



Reforming compliance management in the Single Market

— Discussion on a decentralised enforcement of EU law





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MEMORANDUM

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Single Market – Discussion on a decentralised
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EXECUTIVE SUMMARY

The appointment of a new European Commission in 2019 is an opportunity to debate the future of the Single Market. Within that frame of discussions, new initiatives may be devised to ensure greater economic integration and a smoother functioning of the four freedoms.

As much as it is important to adopt new rules at the EU level, the National Board of Trade finds it crucial to secure that the existing ones are applied correctly in the Member States. Yet, our recent report on compliance¹ shows that significant problems remain in this area and that those undermine the functioning of the Single Market.

The extent of these problems is hard to quantify due to the difficulties in detecting violations of EU law at the local level. Despite this lack of visibility, we argue that Union law is particularly vulnerable to compliance problems when compared with domestic laws.

In particular, we find that the compliance problems affecting the Single Market are inherent to the nature of EU law, a body of rules that transcend distinct legal orders each with their own logic, concepts, interests and traditions. Conceived in the European legal order, these rules are applied in the domestic ones by national bodies which are not always equipped to deal with the subtleties of Union law.

Given this dual structure, it is inevitable that problems of understanding, interpretation, compatibility and, ultimately, compliance occur on a regular basis.

In this memorandum, we argue that an ambitious reform addressing the existence of this dual structure could significantly improve the correct application of EU law in the Member States. Bridging the gap between the EU and national legal orders may be achieved in various ways. One, which is explored in this paper, would consist in introducing in each Member State a new player, a National Enforcement Agency (NEA), that would monitor the correct application of EU law.

Empowered with effective enforcement tools, notably the right to initiate proceedings before the national courts, the NEAs would be able to conduct in the Member States the type of controls which the Commission exerts at EU level. Thus, this decentralisation reform would provide local

¹ National Board of Trade [“In Quest of Compliance”](#) (2016).

interlocutors on compliance issues for the national administrations. The recourse to national courts would also secure an effective enforcement of Union law in the Member States. Finally, the Commission would be able to focus on monitoring cases that are the most relevant for the EU.

This memorandum does not aim at providing a ready-made solution. Rather, our hope is to trigger a reflection on the needs and means for strengthening compliance in the Union. Hence, the exact shape of a decentralisation reform is left open for discussion.

We are also conscious of the objections, not the least political and legal ones, that such reform may face. We do not pretend to remove all of them in this paper but find that precedents, notably the decentralisation of the EU competition rules in the early 2000s, may provide guidance on how to address these potential challenges.

“Non-compliance with the legislation can undermine consumers’ trust in the Single Market. It also undermines the level playing field for businesses. Good implementation, application and enforcement of Single Market rules are therefore prerequisites if the professed desire to deepen the Single Market is to materialise.”

(European Commission, November 2018)²

“The European Council [...] calls for implementing and enforcing, at all levels of government, decisions taken and rules adopted, as well as upholding standards and ensuring the smart application of better regulation principles, including subsidiarity and proportionality;”

(European Council, December 2018)³

“Coherent and effective application of the acquis needs to be ensured by a strong commitment on all political levels. We encourage a new Commission to strengthen the focus on implementation and enforcement, including at the highest political level. At the EU and national level, more attention should be paid to the unified implementation, application and enforcement. [...] A long-term action plan for better implementation and enforcement is needed to make current rules work in practice.”

(Letter of 17 Head of State and Government to the President of the Council, February 2019)⁴

“The Single Market governance infrastructure should be vastly reinforced at EU and national level in order to strengthen timely, transparent and efficient implementation and enforcement of the Single Market rules.”

(Business Europe, November 2018)⁵

² European Commission [“The Single Market in a changing world”](#) (22 November 2018).

³ European Council [conclusions](#) (14 December 2018).

⁴ Letter signed by 17 EU States [“Preparing the March European Council – The future development of the Single Market and European digital policy in view of preparation for the next Strategic Agenda”](#) (26 February 2019).

⁵ Business Europe [“Priorities for the Single Market beyond 2019”](#) (20 November 2018).

Introduction

The European Single Market constitutes a unique example of regional integration. This extensive political, economic and legal project was launched in 1992 with the particular objective of improving the economic performance of the European Union. Today, the benefits of the Single Market are obvious. As shown in various studies,⁶ the establishment of a market encompassing the whole continent, with over 500 million consumers, led to a significant positive impact on European GDP.⁷

Yet, the Single Market is still a work in progress. New rules are continuously adopted at the EU level in order to deepen the integration between the Member States. Calls are also regularly heard for the European Commission, the initiator of EU legislation, to assess the achievements of the Single Market and propose measures addressing its shortcomings.⁸

New strategies for the Single Market are discussed every five years in conjunction with the appointment of a new Commission. With the next appointment approaching in 2019, it is now appropriate to reflect over the current functioning of the Single Market and to identify areas for improvement.

Within the frame of such exercise, various proposals may be examined, ranging from further harmonisation in the field of services to the development of a social pillar or following up on the current digital strategy. Common to these proposals is the idea that further harmonisation is required in order to remove obstacles to the freedom of movement within the EU.

Without minimising the need for harmonising new areas of law, the National Board of Trade would like to stress the importance of securing that existing EU rules are correctly applied in the Member States. There is indeed little value in adopting rules if they are not complied with.

As will be demonstrated below, the EU suffers from a compliance deficit. As an introductory remark, it is important to note that compliance issues are not limited to the transposition of EU directives by the national parliaments (the implementation phase). Notification mechanisms are

⁶ National Board of Trade “[Economic Effect of the European Single Market – Review of the Empirical Literature](#)” (2015).

⁷ In its latest assessment of the Single Market, the European Commission estimates that its economic benefits amount to 8.5% of the Union’s GDP (COM(2018) 772).

⁸ See the recent call for a state-of-play report by the European Council (March 2018).

currently in place in order to identify such possible conflicts with the EU rules.

More difficult to detect however are the compliance issues that take place after the implementation of EU law into national law (the application phase). At that stage, compliance issues may take the form of discriminatory decisions on the import of goods, municipal planning rules that restrict market access in a disproportionate manner or undue delays for the recognition of foreign professional qualifications.

Taken separately, each of these problems may be very painful in the everyday lives of the EU citizens and companies concerned. Added together, they may constitute a significant impediment to the functioning of the Single Market, thereby, holding back the achievement of its full potential.

In order to unlock this untapped potential, we believe that securing compliance with the Union regulatory framework should remain one of the priorities of any future strategy for the Single Market. It is in this context that we discuss in this paper the possibility of decentralising the enforcement of Union law in the Member States as a means to strengthen compliance in the EU.

This idea consists in setting up national supervisory bodies in each Member State with powers to investigate alleged infringements of Union law and, eventually, to bring proceedings before the local courts. Its implementation may however be complex as it raises various political and legal issues. In that respect, earlier experiences of decentralised enforcement, for instance in the area of competition law, may provide guidance on how to design an effective enforcement regime.

The purpose of this memorandum is not to present a ready-made proposal but to introduce key elements of a decentralised enforcement regime as a basis for discussion for the upcoming strategy for the Single Market. We do not pretend to cover all the issues that may arise in the course of these discussions and are conscious that other models than the one explored here may also be suited for the improvement of compliance in the EU.

Structure and method

In this memorandum, we first discuss the major compliance issues affecting the application of Union law and in particular the limits of the existing enforcement mechanisms (**Section 1**). Following this diagnosis, we explain why and how the specific nature of the EU legal system calls

for structural solutions to these problems and more specifically for a decentralisation reform (**Section 2**).

