Sanctions in EU competition law: principles and practice

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THE DECENTRALISATION OF EU COMPETITION LAW
2.1 INTRODUCTION

In 2004, the enforcement of EU competition law has gone from a highly centralised system operated by the Commission to a system of decentralised application in which the Commission and the national authorities work side by side. While this change has successfully increased enforcement capacity, its implications in terms of costs and benefits are less certain. The costs and benefits of decentralisation are dependent on a number of factors. For instance, on the costs side it is important to consider to what extent decentralisation results in the duplication of enforcement infrastructure and procedures. On the benefits side, one of the aspects that needs to be taken into account is whether national authorities have a competitive advantage over the Commission in the enforcement of Articles 101 and 102 TFEU. Whereas chapter 3 will elaborate on these and other economic contingencies, this chapter does the groundwork by detailing the EU framework for decentralised enforcement. As the Member States should stay within the boundaries of this EU framework, it determines to what extent costs and benefits of decentralisation can materialise. Against this background, this chapter clarifies the system of shared administration (paragraph 2.2), the autonomy of the Member States with regard to sanctioning powers (paragraph 2.3), and the mechanisms for cooperation and coordination between the Commission and the national authorities (paragraph 2.4). The concluding paragraph 2.5 already highlights some of the costs that are inherent to the current decentralised enforcement system.

2.2 SHARED ADMINISTRATION

The enforcement of EU competition law has been a shared responsibility of the Commission and the Member States from the very beginning. Part of the TFEU’s earliest predecessor, Articles 103-105 TFEU provide a solid Treaty basis for the tasks of the Commission and the Member States in the enforcement of EU competition law. However, already in 1962 the Commission’s role in the enforcement process was significantly consolidated and reinforced to the detriment of the national authorities. The adoption by the Council of ‘Regulation 17’, the first procedural regulation for the application of Articles 101 and 102 TFEU (then Articles 85 and 86 of the Treaty establishing the European Economic Community), secured for the Commission a pivotal role in the enforcement process. This Regulation gave the Commission the exclusive power to apply Article 101(3) TFEU and to exempt anti-competitive agreements from the prohibition of Article 101(1) TFEU. Under the third

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3 Article 101(3) TFEU in conjunction with Article 9(1) Regulation 17.
paragraph of Article 101 TFEU, anti-competitive agreements that improve production or distribution or that bring about economic or technical progress may be exempted from the prohibition of the first paragraph. To benefit from this exemption, undertakings first had to notify their agreement to the Commission. During the notification procedure, parties to the agreement could not be penalised under Article 101 TFEU.4

This system of notification and exemption significantly frustrated the enforcement of Article 101 TFEU by the national authorities. Undertakings could still notify their agreement pending the proceedings before the national authorities, who would then have to await final judgment by the Commission, or eventually the Court of Justice. This prospective may have been a disincentive for the national authorities to spend their scarce resources on the enforcement of Article 101(1) TFEU. In practice, neither Article 101 nor 102 TFEU was much applied in national procedures. In fact, some Member States had not even designated an authority with the power to apply these provisions. In sum, during the first decades of EU competition policy the enforcement of Articles 101 and 102 TFEU found little resonance in the Member States and this was partly due to the prevailing legal framework.5

This all changed on 1 May 2004, when Regulation 17 was replaced by Regulation 1/2003.6 With the adoption of this Regulation, the centralised system of notification and exemption has been abolished. By virtue of Article 1(3) Regulation 1/2003, the Council has effectively recharacterised Article 101(3) TFEU from a ground for exemption into a directly applicable legal exception. Nowadays, undertakings operate their agreements at their own risk and peril without any notification thereof to any competition authority being required or even possible. This has for a direct consequence that infringements of Articles 101 and 102 TFEU can be pursued by the national authorities without any legal obstacles.

The recharacterisation of Article 101(3) TFEU was meant to promote decentralised application and to relieve the Commission’s administrative services from the workload caused by the system of notification and exemption.7 The former objective is in accordance with the EU principle of subsidiarity, requiring the Union, in areas which do not fall within its exclusive competence8, to act only if and in so far as the objectives of the proposed action

