

## Mutual Trust as a Backbone of EU Antitrust Law\*

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“Trust everyone and trust nobody – is wrong”

Seneca

ABSTRACT: The article is an attempt to analyse to what extent a close cooperation between competition authorities belonging to the European Competition Network is based on the mutual trust principle. The fundamental importance of the principle of mutual trust was underscored in Opinion 2/13 on the Accession of the EU to the European Convention of Human Rights (ECHR), where the Court of Justice found that: “it should be noted that the principle of *mutual trust* between the Member States is of fundamental importance in EU law”.

However, as it was emphasised by the CJEU, mutual trust does not amount to a blind trust, as it is illustrated in the case law of the CJEU in cases concerning the European Arrest Warrant. The CJEU imposes more and more obligations on executing Member States in verifying whether there are no irregularities issuing the European Arrest Warrant (EAW) in comparison to the early days of its functioning, leading towards a regulated or conditioned trust. This development *mutatis mutandis* is particularly interesting to analyse while referring to the functioning of cooperation of competition authorities within the EU. The research statement of this article is that based on the outcome of CJEU case law in cases concerning EAW such as e.g. *Aranyosi and Căldăraru* the trust in institutional cooperation such as provided by Regulation 1/2003 and Directive 2019/1 should not be blind so as not to allow the non-noticing of irregularities occurred in other Member States or before the European Commission. We will begin by framing what the concept of trust englobes and showing how it is normatively framed in EU law. Then, the analysis concentrates on where there are boundaries to mutual trust in the decentralised application of art. 101 and 102 TFEU.

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Subsequently, the questions of how this trust works in practice and what the boundaries are that limit its application are addressed. As the concept of mutual trust is complex itself, this article does not aim to propose detailed solutions *de lege ferenda*. Its ultimate objective is rather to provide a conceptual framework of *de lege lata* analysis of mutual trust in the application of EU competition law.

KEYWORDS: Mutual trust, ECN, Directive 2019/1, Regulation 1/2003, Cooperation within the ECN.

### **1. Introduction**

The inspiration for this research topic materialised while I was working on an article<sup>1</sup> about the exchange of information within the European Competition Network (ECN), whose role was enforced when Directive 2019/1<sup>2</sup> (Directive 2019/1) came into force. While analysing how the information circulates<sup>3</sup> between the European Commission (EC) and the National Competition Authorities (NCA), it became apparent that this close cooperation is based on the principle of sincere cooperation,<sup>4</sup> which is based on mutual trust between not only all the competition authorities, but to some extent, this is also the same for the courts judging cases implying the application of art. 101 and art. 102<sup>5</sup>. However, in contrast to the Framework Decision on the European Arrest Warrant,<sup>6</sup> the principle of mutual trust in competition law is unwritten and the only document mentioning trust is the Commission Staff Working Document, Impact Assessment accompanying proposal of Directive 2019/1, where it can be

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<sup>1</sup> Malgorzata Kozak, "ECN+ Directive – A missed opportunity for strengthening the rights of parties?", in *New Directions of Antitrust Enforcement*, ed. Catalin S. Rusu *et al.* (Nijmegen: Wolf Legal Publishers, 2020), 49.

<sup>2</sup> 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 on the internal market, OJ L 11, 14.1.2019, 3-33.

<sup>3</sup> European Commission, Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27/04/2004 P. 0043-0053, paragraph 1.

<sup>4</sup> Judgment of 3 May 2011, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., now Netia SA*, C375/09, EU:C:2011:270, paragraph 26.

<sup>5</sup> The analysis of a relationship between the European Commission and the courts is not included in the scope of this article as it focuses on a relationship between competition authorities.

<sup>6</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, 1-20.

read that “[t]rust in enforcement by NCAs would be enhanced”.<sup>7</sup> Directive 2019/1 itself refers to “authorities being able to rely on each other to carry out fact-finding measures on each other’s behalf in order to foster cooperation and mutual assistance among the Member States”.<sup>8</sup>

Regulation 1/2003<sup>9</sup>, introducing the principle of decentralized application of articles 101 and 102 TFEU<sup>10</sup>, provided for the legal basis for forming a network of public authorities interpreting and applying the Community competition rules in close cooperation.<sup>11</sup> Moreover, with the introduction of Regulation 1/2003, the European Commission effectively shared the task of enforcing competition rules with the Member States. The ECN is composed of the European Commission and national antitrust authorities. Directive 2019/1 submitted the exercise of the NCAs’ powers to appropriate safeguards which, at least, comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union (Charter).<sup>12</sup>

The ultimate objective of Regulation 1/2003<sup>13</sup> and Directive 2019/1<sup>14</sup> is the effective and uniform enforcement of articles 101 and 102 TFEU<sup>15</sup> as prevention from distortion of competition within the internal market. Those provisions were introduced to improve enforcement efficiency based on the assumption of the equivalence of national systems. Directive 2019/1 is supplemented by the Notice on NCA cooperation, which clarifies

<sup>7</sup> European Commission, Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Directive of The European Parliament and the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [https://ec.europa.eu/competition/antitrust/impact\\_assessment\\_annexes\\_en.pdf](https://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf)

<sup>8</sup> Directive 2019/1, Preamble, recital 7.

<sup>9</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, 1-25.

<sup>10</sup> Regulation 1/2003, article 3 (1).

<sup>11</sup> Regulation 1/2003, Preamble, recital 14.

<sup>12</sup> Directive 2019/1, Preamble, recital 14.

<sup>13</sup> Regulation 1/2003 requires the establishment of mechanisms to ensure the “effective”, “efficient”, “uniform” and/or “coherent” application of the provisions of articles 101 and 102 TFEU.

<sup>14</sup> Directive 2019/1, Preamble, recitals 1-9.

<sup>15</sup> Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, C8/08, EU:C:2009:343, paragraphs 85 and 86. Directive 2019/1, Preamble, recital 5. Maciej Gac, “Europejska Przestrzeń Administracyjna jako mechanizm zwiększający efektywność stosowania prawa europejskiego – analiza na przykładzie Europejskiej Sieci Konkurencji”, *Rocznik Administracji Publicznej*, 1 (2015): 107. <https://ssrn.com/abstract=2732511>.

the jurisdictional principles according to which cases should be allocated within the ECN.<sup>16</sup>

These most important manifestations of this close cooperation are the allocation of cases within the network, the exchange of information between NCAs<sup>17</sup> and the Commission, and the provision of assistance in carrying out inspections and the collecting of evidence. The CJEU emphasises that “Regulation No. 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation.”<sup>18</sup> Directive 2019/1 provides for certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and the power to impose fines.

