



European
University
Institute

ECN Plus Directive:
Empowering NCAs?
Strengthening the network?

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	Experts OECD	Statist WTO	Community ICN
Rule makers/rule followers	Separate	Separate	Combined
Product of governance process	Standards	Binding rules	Beliefs/workbooks
Logic of rule making	Expertise	Political negotiation with expert	Negotiations w experts
Mode of rule monitoring	Expert 'awe'	coercion	Socialisation
Plus and minus	Strong legitimacy of expert body necessary	Efficient but likely to require many exceptions	Easy to start but few constraints on members
EU	Member States; DG comp observer	DG Trade	DG Comp & NCAs



- 1990s:
 - ‘old’ and would be ‘new’ MS align national competition law to EU law
 - 1999: COM reflects on how to decentralise competition law enforcement more effectively
- Regulation 1/2003
 - Abolish system of precautionary notification to COM
 - NCAs must apply EU competition law in parallel to national competition law
 - **Cooperation between COM and NCAs**
 - 2002: birth of European Competition Network



Alexander Italianer (DG Comp): ‘We have taken only 134 decisions. The NCAs an impressive 736’ between 2004 and 2014

A closer look shows:

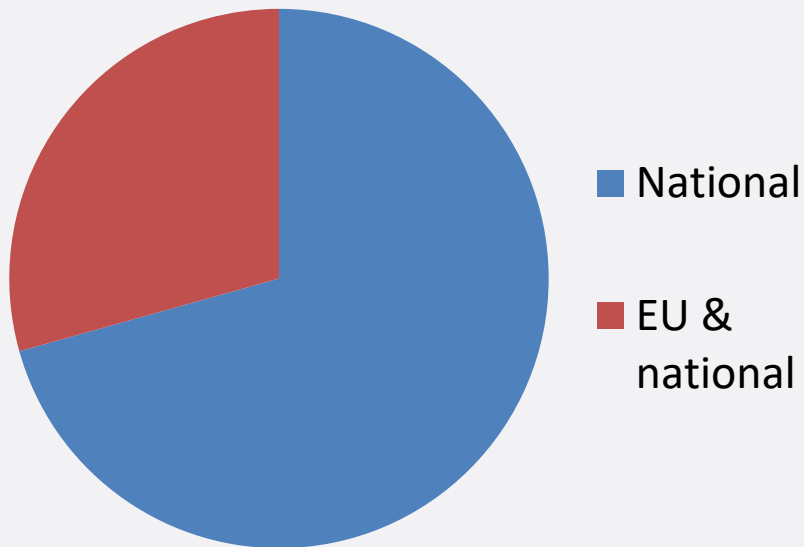
- Most NCA decisions based on effects in own territory
- Few reallocation of cases
- Level of NCA cooperation undisclosed



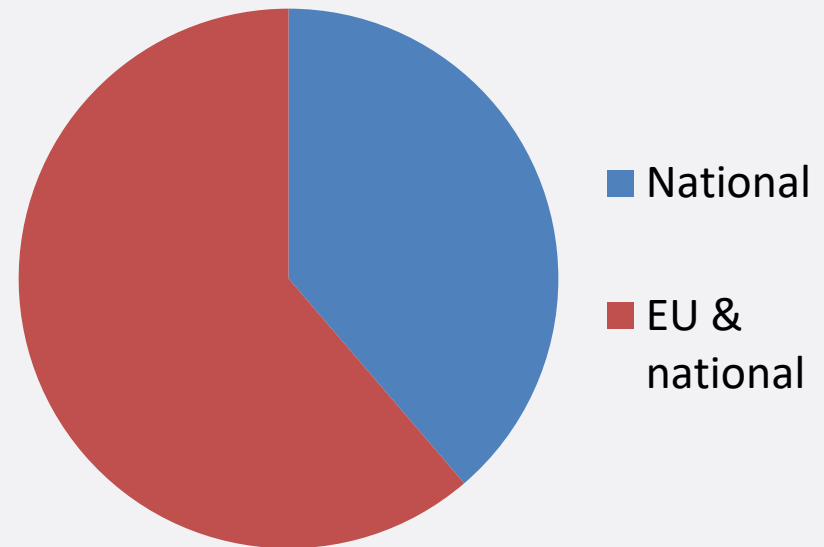
The Law of the land...

Art 101 & national equivalent 2005-2012

Belgium



The Netherlands





French, German, Dutch, Belgian NCA

- Each sets a fine for effects in own territory
- Dutch & German NCA coordinate fines to apply 'inability to pay defense'
- Only France penalises market sharing
- One Belgian fine quashed for breach of *ne bis in idem* (*Brabomills*)

- Issue
 - Booking.com secures contracts preventing hotels from offering cheaper rooms to other on-line travel agents & on hotel own website
- Procedure
 - Swedish, French and Italian NCA investigate jointly & identify workable commitment
 - Commitment satisfies all NCAs save Germany
- Politics
 - Loi Macron (France); Italian Annual Competition Law
 - Render void all limits on hotel pricing of rooms
- Review study by COM
 - Some stimulation of competition
 - Awareness raising needed that MFNs are no longer allowed



COM's ECN plus proposal 1: confirmation bias

- Independence, resources, ability to set priorities
- **Investigatory & fining powers**
 - Powers to inspect businesses/homes
 - Information requests/interviews
 - Termination/interim measures/commitments/fines
- Leniency
- Mutual assistance among NCAs & COM
 - NCA1 inspections on behalf of NCA2
 - NCA1 enforcing penalty on behalf of NCA 2
- Minimum harmonization of
 - enforcement & fining powers (Rec.7);
 - leniency (Rec.10)



COM's ECN proposal 2 arrogance?

- NCAs must be independent, what about the Commission?
- Powers conferred on NCAs are those COM has under Regulation 1/2003
- Have NCAs nothing to contribute to identifying best practices?
 - Competition advocacy (Italy)
 - Review of impact of commitment decisions (France)



ECN Plus directive 3 limits of ECN as a policy forum?

- **Best practices**
 - Leniency 2006, 2012; Procedural matters
 - Many codified in proposed ECN+ Directive
- **Leadership?**
 - EG France & Germany: ecommerce, big data
- **Experimentalist governance?**
 - EG Dutch Sustainability initiative
- **Peer Review**
 - EG convergence tests for leniency
- **Accountability of the ECN?**

More trust + more cooperation with ECN plus Directive?



ECN plus Directive 4: if one were bolder

- **Stimulate joint investigations/decisions**
 - Empower one or more NCAs to act and impose a remedy on the EU as a whole
- **Non-infringement decisions**
 - Why are these the exclusive preserve of COM?
- **Competition Advocacy**
 - Require all NCAs to have such powers