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4 Article 15(5) Regulation 17.
5 See also Wesseling (n 2) 197; WPJ Wils, The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics (European Monographs, Kluwer Law International 2002) 140.
6 In fact, earlier unsuccessful attempts had been made by the Commission to stimulate decentralised enforcement of Articles 101 and 102 TFEU, notably through the adoption of a Notice on co-operation between national competition authorities and the Commission [1997] OJ C 313/3. See Wesseling (n 2) 203-207.
8 The exclusive competences of the Union can be found in Article 3 TFEU and include ‘the establishing of the competition rules necessary for the functioning of the internal market’ (emphasis added). It is submitted herewith that this provision refers to the substantive competition rules (‘what is prohibited?’) and not to the enforcement of these competition rules (‘what are the public law consequences of an
cannot be achieved sufficiently by the Member States but can rather be better achieved at EU level. This principle, which became a part of EU law with the adoption of the Treaty of Maastricht in 1992, essentially gives priority to decentralised application over centralised application. While considerations of subsidiarity will certainly have played a role in the recharacterisation of Article 101(3) TFEU and the process of decentralisation that it engendered, all this was mainly motivated by the objective to relieve the overburdened administrative services of the Commission. Ehlermann has put it even stronger. Commenting on the Commission proposal for Regulation 1/2003, he noted:

In fact, the Commission only pursues one main goal, i.e., to increase the efficiency of the EC antitrust policy. In order to achieve this objective, the Commission proposes to adopt a system of radical decentralization. Decentralization is a tool, not an objective.

By exchanging the exemption procedure for a legal exception the Commission could shift resources from scrutinising notified agreements to investigating covert and more harmful forms of anti-competitive behaviour. Moreover, the enforcement burden from then on would be borne by the Commission and the national authorities jointly. In the light of the EU enlargement with ten new Member States taking effect 1 May 2004, these were urgent matters at the time Regulation 1/2003 was drafted.

The removal of legal obstacles alone could of course not forge the commitment of the Member States to enforce Articles 101 and 102 TFEU. Regulation 1/2003, therefore, makes various other contributions to the decentralised enforcement of EU competition law. Pursuant to Article 35 Regulation 1/2003, Member States have to designate an authority with the power to apply Articles 101 and 102 TFEU (national competition authority, 'NCA'). This authority then becomes responsible for the enforcement of Articles 101 and 102 TFEU and is subject to various duties under Regulation 1/2003, eg the obligation of professional secrecy. Moreover, by virtue of Article 3(1) Regulation 1/2003 NCAs and national courts have to assess any restriction of competition or abuse of dominance that 'affects trade between Member States' under Articles 101 and 102 TFEU. In practice, this


\footnote{On the close connection between enlargement and decentralisation, see KJ Cseres, ‘The Impact of Regulation 1/2003 in the New Member States’ (2010) 6 The Competition Law Review 145.}

\footnote{Article 28 Regulation 1/2003.}

\footnote{Articles 101 and 102 TFEU regard restrictive practices and abuses of dominance in the light of their impact on trade between Member States. The purpose of the effect on trade criterion is to define, within the context of competition law, the boundary between EU law and national law. EU law covers practices capable of affecting trade between Member States in a manner which might harm the attainment of the objectives of the internal market. To fulfil the effect on trade condition, it must be possible to foresee with a sufficient degree of probability, on the basis of objective factors of law or fact, that the restrictive practices may have an appreciable influence, direct or indirect, actual or potential, on the infringement?'). This implies that the enforcement of Articles 101 and 102 TFEU is subject to the EU principle of subsidiarity.
means that national authorities will often have to apply EU competition law if they want to end certain anti-competitive behaviour on their home markets. Where national competition law is applied in parallel to EU competition law, this may not lead to the prohibition of practices that do not form an appreciable restriction of competition in the sense of Article 101 TFEU. This creates a level playing field for (anti-competitive) agreements with an effect on trade and limits the chances of agreements being enforceable in one jurisdiction and not in another. Member States remain free to apply stricter national rules in relation to unilateral conduct of undertakings. In other words, Member States may prohibit conduct that is exonerated under Article 102 TFEU.

Competence to apply national (competition) law
The system of shared administration in the area of EU competition law, with its requirement to designate an NCA and the mandatory application of EU competition law, has led to new kinds of legal issues. For example, in proceedings before the UK Court of Appeal (Criminal Division) in IB v the Queen it has been argued that Regulation 1/2003 limits the jurisdiction of the UK criminal courts. This argument was made in criminal proceedings under Section 188 Enterprise Act 2002 against individuals implicated in a cartel on fuel surcharges. In accordance with this provision, an individual may be guilty of an offence if he engages in certain activities which are also prohibited under Article 101 TFEU. In an interlocutory appeal, a jurisdictional issue was raised. The appellant argued that if the cartel had an ‘effect on trade’ in the sense of Article 101 TFEU then only the competition authority duly designated by UK Government under Regulation 1/2003 had jurisdiction to enforce the cartel offence. After all, in such a case national competition law can only be applied in parallel to EU competition law, and only NCAs may apply EU competition law. The Court of Appeal has not been designated as an NCA.