This close cooperation within the ECN is rooted in principle of sincere cooperation<sup>19</sup> involving more specific concepts such as mutual trust and mutual recognition. Without drawing a clear line between those two, as the principle of mutual trust is being an underlying principle of mutual recognition or they are often perceived as interchangeable or the mutual trust is treated as a meta-principle embodying the principle of mutual recognition, it is mostly recognised utterance of trust therein.<sup>20</sup> It can be easily tracked

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<sup>16</sup> European Commission, Commission Notice on cooperation within the Network of Competition Authorities (2005) OJ C 101/43, <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN)>.

<sup>17</sup> Giorgio Monti, “Independence, interdependence and legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network”, *EUI Working Paper LAW*, no. 1 (2014): 17. <http://ssrn.com/abstract=237932>.

<sup>18</sup> Judgment of 8 March 2007, *France Télécom SA v. Commission of the European Communities*, T-339/04, EU:T:2007:80, paragraph 79.

<sup>19</sup> Claudia Massa, “Sincere cooperation and antitrust enforcement: Insights from the Damages and ECN+ Directives”, *European Competition Journal* (2019). DOI: 10.1080/17441056.2019.1705631.

<sup>20</sup> Tony Marguery, and Ton Van den Brink, “Mutual recognition and mutual trust: Reinforcing EU integration”, *European Papers* 1, no. 3 (2016): 861. Xavier Groussot, Gunnar Thor Petursson, and Henrik Wenander, “Regulatory trust in EU Free Movement Law: Adopting the level of protection of the other?”, *European Papers* 1, no. 3 (2016): 866.

in cases relating to the internal market<sup>21</sup>, and then it spreads to other areas of EU law. In this sense, mutual recognition is used as a bridge between the legislative autonomy of the Member States and harmonisation.<sup>22</sup> It means that in the field of law where it operates, standards and judicial decisions made in one Member State are to be accepted and enforced in another sometimes quasi-automatically, without any centralisation and hierarchy of engaged actors.<sup>23</sup> The fundamental importance of the principle of mutual trust was also underscored in Opinion 2/13 on the Accession of the EU to the European Convention of Human Rights (ECHR), where the Court of Justice found that: “it should be noted that the principle of *mutual trust* between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained”.<sup>24</sup> In this opinion, the CJEU underlined specific characteristics arising from the very nature of EU law, including its primacy over laws of the Member States, the fundamental rights recognised by the Charter, and by the direct effect of a whole series of provisions, which apply to their nationals and the Member States.<sup>25</sup> Those specific characteristics led “to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged.” This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in article 2 TEU.<sup>26</sup>

Currently, the principle of mutual trust is mainly recognised in the Area of Freedom, Security and Justice (AFSJ). It concerns particularly judicial cooperation in civil and criminal matters. However, as it was emphasised

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<sup>21</sup> For a critical analysis of mutual trust in the development of internal market, Jukka Snell, “The Single Market: Does Mutual Trust Suffice?”, in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in Eu Law (Max Weber Programme 2016/13)*, ed. Evelien Brouwer, and Damien Gerard (Florence: Cadmus, 2016), 11.

<sup>22</sup> Marguery, and Van den Brink, “Mutual recognition”, 861. Groussot, Petursson, and Wenander, “Regulatory trust”, 866.

<sup>23</sup> Marguery, and Van den Brink, “Mutual recognition”, 861.

<sup>24</sup> Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

<sup>25</sup> The objective of this article is not to analyse to what extent mutual trust is an EU law constitutional principle, nor what kind of limits were imposed by the CJEU in the verification by the executing Member States of the EAW.

<sup>26</sup> Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, paragraphs 166-169.

by the CJEU mutual trust does not amount to a blind trust.<sup>27</sup> The development of the case law on the EAW shows that the CJEU, by imposing more and more obligations on executing Member States in verifying whether there are no irregularities in the Member State issuing the European Arrest Warrant (EAW) in comparison to early days of its functioning, led towards a regulated or conditioned trust. This development *mutatis mutandis* is particularly interesting to analyse while referring to the functioning of cooperation of competition authorities within the EU.<sup>28</sup>

Mutual trust as such has not been analysed yet in the literature related to EU competition law, especially its underlying existence as to cooperation within the ECN. Cooperation among EU competition authorities is mainly analysed through the principle of sincere (loyal) cooperation. The research statement of this article is that, based on the outcome of CJEU case law in cases concerning EAW such as e.g. *Aranyosi and Căldăraru*<sup>29</sup>, trust in institutional cooperation such as provided by Regulation 1/2003 and Directive 2019/1 should not be blind so as not to allow for the non-noticing of irregularities occurred in other Member States or before the European Commission.

This article is an attempt to frame firstly what the concept of trust englobes, and then how it is normatively framed in the EU law. Then, the analysis will concentrate on where there are boundaries to mutual trust in the decentralised application of art. 101 and 102 TFEU. Subsequently, the questions how this trust works in practice, and what are boundaries that limit its application are analysed. As the concept of mutual trust is complex itself, this paper does not aim to propose any detailed *de lege ferenda* solutions. Its ultimate objective is rather to provide a conceptual framework of *de lege lata* analysis of mutual trust in application of EU competition law.

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<sup>27</sup> Koen Lenaerts, “La vie après l’avis: Exploring the principle of mutual (yet not blind) trust”, *Common Market Law Review* 54 (2017): 806.

<sup>28</sup> Sacha Prechal, “Mutual trust before the Court of Justice of the European Union”, *European Papers* 2, no. 1, (2017): 76.

<sup>29</sup> Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15 PP, EU:C:2016:198.

## 2. Concept of trust

Trust is defined as “assured reliance on the character, ability, strength, or truth of someone or something”, or it could also mean to rely on the truthfulness or accuracy of.<sup>30</sup> The notion of trust appeared in early philosophers’ works<sup>31</sup>, who first tried to frame the very concept. Therefore, the authors sometimes related this to that of faith, which can be defined as “the ability to accurately evaluate specific objects without any penetration into their essence, into the real form of things”.<sup>32</sup> According to Plato, faith does not require rational premises. Faith that is supported by evidence becomes knowledge. In the case of knowledge, there is no or minimal risk, so there is no place for trust. Therefore, it seems most appropriate to place trust between faith (boundless trust) and knowledge.<sup>33</sup>

However, already Aristotle in his reflections on rhetoric placed trust in relation to both sides of a conversation (as the early word “speech” can be defined).<sup>34</sup> He placed the concept of trust concerning the interlocutor, credibility or even faith, therefore the credibility of the interlocutor becomes crucial.<sup>35</sup> Aristotle sees cognition as a condition of mutual trust. In this context, the immanent criteria that are reputation, knowledge, experience which one side has in dealing with the other, are important.<sup>36</sup>

Seneca, referred to at the beginning of this article, underlines that boundless trust without rational premises is a dogmatism that can have negative consequences for the trustee.<sup>37</sup> Finally, according to Locke, analysing a context of authority deriving its power from society, trusting gives oneself some kind of power resulting from the expectation of the person in whom trust is placed, behaviour consistent with the expectations of the

<sup>30</sup> Merriam-Webster internet edition, s.v. trust, <https://www.merriam-webster.com/dictionary/trust>.

