CENTRALISATION BY STEALTH: UNCOVERING EU SANCTIONING PRINCIPLES
4.1 INTRODUCTION

It has been concluded in chapter 2 that Regulation 1/2003 leaves the Member States a sizeable discretion in allocating sanctioning powers to their NCAs. However, Regulation 1/2003 is not the only source of EU law that is able to limit the sanctioning autonomy of the Member States. In fact, the European Union holds a grip on the decentralised enforcement of Articles 101 and 102 TFEU through various other strings of influence. Where the Member States act as ‘agents’ of EU law, enforcing Articles 101 and 102 TFEU, the domestic sanctioning powers are subject to EU rules and principles (hereinafter simply referred to as ‘principles’1) of a more general nature.2 These principles form a legal framework for the Member States, narrowing down the sanctioning autonomy that has been left by Regulation 1/2003. The applicability of these EU principles in the Member States can be seen as a form of centralisation, in the sense that the terms and conditions for the enforcement of Articles 101 and 102 TFEU are dictated by EU law. As these principles are in a constant state of evolution and not readily cognisable, their impact on the enforcement of EU competition law could be described as ‘centralisation by stealth’.

As was indicated in chapter 3, the applicability of these EU sanctioning principles can have various economic implications. The more the sanctioning autonomy of the Member States is narrowed down, the fewer the possibilities for preference matching and regulatory innovation, but also the smaller the losses in terms of transaction costs, coordination costs and duplication costs. In order to examine the economies and diseconomies of the current division of sanctioning competences between the EU and the Member States, the nature of these sanctioning principles needs to be studied. This will clarify the extent to which Member States really have the possibility to accommodate domestic sanctioning preferences and to engage in regulatory innovation. Furthermore, by detailing the EU sanctioning principles this chapter indicates areas in which transaction costs and diseconomies of scale should not arise precisely because of this uniform legal framework. In fact, by clarifying this framework, this chapter could even make a modest contribution to these savings. In any case, the analysis below will explain many of the legal implications of decentralisation.

In anticipation of the findings in this chapter, it should already be mentioned that the EU sanctioning principles derive from four different sources of law, namely:

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1 The use of the term ‘principles’ and all derivatory terms are used as a shorthand for every norm of EU law, whether rule or principle. For the purpose of this study, a distinction between rules and principles is less important than the fact that both type of EU legal norms may penetrate the national legal order.

The sanctioning principles deriving from the Articles 101 and 102 TFEU are obviously limited in scope, but all other principles govern the enforcement of EU law more generally. After having clarified in paragraph 4.2 how EU sanctioning principles penetrate the national legal orders, the next four paragraphs provide a detailed analysis of the relevant sources of EU law. This analysis aims to identify and clarify the various sanctioning principles. The concluding paragraph 4.7 draws all principles together with a view to provide a complete overview of the EU framework for national sanctioning powers and to discuss the areas and degree of centralisation.

4.2 EU PRINCIPLES IN THE NATIONAL LEGAL ORDER

How do EU sanctioning principles penetrate the national legal orders? Before identifying and analysing the EU sanctioning principles this question should be addressed. By enforcing Articles 101 and 102 TFEU, the NCAs enter the realm of EU law and essentially become agents of the Union. This is relevant, as the 'centralisation effect' of EU principles is limited to the actions of the Member States within the scope of EU law. Accordingly, the EU sanctioning principles have no direct implications for the enforcement of national competition law. Moreover, as will become clear below, the EU sanctioning principles mainly derive from Treaty provisions and general principles of EU law. The working of these primary sources of EU law extends to the decentralised enforcement of Articles 101 and 102 TFEU. Finally, any conflict between EU principles and national law is settled in favour of the former. This follows from the EU principle of priority.

5 While this study focuses on 'sanctions', the above legal sources influence the entire enforcement process in the Member States, from the earliest inspection to the ultimate stage of judicial review. See MJ Frese, 'De Doorwerking van Europese Rechtsbeginselen bij de Decentrale Handhaving van het EU Mededingingsrecht' (2012) 61 Ars Aequi 108.
4 Jans et al (n 2) 206-220.
5 Case C-249/96 Grant v South-West Trains Ltd [1998] ECR I-621.
6 Most if not all Member States operate a system of domestic competition law for anti-competitive practices without an 'effect on trade'. This study is not concerned with the enforcement of these national laws.
7 Not every disparity between EU and national law necessarily results in conflict. For instance, where an EU principle sets a minimum legal safeguard and a principle of national law provides further protection, then there might be a disparity but no conflict.
8 Case 6/64 Costa v ENEL [1964] ECR 585. See also Declaration 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2010] OJ C 83/335. Other words used to denote the priority or primacy of EU law over national law are: 'precedence' or 'supremacy'. This study uses the term priority, as it is felt that priority has a less hierarchical connotation.
The principle of priority guarantees the penetration of EU law in the national legal orders. On the basis of this principle, EU law has priority over national law. In *Costa v ENEL* the Court of Justice found that by creating the European Union (or rather its predecessor, the European Economic Community) the Member States have limited their sovereign rights and have created a body of law which binds both their nationals and themselves. At the same occasion the Court held that the terms and spirit of the Union make it impossible for the Member States to accord priority to national law. Meanwhile it has become clear that any principle of EU law has and retains priority over any rule or principle of national law. Pursuant to the principle of priority, NCAs and national courts therefore have to disregard any rule or principle of national law that conflicts with any principle of EU law. While there can be disagreement about the legal basis of the principle of priority, Member States agree on the existence of this principle.

Within the context of EU competition law, the priority of EU law over national law manifests itself in various ways. First, *EU competition law has priority over national law*. Accordingly, the prohibitions of Articles 101 and 102 TFEU cannot be overruled by national law. These prohibitions apply to all undertakings active in the EU and must be fully and uniformly applied in all Member States. Moreover, Member States may not adopt or maintain in force any measure that would deprive Articles 101 and 102 TFEU of their useful effect. Further, the application of national competition law parallel to EU competition law is allowed only insofar as the uniform application of the latter and the full effect of the implementing measures is not prejudiced. Finally, national institutions should have the power to set aside national law that might prevent Articles 101 and 102 TFEU from having full effect. Second, *the priority of EU law influences the terms and conditions of the decentralised enforcement of EU competition law*. Where the Member States enforce Articles 101 and 102 TFEU, the domestic enforcement powers are governed by EU principles. These principles function as a legal framework and govern the enforcement actions of the Member States.
Before starting with the analysis of the EU sanctioning principles, one further point needs to be clarified, i.e., the ‘identification process’. As was mentioned earlier, most of the EU sanctioning principles are not readily cognisable. The development of these principles is for a considerable part the achievement of the Court of Justice. In a process that can be referred to as ‘judicial harmonisation’ or, as in this study, ‘centralisation’, the Court has formulated specific sanctioning principles on the basis of more general sources of EU law. In this respect it should be noted that rulings of the Court of Justice extend beyond the narrow confines of the case at hand. While the opportunity for the Court to elaborate on the requirements for the decentralised enforcement of EU competition law has been limited so far, there does exist a vast body of case law on the legality of the Commission’s enforcement decisions and on the administration of EU law more generally. For two reasons, many of these cases and the principles developed therein are equally valid for the decentralised enforcement of EU competition law. First, to the extent that these principles derive from primary sources of EU law, there can be no strict distinction with regard to the application of these principles between the centralised and decentralised enforcement of Articles 101 and 102 TFEU, or between the enforcement of EU competition law and other EU law. Second, the procedures of the Commission in the context of Articles 101 and 102 TFEU are a benchmark for the procedures of the NCAs.

This benchmarking entails that the adequacy of national procedures for the enforcement of EU law may be evaluated against the EU’s internal legal system. This conclusion follows from the case Upjohn, where the question arose whether the limited scope of review for UK courts to revoke marketing authorisations for medical products was in conformity with EU law. The Court of Justice considered first that where an EU authority has to make complex assessments it enjoys a wide margin of discretion, the exercise of which is subject to limited judicial review. Consequently, Community law does not require the Member States to establish a procedure for judicial review (...) which involves a more extensive review than that carried out by the Court in similar cases.

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23 ibid para 34.
24 ibid para 35.
Similar reasoning stood on the basis of *i-21 Germany*, where the Court concluded that EU law does not, in principle, require national authorities to reopen decisions which have become final upon expiry of reasonable time-limits for legal remedies or by exhaustion of those remedies.\(^25\) The Court based this conclusion on its earlier *AssiDomän Kraft Products* judgment\(^26\), where the Commission was not required to reopen an earlier decision either. Both *Upjohn* and *i-21 Germany* strongly suggest that enforcement principles applicable to the procedures of the Commission are a benchmark for the procedures of the national authorities.\(^27\) This applies *a fortiori* to the enforcement of Articles 101 and 102 TFEU, where the close cooperation between the various authorities has resulted in highly integrated legal orders. In this respect, reference could be made to De Visser, who has concluded that:

> National authorities are no longer part of only the national administrative hierarchy, applying home-grown approaches. They have become agents in the enforcement of European law and part of a broader Community administration.\(^28\)

In sum, the terms and conditions under which the Commission executes its enforcement mandate with regard to Articles 101 and 102 TFEU are highly relevant for the Member States.\(^29\)

However, one should make a note of caution here. The wholesale transposition of the often highly specific rules and principles formulated in the context of Commission procedures to the level of the NCAs, whether by virtue of priority or through benchmarking, comes with a peril. These rules and principles will be a reflection of the overall enforcement regime of the Commission. Their transposition to the national legal orders means that these rules and principles are abstracted away from their original context and purpose and, subsequently, are then applied to a situation for which they have not been drawn up. This could disturb national checks and balances with regard to enforcement powers. For example, Commission standards for rights of defence could be inappropriate for national enforcement regimes with more severe sanctions. As rights of defence are generally a reflection of the severity

\[^{25}\text{Joined Cases C-392/04 and C-422/04 }i-21 \text{ Germany and Arcor} \text{ [2006] ECR I-8559, para 51.}\]

\[^{26}\text{Case C-310/97 P }AssiDomän \text{ Kraft Products} \text{ [1999] ECR I-5363.}\]

\[^{27}\text{Gerbrandy seems to hold a different opinion. She argues that Court rulings on direct actions against Commission decisions have no precedent-value by virtue of EU law. See A Gerbrandy, }Convergentie in het Mededingingsrecht: \text{De Invloed van het EG-Recht op Materiële Toepassing, Toegang, Bewijs en Toetsing bij de Nederlandse Mededingingsbestuursrechter, Bezuin in het Licht van Effectieve Rechtsbescherming} \text{(Boom Juridische uitgevers 2009) 450.}\]

\[^{28}\text{M de Visser, }Network-Based Governance in EC Law: \text{The Example of EC Competition and EC Communications Law} \text{(Hart Publishing 2009) 238. A similar point has earlier been made in Tridimas (n 21) 449.}\]

\[^{29}\text{While the terms and conditions under which the Commission executes its enforcement mandate with regard to Articles 101 and 102 TFEU are ‘highly relevant’ for the Member States, they do not necessarily ban domestic alternatives. For example, in Case T-38/02 }\text{Groupe Danone} \text{ [2005] ECR II-4407, paras 362-363, the General Court accepted that an EU definition of recidivism (‘a finding of infringement has been made in the past’) could exist alongside domestic definitions of recidivism (‘a fine has been imposed in the past’).}\]

of the available sanctions, both these elements of a sanctioning regime should preferably be applied in tandem. This transposition issue essentially applies to any rule or principle applicable to Commission procedures. While this does not detract from the above findings on the identification of EU sanctioning principles, it does warrant a certain flexibility in translating Commission standards for national purposes.

With the ‘centralisation effect’ and the ‘identification process’ having been clarified, the following paragraphs will provide a detailed analysis of each of the relevant sources of EU law. This analysis is meant to uncover the EU sanctioning principles and to establish the prevailing sanctioning autonomy of the Member States. The approach for each of these principles is the same. First, their content and meaning is clarified. Then, the centralisation effect of these principles is established.

4.3 CENTRALISATION EFFECTS OF THE ARTICLES 101 AND 102 TFEU

4.3.1 Introduction

Articles 101 and 102 TFEU contain the competition law prohibitions. By virtue of these provisions, anti-competitive behaviour on the European market is prohibited. However, more than just proscribing particular conduct, Articles 101 and 102 TFEU also determine who should ultimately bear responsibility for this conduct. The Court of Justice has read various ‘liability principles’ into the Articles 101 and 102 TFEU. These principles, in turn, have an impact on the sanctioning powers of the competition authorities.

The liability principles have been formulated mainly in the context of Commission procedures, but they extend to the enforcement actions of the Member States. As will be established below, all these principles are based directly on the text of Articles 101 and 102 TFEU, making a distinction between centralised and decentralised enforcement at best artificial and at worst in conflict with fundamental conceptions of EU law. The conditions for the application of Articles 101 and 102 TFEU are EU law concepts. Interpretation of these concepts is the sole task of the Court of Justice. Once the Court has rendered an interpretation of one of these conditions, this interpretation applies throughout the EU. In this respect, the Court has held in Eco Swiss that there can be no differences of interpretation between the various institutions that apply these provisions, be that the Commission, an

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30 Another question is which principles are actually based directly on the text of Articles 101 and 102 TFEU. Case C-8/08 T-Mobile Netherlands [2009] ECR I-4529 shows that the Court of Justice takes an ‘all-inclusive approach’ by even including in this category legal presumptions for proving infringements of Article 101 TFEU. This point has been criticised in MJ Frese, ‘Tightening the Grip On the Application of Article 81 EC Treaty; the European Court of Justice Guards its Province’ (2011) 37 Legal Issues of Economic Integration 87.