The Court of Appeal dismissed this argument essentially on two grounds. First the EU interests for limiting the possibility to apply national competition law in isolation would not be at stake. The risk of any inconsistency between a prosecution under Section 188 Enterprise Act 2002 and a decision on the validity of an agreement under Article 101 TFEU was considered small. Second, the Court of Appeal simply saw no legal basis for the conclusion that Regulation 1/2003 makes the punishment of an offence which amounts to part of a national competition law the exclusive province of the designated NCA. In the words of the Court of Appeal:

pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market. Especially practices that seal off national markets or affect the structure of competition would be problematic in the light of this objective. See Commission Notice laying down Guidelines on the effect on trade concept contained in Articles 81 and 82 of Treaty [2004] OJ C 101/81.

14 Article 3(2) Regulation 1/2003. Practices that do not affect trade between Member States are not governed by this ‘convergence clause’.
16 IB v the Queen [2009] EWCA Crim 2575.
17 ibid para 36.
18 ibid para 38.
None of these Articles [Articles 3, 5 and 35 Regulation 1/2003] say anything at all about what may be done to give effect to local laws which are not concerned with decisions whether there has or has not been an infringement of Articles 81 and 82 [now Articles 101 and 102 TFEU]. If, therefore, section 188 is properly to be described as part of “national competition law” for the purposes of the Modernisation Regulation, it is a part of it which is not concerned with decisions on the validity of agreements (etc) and whether there has or has not been an infringement of Articles 81 and 82; it is not concerned with directly applying those Articles.\textsuperscript{19}

The Court of Appeal therefore concluded that Articles 3, 5 and 35 Regulation 1/2003 do not prevent national courts from assuming jurisdiction over infringements of national (competition) law. In reaching this conclusion, it made a distinction between means of enforcing competition rules applying to undertakings and ancillary law which bolsters the effectiveness of competition rules but is not concerned with directly enforcing them against undertakings. Only the former would be governed by Regulation 1/2003. The Court of Appeal concluded that Section 188 Enterprise Act 2002 falls within the second category.

In accordance with this judgment, national institutions that have not been designated as an NCA are not prevented by Regulation 1/2003 from penalising infringements of these ancillary laws, irrespective of whether these infringements are also covered by Articles 101 and 102 TFEU. Of course, this ruling does not prejudice the interpretation of the Court of Justice. It should be noted that for the purpose of safeguarding the ‘coherent application’ of Articles 101 and 102 TFEU, the Court of Justice has thus far accorded little significance to the difference between the behavioural rules laid down in Articles 101 and 102 TFEU and the enforcement of these rules.\textsuperscript{20} And while some may consider \textit{IB v the Queen} a sensible ruling\textsuperscript{21}, it does imply that various other provisions of Regulation 1/2003 do not apply to proceedings under Section 188 Enterprise Act 2002 either, eg the information-exchange mechanism of Article 12 (\textit{infra} paragraph 2.4).

Another contribution to the decentralised enforcement of Articles 101 and 102 TFEU is that Regulation 1/2003 has created a system of parallel competences. Regulation 1/2003 delimits neither the jurisdiction of the NCAs to apply Articles 101 and 102 TFEU nor the scope of their sanctioning powers.\textsuperscript{22} With respect to the latter point it should be noted that

\textsuperscript{19} ibid.
\textsuperscript{20} Case C-429/07 \textit{Inspecteur van de Belastingdienst v X BV} [2009] ECR I-4833.
\textsuperscript{22} See also S Brammer, ‘Concurrent Jurisdiction Under Regulation 1/2003 and the Issue of Case Allocation’ (2005) 42 \textit{Common Market Law Review} 1383, 1385, who argues that the power of NCAs to apply Articles 101 and 102 TFEU is not geographically restricted. The opposite position has also been taken. See R Smits, ‘The European Competition Network: Selected Aspects’ (2005) 32 \textit{Legal Issues of Economic Integration} 175, 184, who argues that ‘Regulation 1/2003, although it contains a mechanism for apportioning the competence to act in the enforcement of Community competition law, does not provide for a single sanctioning system. Rather, it relies on nationally diverse systems without even
Article 5 Regulation 1/2003 provides, without restrictions: ‘The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] in individual cases.’ NCAs only lose their competence to apply Articles 101 and 102 TFEU in a particular case when proceedings have been initiated by the Commission. Any further delimitation is solely a matter of national law or public international law. Accordingly, cases can be dealt with either by the Commission, a single NCA, or several NCAs. The authorities themselves are responsible for an efficient division of work (infra paragraph 2.4). The adoption of Regulation 1/2003 has thus enhanced the role and responsibility of the NCAs in the enforcement of Articles 101 and 102 TFEU. In practice, EU competition law is actually applied on Member State level and, reportedly, this has contributed to ‘a significant increase of enforcement activities in the EU since 2004.’