We then explore possible ways to devise such decentralisation reform. For instance, the local monitoring of Union law could either be entrusted to national enforcement agencies or delegated by the European Commission to own agencies set in each Member State (**Section 3**). Given the comparative advantages of the first approach, in terms of efficiency and suitability, we focus, in the remaining part of this memorandum, on the setting up of national enforcement agencies. In particular, we discuss in the next section the possible features of these agencies (**Section 4**). We also address some of the objections that could be formulated against such reform (**Section 5**).

We conclude this paper with a review of similar reforms in other areas of law in order to illustrate how a decentralised enforcement regime might work in practice (**Section 6**) and briefly discuss some practicalities for the implementation of such regime at the EU level (**Section 7**).

The findings in this memorandum are based on our review of the relevant Union rules, existing literature on compliance in the EU as well as on our experience as the Swedish authority in charge of the Single Market.

In that capacity, the National Board of Trade is responsible for a number of EU functions in Sweden such as SOLVIT, the notification mechanisms for services and technical requirements⁹ as well as the contact points for goods, services and e-commerce. We also advise the Swedish authorities and municipalities on Single Market law issues and review the compliance of new Swedish rules with EU law. Finally, we provide analyses of various Single Market issues ranging from the review of trade barriers in specific areas to discussions on possible improvements of the Single Market.

A first version of this paper was discussed with various national experts working with the enforcement of Union law in several Member States as well as with academics. The National Board of Trade is particularly thankful for the valuable comments made by Professor Antonina Bakardjieva Engelbrekt (Stockholm University), Professor Ulf Bernitz (Stockholm University), Associate Professor Jörgen Hettne (Lund University), Professor Joakim Nergelius (Örebro University) and Professor Sybe de Vries (Utrecht University).

⁹ Directive (2006/123/EC) on services in the internal market and Directive (2015/1535/EU) on technical regulations.

Finally, it should be noted that the National Board of Trade is an independent authority and that this memorandum only reflects the views of the Board.

1 Problem definition

The European Union is one the most advanced models of regional integration among sovereign states. Part of its success relies on basic principles that, unlike for other models of regional integration,¹⁰ allow the EU legal system to enter into the domestic sphere and, thereby, contribute to its effectiveness.

The first stones were put by the Court of Justice of the EU (CJEU) which, in the early 1960s, introduced such principles as the supremacy of EU law and its direct effect.¹¹ Yet, it is the acceptance of those principles by the supreme courts of the Member States over the following decades¹² that allowed Union law to slowly penetrate the national legal orders.

As will be shown below however, this acceptance “in principle” is not necessarily reflected in the day-to-day activities of the Member States.

Compliance mechanisms

On paper, compliance in the EU is safeguarded by solid principles and mechanisms. Union law is binding on the Member States which shall adjust their national rules accordingly.¹³ The Member States are entrusted with the primary responsibility to apply EU law correctly. Thus, the national legislators and the public authorities shall transpose the EU legislation in their national legal orders and set aside any national rule in conflict with EU law.

Should compliance issues arise, the aggrieved parties (private persons or undertakings) may lodge complaints before the national courts which, in

¹⁰ See for instance with regard to ASEAN, J. Hopkins “Falling on stony ground: ASEAN’s acceptance of EU constitutional norms” *Asia Eur J* (2015) 13:275–283.

¹¹ The principle of supremacy of EU law over national law means that in the case of a conflict between a national rule and EU law, the latter shall prevail (case 6/64 *Costa v. ENEL*). The principle of direct effect gives private parties the right to rely directly on certain EU law provisions against national measures (case 26/62 *Van Gen den Loos*).

¹² For instance, the acceptance of the EU principle of supremacy by the German Constitutional Court in 1986 (BvR 197/83 *Solange II*) and by the French Supreme Administrative Court in 1989 (Conseil d’Etat, case 108243, *Nicolo*).

¹³ In accordance with the principle of sincere cooperation set in Article 4(3) of the Treaty on European Union and the principle of supremacy mentioned above.

turn, are bound to secure the correct application of EU law.¹⁴ If a Union law provision is unclear, the national courts can seek guidance from the CJEU by way of a preliminary reference.¹⁵ The rulings of the CJEU are binding on the Member States and thereby secure the uniform interpretation of EU law in the Union.

As an additional safeguard, the European Commission, acting as the guardian of the Treaties, may launch infringement proceedings against the Member States before the CJEU.¹⁶

Compliance issues

In practice, however, this seemingly tight proof system of compliance has its weaknesses. Compliance issues may arise at various stages, from the transposition of Union law into the national legal orders to its application by national authorities and the enforcement of EU rules by local courts.

The National Board of Trade discusses these issues in detail in the report “In Quest of Compliance”.¹⁷ The main finding of this report is that the compliance deficit, whether due to a lack of understanding or of capacity or even to political unwillingness, may, at times, “*lead to significant problems for companies and citizens, and prevent the Single Market from fully delivering projected benefits*”.

In particular, our report on compliance shows that the venues offered to individuals and companies in order to safeguard their EU rights are flawed with various problems.

- **National court proceedings:** in the case of an alleged breach of Union law, the main recourse for the aggrieved parties is to bring the matter before a domestic court. Proceedings before national courts are however particularly costly and time-consuming in cases involving Union law. The lack of familiarity with EU law of judges and lawyers and the averseness of some in questioning the validity of national rules render the outcome of such proceedings uncertain. As a result, private parties may be reluctant to go to court and may find it a lesser evil to comply with national rules, even when those violate their EU rights.

¹⁴ In accordance with the principle of direct effect mentioned above and the principle of judicial review which grants private parties a right to an effective remedy before court in the case of violations of their EU rights by the Member States (case 222/84 *Johnston* and Article 47 of the Charter of Fundamental Rights of the EU).

¹⁵ Article 267 of the Treaty on the Functioning of the European Union (TFEU).

¹⁶ Article 258 TFEU.

¹⁷ National Board of Trade “[In Quest of Compliance](#)” (2016).

- **European Commission proceedings:** as an alternative remedy to national court proceedings, private parties may lodge a complaint before the Commission which has the power to investigate an alleged breach of Union law and eventually bring the matter before the CJEU. In practice however, only a minority of complaints brought before the Commission result in changes of national rules or infringement proceedings before the CJEU. The Commission's limited resources and its political priorities make it impossible to proceed with every alleged infringement brought to its attention. Thus, regardless of the merits of their case, plaintiffs may not find it very useful to challenge the legality of national measures with the Commission.
- **Other enforcement proceedings:** other mechanisms, such as notification and consultation proceedings or the use of dedicated communication channels (e.g. SOLVIT, Your Europe) may assist in safeguarding compliance but their soft law nature is not always appropriate to infringement cases. For instance, a SOLVIT-centre would attempt to convince a national authority to remedy a breach of Union law but would have no means to oblige that authority to do so. The flip side of mechanisms such as SOLVIT, which solely rely on dialogue and goodwill, is their limited ability to compel observance of EU law.

Compliance with EU law may vary from one country to the other, even from one national court or authority to the other. Cultural and legal traditions, the level of education in EU law, national interests and the complexities of Union rules are among the many factors that may affect their correct application.

Anecdotal evidence suggests that in some extreme cases, there may be a culture of impunity with regard to the application of Union law. Indeed, the National Board of Trade has encountered situations whereby local authorities would justify their lack of compliance with spurious explanations such as the facts that they are solely accountable to their national government, that other countries would do the same and, ultimately, that the risk of sanctions was remote.