31 Articles 19 TEU, 263 TFEU and 267 TFEU.

NCA or a national court. More recently, this requirement has been reiterated in *T-Mobile Netherlands*.33

In *T-Mobile Netherlands*, the Court of Justice required the referring court to use a legal presumption in the application of Article 101 TFEU. The legal presumption itself was formulated several years earlier, in the context of Commission procedures.34 The Court extended the scope of application of this presumption of causality between concertation and practice – needed for establishing a ‘concerted practice’ in the sense of Article 101 TFEU – to the decentralised enforcement of Article 101 TFEU. To this effect it first concluded that this presumption is a matter of Treaty interpretation and that the nature of Article 101 TFEU demands that this interpretation is also binding on the Member States.35 It then held:

In applying Article 81 EC [now Article 101 TFEU], any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States.36

This conclusion, which logically extends to NCAs37, requires Member States to apply a presumption of causality between contact and market conduct in the application of Article 101 TFEU. More generally, *T-Mobile Netherlands* suggests that any rule or principle which the Court infers from Articles 101 and 102 TFEU is binding for the Member States. This point has been confirmed in later case law.38 Against this background it should be concluded that the principles for the attribution of liability in relation to infringements of Articles 101 and 102 TFEU are binding as well.39 Member States cannot disregard the liability principles without endangering the uniform application of Articles 101 and 102 TFEU. As a result, the sanctioning autonomy of the Member States is narrowed down. The following three subparagraphs will study the various liability principles.

### 4.3.2 Liability Principles deriving from the Concept of ‘Undertaking’

Articles 101 and 102 TFEU prohibit ‘undertakings’ from engaging in anti-competitive conduct. The Court of Justice has interpreted these prohibitions as applying solely to conduct engaged in by undertakings on their own initiative.40 In addition, the notion of

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34 Case C-49/92 P *Anic* [1999] ECR I-4125.
36 ibid para 50.
38 Joined Cases T-141, T-142, T-145 and T-146/07 *Otis* [2011] OJ C 269/44, para 77: ‘By virtue of that principle [the principle that penalties must be specific to the offender], which applies in any administrative procedure that may lead to the imposition of penalties under EU competition law, an undertaking may be penalised only for acts imputed to it individually’ (emphasis added).
39 Frese, ‘Tightening the Grip on the Application of Article 81 EC Treaty’ (n 30).
40 Anti-competitive behaviour attributable wholly to a Member State falls outside the scope of Articles 101 and 102 TFEU, see Case T-271/03 *Deutsche Telekom* [2008] ECR II-477, para 85; Case C-280/08 P *Deutsche Telekom* [2010] ECR I-9555, para 80ff.
undertaking has prompted the Court to adopt detailed principles on the attribution of liability. These principles have a direct influence on the conditions under which fines can be imposed. As yet, the Court has only had the chance to apply these principles in the context of Commission procedures. However, as the notion of undertaking needs to be applied uniformly throughout the EU, the liability principles that are part of this notion are capable of limiting the sanctioning autonomy of the Member States.

The principle of personal responsibility

An undertaking in the sense of Articles 101 and 102 TFEU is an entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.41 This entity may or may not have legal personality itself,42 and it may consist of several legal and/or natural persons.43 The mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies form an economic unit.44 Conversely, the possibility that within a group of companies various majorities are formed within each of the respective shareholders' meetings does not, in itself, exclude the possibility of a single economic unit.45 As long as there is a unitary organisation of personnel and tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to a restriction of competition or an abuse of dominance, it qualifies as an undertaking for the purposes of Articles 101 and 102 TFEU.46

Lacking the capacity to carry rights and obligations, these economic entities cannot bear responsibility for their own actions. Liability for infringements of Articles 101 and 102 TFEU should therefore be allocated to the legal or natural person that is ultimately in charge. The Court of Justice has allocated liability on the basis of the principle of personal responsibility.47 In Bolloré II, the General Court has concluded that this principle of personal responsibility is a part of EU competition law.48 Pursuant to this principle, it falls to the legal or natural person actually managing the undertaking when the infringement was committed to answer for that infringement.49 Where the infringement is committed by an economic entity consisting of several natural and/or legal persons but without a person

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48 Case T-372/10 Bolloré II (General Court, 27 June 2012), para 52.
bearing overall responsibility, the various natural and/or legal persons may be held liable jointly and severally.50 In Siemens AG Österreich, the General Court even found that the issue of joint and several liability is a legal effect which follows as a matter of law from Article 101 TFEU.51 It then continued:

where several persons may be held personally liable for the participation in an infringement of one and the same undertaking (...) they must be regarded as jointly and severally liable for that infringement (...).52

In the view of the General Court, the issue of joint and several liability therefore does not come at the discretion of the competition authority. It should be noted that this limitation of the authority’s discretion is in marked contrast with various other doctrines under the principle of personal responsibility (infra). This issue is currently pending before the Court of Justice.53

The Court of Justice has thus far granted the Commission considerable flexibility in applying the principle of personal responsibility. This flexibility follows most clearly from the doctrines of ‘parent liability’ and ‘economic continuity’. The Commission may stretch the principle of personal responsibility if the conditions for parent liability or economic continuity apply. This allows the Commission to impose higher fines.

Parent liability

In most cases, infringements of Articles 101 and 102 TFEU are committed by incorporated entities and liability can be attributed to a legal person, a company. This company may own the undertaking directly or indirectly through a shareholding.54 In the latter case, the shareholding may even be through an interposed company.55 Companies may be liable for the anti-competitive behaviour of an undertaking they indirectly own. This ‘parent liability’ does not require full ownership. In fact, even a 50 per cent shareholding may be sufficient to establish parent liability.56 Parent liability is based directly on the notion of undertaking. To this effect the Court of Justice concluded in Akzo Nobel:

58. (...) that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (...).

52 ibid para 150.
55 Case C-90/09 P General Química [2011] OJ C80/2, paras 84-89.
59. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking (...). Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC [now Article 101 TFEU] enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.57

The legal basis and scope of parent liability thus follow directly from the text of Articles 101 and 102 TFEU. The practical relevance of this ‘parent liability’ is that the parent company may have deeper pockets than its subsidiaries and is therefore able to pay a higher fine. The decision to go after the parent company instead of the subsidiary and to impose a higher fine falls within the discretion of the authority. 58 In other words, the doctrine of parent liability does not exonerate subsidiaries. It follows from Bolloré II that the decision to attribute liability to the parent or subsidiary can be based on considerations of effectiveness and dissuasiveness.59

In principle, the anti-competitive behaviour of an undertaking may be attributed to the parent company, ie the indirect owner, only where the latter exercises decisive influence over this behaviour.60 The mere possibility of exercising decisive influence is not enough; influence should actually have been exercised.61 In this respect, the doctrine of parent liability can be seen as a hallmark for the principle of personal responsibility. However, this influence may be ‘inferred’ from the economic and legal links between the parent company and its subsidiaries.62 Moreover, it follows from a consistent line of cases that a 100 per cent shareholding, whether direct or through an interposed company63, constitutes a ‘rebuttable’ presumption that the parent company has indeed exercised decisive influence.64 In any case, there is no need for the parent to be implicated or even to have been aware of the infringement in order to be held liable.65 In fact, the condition of influencing the subsidiary's conduct not even requires the parent's influence to relate to the activities which are directly linked to the infringement.66 Corporate reality is such that decisive shareholders only rarely will not

59 Case T-372/10 Bolloré II (General Court, 27 June 2012), paras 91-92.
influence their subsidiary’s general commercial conduct. In this respect, the doctrine of parent liability can be seen as a relaxation of the principle of personal responsibility.

**Economic continuity**

The doctrine of economic continuity constitutes a further relaxation of the principle of personal responsibility. In accordance with the economic continuity doctrine, liability may be attributed to a legal person other than the one that managed the undertaking at the time the infringement was committed. This may take place after a change in the legal form or name of the undertaking. Such changes do not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor, when, from an economic point of view, the two are identical.

This economic continuity doctrine may also apply to transfers of undertakings. This is the case when the effectiveness of EU competition law so requires. The effectiveness of EU competition law calls for the reliance on economic continuity either when the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed, the transferring legal person remains nothing but an empty shell, there exist clear structural links between the legal persons (e.g. intra-group transactions), or the acquiring undertaking has explicitly assumed liability. In all other circumstances, liability remains with the transferor.

The rationale underlying the economic continuity doctrine is twofold. First, a penalty imposed on an undertaking that continues to exist in law but has ceased economic activity is likely to have no deterring effect. Second, if no possibility were foreseen to impose a penalty on an entity other than the one which committed the infringement, undertakings

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67 The Court of Justice has suggested that if it can be demonstrated that contacts between subsidiary and parent were limited to the former’s financial results in the context of the group’s consolidated accounts this would rebut the presumption. Case C-90/09 P General Química [2011] OJ C80/2, para 108. On the other hand, the exchange of sales figures between companies within a group is indicative for the existence of an single economic unit, cf Case C-407/08 P Knauf Gips [2010] ECR I-6375, para 78.

68 Similarly, acquiring the business name of an entity that engaged in anti-competitive practices is not sufficient to constitute liability, cf Case T-386/06 Pegler [2011] OJ C 145/23.


75 Case C-280/06 Ente tabacchi italiani [2007] ECR I-10893, para 40.
could escape penalties simply by changing their identity through reststructurings, sales or other legal or organisational changes.76

Centralisation effects

The following conclusions can be drawn in relation to the sanctioning autonomy of the Member States. While ultimately a matter for future litigation, it is plausible that Member States should impute liability in accordance with the EU principle of personal responsibility and – for this purpose – should recognise the doctrines of parent liability and economic continuity. After all, the principle and its progeny follow directly from the Articles 101 and 102 TFEU. However, just as the Commission, also the NCAs are in principle allowed to refrain from seeking parent liability or apply the doctrine of economic continuity in individual cases. This means that the EU doctrines of parent liability and economic continuity only bind the national courts before which appeals can be brought against administrative decisions. If an NCA decides to apply the EU doctrines, and does so correctly, the national court cannot invalidate this approach on the basis of national law.

4.3.3 Liability Principles deriving from the Concept of ‘Agreement’

The ‘agreement’ or ‘concerted practice’ is the means through which undertakings should restrict competition in order to fall within the scope of Article 101 TFEU.77 These concepts translate the objective of EU competition law to have economic operators determine their commercial policy independently.78 In accordance with this objective the Court of Justice has interpreted these concepts widely, so as to cover any form of cooperation and coordination.79 Patterns of conduct by several undertakings may be a manifestation of a single and complex infringement, or a single and continuous infringement (‘SCI’).80 Even if one or several elements of such a pattern qualify as infringements in their own right, these elements may still qualify jointly as a single infringement. Better yet, even if none of the different elements, considered separately, constitutes an agreement or concerted practice prohibited by Article 101(1) TFEU, those elements, considered together, may qualify as such.81 Complementarity of elements seems to have become the decisive criterion.82

The SCI-concept has various implications for the liability of undertakings. The characterisation of ‘various instances of conduct’ as constituting one and the same

76 ibid para 41.
77 Associations of undertakings can fall within the scope of Article 101 TFEU through the adoption of anti-competitive decisions.
infringement may directly affect the penalty that can be imposed. The existence of an SCI prevents the competition authorities from prosecuting ‘various instances of conduct’ separately and also prevents the imposition of several distinct fines. At the same time, this characterisation effectively extends the statute of limitation of the SCI’s earliest manifestations. The limitation period for the ‘single infringement’ starts running with the last instance of conduct.

The SCI-concept also affects the penalty more indirectly. Participation in an SCI makes the undertaking responsible for the entire, but single, infringement committed during its participation. An undertaking that takes part in an SCI through conduct of its own which itself qualifies as an agreement or concerted practice contrary to Article 101 TFEU and which was intended to help bring about the infringement as a whole is also responsible, for the duration of its participation in the infringement, for conduct put into effect by other undertakings in the context of the same infringement. This is the case if the undertaking was aware of the offending conduct of the other participants or could reasonably have foreseen it and was prepared to take the risk. Even passive forms of participation (e.g. tacit approval) are capable of rendering an undertaking liable in the context of a single infringement, as the effect of this complicity is thought to encourage the continuation of the infringement and to compromise its discovery. However, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.

Centralisation effects

The following conclusions can be drawn in relation to the sanctioning autonomy of the Member States. As the SCI-concept derives from the text of Article 101 TFEU, Member States need to recognise this concept in all its manifestations. This is all the more pertinent as the SCI-concept not only facilitates the penalisation of cartels, but also offers legal

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83 Joined Cases T-71, T-74, T-87 and T-91/03 Tokai Carbon (Speciality Graphite) [2005] ECR II-10, para 118.
84 Joined Cases T-101/05 and T-110/05 BASF and UCB [2007] ECR II-4949, para 158.
89 The SCI-concept also applies to infringements of Article 102 TFEU, cf Case T-321/05 AstraZeneca [2010] ECR II-2805, para 892. However, since infringements of Article 102 TFEU are typically committed by a single undertaking, the implications of this concept for the undertaking’s liability are more straight-forward.
safeguards to the undertakings involved.\textsuperscript{90} It can further be concluded that while NCAs may decide not to include certain patterns of conduct within their SCI-finding, they cannot prosecute complementary anti-competitive instances separately under Article 101 TFEU. Also national courts are bound by the SCI-concept. If an NCA decides to include certain patterns of conduct within its SCI-finding, and does do correctly, the national court cannot invalidate this approach on the basis of national law. Conversely, national courts should annul administrative decisions punishing manifestations of an SCI that could have been included in an earlier decision.