2.3 SANCTIONING AUTONOMY

With the decentralisation of EU competition law not only the number of enforcement authorities has increased, it has also resulted in a multiplication of sanctioning regimes. The decision to involve the Member States in the enforcement of Articles 101 and 102 TFEU has not been matched by large-scale harmonisation of national sanctioning powers and procedures. Regulation 1/2003 recognises the wide variation of public enforcement systems existing in the Member States and therefore leaves intact the sanctioning autonomy of the Member States. As a result, NCAs may enforce Articles 101 and 102 TFEU, using different procedural frameworks and imposing different sanctions. There are only relatively few issues with regard to sanctions that are dictated by Regulation 1/2003. Nonetheless, those issues should be clarified before one can determine the scope of the sanctioning autonomy.

granting a competence to sanction behaviour beyond the confines of State borders. Thus, in a case where one NCA acts to end and sanction an infringement, which affects the markets in several other Member States as well, the NCAs power to sanction seems restricted to the effect within the first State.’


See in this respect also M de Visser, Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law (Hart Publishing 2009) 297: ‘Many competition laws require a causal link between alleged infringements and the territory for which the competition authority bears responsibility. This effects doctrine is in fact an extension of the Network Notice’s allocation criteria. It will be a rare occurrence indeed if an authority with no connection whatsoever to the alleged infringement were to become responsible for its investigation.’ (footnote omitted). See further S Brammer, Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law (Hart Publishing 2009) 484-485, who argues that public international law is of limited importance for the decentralised enforcement of Articles 101 and 102 TFEU.


Cereis, ‘The Impact of Regulation 1/2003’ (n 11) 155.

Also outside the area of ‘sanctions’, Regulation 1/2003 leaves the Member States considerable autonomy in designing their enforcement regime. Probably the most clear exception to this rule is Article 2 Regulation 1/2003, which ‘centralises’ the burden of proof for infringements of Articles 101 and 102.
In accordance with Article 35 Regulation 1/2003, Member States have to allocate enforcement competences in such a way that the provisions of the Regulation are effectively complied with. In VEBIC, the Court of Justice has interpreted this provision as requiring Member States to ensure the effective enforcement of Articles 101 and 102 TFEU. This conclusion has not attracted much attention, but there is of course a difference. While the VEBIC ruling was rendered in relation to an institutional peculiarity of the Belgian enforcement regime – the Belgian NCA could not defend its own decision on appeal – the Court’s interpretation of Article 35 Regulation 1/2003 extends beyond the narrow confines of this case. This general requirement of effective enforcement of Articles 101 and 102 TFEU is broad enough to cover the allocation of sanctioning powers, along with all other national enforcement powers and procedures.

Arguably more important from the perspective of the sanctioning autonomy of the Member States is Article 5 Regulation 1/2003. This Article reads:

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end, ordering interim measures, accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

The legal literature has been divided on the interpretation of Article 5 Regulation 1/2003. Some commentators have concluded that it remains to the Member States to vest their NCAs with the specific enforcement powers, whereas others have argued that NCAs can directly use the instruments listed in Article 5 Regulation 1/2003. This difference in opinion is also recognised in the Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003. More recently AG Mazák has joined this debate through TFEU, by providing: ‘In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.’

29 This point has earlier been made in MJ Frese, ‘Case C-439/08, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC), Judgment of the Court (Grand Chamber) of 7 December 2010’ (2011) 48 Common Market Law Review 893.
his opinion in *Tele2 Polska*, arguing in favour of the ‘directly use’ camp. Mazák could even support his argument by referring to several NCAs that had already adopted enforcement measures directly on the basis of Article 5 Regulation 1/2003. Whatever could be said about these national practices, in *Tele2 Polska* the Court of Justice seems to have sided with the ‘no direct use’ camp. In the latter case, the referring court asked explicitly whether on the basis of Article 5 Regulation 1/2003 an NCA may bring to an end the procedure by taking a decision which states that there are no grounds for action on its part, even though national law provides in such circumstances only for the possibility of taking a negative decision on the merits, i.e. a decision that the behaviour does not qualify as an infringement. The Court only censured the latter type of decision, by holding:

> since (…) Article 5 of the Regulation is directly applicable in all the Member States, Article 5 precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.

This is significant as Article 5 Regulation 1/2003 explicitly mentions that NCAs may decide that there are no grounds for actions on their part. The Court thus stopped short from interpreting Article 5 Regulation 1/2003 as allocating powers to the NCAs directly. This approach is in accordance with earlier case law dealing with similar issues. It should therefore be concluded that the competences listed in Article 5 Regulation 1/2003 are not directly available for the NCAs. In principle, a legal basis in national law is required before the latter may adopt any of the measures listed in this provision.

