM package, the Commission adopted new guidelines in a large number of areas (on, for example, research and development and innovation; broadband connections; energy and environment; risk financing of SMEs and midcaps; regional aid, etc.). The Commission also adopted five important regulations in order to make State aid control instruments and procedures more efficient.[26] Last but not least, in order to provide practical guidance to public authorities (and national courts) and undertakings in identifying when public support measures fall within, and outside, the

[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation, COM(2012) 209 final. In par. 8 of this document, the Commission states that the SAM programme has a threefold objective: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission *ex ante* scrutiny on cases with the biggest impact on the internal market whilst strengthening the Member States' cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions.

[26] For a comprehensive overview of the SAM programme, see: http://ec.europa.eu/competition/state_aid/modenisation/index_en.html, accessed on 15.12.2016.

scope of the EU State aid rules, in May 2016, the Commission adopted the long-awaited Notice on the Notion of State Aid.[27] Apart from providing clarifications on a number of points, this Notice gives general guidance on all the constitutive elements of the notion of State aid: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition and trade between Member States. This guidance is based on existing case law of the EU Courts and, in some instances, on the views of the Commission itself.

Secondly, in 2015 and 2016, the Commission handed down a number of decisions concerning one of the elements for the application of Article 107 (1) TFEU, namely that the measure in question must have an effect on trade between Member States. The approach followed by the Commission is also reflected in its Notice on the notion of State aid.[28] As will be demonstrated below, it is debatable whether the approach of the Commission is itself consistent and whether it is in line with that of the CJEU.

A third significant recent development concerns the State aid investigations conducted by the Commission into a number of tax rulings granted to large multinational companies in the Member States. These decisions have attracted a great deal of media attention and, in some cases, fierce criticism.[29]

All of these developments have important ramifications for the enforcement of the State aid rules at national level which we will deal with in turn below.

It should, however, first be noted that, in contrast with the important role conferred on the national competition authorities of the Member States in the enforcement of the EU antitrust rules, for obvious reasons, no such role has been conferred on these authorities with regard to the enforcement of the EU State aid rules. At national level, only the courts of the Member States are entrusted (to a certain extent) with the enforcement of the State aid rules. The Commission observes that litigation on State aid matters before domestic courts in the EU has significantly increased in recent years which means that private litigation now plays an important

[27] Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union, OJ C262/1, 19.07.2016.
[28] See Commission Notice on the notion of State aid, par. 190-198.
[29] See for example, Kavanagh and Robins, "Corporate Tax Arrangements Under EU State Aid Scrutiny. The application of the Market Economy Operator Principle"; Gunn and Luts, "Tax Rulings, APAs and State Aid: Legal Issues", p. 119.

role in the overall enforcement of the State aid rules.[30] This raises the question of whether the tools which domestic courts have at their disposal contribute to an effective enforcement of the EU State aid rules at national level.

In the application and enforcement of the State aid rules, the Commission and national courts have complementary and separate roles to play. Although decisions on the compatibility of State aid measures with the Internal Market are reserved solely to the Commission, national courts do have a number of key roles to play. It may therefore be useful, in the context of this volume, to briefly recall the powers of domestic courts with regard to the enforcement of the State aid rules.[31] Domestic courts are responsible for enforcing the so-called standstill obligation set out in Article 108 (3) TFEU,[32] for enforcing decisions taken by the Commission under Article 108 (2) TFEU[33] and for applying the provisions of block exemptions adopted under Article 109 TFEU.[34] In order to enforce the standstill obligation and to apply any relevant block exemption, national courts will in most cases need to apply and interpret Article 107 (1) TFEU to determine whether and to what extent a national measure indeed forms State aid.[35]

In Chapter 6 of this volume, Metselaar discusses in detail the wide variety of cases which come before the domestic courts in the Netherlands. Her contribution makes clear that the role of the domestic courts is not limited to settling cases where an interested party (often a competitor) argues that aid has been granted in contravention of the standstill obligation set out in Article 108 (3) TFEU. Metselaar reviews seven other categories of cases which have come before the Dutch courts on the basis

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[30] See, *Enforcement of EU State aid law by national courts. The Enforcement Notice and other relevant materials*, European Commission, Brussels, 2010, Foreword; 2009 National Enforcement Study Update, available at: http://ec.europa.eu/competition/court/state_aid/studies_reports/html, accessed on 15.12.2016.

[31] See Bacon, *European Union Law of State Aid*.

[32] See for example, CJEU 11 December 1973, 120/73, ECLI:EU:C:1973:152 *(Lorenz v. Germany)*, par. 8; CJEU, C-354/90, ECLI:EU:C:1991:440 *(FNCEPA v. Commission)*, par. 11-12.

[33] See for example, CJEU 19 June 1973, 77/72, ECLI:EU:C:1973:65 *(Capolongo)*, par. 6.

[34] See, Commission Notice on the enforcement of State aid law by national courts, OJ C85/1, 09.04.2009, par. 16.