<sup>31</sup> For a detailed analysis of mutual trust in modern sociopolitical order: Franz Leander Fillafer, “Mutual trust in the history of ideas”, in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in Eu Law (Max Weber Programme 2016/13)*, ed. Evelien Brouwer, and Damien Gerard (Florence: Cadmus, 2016), 3.

<sup>32</sup> Platon, *Państwo, Prawa, Antyk*. Kęty, 1997, 218.

<sup>33</sup> Monika Czajkowska, “Trust in organization – The philosophical outline of fundamentals of the problem”, *Acta Universitatis Lodzianis, Folia Oeconomica* 234 (2010): 409.

<sup>34</sup> Using the Greek word πίστις in the meaning of “trust”.

<sup>35</sup> Arystoteles, *Dzieła Wszystkie*, tom 3, Warszawa: Wyd. Naukowe PWN 1996, s. 272. M. Czajkowska, “Trust in organization”, 410.

<sup>36</sup> Arystoteles, *Dzieła Wszystkie*, Wyd. Naukowe PWN, Warszawa 1996, vol. 6, 163.

<sup>37</sup> Seneka, *Listy moralne do Lucylusza*, PWN 1961, 8.

persons whom one has trusted, and drawing the consequences of acting contrary to them.<sup>33</sup>

Therefore, it can be concluded that, in the context of building trust in an at least two-sided relation, Aristotle's criteria applied *mutatis mutandis* could provide safeguards against boundless trust, providing a framework for such cooperation. It is thus essential to consider the existence of cognition. In respect to cooperation between institutions, trust is relative and should be based on mutual credibility. However, this mutual credibility should be limited to prevent the negative consequences indicated by Locke.

### 3. Trust in EU law

The notion of trust in EU law derives from the principle of loyalty enshrined in article 4 (3) TEU.<sup>38</sup> It can take many legal morphologies, ranging from soft law and preambular commitments to hardcore enforceable rules, especially in instruments relating to judicial cooperation in civil and criminal matters. Although the principle of mutual trust has been given a practical dimension by the Court in its jurisprudence, its legal content remains rather elusive. Also, the jurisprudence of the CJEU on the scope of application and effects of mutual trust is not clear, as it also applies to an accorded level of human rights protection. In particular, the difference, if any, between the unwritten principle of 'mutual trust' and the principle of sincere cooperation, which is enshrined in article 4(3) TEU, can be subject to debate which provides that the principle of sincere cooperation requires from both the European Union and the Member States to assist each other in full *mutual respect* in carrying out obligations stipulated in the Treaties. The principle of sincere cooperation translates into limiting the autonomy of Member States unless there is no EU regulation *ratione materiae*<sup>39</sup>. In cases where EU legislation on the subject is absent, the lawfulness of Member States' actions is assessed in the light of the general principles of EU law, as well as the EU Charter of Fundamental Rights.<sup>40</sup> The wording seems to suggest that sincere cooperation is the leading principle in

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<sup>38</sup> Groussot, Petursson, and Wenander, "Regulatory trust", 868. Marcus Klamert, *The Principles of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), 11. Judgment of 17 December 1998, *IP v. Borsana*, C-2/97, EU:C:1998:613, paragraph 26. Judgment of 14 December 2000 *Masterfoods Ltd and HB Ice Cream Ltd*, C-344/98, EU:C:2000:689.

<sup>39</sup> Judgment of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188.

<sup>40</sup> Herwig C. H. Hofmann, "General principles of EU law and EU administrative law", in *European Union Law* ed. Catherine Barnard, Steve Peers (Oxford: Oxford University Press, 2017), 200-201.



guiding the *vertical* relationship between EU institutions and its Member States, as it strikes balance between the Member State's independence and cooperation within the EU.<sup>41</sup>

Thus, the principle does not call for simple trust, but even warrants cooperation, mutual respect, and *assistance* – calling for positive action. As such, it could be argued that mutual trust has the same conceptual underpinning of the principle of sincere cooperation; and the principle of mutual trust constitutes *lex specialis* to the principle of sincere cooperation. Therefore, subsequently, this article will refer to the first one.

The provision of article 4(3) TEU *in statu nascendi* applied not only to Member States, including their executive and legislative authorities as well as their judiciary, creating on their part the obligation to ensure that the provisions of EU law take full effect, but also to cooperation<sup>42</sup> between the EU and the Member States' institutions.<sup>43</sup>

Lenaerts, in his analysis of mutual trust, also points to article 4 (2) TEU as the constitutional basis for mutual trust and the relevance of equality of Member States before the Treaties.<sup>44</sup> He concludes that “[t]he EU is thus precluded from considering that some national democracies and the choices that they make are better than others”. However, the principle of equality also imposes on Member States duties to uphold the rule of law within the EU.<sup>45</sup> At the same time, it implies that “all Member States are equally committed to upholding the common values on which the EU is founded”.<sup>46</sup>

The principle of ‘mutual trust’ is the best-known legal articulation of the notion of trust in the EU context, and mutual trust is a core structural principle of EU law, although it is not mentioned in the Treaties.<sup>47</sup> In its Opinion 2/13, the CJEU indicated that “[t]hat principle requires (...) each of the [Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law”.<sup>48</sup> Thus, it implies that

<sup>41</sup> Groussot, Petursson, and Wenander, “Regulatory trust”, 867.

<sup>42</sup> E.g. Judgment of 22 September 1988, *France v. European Parliament*, 358/85 and 51/86, EU:C:1988:431, paragraphs 34-35.

<sup>43</sup> Klamert, *The Principles of Loyalty*, 23-25.

<sup>44</sup> Lenaerts, “La vie après l’avis”, 808.

<sup>45</sup> *Ibid.* Opinion 2/13, paragraph 168.

<sup>46</sup> Lenaerts, “La vie après l’avis”, 809.

<sup>47</sup> Prechal, “Mutual trust”, 75.

<sup>48</sup> Opinion 2/13, paragraph 191.