Pursuant to Article 5 Regulation 1/2003, Member States may grant their NCAs the power to adopt cease-and-desist orders, to order interim measures, to accept commitments, to impose fines and periodic penalty payments and to decide that there are no grounds for further actions on their part. Furthermore, NCAs may impose any other penalty provided for in their national law. This could include penalties for natural persons. Conversely, Member States are not required to provide for all these sanctions. Not listed in Article 5

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54 ibid.
55 Case C-375/09 *Tele2 Polska* [2011] OJ C186/4, para 34.
58 Cf Article 12(3) Regulation 1/2003.
59 Oliver (n 30).
Regulation 1/2003, and excluded from the NCAs’ scope of competences, is the power to make findings of inapplicability. By virtue of Article 10 Regulation 1/2003, this power falls within the exclusive purview of the Commission. Whereas the NCAs may conclude that ‘there are no grounds for action on their part’, only the Commission may reach a finding that Articles 101 and 102 TFEU are inapplicable to a particular practice. This follows from *Tele2 Polska* (*supra*). While not explicitly mentioned in Article 5 Regulation 1/2003 either, NCAs do not seem barred from requiring undertakings to make specific changes in their commercial behaviour or their organisational structure in order to ensure compliance with Articles 101 and 102 TFEU, nor from terminating investigations with a settlement, nor from adopting declaratory findings of past infringements. Decisions of this type cannot be equated with findings of inapplicability, as only the latter exonerate anti-competitive practices from public intervention.

Although the exact scope remains to be determined by the Court of Justice, it can savely be concluded that Regulation 1/2003 leaves the Member States a considerable degree of sanctioning autonomy.

2.4 COOPERATION AND COORDINATION

Infringements of Articles 101 and 102 TFEU typically extend beyond national borders. Indeed, in the absence of an effect on trade between Member States, these prohibitions do not even apply. As a result, Member States cannot properly enforce the prohibitions of Articles 101 and 102 TFEU without the help of each other. The decentralisation of EU competition law has therefore called for coordination and cooperation in individual cases and with regard to enforcement policy. This has resulted in the creation of a European Competition Network (‘ECN’ or ‘Network’). The ECN is based on the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities and has been worked out in the Commission Notice on cooperation within the Network of Competition Authorities (‘Network Notice’) as acknowledged and declared binding by NCAs from all the Member States. The ECN provides a forum for the Commission

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40 The Commission's administrative services seem less certain that NCAs may adopt decisions not explicitly mentioned in Article 5 Regulation 1/2003, cf Commission Staff Working Paper (n 25) para 198: 'the question has come up whether national competition authorities may adopt declaratory decisions in relation to past infringements. Given that Article 5 does not contain a provision equivalent to the last paragraph of Article 7(1) of Regulation 1/2003, there remains a question mark about whether the lack of an express provision may prevent national competition authorities from taking a decision on the basis of Articles 81 and 82 EC [now Articles 101 and 102 TFEU] in relation to past infringements where they do not intend to impose a fine.'


42 [2004] OJ C 101/03.

43 Network Notice, para 42. The list of national authorities that have signed the Statement regarding the Commission Notice on Co-operation within the Network of Competition Authorities is available at <http://ec.europa.eu/competition/antitrust/legislation/list_ofAuthorities_joint_statement.pdf>
and NCAs to meet and discuss cases and policy. Secretarial functions are organised by the administrative services of the Commission, which exemplifies the central position of the latter within the Network.\textsuperscript{44} Cooperation and coordination in individual cases is further facilitated by Regulation 1/2003, providing mutual duties for the Commission and the NCAs in the enforcement of Articles 101 and 102 TFEU.

*Cooperation in individual cases: case allocation, investigative assistance and consultation*

As already mentioned, the enforcement system introduced by Regulation 1/2003 is based on the principle of parallel competences. All ECN members have the power to apply Articles 101 and 102 TFEU and they are jointly responsible for an efficient division of work. The objective of this system is that cases are handled by a single authority as often as possible.\textsuperscript{45} For this purpose Article 13 Regulation 1/2003 provides a ground to suspend or terminate enforcement proceedings. In accordance with the Network Notice, parallel action by two or three NCAs is appropriate only where an agreement or practice has substantial effects on competition in their respective territories and the action of a single NCA would be insufficient to end or penalise the entire infringement adequately.\textsuperscript{46} Where more than three Member States are affected by the agreement or practice, or where effective enforcement or other EU interests so require, the Commission is likely to deal with the case.\textsuperscript{47} In all other cases, enforcement action will in principle be undertaken by a single NCA.\textsuperscript{48} This will be the NCA that has a material link with the infringement and that is able to gather the necessary evidence to prove the infringement and that is able to gather the necessary evidence to prove the infringement and to end and penalise the entire infringement effectively.\textsuperscript{49} For the purpose of case allocation, the Commission and the NCAs inform each other before or without delay after commencing the first investigative measures.\textsuperscript{50} Dekeyser and Jaspers have described the practicalities of this mechanism as follows:

An authority who is well placed and willing to investigate and sanction an infringement informs the Network of its intentions at an early stage of the investigation by inserting some basic information in a common case management system. This allows other authorities to signal their interest to also act in the case, either in parallel with the first authority (in the case of national competition authorities) or solely (in the case of the Commission). In the rare case that authorities disagree on the most suitable allocation of the case, bilateral discussions take place between the concerned authorities.\textsuperscript{51}

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\textsuperscript{44} Cf Cseres, ‘Comparing Laws’ (n 15) 25
\textsuperscript{45} Recital 18 of the preamble to Regulation 1/2003.
\textsuperscript{46} Network Notice, para 12.
\textsuperscript{47} ibid paras 14-15.
\textsuperscript{48} ibid para 11.
\textsuperscript{49} ibid para 8.
\textsuperscript{50} Article 11(2) and (3) Regulation 1/2003.
Case allocation, therefore, remains somewhat informal and the ECN does not decide which authority/authorities will do the investigation. 52

The ECN members also help each other in the investigation of cases. In accordance with Regulation 1/2003, the officials of the NCAs may assist the Commission in its inspections. NCAs will provide assistance either on their own request or on request of the Commission. 53 In these cases, the officials of the NCAs will dispose of the same powers as the Commission officials. 54 NCAs may also carry out investigations on behalf of another ECN member, in accordance with their domestic investigatory powers. 55 Investigative assistance is further facilitated by the information-exchange mechanism provided for in Article 12 Regulation 1/2003. In accordance with this provision, ECN members have the power to provide one another with and use in evidence any matter of fact or law for the purpose of applying Articles 101 and 102 TFEU. 56 Where national competition law is applied in the same case and in parallel to EU competition law and does not lead to a different outcome, information exchanged under Article 12 Regulation 1/2003 may also be used for the application of national competition law. Information that has been exchanged by ECN members may only be used in evidence to impose sanctions on natural persons where i) the law of the transmitting authority foresees sanctions of a similar kind, or ii) the information has been collected in a way which respects the same level of protection of the rights of defence of the natural persons. 57 However, information that has been exchanged may only be used to impose custodial sanctions if the first condition is fulfilled, so where the law of the transmitting authority also foresees in custodial sanctions. 58 Notwithstanding these limitations with regard to use of exchanged information in evidence, Article 12(1) Regulation 1/2003 authorises ECN members to exchange information as intelligence irrespective of the type of sanctions 59, but provided it is used for competition law purposes. Meanwhile, the Commission’s administrative services report of ‘a discussion’ on whether the limitation on the use of information in evidence for the imposition of custodial sanctions is too far-reaching and constitutes an obstacle to effective enforcement. 60 If this discussion were to result in legislative amendments, this could means that the ‘level of protection’ criterion becomes generally applicable. This would not necessarily remove all the obstacles to effective enforcement, however. Brammer has already indicated:

It can hardly be expected for an NCA to be familiar with the procedural rules of its 26 colleague agencies. Moreover, comparing the two systems and making a well-founded

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52 ibid.
54 Articles 20(5) and 21(4) Regulation 1/2003.
55 Article 22 Regulation 1/2003.
56 Article 12(1) and (2) Regulation 1/2003.
57 Article 12(3) Regulation 1/2003.
58 ibid.
60 ibid para 245.
judgement on the equivalence of protection afforded by both is a complex exercise. Each national law will consist of an elaborate, coherent system of detailed rules and principles which may be similar between Member States, but will hardly ever be identical.61

In other words, the mere existence of distinct sanctioning regimes could limit the possibilities for information-exchange and therefore hamper the enforcement of Articles 101 and 102 TFEU.