[35] See for example, CJEU 22 March 1977, 78/76, ECLI:EU:C:1977:52 *(Steinike & Weinlig v. Germany)*, par. 14; CJEU 11 November 1996, C-39/94, ECLI:EU:C:1996:285 *(SFEI)*, par. 49.

of the EU State aid rules. It is interesting to note that one such category is the situation where the state itself, increasingly so in the Netherlands, invokes the State aid rules in order to prevent granting aid, or to undo aid already granted, without having been ordered to do so by the Commission. Another type of case which frequently reaches the Dutch administrative courts is that in which a spatial planning decision is challenged on the grounds that the project to which the spatial planning decision pertains involves the granting of State aid. The chapter by Metselaar also makes clear that not only the civil courts have a role to play in deciding cases based on the EU State aid rules, a comparable role is also played by the administrative and tax courts in the Netherlands.

3.2 Foreseen Developments

We will now discuss what ramifications the above-mentioned three developments may have for the application and enforcement of the State aid rules by domestic courts.

3.2.1 Enforcement of the standstill obligation by domestic courts

As mentioned above, one of the most important tasks of the domestic courts of the Member States is the enforcement of the so-called standstill obligation contained in Article 108 (3) TFEU. If a dispute with regard to an alleged infringement of the standstill obligation comes before a domestic court, in order to settle this dispute, this court will first have to answer the question of whether the measure in question does indeed constitute aid within the meaning or Article 107 (1) TFEU. In order to do so, the domestic court will have to examine whether all the constitutive elements of the notion of State aid contained in this provision exist. Answering this question is not as simple as appears at first glance.

As mentioned above, the Commission has, in its Notice on the notion of State aid, attempted to provide guidance on this matter. Be that as it may, we would like to point out that difficulties may arise with regard to the interpretation of a number of the constitutive elements of State aid.

In Chapter 7 of this volume, Ament deals with the element ‘undertaking’. The State aid rules apply only if the beneficiary of the aid qualifies as an ‘undertaking’ within the meaning of the EU competition law rules. On the basis of settled case law of the CJEU, at first glance this would not appear to be a difficult issue to determine: an undertaking is

every entity engaged in an economic activity.[36]

However, Ament's discussion of ancillary activities raises interesting questions on the concept of an economic activity. Ament provides a detailed overview of the practice of the Commission and the case law of the General Court regarding aid to environmental production organisations. The main thrust of Ament's argument, which is shared by Van de Gronden in his chapter (Chapter 8), is that some economic activities form such a small part of the activities of a non-economically active entity, such as an environmental organisation, that they should be excluded from the EU competition law rules altogether. This would greatly reduce the administrative burden imposed on public authorities planning to grant aid to environmental organisations and the like.

In their contributions, both Ament and Van de Gronden deal extensively with this matter. In this introductory chapter, we would like to focus on two other constitutive elements of the notion of State aid: the trade between Member States criterion and the criterion of selectivity.

In order to constitute aid within the meaning of Article 107 (1) TFEU, the measure at issue must have an effect on trade between Member States. As Van de Gronden states in Chapter 8, "[…] it is of utmost importance for the national authorities to have a clear and transparent test for establishing an impact on intra-Union trade." It is obvious that the same applies to the domestic courts.

In a press release dated 29 April 2015,[37] the Commission discusses seven decisions in which it found that measures granting public support to purely local operations in the Czech Republic, Germany, the Netherlands and the UK did not involve EU State aid because these measures were unlikely to have a significant effect on trade between Member States. The Commission states that the reason for the finding of no impact on interstate trade is that in these cases support was granted to an activity which has a purely local impact. In a further five decisions handed down on 21 September 2016, the same approach of the Commission can be found.

In a press release from the same date,[38] the Commission states "[…] where the beneficiary of state support supplies goods or services to a limited area within a Member State, and is unlikely to attract customers from other Member States, there may be no effect on intra-EU trade and therefore no State aid within the meaning of the EU rules. To be free of aid, the measure should also have no – or at most marginal – foreseeable

[36] See for example, CJEU 23 April 1991, C-41/90, ECLI:EU:C:1991:161 *(Höfner)*.
[37] See Press Release IP/15/4889 of the Commission of 29.04.2015.
[38] See Press Release IP/16/3141 of the Commission of 21.09.2016.

effects on cross-border investment in the sector or on the establishment of companies within the EU's Single Market." These decisions would seem to indicate that the Commission is adopting a 'softer' approach to measures with a purely local impact, as far as the criterion of an effect on interstate trade is concerned. In previous decisions, the Commission was not eager to accept that the criterion of an effect on trade between Member States could be excluded.[39] An actual effect on interstate trade was not required. A potential effect sufficed.

The 'new' approach is also reflected in the Commission Notice on the notion of State aid where the Commission repeats the statement made in the press release of 21 September 2016.[40] Furthermore in this Notice, the Commission attempts to provide guidance on the interstate trade criterion by giving numerous examples of past decisions where it found that there was no impact on trade between Member States.[41] The Commission does not, however, lay down a clear test for determining what amounts to an effect on trade between Member States.