It is not feasible, within the frame of this memorandum, to provide an exhaustive picture of the compliance issues arising in each Member State.¹⁸ Nor is it possible for us to appraise the costs arising from these

¹⁸ Compliance issues and enforcement mechanisms are discussed in a comprehensive manner in various communications from the European Commission, notably those from 2002 ("[Better monitoring of the application of Community law](#)" COM(2002) 725), 2007

issues. Various economic studies discuss non-compliance¹⁹ but, at the same time, we are conscious of the difficulties in quantifying a problem that largely goes under the EU's radar.

Addressing compliance issues

The lack of compliance is not only about economic shortfalls, such as missed business opportunities and additional transaction costs, or about frustrations experienced by citizens in moving to another Member State. It also raises more profound questions of trust between the Member States.

Indeed, it only makes sense for a country to meet its EU obligations if it can trust that the other Member States also comply with them. Without such trust, the EU countries would lack incentives to fulfil their EU commitments, which in turn would seriously undermine the functioning of the Single Market.

For these reasons, the correct application of EU law has been a recurrent concern for the European Commission in the last decades. A number of new mechanisms were developed over the years,²⁰ from improving communication (guidelines, scoreboards, etc.) to notification procedures and the setting up of the informal problem-solving network SOLVIT.

In the next section, we discuss why those mechanisms, most of which are of a soft law nature and have a preventive function (avoiding potential problems) rather than a curative one (remedying existing problems), are not sufficient to address the compliance deficit affecting the Single Market. Instead, we argue that this deficit is structural in nature and, therefore, calls for more ambitious solutions.

2 Call for structural solutions

No area of law, be it national or European, is immune from compliance problems. What is specific to Union law however is that it transcends several legal orders: adopted at the EU level, it is implemented and applied by the administrations of the Member States. We argue in this section that

(“[A Europe of results – Applying Community law](#)” COM(2007) 502) and 2016 (“[EU Law: Better Results through Better Application](#)” COM(2016) 8600) as well as in several independent studies; for instance J. Pelkmans and A. de Brito “Enforcement in the EU Single Market” (Center for European Policy Studies, 2012).

¹⁹ For instance, Copenhagen Economics “[Delivering a Strong Single Market](#)” (2012) and more generally, on the cost of non-Europe (of which non-compliance is but one aspect), European Parliament “[Mapping the Cost of Non-Europe, 2014-19](#)” (December 2017).

²⁰ See for instance the main communications of the European Commission on compliance from 2002, 2007 and 2016 (referred in footnote 18).

this dual structure is the main cause of the problems affecting the correct application of Union law and that effective compliance mechanisms shall therefore primarily target this structural issue.

The “unbearable foreignness of EU law”

Unlike the various areas of domestic law, Union law cuts across the EU and national legal orders. These orders are distinct from each other and, therefore, interactions between them require solid collaboration mechanisms. Yet, in spite of numerous notification, consultation and communication procedures involving national civil servants (from government officials to local experts or judges) and the EU institutions, Union law remains in the end a foreign body imported into the legal orders of the Member States.

Hence, the chain of communication between the EU legislator and the national civil servant in charge of applying the EU rules in individual cases is not only longer than in the case of the application of domestic laws. It is also rendered more complex by the fact that the players at each end of this chain evolve in different legal orders, each with their own (not always compatible)²¹ logic, concepts, interests and traditions. Given this dual structure, it is inevitable that problems of understanding, interpretation, compatibility and, ultimately, compliance occur on a regular basis.

By comparison, the application of purely domestic rules may sometimes be problematic but, in contrast to EU law, it is circumscribed to the national regulatory “eco-system”, i.e. a legal order that integrates in a coherent and consistent manner all parties involved, from the legislator to the judge. These national players speak the same legal language and share the same values and references which minimise the risk of misapplication of domestic rules.

Thus, the compliance problems affecting the application of Union law, as opposed to purely domestic laws, are of a structural nature. It is the fact that, despite the slow penetration of Union law in the national legal orders, it remains an alien object for the administrations of the Member States,

²¹ For instance, Union law is typically focusing on obligations of results whereas the national legal orders are more formalistic in nature. Thus, incompatibilities may arise when domestic procedural rules cannot accommodate measures that would be necessary for the achievement of an objective set by the EU legislator. The tensions between the EU obligations of results and national procedural obligations may affect various areas of law, from the enforcement of the principles of supremacy or of judicial review to the mutual recognition of goods or of professional qualifications.

what we call the “unbearable foreignness of EU law”,²² that is the root of these problems.

The need for structural solutions

We argue further that the structural compliance problems identified above cannot only be solved by better communication and cooperation mechanisms. Such mechanisms are necessarily limited in scope²³ and rely on the goodwill of all involved parties, as well as their awareness and understanding for Union law. These conditions are hardly met by every single player at all time and for all matters.

What we find is lacking for the interests of the Union to be efficiently taken into account in the Member States is a pro-active player embedded locally and able to voice the cause of the EU in the national legal orders. In other areas of law, e.g. domestic criminal, consumer, environmental or tax laws, a similar representative function is already entrusted to national bodies such as the public prosecutor or specialised authorities. These public bodies play a critical role in the enforcement of domestic rules as they are able to initiate judicial proceedings or, at least, defend in a consistent and substantiated manner the interests they represent before the national courts.

In the conflicts between national and Union interests, which typically characterise most EU law cases, the national interests are normally represented before the domestic courts by the relevant public authorities.²⁴ Those of the EU legal order, on the other hand, are only represented by the aggrieved parties, to the extent that the individuals or companies concerned have sufficient incentives, resources and capacity to pursue legal proceedings.

Thus, in our view, the power imbalance between the national and EU interests calls for the introduction in the domestic legal order of a representative that can act as a driving force for the enforcement of Union law in the national legal orders. In practice, this structural reform would amount to decentralising the enforcement of Union law by shifting to the

²² This formulation is borrowed from Jean-Claude Barbier, Fabrice Colomb “The unbearable foreignness of EU law in social policy, a sociological approach to law-making” Documents de travail du Centre d’Economie de la Sorbonne 2011.65.

²³ For instance, the Commission’s work on the transposition deficit, the “Single Market Scoreboard”, focuses on the timely transposition of EU directives in the Member States. Given the limited resources of the Commission, there is not much room for a thorough qualitative review of the transposition measures. In any case, the scoreboard does not address compliance issues occurring in the application of these measures.

²⁴ Obviously national authorities should consider both national and Union interests but it is precisely in infringement cases, that potential conflicts between the two arise.

national level part of the supervisory work that is conducted today at the EU level.

In the next sections, we explore first the pros and cons of two different models of decentralisation for the enforcement of Union law (Section 3) and focus then on the approach which, in our view, would be the most efficient and suitable (Sections 4 to 7).

3 Devising a decentralisation reform

There are various ways to devise a decentralised enforcement regime. Making use of the existing enforcement mechanisms, i.e. the judicial review by national courts and the Commission's infringement proceedings, we discuss in this section two possible ways to go about decentralisation.

In the first case, such reform would consist in setting up national supervisory bodies, hereinafter "National Enforcement Agencies" or "NEAs", in each Member State. These agencies would monitor the application of EU law in the Member States and, in the case of a violation of Union rules, would have the power to initiate proceedings before the national courts. The NEAs would therefore be an integral part of the national administrations which would give them access to information on local compliance issues and to the national judicial system. One challenge with this option would be to guarantee their independence from other national public bodies.