“the rules of the first Member State are adequate, that they offer equal or equivalent protection and that they are applied correctly. In this way, mutual recognition is based on mutual confidence”.<sup>49</sup> Of course, “equivalent” does not mean identical. This can be extended to a presumption that a Member State has complied with (and often implemented) EU law in a correct manner.

However, the condition “save in exceptional circumstances” prevents Member States from verifying observance of fundamental rights in another Member State.<sup>50</sup> This is why, in case of doubts, national courts are obliged to apply the preliminary reference procedure.<sup>51</sup> The principle entails that a Member State should presume that fundamental rights, as well as the principles of freedom and rule of law, are respected by the other Member States.<sup>52</sup> The fundamental right becomes the inherent element of the scope of verification provided that no higher level of protection is required from another Member State<sup>53</sup> and, as per rule, no Member State can check whether another Member State has in an individual case observed those rights.<sup>54</sup> Therefore, as it was stressed in *Diego Brands*<sup>55</sup>, it is not only the presumption that EU law is preserved in another Member State, but also that (another) Member State is supposed to observe any other EU law provisions, including the existence of legal remedies.<sup>56</sup>

As Prechal points out in reference to social security regulations, it could mean that the competent authority in a Member State which is the home country should assess the facts to verify the correctness of documents at stake. Then, the authority in the host Member State should rely on the appropriateness of these findings.<sup>57</sup> Finally, the CJEU ruled that mutual

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<sup>49</sup> Prechal, “Mutual trust”, 76. The reference to *confidence* is used by the CJEU e.g. in the Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15 PP, EU:C:2016:198, and also in joined Cases C-411 & 493/10, N.S., EU:C:2011:865, paragraph 83. The expressions “mutual trust” and “mutual confidence” are synonyms (in French, both those expressions are translated as “confiance mutuelle”).

<sup>50</sup> Lenaerts, “La vie après l’avis”, 813.

<sup>51</sup> Judgment of 26 February 2013, *Stefano Melloni v. Ministero Fiscal*, C-399/11, EU:C:2013:107, paragraph 49. Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15 PP, EU:C:2016:198.

<sup>52</sup> Opinion 2/13, paragraph 191.

<sup>53</sup> Judgment of 26 February 2013, *Stefano Melloni v. Ministero Fiscal*, C-399/11, EU:C:2013:107.

<sup>54</sup> Prechal, “Mutual trust”, 79. Opinion 2/13, paragraph 192.

<sup>55</sup> Judgment of 16 July 2015, *Diego Brands BV v. Simiramida-04 EOOD*, C-681/13, EU:C:2015:471.

<sup>56</sup> Prechal, “Mutual trust”, 83.

<sup>57</sup> Prechal, “Mutual trust”, 77.

recognition and mutual trust need a certain degree of simplicity and transparency.<sup>58</sup>

In addition, one can observe several cases in which the principle was applied to internal market law, where it was applied in the context of proportionality reviews, as well as in connection with the principle of loyal cooperation.<sup>59</sup> Most of the judgments provided for an application of this principle, however, concern the Area of Freedom, Security and Justice (“AFSJ”). It also confirms, as debated by Storskrubb, that mutual trust “should never be introduced in a void but rather it should form part of a complex regulatory strategy, coupled with other tools and support structures”.<sup>60</sup>

Completely referring to Seneca’s thought, mutual trust under EU law reaches its limits when it is required by the protection of fundamental rights or provided in the secondary law of the European Union, such as policy clauses<sup>61</sup>. It is also well established by the Treaties or secondary legislation that the performance of the principle of mutual recognition can be blocked. The detailed analysis of specific conditions allowed by the CJEU goes beyond the scope of this analysis as they are often case-by-case based, e.g. relating to prohibition of torture and inhuman or degrading treatment or punishment<sup>62</sup>. In case of free movement of goods, another Member State must present valid reasons if it envisages the refusal of the level of protection of the State of origin of the products.<sup>63</sup> In the AFSJ, the principle of mutual trust has functioned as a conceptual precondition for a consistent interpretation of these European instruments across the Member States.<sup>64</sup>

Last but not least, pursuant to Article 6 (3) TEU, fundamental rights, provided for in the ECHR constitute EU general principles.<sup>65</sup> The European Court of Human Rights confirmed, in its judgment *A. Menarini*

<sup>58</sup> *Ibid.*, 81.

<sup>59</sup> Prechal, “Mutual trust”, 79. The principle of loyal cooperation is enshrined in Article 4(2) TEU.

<sup>60</sup> Eva Storskrubb, “Mutual trust and the limits of abolishing *exequatur* in civil justice”, in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in Eu Law (Max Weber Programme 2016/13)*, ed. Evelien Brouwer, Damien Gerard (Florence: Cadmus, 2016), 21.

<sup>61</sup> Prechal “Mutual trust”, 86-87.

<sup>62</sup> Opinion of Advocate General Bot delivered on 3 March 2016, *Pál Aranyosi and Robert Căldăraru*, Joined Cases C404/15 and C659/15 PPU, EU:C:2016:140, paragraphs 80 et seq.

<sup>63</sup> Groussot, Petursson, and Wenander, “Regulatory trust”, 870.

<sup>64</sup> See, by way of example, the case law in connection with the “Brussels I Regulation” where ‘anti-suit injunctions’ were interpreted against the Regulation by using the principle of mutual trust.

<sup>65</sup> The case law of the ECtHR must be taken into account when interpreting the Charter. Opinion 2/13.

*Diagnostics S.R.L. v. Italy*,<sup>66</sup> that “the fine imposed on the applicant company [by the AGCM, the independent regulatory authority in charge of competition – MK], was of a criminal law nature, with the result that Article 6 § 1 [ECHR] was applicable, in this instance, under the criminal law aspect of that provision”.

In the light of the above analysis, mutual trust in the decentralised application of articles 101 and 102 TFEU will be analysed. Three reference points will be considered: how the principle of mutual trust is applied in the application of articles 101 and 102 TFEU, what kind of security valves are provided in the legal system, and finally under which circumstances this is blind trust indeed.

