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Harmonising Dawn Raids in a Global Village: The ECN+ Directive and Negotiating Legal Certainty Within Fragmented European Administrative Procedure*

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ABSTRACT: Administrative procedure remains largely unharmonized in the European Union. One area where the divergent national procedures are particularly visible are unannounced inspections or 'dawn raids'. They are carried out by national competition authorities to enforce both national competition laws and the corresponding EU provisions, notably Articles 101 and 102 of the Treaty on the Functioning of the European Union. Provisions that are similar or even identical are thus being enforced under different procedural rules within the Union. Minimum harmonisation of competition law enforcement is underway with Directive 2019/1 or "ECN+", as it became known in the early stages of the work towards the actual Directive. This article looks at different views to harmonisation and uneven enforcement and public statements from six EU Member States about the national amendments to implement Directive 2019/1. Dawn raids are always a balancing act between the public interest in uncovering competition infringements and fundamental and human rights, such as the right of defence. This article argues fragmentation poses a threat to legal certainty and does so in an area that routinely overlaps with fundamental and human rights. What is more, the ECN+ Directive may not level the playing field as intended. The current harmonisation efforts may, instead, carry a risk of merely shifting the existing imbalance to other areas of enforcement.

KEYWORDS: Administrative procedure, dawn raids, harmonisation, ECN+, fragmentation

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1. Introduction

Legislation applicable to European competition authorities' (hereinafter "CA") unannounced inspections varies somewhat in different Member States (hereinafter "MS").[1] Once the CA appears at the targeted undertaking's offices, there may be significant differences depending on national procedural legislation: whether the inspection decision has been subject to judicial control *ex ante* or not, how broad the scope of legal professional privilege (hereinafter "LPP") is, or whether the duration of the inspection has been limited in one way or another.[2] As cross-border business operations are currently more the norm than an exception, one has to wonder whether this fragmentation is justified.[3]

A fair amount of scholarship has examined harmonisation of EU administrative procedure in a more general sense and of EU competition law in the substantive sense. Less so for harmonising dawn raid procedure: where, how and through what kinds of decisions such measures are carried out in practice. The term "dawn raid" is often used to refer to unannounced inspections carried out by CAs to investigate suspected infringements of competition rules. In the absence of EU rules, it is for the domestic legal system of MS to determine the procedural conditions governing actions at law intended to ensure the protection of the rights arising from EU law.[4] Harmonisation of dawn raid provisions may seem like a minor detail in the broader context of EU competition law or European administrative procedure. It is, however, representative of major themes.

The European Commission (hereinafter "EC") and MS both apply Article 101 and 102 of the Treaty on the Functioning of the European

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[1] See also Riina Autio, "Drawing the line at dawn raids: European courts' decisional practice on procedural issues arising from competition authorities' unannounced inspections", *European Competition Law Review* 41, no. 6 (2020): 299; Claudia Massa, "New CPC Regulation and ECN+ Directive: The powers of National Authorities in the fields of consumer protection and antitrust", *Market and Competition Law Review* IV, no. 2 (2020): 129.

[2] See also Riina Autio, "Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities' Explanatory Notes on Unannounced Inspections", *Journal of European Competition Law & Practice* 11, no. 9 (2020).

[3] See e.g. Etsuko Kameoka, "Proposals for Legal Professional Privilege in EU Competition Investigations", *Market and Competition Law Review* 6, no. 1 (April 2022): 19.

[4] Judgment of 16 December 1976, *Rewe v. Landwirtschaftskammer für das Saarland*, 33/76, ECLI:EU:C:1976:188, paragraph 5; judgment of 16 December 1976, *Comet BV v. Produktschap voor Siergewassen*, 45/76, EU:C:1976:191, paragraphs 13-16.

Union (hereinafter "TFEU"),[5] the legal provisions that form the basis of EU competition enforcement. National Competition Authorities (hereinafter "NCA") apply national equivalents of these articles.[6] Regulation 1/2003[7] regulates the powers of the EC in applying Articles 101 and 102 TFEU, obliges MS NCAs to also apply these where they apply national competition law to agreements and practices which may affect trade between MS, and requires MS to refrain from applying national competition laws in a contradictory manner. Directive 2019/1 (hereinafter "ECN+") aims to ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively, inevitably also when applying national competition law in parallel.[8]

Publicly available information on European CAs' dawn raid procedures is scarce. What little there is has examined legislation, individual judgments, or individual advocates' experience from the perspective of an undertaking under investigation. Practical procedure in this area stands far from the legislation, as legislation provides guidance in extremely broad strokes compared to the practical issues routinely faced during dawn raids. Legislation establishes general rules, such as whether means of transport may be considered business premises, but does not go into details, such as whether rights of access include location data found in means of transport. Many such issues have avoided scrutiny in courts thus far. This means hard law does not enable one to predict whether a CA is likely to inspect, for instance, GPS data to verify suspected participation in face-to-face cartel meetings.

There are procedural differences depending on whether it is the EC or an NCA conducting the inspection. Legislation in MS varies a great deal when it comes to areas including procedural and administrative law.[9] Judgments from the EU Courts or the European Court of Human Rights (hereinafter

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[5] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47-390.

[6] See e.g. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3-33, recital 3.

[7] 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, [2003] OJ L1/1. Hereinafter also 'the Regulation'.

[8] The ECN+ Directive, pp. 3-33.

[9] Autio, "Drawing the line", 298-299.

"ECtHR") are only able to shed light on the specific issues raised in individual cases. It is unclear to what extent CAs or legislators follow these judgments beyond the individual case.[10]

As reflected in the wording of ECN+, competition policy ought to be about "making sure that companies compete with each other on an equal footing – on the basis of their products and prices – with no unfair advantages".[11] Enforcement procedure is intertwined with fundamental and human rights, such as privacy and right of defence. Uneven enforcement is problematic not only regarding the objectives of competition policy, but also with view to general principles of EU law such as effectiveness and legal certainty.

The present article argues that this fragmented system threatens legal certainty. What is more, it does so in an area where interference with private correspondence, for example, is routine. Narrowing the focus to dawn raid procedure allows us to examine certain features of a partially harmonised system in more detail. The current harmonisation efforts, along with the fact that many undertakings operate in more than one MS, stress the importance of the topic. A core finding of the present article is that ECN+ may not level the playing field as intended.

The following sections examine the harmonisation of dawn raid provisions, and how this process may be seen from the perspective of legal certainty. The article starts by introducing the legal context of the topic, followed by the ongoing harmonisation endeavour around ECN+. Public statements, including press releases and overviews of cartel legislation and CA powers from six MS, are then studied more closely. Public statements about the amendments to implement ECN+, available at the time of writing in languages accessible to the author, are used as a source to pinpoint and to compare the changes arising from ECN+ that national authorities and experts themselves consider noteworthy. This is done in hopes of filling in at least part of the gap between "law in books"[12] and the reality of dawn raid procedures. Relevant literature provides context and balance to official statements. The article then provides a closer analysis of the issues arising from uneven enforcement, closing with concluding remarks.

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[10] Autio, "Explaining Dawn Raids", 476.

[11] EC, "What is competition policy?" accessed 24 November 2020. https://ec.europa.eu/competition/consumers/index_en.html.

[12] Roscoe Pound, "Law in Books and Law in Action", 44 *Am. L. Rev.* 12 (1910).

2. Background

2.1. Regulation of dawn raids within the EU

The present section provides a legal context for CAs' dawn raids within the EU, starting with the more general framework and moving onto the cornerstone of modern EU competition enforcement that is Regulation 1/2003. When looking at the system of EU competition law enforcement, one needs to be aware of the delicate balance between various interests and principles. An obvious example would be the balancing of the efficiency of EU law and MS autonomy, as seen in the inconsistent level of independence, resources and enforcement across NCAs discussed further in following sections.[13] The general starting point is procedural autonomy, which is to say that in the absence of EU rules, it is for the domestic legal system of MS to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of EU law, provided such conditions are not less favourable than those relating to similar actions of a domestic nature.[14] Rights of appeal concerning inspection decisions and inspection procedure are among the features left up to national legislators.[15]

Davis refers to a scale of decision making ranging from decisions governed by precise rules, all the way to those "involving unfettered

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[13] On efficiency and autonomy, see e.g. Herwig C.H. Hofmann, "European Administration – Nature and Developments of a Legal and Political Space", in *Research Handbook on EU Administrative Law*, ed. Giacinto Della Cananea *et al*. (Edward Elgar Publishing 2017): 24, 32.