Finally, Network cooperation consists of mandatory consultation and other means to guarantee the uniform application of Articles 101 and 102 TFEU. The Commission has to consult with all EC N members before imposing any sanction.62 More specifically, the Commission needs to consult the so-called Advisory Committee on Restrictive Practices and Dominant Positions. This Advisory Committee is composed of representatives of the NCAs. With regard to the more general (enforcement) issues, Member States may appoint an additional representative with competence over competition matters (eg an official working directly under the responsible minister). The Commission needs to take 'the utmost account' of the opinion delivered by the Advisory Committee.63 Where the Advisory Committee so recommends, the Commission publishes the opinion.64 The NCAs, in turn, have to consult with the Commission before imposing sanctions for infringements of Articles 101 and 102 TFEU.65 More precisely, the NCAs need to inform the Commission 'no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefits of a block exemption Regulation'.66 The uniform application of Articles 101 and 102 TFEU is further reinforced by the power of the Commission to relieve the NCAs of their enforcement competences by initiating proceedings itself.67 Where the Commission has adopted an enforcement decision, NCAs cannot take decisions running counter to the decision of the Commission.68 As soon as the actions of the NCAs enter the appeal stage, further mechanisms have been put in place to ensure the uniform application of Articles 101 and 102 TFEU. In addition to the possibility to refer questions to the Court of Justice for a preliminary ruling69, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition law.70 The Commission may also

61 Brammer (n 24) 476.
64 Article 14(6) Regulation 1/2003.
66 Ibid. Interpreted literally, this implies that NCAs need not to communicate draft decisions punishing past infringements. In reality, this concerns the bulk of the decisions. As it is highly unlikely that the Council intended to exclude these decisions, it is suggested that Article 11(4) Regulation 1/2003 should be interpreted broadly so as to include decisions on past infringements.
68 Article 16(2) Regulation 1/2003.
69 Article 267 TFEU.
70 Article 15(1) Regulation 1/2003.
intervene as *amicus curiae* on its own initiative.\(^{71}\) In any case, national courts may not take a decision running counter to a decision adopted or contemplated by the Commission.\(^{72}\)

**Coordination of enforcement policy**

Further to its role in individual cases, the ECN provides a forum for a continuous dialogue between the Commission and the NCAs to discuss competition policy. For this purpose it organises meetings for its members, conducts evaluations, adopts policy guidelines and publishes newsletters. Within this context, competition authorities discuss and share experiences with particular sectors of the economy or means of enforcement.\(^{73}\) One of the ECN’s more notable activities is that it has drawn up a model leniency programme (ECN Model Leniency Programme).\(^{74}\) This document contains suggestions as to how the authorities should deal with cartel members that confess their wrongdoings. A leniency programme functions as proverbial carrot for cartel members to break ranks and inform the authority. The ECN Model Leniency Programme aims to align key aspects of the leniency programmes of the Commission and NCAs. However, the Model is not binding on the Member States\(^{75}\), and explicitly excludes the possibility of creating legitimate expectations.\(^{76}\) Notwithstanding its voluntary nature, the fact that this Model has been drafted by the Commission and the NCAs jointly suggests that it will be reflected in domestic penalty regimes.\(^{77}\)

These activities of the ECN add to the discussions between the competition authorities taking place outside the EU framework, such as the discussions in the context of the European Competition Authorities (‘ECA’)\(^{78}\), the Organisation for Economic Cooperation

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\(^{71}\) Article 15(3) Regulation 1/2003.

\(^{72}\) Article 16(1) Regulation 1/2003.

\(^{73}\) Commission Staff Working Paper (n 25) para 248: ‘Currently [in 2009], policy work is organised at four different levels of organisation: the yearly meetings of the Directors General of the European Competition Authorities, the Plenary meetings, the horizontal working groups and the sector-specific subgroups.’ Discussions with relevance to sanctioning powers take place in the Director General’s meetings, the Plenary meetings and various horizontal working groups.


\(^{75}\) Cf Case C-360/09 *Pfleiderer* [2011] OJ C232/5, paras 21-22

\(^{76}\) Stakeholders cannot derive any legitimate expectations from the ECN Model Leniency Programme. It is stated in its explanatory notes that it ‘does not give rise to any legal or other legitimate expectations on the part of any undertaking’.

\(^{77}\) Cf Case C-360/09 *Pfleiderer* [2011] OJ C232/5, para 23.

\(^{78}\) ECA was founded in April 2001 as a discussion forum for competition authorities in the European Economic Area, the EEA. This forum consists of the Commission, the NCAs, the competition authorities of Norway, Iceland and Liechtenstein (all states that have signed the European Free Trade Agreement, ‘EFTA’) and the EFTA Surveillance Authority. ECA operates outside the public sphere; it has no office and does not manage a website either. The little information that is publicly available can be found on websites of the Commission and the NCAs. It appears that ECA supports various working groups, including a working group on sanctions.
and Development (‘OECD’)

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, the International Competition Network (‘IC n’)

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and the United Nations Conference on Trade and Development (‘UNCTAD’).

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Perhaps with the exception of the latter, the other organisations mentioned have contributed to the sharing of experiences and the drafting of best practices in the field of competition law enforcement. For instance, in the context of the ECA working group on sanctions, the participating competition authorities have agreed on Principles for convergence of pecuniary sanctions imposed on undertakings for infringements of antitrust law (‘ECA Fining Principles’).

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This document is not binding but does contain shared principles for the determination of fines in relation to infringements of competition law.

It can be concluded that the Commission and the NCAs have tried to limit the differences between their sanctioning regimes by coordinating some of their discretionary sanctioning powers in the context of ECN or other international networks.

2.5 CONCLUSION

The EU framework for the enforcement of Articles 101 and 102 TFEU is based on a system of shared administration, sanctioning autonomy for the Member States, and mechanisms for cooperation and coordination. Shared administration implies that each Member State

79 The OECD was founded in December 1960 through a Convention signed by 20 states and has gradually expanded. Its origins date back to 1947, when its forerunner, the Organisation for European Economic Cooperation, was formed to administer the Marshall Plan for the reconstruction of Europe after World War II. In order to pursue its aim of economic growth, the OECD members promote the efficient use of economic resources, pursue policies for economic growth and pursue efforts to reduce trade barriers and to liberalise markets. For this purpose the OECD members can carry out joint studies and projects and, by unanimity, adopt binding decisions and recommendations. The OECD has a Secretariat consisting of several Directorates. The Directorate for Financial and Enterprise affairs supports various committees and working groups, amongst others the Competition Committee. In the field of competition law enforcement the OECD has adopted various recommendations and policy briefs and there are various Committee Reports, most notably in the field of sanctioning, leniency, cartel enforcement and inter-authority cooperation.

80 The Commission and the NCAs all are members of the IC n. This global competition law network was launched by competition law officials of 14 different jurisdictions, with the endorsement of the International Bar Association and after the impetus given by the United States’ Assistant Attorney General for Antitrust and the EU’s Commissioner for Competition. This network groups together competitions authorities from around 100 jurisdictions and operates on the basis of a Memorandum on the Establishment and Operation of the International Competition network. The IC n has a steering group and various working groups. The working groups undertake studies and adopt recommended practices in various fields of competition law, including enforcement and most notably on institutional design and cartel enforcement.

81 UNCTAD, established in 1964, promotes the economic development and integration in the world economy of developing countries. For this purpose, UNCTAD operates a programme on International Trade and Commodities, which includes a programme on Competition and Consumer Policies. In this capacity, UNCTAD functions mainly as a forum for discussion, peer review and technical assistance. For the decentralised enforcement of EU competition law, UNCTAD activities are hardly relevant.

needs to designate an NCA and that infringements of Articles 101 and 102 TFEU can be prosecuted in parallel procedures. This inevitably leads to 'duplication costs.' In this respect, decentralisation should be seen as a rather inefficient way to increase enforcement capacity. Enforcement capacity could have been increased without any duplication costs simply by allocating additional resources to the Commission. Moreover, this alternative would have saved on 'coordination costs,' needed to ensure the uniform and effective application of Articles 101 and 102 TFEU in a system of decentralised enforcement. Due to the mechanisms for consultation and uniform application, in principle there will be no discrepancies in terms of what is prohibited and what is not. With these mechanisms in place, undertakings need not have to waste additional resources in complying with national variations of EU competition law and to incur potentially large 'transaction costs.' Also the convergence initiatives undertaken by the ECn and other international organisations will limit transaction costs for the undertakings involved and make sure that the effectiveness of EU competition law is not eroded by disparities in sanctioning regimes. However, all these mechanisms and initiatives will come at the expense of enforcement resources.\textsuperscript{83} Also in this respect decentralisation has been a rather costly venture. Furthermore, prevailing differences between the various sanctioning regimes, whether in terms of sanctioning powers or legal safeguards, could frustrate the exchange of information between the authorities and, therefore, the effectiveness of EU competition policy. This too could be seen as 'coordination cost.' All of these costs could have been avoided, if only there had been sufficient political support to improve the former centralised enforcement system. However, intended or not, this alternative would have prevented more than duplication costs and coordination costs alone. It would have ignored the potential benefits of decentralisation. To a large extent, these benefits can be explained precisely because several authorities can claim jurisdiction over a single case and because every Member State can design its sanctioning regime in accordance with domestic preferences. In order to determine the economic implications of the decentralisation of enforcement competences in the area of EU competition law, the economic contingencies need to be studied in more detail. This will be done in the following chapter.

\textsuperscript{83} See also R Wesseling, 'The Draft-Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26 European Law Review 357, 377; Brammer (n 24) 21.