#### **4. EU competition law and mutual trust**

##### ***i. Recognition of mutual trust in the application of articles 101 and 102 TFEU***

Under Regulation 1/2003, all ECN members and the European Commission have the competence to apply articles 101 and 102 TFEU directly in a decentralized way.<sup>67</sup> Regulation 1/2003 obliges Member States to designate a competition authority or authorities to apply articles 101 and 102 TFEU.<sup>68</sup> According to article 11(1) of Regulation 1/2003, the Commission and the NCAs are to apply the competition rules in close cooperation. As it is emphasised in recital 35 to Regulation 1/2003, the variation in the public enforcement systems of the Member States is recognised,<sup>69</sup> nonetheless “the Member States mutually recognise the standards of each other’s system as a basis for cooperation”.<sup>70</sup> It looks as the recognition by the Member States of conditions mentioned in the Opinion 2/2013, namely that rules of Member States are adequate, provide an equivalent level of protection and that they are applied correctly. However, it misses the second part as to exceptional circumstances that prevent the Member States from verifying observance of fundamental rights in another Member State. The ECN+ Directive fulfills the gap as to ensure that at least the equal level of a

<sup>66</sup> *A. Menarini Diagnostics S.R.L. v. Italy*, 43509/08, 27 September 2011.

<sup>67</sup> Regulation 1/2003, Preamble, Recital 4.

<sup>68</sup> Regulation 1/2003, Article 35 (1).

<sup>69</sup> Regulation 1/2003, Preamble, Recital 35.

<sup>70</sup> European Commission, Council, Joint Statement by the Council and the Commission on the functioning of the network of competition authorities, entered in the Council minutes (doc. 15435/02 ADD 1 of 10 December 2002), 6-8.

playing field is assured, which could indicate that not all the participating Member States “earned” mutual trust through effective compliance.

As it results from the proposal<sup>71</sup>, it was considered that “[s]ome NCAs do not have enforceable guarantees that they can apply the EU competition rules independently without taking instructions from public or private entities. A number of authorities struggle with insufficient human and financial resources. This may have an impact on their ability to effectively enforce. For example, some NCAs are not able to carry out simultaneous inspections of all members of a suspected cartel, giving the others valuable time to destroy evidence and escape detection. Others lack the appropriate forensic IT tools to find evidence of infringements”. Chapter III of the ECN + Directive is devoted to the independence and resources of organs. The provisions of article 4 refer to independence and article 5 to resources.<sup>72</sup> The directive should be implemented by February 4, 2021.

Moreover, the ECN + Directive indicates in art. 3 that the proceedings regarding violations of Arts. 101 or 102 TFEU run by national competition authorities must comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union. The ECN+ Directive Preamble refers to the right to be heard, including the right to good administration and the respect of undertakings’ rights of defence. Neither article 3 nor the Preamble refer to the right to a fair trial that is provided by the Charter. No specification as to how these safeguards are to be ensured is provided. The obligation imposed on Member States is to “ensure that the exercise of the powers referred to in paragraph 1 is subject to appropriate safeguards in respect of the undertakings’ rights of defence, including the right to be heard and the right to an effective remedy before a tribunal” (article 3 (2)), which means that no national legislation is required and it will be assessed on case-by-case basis by NCA and courts. The ECN+ Directive only imposes those obligations with respect to the general principles and the Charter on the Member States. It does not take into account the multi-level character of the ECN<sup>73</sup> and different axes of cooperation (vertical/horizontal). The rights of defence are now

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<sup>71</sup> Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM/2017/0142 final – 2017/063, 2.

<sup>72</sup> ECN+ Directive, articles 4, 5.

<sup>73</sup> Firat Cengiz, “Multi-level governance in competition policy: the European Competition Network”, *European Law Review* 35, no. 5 (2010): 661.

framed in articles 41(2) and 48(2) of the Charter, however, their application is not absolute. According to AG Kokott in her opinion in *FSL Holdings*, “the rights of the defence provide only certain procedural safeguards which the Commission must observe when conducting those proceedings, with the infringement of such safeguards leading to the annulment of the Commission’s final decision”.<sup>74</sup> The ECN + Directive does not specify the link between the effectiveness of the authorities and their independence. It also omits the issue of ensuring a balance between the effectiveness of the authority’s operation and ensuring the protection of the rights of undertakings in the course of achieving the objectives imposed on the competition authority. Undoubtedly, this issue will recur in the course of disputes on appeals against decisions of the authorities.

One can expect the application of the principle of mutual trust to be raised in all those circumstances where possible overlaps of jurisdiction, interpretation and/or enforcement might occur. In that sense, the principle functions as a compass to ensure the coherent application of EU law and thereby avoid the legal uncertainty that stems from overlaps and possibly conflicting outcomes.

The scheme of Regulation 1/2003 relies on a close cooperation to be developed between the Commission and the NCAs organised as a network, with the Commission being given responsibility for determining the detailed rules for such cooperation.<sup>75</sup> Finally, as emphasised in the Commission Notice on cooperation within the Network of Competition Authorities, even though the Commission is particularly well placed to deal with a case if it is closely linked to other EU provisions which may be exclusively or more effectively applied by the Commission, the Commission is apt to develop EU competition policy when a new competition issue arises or to ensure effective enforcement.<sup>76</sup> The question as to which authority is “well placed”<sup>77</sup> is relevant for leniency summary applications, as it was pointed out that “the national competition authorities are free to adopt leniency programmes and each of those programmes is autonomous, not only in

<sup>74</sup> Kozak, “ECN+ Directive”, 52.

<sup>75</sup> Judgment of 8 March 2007, *France Télécom SA v. Commission of the European Communities*, T-339/04, EU:T:2007:80, paragraphs 79 and 84.

<sup>76</sup> Opinion of Advocate General Mazák delivered on 7 December 2010, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. zoo, now Netia SA w Warszawie*, C375/09, EU:C:2010:743, paragraph 15.

<sup>77</sup> European Commission, Commission Notice on cooperation within the Network of Competition Authorities, paragraph 14.

respect of other national programmes, but also in respect of the EU leniency programme”.<sup>78</sup>

As underlined by AG Mazak, “The decentralisation of the enforcement of EU competition law goes further than simply requiring NCAs and national courts to apply Articles 101 and 102 TFEU”.<sup>79</sup> To carry out this objective, Regulation No. 1/2003 provides for the following distinct mechanisms:

- the conferral of power and the requirement on NCAs<sup>80</sup> and national courts to apply article 101 and article 102 within a system regulating the relationship between national and EU law;
- arrangements to facilitate cooperation and control of the work of the NCAs and the national courts in order to safeguard a uniform and coherent application of the EU competition rules.<sup>81</sup>

#### ***ii. The limits to the principle of mutual trust in decentralised application of articles 101 and 102 TFEU***

Thus, although Regulation 1/2003 accommodates for the diversity in the institutional and procedural environments in the EU<sup>82</sup>, neither Regulation 1/2003 nor ECN+ Directive harmonises national procedural rules that regulate the application of articles 101 and 102 TFEU. The Commission considered such harmonisation unnecessary provided that the principles of effectiveness and equivalence are preserved.<sup>83</sup> Moreover, the discrep-

<sup>78</sup> Judgment of 20 January 2016, *DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del Mercato*, C428/14, EU:C:2016:27.

<sup>79</sup> Opinion Of Advocate General Mazák delivered on 7 December 2010, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. zoo, now Netia SA w Warszawie*, C-375/09, EU:C:2010:743, paragraph 14.

<sup>80</sup> In Judgment of 18 June 2013, *Bundswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, C-681/11, EU:C:2013:404, the Court of Justice held that, in order to ensure that article 101 is effectively applied in the general interest (*‘effet utile’*), an NCA may only exceptionally not impose a fine where an infringement is established.

<sup>81</sup> Opinion of Advocate General Mazák delivered on 7 December 2010, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. zoo, now Netia SA w Warszawie*, C-375/09, EU:C:2010:743, paragraph 14.

<sup>82</sup> Carles Esteva Mosso, “Regulation 1/2003 – Five years on”, in *16<sup>th</sup> St Gallen International Competition Law Forum 2009*, ed. Carl Baudenbacher (Germany: Helbing Lichtenhahn, 2010), 247. Christophe Lemaire, “Premier bilan de l’application du règlement no. 1/2003”, *Petites affiches*, no. 251 (2009): 38.

<sup>83</sup> ECN+ Directive Preamble, Recital 15. Daniel Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market*

ancies between the Member States remain, including the possibility for criminal penalties, liability of associations of undertakings, time limits of specific actions, and the applicable standard of proof.<sup>84</sup> Finally, especially articles 3(2) and 16(2) of Regulation No. 1/2003 exert a strong harmonising influence over the interpretation of national competition law.<sup>85</sup>

As previously stated, the central objective of the creation of a decentralised system of application of articles 101 and 102 TFEU is their effective, uniform and coherent application. Józwiak indicates that the European Commission's role considering the other NCAs under Regulation 1/2003 and article 105 (1) TFEU is *primus inter pares*, as the European Commission is the authority responsible for the coherent and effective application of articles 101 and 102 TFEU and for shaping the European competition culture.<sup>86</sup> Gac refers to the "dominant position of the European Commission".<sup>87</sup> This "dominant" position is expressed through various mechanisms, e.g. the fact that national courts<sup>88</sup> and NCAs cannot decide contrary to the Commission's decisions<sup>89</sup> and the Commission has a final word in cases' allocation, etc. The key element is the interpretation of the influence on intra-Union trade which triggers the application of articles 101 and 102 TFEU, but also leaves a significant margin of discretion to the Commission.<sup>90</sup> The Commission surely takes this notion rather seriously and dedicates part of its monitoring efforts to this, as can be seen

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*Law Review* 42 (2005): 747. European Commission, Notice on co-operation between Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, Official Journal C 101, 27.04.2004, paragraph 2, 10 (c).

<sup>84</sup> Mosso, "Regulation 1/2003", 247

<sup>85</sup> Helmut Brokelmann, "Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The case of Spain and Portugal", *World Competition* 29, no. 4 (2006): 553.

<sup>86</sup> Sonia Józwiak, *Europejska Sieć Konkurencji — model: struktura i współpraca oraz kompetencje decyzyjne członków*, Warszawa 2011, 8. [www.uokik.gov.pl](http://www.uokik.gov.pl). Kati Cseres, and Annalies Outhuijse, "Parallel Enforcement and Accountability: The Case of EU Competition Law" (June 30, 2017), *University of Groningen Faculty of Law Research Paper*, No. 11, (2017): 11. <https://ssrn.com/abstract=2995729> or <http://dx.doi.org/10.2139/ssrn.2995729>

<sup>87</sup> Gac, "Europejska Przestrzeń Administracyjna", 105. Cseres, Outhuijse, "Parallel Enforcement and Accountability: The Case of EU Competition Law", 13.

<sup>88</sup> On that point, see, in particular, paragraphs 4, 6, 7, 8, 21 and 22 in the preamble to Regulation No 1/2003. Even for the period prior to 1 May 2004, the Court had already stressed the obligation to cooperate in good faith, incumbent upon the national courts in the field of competition law. *Masterfoods v. HB*, C-344/98, EU:C:2000:689, paragraph 49.

<sup>89</sup> Christopher Townley, *A Framework for European Competition Law, Co-ordinated Diversity* (Oxford: Hart 2019), 348.

<sup>90</sup> Regulation 1/2003, although sincere cooperation is not mentioned in the text of the Regulation.



in the Analytical Report on mutual assistance and sincere cooperation.<sup>91</sup> This is the area where the Commission is considered dominant and exercises some control over activities of the NCAs. The objective of this control is the uniform application of articles 101 and 102 TFEU. It could be said that this is the principle that establishes safety valves to the activities carried out by the NCAs and national courts, as provided in article 15 (3) of Regulation 1/2003. However, in practice, the outcome of procedures initiated by different NCAs may differ from one Member State to another, which could lead to problems of consistency.<sup>92</sup>

Moreover, the principle of (sincere) cooperation extends to the powers of NCAs to rule over breaches of EU provisions in individual cases.<sup>93</sup> As such, sincere cooperation has effects not only on the jurisdictional allocation of powers between the NCAs and the Commissions, but also on the substantive powers of NCAs. This principle allowed the Court to rule that competition authorities, in reviewing a possible abuse of dominant position under article 102 TFEU, may only state that “there are no grounds for action” and may not take the step further to decide that article 102 TFEU as such was not breached.<sup>94</sup> This is a result of the system of cooperation between the Commission and the NCAs as established under Regulation 1/2003, and stems from the fact that the Commission alone is “empowered to make a finding that there has been no breach of the prohibition of abuse of a dominant position”.<sup>95</sup> Such a solution provided by the CJEU was justified by a need for uniform application of article 102 TFEU, the wording and the scheme of Regulation 1/2003, and the objective it pursues. An introduction of the possibility for the NCAs to issue “negative decisions” on no breach of article 102 TFEU could lead to calling into question the system of cooperation established by the Regulation and would undermine the power of the Commission.<sup>96</sup>

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<sup>91</sup> European Commission, “Analytical Report 2017 on mutual assistance and sincere cooperation”, (2017), <https://ec.europa.eu/social/BlobServlet?docId=19403&langId=en>.

<sup>92</sup> Massa provides the example of proceedings carried in the case of Booking by the Italian (AGCM), French (Autorite de la Concurrence) and Swedish (Konkurrensverket) Authorities under *the general coordination of the Commission* implying application of article 11(2), 11(3) and 11(4) of Regulation 1/2003. Massa, “Sincere cooperation”, 16.

<sup>93</sup> Regulation 1/2003, Art. 5.

<sup>94</sup> Judgment of 3 May 2011, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., now Netia SA*, C-375/09, EU:C:2011:270.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, paragraph 27.

Further, article 11(2) of Regulation 1/2003 requires the Commission to transmit to NCAs the most important documents collected with a view to the adoption of decisions under articles 7 to 10 and article 29(1). On the other hand, the Commission is empowered to relieve NCAs of their competence to apply articles 101 and 102 TFEU in an individual case.<sup>97</sup> The Commission's position is also strengthened by the provision in article 16 of Regulation 1/2003. It means that neither NCAs, nor national courts can take decisions that run counter to a Commission decision.

Finally, the most recent supplements to the system, namely the requirement of independence and the minimum standard of the Charter, are introduced by Directive 2019/1.

As it is underlined by Directive 2019/1, the guarantees of independence, resources, and enforcement and fining powers are necessary for the effective enforcement of Union competition rules.<sup>98</sup> Again, the effectiveness and coherent application of articles 101 and 102 TFEU are the major objectives that is assured by the independence of NCAs.<sup>99</sup> It shows that the Commission noted existing lacunae in the independence of NCAs that influence the outcome of proceedings. It could also be read as a motion of no confidence in respect to the authorities that comprise the ECN. Moreover, it should be noted that in order to assure the work of the ECN as a cohesive whole based on close cooperation, it is necessary to introduce the common level of tools and guarantees of NCAs.<sup>100</sup> Therefore, in order to foster cooperation and mutual assistance, specific fact-finding tools as a *conditio sine qua non* of mutual assistance are necessary. Nevertheless, the input of Directive 2019/1 should be assessed positively and strengthen mutual trust within the ECN, as some of the NCAs do not fulfill requirements included in the Directive.<sup>101</sup> It resonates with Aristotle's thought on the credibility of an interlocutor.

The European Commission assumes that article 12(2) of Regulation 1/2003 provides for "a sufficient degree of equivalence of the rights of

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<sup>97</sup> The Commission has not exercised power under art. 11(6).

<sup>98</sup> Directive 2019/1, Recital 5, Preamble.

<sup>99</sup> Malgorzata Kozak, "One, three and two, and independent will be you... On the necessity of the wider analysis of independence of Polish National Competition Authority in the light of ECN+ directive", *iKAR* 8 (2019): 23.

<sup>100</sup> Directive 2019/1, Recital 7, Preamble.

<sup>101</sup> Kozak, "One, three and two", 23.

defence in the different enforcement systems”.<sup>102</sup> Article 3 of Directive 2019/1 introduces the general principle that proceedings concerning infringements of article 101 or 102 TFEU must at least comply with the general principles of Union law and the Charter, which means that there is a minimum common standard established. As recently confirmed by the CJEU,<sup>103</sup> the Charter is not only applicable where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto. The national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter.<sup>104</sup> Thus, the provision of Directive 2019/1 simply confirms that the standard of protection of the Charter should be preserved while applying arts. 101 and 102 TFEU. However, at the same time, Directive 2019/1 provides explicitly for a minimum standard that needs to be applied by all the NCAs within the network.

### *iii. Blind trust within the ECN*

However, neither Regulation 1/2003 nor Directive 2019/1 provide for European Commission competence to verify the actions carried out by NCAs within the scope of cooperation. The same applies to NCAs verifying the actions undertaken by other NCAs.

One of the examples of the lack of such competence is provided by the rules on the exchange of information between the NCAs and the European Commission.<sup>105</sup> These exchanges are crucial for the functioning of the

<sup>102</sup> European Commission, Communication from the Commission to the European Parliament and the Council – Report on the Functioning of Regulation 1/2003, {SEC(2009)574}, recital 16.

<sup>103</sup> Judgment of 19 November 2019, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liitto ry, and Auto- ja Kuljetusalan Työntekijäliitto AKT v. Satamaoperaattorit ry*, C-609/17 and C-610/17, EU:C:2019:981, paragraphs 42-43.

<sup>104</sup> See, to that effect, judgment of 10 July 2014, *Victor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, C-198/13, EU:C:2014:2055, paragraph 35. Judgment of 14 December 2017, *Antonio Miravittles Ciurana and Others v. Contimark SA and Jordi Socias Gispert*, C-243/16, EU:C:2017:969, paragraph 34; judgment of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*, C-152/17, EU:C:2018:264, paragraphs 34 and 35.

<sup>105</sup> The legal framework for the exchange of information in antitrust cases including confidential information within the network is article 105 (1) TFEU, article 4(3) TEU on duty of sincere cooperation, and articles 11 and 12 of Regulation 1/2003. Information that is obtained on the basis of article 22 Regulation 1/2003 can also be exchanged on the basis of article 12 of Regulation 1/2003.

ECN, as illustrated by the fact that the exchange of information was also one of the very first tasks of the ECN.<sup>106</sup> Information collected by one system can be used as evidence in another system, provided that the general conditions of article 12(2) are fulfilled, particularly that the information may be used only for the purpose of applying article 101 or 102 TFEU and in respect of the ‘subject matter’ for which it was collected. It is emphasised that this system creates a “double barrier”. Firstly, the authority collecting the information acts according to its own national rules of due process, and then the authority receiving the information delivers a decision according to its own rules of due process.<sup>107</sup> In practice, as explained by the CJEU in the *France Telecom* Judgment, the prohibition on using information for other purposes than those for which it was collected should be considered on a case by case basis, since it is aimed to meet a specific need, “namely the need to ensure that the procedural safeguards inherent to the collection of information by the Commission and by the national competition authorities in the context of their tasks are respected, while allowing an exchange of information between those authorities”(paragraph 78). If this prohibition was of a general character, it would render the tasks entrusted to the Commission and the NCAs more difficult.

Consequently, in the context of mutual trust, it needs to be emphasised that cooperation within the ECN does not include a verification of appropriateness of procedures accomplished by an authority sending the information e.g. concerning privacy. There is no verification as to the period of storage of information or data protection requirements. In response to some claims concerning the application of the General Data Protection Regulation (GDPR),<sup>108</sup> also in competition investigations,<sup>109</sup> the European Data Protection Supervisor (EDPS), in its letter dated 22 October 2018,

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The ECN+ Directive indicates that the exchange of information must be carried in accordance with article 12 of Regulation 1/2003. Moreover, article 28 of Regulation 1/2003 provides safeguards concerning professional secrecy. Further safeguards are included in the Commission Notice on cooperation within the Network of Competition Authorities in section 2.2.3.

<sup>106</sup> Monti, “Independence”, 17.

<sup>107</sup> Townley, *A framework*, 381.

<sup>108</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, 1-88.

<sup>109</sup> EDPS letter addressed to the DPOs of the EC, EIB, and EIF on implications of GDPR on investigative activities of EU institutions, notably regarding anti-fraud, competition and trade, WW/OL/sn/D(2018)2422 C 2018-0632, [https://edps.europa.eu/sites/edp/files/publication/18-10-30\\_letter\\_investigative\\_activities\\_eui\\_gdpr\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/18-10-30_letter_investigative_activities_eui_gdpr_en.pdf).

indicated that the GDPR does not change the situation substantially. However, EU institutions including the DG COM are required to observe a high standard of data protection on the basis of a specific regulation applicable to EU institutions, which is Regulation (EU) 2018/1725.<sup>110</sup> This Regulation is not applicable to NCAs. In its letter, the EDPS notably analysed whether individual notifications under article 14 GDPR to the data subject are necessary while collecting and processing of personal data by EU institutions. Such a possibility could lead to impacting an investigation by warning potential suspected companies. The EDPS notes that, when exercising their powers under Union law, EU institutions may qualify as “independent administrative authorities” which are not considered as “recipients” under article 14(1) (e) read together with article 4(9) GDPR. Thus, they can “receive personal data in the framework of a particular inquiry in accordance with Union law”. However, this does not apply to standard financial verifications and checks (e.g. checking the eligibility of declared expenses as part of standard ex-post controls). The EDPS emphasises that “in those cases, EU institutions have to inform data subjects up front about the processing, for example using the data protection notice for grant management or other relevant procedures”. Therefore, there is no procedural possibility for the European Commission, nor the NCA to confirm appropriateness of procedures accomplished by an authority sending the information. The ECN authorities apply mutual trust in this exchange considering that it is for national data protection authorities to verify how the personal data is collected and proceeded by the NCAs. Again, it could lead to different procedural outcomes in case of individual proceedings.

In this respect, AG Kokott emphasised that article 12 of Regulation 1/2003 provides that evidence exchanged between NCAs and the European Commission may be used automatically in antitrust proceedings.<sup>111</sup> The exclusion of evidence is not possible even in the case of evidence coming from an authority not belonging to the ECN, as it would be contrary to the principle of the procedural autonomy of Member States and could obstruct another principle, such as effective enforcement of EU competition law.

<sup>110</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC, PE/31/2018/REV/1, OJ L 295, 21.11.2018, 39-98.

<sup>111</sup> Opinion of Advocate General Kokott delivered on 17 November 2016, *FSL Holdings and Others v. European Commission*, C-469/15 P, EU:C:2016:884, paragraph 30.

According to her, there is no general principle derived from article 12 (2) of Regulation 1/2003 stating that the only evidence that may be used in antitrust proceedings is that which has already been gathered for the purposes of such proceedings. She emphasised that “[i]t does not follow from this, however, that evidence which was gathered for a purpose other than competition (...) must never be used for a purpose connected with competition law (...)” (paragraph 47). According to AG Kokott, the evidence cannot be used only in case the legislation (national or EU) specifically describes an intended purpose for particular items of evidence. Therefore their reuse for purposes other than that for which they were originally gathered is subject to a prohibition, e.g. article 28 (1) Regulation 1/2003. In practice, this blind mutual trust leads to the impossibility of challenging any kind of evidence obtained by competition authorities, as the legality of a gathering of information is defined according to the national law binding on the national authority and Regulation 1/2003 does not refer directly to it<sup>112</sup>. If the system remains in the present shape, it would be useful to introduce an independent officer able to verify the appropriateness and legality of actions within the network.<sup>113</sup>

The other illustration substantiating that mutual trust in the application of EU law exists without real safety valves is the lack of accountability and transparency of decisions taken within the network<sup>114</sup> which, in combination with the lack of legal personality<sup>115</sup>, could lead to due process issues. However, Directive 2019/1 already provides for the same safeguards, which are general principles of the Union law and principles stemming from the Charter.<sup>116</sup> It strengthens the presumption that other Member States have applied those principles. However, it still does not provide the competence for the first Member State to verify the due process of the second, nor does it provide for consequences in case due process principles are not preserved. The question regarding how Member States should “earn” mutual trust remains open. The question whether authorities should be blind to irregularities before other Member States, therefore, remains.

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<sup>112</sup> Reichelt, “To what extent”, 751.

<sup>113</sup> Kozak, “ECN+ Directive”, 53.

<sup>114</sup> Imelda Maher, “Competition law networks and the challenge of transparency” (February 22, 2019), *UCD Working Papers in Law, Criminology & Socio-Legal Studies*, Research Paper No. 1/2019. <https://ssrn.com/abstract=3339884> or <http://dx.doi.org/10.2139/ssrn.3339884>.

<sup>115</sup> Cseres, Outhuijse, “Parallel enforcement”, 17.

<sup>116</sup> Directive 2019/1, Art. 2.

## 5. Conclusion

The mutual trust in the application of articles 101 and 102 TFEU was implicitly introduced by Regulation 1/2003. The only limits that were provided were limited to the uniform application of articles 101 and 102 TFEU and the set of decisive powers of the European Commission in respect to the allocation of cases, and the obligation imposed on NCAs to consult decisions. The existence of various actors, e.g. NCAs, the European Commission and sometimes courts, the requirements of accountability and independence of NCAs and the implications of general principles of the EU law and the Charter have added more and more complexity to the foundations of cooperation. The existence of mutual trust is apparent in exchange for information within the ECN, mutual assistance, etc. However, no competence to verify the actions of other authorities is provided. The task of reviewing decisions adopted by competition authorities belonging to the network will remain with national courts and the CJEU. It is important for them to remain vigilant to the existence of this blind mutual trust and its eventual implications for parties to the proceedings. In any case, it could lead to different procedural outcomes, as is the case of application of the mutual trust principle in AFSJ,<sup>117</sup> by different Member States, even if the minimum standard of a Charter is preserved.

Nevertheless, the entry into force of Directive 2019/1 offered a great opportunity to set the boundaries to mutual trust in the cooperation among the European Commission and the NCAs and between the NCAs. Of course, both the practice and the assessment of the CJEU will show whether those boundaries are sufficient. However, as in the case of ASFJ, the cooperation between NCAs will be analysed in a more and more specific way. “Trust takes years to build and only minutes to destroy”, therefore the credibility of bodies within the ECN remains essential. The question whether they earned it remains open.

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