We would, however, observe that the approach of the Commission is not always consistent. The Commission seems to be oscillating between its former approach and its 'new' approach. An illustration can be found in a recent Commission decision.[42] At issue was aid granted to a port authority which operates the Lauterbach port. This port is a small harbour located in the city of Putbus, Germany, which is used predominately by excursion vessels and river cruise ships. The aid was granted to facilitate the expansion and adaption of the port in order to meet the growing demand for river cruise ships. In deciding whether the granting of the aid would distort competition, the Commission stated: "It can therefore not be excluded that the project will, at least potentially, distort competition between river cruise ship ports *in Germany*." In deciding on the impact on interstate trade, the Commission reverted to its former approach. It states: "[…] the Commission is of the view the measure is *at least potentially* capable of affecting trade between Member States by *potentially* diverting

[39] An example can be found in Commission Decision N 1/2010, C(2010) 22540, State aid to Basque museums. Here, although the Commission found that the aid granted was unlikely to significantly affect intra-Union trade, it did not rule out the presence of State aid completely. The Commission therefore reviewed the compatibility of the aid under the cultural derogation of Article 107 (3) (d) TFEU.
[40] See Commission Notice on the notion of State aid, par. 196.
[41] See Commission Notice on the notion of State aid, par. 197.
[42] Commission Decision SA.45848 (2016/N) Extension of cruise ship terminal Putbus-Lauterbach, Brussels, 19.08.2016, C(2016) 5456 final.

traffic away from other Member States […]."[43]

In this volume, Van de Gronden points out that the 'new' approach of the Commission may be contrary to established case law of the CJEU. We agree with this observation. The CJEU applies a very lenient test with regard to the trade between Member States criterion which means that this criterion is easily satisfied. It is settled case law that a potential effect on interstate trade suffices for the application of the State aid rules.[44] Furthermore, the CJEU has never applied a *de minimis* rule in determining whether a measure is liable to affect trade between Member States. In other words, the relatively small amount of the aid concerned or the relatively small size of the undertaking receiving the aid does not exclude the possibility that trade between Member States might be affected.[45]

The fact that the final version of the Commission Notice on the notion of State aid, unlike the draft version of this Notice, does not contain a general test for determining when interstate trade is affected, is also mentioned in the contribution of Van de Gronden. He, however, finds that the Commission may have good reasons for not including a general test, namely the fact that it is ultimately for the CJEU to decide on the interpretation of the criterion of the effect on trade between Member States, not the Commission.

Van de Gronden puts forward the interesting suggestion that, in order to aid national authorities in the application of the trade between Member States criterion, the Commission should consider exploring the avenue of raising the threshold set out in the *De Minimis* Regulation.[46] Although this exercise may have a number of pitfalls, we feel that it should be given serious consideration as this may provide clearer guidance to all stakeholders involved than the examples given by the Commission in its Notice on the notion of State aid.

[43] All emphasis by the authors of this chapter.

[44] See for example, CJEU 8 May 2013, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288 *(Libert)*, par. 76; CJEU 14 January 2015, C-518/13, ECLI:EU:C:2015:9 *(Eventech v. The Parking Adjudicator)*, par. 65.

[45] See for example, CJEU 24 July 2003, C-280/00, ECLI:EU:C:2003:415 *(Altmark)*, par. 81.

[46] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L352/1, 24.12.2013.

3.2.2 Tax rulings and the role of domestic courts (the selectivity criterion)

Another, highly publicised, development concerns the State aid investigations conducted by the Commission into a number of tax rulings granted to large multinational companies in the Member States. This development may also lead to problems for domestic courts when deciding on whether a tax ruling amounts to State aid within the meaning of Article 107 (1) TFEU. This relates in particular to the criterion of selectivity.

To date the Commission has adopted final decisions in the following cases: *Fiat Finance & Trade*,[47] *Starbucks*,[48] *Belgian Excess Profit Ruling System*[49] and *Apple*.[50] The Commission concluded in all four cases that the tax rulings in question constituted unlawful State aid which must be recovered (with interest) from the beneficiary by the national authorities concerned. A number of other investigations are still pending. Moreover, in a working paper published on 3 June 2016,[51] the Commission announced its intention to pursue further investigations.

The decisions concerning tax rulings have been subjected to fierce criticism from both within[52] and outside the EU.[53] One of the main points

[47] Commission Decision on State aid SA.38375 (2014/C ex 2014 NN) which Luxembourg granted to Fiat, Brussels, 21.10.2015, C(2015) 7152 final.

[48] Commission Decision on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, Brussels, 21.10.2015, C(2015) 7143 final.

[49] Commission Decision on the excess profit exemption state aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium, Brussels, 11.01.2016, C(2015) 9837 final.

[50] On 30 August 2016, the Commission adopted a final negative decision with recovery in this case. The public version of this decision is not yet available.

[51] DG Competition Working Paper on State Aid and Tax Rulings, 03.06.2016, available at: http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf, accessed on 16.12.2016.

[52] See footnote 29, above.

[53] In particular the alleged bias of the Commission against US-based multinational companies has led to criticism in the USA. In August the U.S. Treasury Department issued a White Paper criticising the Commission's approach. See, The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings. U.S. Department of the Treasury White Paper of 24 August 2016, available at: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf, accessed on 16.12.2016.