[14] Judgment of 16 December 1976, *Rewe v. Landwirtschaftskammer für das Saarland*, 33/76, ECLI:EU:C:1976:188, paragraph 5; judgment of 16 December 1976, *Comet BV v. Produktschap voor Siergewassen*, 45/76, EU:C:1976:191, paragraphs13-16; judgment of 15 March 2017, *Lucio Cesare Aquino v. Belgische Staat*, C-3/16, ECLI:EU:C:2017:209, paragraph 48; judgment of 19 October 2017, *Hansruedi Raimund v. Michaela Aigner*, C-425/16, ECLI:EU:C:2017:776, paragraph 40. See also Franziska Grashof, *National Procedural Autonomy Revisited: Consequences of Differences in National Administrative Litigation Rules for the Enforcement of European Union Environmental Law: The Case of the EIA Directive* (Europa Law Publishing, 2016); Rolf Ortlep and Maartje Verhoeven, "The principle of primacy versus the principle of national procedural autonomy", Netherlands Administrative Law Library (June 2012); Diana-Urania Galetta, *Procedural autonomy of EU member states: paradise lost?*, (Springer, 2010).

[15] See e.g. Ministry of Economic Affairs and Employment of Finland (hereinafter also "TEM"), *Report of the working group on reforming the Competition Act*, 14 March 2017: 32–33; Nathalie Jalabert-Doury, *Competition Inspections in 21 jurisdictions: A Practitioner's Guide* (Institute of Competition Law, New York, 2022): 265.

discretion".[16] Terpan similarly views regulation as a continuum ranging from hard law to non-legal norms.[17] The conceptualisation of such a scale or continuum of rules from law to unfettered discretion or from hard law to non-legal norms with varying types and degrees of enforcement is helpful for understanding the complex whole of regulation relevant to the topic at hand, one that may even be viewed as a spectrum rather than a linear progression.

Antitrust rules are contained in a variety of legal instruments. Articles 101 and 102 TFEU establish the core of EU competition law as far as substance.[18] Most dawn raids involve horizontal conduct prohibited in Article 101.[19] Regulation 1/2003 establishes the EC's competition enforcement procedure. Notices and guidelines from the EC also play an important part in EU competition enforcement.[20]

Articles 101 and 102 TFEU are applied in MS in parallel to national provisions, as per TFEU Article 3 and Article 3 of Regulation 1/2003. In the Finnish Competition Act (948/2011), Section 3 for example stipulates: When a restraint on competition may affect trade between the EU MS, the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union shall also apply. The wording of the provision was amended in 2011, the Government proposal stressing that the aim was to ensure the wording corresponds to that of Regulation 1/2003.[21] An extreme practical example may be found in the *Amazon* case, where the EC investigation covers the whole of the EEA excepting Italy, running a parallel investigation.[22] National provisions prohibiting competition infringements have typically been drafted in MS following the content of TFEU Articles 101 and 102, often word-for-word. Procedural rules are different for each MS. ECN+, covered in more detail below, was to be implemented

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[16] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969): preface, v.

[17] Fabien Terpan, "Soft Law in the European Union: The Changing Nature of EU Law", *European Law Journal* 21, no. 1 (2015): 74-77.

[18] See e.g. Wolf Sauter, *Coherence in EU Competition Law* (Oxford University Press, 2016), 29-31.

[19] See e.g. Jalabert-Doury, *Competition Inspections,* 100.

[20] See e.g. "Antitrust and Cartels Legislation", under "Antitrust" accessed 11 May 2022, https://ec.europa.eu/competition-policy/antitrust/legislation_en.

[21] Government Proposal HE 88/2010 vp: 56. See also Miroslava Scholten, "Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting", *The European Journal of Risk Regulation* 10, no. 3 (2019): 542, 547.

[22] EC Press Release IP/20/2077, 10 November 2020, Brussels.

by 4 February 2021 to bring about partial harmonisation of the relevant procedural rules in MS.[23]

Powers of inspection, as established in Article 20 of Regulation 1/2003, are at the core of a balancing act ever present in competition enforcement. On one side, there is the presumption of innocence and an undertaking's rights of defence. On the other, the public interest in uncovering competition infringements – in many instances entirely reliant on evidence made available only by way of a dawn raid.[24]

Legislation applicable to dawn raids regulates procedure on too crude a scale to truly understand practical dawn raid procedure.[25] Practical procedure therefore relies to a notable extent on sources further from the hard law end of the regulatory scale. These include soft law sources such as recommendations from the European Competition Network (hereinafter "ECN"), the International Competition Network (hereinafter "ICN") or the OECD, but also for instance exchanges within these and other networks, and NCA's internal best practices.[26] Transparency and predictability are likely to suffer. Hard law is of limited use for understanding practical dawn raid procedure.

Even the basic structures of MS' competition enforcement systems differ greatly. Typically, these systems are divided into three different categories based on institutional structure: who investigates, who may decide on findings, who imposes sanctions.[27] In Belgium, one administrative body investigates suspected infringements, and a second administrative body adopts decisions. The Finnish system is an administrative system where the Finnish Competition and Consumer Authority (hereinafter "FCCA") investigates and gives prohibition decisions, but the Market Court is the first instance for imposing penalty payments. The FCCA acts in a

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[23] See e.g. Sauter, *Coherence in EU Competition Law*: 252 on the procedural trend of decentralisation.

[24] See Laurence Idot, "Réflexions sur l'évolution de la preuve des pratiques anticoncurrentielles devant les autorités de concurrence", *Concurrences* 4-2017: 46 on the presumption of innocence and evidence.

[25] Autio, "Explaining Dawn Raids", 475.

[26] Autio, "Explaining Dawn Raids", 476, 486.

[27] ECN Working Group Cooperation Issues and Due Process, "ECN Decision-making Powers Report" (31.10.2012), accessed 15 October 2020, https://ec.europa.eu/competition/ecn/documents.html: 5-6. See also Jurgita Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer, 2020): 141, 155; Francisco Enrique Gonzalez-Diaz & Alvaro Fomperosa Rivero, "European Competition Law Procedural Reform – Introduction", *Competition Law & Policy Debate* 3, no. 3 (2017): 31.

prosecutorial role in proposing penalty payments. The Dutch CA may impose fines and periodic penalty payments.

In practice the division is less clear, as illustrated by the more detailed examples in the ECN Decision-making Powers Report.[28] In systems where cartels or bid rigging is criminalised, criminal cases call for a different procedure than other competition infringements. The Danish CA, for example, imposed a fine on an individual for bid-rigging, the fine confirmed by a Danish court 19 September 2018.[29]

2.2. Regulation 1/2003

The EC's powers of inspection are regulated in Regulation 1/2003. As much of national regulation concerning dawn raid procedure is based on Regulation 1/2003, the following will provide a summary of dawn raid-related content, along with an assessment of why further EU legislation has been deemed necessary.[30]

Article 20 regulates the EC's powers of inspection. The aims of the provision reflect those of the Regulation; ensuring that competition in the common market is not distorted, by way of ensuring effective enforcement of EU competition rules while respecting fundamental rights of defence.[31]

Article 20(1) empowers the EC to conduct all necessary inspections of undertakings. The corresponding provision in France, for example, is the first point of Article L450-1 of the *Code de commerce* chapter on investigative powers. Article 20(2) empowers EC Officials and other authorised persons to enter any premises, land and means of transport of undertakings. The EC may examine the books and other records related to the business, irrespective of the medium on which they are stored, and take or obtain in any form copies of or extracts from such books or records. The EC may seal any business premises and books or records for the period and to the

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[28] ECN, "Decision-making Powers Report": 5-10.

[29] Konkurrence- og Forbrugerstyrelsen, "Bøde i første sag om nedrivningskarteller" accessed 11 May 2022, https://www.kfst.dk/pressemeddelelser/kfst/2018/20180919-bode-i-forste-sag-om-nedrivningskarteller/. See also Official Statement from the Danish Competition and Consumer Authority, "Association of passenger carriers pays a fine of DKK 400,000 for bid rigging", 1 September 2020, accessed 30 December 2020, https://www.en.kfst.dk/nyheder/kfst/english/news/2020/20200901-association-of-passenger-carriers-pays-a-fine-of-dkk-400-000-for-bid-rigging/; OECD, *Background Note for a roundtable discussion on Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences* (DAF/COMP/WP3(2020)1) 9 June 2020.

[30] Previously covered in Autio, "Drawing the line", 299-300.

[31] Regulation 1/2003, recitals 1 and 5.

extent necessary for the inspection. It may also ask any representative or member of staff of the undertaking for explanations on facts or documents relating to the subject-matter and purpose of the inspection and record the answers.

Paragraphs (3) and (4) specify that the above-mentioned powers are exercised upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in case the records provided prove incomplete or answers to questions are incorrect or misleading. Undertakings are required to submit to inspections ordered by decision of the EC. An inspection decision shall indicate the right to have the decision reviewed by the Court of Justice (hereinafter "ECJ").

Article 20(5) obliges officials and other authorised persons of the relevant NCA to actively assist an EC inspection under the same powers as those of EC officials. Article 20(6) obliges the NCA to request police assistance to enable the EC to conduct an inspection should an undertaking oppose the inspection. Article 20(7) stipulates that where applicable, judicial authorisation as required by national law for police assistance may be applied for as a precautionary measure.

Article 20(8) makes it clear that a national judicial authority asked to provide national judicial authorisation as may be required may review the authenticity of an EC decision and make sure that the coercive measures envisaged are not arbitrary or excessive. The necessity of an EC inspection is assessed by the EC alone, and the lawfulness of the EC decision may only be subject to review by the ECJ.

Article 23(1) of Regulation 1/2003 contains provisions on procedural fines for producing books or other records in incomplete form, for refusing to submit to inspections, giving incorrect or misleading answers to questions under Article 20(2), and for breaking seals. These fines may amount to a maximum of 1% of the total turnover of the undertaking in the preceding business year. A corresponding national provision was recently found unconstitutional in France due to the fact there were also provisions in force sanctioning the same conduct differently, resulting in a cumulative effect that was seen to be problematic.[32] As per subparagraph (e) of Article 24(1), the EC may impose periodic penalty payments of up to 5%

[32] Decision of the French Constitutional Council no. 2021-892 QPC, *Société Akka technologies et autres*, 26 March 2021.

of average daily turnover,[33] per day, in order to compel an undertaking to submit to an inspection.

Article 21 of the Regulation establishes the power to inspect other premises. This type of inspections is often called "home inspections", the usual example being the homes of executives. To date, the vast majority of inspections has been to business premises, although practical considerations may be causing a shift towards more home inspections due to the recent increase in remote working.[34]

It has been suggested that having left institutional structure and means of enforcement to MS has facilitated an inconsistent level of independence, resources, and enforcement across NCAs. After the Regulation had been in force for five years, stronger harmonisation of procedures and enforcement means at national level was argued for. The application of different procedural rules could, it was argued, lead to diverging outcomes. This is likely to have a detrimental effect on legal certainty and due process. Upon further assessment, five more years on, the EC concluded further harmonisation would be required.[35] What does the current harmonisation effort entail, then?

3. ECN+

3.1. The Directive

The EC recognised the need for further harmonisation in its Communication on the first decade of Regulation 1/2003.[36] ECN+ intends to respond to the issues identified by further alignment of MS competition enforcement procedures, safeguards, and priorities. The present section looks more closely at what is known about the changes arising from ECN+, specifically from the point of view of dawn raids.

ECN+ notes that, in cases of parallel application of national competition law and Union law, it is essential that the NCAs have the same guarantees of independence, resources, and enforcement and fining powers necessary to ensure that a different outcome is not reached.[37] Uneven enforcement

[33] Calculated based on the preceding business year.

[34] ICN, *Anti-Cartel Enforcement Manual Chapter 3: Digital Evidence Gathering (2021)*: 11; Cf. Jalabert-Doury, *Competition Inspections*, 107.

[35] Gonzalez-Diaz & Fomperosa Rivero, "European Competition Law Procedural Reform", 25-27.

[36] Communication from the EC, *Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives*, COM(2014) 453.

[37] Recital 3.

results in missed opportunities to remove barriers to market entry and to create fairer competitive markets throughout the Union where undertakings compete on their merits.[38]

One interesting point in ECN+ is the emphasis on the need to be able to carry out inspections on other authorities' behalf. This requirement cannot be adequately fulfilled when there are still authorities operating without the necessary tools for fact-finding. It is difficult to know the extent of the problem, as CAs are generally not forthcoming about the measures not used; a strategically understandable lack of transparency as one does not wish to make circumference of competition law as easy as stressing that mobile communications will not fall under investigation. The emphasis sets the bar high for harmonisation.

ECN+ emphasises MS may endow NCAs in administrative systems with additional powers to further enhance enforcement efforts, such as imposing fines on natural persons. Whether imposing fines on natural persons is a genuine option in a given MS and if so, under what conditions, depends on the national regime and the relevant procedural rules. This reflects the principle of procedural autonomy, as confirmed in settled case-law.[39] Motivation to destroy evidence during a dawn raid for instance, may well be affected by whether procedural fines may be imposed, whether they may be imposed independently of an eventual decision on substance, and whether such fines are imposed on the undertaking or the individual responsible. The effect on dawn raids is equally oblique.

Article 5 states: "Member States shall ensure that national competition authorities have the human, financial and technical resources that are necessary for the effective performance of their duties and exercise of their powers". The wording is open to interpretation, and what qualifies as "necessary" for "effective performance of duties and exercise of powers" is likely to be one of the many aspects of legislation where a seemingly harmonised aspect of law motivates wildly different interpretations.

This may be true in varying degrees for many of the provisions of ECN+. In fact, this article finds that the current harmonisation effort may in fact merely shift the existing imbalance to other areas of enforcement. Assessing the outcomes of the changes made may pose a challenge, as will be discussed in the following sections.

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[38] Recital 6.

[39] (n14) above.

3.2. What will change?

Some elements of ECN+ are likely to have substantial effects. Others may have no effect at all. Different NCAs face different challenges, and ECN+ aims to level the playing field by way of minimum harmonisation. The differences in emphasis in press releases and other publicly available sources on proposed amendments to national competition laws likely reflect the varying challenges faced by different NCAs that ECN+ is expected to address. This information is not available through study of law in books.

Firstly, it is possible to identify upon viewing easily accessible public sources a broad category of what one might call basic powers of inspection. These range from home inspections to imposing procedural fines and carrying out inspections on behalf of other NCAs.

The Danish CA has not had powers to carry out home inspections, prior to implementation of ECN+, so this aspect will need to be changed as per Article 7.[40] The possibility to carry out dawn raids beyond the actual registered business premises is an important one, most likely increasingly so as a result of the recent increase in working from home.[41]

The Finnish Ministry of Economic Affairs and Employment notes in its press release that in addition to competition restrictions, penalty payments could also be imposed for infringements of certain procedural provisions.[42] The Swedish Government's Trade Department's press release on the effect of ECN+ on the powers of the *Konkurrensverket* also notes a change concerning procedural fines.[43]

The Finnish Competition Act has thus far contained a reference to the Criminal Code. Section 48 of the Competition Act (948/2011) refers to

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[40] See e.g. Olaf Koktvedgaard, Søren Zinck and Frederik André Bork, "Cartels Laws and Regulations 2022: Denmark", under "Practice Areas", accessed 11 May 2022, https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/denmark; English translation of Danish Competition Act, accessed 19 October 2020, https://www.en.kfst.dk/competition/legislation/.

[41] ICN, *Anti-Cartel Enforcement Manual Chapter 3: Digital Evidence Gathering (2021)*: 11.

[42] TEM, Press Release, EU competition law enforcement more effective – Public consultation on proposed Competition Act amendments begins (14 May 2020), https://tem.fi/en/-/eu-n-kilpailusaantojen-noudattamisen-valvontaa-tehostetaan-lausuntokierros-kilpailulain-muutoksista-alkaa.

[43] Government Offices of Sweden, Public statement, "Konkurrensverkets befogenheter" (2 October 2020), accessed 11 May 2022, https://www.regeringen.se/rattsliga-dokument/lagradsremiss/2020/10/konkurrensverkets-befogenheter/. For details on the existing regime, see e.g. Sweden's Anti-Cartel Enforcement Template for the ICN, accessed 25 November 2020, https://www.internationalcompetitionnetwork.org/working-groups/cartel/templates/.

Chapter 16, Section 8 of the Criminal Code (39/1889), suggesting criminal sanctions are available for providing false information to a public authority. As far as the author is aware, however, this option has never been used in practice.

The Swedish *Konkurrensverket* mentions some changes not arising directly from ECN+, including that the authority itself is to be given powers to impose fines, both in matters of procedure and substance.[44] The transition from a system where a court imposes fines as a first instance to one where the CA imposes fines is noteworthy. As discussed above, procedural fines act as a deterrent to withholding evidence.

Secondly, several authorities highlight technology-driven changes. The Referral linked to the Swedish press release specifies a clarification is in order to make it explicitly clear that the *Konkurrensverket* is entitled to access documents and data in line with Article 6(1)(b) of ECN+, i.e. empowered "to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection".[45]

The clarification of the access principle is one of interest.[46] This is a confirmation that in inspecting documents and data, the CA is not limited to documents and data stored onsite but may inspect any data available to those working at the inspected premises. The importance of the principle lies in the fact that such data is increasingly stored offsite on cloud services, for instance. The reach of inspection powers in today's increasingly global, digital business environment has not gained much public notice, but has been a recurring issue amongst some national enforcers.

The Portuguese *Autoridade da Concorrência* (hereinafter "AdC") noted that the transposition of ECN+ explicitly provides the AdC may access any technological device, including smartphones, tablets or cloud servers to

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[44] *Konkurrensverket*, Press release, "*Starkta befogenheter för konkurrensverket*" (19 November 2020), accessed 11 May 2022, https://www.konkurrensverket.se/nyheter/starkta-befogenheter-for-konkurrensverket/. The significance of decision-making powers has been discussed in relation to the EC by Denis Waelbroeck & Denis Fosselard, "Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Antitrust Procedures", *Yearbook of European Law* 14, no. 1 (1994), 111-142.

[45] Government Offices of Sweden, *Lagrådsremiss* (draft legislative proposal), *Konkurrensverkets befogenheter* (1 October 2020), accessed 11 May 2022, www.regeringen.se/rattsliga-dokument/lagradsremiss.

[46] See e.g. Autio, "Explaining Dawn Raids", 484.

seize evidence of competition infringements.[47] It is interesting to note that the amendments made to Article 18 of the Portuguese Competition Act are substantial, even though the provision was previously written out to cover "*documentação, independentemente do seu suporte*".[48] The relevant provision thus appears to have been technology neutral, its wording in line with Article 6(1)(b) of ECN+ "irrespective of the medium on which they are stored" also prior to the proposed amendments. Based on the AdC press release and other public communications, it seems inspection of mobile devices and cloud storage is in fact a new addition.[49] This is one of the many aspects of practical procedure that law in books does not inform us on.

Other amendments highlighted appear to involve issues not necessarily shared by many CAs. The French CA points to changes to the judicial control of dawn raids.[50] The procedures detailed in the French press release relating to the *juge des libertés et de la détention* are not present in most other MS.[51] These parts of French dawn raid procedures have been subjected to scrutiny in ECtHR cases such as *Vinci* and *Janssen Cilag*.[52]

According to the Lithuanian Competition Council, amendments implementing ECN+ to the Law on Competition of the Republic of Lithuania entered into force 1 November 2020. The law, as amended, is reported to require the authority "to have sufficient human, financial, technical and technological resources to apply the EU antitrust rules more effectively, for instance, conduct simultaneous inspections, use technologically advanced

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[47] AdC, Press Release 21/2019, "Infringement of Competition law will enable access to smartphones, tablets and cloud servers", 25 October 2019, accessed 12 May 2022, https://www.concorrencia.pt/en/articles/infringement-competition-law-will-enable-access-smartphones-tablets-and-cloud-servers.

[48] AdC, *Proposta de Anteprojeto de Transposição da Diretiva ECN+: Alterações à Lei da Concorrência*, 25 October 2019, https://www.concorrencia.pt/pt/consultas-publicas/consulta-publica-sobre-proposta-de-anteprojeto-de-transposicao-da-diretiva-ecn: 12.

[49] AdC, "Infringement of Competition law will enable access to smartphones". See also Maria João Melicias, Speech, "Principais desafios em torno da Diretiva ECN+" (Lisbon 5 December 2019).

[50] *Autorité de la concurrence*, press release, "*L'Autorité de la concurrence salue le pas décisif vers la transposition de la directive ECN+, qui a été accompli mercredi par le Parlement, avec l'adoption du projet de loi DDADUE*", accessed 12 May 2022, https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-salue-le-pas-decisif-vers-la-transposition-de-la.

[51] See e.g. Autio, "Drawing the line", 301. See also Jalabert-Doury, *Competition Inspections*, 100.

[52] See e.g. Autio, "Drawing the line", 306.

equipment helping to detect an alleged infringement".[53] The wording suggests all necessary technical resources may not have been available to the Lithuanian CA.

Some amendments brought about by ECN+ are likely to have substantial effects, though it is difficult in many instances to predict how with any precision. It should be interesting to follow how certain provisions – such as Article 5 – are implemented, that is to say, what constitutes sufficient human, financial and technical resources.

What remains unclear is to what extent ECN+ will be successful in harmonising enforcement, and to what extent the different emphasis of MS may in fact merely shift an existing imbalance onto new issues. The fact that different NCAs face different challenges may lead to a different focus for the ongoing reform. Ideally, this would bring each national system up to a minimum level as required by ECN+. It may also, however, mean what is created is not so much an EU-wide level playing field but more a patchwork of remedies for the most pressing national concerns. This may pose a problem from the point of view of the effectiveness of EU regulation.[54] The EC is to present a report to the European Parliament and the Council on the transposition and implementation of ECN+ within six years of the Directive being adopted.

3.3. Critique

Harmonisation efforts are not immune to critique. The present sub-section examines some countering views in light of information available on the practical procedure of some CAs within the EU.

One of the primary causes for concern has been the relationship between ECN+ and targeted undertakings' rights of defence. Most prominently, stronger investigative powers have been argued to be insufficiently balanced with a strengthening of rights of defence.[55] The EC assured in

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[53] *Konkurencijos taryba*, press release, "Lithuanian competition law amendments: from fining powers to guarantees of independence", 30 October 2020, https://kt.gov.lt/en/news/lithuanian-competition-law-amendments-from-fining-powers-to-guarantees-of-independence.

[54] See e.g. judgment of 15 March 2017, *Lucio Cesare Aquino v Belgische Staat*, C-3/16, ECLI:EU:C:2017:209, paragraph 48.

[55] See e.g. Kameoka, "Proposals for Legal Professional Privilege, ": 18; Marialaura Rea, "New Scenarios of the Right of Defence following Directive 1/2019", *Yearbook of Antitrust and Regulatory Studies* 12, no. 20 (2019): 111, 114-115; Maciej Bernatt and Alexandr Svetlicinii, "The Right of Defence in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe", *World Competition* 41, no. 3. (2018): 309-334;

response that "[the Directive] proposal underlines the importance of companies' fundamental rights and requires authorities to respect appropriate safeguards for the exercise of their powers, in accordance with the EU Charter of Fundamental Rights."[56]

Where each MS is left to their own devices, the consideration of rights of defence may be patchy and difficult to predict, as suggested by Bernatt *et al*.[57] Even where European Courts have ruled on an issue, MS may come to different interpretations of the same rulings, or even differ in their views on whether a given judgment is applicable to national procedure.[58]

Some have questioned the need for formal harmonisation, arguing that spontaneous approximation may go beyond formal harmonisation efforts. Láncos suggests spontaneous approximation may be particularly likely within the context of European competition law. The example used is the EC's Fining Guidelines, which have been used by some MS as a model for their own fining policies, even though the Guidelines declare no harmonisation objective. Láncos raises the question of whether the partial harmonisation of ECN+ was unnecessary, since some MS had gone beyond the requirements of the Directive, voluntarily.[59]

In the context of dawn raids, we can see various procedural features that may undoubtedly best be solved at a national level, as per the principle of procedural autonomy. The use of investigative tools such as particular computer forensics software, for instance.[60] From the Finnish perspective, Finns being generally respective of public authorities, the mandated presence of police officers at routine inspections of business premises would seem a waste of scarce resources.

Features that should be harmonised should, equally, not be left up to spontaneous approximation. How does one justify some MS not having the option of imposing procedural fines or interviewing key personnel

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Borenius Attorneys Ltd, Legal Alert, "New Proposals for the Amendment of the Competition Act", 14 May 2020, https://www.borenius.com/2020/05/14/new-proposals-for-the-amendment-of-the-competition-act/.

[56] EC, press release, "Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth", 22 March 2017, Brussels, IP/17/685.

[57] Bernatt and Svetlicinii, "The Right of Defence".

[58] Autio, "Explaining Dawn Raids", 476.

[59] Petra Lea Láncos, "The power of soft law: Spontaneous approximation of fining policies for anti-competitive conduct", *European Competition Law Review* 40, no. 11 (2019): 538-546.

[60] Jalabert-Doury, *Competition Inspections*, 109. See also Dirk van Erps, "Processes and procedures in inspections / dawn raids", at 2nd EU-India Competition Week, Delhi, 10 December 2019.

during inspections?[61] It can hardly be ideal that seals may be broken, or evidence destroyed without consequence in some MS.[62] It is equally difficult to see why inspections ought to be technology neutral or adhere to the access principle only in some MS. The efficiency of EU competition policy unavoidably suffers if concealing evidence of a cartel is made as easy as communicating using a mobile device or storing data offsite (more the norm than an exception at the time of writing). Ambiguities surrounding the division between fishing expeditions and accidental findings may be added to features where fragmentation poses an issue, as can wildly different approaches to LPP or private data of employees.[63]

The critique directed towards ongoing harmonisation efforts does appear justified to the extent that the ambiguity of the wording of ECN+ or areas not covered by the harmonisation project are concerned. As identified by Rea, there may indeed be a paradoxical situation where enforcement powers are harmonised while rights of defence are not.[64] An obvious example might be the right of appeal concerning inspection decisions and inspection procedure. In Finland, for instance, a right of appeal separate from an eventual decision on substance has not been deemed necessary, while other MS have established separate judicial controls both *ex ante* and *ex post*.[65]

Room for national discretion combined with varying concerns and priorities may affect the aims of ECN+ as viewed from the broader perspective of EU competition enforcement. The following section takes a closer look at some of the issues related to uneven enforcement.

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[61] Jalabert-Doury, *Competition Inspections*, 100, 253.

[62] See e.g. Agata Jurkowska-Gomułka, "Mind the Gap! ECN+ Directive Proposal on its Way to Eliminate Deficiencies of Regulation 1/2003: Polish Perspective", *Market and Competition Law Review* II, no. 2 (2018): 147.

[63] Jalabert-Doury, *Competition Inspections*, 109, 262; Autio, "Explaining Dawn Raids", 477, 480.

[64] Rea, "New Scenarios", 115.

[65] TEM, *Report of the working group*, 32-33; Jalabert-Doury, *Competition Inspections*, 99, 265.

4. Uneven enforcement

4.1. The EC and NCAs – a recipe for legal uncertainty?

"The authority and credibility of competition enforcers anywhere in the world depend on their independence, on the quality of their work, and on impartial, consistent and balanced decisions".[66]

The present section looks closer at the issues related to partial harmonisation of inspection procedures. The first part focusses on the more general issues of a lack of legal certainty, the second part looks more closely at the specific context of dawn raids, while the final part of the section aims to find reasons for the difficulty of not only harmonisation but of assessing the existing situation or the success of reforms made.

Legal certainty has been recognised by the ECJ as a general principle of EU law.[67] Rules of a similar wording ought not to be interpreted differently.[68] This, however, appears to be a likely consequence of the parallel application of Articles 101 and 102 TFEU and their national equivalents while procedural rules remain unharmonized. EU competition rules are enforced based solely on national procedural regulation and with a strong focus on national legal tradition and competition enforcement experience. This risk appears to be present also following implementation of ECN+.

Looking at case law from the EU courts, yet another layer of complexity is revealed. According to Van Meerbeeck, even though legal certainty has been recognised as a general principle of EU law, and even though the EU courts refer to the concept of legal certainty often, the treatment of the principle itself may be difficult to predict.[69] The ECJ has made it clear that: "It would run counter to the principle of legal certainty to interpret differently two provisions worded in an essentially identical manner and which, moreover, appear in the same article of a Community regulation".[70] Yet,

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[66] Margrethe Vestager, Speech, "Competition policy in the EU: Outlook and recent developments in antitrust", Peterson Institute for International Economics, Washington DC, 16 April 2015.

[67] See judgment of 22 March 1961, *Société nouvelle des usines de Pontlieue – Aciéries du Temple (S.N.U.P.A.T.) v. High Authority of the European Coal and Steel Community,* joined cases 42 and 49/59, EU:C:1961:5. See also Jérémie van Meerbeeck, "The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust", *European Law Review* 41, no. 2 (2016): 275-288.

[68] Judgment of 20 June 2002 *Peter Heinrich Thomsen v Amt für ländliche Räume Husum*, C-401/99 EU:C:2002:387, paragraph 35.

[69] Van Meerbeeck, "The principle of legal certainty", 281.

[70] Judgment of 20 June 2002 *Peter Heinrich Thomsen v. Amt für ländliche Räume Husum*, C-401/99 EU:C:2002:387, paragraph 35. The ECJ has highlighted the importance of legal certainty in relation

this is exactly what is happening in some aspects of competition enforcement within the EU. Enforcement of EU competition rules is bound to vary while various NCAs access to evidence during inspections is dramatically different, for example, or while interpretations of "sufficient resources" differ to a point where carrying out dawn raids necessary to uncover infringements is not an option due to the resources made available to a given NCA.

Harmonisation efforts on the whole face the added level of complexity caused by the role of soft law.[71] Soft law instruments issued by the EC, such as explanatory notes on dawn raids, may be an easier route to encourage a shift in assessment nationally than hard law, but the challenges involved are well-recognised.

In a broader sense, the European Parliament and the Council have recognised that currently understanding citizens' administrative rights even just within the context of EU law is difficult. The reason, according to the 2016 proposal for a Regulation for an open, efficient, and independent European Union administration is "[t]he fact that the Union lacks a coherent and comprehensive set of codified rules of administrative law".[72]

Once one adds to this equation the MS' various systems of administrative procedure, the complexity of even a very narrowly defined part of whole (such as dawn raid procedure) becomes evident. As noted by Hofmann: "[T]he EU to date lacks the normal reflex to simplification in the face of diversity".[73] In today's globalised business environment, understanding the rights and responsibilities related to investigations of suspected competition infringements as carried out by the relevant European CAs may be exceedingly difficult. Article 298 TFEU would enable broader harmonisation of administrative procedure with a view to promoting an

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to procedural time limits more recently for instance in judgment of 19 June 2019, *RF v. European Commission*, C-660/17 P, EU:C:2019:509. Even the beginning of such a limitation period, however, turns out to be open for debate, as seen in judgment of 14 January 2021 *Kilpailu- ja kuluttajavirasto,* C-450/19, EU:C:2021:10.

[71] See e.g. Mariolina Eliantonio & Oana Stefan, "Soft Law Before the European Courts: Discovering a 'common pattern'?", *Yearbook of European Law* 37, no. 1 (2018): 458.

[72] Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration, P8_TA(2016)0279, Recital 5. See also "ReNEUAL Model Rules on EU Administrative Procedure", under "projects and Publications", accessed 12 May 2022, http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0.

[73] Hofmann, "European Administration", 34.

open, efficient, and independent European administration. The following subsections further illustrate the challenges involved.

4.2. Potential issues

"There is a real risk here: if each national agency looks at things too narrowly, we end up collectively achieving little more than keeping a lot of enforcers and practitioners busy"[74]

The examples above stress the significance of fundamental differences in the basic structures of the various competition enforcement systems within the EU. When one looks at a particular area such as dawn raids, procedural regulation gains yet another level of variety. Practical procedure in this area stands far from law in books, as seen above.

One example of variation between national regimes that may not be evident even to a practitioner familiar with dawn raid procedures in various MS may be found in legislation applicable to the scope of an inspection decision. This refers to the definition between documents and data that are covered by a given inspection decision, and those that are not (and thereby may not be inspected). According to Malinauskaite, the Bulgarian CA may collect evidence of an infringement other than that originally targeted by the inspection. This is in clear contrast to the situation of the EC and many other NCAs.[75]

Another example of variation that may be difficult to anticipate may be found in national limitations to, in essence, the undertaking's rights of defence. According to Eklund, the Finnish Act on Privacy in Working Life is unique within the EU.[76] The legislation stipulates an employer may not view employee emails without individual consent from the employees in question. An undertaking has a right to oversee an inspection, but while the inspectors may view employee emails to identify evidence of an infringement, the undertaking (including its legal counsel) is required to have individual consent in order to observe. The Finnish employee privacy

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[74] Margrethe Vestager, speech, "Enforcing competition rules in the global village", Brussels, 20 April 2015, ec.europa.eu/competition/speeches/index_2015.html.

[75] See e.g. judgment of 5 October 2020 *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC), formerly EMC Distribution v European Commission,* T-249/17, EU:T:2020:458 (appealed at time of writing); Malinauskaite, *Harmonisation of EU Competition Law Enforcement,* 198; Autio, "Drawing the line", 301-303.

[76] Mia Eklund, *Integritet och övervakning i arbetslivet – juridiska perspektiv på arbetsgivarens rätt att övervaka arbetstagare*, Unigrafia, Helsinki (2021): 1. See also Finnish Act on the Protection of Privacy in Working Life (759/2004).

regime is therefore an example of a situation where all the national provisions relevant to dawn raid procedure may be challenging to identify.[77]

Features such as the legitimate scope of inspection decisions or an undertaking's right to oversee an inspection are essential to understanding dawn raid procedure in any given legal system. It may, however, be difficult to gain a sufficient understanding of relevant legislation without a broader in-depth understanding of the legal system in question. Comparability is an issue, as not only is the reasoning behind amendments not necessarily made public, but the issues faced by enforcers may also not be predictable looking at legislation and case law alone. For undertakings operating in more than one MS, this challenge is more than just a theoretical curiosity.

Yet another clear example: remote data collection, that is to say, remote access to inspect data or "virtual inspections".[78] Advocates from a Spanish law firm are able to inform us that Spanish law has been amended to explicitly allow for such measures. The author has found no such information, one way or another, from other CAs.

The coherence of such a varied system is undoubtedly an issue. A public consultation carried out by the Spanish Ministry of Economy explains that Articles 101 and 102 TFEU are intended to function coherently based on MS and the EC cooperating within the framework of the ECN. The text quotes recitals from ECN+, stressing that "Uneven enforcement (…) results in missed opportunities to remove barriers to market entry and to create fairer competitive markets throughout the Union where undertakings compete on their merits."[79] The Spanish Ministry of Economy goes on to explain that ECN+ aims to address these issues.[80]

The issues related to what has been described as an enforcement gap have been discussed by Cseres, according to whom decentralised enforcement of EU competition law has become subject to similar problems of

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[77] See also Autio, "Explaining Dawn Raids", 477, 483.

[78] Jalabert-Doury, *Competition Inspections*, 260.

[79] ECN+, recital 6.

[80] Spanish Ministry of Economy, public consultation, *Consulta Pública previa sobre la transposición de la Directiva (UE) 2019/1 del Parlamento Europeo y del Consejo de 11 de diciembre de 2018 encaminada a dotar a las autoridades de competencia de los Estados Miembros de medios para aplicar más eficazmente las normas sobre competencia y garantizar el correcto funcionamiento del mercado interior*, accessed 12 May 2022, https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/consultapublica/Paginas/ECO_Pol_CP_190724_ECN+.aspx.

multilevel governance, as seen in other fields of EU law.[81] This can also be seen in the regulation applicable to dawn raids within the EU. The EU project marches on, while national institutional bodies may be seen to maintain an ideal of national sovereignty. While the coexistence of the various levels of governing bodies is more or less settled, it is certainly not without friction.

As we have seen, fundamental differences between various legal systems within the EU are likely to add to this friction, also in the context of dawn raids. These differences pose a challenge to the coherence and predictability of such measures.

4.3. A challenging assessment

It has been noted that the often hard-found compromises between the EU and its MS may be reflected in issues such as the relationship, at the international law level, between the EU and the European Convention on Human Rights (hereinafter "ECHR").[82] One may indeed ask how far spontaneous approximation is likely to carry the harmonisation process when even human rights have failed to find consensus, as attitudes towards ECHR and ECtHR decisional practice reflect. As discussed, the relationship between various legislators, judiciaries and enforcers within the EU is not without friction.

The predictability of EU administration or competition enforcement as a whole can hardly be helped by an excessively varied and immensely broad spectrum of regulation. As many legal subjects need to be aware of both the national and the Union regulation applicable to their activities, a deeper evaluation of the regulation applicable to dawn raid procedures alone reveals the enormity of the task. Even if one were to consider the EC's procedure entirely transparent, or a national equivalent as seen from within the legal culture in question, comparing these systems and the interactions between them in any meaningful way is a gargantuan effort.

It is not possible to carry out an exhaustive assessment of the level of harmonisation based on publicly available sources due to previously noted issues such as much of practical procedure depending on internal practices

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[81] Kati Cseres, "The Implementation of the ECN+ Directive in Hungary and Lessons Beyond", Amsterdam Law School Research Paper No. 2019-40, accessed 27 October 2020, papers.ssrn.com, 2-6.

[82] See e.g. Katja Ziegler, "Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law", *Yearbook of European Law* 35, no. 1 (2016).

rather than legislation. As soon as one hopes to compare any selection of national regimes, language also becomes an issue. If this lack of transparency or accessibility concerning practical procedure is a problem for academic research, it is likely a problem for an undertaking or its legal counsel as well.[83]

The complexity of the regulation applicable to dawn raid procedure is evident even upon superficial study of core powers of inspection and limitations to these. National regimes differ in features that may be difficult to predict from another jurisdiction.

As noted above, diverging outcomes arising from the application of different procedural rules are undoubtedly an issue from the point of view of due process and legal certainty, but also possibly for the full effect of EU law.[84] As central as competition policy is to the internal market, the level of divergence is noteworthy in an area such as dawn raids.

It is difficult to find reliable information from public sources on the practical significance of amendments drafted for the implementation of ECN+, covered in more detail above. While some MS have published the drafts in their entirety and many have now implemented ECN+, others seem to have published next to nothing at the time of writing.[85]

The difficulty of assessing the practical significance of ambiguous wordings in legislation adds yet another level to the challenge of forming a complete picture of what dawn raid procedures actually entail, how they are being changed and whether there might be room for improvement in all of this. From the point of view of an NCA official whose work involves carrying out dawn raids – which the author here happens to represent – it feels baffling to read for instance that "NCAs are […] empowered to […] seal *buildings*".[86] "Seals", at least for the EC and the FCCA, are numbered small stickers that leave a mark if moved[87] so one seals for instance a conference

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[83] For more on issues related to transparency in a multi-level institutional setting such as EU competition law, see e.g. Yannis Papadopoulos, "Accountability and Multi-level Governance: More Accountability, Less Democracy?", *West European Politics* 33, no. 5 (2010): 1030-1049; Scholten, "Shared Tasks", 538.

[84] See also Kameoka, "Proposals for Legal Professional Privilege": 23.

[85] See e.g. Tuomas Haanperä, Mindaugas Cerpickis, Kalle Kantanen and Heidi Partanen, "Estonia: economis perspective" *Global Competition Review* 28, October 2021, https://globalcompetitionreview.com/insight/enforcer-hub/2021/article/estonia-economist-perspective.

[86] Massa, "New CPC Regulation and ECN+ Directive", 130, emphasis here.

[87] An example of an EC seal can be found at "Inspections" under Competition Policy", accessed 20 May 2022, https://ec.europa.eu/competition-policy/index/inspections_en.

room with documents and data in by closing the door from the outside and placing a sticker so that it touches both the door itself and the frame of the door to control whether the door has been opened overnight.[88] Upon closer reading of the provision referred to, however, one can see the ambiguity of "any business premises".

It may indeed be true that the effects of legal certainty itself are hard to predict in the EU courts. The transparency and predictability of MS' approaches to dawn raid procedure remain equally problematic from the point of view of legal certainty as far as competition enforcement within the EU. What, then, may we conclude as regards the current situation of partially harmonised dawn raid procedures within the EU?

5. Conclusions

Harmonisation of dawn raid procedure in MS may not be necessary or even desirable for every single aspect of procedure. National differences may well be justified in many instances. While spontaneous approximation may be seen as a counterargument to harmonisation efforts, this article finds that partial harmonisation on an EU level is well-founded.

Narrowing the focus of study to dawn raid procedure allows us to view the repercussions of a fragmented and multi-layered system in more detail. A fragmented system threatens legal certainty in an area inextricably linked with fundamental and human rights. An exceedingly varied and broad spectrum of regulation is problematic from the perspective of predictability.

Fragmentation poses a problem for the efficiency of EU law. Uneven enforcement threatens the very heart of EU competition policy, creating a level playing field for the benefit of European consumers. In what Vestager calls the global village[89], business activities are not confined to the borders of nation states. In this sense, it seems arbitrary that inspection procedure should be.

The pros of harmonisation are easy to see, but the difficulty of attaining unanimous support from MS is equally evident. One issue, then, seems to be that differing views from various MS may stand in the way of an ideal level of harmonisation. The question is not so much one of conscious preference for a suboptimal result. It seems more likely that the issue arises

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[88] For more on so-called "night seals", see Jalabert-Doury, *Competition Inspections*, 111, 264.

[89] Vestager, "Enforcing competition rules".

from each decision maker having a very narrow view of the whole – be it the whole of CA dawn raids in a single MS or the whole of EU dawn raid procedures.

Practical dawn raid procedure is also not familiar even to many of those shaping the future of regulating competition enforcement. If one should wish to find out whether it might be possible to make use of remote data collection during a dawn raid, it seems there is no information available to answer such a question for most CAs. The example of seals in the previous section is another example of the misunderstandings permitted by even the most seemingly straightforward hard law.

A lack of transparency concerning the practical application of highly ambiguous legal provisions may even mean it is not possible to gain an in-depth understanding of the whole of dawn raid procedures in Europe. A good example of the level of clarity is the ongoing *Casino* case, where judges have been reported to open for debate "whether the Akzo appeal principle should apply to other aspects of a dawn raid"; in other words, whether a practical procedure to resolve particular differences concerning LPP ought to be applied to documents and data involving privacy concerns or concerns relating to the scope of the investigation.[90] The repercussions may be massive and hard to predict.

It is not, then, possible to form a complete, detailed picture of what dawn raid procedures in Europe entail. This is true for public sources at least. We can see further harmonisation is justified in order to create a level playing field, but not how far we currently stand from this objective.

Added transparency of practical procedure and accessibility of information concerning the practical significance of broad legislative outlines seems, then, as important as further harmonisation. The subject merits further study, as matters of practical procedure, the true level of harmonisation or spontaneous approximation, or the interaction of EU and national enforcement policies in practice are largely unknown. Upon closer inspection it seems that current harmonisation efforts may carry a risk of merely shifting the existing imbalance to other areas of enforcement. Future assessments of the success of ECN+ or of further needs for harmonisation ought to consider the EU competition enforcement system as a whole instead of focussing on remedies for isolated issues.

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[90] Nicholas Hirst, "Comment: Targets of EU dawn raids see new appeal avenue open over privacy concerns", *MLex*, 14 April 2022.

Bibliography

Autio, Riina. "Drawing the line at dawn raids: European courts' decisional practice on procedural issues arising from competition authorities' unannounced inspections". *European Competition Law Review* 41, no. 6 (2020): 297-310.

Autio, Riina. "Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities' Explanatory Notes on Unannounced Inspections". *Journal of European Competition Law & Practice* 11, no. 9 (2020): 475-486. doi:10.1093/jeclap/lpaa044.

Autoridade da Concorrência. *Proposta de Anteprojeto de Transposição da Diretiva ECN+: Alterações à Lei da Concorrência*. 25 October 2019. https://www.concorrencia.pt/pt/consultas-publicas/consulta-publica-sobre-proposta-de-anteprojeto-de-transposicao-da-diretiva-ecn.

Autoridade da Concorrência. Press Release 21/2019, "Infringement of Competition law will enable access to smartphones, tablets and cloud servers". 25 October 2019. https://www.concorrencia.pt/en/articles/infringement-competition-law-will-enable-access-smartphones-tablets-and-cloud-servers.

Autorité de la concurrence. Press release, "L'Autorité de la concurrence salue le pas décisif vers la transposition de la directive ECN+, qui a été accompli mercredi par le Parlement, avec l'adoption du projet de loi DDADUE". Accessed 12 May 2022. https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-salue-le-pas-decisif-vers-la-transposition-de-la.

Bernatt, Maciej and Svetlicinii, Alexandr. "The Right of Defence in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe". World Competition 41, no. 3. (2018): 309-334.

Borenius Attorneys Ltd. Legal Alert, "New Proposals for the Amendment of the Competition Act". 14 May 2020. https://www.borenius.com/2020/05/14/new-proposals-for-the-amendment-of-the-competition-act/.

Cseres, Kati. "The Implementation of the ECN+ Directive in Hungary and Lessons Beyond". Amsterdam Law School Research Paper No. 2019-40. Accessed 27 October 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489903&download=yes.

Danish Competition and Consumer Authority. "Bøde i første sag om nedrivningskarteller". 19 September 2018. https://www.kfst.dk/pressemeddelelser/kfst/2018/20180919-bode-i-forste-sag-om-nedrivningskarteller/.

Danish Competition and Consumer Authority. Official Statement from the Danish Competition and Consumer Authority, "Association of passenger carriers pays a fine of DKK 400,000 for bid rigging". 1 September 2020. https://www.en.kfst.dk/nyheder/kfst/english/news/2020/20200901-association-of-passenger-carriers-pays-a-fine-of-dkk-400-000-for-bid-rigging/.

Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry.* Louisiana State University Press. 1969.

Eklund, Mia. *Integritet och övervakning i arbetslivet – juridiska perspektiv på arbetsgivarens rätt att övervaka arbetstagare*. Helsinki: Unigrafia, 2021.

Eliantonio, Mariolina and Stefan, Oana. "Soft Law Before the European Courts: Discovering a 'common pattern'?". *Yearbook of European Law* 37, no. 1 (2018): 457-469. https://doi.org/10.1093/yel/yey017.

European Commission. Communication from the Commission, *Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives*. COM(2014) 453.

European Commission. Press release, "Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth". 22 March 2017. Brussels. IP/17/685.

European Commission. "What is competition policy?" Accessed 24 November 2020. https://ec.europa.eu/competition/consumers/index_en.html.

European Commission. "Antitrust and Cartels Legislation", under "Antitrust". Accessed 11 May 2022, https://ec.europa.eu/competition-policy/antitrust/legislation_en.

European Competition Network Working Group – Cooperation Issues and Due Process. "ECN Decision-making Powers Report". 31 October 2012. https://ec.europa.eu/competition/ecn/documents.html.

Galetta, Diana-Urania. *Procedural autonomy of EU member states: Paradise lost?* Springer, 2010.

Gonzalez-Diaz. Francisco Enrique & Fomperosa Rivero, Alvaro. "European Competition Law Procedural Reform – Introduction". *Competition Law & Policy Debate* 3, no. 3 (2017).

Government Offices of Sweden. Lagrådsremiss (draft legislative proposal), *Konkurrensverkets befogenheter.* 1 October 2020. www.regeringen.se/rattsliga-dokument/lagradsremiss.

Government Offices of Sweden. Public statement, "Konkurrensverkets befogenheter". 2 October 2020. https://www.regeringen.se/rattsliga-dokument/lagradsremiss/2020/10/konkurrensverkets-befogenheter/.

Grashof, Franziska. *National Procedural Autonomy Revisited: Consequences of Differences in National Administrative Litigation Rules for the Enforcement of European Union Environmental Law: The Case of the EIA Directive.* Europa Law Publishing, 2016.

Haanperä, Tuomas; Cerpickis, Mindaugas; Kantanen, Kalle and Partanen, Heidi. "Estonia: Economic perspective". *Global Competition Review.* 28 October 2021. https://globalcompetitionreview.com/insight/enforcer-hub/2021/article/estonia-economist-perspective.

Hirst, Nicholas. "Comment: Targets of EU dawn raids see new appeal avenue open over privacy concerns". *MLex*, 14 April 2022.

Hofmann, Herwig C.H. "European Administration – Nature and Developments of a Legal and Political Space". In *Research Handbook on EU Administrative Law*, edited by Giacinto Della Cananea, Carol Harlow, Päivi Leino, 21-43. Edward Elgar Publishing 2017. https://doi-org.libproxy.helsinki.fi/10.4337/9781784710682.

Idot, Laurence. "Réflexions sur l'évolution de la preuve des pratiques anticoncurrentielles devant les autorités de concurrence". *Concurrences* 4-2017.

International Competition Network. *Anti-Cartel Enforcement Manual Chapter 3: Digital Evidence Gathering (2021).*

International Competition Network. *Templates*. Accessed 11 May 2022. www.internationalcompetitionnetwork.org/working-groups/cartel/templates/.

Jalabert-Doury, Nathalie. *Competition Inspections in 21 jurisdictions: A Practitioner's Guide*. Institute of Competition Law. New York. 2022.

Jurkowska-Gomułka, Agata. "Mind the Gap! ECN+ Directive Proposal on its Way to Eliminate Deficiencies of Regulation 1/2003: Polish Perspective". *Market and Competition Law Review* II, no. 2 (2018): 125-150. https://doi.org/10.7559/mclawreview.2018.2.2.

Kameoka, Etsuko. "Proposals for Legal Professional Privilege in EU Competition Investigations". *Market and Competition Law Review* 6, no. 1 (2022): 15-48.

Koktvedgaard, Olaf; Zinck, Søren and Bork, Frederik André. "Cartels Laws and Regulations 2022: Denmark". Accessed 11 May 2022. https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/denmark.

Konkurencijos taryba. Press release, "Lithuanian competition law amendments: from fining powers to guarantees of independence". 30 October 2020. https://kt.gov.lt/en/news/lithuanian-competition-law-amendments-from-fining-powers-to-guarantees-of-independence.

Láncos, Petra Lea. "The power of soft law: spontaneous approximation of fining policies for anti-competitive conduct". *European Competition Law Review* 40, no. 11 (2019): 538-546.

Malinauskaite, Jurgita. *Harmonisation of EU Competition Law Enforcement*. Springer, 2020.

Massa, Claudia. "New CPC Regulation and ECN+ Directive: The powers of National Authorities in the fields of consumer protection and antitrust". *Market and Competition Law Review* IV, no. 2 (2020): 113-137. https://doi.org/10.34632/mclawreview.2020.4.2.

Melícias, Maria João. Speech, "Principais desafios em torno da Diretiva ECN+". Vieira de Almeida, Lisbon. 5 December 2019.

Ministry of Economic Affairs and Employment of Finland. Report of the working group on reforming the Competition Act. 14 March 2017.

Ministry of Economic Affairs and Employment of Finland. Press Release, EU competition law enforcement more effective – *Public consultation on proposed Competition Act amendments begins.* 14 May 2020. https://tem.fi/en/-/eu-n-kilpailusaantojen-noudattamisen-valvontaa-tehostetaan-lausuntokierros-kilpailulain-muutoksista-alkaa.

OECD. *Background Note for a roundtable discussion on Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences.* DAF/COMP/WP3(2020)1. 9 June 2020.

Ortlep, Rolf and Verhoeven, Maartje. "The principle of primacy versus the principle of national procedural autonomy". *Netherlands Administrative Law Library* (June 2012). DOI: 10.5553/NALL/.000004.

Papadopoulos, Yannis. "Accountability and Multi-level Governance: More Accountability, Less Democracy?". *West European Politics* 33, no. 5 (2010): 1030-1049.

Pound, Roscoe. "Law in Books and Law in Action". 44 *American Law Review* 12 (1910): 12.

Rea, Marialaura. "New Scenarios of the Right of Defence following Directive 1/2019". *Yearbook of Antitrust and Regulatory Studies* 12, no. 20 (2019): 111-126.

"ReNEUAL Model Rules on EU Administrative Procedure", under "projects and Publications". Accessed 12 May 2022. http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0.

Sauter, Wolf. *Coherence in EU Competition Law.* Oxford University Press, 2016. DOI:10.1093/acprof:oso/9780198749158.001.0001.

Scholten, Miroslava. "Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting". *The European Journal of Risk Regulation* 10, no. 3 (2019): 538-553. https://doi.org/10.1017/err.2019.33.

Spanish Ministry of Economy. Public consultation, *Consulta Pública previa sobre la transposición de la Directiva (UE) 2019/1 del Parlamento Europeo y del Consejo de 11 de diciembre de 2018 encaminada a dotar a las autoridades de competencia de los Estados Miembros de medios para aplicar más eficazmente las normas sobre competencia y garantizar el correcto funcionamiento del mercado interior.* Accessed 12 May 2022. https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/consultapublica/Paginas/ECO_Pol_CP_190724_ECN+.aspx.

Swedish Competition Authority. Press release, "Starkta befogenheter för konkurrensverket". 19 November 2020. https://www.konkurrensverket.se/nyheter/starkta-befogenheter-for-konkurrensverket/.

Terpan Fabien. "Soft Law in the European Union: The Changing Nature of EU Law". *European Law Journal* 21, no. 1 (2015): 69-96.

van Meerbeeck, Jérémie. "The principle of legal certainty in the case-law of the European Court of Justice: From certainty to trust". *European Law Review* 41, no. 2 (2016): 275-288.

van Erps, Dirk. "Processes and procedures in inspections / dawn raids". 2nd EU-India Competition Week. Delhi. 10 December 2019. competitioncooperation.eu.

Vestager, Margrethe. Speech, "Competition policy in the EU: Outlook and recent developments in antitrust". Peterson Institute for International Economics. Washington DC. 16 April 2015.

Vestager, Margrethe. Speech, "Enforcing competition rules in the global village". Brussels. 20 April 2015. ec.europa.eu/competition/speeches/index_2015.html.

Waelbroeck, Denis & Fosselard, Denis. "Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Antitrust Procedures". *Yearbook of European Law* 14, no. 1 (1994): 111-142.

Ziegler, Katja. "Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law". *Yearbook of European Law* 35, no. 1 (2016): 667-711.