In the second case, the Commission's infringement proceedings would be strengthened by the setting up, in each Member State, of Commission's local agencies.²⁵ These agencies would not be part of the national administrations and, therefore, would not be able to bring matters before the local courts. Instead, their role would be to collect information on possible infringements at the national level and feed the Commission on local compliance issues. This, in turn, would facilitate the Commission's supervision of the national administrations from the field. Hence, the decentralisation envisaged under this approach would take the form of a deconcentration of some of the Commission's investigative powers.²⁶

²⁵ As an alternative, the Commission could reinforce its representation offices in the Member States.

²⁶ By "deconcentration", we refer to the transfer of powers within the same institution (here the European Commission), albeit at a local level.

Both approaches would lead to a better understanding and coverage of local compliance issues. As demonstrated below however, the reliance on the Commission's local agencies would likely be less efficient than the NEA approach and may be particularly sensitive for the Member States, as it would encroach on their national sovereignty.

Comparative analysis of the efficiency of the two approaches

For several reasons, we find that the NEAs would be more efficient than the Commission's local agencies in monitoring the correct application of Union law.

First, the NEAs being a part of the national administrations would likely have easier access to information on local compliance issues. For instance, the NEAs would be able to request information from other national bodies. It is unlikely that the Commission's agencies would be granted a similar access unless the procedural rules on infringement proceedings are significantly amended. Under the current rules, the Commission does not directly discuss infringement cases with the local authorities concerned. Instead, the chain of communication goes via the Member State's government.

In the absence of direct communication channels between the national administrations and the Commission's local agencies, the latter would have to rely on information included in complaints from private parties or media reports as well as on any publicly available information. Given the varying levels of openness and transparency in the EU countries, it is likely that the Commission's local agencies would be more informed in some Member States than others.

Second, the Commission's local agencies would not have the possibility to remedy compliance issues on their own. Unlike the NEAs which could bring matters before the national courts, the Commission's local agencies would be dependent on the Commission's willingness to launch infringement proceedings before the CJEU. There is no obligation for the Commission to do so and, in any case, it is debatable whether every single violation of Union law by local authorities or municipalities should be solved in Luxembourg.

In our view, the NEA approach would have the advantage over the Commission's agencies of solving local problems at the local level.

One drawback with the NEAs, as opposed to the Commission's local agencies, is that their independence towards the Member States may be challenging to safeguard. However, as will be discussed below (Section

5.2), mechanisms are in place in the EU in order to guarantee the independence of national authorities in charge of applying sector-specific EU legislation. Those mechanisms could likewise apply to the NEAs and thereby mitigate the risk of a conflict of interests in handling local infringement cases.

A question of national sovereignty: subsidiarity vs. supranational review of national rules

From the Member States' perspective, another argument speaks in favour of the NEA approach. As explained below (Section 5.1), this approach would imply that the Member States would take back greater control over the judicial review of their national laws and administrative practices. This is in line with the EU principle of subsidiarity.²⁷

By contrast, the setting up of Commission's local agencies in the Member States may be quite sensitive. Some Member States may be reluctant to accept that foreign organs are set up on their territory in order to collect information for the purpose of a supranational review mechanism. The debates on ISDS mechanisms or the role of the CJEU in the Brexit negotiations illustrate the sensitivity of strengthening the supranational review of national laws and administrative practices.

There is one last argument that supports the NEA approach. It concerns the allocation of roles between the Member States and the European Commission in the EU legal architecture.

The Commission, as the guardian of the Treaties, plays a key role in overseeing the correct application of EU law. However, this role is necessarily limited in a Union with 28 Member States, tens of thousands of local authorities and municipalities and countless national rules and decisions. For this reason, it is important to remind that, under the EU Treaties,²⁸ the primary responsibility for the correct application of Union law lies with the Member States.

The NEA approach reflects this responsibility by strengthening the national enforcement of Union law and reasserting the Member States' ownership of the Single Market.

²⁷ Article 5(3) of the Treaty on European Union (TEU).

²⁸ Article 4(3) TEU: "*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*"

Given the above, we focus in the remaining parts of this paper on the setting up of national enforcement agencies as a means to reduce the compliance deficit in the Member States.

4 Setting up National Enforcement Agencies

As mentioned in the previous section, the NEA approach would consist in setting up national supervisory bodies which would monitor the application of EU law in the Member States. In the case of a violation of Union rules, these NEAs would have the power to initiate proceedings before the national courts.

In this section, we first explain why these two core features (national agencies and access to justice), are important in order to address the EU compliance deficit. We then examine a variety of options that may be considered in order to flesh out these core features.

4.1 Objective

The objective of a decentralisation reform would be to strengthen the enforcement of Union law in the Member States. For several reasons discussed below, we find that both the setting up of national enforcement agencies and the possibility for them to initiate court proceedings could address the structural issues highlighted in the previous sections.

First, by introducing in the Member States a new public body with dedicated competence in Union law, the national administrations would have access to an interlocutor with whom to discuss compliance issues. This interlocutor would also have the ability to effectively argue before courts which, in turn, would contribute to raising awareness and understanding for EU law with the NEAs' counterparts, i.e. the public authorities and the judiciary.

The status of the NEAs, as an integral part of the public administrations, may also raise the legitimacy of Union law in the Member States and may alleviate the reluctance that a national authority or court may have in setting aside national rules. For individuals and companies, it could also remove the burden of engaging in potentially hazardous proceedings.

Second, the setting up of NEAs would ensure greater effectiveness in the monitoring of national measures by allowing the Commission to focus on the cases that are the most relevant for the EU.²⁹ Conversely, the NEAs

²⁹ For instance, cases raising issues of principle or covering several Member States.

would be better suited to identify the bulk of conflicts between the EU and national rules which are more local in nature.

By comparison with the Commission, the NEAs would have a greater understanding of the national legal framework, the language and, more generally, the local circumstances affected by a national rule. Unlike the Commission, the NEAs would also have the possibility to discuss cases directly with other national authorities. At the same time, a solid cooperation between the NEAs and the Commission may assist the latter in better appraising its role as guardian of the Treaties.

Finally, the existence of a real threat of court proceedings, as opposed to the remote risk of a Commission investigation or of private litigation, may facilitate the use of soft law mechanisms such as the various notification procedures already in place or SOLVIT. In our view, a carrot and stick approach is a prerequisite for an efficient enforcement policy and shall combine incentives (benefits of the Single Market) with soft law instruments (communication) and, ultimately, effective sanction mechanisms (judicial review).

4.2 Mandate

A number of variables may be taken into account in designing the mandate of the NEAs. Below is a short overview of the most relevant ones.

4.2.1 Scope of supervision

The NEAs could be responsible for the enforcement of all Union law related to the Single Market in the Member States or of specific pieces of EU legislation, for instance those where significant compliance problems have been identified.

The advantage of defining a broad mandate encompassing the Treaty rules on the four freedoms and the Single Market legislation is that it would allow for flexibility in the supervision of the national application of Union law.³⁰ Compliance issues may vary from time to time and from one jurisdiction to the other. A too narrow scope of supervision may therefore not address the breadth of issues arising in the Union. Hence, the broader the mandate of the NEAs, the stronger chances to detect and remedy compliance issues in the Member States.

³⁰ Although not discussed in this paper, additional Union rules may be included in the mandate of the NEAs, for instance EU citizens' rights or the Charter of Fundamental Rights of the European Union.

The drawback of such approach, as opposed to a narrower scope of supervision, is that it may require more resources in terms of staffing and competence. This particular issue is dealt with below (Section 5.3).

A related issue concerns the type of national measures to be supervised by the NEAs. Although we find that their focus should primarily be to review barriers imposed by the Member States (public measures), there are strong arguments for also including some private barriers in their scope of supervision.

With regard to the concept of public measures, we note that it is a broad one that encompasses norms of a general nature (laws and regulations) as well as decisions adopted by the national administrations in individual cases. In terms of efficiency, there would be no reason to restrict the scope of the NEAs' supervision to certain types of public measures.

In particular, the mandate of the NEAs should not necessarily be limited to reviewing decisions in individual cases but should also include the review of legality of laws and regulations. Indeed, this broad approach would address recurrent compliance problems in a Member State as it would allow the NEAs to target at the root of these problems (an underlying rule breaching Union law) rather than its symptoms (an individual decision based on such rule).

With regard to private barriers, the mandate of the NEAs could also include the most significant ones, to the extent that they are not already covered by the competition rules. Private barriers may take different forms, from discriminatory practices by individual businesses to market entry restrictions imposed by trade organisations.³¹ Such barriers may create a significant impediment to the achievement of the Single Market, especially in the case of a collective regulation of a market or where a private actor acts on behalf of the state.

These barriers may be difficult to bring to court by the aggrieved parties as the case law is quite sparse in this area. In particular, it may be quite problematic for a consumer or a company to challenge the compliance of private barriers with Union law. Thus, in the case of a collective regulation of a market or where a private actor acts on behalf of the state, the NEAs

³¹ The EU legislator has been increasingly active in addressing such barriers, for instance within the digital economy (e.g. prohibition of roaming fees or of geoblocking practices) or financial services (e.g. prohibition of discriminatory charges on cross-border payments).

may be an appropriate instance to investigate the legality of private practices and, eventually, bring them before the national courts.

Finally, other considerations may play a role in defining the scope of supervision of the NEAs. In particular, their mandate may be defined by opposition to the ones held by other national authorities or by the European Commission. Both issues are addressed below.

4.2.2 Relations to other national authorities

Already today, several national authorities are applying well-delineated areas of Union law, from sector-specific legislation (energy, telecom, transport) to consumer or environmental law. In order to avoid an overlap, it would be important to clearly delineate the scope of the NEAs' mandate. One way to do so is to clarify the distinction between specialised authorities which apply EU law and the NEAs which would supervise their application.

This distinction between the application and the supervision of EU law is not uncommon in the Single Market. Supervision is basically what the Commission (albeit with limited resources) or SOLVIT (albeit without teeth) do today in relation to the application of Union law by the national administrations. In the Nordic countries, dedicated authorities also have a general mandate to oversee the lawfulness of the activities of other public bodies.³² More generally, most Member States have entrusted public authorities with the task of controlling the lawfulness of the work of other authorities, for instance in the field of data protection or of public procurement.³³

It could be argued that the national authorities whose activities mostly consist in the application of Union legislation, for instance in the areas of chemicals, financial services or telecom which are highly harmonised, are so familiar with EU law that their supervision by the NEAs would be of limited value. If that is the case, it could be appropriate to exclude those areas of law from the mandate of the NEAs.

Another possible delineation between the NEAs and the specialised authorities could be based on the distinction between EU primary law and secondary legislation. Under this model, the mandate of the NEAs would be limited to monitoring the correct application of the Treaty rules on e.g.

³² For instance, in Sweden, the Parliamentary Ombudsman and the Chancellor of Justice.

³³ The Data Protection Authorities control that other authorities apply the privacy rules correctly whereas the public procurement authorities oversee the transactions of contracting authorities.

free movement. The NEAs would therefore not have the possibility to challenge the application of harmonising legislation by the various national authorities.

The options presented here are meant to illustrate the various issues that may be considered when defining the role of the NEAs as opposed to other national authorities. As discussed in the previous section however, it may be more suitable to entrust the NEAs with a broad mandate encompassing the EU rules on the four freedoms and hence mirroring the Commission's own scope of supervision at EU level.

4.2.3 Relations to the European Commission

Even if the supervisory role of the NEAs would be similar to the one of the European Commission, the risk of overlap in handling infringement cases could easily be avoided. Solid cooperation mechanisms with possibilities to refer cases between the NEAs and the Commission would preclude such risk.

Similar mechanisms are already in place within specific areas or sectors. For instance, we describe below (Section 6.2) how the Commission and the national authorities in charge of competition law and of the telecom sector cooperate with each other via dedicated networks. These allow for an exchange of best practices, guidelines on the interpretation of the relevant EU rules and the coordination of the national enforcement policies.

Within the frame of such cooperation mechanisms, the Commission and the NEAs may also agree on their respective scope of supervision. The Commission could for instance decide to focus its attention on the transposition of secondary legislation in the Member States, leaving to the NEAs the primary responsibility to supervise the application of Union law by public authorities and municipalities.

It is important, however, that the Commission retains its right to investigate any case of misapplication of Union law in accordance with its Treaty-based mandate. Thus, the Commission would have to be able to request that a case handled by an NEA be referred back to it. Typically such mechanism could be activated for infringements that raise issues of principle or that affect several Member States. It may also be relevant for matters which are sensitive to investigate at national level, for example those involving breaches of the rule of law.

4.3 Status of the NEAs

In this memorandum, we investigate the idea of setting up the NEAs as national public bodies integrated within the administration of each Member State.

Doing so would be in line with the EU principle of subsidiarity, as it would give the Member States the discretion to establish such bodies in accordance with their legal traditions. For instance, the NEAs may be set up as independent authorities, as national ombudsmen or as autonomous units within existing authorities or ministries.

It is not feasible, within the scope of this paper, to conduct a comparative study of the Member States' various legal orders. However, it is our understanding that some of them already have in place dedicated organs in charge of Single Market issues. For those Member States, the decentralisation reform discussed here may not necessarily require the setting up of new bodies but rather adjusting existing structures.

One challenge with the NEA approach is to guarantee the independence of a national public body in investigating other national public bodies. As will be discussed below (Section 5.2), experiences from specific sectors and areas of law illustrate how the independence of national bodies entrusted with the application and supervision of Union law may be safeguarded.

4.4 Powers

The NEAs would need to have the powers to investigate alleged violations of EU law and to bring cases before courts. Short of these powers, the NEAs would merely duplicate the work of the national SOLVIT-centres. In the absence of sanction mechanisms (i.e. actions before courts), there is a risk that the establishment of NEAs would not substantially remedy the structural problems that affect compliance in the Single Market.

The recourse to the judiciary is also in line with the idea that the review of legality of public measures is best handled by courts. Therefore, there is no reason to endow NEAs with power to quash decisions adopted by the national administrations. Rather, an important function of the NEAs would be to facilitate access to courts for EU law cases.

However, the NEAs' power to initiate judicial proceedings would not necessarily result in an explosion of court cases. On the contrary, the recourse to the judiciary should, in our view, be a measure of last resort, limited to cases for which the dialogue between the NEAs and the investigated authorities has been unsuccessful.

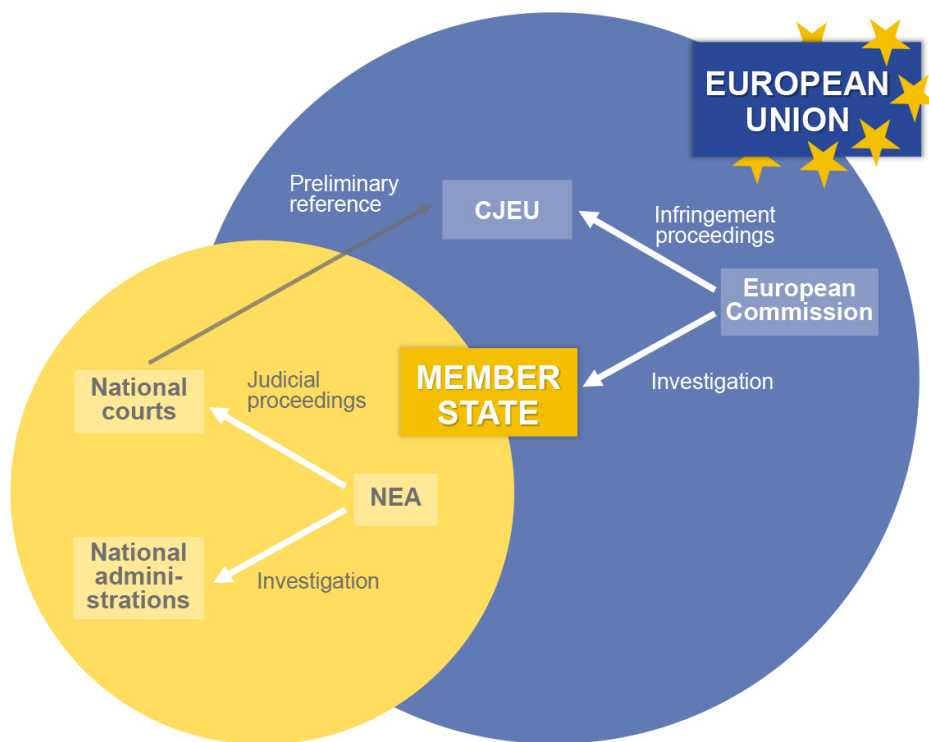
Indeed, the NEAs should primarily be considered as an interlocutor with whom the national administrations may engage in order to discuss compliance issues. This dialogue may be informal or within the frame of an investigation. It would only be in the case of such investigation, and insofar as the parties fail to agree on the legality of a national measure, that the NEAs would be able to ask a national court to rule on the matter.

Aside from the powers of investigation and of litigation before courts, the NEAs may be granted additional tasks such as advising their government on the adoption of new rules or on the transposition of EU directives. Such preventive role may also be extended to assisting the Commission and the Member States in the review of national notifications for goods and services.³⁴

Finally, the NEAs could play an active role as a link between the Commission and the Member States, by e.g. gathering information on national rules, assisting the Commission in identifying the need for new EU legislation and, more generally, facilitating the dialogue between the two legal orders.

³⁴ In accordance with Directive (2006/123/EC) on services in the internal market and Directive (2015/1535/EU) on technical regulations.

A decentralised enforcement of EU law



Today, the European Commission monitors the application of EU law by the Member States with the possibility of bringing infringement proceedings before the CJEU. The decentralisation of this supervisory function would entail that parts of the Commission's mandate at the EU level would be shared with National Enforcement Agencies. The NEAs would conduct similar types of controls at national level, with the possibility of bringing proceedings before the national courts. The uniform interpretation of EU law would be safeguarded by the existing mechanism of preliminary references according to which national courts can seek guidance from the CJEU.

5 Potential objections to a decentralisation reform

The ambitious nature of the decentralised enforcement regime, with NEAs set up in each Member State, would inevitably raise a number of objections. This, in turn may affect the willingness of the Member States and the EU legislator to consider a reform of compliance management. In this section, we address in general terms some of the main objections.

5.1 Political issues

The Member States may view the reform as a serious encroachment in their national sovereignty. Recent debates on e.g. ISDS-mechanisms or the CJEU's role in the Brexit negotiations illustrate the sensitivity of measures that touch upon the judicial or arbitral review of national laws.

However, as discussed in Section 3, we find that, unlike the debates mentioned above, this reform would result in the Member States taking back a greater control over the judicial review of their national laws. In practice, it would likely mean that part of the scrutiny work conducted today by the European Commission would be transferred to the NEAs and the national courts.

More generally, the decentralisation reform discussed in this paper may curb the increased oversight at Union level resulting, in the Commission's words,³⁵ from "*the poor application of [Single Market] rules*" by national authorities in several cases. In that respect, this reform is an expression of the principle of subsidiarity according to which "*the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States*".³⁶

The European Commission may also be reluctant in sharing its Treaty-based mandate with national authorities. In that respect, it is important to note that the decentralised enforcement of Union law does not call for an amendment of the Treaties, nor does it restrict the powers of the Commission. As mentioned above, the Commission would, in any case, retain its discretion to investigate any alleged infringements of Union law.³⁷ Furthermore, as shown with the decentralised enforcement of

³⁵ European Commission "[The Single Market in a changing world](#)" (COM(2018) 772), p.9. For a discussion on the centralisation of EU law enforcement, see Miroslava Scholten (2017) "Mind the trend! Enforcement of EU law has been moving to 'Brussels'", *Journal of European Public Policy*, 24:9, 1348-1366.

³⁶ Article 5(3) of the Treaty on European Union.

³⁷ See above (Section 4.2.3) for a discussion on the setting up of referral mechanisms between the NEAs and the Commission.

competition law,³⁸ the Commission's supervisory role would likely benefit from pooling resources from the NEAs.

5.2 Legal issues

From the Member States' perspectives, the decentralisation reform discussed in this paper may raise several legal issues.

The first issue is of a constitutional nature and relates to the ability of public bodies, here the NEAs, to challenge the validity of certain legal acts before courts. Whereas decisions by public authorities in individual cases may normally be appealed before the national administrative courts, not all Member States allow for the judicial review of norms of a general nature (laws, regulations, etc.) or of government decisions.

This issue is however not specific to a decentralised enforcement of Union law. Under EU law,³⁹ any national measure, whichever its position in the hierarchy of norms, may be subject to judicial review. Thus, regardless of the existence of the NEAs, each Member State shall guarantee the possibility for national courts to review the compatibility of laws and government decisions with EU law.

In some cases, national procedural rules may allow for judicial review but restrict this right to the persons that are individually concerned, thus possibly affecting the standing of independent bodies in bringing cases before courts. In this regard, experiences from sector-specific legislation may provide guidance on how to guarantee the rights of the NEAs to initiate judicial proceedings.

More generally, some Member States may be reluctant to have public bodies, here the NEAs, monitoring the activities of other public bodies and, eventually, initiating judicial proceedings against them.

As mentioned above however, it is not uncommon for the Member States to have dedicated agencies reviewing the activities of other public bodies. For instance, Union law imposes such mechanisms in the fields of public procurement or of data protection. National ombudsmen also have the possibility in certain Member States to bring matters against other authorities before courts.

As for the recourse to the judiciary, it is important to stress that this would be a measure of last resort. Again, the NEAs shall primarily be seen as an interlocutor on compliance issues for the national administrations. It is

³⁸ See below, Section 6.2.

³⁹ The EU principles of supremacy and judicial review.

only if the dialogue between the two fails that a court, not the NEA, may rule on a possible breach of Union law.

A second issue concerns the independence of the NEAs within their national legal orders. Again, sector-specific measures at the EU level already address the independence of national regulators.⁴⁰ Those include detailed obligations on the Member States, for instance on the appointment and dismissal of the management of the regulators, on safeguarding their financial and organisational independence as well as on the provision of adequate human resources. These EU measures also strictly prohibit other public entities (including governments) from giving instructions to the national regulators or from interfering in the recruitment of their staff. Lessons from these precedents may therefore also serve as guidance when considering the status of the NEAs.

From the EU's perspective, another objection may be raised. It concerns the threat which a decentralised enforcement may pose on the uniform application of EU law. It could be argued that such reform would lead to divergences in the interpretation of Union law by the various NEAs. However, as explained below, the risk of such fragmentation is minimal.

Although this memorandum focuses on the NEAs, it is actually the national courts which are the primary enforcers of Union law in the Member States under a decentralised regime. The proposed reform would not affect the role of the CJEU as the final interpreter of EU law. The national courts before which the NEAs would bring proceedings would still be able to seek guidance from the CJEU under the preliminary rulings procedure, thus securing the uniform application of Union law.

In addition, the creation of national enforcement agencies would have to be supported by the introduction of cooperation mechanisms between the NEAs and the Commission. Similar mechanisms are already in place in various areas of Union law and aim notably at avoiding divergences in the interpretation of EU law by specialised authorities.⁴¹

⁴⁰ For instance, Article 30 of the Audio Visual Media Services Directive (2010/13/EU), Article 35(4) of the Directive on the internal market for electricity (2009/72/EC), Article 3 of the Framework Directive (2002/21/EC) or Article 52 of the General Data Protection Regulation (679/2016/EU).

⁴¹ See for instance the cooperation mechanisms for the enforcement of the competition rules and the telecoms rules examined in Section 6.2. Aside from these, several cooperation networks are in place in the EU, for example in the field of data protection (the European Data Protection Board), consumer protection (the Consumer Protection Cooperation Network) or medical devices (the Competent Authorities for Medical Devices).

5.3 Resources

Probably one of the main issues associated with the setting up of NEAs concerns the resources to be allocated to these bodies. Regardless of whether this cost shall be borne by the Member States, the EU or both; it is inevitable that some would argue that it represents an unnecessary burden on public finances. This objection may also concern the resources that may need to be allocated to the judiciary in order for the national courts to cope with an increased flow of cases.

Obviously, the resources to be committed to the NEAs would have to be commensurate with the benefits of having in place a more efficient enforcement mechanism. A cost-benefit analysis, in as much as it is feasible, would have to demonstrate that the costs of non-compliance outweigh those associated with setting up NEAs.⁴²

Thus, to be clear, a decentralisation reform shall not consist in spending unnecessary resources on setting up national agencies. Such investment only makes sense if it unlocks the untapped potential of the Single Market and thereby results in significant economic gains for citizens and businesses in the EU.

In relation to the costs of such reform, it may also be discussed to what extent the setting up of National Enforcement Agencies could lead to savings in other resource-intensive compliance programs. Although the NEAs are not primarily meant to replace other mechanisms, they may, in practice, relieve the burden of some.

Another important aspect, which falls outside the scope of this paper, concerns the financing method of the NEAs. For instance, it could be discussed whether their operating costs should be borne by the Member States and/or by the EU.

Aside from the costs of setting up the NEAs, another objection may be formulated in respect of their level of expertise. The current compliance issues affecting the Single Market illustrate in part the difficulties for the national administrations in building adequate capacity in order to apply correctly Union law. It could be argued that similar difficulties may affect the staffing of the NEAs and hence the quality of their supervisory work.

⁴² According to a study from 2012, the cost of non-compliance for four areas (taxation, services, public procurement and mutual recognition) was equivalent to a “*large two digit billion loss in euros*” (Copenhagen Economics, 2012). More recently, a study published by the European Commission, estimated that the costs of non-compliance with EU environmental legislation to be around EUR 55 billion per year (Commission “[Study: The costs of not implementing EU environmental law](#)” (March 2019)).

It is true that the complexity of Union law and of its interactions with national rules requires expertise that may be scarce in some Member States. However, this is precisely one of the benefits of having a dedicated instance working on EU law compliance: its focus on that specific issue should create a capacity-building dynamic enabling the NEAs to fulfil their mandate.⁴³

6 Precedents

Although a decentralised enforcement reform may sound radical, it is not entirely new. In this section, we briefly examine two types of enforcement mechanisms that are in place today and present similarities with the reform discussed in this paper. The first one relates to purely domestic law issues and consists in entrusting certain bodies with the task of representing the general interest before courts. The second mechanism relates to the decentralised enforcement of specific areas of EU law.

6.1 Representation before national courts

It is not uncommon for specific national interests to be represented by dedicated bodies before courts.

For instance, in most countries, the prosecutor would act in the general interest in bringing criminal proceedings before a national court. In some Member States, such as Sweden, the Consumer Ombudsman would challenge before court actions by traders that infringe consumer rules. In certain cases, the national law would also allow interest organisations to initiate class actions, for instance in environmental law matters.⁴⁴

Common to these mechanisms is the idea that the imbalance of power is such in certain areas that the weaker party may not be able to effectively pursue legal proceedings against the stronger party and that the interests to be protected extend beyond those of the individuals directly affected. As mentioned above, we find that a similar imbalance exists in the conflict between the national and EU interests.

⁴³ For instance, learning through experience (e.g. by handling concrete compliance cases or exchanging views with the Commission), would likely contribute to building the NEAs' expertise in EU law.

⁴⁴ The European Commission is increasingly resorting to collective redress mechanisms, for instance with regard to consumer disputes (COM(2018) 185) and in business to business disputes (COM(2018) 238).

6.2 Earlier experiences of decentralised enforcement of EU law

Since the early days of the EU, national courts are entrusted with the task of applying Union law. Similarly, national authorities have the obligation to set aside domestic rules that conflict with Union law. Thus, national courts and authorities do act as “EU organs” to the extent that they apply EU rules.

In certain areas, the EU legislation requires the setting up of national supervisory bodies in charge of enforcing Union rules. This is for instance the case with regard to energy, railways, public procurement or data protection. In this section, we describe the decentralisation of the EU competition rules in the early 2000s and the supervisory regime put in place in the telecom sector in order to illustrate how the reform discussed in this paper may be designed.

6.2.1 Decentralisation of the enforcement of the EU competition rules

The EU competition rules prohibit agreements between undertakings which restrict competition and abuses of dominant position.⁴⁵ Until the early 2000s, the European Commission was responsible for the enforcement of these rules. In particular, it held exclusive competence to grant individual exemptions from the prohibition of concerted practices.

The review of thousands of agreements and practices throughout the Union represented a heavy burden for the Commission. This, in turn, prevented it from “*concentrating its resources on curbing the most serious infringements*”.⁴⁶ Ahead of the enlargement of the EU and in order to “*ensure effective supervision [...] and to simplify administration to the greatest possible extent*”, the Union legislator decided, in 2003, on a decentralisation reform.⁴⁷

The reform created a system whereby the Commission and the Member States have parallel competences to enforce the EU competition rules. As a result, the National Competition Authorities (NCAs) which, until then, were only in charge of applying their national competition rules, are now entrusted with the application of the EU rules in their countries.

In short, competition cases which relate to one or a few countries are dealt with by the relevant NCAs, whereas cases that may affect more than three Member States or which raise issues of principle are handled by the

⁴⁵ Articles 101 and 102 TFEU.

⁴⁶ Regulation (1/2003/EC) on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty (Recital 2).

⁴⁷ Ibid.

Commission. Referral mechanisms are in place between the NCAs and the Commission in order to ensure that cases are dealt with at the most appropriate level.⁴⁸ In addition, the NCAs and the Commission exchange information on best practices, collaborate in joint cases and adopt common guidelines via a dedicated European Competition Network (ECN).

Ten years after its entry into force, the Commission conducted a review of this reform.⁴⁹ The Commission found that it had led to a significant increase in the enforcement of EU competition law, with approximately 85% of the cases being handled by the NCAs. It also highlighted the importance of the ECN to ensure a coherent enforcement of the competition rules.

At the same time, the Commission noted divergences in the application of the EU competition rules, largely due to differences in the institutional positions of the NCAs and in national procedures and sanctions. As a result, the Commission recently proposed a set of measures to increase the efficiency of the NCAs and, notably, to secure their independence, their financial and human resources as well as their powers to conduct investigations and to sanction breaches of the competition rules.⁵⁰

6.2.2 Local enforcement of the EU rules on telecom

As for other network-related industries, the EU adopted a number of rules in order to liberalise the telecom sector and facilitate the cross-border provision of services. The Telecom Package adopted in 2002 provides for transparent, objective and non-discriminatory rules on e.g. spectrum allocation and licensing.⁵¹ In order to avoid distortion of competition, it also imposes specific requirements on telecom operators holding significant market power. Over the years, additional rules were adopted at the EU level, for instance on the prohibition of roaming fees and on net neutrality.⁵²

⁴⁸ The Commission may for instance require the transfer of cases handled by NCAs if they raise issues of principle. Conversely, the Commission may refer a case to an NCA if its effects are merely limited to the territory upon which that authority has jurisdiction.

⁴⁹ Commission Communication “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives” (COM(2014) 453).

⁵⁰ Proposal for a Directive to empower the NCAs to be more effective enforcers and to ensure the proper functioning of the internal market (COM(2017) 142).

⁵¹ The Telecom Package comprises the Access Directive (2002/19/EC), the Authorisation Directive (2002/20/EC), the Framework Directive (2002/21/EC), the Universal Service Directive (2002/22/EC) and the e-privacy Directive (2002/58/EC).

⁵² Regulation on open internet access (2120/2015/EU).

The Telecom Package includes a directive which specifically deals with the enforcement of the EU rules on telecom.⁵³ Under the Framework Directive, this task is entrusted to National Regulatory Authorities (NRAs). The Directive sets a number of requirements on the Member States in order to guarantee the independence of the NRAs. It also defines the objectives and mandate of these national bodies, in particular the assignment of radio frequencies as well as the control over powerful companies on the market, and introduces procedural rules safeguarding a consistent application of the EU regulatory framework.

The European Commission regularly issues recommendations to the NRAs on the application of this regulatory framework. An EU-wide body grouping the NRAs and the Commission, the Body of European Regulators for Electronic Communications (BEREC), was also established in order to facilitate their collaboration and avoid divergences in the national application of the EU rules.⁵⁴

6.2.3 Conclusions on earlier decentralisation reforms

Unlike the reform of the competition rules which entailed a partial transfer of the Commission's existing supervisory powers to the NCAs, no such transfer was made in the telecom sector. Rather, the EU legislator decided that the supervision of newly adopted telecom rules would directly be entrusted to the NRAs. In both cases, however, the EU relies on national authorities to enforce its rules in the Member States and provides a detailed framework for how such tasks shall be performed.

In that respect, the reform outlined in this paper merely extends to the Single Market as a whole efficient enforcement mechanisms already in place in certain areas (e.g. competition) or sectors (e.g. telecom). In a sense, this reform is a corollary of decentralised regimes which have proved to be successful, albeit on a smaller scale.

One shall however be cautious with the precedents above. Although we find many similarities with the decentralisation reform discussed in this paper, the supervision of the competition and telecom rules differ in at least one important point. Unlike the NCAs and the NRAs which monitor private practices, the NEAs would primarily supervise public authorities.

As discussed above, this peculiarity raises specific issues on the organisation of the state for which the reforms of competition law and the

⁵³ The Framework Directive (2002/21/EC).

⁵⁴ Regulation on the establishment of a Body of European Regulators for Electronic Communications (1211/2009/EU).

telecom sector are not relevant. With regard to the control of public authorities by other public bodies, it is more relevant to refer to the setting up of supervisory bodies in areas such as public procurement or data protection.⁵⁵

7 Ways forward

The incorrect application of EU law in one Member State affects the functioning of the Single Market as a whole. Therefore, a decentralisation of the enforcement of Union law should not be limited to only some EU countries. It is important that it applies equally to all the Member States.

For this reason, the main features of such decentralisation reform would have to be implemented by way of EU legislation that is binding on all the Member States.

In our view, the adoption of an EU regulation or directive in that field could be based on Article 114 TFEU. This provision enables the EU to take measures for “*the establishment and functioning of the internal market*” and has been used in the past for setting up national supervisory bodies in various areas of Union law.⁵⁶

Ultimately, it would be for the European Commission, as the initiator of EU legislation, to decide on the appropriateness of proposing a decentralisation reform.

In this paper, we limit ourselves to identifying some of the issues that could be covered by an EU regulation or directive on the decentralised enforcement of Union law. For instance, it could include specific requirements in respect of the mandate of the NEAs, their powers and status as well as rules on the cooperation between the NEAs and the Commission. Other aspects may also be brought up, for example on the staffing of the NEAs or safeguarding the role of the Commission as guardian of the Treaties in a decentralised regime.

⁵⁵ See Section 5.2.

⁵⁶ Article 114 TFEU is for instance the legal basis for the Framework Directive (2002/21/EC) setting up the NRAs. It was also used as a legal basis for setting up national monitoring authorities in the field of public procurement (Directive (2014/24/EU)), chemicals (Regulation (1907/2006/EC)) or electricity (Directive (2009/72/EC)).

8 Conclusions

As mentioned in the introduction, our intent with this paper is not to present a ready-made solution to the compliance problems affecting the application of Union law in the Member States.

Rather, our objective is twofold. First, we hope that this memorandum contributes to the upcoming discussions on the future of the Single Market by highlighting the need for significant improvement of the existing compliance mechanisms. Second, we want to show that such improvements can only be achieved with an ambitious reform addressing the root of the compliance problems, i.e. the existence of a dual structure, with players in the national legal orders being in charge of applying rules from the Union legal order.

How such reform may be designed is very much open to discussion. In this paper, we discuss the idea of a decentralised enforcement of Union law, by setting up national enforcement agencies in the Member States. Although we outline the main points of this reform, we are conscious that more flesh needs to be put on the bones of this idea, for example with regard to the scope of activities of these national bodies, their powers and resources.

Aside from highlighting the advantages of such reform in terms of efficiency, we note that it would give the Member States a greater control over the review of their rules. This, in turn, would be in line with the principle of subsidiarity and would reassert the Member States' ownership of the Single Market. It may also be viewed as the natural outcome of decades of integration, starting with the slow acceptance of Union law in the national legal orders and, more recently, the increased reliance on national authorities for the application of sector-specific EU rules.⁵⁷

At the same time, we are conscious that the ambitious nature of such reform would raise strong objections and may, as the Commission puts it in its latest communication on the Single Market,⁵⁸ require “*political courage*”. We attempt to address some of these objections in this paper.

Other options of a decentralised enforcement regime may also be considered. As an alternative to setting up national agencies, we mention

⁵⁷ The European Commission noted recently that “*To be effective Single Market legislation often requires oversight from independent authorities at national level which are sufficiently staffed and equipped. This is the case in areas such as competition, market surveillance, data protection, energy, transport, telecoms or financial services. These bodies are an additional guarantee of good application of Single Market rules [...].*” Communication on “[The Single Market in a changing world](#)” (COM(2018) 772), p.9.

⁵⁸ Ibid, p.1.

the strengthening of the Commission's local representations in the Member States for the purpose of investigating infringement. Although less effective, this option would also, to some extent, address the structural dimension of the compliance problems.

Ultimately, this overarching objective of reducing the compliance deficit should mark the next strategy for the Single Market for it is closely linked to the achievement of the EU's goals of peace, stability and sustainable growth.

This memorandum was written by Olivier Linden, with contributions from Fredrik Ahlstedt and Sara Sandelius. It was reviewed by Erik Dahlberg and Karolina Zurek.

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