4.3.4 Liability Principles deriving from the Concept of ‘Restriction of Competition’

An infringement of Article 101 TFEU demands a ‘restriction of competition’. In \textit{AC-Treuhand}, the applicant claimed that perpetrating an infringement of Article 101 TFEU implies that an undertaking restricts its own commercial autonomy vis-à-vis its competitors. For the applicant, a consultancy firm, this was not the case; it ‘only’ administrated the anti-competitive agreements between producers of organic peroxides. The General Court gave this claim short shrift. It considered that the ‘contextual notion of restriction of competition’ does not rule out that an undertaking may participate in the implementation of such a restriction even if it does not restrict its own freedom of action on the market on which it is primarily active.\textsuperscript{91} More precisely:

it is only by making all ‘undertakings’ within the meaning of Article 81(1) EC [now Article 101(1) TFEU] subject to liability that that useful effect can be fully guaranteed, since that makes it possible to penalise and to prevent the creation of new forms of collusion with the assistance of undertakings which are not active on the markets concerned by the restriction of competition, with the aim of circumventing the prohibition laid down in Article 81(1) EC.\textsuperscript{92}

It follows that the prohibition of Article 101 TFEU is addressed to all undertakings that contribute to the infringement, irrespective of their role in the infringement. Article 101 TFEU, therefore, renders all participating undertakings liable as co-perpetrators. However, the Court has insisted that the limited importance of the undertakings’ role in the infringement should influence the severity of the penalty.\textsuperscript{93}

\begin{flushleft}
\textsuperscript{90} Practice shows that undertakings generally dispute a finding of an SCI, which suggests that these findings are normally experienced as an extension of liability.
\textsuperscript{91} Case T-99/04 \textit{AC-Treuhand} [2008] ECR II-1501, para 127. See also Case T-29/05 \textit{Deltafina} [2010] ECR II-4077, paras 47-49.
\textsuperscript{92} ibid.
\textsuperscript{93} Case T-29/05 \textit{Deltafina} [2010] ECR II-4077, para 61. See also Case T-99/04 \textit{AC-Treuhand} [2008] ECR II-1501, para 155
\end{flushleft}
Centralisation effects

While this is ultimately a matter for the Court of Justice to decide, the legal basis of this ‘co-perpetrator doctrine’ suggests that Member States cannot exclude accessory forms of participation from the scope of Article 101 TFEU. The fact that national law indeed provides for a single form of liability for all participants is useful, but strictly speaking entirely irrelevant. This does of course not mean that NCAs have to prosecute every co-perpetrator for its involvement in the infringement. NCAs could decide to proceed only against some of the perpetrators. Where an NCA decides to apply the ‘co-perpetrator doctrine’, it should not forget to account for the degree of participation in the severity of the penalty. The co-perpetrator doctrine narrows down the sanctioning autonomy of the Member States most strongly in the appeal stage of the enforcement procedure. The national court cannot invalidate administrative decisions rendered under this EU doctrine on the basis of national law.

4.4 CENTRALISATION EFFECTS OF THE FREE MOVEMENT RIGHTS

The decentralised enforcement of Articles 101 and 102 TFEU is also subject to EU principles of more general nature. The prohibitions laid down in Articles 101 and 102 TFEU do not operate in isolation. They form part of the EU’s more comprehensive internal market policy and operate alongside other policy areas, notably EU citizenship. Maintaining the internal market and forging EU citizenship are core objectives of the EU. These areas of EU law are closely related and create free movement rights for economic operators and EU citizens. Accordingly, discrimination on grounds of nationality and unjustified restrictions of the free movement of goods, persons, services and capital are prohibited. On many occasions, all outside the realm of EU competition law, the Court of Justice has found national sanctions contrary to the free movement provisions, either for being discriminatory or excessive. This paragraph establishes that Member States should also take account of the free movement rights in imposing sanctions for infringements of Articles 101 and 102 TFEU and explains what this requirement precisely entails.

Discriminatory sanctions for infringements of EU competition law are prohibited. This follows already from Article 18 TFEU, which provides:

97 Article 3 TEU.
Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

In the enforcement of Articles 101 and 102 TFEU, Member States may not discriminate on grounds of nationality. Accordingly, Member States may not impose heavier or more severe sanctions for infringements of Articles 101 and 102 TFEU on non-nationals, whether natural or legal persons, than on their own nationals. The same applies to the Commission, who may not impose discriminatory sanctions either.

Article 18 TFEU can be relied upon only to the extent the right to a non-discriminatory treatment is not already protected by ‘any special provisions’. For the NCAs there could even be a more pertinent legal basis for the prohibition of discrimination in the enforcement of Articles 101 and 102 TFEU. Above and beyond Article 18 TFEU, national sanctioning powers are affected by the EU free movement rights, deriving from EU citizenship and the internal market. Pursuant to Article 20(2)(a) TFEU, EU citizens shall have the right to move and reside freely within the territory of the Member States. Pursuant to Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. In particular situations, these free movement liberties could be threatened by competition law sanctions and demand priority.

The free movement rights and the competition law prohibitions jointly protect the internal market from being recompartmentalised. In this respect, there is no conflict between these two policy areas. However, national sanctions for infringements of EU competition law could limit EU citizens and undertakings from making use of their free movement rights. For example, someone who is locked away in prison for having committed an infringement of Article 101 or 102 TFEU obviously is unable to make use of its free movement rights. Contrary to some of its Advocates General, the Court of Justice has not been willing to exclude national criminal law or other means of enforcement from the scope of the free movement rights. This means that any conflict between the free movement rights and national sanctioning regimes should be reconciled within the specific legal framework of the free movement rights.

The effect of the free movement rights on national sanctions can be demonstrated with the cases *Sjöberg and Gerdin* and *Calfa*, both dealing with the free movement

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99 Protocol (No 27) on the Internal Market and Competition (n 96). See also Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36.
of services. Sjöberg and Gerdin were prosecuted under Swedish law for the promotion of gambling organised outside Sweden. In the proceedings before the national court, the question arose whether Swedish law was contrary to the free movement of services, for subjecting the promotion of gambling organised outside Sweden to more severe treatment than the promotion of gambling organised in Sweden. The Court of Justice effectively concluded that Swedish law was contrary to the free movement of services by holding:

if the persons carrying out the promotion of gambling organised in Sweden without a licence incur penalties which are less strict than those imposed on the persons who advertise gambling organised in other Member States, then it must be stated that those arrangements are discriminatory and that the [domestic legal provisions] are contrary to Article 49 EC [now Article 56 TFEU] and, consequently, unenforceable against the persons being prosecuted in the main actions.104

In Calfa, the Court of Justice had to consider the compatibility with EU law of the Greek expulsion order imposed on the Italian Ms Calfa for using soft drugs during her holiday on Crete. Within this context the Court concluded:

Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law (…).105

The Court found the expulsion for life to constitute a clear obstacle to the freedom to provide services: Ms Calfa could no longer receive touristic services in Greece.106 The cases Sjöberg and Gerdin and Calfa provide clear examples of how free movement rights may affect the Member States’ sanctioning powers.

The free movement rights prohibit any restrictions, either as a result of (indirect) discrimination on nationality, or resulting from other impediments.107 Such restrictions may be the result of (lacking108) administrative or judicial measures for law enforcement.109 On numerous occasions the Court of Justice has considered that national sanctions were liable

106 ibid para 18.
107 For the wide scope of application of the four economic freedoms, reference could be made to Articles 30, 34 and 35 TFEU and Case 8/74 Dassonville [1974] ECR 837 (for goods); Articles 45 and 49 TFEU and Case C-415/93 Bosman [1995] ECR I-4921 (for persons); Article 56 TFEU and Case C-76/90 Säger [1991] ECR I-4221 (for services); Article 63 TFEU and Case C-222/97 Trummer and Mayer [1999] ECR I-1661 (for capital).
to deter individuals from making use of their free movement rights, whether in relation to goods\textsuperscript{110}, workers\textsuperscript{111}, establishment\textsuperscript{112}, services\textsuperscript{113} or capital\textsuperscript{114}. Often this took place in the context of sanctions for breaches of formalities\textsuperscript{115}, sometimes the administrative rules in question were even specifically meant to enhance free movement. In those cases, expulsion orders, detention, but also significant pecuniary sanctions were considered too severe a sanction. However, there have also been various cases in which the Court considered the restrictive effect of national sanctions for breaches of substantive rules: breaching professional codes\textsuperscript{116}, travelling without a ticket\textsuperscript{117}, drug abuse\textsuperscript{118}, illegal waste dumping\textsuperscript{119}, theft\textsuperscript{120}, murder\textsuperscript{121} and anti-competitive behaviour by an undertaking with market power.\textsuperscript{122}

In\textit{Milk Marque}\textsuperscript{123}, the Court of Justice had to assess competition law sanctions from the perspective of the free movement rights. This case dealt with the compatibility of a reparatory sanction imposed within the context of UK competition law with the free movement of goods. The UK authorities prohibited a dairy cooperative with market power from entering into contracts with undertakings (including undertakings established in other Member States) for the processing on its behalf of milk produced by its members. The Court concluded that this measure did not have equivalent effects as quantitative export restrictions, as prohibited by Article 35 TFEU. To this effect it held:

118. (…) that provision [Article 35 TFEU] concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question (…)

119. However, that is not the case with regard to measures (…), which come within national competition policy, are designed to limit anti-competitive practices engaged in by just one agricultural cooperative and apply indistinctly to processing contracts

\textsuperscript{113} Case C-348/96 Calfa [1999] ECR I-11.
\textsuperscript{116} Case C-81/09 Idrima Tipou [2010] ECR I-10161.
\textsuperscript{117} Case 298/84 Iorio [1986] ECR 247.
\textsuperscript{118} Case C-348/96 Calfa [1999] ECR I-11.
\textsuperscript{119} Case C-379/92 Peralta [1994] ECR I-3453.
\textsuperscript{120} Case 175/78 Saunders [1979] ECR 1129.
\textsuperscript{121} Case C-299/95 Kremzow [1997] ECR I-2629.
\textsuperscript{122} Case C-137/00 Milk Marque [2003] ECR I-7975.
\textsuperscript{123} Case C-137/00 Milk Marque [2003] ECR I-7975.
Significantly, the Court concluded that the measures in *Milk Marque* could not lead to a restriction in patterns of export as they were limited in scope (addressed to a single undertaking) and did not discriminate. These points suggest that national sanctions for competition law infringements are not excluded from the free movement regime altogether. Moreover, with respect to the second point – the measures did not discriminate – it should be noted that *Milk Marque* concerned potential export restrictions. In accordance with established case law on export restrictions, the Court applied a ‘discrimination test’: only discriminatory export limitations are prohibited under the free movement regime. Yet, in relation to import restrictions and restrictions to the free movement of persons, services and capital a wider ‘restriction test’ is applicable. Any restriction is prohibited, not just discriminatory restrictions (*supra*). Under such a test even non-discriminatory trade-restrictive sanctions could be prohibited. Therefore, *Milk Marque* cannot be read as an exoneration of competition law sanctions from the free movement regime.

**Centralisation effects**

For the purpose of the decentralised enforcement of Articles 101 and 102 TFEU it can be concluded, first, that discriminatory sanctions are prohibited. Further, it can be argued that excessive sanctions for commercial practices that barely have anti-competitive effects and sanctions that directly limit trade flows both risk being found contrary to the EU free movement regime. The latter conclusion is subject to one important *caveat*, however. The free movement limitations on national sanctioning regimes, which are quite subtle already, will be even more delicate when the decentralised enforcement of EU competition law is concerned. First, proving that enforcement measures actually hinder cross-border trade will be a challenging task. Second, free movement not necessarily trumps competition. In this respect it should be noted that both the free movement rights and the competition law prohibitions are primary sources of EU law, forming part of the EU’s internal market policy and having a fundamental status within the EU. Indeed, the Court of Justice has referred...
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to Articles 101 and 102 TFEU as fundamental and essential to the internal market.128 Greater internal market considerations could thus legitimise sanctions with chilling side-effects on cross-border trade. All the more so as Member States act as ‘agents’ of EU competition law. It should further be noted that restrictions of the free movement rights can be justified on various public interests grounds. These include restrictions necessary for reasons of ‘public policy’ and ‘public security’.129 It can be concluded from Van den Bergh Foods that the interest of EU competition law is a public interest worthy of protection.130 Even if national sanctions for infringements of EU competition law were found to restrict inter-state trade, they may therefore still be justifiable, provided they are proportionate131 and in accordance with fundamental rights.132 In sum, while the free movement rights narrow down the sanctioning autonomy of the Member States this is unlikely to have a significant influence on the domestic regimes. The type of sanctions that are ultimately prohibited under the free movement rights will generally not be contemplated by the Member States anyway.

4.5 CENTRALISATION EFFECTS OF THE FUNDAMENTAL RIGHTS

4.5.1 Introduction
The EU is based on the rule of law and therefore upholds certain fundamental rights.133 These rights qualify as primary sources of EU law and have priority over any other rule of


129 Articles 36, 45, 52, 62 and 65 TFEU and Article 27 of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77 (as corrected subsequently).


131 Were such a justification to be necessary, the trade-restrictive sanction would be subject to a proportionality test. Disproportionate sanctions for a legitimate cause may still be contrary to the free movement rights. It follows from Louloudakis, first, that the severity of sanctions cannot simply be raised to excessive levels and, second, that a sanction might be considered disproportionate either when multiple sanctions are imposed, or the amount of a pecuniary sanction constitutes a multiple of the illegal gains. Case C-262/99 Louloudakis [2001] ECR I-5547, para 67.

132 Case C-260/89 ERT [1991] ECR I-2925; Case C-368/95 Familiapress [1997] ECR I-3689. In the words of Tridimas: ‘The effect of ERT and Familiapress is that compatibility with human rights is part of the enquiry which the Court performs in order to assess whether a national measure which interferes with the fundamental freedoms is permitted under Community law.’ Tridimas (n 21) 326.

Accordingly, in Schmidberger the Court of Justice gave priority to fundamental rights over Treaty provisions, by holding:

since both the [EU] and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by [EU] law (...).

This means that also the enforcement of Articles 101 and 102 TFEU can only take place within the boundaries of the EU fundamental rights. Regulation 1/2003 even makes specific reference to this obligation by stating in recital 37 of its preamble that:

This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

It follows from the priority of EU law over national law that the decentralised enforcement of EU competition law should take place in accordance with these fundamental rights. Many of the EU fundamental rights will apply on Member State level anyway. Most, if not all, EU fundamental rights originally derive from the constitutional traditions of the Member States. However, the EU nature of these rights strengthens their effect in the context of the decentralised enforcement of EU competition law – and makes them enforceable against the failing Member State by the Commission and other Member States before the Court of Justice and by private parties before the national courts. Moreover, EU fundamental rights may protect interests that have not been recognised under national law and may therefore supplement national legal safeguards. It is in this capacity that the EU fundamental rights are most relevant for this study. By protecting interests beyond those in the national legal system, the EU fundamental rights effectively centralise parts of the enforcement process. As was indicated in Chapter 3, this could have various economic implications for the enforcement system.

Limitation of the centralisation effects

The question could be raised as to whether NCAs may (or should!) content with EU fundamental rights in disregard of more generous national rights. The answer to this question is crucial for the sanctioning autonomy of the Member States. If NCAs would

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135 Case C-112/00 Schmidberger [2003] ECR I-5659, para 74.
137 Articles 258 and 259 TFEU.
have to apply the more sober EU legal safeguards, undertakings would be deprived of
rights granted under national law. If NCAs could apply these national legal safeguards,
fundamental rights protection in proceedings under Articles 101 and 102 TFEU could
differ per authority. It is submitted herewith that this latter point should in principle not
be given any weight. The level of fundamental rights protection has significance only in
combination with sanctioning powers. Without the uniformity of sanctioning powers,
disparities in fundamental rights protection will not have any direct implications for the
level playing field within the EU and will therefore not be to anyone’s prejudice. In similar
vein, it should be noted that by applying fundamental rights more generously, national
jurisdictions do not affect EU rights either. The legal interest affected by the application
of generous national safeguards – the effectiveness of EU policy – is more abstract and
uncertain. While considerations of effectiveness could incidentally reduce legal safeguards
(*infra* subparagraph 4.5.4), EU law seems ultimately more concerned with the rule of law
than with the uniformity and effectiveness of EU competition law.139 Therefore, EU law does
not require NCAs to content with EU fundamental rights in disregard of more generous
national rights.140 This is confirmed by Article 53 EU Charter, which provides that

> Nothing in this Charter shall be interpreted as restricting or adversely affecting
> human rights and fundamental freedoms as recognised (…) by the Member States’
> constitutions.

Therefore, EU fundamental rights only provide a floor below which neither the Commission
nor the NCAs may operate.

**Sources of fundamental rights**

EU fundamental rights derive from various sources of law. The most direct legal source for
fundamental rights in the EU legal order is the EU Charter of Fundamental Rights (‘EU
Charter’).141 Since the Treaty of Lisbon entered into force in 2009, the EU Charter has been
given the status of primary source of EU law.142 In accordance with its preamble, the EU
Charter ‘reaffirms’ in particular the rights as they result from the constitutional traditions of

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139 Case C-17/10 *Toshiba Corporation* [2012] OJ C98/3-4, Opinion of AG Kokott, para 54: ‘However
desirable a uniform and efficient interpretation and application of competition law within the European
Union may be, it must not come at the price of infringing principles based on the rule of law.’ See also
*Gerbrandy* (n 27) 84.

140 *Cf* *Tridimas* (n 21) 321, who refers to Weiler and concludes that i) implementing legislation should
be struck down where it violates the EU standard for the protection of fundamental rights even if it
does not violate the said standard set by national law and ii) if the implementing measure clears the
human rights protection standard set by EU law but fails to clear the higher standard set by national
law, the national court is entitled to strike down the measure. In the latter case, the higher standard of
protection provided by national law must, however, not prejudice the effective enforcement of EU law.
See also *Wils*, ‘EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees’ (n 2) 209.


142 Article 6(1) TEU.
the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’). As a result, Charter rights that correspond with rights laid down in the ECHR or that derive from the constitutional traditions of the Member States should be interpreted accordingly. Charter rights for which provision is made in the TEU or TFEU are exercised under the conditions and within the limits defined by those Treaties. Apart from the EU-internal fundamental rights protection guaranteed by the EU Charter, Article 6(2) TEU requires the EU to seek accession to the ECHR. This will bring the EU and its dealings under the fundamental rights supervision of the European Court of Human Rights (‘ECtHR’). Prior to the coming into force of the Treaty of Lisbon, fundamental rights were protected as general principles of EU law. The Court of Justice has recognised the existence and application of general principles of EU law on the basis of what is currently Article 19 TEU. In accordance with this provision the Court is required to ensure that in the interpretation and application of the Treaties the law is observed. This task allows the Court to draw inspiration outside the Treaty texts, notably from national legal systems. Rules common to the Member States and essential in their legal systems as genuine general principles of law qualify as general principles of EU law. Accordingly, the ECHR and other international treaties to which the Member States are signatories should be respected by virtue of EU law. The constitutional traditions common to the Member States, still to date, are protected as general principles of EU law. With all these legal sources for fundamental rights protection in the EU, there can be little concern over their legal basis when these rights are relied upon in the context of EU competition law.

143 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 005.
144 Article 52(3) and (4) EU Charter. Cf Case C-279/09 DEB [2010] ECR I-13849.
145 Article 52(2) EU Charter.
149 Article 6(3) TEU.
150 In this respect it should be noted that the applicability of the EU Charter is qualified. By virtue of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2010] O J C 83/313, the scope of application of the EU Charter is limited in relation to Poland and the United Kingdom. In accordance with the Presidency Conclusions of the European Council of 29/30 October 2009, the Czech Republic will be included in Protocol (No 30) at the time of the next Accession Treaty, see <http://register.consilium.europa.eu/pdf/ en/09/st15/st15265-re01.en09.pdf> accessed 1 July 2012. Most relevant for the decentralised enforcement of EU competition law is Article 1(1) of this Protocol, pursuant to which: ‘The Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’ It seems therefore that the enforcement actions of the Polish and UK’s (and the Czech) competition
Of the multitude of fundamental rights applicable to the decentralised enforcement of Articles 101 and 102 TFEU, several have particular relevance for national sanctioning powers, ie the stage of the enforcement process where the authority decides on the consequences of a (putative and/or prima facie) infringement. It appears uncontroversial that the enforcement of EU competition law should take place in respect of human dignity and all human rights related thereto and that no one may be deprived of his or her liberty by arbitrary arrest or detention. Yet, the impact of other fundamental rights on national sanctioning powers may be less self-evident. To clarify the Member States’ sanctioning autonomy, the following fundamental rights would require further analysis:

- the right to property (subparagraph 4.5.2)
- the right to economic engagement (subparagraph 4.5.3)
- the principle of legal certainty (subparagraph 4.5.4)
- the right to a reasoned decision (subparagraph 4.5.5)
- the principle of good administration (subparagraph 4.5.6)
- the protection against undue delays (subparagraph 4.5.7)
- the principle of retroactivity in mitius (subparagraph 4.5.8)
- the principle of ne bis in idem (subparagraph 4.5.9)
- the principle of nulla poena sine culpa (subparagraph 4.5.10)
- the principle of equal treatment (subparagraph 4.5.11)
- the proportionality between infringement and sanction

These rights derive from the EU Charter, the ECHR and/or the general principles of EU law. Each of these fundamental rights has the ability to limit the sanctioning autonomy of the Member States with regard to Articles 101 and 102 TFEU and thus to centralise parts of the enforcement regime. Because of its close links to the principles deriving from Article 4(3) TEU, the principle of proportionality between infringement and sanction is dealt with in subparagraph 4.6.5.

authorities cannot be assessed against the rights and freedoms laid down in the EU Charter directly. While it is yet unclear how this provision will be applied in practice, it is suggested that also these Member States cannot detract themselves from those Charter rights that have been recognised in the Court’s case law as general principles of EU law.

151 No civilized woman or man would ever contemplate the introduction of capital punishment or any other form of corporal punishment irrevocably leading to torture or inhuman or degrading treatment or punishment. Clearly, these types of sanctions could under no circumstance be used to address infringements of EU competition law as this would be contrary to Articles 1 to 5 EU Charter, Article 3 ECHR, Article 1 Protocol No 6 to the ECHR (CETS No 114) and Article 1 Protocol No 13 to the ECHR (CETS No 187). The Court of Justice has recognized that the protection of human dignity may influence the Member States’ implementation obligations, Case 29/69 Stauder [1969] ECR 419.

152 Article 6 EU Charter and Article 5 ECHR.
4.5.2 The Right to Property

The fundamental right to property protects ownership and exploitation of assets.\[^{153}\] This right is not absolute in nature; it has a social function and may be restricted to achieve other public interests recognised under EU law.\[^{154}\] Any such restrictions should correspond to the objectives of this interest and may not constitute a disproportionate and intolerable interference, impairing the very substance of this right. To this effect the General Court held in *Van den Bergh Foods*:

> that the application of Article 85 and 86 of the Treaty [now Article 101 and 102 TFEU] constitutes one of the aspects of public interest in the Community. (…) Consequently, pursuant to those articles, restrictions may be applied on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.\[^{155}\]

The right to property is mainly relevant for the use of reparatory sanctions, e.g. compulsory divestitures, compulsory licences or compulsory supplies. In *SGL Carbon* the Court of Justice held that the right to property is not applicable in relation to fines.\[^{156}\] Remarkably, in the more recent *Schindler* case the General Court did entertain the applicant’s argument that the fine was contrary to the right to property, but dismissed it on substantive grounds.\[^{157}\] Irrespective of whether the approach in *Schindler* will be followed by the Court of Justice, this case demonstrates that, in any case, a fine will not easily run counter to this principle.

In practice, the property rights relied upon against reparatory sanctions mainly concern intellectual property rights. Under exceptional circumstances, the refusal by a dominant undertaking to licence intellectual property rights to another undertaking may constitute an abuse prohibited by Article 102 TFEU.\[^{158}\] This behaviour could attract a sanction ordering the dominant undertaking to license its intellectual property right.

It follows from *Microsoft* that in these ‘refusal to license’ cases, the assessment of the reparatory sanction in the light of the right to property is rendered virtually obsolete by the preceding question whether the refusal to licence indeed constitutes an infringement.\[^{159}\] The legality of the restriction of the undertaking’s property rights is then reduced to

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\[^{153}\] Article 17 EU Charter, Article 1 Protocol No 1 to the ECHR (CETS No 009) and Case 44/79 *Hauer* [1979] ECR 3727; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411; Case C-491/01 *RAT* [2002] ECR I-11453.


\[^{156}\] Case C-308/04 P *SGL Carbon* [2006] ECR I-5977, para 108.


\[^{159}\] Case T-201/04 *Microsoft* [2007] ECR II-3601, para 691.
the consistency between the established infringement and the sanction. However, in recognition of the undertaking’s property rights, the licensor may demand payment of ‘reasonable royalties’ by the licencee. The question what this entails has been the subject-matter of Microsoft II. The General Court was not in a position to formulate general rules on reasonable royalties, but various criteria can be inferred from this case. First, these royalties can be more than ‘token remuneration’. Second, they may be calculated as a proportion of the revenue made with the licence. Third, the fact that some parties are willing to pay a certain amount for the royalties in question does not make them reasonable. Fourth, the remuneration rates may not reflect the strategic value of the property right, but should be limited to its intrinsic value (ie the innovative character).

Centralisation effects

It follows from the foregoing that the EU fundamental right to property only has a modest impact on the sanctioning autonomy of the Member States. Its effects are largely subsumed by the conditions for establishing the infringement and the EU principle of proportionality (infra subparagraph 4.6.5). It should be noted, however, that the paucity of legal safeguards against incursions on the right to property in the context of EU competition law has been lamented in the legal literature. The prevailing safeguard of reasonable royalties would be insufficient from a human rights perspective. Especially the unclear rules on the royalties payable and the unsatisfying judicial protection have been considered problematic in this respect. While Microsoft II might have clarified some issues, there remains considerable discretion on the part of the Commission to determine whether a certain rate is reasonable or not.

4.5.3 The Right to Economic Engagement

The fundamental right to economic engagement consists of the right to engage in work and pursue a professional occupation and the freedom to conduct a business. These rights

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160 ibid paras 246-266.
162 Case T-167/08 Microsoft II (General Court, 27 June 2012).
163 ibid para 160.
164 ibid para 120.
165 ibid para 119.
166 ibid paras 141-143.
167 This conclusion is in line with Tridimas’ conclusions on the application of the right to property more generally. See Tridimas (n 21) 315-316
169 ibid 250.
170 Cf Case T-167/08 Microsoft II (General Court, 27 June 2012), para 95: ‘Microsoft is, on the other hand, right to maintain that several rates may be covered by the notion of ‘reasonable remuneration rates’. Nevertheless, that finding confirms the merits of the Commission’s argument that it is not for it to choose a particular rate of remuneration from among what are reasonable rates for the purpose of the 2004 decision and impose that rate upon Microsoft.’
originates in the Court's case law\footnote{Case 4/73 Nold [1974] ECR 491, para 14; Case 44/79 Hauer [1979] ECR 3727, para 32; Case 240/83 ADBHU [1985] ECR 531; Case C-84/95 Bosphorus [1996] ECR I-3953, para 21.} and meanwhile have found their way in Articles 15 and 16 of the EU Charter. The right to economic engagement is closely related to the right to property, more specifically the right to use one's property, and these rights are often relied upon together.\footnote{Case 44/79 Hauer [1979] ECR 3727, para 16; Case C-84/95 Bosphorus [1996] ECR I-3953, para 19.} Similar to the right to property, also the right to economic engagement is not absolute in nature.\footnote{Case 4/73 Nold [1974] ECR 491, para 14; Case 5/88 Wachauf [1989] ECR 2609, para 18. See also Joined Cases C-20/00 and C-64/00 Booker Aquaculture [2003] ECR I-7411, para 68, stating that 'restrictions may be imposed on the exercise of [fundamental] rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of a disproportion or intolerable interference impairing the very substance of those rights'.} One could come up with various types of sanctions for infringements of Articles 101 and 102 TFEU that may affect the right to economic engagement. Disqualification orders for company officers or orders excluding undertakings from public tenders or licenses may come to mind. Tridimas has suggested that extensive bans on taking up employment in state and private sectors could indeed be contrary to the EU right to economic engagement.\footnote{Tridimas (n 21) 315-316.} Sanctions of this type immediately stress the relevance of the right to economic engagement, alongside the protection offered by the right to property.

**Centralisation effects**

The right to economic engagement seems capable of limiting the sanctioning autonomy of the Member States. However, at this stage it is hard to predict how seriously national sanctions will be tested. Article 52 EU Charter is equivocal on this point. On the one hand, it seems very protective by providing that any limitation on the exercise of the rights and freedoms recognised by the EU Charter may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.\footnote{Article 52(1) EU Charter.} On the other hand, the Charter accepts that the right to economic engagement can only be exercised under the conditions and within the limits defined by the EU Treaties.\footnote{Article 52(2) EU Charter.} This suggests that the right to economic engagement is subject to all the limitations that have been accepted in the context of the free movement rights, including limitations needed for the effective enforcement of EU competition law (\textit{supra} paragraph 4.4). For the purpose of the decentralised enforcement of Articles 101 and 102 TFEU, the protection offered by the right to economic engagement would then add little to the EU free movement rights. The implications of the right to economic engagement will have to be clarified through future litigation. It can be concluded that the right to economic engagement, at this stage, imposes no clear limitations onto the Member States with regard to the type of sanctions.
4.5.4 The Principle of Legal Certainty

The EU principle of legal certainty derives from various sources of law and limits Member States’ sanctioning autonomy in a number of ways.\(^{177}\) It requires Member States to adopt limitation periods for the exercise of their sanctioning powers and to respect the principle of legality and the principle of non-retroactivity of penalties. All three will be discussed in turn.

**Limitation periods**

The principle of legal certainty requires Member States not to leave undertakings in uncertainty about their legal position indefinitely. This requirement follows from EU case law on Commission procedures.\(^{178}\) There is no reason to expect any other interpretation when it comes to national procedures under Articles 101 and 102 TFEU. As a result, Member States cannot exercise their sanctioning powers excessively late. In fact, limitation periods will have to apply to any decision under Articles 101 and 102 TFEU, irrespective of whether a sanction is imposed.\(^{179}\) In this respect, the principle of legal certainty supplements any statutory limitation periods, for instance limitation periods that are limited to the imposition of penalties, such as Article 25 Regulation 1/2003. In principle, the duration of the limitation periods, as well as other detailed rules, falls within the autonomy of the Member States.\(^{180}\) Once the Member States have provided for a limitation period, the effects of this EU principle are exhausted.\(^{181}\) Only if a Member State fails to provide for a limitation period, national courts need to censure enforcement actions that have been initiated excessively late.\(^{182}\) Closely related to the requirement not to leave undertakings in uncertainty about their legal position indefinitely is the protection against undue delays. The latter principle derives from the fundamental right of defence and has slightly different implications. This principle will be discussed in subparagraph 4.5.7.

**Principle of legality**

The principle of legal certainty further requires sanctions to rest on a clear and unambiguous legal basis.\(^{183}\) This requirement, which is also known as the principle of legality, forms the second limitation of the Member States’ sanctioning autonomy. The terms under which sanctions may be imposed for infringements of Articles 101 and 102 TFEU should allow

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\(^{180}\) Cf Joined Cases T-22/02 and T-23/02 Sumitomo [2005] ECR II-4065, paras 83 and 87.

\(^{181}\) Cf Case T-372/10 Bolloré II (General Court, 27 June 2012), paras 114-117.


natural and legal persons to make informed choices with regard to their behaviour.\textsuperscript{184} These terms need not to be so precise that the consequences of an infringement of Article 101 or 102 TFEU are foreseeable with absolute certainty. What suffices is that the provision is accessible and the sanction foreseeable.\textsuperscript{185} This accessibility and foreseeability may follow from a statutory provision, case law, policy documents and case practice.\textsuperscript{186}

In accordance with the maxim nullum crimen, nulla poena sine lege the principle of legality applies, first and foremost, to penalties.\textsuperscript{187} However, the obligation of legality in principle also applies outside the field of punitive sanctions. This can be concluded from Penycoed\textsuperscript{188}, where the Court of Justice applied the principle of legality to the imposition of a levy on the production of milk outside the allocated quota. In accordance with the applicable EU legislation, the purchaser of milk was liable for the payment of the levy. The question was raised whether the competent national authorities could impose a levy on the producer of milk, when the levy could not be collected from the purchaser. The Court considered that without legal basis defining the conditions and scope of the authority's power, the purchaser could not be substituted for the producer.\textsuperscript{189} While this did not discharge the Member State in question from its obligation to recover the levies\textsuperscript{190}, it demonstrates the applicability of the principle of legality with regard to reparatory sanctions. This approach to the principle of legality finds support in the case law of the ECtHR. In the case Beyeler v Italy, the ECtHR decided that also reparatory sanctions may be subject to a separate obligation of legality, namely then when they encroach on the right to property.\textsuperscript{191}

Legality v effectiveness

Tension could arise between the principle of legality and considerations of effective enforcement, another EU principle (\textit{infra} subparagraph 4.6.3). The absence of (adequate) sanctions on national level could be detrimental to the effective enforcement of EU law. It follows from EU case law that in these situations of conflict either effectiveness considerations or legality requirements prevail, dependent on the nature of the sanction. With regard to reparatory sanctions, there are clear precedents that effectiveness considerations should be given priority and that a Member State could (and should!) remedy an infringement even

\begin{itemize}
\item[186] ibid para 96.
\item[188] Case C-230/01 Penycoed [2004] ECR I-937.
\item[189] ibid para 32.
\item[190] ibid para 34ff.
\item[191] Cf Beyeler v Italy App no 33202/96 (ECtHR, 5 January 2000) paras 108-109: ‘that an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful’ (para 108) and ‘the principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable’ (para 109).
\end{itemize}
in the absence of an appropriate legal basis.\textsuperscript{192} Applied to the context of EU competition law, this means that NCAs should be deemed competent to terminate an infringement, using any adequate reparatory sanction, even in the absence of a specific domestic legal basis. Punitive sanctions are treated differently, however. Effectiveness considerations alone cannot function as legal basis for NCAs to impose an adequate \textit{penalty}.\textsuperscript{193} Even if this would mean that a severe infringement of Article 101 or 102 TFEU would go un(der)penalised, this would not overrule the requirement of legality.

Notwithstanding the above conclusion, case law does suggest that Member States may allow their NCAs a certain margin of discretion with regard to the severity of the penalty in order to ensure effective enforcement. This can be concluded from \textit{Jungbunzlauer}, where the General Court held:

> to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted. A fine subject to sufficiently circumscribed variation between the minimum and the maximum amounts which may be imposed for a given offence may therefore render the penalty more effective both from the viewpoint of its application and its deterrent effect.\textsuperscript{194}

The Court then concluded that, in relation to fines, a margin of discretion ranging from 1000 EUR to 10 per cent of the undertaking’s worldwide turnover constitutes a sufficient legal basis for adopting fining decisions.\textsuperscript{195} What seems important, for the purpose of legality, is that there is a statutory maximum penalty.

\textit{Principle of non-retroactivity of penalties}

The principle of legality includes the principle of non-retroactivity of penalties. In accordance with the latter principle, the terms and conditions of penalties for infringements of Articles 101 and 102 TFEU should correspond with those laid down at the time when the infringement was committed.\textsuperscript{196} Moreover, natural and legal persons cannot be punished more severely than they were allowed to expect at the time of the offence.\textsuperscript{197} The Court of Justice has created some uncertainty as to scope of this principle by suggesting that it only applies to \textit{criminal} penalties.\textsuperscript{198} However, the subsequent application of this principle to fines

\begin{thebibliography}{99}
\bibitem{193} Case 117/83 \textit{Könecke} [1984] ECR 3291, para 16; Case C-60/02 \textit{Rolex} [2004] ECR I-651.
\bibitem{194} Case T-43/02 \textit{Jungbunzlauer} [2006] ECR II-3435, para 84.
\bibitem{195} ibid paras 83-92.
\bibitem{196} Joined Cases T-117/07 and T-121/07 \textit{Areva and Alstom} [2011] OJ C 113/10, para 133.
\bibitem{197} Case 331/88 \textit{FEDESA} [1990] ECR I-4023, para 42.
\bibitem{198} Case C-60/02 \textit{Rolex} [2004] ECR I-651, paras 60-63.
\end{thebibliography}
imposed by the Commission under EU competition law suggests that this principle has a bearing on punitive sanctions more generally and competition law penalties in particular.\footnote{Case C-397/03 P Archer Daniels Midland [2006] ECR I-4429; Joined Cases T-117/07 and T-121/07 Areva and Alstom [2011] OJ C 113/10, paras 131-132.}

The Court of Justice views the principle of non-retroactivity through the prism of effectiveness and essentially reduces its safeguards to the requirement of statutory certainty.\footnote{Case C-397/03 P Archer Daniels Midland [2006] ECR I-4429, paras 20-24.} As long as the legal basis and conditions for the penalty are not altered, a change in administrative policy or practice will not easily be considered contrary to this principle.\footnote{Cf Case T-138/07 Schindler [2011] OJ C 269/44, paras 117-130.}

For example, the competition authorities may change their fining guidelines without ever having to apply different guidelines to a single continuous infringement. Undertakings cannot legitimately expect sanctioning policy or practice to remain constant over time.\footnote{Joined Cases C-189, C-202, C-205 to C-208 and C-213/02 P Dansk Rørindustri [2005] ECR I-5425, paras 191-193.}

However, the EU principle of non-retroactivity does demand that infringements are penalised in accordance with the fining guidelines applicable at the time the infringement has come to an end. This could require the authorities to penalise an infringement of Article 101 or 102 TFEU in accordance with fining guidelines that have become outdated in the meantime.

**Centralisation effects**

The EU principle of legal certainty has various implications for the decentralised enforcement of Articles 101 and 102 TFEU. First, Member States should draw up statutes of limitation, as they cannot delay the exercise of their sanctioning powers indefinitely. Further, Member States should ensure that sanctions for infringements of Articles 101 and 102 TFEU rest on a clear and unambiguous legal basis so that the consequences are foreseeable. This requirement applies to punitive sanctions and in principle also to reparatory sanctions that limit the undertakings’ right to property. However, effectiveness considerations dictate that NCAs should be deemed competent to terminate any infringement, irrespective of its statutory powers. Finally, Member States may accord their NCAs considerable discretion as to the level of a punitive sanction, as long as the maximum penalty is defined by law. All these requirements ‘limit’ the sanctioning autonomy of the Member States. These examples show what this limitation could entail: Member States may neither allow their NCAs to breach the EU principle of legal certainty, nor curtail their NCAs in effectively enforcing Articles 101 and 102 TFEU. It should be noted that the latter ‘limitation’ derives from the EU principle of effectiveness (infra subparagraph 4.6.3) rather than the EU principle of legal certainty.

**4.5.5 The Right to a Reasoned Decision**

The right to a reasoned decision is the flipside of the authority’s duty to state reasons. Under this duty there is a requirement to explain the grounds for deciding on a particular sanction for an infringement of EU law. This duty, which is separate from stating the reasons for
finding an infringement, follows from the general principle of effective judicial protection. The duty to state reasons for a particular sanction is an essential procedural requirement, which must also be distinguished from the question whether the reasoning is well founded. The fact that the reasoning might be erroneous cannot call into question the sufficiency of the reasoning for a decision. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. Breach of the right to a reasoned decision could affect the legality of the decision, but may also be remedied in other ways (eg a reduction of the penalty).

The specific requirements under the duty to state reasons can be grasped from case law on Article 296 TFEU, the Statute of the Court of Justice and the Rules of Procedure of the General Court. The statement of reasons must be appropriate to the sanction at issue and must disclose in a clear and unequivocal manner the reasoning followed by the institution which adopted that sanction in such a way as to enable the person concerned to ascertain the reasons for it and to enable the competent judicial body to exercise its power of review. This duty covers in principle every aspect of the sanctioning decision, eg the culpability of the offender, the decision to impose a penalty, the determination of the fine, the method for calculating a ‘deterrence multiplier’, the reduction of the fine for reasons of cooperation. Yet, in terms of actual explanation, the duty to state reasons for a particular sanction is not extremely demanding. In Deutsche Telekom, the Court of Justice considered that the duty to state reasons in relation to the intentional or negligent nature of the infringement was fulfilled by the reference to Article 15(2) of Regulation No 17 (now Article 23(2) Regulation 1/2003), which referred to this condition, and by the detailed grounds for considering the appellant’s pricing practices abusive and for considering him responsible for the infringement. In Siemens, the General Court reviewed the sufficiency of reasons for the application of a certain deterrence multiplier. It accepted that the Commission did not indicate the method adopted in arriving at the precise level of the multiplier.

206 In accordance with Case T-148/89 Tréfilunion [1995] ECR II-1063, para 42, the right to a reasoned decisions forms part of the EU principle of good administration. Breach of the principle of good administration could affect the legality of the administrative decision, but may also be remedied with a reduction of the penalty, cf Tridimas (n 21) 412-413.
208 ibid para 130.
210 ibid para 288.
The Court considered that the duty to state reasons was satisfied as the Commission had set out the factors which enabled it to measure the gravity and duration of the infringement and is not required to set out a more detailed account of the figures relating to the method of calculating the fine.\footnote{ibid para 311.} It continued that:

> it is desirable, but not a requirement of the obligation to state reasons, that the Commission indicate the figures which influenced the exercise of its discretion when setting the fines, especially in regard to the desired deterrent effect (…).\footnote{ibid para 312.}

The above cases suggest that the scope of the EU duty to state reasons for a particular sanction is limited to mentioning the elements that have been taken into account and does not extend to the actual assessment of these elements in the process of deliberation.

**Centralisation effects**

Member States’ duty under EU law to state reasons for administrative decisions has traditionally focused on the protection of (fundamental) EU rights.\footnote{Case 222/86 Heylens [1987] ECR 4097; Case C-467/01 Eribrand [2003] ECR I-6471; Case C-239/05 BVBA Management, Training en Consultancy [2007] ECR I-1455.} The principle of effective judicial protection, from which this duty derives, has been formulated by the Court of Justice as a safeguard for Treaty rights. In the light of Article 47 EU Charter, requiring an effective remedy in relation to violations of ‘rights and freedoms guaranteed by the law of the Union’, there can be no doubt that the principle of effective judicial protection also applies to the decentralised enforcement of EU competition law. The rights and freedoms at stake are the rights granted under Articles 101 and 102 TFEU, notably Article 101(3) TFEU, and the fundamental rights and freedoms protected by the EU Charter and the general principles of EU law, eg the right to property and the principle of legality. As a result, the sanctioning powers of the Member States are subject to an EU duty to state reasons. This duty is confirmed by the fact that the Commission is under an identical duty\footnote{Cf Case C-272/09 P KME [2012] OJ C 32/4, paras 91-101.} and that these Commission procedures, in turn, are a benchmark for national procedures. This EU duty does not go beyond indicating the elements that have led to a particular sanction. Nonetheless, Member States remain in principle free to decide that sanctions for infringements of Articles 101 and 102 TFEU require a more elaborate explanation, for instance by requiring their NCA to explain carefully the relative weight of each element in arriving at a certain sanction.

4.5.6 The Principle of Good Administration

The principle of good (or sound) administration has been recognised under EU law and is applicable to competition law procedures.\footnote{Case T-113/07 Toshiba Corp (Gas Insulated Switchgear) [2011] OJ C 252/30, para 75.} It is closely related to the principle of legal
certainty and the rights of defence and it applies to any aspect of the administration of EU competition law. The principle of good administration manifests itself in various ways and includes, amongst others, the right to a hearing, the right to access one’s file, the right to hear reasons for the actions of the administration, the right of compensation for miscarriages in the administration of EU law, and the principle of res judicata. The principle of good administration also influences the exercise of sanctioning powers. In Tréfilunion the General Court held that it would be contrary to the principle of good administration if an undertaking that has been fined for an infringement of Articles 101 and 102 TFEU would have to bring court proceedings in order to determine in detail the method for calculating the fine. Reportedly, the Commission adopted its first fining guidelines as a direct result of this judgment. More generally, it could be argued that the principle of good administration requires authorities to clarify how they will exercise (and have exercised) their discretionary sanctioning powers. The principle of good administration also influences the exercise of sanctioning powers in order respects. In BASF, the General Court applied this principle to the Commission’s leniency procedure and concluded that

If an undertaking makes contact with the Commission with a view to cooperating to an extent which may be rewarded under the Leniency Notice and a meeting is organised in that context between the institution and that undertaking, the minutes of such a meeting, recording the essential aspects of the assertions made at that meeting, must be drawn up or, at the very least, a sound recording must be made, pursuant to the principle of sound administration, if the undertaking in question so requests at the latest at the beginning of the meeting.

It follows that the handling of leniency applications is subject to the principle of good administration. Furthermore, the principle of good administration also has something to say about the treatment of recidivism. It can be concluded from Lafarge that the Commission may increase the amount of the fine for reasons of recidivism even if the decision finding the first infringement is still subject to review, provided however that the recidivism increment is undone if the first decision is annulled. It seems that the principle of good administration is relied upon ever more often and in relation to a broad range of issues, albeit often unsuccessful. Future litigation will have to clarify the exact implication

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220 Cf Tridimas (n 21) 411.
224 Case T-343/08 Arkema France [2011] OJ C 186/20 (where the principle of good administration was relied upon in relation to the increase in the amount of the fine for reasons of recidivism); Case T-309/11 Elf Aquitaine [2011] OJ C 186/19 (where the principle of good administration was relied upon in relation to the assessment of parent liability, the treatment of indicia in establishing the infringement, and the suspension of the decision pending the review of another decision); Case T-167/08 Arkema France [2011] OJ C 186/20 (where the principle of good administration was relied upon in relation to the increase in the amount of the fine for reasons of recidivism); Case T-167/08
of this EU principle. Breach of the right to good administration could affect the legality of the administrative decision. It may also lead to a variety of remedies, one of which is the reduction of the penalty.226

Centralisation effects

The principle of good administration has been codified in Article 41 EU Charter. This suggests that this principle, meanwhile, has a fundamental status in the EU legal order. However, it can be debated whether the scope of this principle extends to the administration of EU law by national institutions. Article 41 EU Charter relates solely to institutions, bodies, offices and agencies of the Union and so does the majority of cases. In fact, very recently in Cicala the Court adopted a literal interpretation of this provision and concluded that Article 41 EU Charter is not addressed to the Member States.227 It should be noted that this ruling was made in a somewhat unusual context, in which the Court had to determine whether it was competent to render a preliminary ruling. It should further be noted that there have also been instances where the Court of Justice has interpreted EU legislation in accordance with the principle of good administration.228 This could suggest that EU law includes a general principle of good administration that extends beyond the narrow confines of Article 41 EU Charter. It is submitted herewith that there are indeed good reasons to extend the action radius of this principle to the decentralised administration of EU law. In accordance with Upjohn229 and i-21 Germany230, rules and principles applicable to Commission procedures function as a benchmark for national procedures. Considering its fundamental status, this should apply a fortiori to the EU principle of good administration. A procedural safeguard that is so fundamental for the EU’s internal legal order as to warrant its inclusion in the EU Charter should not be dependent on the level of administration. Although this is obviously a matter for the Court to decide, it is argued that the Member States should be considered bound by the EU principle of good administration in the enforcement of Articles 101 and 102 TFEU.231
4.5.7 The Protection Against Undue Delays

It was already concluded in subparagraph 4.5.4 that Member States cannot delay the exercise of their sanctioning powers indefinitely. As a consequence, Member States should provide for a limitation period, beyond which decisions can no longer be adopted.²³² Closely related to this requirement is the protection against undue delays. Even within the boundaries of reasonable limitation periods, undue delays in enforcement proceedings should be avoided. This principle focuses on periods of inactivity during the various stages of the enforcement procedure separately, rather than at the duration of the entire procedure.²³³

The protection against undue delays in administrative procedures constitutes a general principle of EU law.²³⁴ This principle originally derives from the fundamental right of defence and has for an ultimate consequence that a decision establishing an infringement (and imposing sanctions) can no longer be adopted. This is the case if the delay prevents the undertaking from defending itself adequately against the objections of the competition authorities.²³⁵ Yet, the protection against undue delays is also capable of reducing the penalty. In various cases, the Court of Justice has exercised its powers of review to reduce fines imposed by the Commission for reasons of undue delay.²³⁶ This concerned cases where there were long periods of inactivity on the part of the Commission but where rights of defence had not actually been breached. In these cases, the Court compensated the undertakings for the extended period of uncertainty. Initially, this resulted in modest reductions of EUR 50,000 and 100,000.²³⁷ More recently, the General Court has become less patient with the Commission and reduced Heineken NV’s EUR 220 million fine for its participation in the Dutch Beer cartel with as much as 5 per cent.²³⁸

The issue of undue delays caused by periods of inactivity on the part of the Commission needs to be distinguished from unreasonably long proceedings. In Bolloré II, the General Court concluded that a breach of reasonable periods does not affect the amount of the fine, as Regulation 1/2003 has provided a ‘réglementation complète’.²³⁹ It should be noted that the long duration of the proceedings leading to the decision in Bolloré II was not caused by periods of inactivity on the part of the Commission.

²³² See text at n 179.
²³³ Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied [2006] ECR I-8725, para 38; Case T-372/10 Bolloré II (General Court, 27 June 2012), paras 115-116.
²³⁵ ibid paras 42-43.
²³⁹ Case T-372/10 Bolloré II (General Court, 27 June 2012), paras 115-116.
Centralisation effects
It is difficult to determine how exactly this protection against undue delays needs to be implemented on national level. It would in any case not be warranted to conclude from current EU case law that every finding of undue delay should automatically lead to a 5 per cent reduction of the penalty. However, Member States cannot ignore the fact that the Court has taken a firm stance against delays caused by the Commission. The Court is no longer willing to accept that periods of inactivity on the part of the administrative authority come at the expense of the undertakings. A symbolic compensation will no longer do. National courts will have to follow suit and make sure that addressees of sanctioning decisions adopted under Article 101 or 102 TFEU are compensated for any undue delays. This development will limit the sanctioning autonomy of the Member States, in that it provides an additional ground for review and terminates situations of unlimited delay.

4.5.8 The Principle of Retroactivity In Mitius
Penalty powers should be used retroactively if this would result in a more lenient penalty. Retroactive application of the more lenient penalty (or retroactivity in mitius) is a general principle of EU law. It is the opposite of the principle of non-retroactivity of penalties (supra subparagraph 4.5.4). The latter derives from the principle of legal certainty. The principle of retroactivity in mitius derives from considerations of equity and proportionality. While individuals cannot be punished more severely than they were allowed to expect at the time the act was committed, they should benefit from penalty statutes that have been mitigated subsequent to their act. What seems decisive for this principle is that the newly introduced penalty reflects a revised assessment as to what reaction is commensurate with the gravity of the infringement. This suggests that the scope of this principle extends to administrative guidelines for the exercise of penalty powers.

A revised assessment as to the appropriate penalty could of course mean that EU law is enforced less effectively than it used to be. It follows from Berlusconi that in these cases the principle of retroactivity in mitius has priority over considerations of effective enforcement. Berlusconi dealt with the implementation of the First Company Law Directive. In accordance with this Directive, Italian law provided for penalties for failure to respect corporate accounting rules. Domestic investigations had established an infringement of these accounting rules and the Italian government subsequently passed a bill, lowering the penalties for such infringements. Within this context, the Court of Justice had to give a preliminary ruling on the relation between effective enforcement and the principle of retroactivity in mitius. The Court gave priority to the latter. However, rather than weighing

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these principles against each other, the Court came to its conclusion on the ground that Member States may not rely on a Directive to aggravate the criminal liability of individuals. The Court, therefore, simply disregarded the requirement to provide for effective penalties laid down in the Directive. Nonetheless, this case does permit the conclusion that the principle of retroactivity in mitius has priority over considerations of effective enforcement. Any other conclusion would lead to the paradoxical situation that the general principle of effectiveness laid down in Article 4(3) TEU would be more demanding than the specific requirement of effective enforcement laid down in a Directive.244

Centralisation effects
As the principle of retroactivity in mitius is a general principle of EU law, it governs the decentralised enforcement of EU competition law.245 This means that the introduction of more lenient penalties for infringements of Articles 101 and 102 TFEU or the adoption of more lenient administrative guidelines for the exercise of penalty powers need to be applied retroactively. NCAs and national courts should apply this principle irrespective of the consequences for the effectiveness of EU competition policy.

4.5.9 The Principle of Ne Bis In Idem
The EU principle of ne bis in idem precludes any person from being found guilty or proceedings from being brought against it a second time on grounds of conduct in respect of which he or she has been penalised or acquitted by a previous final decision.246 Ne bis in idem is a general principle of EU law that derives from the constitutional traditions of the Member States, as inspired by the ECHR, and which has been codified in Article 50 EU Charter.247 This principle rests on two pillars: legal certainty and equity.248 The prohibition to commence a second proceeding does not require that the first proceeding has culminated in a judicial decision. In fact, the principle not even requires the involvement of a court or tribunal.249 However, application of this principle presupposes that a finding has already been made on the question whether or not an offence has been committed.250 The termination of proceedings for entirely procedural reasons, therefore, does not preclude the opening of proceedings a second time.251

244 Cf Tridimas (n 21) 264-265.
246 Case C-17/10 Toshiba Corporation [2012] OJ C98/3-4, para 94.
250 Joined Cases C-238, C-244, C-245, C-247, C-250 to C-252 and C-254/99 P LVM [2002] ECR I-8375, para 60.
The prohibition to commence a second proceeding has for a consequence that double punishment is prohibited as well. Indeed, the prohibition of double punishment should be seen as a mere corollary of the prohibition to commence a second proceeding. Only by appreciating this subtle difference is one able to explain why the principle of \textit{ne bis in idem} does not preclude authorities from taking into account recidivism in determining an appropriate penalty.

In accordance with consistent EU case law in the field of anti-competitive practices, the principle of \textit{ne bis in idem} is subject to the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected. The principle of \textit{ne bis in idem} has special relevance for the system of decentralised enforcement of EU competition law. While the Court of Justice has not yet ruled specifically on this issue, the principle of \textit{ne bis in idem} would seem to apply to parallel or consecutive enforcement procedures under Articles 101 and 102 TFEU by different competition authorities. Whereas Regulation 1/2003 leaves open the possibility of parallel and/or consecutive enforcement proceedings by the Commission and NCAs, the hierarchical superior legal principle of \textit{ne bis in idem} may under conditions prevent these authorities from opening a second proceeding. This already follows implicitly from \textit{Jungbunzlauer}, where the General Court held:

The Community case-law has (...) held that an undertaking may be made defendant in two parallel sets of proceedings concerning the same infringement and, thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction, to the extent that the two sets of proceedings pursue different ends and that the legal rules infringed are not the same (...).
Subject to the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected, NCAs may not initiate proceedings under Articles 101 and 102 TFEU, let alone impose sanctions, for presumed infringements already decided on either by themselves, by the Commission or by another NCA.

Identity of the facts
The principle of *ne bis in idem* is subject to the condition of ‘identity of the facts’. It is submitted herewith that the principle of *ne bis in idem* should have consequences for the prosecution of infringements that are part of a pattern of conduct and qualify as an SCI (*supra* subparagraph 4.3.3). After all, if the existence of an SCI prevents a competition authority from prosecuting ‘various instances of conduct’ separately and from imposing several distinct fines, why would it suddenly be allowed for two or more competition authorities to prosecute and penalise various manifestations of an SCI? If the principle of *ne bis in idem* and the SCI-concept have to be taken seriously then one cannot allow anti-competitive conduct that forms part of a pattern of conduct to be penalised in separate procedures. This limitation should also apply to parallel or consecutive enforcement proceedings that do not have any geographical overlap.258 To make matters more concrete: in a market-sharing arrangement covering two Member States, the responsible NCAs should not be allowed to each prosecute both undertakings for anti-competitive conduct on their respective home-markets. In order to have every aspect of such an infringement penalised, either a single authority would have to assume jurisdiction over the entire infringement259, or each NCA would have to focus on one of the undertakings. However, while the principle of *ne bis in idem* is taken seriously, this cannot be said for the SCI-concept. In her recent opinion in *Toshiba Corporation*, AG Kokott concluded, first, that the principle of *ne bis in idem* covers cross-border infringements, to then find it perfectly acceptable for various authorities to prosecute and punish various manifestations of an SCI.260 The Court of Justice sided with its Advocate General on this matter.261 As *Toshiba Corporation* concerned the application of national competition law (for the period prior to Czech accession to the EU) subsequent to

258 Cf Wils, ‘The Principle of Ne Bis in Idem in EC Antitrust Enforcement’ (n 252) 146; Brammer (n 256) 378-381. See on this issue also Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003 [2009] COM 206final, para 223, reporting a rare instance of parallel actions by the German and Belgian authorities: ‘The Belgian authority which imposed the second fine notably contemplated the issue of “ne bis in idem”. It considered inter alia that it was able to impose a fine in regard of the effects of the cartel in the Belgian territory and based on the turnover in Belgium insofar as the first fine had been imposed by the German authority in view of the effects in the German territory only. The case might prima facie have presented the opportunity for the Community Courts (pursuant to an Article 234 EC reference [now Article 267 TFEU]) to clarify questions relating to the principle of ne bis in idem and in particular the definition of ‘idem.’ However, neither of the decisions was appealed.’

259 It should be reminded that Regulation 1/2003 does not delimit the geographical scope of the sanctioning powers of the NCAs.

260 Case C-17/10 *Toshiba Corporation* [2012] OJ C98/3-4, Opinion of AG Kokott, paras 100 and 131.

261 Case C-17/10 *Toshiba Corporation* [2012] OJ C98/3-4, paras 98-103.
EU competition law, it is currently still unclear how the principle of *ne bis in idem* should be applied in relation to consecutive proceedings against a single and continuous infringement of Article 101 TFEU.

*Unity of the offender*

In applying the condition of ‘unity of the offender’, the General Court has focused on the persons that are ultimately liable for the infringement.262 The principle of *ne bis in idem* precludes penalising more than once, for the same infringement of [EU] competition law, the same conduct of the undertaking on the market through the persons which may be held personally liable for it (...).263

It is therefore not contrary to the principle of *ne bis in idem* to hold various persons, whether natural or legal, jointly and severally liable for the conduct of a single undertaking.264 Similarly, this principle does not preclude competition authorities from penalising separate (associations of) undertakings owned by the same (legal) person or sharing the same members either.265 It logically follows that the principle of *ne bis in idem* is not opposed to the penalisation of natural persons for an infringement for which the responsible legal person has already been penalised, or vice versa. It seems immaterial whether or not the legal person and natural person are penalised by a single authority or by separate authorities.266 Accordingly, three businessmen could be sentenced to imprisonment and disqualified as directors in the United Kingdom for their role in the Marine Hose Cartel, while the companies involved had already been fined by the Commission.267 However, what seems not allowed is for the same natural or legal person to be punished twice or more under Article 101 or 102 TFEU, for instance in subsequent administrative and criminal proceedings.

*Unity of the legal interest protected*

The ‘legal interest-condition’ of the *ne bis in idem* principle has been the object of growing criticism.268 So far, this condition has been mainly relevant with regard to the parallel application of EU competition law and domestic or foreign competition law. In a recent opinion in Toshiba Corporation, AG Kokott has unsuccessfully invited the Court of Justice to change its case law and take account only of the material acts, thus abandoning the condition of ‘unity of the legal interest protected’.269 The Court of Justice maintains that EU

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262 Joined Cases T-217/03 and T-245/03 FNCBV [2006] ECR II-4987, para 344.
264 Ibid.
266 Cf Brammer (n 256) 384; Van Bockel (n 252) 104, 219-221.
268 Wils, ‘The Principle of Ne Bis in Idem in EC Antitrust Enforcement’ (n 252) 143.
competition law does not protect the same legal interests as the competition laws of the Member States and third countries. Articles 101 and 102 TFEU require the anti-competitive behaviour to be ‘capable of affecting trade between Member States’. These provisions thus intend to safeguard competition within the EU market. National competition law would not take account of this dimension.\(^{270}\) The actions by third country competition authorities would aim at the protection of competition within their territorial jurisdiction, on the basis of specific objectives and substantive rules, and through legal measures that may have a variety of legal consequences.\(^{271}\) It is questionable whether this distinction according to the legal interest protected is still in conformity with the ECHR. The ECtHR seems to have abandoned this condition.\(^{272}\) In any case, this distinction is not in conformity with the case law of the Court of Justice on the principle of *ne bis in idem* in the Convention implementing the Schengen Agreement.\(^{273}\)

In any case, the EU principle of natural justice requires a reduction of the penalty for persons caught by EU competition law which have already been confronted with an earlier penalty under national competition law for identical facts.\(^{274}\) This form of mitigation has been justified by the close interdependence between the internal market and the markets of the Member States and by the (erstwhile applicable) special system for the division of jurisdiction between the EU and its Member States.\(^{275}\) It is submitted herewith that also Member States are subject to the EU principle of natural justice, meaning that they need to mitigate the penalty for breach of national competition law if the person in question has already been punished under EU competition law.\(^{276}\) This requirement is not only relevant in

\(^{270}\) Case 14/68 Wilhelm [1969] ECR 1, para 3.


\(^{272}\) Zolotukhin v Russia App no 14939/03 (ECtHR, 10 February 2009) paras 82-84: ‘the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same’ (para 82) and ‘The Court’s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings’ (para 84).


\(^{275}\) Joined Cases T-236, 239, 244, 246, 251, 252/01 Tokai Carbon (Graphite Electrodes) [2004] ECR II-1181, paras 132 and 141; Case T-322/01 Roquette Frères [2006] ECR II-3137, para 287. This suggests that the EU principle of natural justice has no effect where enforcement procedures under Articles 101 and 102 TFEU have been preceded by enforcement procedures in third countries. This is indeed confirmed by the case law, see Case 7/72 Boehringer Mannheim [1972] ECR 1281, para 3; Case C-289/04 P Showa Denko [2006] ECR I-5859, para 60; Case C-308/04 P SGL Carbon [2006] ECR I-5977, para 36; Case T-322/01 Roquette Frères [2006] ECR II-3137, paras 284-292.

\(^{276}\) Cf Case 14/68 Wilhelm [1969] ECR 1, para 11. See also De Moor-Van Vught, *Maten en Gewichten* (n 2) 108.
relation to the application of substantive competition law (domestic equivalents to Articles 101 and 102 TFEU), but also in relation to procedural competition law (e.g., law meant to bolster the effectiveness of competition rules, such as a criminal offence provision).

Centralisation effects

The EU principle of *ne bis in idem* is capable of limiting the sanctioning autonomy of the Member States with regard to infringements of Articles 101 and 102 TFEU. This principle does not so much centralise the type and nature of sanctions, but may exclude sanctions altogether. In fact, the principle of *ne bis in idem* could prohibit the NCAs from initiating enforcement actions in the first place. In this respect, all domestic sanctioning regimes are subject to the same EU limitation and will necessarily converge to a shared minimum standard. The EU principle of *ne bis in idem* prohibits NCAs from commencing proceedings under Articles 101 and 102 TFEU against any person already penalised or acquitted for certain material acts by a previous decision under Articles 101 and 102 TFEU. It is irrelevant which Network authority has taken this earlier decision. The EU principle of *ne bis in idem* does not seem to prohibit a situation in which various authorities start parallel or consecutive actions against distinct manifestations of an SCI. Similarly, the EU principle of *ne bis in idem* does not prohibit NCAs from commencing proceedings under Articles 101 and 102 TFEU against persons already penalised or acquitted for certain material acts by a previous decision under national competition law either, or vice versa. However, in these cases the EU principle of natural justice does demand that the second penalty is reduced.

4.5.10 The Principle of Nulla Poena Sine Culpa

Under the principle of *nulla poena sine culpa* there can be no punishment without fault. Punishment is just and beneficial to society only if the offence was committed intentionally or negligently. Penalties are meant to punish the offender and to deter future offences rather than to restore a previous situation. For the latter objective, fault would be an inappropriate requirement, which explains why reparatory sanctions are not subject to any such requirement.

The scope of application of the principle of *nulla poena sine culpa* is currently still unclear. What is certain is that this principle does not apply outside the field of penalties. However, the Court of Justice has created some doubts as to whether every type of penalty is subject to this principle. In *Estel, Lucchini and Alfer*, the Court effectively applied the principle of *nulla poena sine culpa* to non-criminal penalties, notably fines. However, in *Maizena* and more recently in *KCH*, application of this principle was reserved for criminal sanctions alone. The latter cases dealt with punitive sanctions that were coupled to aid schemes voluntarily entered into. The Court rejected the application of the principle of

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277 Article 7 ECHR and Case C-210/00 *KCH* [2002] ECR I-6453.
nulla poena sine culpa to these sanctions. To give a consistent narrative for the above cases, one should conclude that this principle does not apply to punitive sanctions forming part of a legal regime voluntarily accepted. 281

In any case, Regulation 1/2003 recognises the principle of nulla poena sine culpa by making Commission fines subject to intent or negligence. 282 The alternative requirement of intent or negligence can be fulfilled already when the undertaking played a subsidiary, accessory or passive role283 and where the undertaking cannot have been unaware of the anti-competitive nature of its conduct.284 Whether or not it is aware that this conduct is contrary to Article 101 or 102 TFEU is irrelevant. For the purpose of imposing fines, the Court of Justice considers negligent infringements of EU competition law equally serious as intentional infringements. 285 Yet, the degree of fault may affect the severity of the penalty in other ways. In Degussa, the General Court concluded that the principle of nulla poena sine culpa requires the Commission, in fixing the amount of the fine, to determine the scale of and responsibility for the infringement on the basis of facts and circumstances prevailing at the time of the infringement, instead of any later period.286

Centralisation effects

Apart from the questions that may arise in relation to the material scope of the principle of nulla poena sine culpa (supra), there can also be some doubt about the decentralised application of this principle. Its inclusion in Regulation 1/2003 with regard to Commission fines gives strong indications that penalties for infringements of EU competition law cannot be imposed without any form of fault, irrespective of the level of administration. However, outside the field of EU competition law the Court of Justice has implicitly rejected that there is an unqualified EU requirement for the Member States to apply the principle of nulla poena sine culpa. It has insisted on various occasions that a national system of strict criminal liability is not in itself contrary to EU law. 287 In the absence of specific EU legislation, Member States may provide for such a system on the condition that the penalties are similar to those imposed in the event of infringements of national law of similar nature and importance and are proportionate to the seriousness of the infringement. In a system of strict criminal liability, fault is not a precondition for the offence and the person responsible for this offence cannot exonerate itself by disproving its intent or negligence. One cannot

281 In this respect it should be noted that also the ECtHR has considered that the voluntary nature of a regulatory regime is a relevant aspect for the scope of fundamental rights, cf O’Halloran and Francis v United Kingdom App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007) para 57.
282 Article 23(2) Regulation 1/2003.
283 Cf T-29/05 Deltafina [2010] ECR II-4077, paras 55ff. In para 61 the General Court reiterated : ‘although the limited importance, as the case may be, of the participation of the undertaking concerned cannot therefore call into question its individual liability for the infringement as a whole, it none the less has an influence on the assessment of the extent of that liability and thus the severity of the penalty.’
reconcile such a system of strict liability with the principle of *nulla poena sine culpa* without compromising this principle. At the current state of EU law it is therefore unclear whether and to what extent Member States are under an EU duty to make the punishment of infringements of Articles 101 and 102 TFEU subject to conditions of intent or negligence. As a more fundamental point, one can debate over whether the principle of *nulla poena sine culpa* constitutes a general principle of EU law.

4.5.11 The Principle of Equal Treatment

The application of EU law is governed by the principle of equal treatment. In accordance with this principle, similar situations may not be treated differently and different situations may not be treated similarly, unless there would be an objective justification for such treatment. This principle applies to different parties in a single case and across different cases. When applying the principle of equal treatment to sanctions for infringements of Articles 101 and 102 TFEU, one should compare the treatment of every single element that has a bearing on the severity of the sanction (e.g., the characteristics of the undertakings, the infringements and the markets, the behaviour of the undertakings during and after the infringement). In *Bolloré*, for instance, the General Court made a detailed analysis of the relative usefulness of documents submitted in the context of leniency applications. In light of the principle of equal treatment, the Court concluded that the Commission committed a manifest error of assessment. In *Bolloré II*, the question arose whether the attribution of liability to the parent company with regard to only one of undertakings amounted to unequal treatment. The General Court concluded that it did not as the circumstances were sufficiently different. Yet, this case does indicate that the principle of equal treatment also applies to the attribution of liability within a group of companies. In *Toshiba Corp (Gas Insulated Switchgear)*, the General Court applied the principle of equal treatment to the reference year for determining the relevant turnover in calculating the amount of the fine. It concluded that the undertaking in question had not been treated equally to the other undertakings and that there was no objective justification for this discrimination. Consequently, the Court annulled part of the decision.

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288 Cf Joined Cases T-236, 239, 244, 246, 251, 252/01 *Tokai Carbon (Graphite Electrodes)* [2004] ECR II-1181, para 219; Case C-76/06 *P Britannia Alloys & Chemicals* [2007] ECR I-4405, paras 40 and 44.

289 The principle of equal treatment includes the prohibition of discrimination on nationality, Article 21(2) EU Charter, Article 18 TFEU and Case C-29/95 *Pastoors* [1997] ECR I-285. Discrimination on grounds of nationality that affects the free movement of goods, persons, services or capital is prohibited pursuant to the particular free movement provision (*supra* paragraph 4.4).


291 Case T-372/10 *Bolloré II* (General Court, 27 June 2012), para 83ff.

A further example
The implications of the principle of equal treatment can further be demonstrated with the case *JFE Engineering*. In this case the General Court found that the requirement of equal treatment had been breached as different situations were treated similar. Both European and Japanese undertakings active in the market for seamless steel tubes were involved in an infringement of Article 101 TFEU. These undertakings agreed to respect each others home markets. Yet, only the European undertakings were found to have been involved in anti-competitive supply contracts. In accordance with these contracts one of European undertakings closed its production activities and was supplied by the others in accordance with fixed quota. This was meant to ring-fence the European market. The Japanese undertakings argued that the fines imposed on them for agreeing to refrain from selling their products in Europe was disproportionate in comparison with the level of the fines imposed on the European producers. This objection found resonance with the General Court, which concluded that the Commission was required to draw inferences from the European dimension of the cartel. By omitting to take account of these anti-competitive supply contracts in determining the amount of the fine for the European producers, the Commission was found to have treated different situations similarly without objective justification. The Commission thereby infringed the requirement of equal treatment. The Court remedied the inequality by mitigating the fine for the Japanese undertakings. It did so reluctantly, however. The Court considered that the most appropriate way of restoring a fair balance between the addressees of the contested decision would be to increase the amount of the fine imposed on each of the European producers. In fact, the unlimited jurisdiction conferred upon the Court allows it to increase penalties. However, the Court refrained from increasing the fines for the European producers, as the latter did not have the opportunity to give their views on this matter. Therefore, the Court decided that the most suitable way of remedying the unequal treatment was to reduce the fines for the Japanese applicants.

Rather than mandating total equality, the EU principle of equal treatment requires that any difference in treatment is proportionate to the difference in circumstances. In reviewing the ‘equality’ of Commission fines, the General Court takes a practical approach and

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294 Another approach was taken in Case T-113/07 *Toshiba Corp (Gas Insulated Switchgear)* [2011] OJ C 252/30. In para 261 of that judgment, the General Court rejected the objection of unequal treatment in determining the amount of the fine on the following grounds: ‘given the nature of the applicant’s commitment under the common understanding, the fact that it did not participate in the distribution of GIS projects in the EEA is irrelevant, since it was not necessary for it to intervene. Thus, the fact referred to by the applicant was not the result of its choice, but a mere consequence of the nature of its participation in the agreement relating to the EEA market. On the other hand, that same participation was a prerequisite for ensuring that the allocation of GIS projects in the EEA could be carried out among the European producers in accordance with the rules agreed to that effect.’
296 ibid para 578.
297 ibid para 579.
allows the Commission to categorise punishable circumstances and concomitant fines in various bands of severity.\textsuperscript{298} Review of this division is limited to its coherence and objective justification.\textsuperscript{299} In fact, the General Court seems to put more weight on the proportionality of a sanction than on the equality of sanctions.\textsuperscript{300}

Total equality need not to be ensured for yet another reason. The Court of Justice has held on numerous occasions that the Commission’s practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters. Decisions in other cases can only give an indication of (in)equality since the facts of those cases are not likely to be the same or sufficiently similar. More importantly, undertakings must take into account that within the statutory limits fining levels may be increased at any time.\textsuperscript{301} Even the application of different calculation methods to contemporaneous infringements as a consequence of the date of the decision has not been considered contrary to the EU principle of equal treatment.\textsuperscript{302}

Undertakings cannot escape being punished on the ground that another trader, not subject to the proceedings, has not been punished either.\textsuperscript{303} This limitation follows from \textit{Peróxidos Orgánicos}\textsuperscript{304}, where the General Court accorded priority to legality over equality. In the words of the General Court:

\begin{quote}
A possible unlawful act committed with regard to another undertaking, which is not party to the present proceedings, cannot induce the Court to find that it is discriminatory and, therefore, unlawful with regard to the applicant. Such an approach would be tantamount to laying down a principle of ‘equal treatment in illegality’ and to requiring the Commission, in the present case, to disregard the evidence in its possession to sanction the undertaking which has committed a punishable infringement, solely on the ground that another undertaking which may find itself in a comparable situation has unlawfully escaped being penalised. In addition, as is clear from the case-law on the principle of equal treatment, where an undertaking has acted in breach of Article 81(1) EC [now Article 101(1) TFEU], it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where, as in this case, those undertakings’ circumstances are not the subject of proceedings before the Court (…).\textsuperscript{305}
\end{quote}

\begin{itemize}
\item \textsuperscript{298} Cf Joined Cases T-236, 239, 244, 246, 251, 252/01 \textit{Tokai Carbon (Graphite Electrodes)} [2004] ECR II-1181.
\item \textsuperscript{299} Case T-26/02 \textit{Daichii Pharmaceuticals} [2006] ECR II-713, para 85.
\item \textsuperscript{300} Case T-303/02 \textit{Westfalen Gassen} [2006] ECR II-4567, para 174.
\item \textsuperscript{301} Cf Case C-76/06 P \textit{Britannia Alloys & Chemicals} [2007] ECR I-4405, paras 60-61; Joined Cases 100/80 to 103/80 \textit{Musique Diffusion française} [1983] ECR 1825.
\item \textsuperscript{302} Case C-397/03 P \textit{Archer Daniels Midland} [2006] ECR I-4429, paras 28-32. Cf Joined Cases 100/80 to 103/80 \textit{Musique Diffusion française} [1983] ECR 1825.
\item \textsuperscript{303} Joined Cases 89, 104, 116, 117 and 125 to 129/85 \textit{Ahlström Osakeyhtiö} [1993] ECR I-1307, para 197.
\item \textsuperscript{304} Case T-120/04 \textit{Peróxidos Orgánicos} [2006] ECR II-4441.
\item \textsuperscript{305} ibid para 77.
\end{itemize}
While the Court’s line of reasoning raises some questions – why would it be unlawful for an undertaking to escape penalisation when the Commission’s enforcement powers are discretionary? – it is clear that undertakings cannot rely on the principle of equality to dispute the legality of the sanction.

Centralisation effects

Subject to the same relaxations as the Commission, also the Member States should have regard to the principle of equal treatment in the enforcement of EU competition law. Member States may not treat similar situations differently and different situations similarly, unless there would be an objective justification for such treatment. In the enforcement of Articles 101 and 102 TFEU, NCAs should ensure equal treatment with regard to every single element that adds to the severity of the sanction. In this respect, the EU principle of equal treatment limits the Member States’ sanctioning autonomy and contributes to a uniform body of procedural rules. However, just as the Commission, also the NCAs may apply the principle of equal treatment with a certain flexibility and categorise punishable circumstances and concomitant penalties in various bands of severity. Similarly, the EU principle of equal treatment does not prevent NCAs from raising the level of fines or from going after some undertakings while not bothering about others. Just as most of the sanctioning principles deriving from the EU fundamental rights, also the principle of equal treatment leaves the Member States entirely free in choosing the appropriate sanctioning powers.

4.6 CENTRALISATION EFFECTS OF THE DUTY OF SINCERE COOPERATION

4.6.1 Introduction

To the extent that EU law does not provide specific rules for the enforcement of Articles 101 and 102 TFEU, Member States may rely on home-grown approaches. Outside the realm of Regulation 1/2003 (supra paragraph 2.3) and the EU sanctioning principles detailed in the previous three paragraphs, Member States may thus experiment and organise their sanctioning regime in accordance with domestic preferences. However, in enjoying this sanctioning autonomy Member States cannot disregard their role and responsibility with regard to the administration of EU law. Member States therefore remain subject to the general EU duty of sincere cooperation. In accordance with Article 4(3) TEU:

the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

This duty of sincere cooperation applies to all areas of EU activity and is the single most important rule in the relation between EU and national institutions. It applies to all national authorities, whether executive, legislative or judicial, whether central, regional or local. The duty of sincere cooperation can be seen as a panacea for problems with the implementation of EU law in the national legal orders. It reconciles the EU principle of subsidiarity with the EU interests of uniform and effective application. The duties of the Member States under Article 4(3) TEU find their limits in the rule of law. This provision cannot create de novo obligations. It can only build upon and reinforce existing EU obligations.

A variety of duties
The requirements under Article 4(3) TEU are not readily cognisable. They have to be inferred from a vast body of case law, dealing with various policy areas and different implementation issues. EU case law on Article 4(3) TEU could be categorised in various ways. With regard to the enforcement of EU competition law, it seems helpful to divide the cases in three categories.

First, the duty of sincere cooperation safeguards rights that have been granted by EU law. In the absence of specific EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights that derive from EU law. This principle of procedural autonomy is limited by the duty of sincere cooperation. As a result, the national procedural rules must neither be less favourable than those governing similar domestic actions (principle of equivalence) nor render virtually impossible or excessively difficult the exercise of EU rights (principle of effectiveness).
Second, the duty of sincere cooperation reinforces obligations imposed by EU law. Insofar as EU obligations are not complemented with specific implementation requirements it is for the Member States to ensure the implementation in accordance with the procedural and substantive rules of national law.\footnote{Joined Cases 51/71 to 54/71 \textit{International Fruit Company} [1971] ECR 1107.} The duty of sincere cooperation places the Member States under a duty to take all appropriate measures, whether general or specific, to ensure the fulfilment of this obligation.\footnote{Case 3/73 \textit{Hessische Mehlindustrie Karl Schöttler} [1973] ECR 745; Case 48/75 \textit{Royer} [1976] ECR 497; Case 50/76 \textit{Amsterdam Bulb} [1977] ECR 137; Joined Cases 205/82 to 215/82 \textit{Deutsche Milchkontor} [1983] ECR 2633.} More specifically, this duty requires the adoption of effective, proportionate and – if needed – dissuasive measures, no less favourable than those applicable to comparable situations wholly governed by national law.\footnote{Cf Joined Cases 146, 192 and 193/81 \textit{BayWa} [1982] ECR 1503; Joined Cases 205/82 to 215/82 \textit{Deutsche Milchkontor} [1983] ECR 2633; Case 14/83 \textit{Von Colson and Kamann} [1984] ECR 1891; Case 68/88 \textit{Commission v Greece} (Greek Maize) [1989] ECR 2965.}

Third, the duty of sincere cooperation requires the Commission and the national institutions to work together in good faith with a view to overcoming implementation difficulties, ie to facilitate institutional cooperation. This is a mutual obligation: the national institutions are required to assist the Commission\footnote{Case 94/87 \textit{Commission v Germany (Illegal State Aid)} [1989] ECR 175; Case C-234/89 \textit{Delimitis} [1991] ECR I-935; Case C-344/98 \textit{Masterfoods} [2000] ECR I-11369; Case C-94/00 \textit{Roquette Frères} [2002] ECR I-9011.} and the Commission is required to assist the national institutions in the implementation of EU law.\footnote{Case 2/88 IMM \textit{Zwartveld} [1990] ECR 3365; Case T-353/94 \textit{Postbank} [1996] ECR II-921.}

### Sincere cooperation in relation to EU rights and EU obligations: a principled distinction

The impact of Article 4(3) TEU on the autonomy of the Member States differs according to whether Member States need to enforce EU obligations or to facilitate the enforcement of EU rights. In the context of EU competition law, the enforcement of EU obligations relates to the duty of NCAs to proceed against infringements of Articles 101 and 102 TFEU. Facilitating the enforcement of EU rights relates to the private enforcement of EU competition law. While a principled distinction is not generally made in the legal literature\footnote{Cf K Lenaerts, D Arts and I Maselis, \textit{Procedural Law of the European Union} (Second Edition, Sweet & Maxwell 2006) 3-003: ‘Art.10 of the EC Treaty [now Article 4(3) TEU] places national courts and tribunals under a duty to ensure the “full effectiveness of Community law”. The Court of Justice has defined this duty by means of a number of Community constraints with which national procedural law and law relating to sanctions must comply. Those constraints (the principles of equivalence and effectiveness) are a practical expression of the principles of the primacy and direct effect of Community law and aim at enabling individuals to claim before national courts the full enforcement and protection of the rights which they derive from Community law.’ (footnotes omitted). See also Temple Lang, ‘The Development by the Court of Justice of the Duties of Cooperation’ (n 310); S Prechal, ‘EC Requirements contrary to the EU principle of priority. cf Case 106/77 \textit{Simmenthal} [1978] ECR 629; Case C-221/89 \textit{Factortame II} [1990] ECR I-2433; Case C-453/99 \textit{Courage v Crehan} [2001] ECR I-6297.} various differences can be observed with regard to Member States’ duties...
in relation to EU obligations and EU rights. In this respect it should be noted that the duty of sincere cooperation in the context of EU rights is closely linked to the concept of direct effect. Precisely this concept has left deep incursions in the division of competences on national level. Although the concept of direct effect is not irrelevant in the context of the enforcement of EU obligations either – private parties may rely on EU rights of procedural nature (e.g., fundamental rights) to fend off enforcement actions – it mainly serves to reinforce substantive EU rights (e.g., the right to claim for damages under Article 101 TFEU). In any case, enforcement obligations resting on the Member States have no direct effect.

The wording and working of the principles deriving from the duty of sincere cooperation are different, depending on whether domestic procedures foster the enforcement of EU rights or EU obligations. First, whereas the enforcement of EU obligations is governed by the principles of equivalence, effectiveness, proportionality, and dissuasiveness, the enforcement of EU rights is governed by the principles of equivalence and effectiveness alone. Second, the conditions under the principle of effectiveness are different for each of the two enforcement trajectories. The Court of Justice seems more demanding of Member States when it comes to EU rights than when it comes to EU obligations. Third, the

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319 One of the few authors that does make a principled distinction between the enforcement of EU obligations and EU rights for the purpose of the duty of sincere cooperation (or rather the principle of effectiveness) is Dougan. In fact, Dougan even makes a further distinction in relation to the enforcement of EU rights. The requirement of effectiveness would be different when an individual exercises EU-based claims against a public authority than when these claims are exercised against another individual. See M. Dougan, National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation (Hart Publishing 2004) 26-52. Also Advocate General Bot has made a principled distinction between the enforcement of EU obligations and EU rights for the purpose of the principle of effectiveness. See Case C-455/06 Heemskerk and Schaap [2008] ECR I-8763, Opinion of AG Bot, para 122ff.


321 See also Oliver (n 21) 371.

322 Cf Joined Cases C-295/04 to C-298/04 Manfredi [2006] ECR I-6619, where the Court of Justice limited its assessment on the necessity (and compatibility with EU law) of punitive damages for infringements of EU competition law to the principles of effectiveness and equivalence. The Court concluded that Member States are not under an inherent EU obligation to provide for punitive damages. If the enforcement of EU rights would have been subject to the principle of dissuasiveness, another outcome might have been expected.


324 For the enforcement of EU obligations the principle of effectiveness is formulated positively, requiring Member States to penalise effectively. For the enforcement of EU rights, the Court of Justice requires Member States not to make the exercise of EU rights virtually impossible or excessively difficult. This suggests that the Court applies a negative test in relation to the latter. While the intensity with which the Court applies the principle of effectiveness indeed differs, this difference does not conform with what language suggests. