Ten years decentralized enforcement: success or failure?

the BCA perspective

Prof. em. Dr. Jacques Steenbergen
president

ACELG
Universiteit van Amsterdam

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Reg.1/2003: the past

- The focus was on the relations between the Commission and the Member states.
- DGComp / NCAs:
  - Critics feared case allocation disputes and legal uncertainty because of self assessment: few disputed allocations and I am not aware of ‘accidents’;
  - Unqualified success. See presentation Jeroen Capiau.
- DG Comp / National judges:
  - Late or no communication of decisions, few requests for assistance,
  - But there are signs of enhanced cooperation.

Reg. 1/2003: the future (1)

- Focus is on relations between NCAs:
  - The network is more than a bundle of vertical relations!
  - Very positive experience with cooperation among neighbors!
- Broad consensus on agenda:
  - Convergence in respect of sanctioning policies of NCAs,
  - Enhanced cooperation between NCAs in related cases: the right to exchange information between NCAs,
  - Enhanced guarantees for the availability of adequate investigative powers: the ECN recommendations and common standards on evidence collection to guide review judges.
  - Enhanced guarantees for the independence and the availability of adequate funding of NCAs.

Reg. 1/2003: the future (2)

– Example: give flexibility in the choice of the turnover basis for the calculation of fines in order to avoid both over- and under enforcement and to respect the *ne-bis-in-idem* rule when sanctions are imposed by one or more NCAs in related cases:

NCAs	**Turnover basis**	**Impact on *ne bis in idem***	**Impact on uniform application and deterrence**	**Impact on ability to pay and passing on risk**
1	Domestic	None	Negative	Less risk
	EU or worldwide	*De facto* none	Neutral	Neutral
Several	Domestic	None	Neutral or limited	Neutral or limited
	EU or worldwide	None in view of case law	Potentially enhanced	Increased risk

Merger Control

- It is necessary to streamline referral procedures as proposed in White Paper.
- Procedural convergence to limit risk of conflicting decisions when several NCAs assess the impact of concentration on the same relevant market: e.g. obligation for parties to mention all jurisdiction in which a transaction is notified, and for the NCAs to check whether they look at the same relevant markets with the possibility for all NCAs to suspend procedures when it is established that they assess the impact of a concentration on the same relevant market.
- Incorporation of merger control network in ECN.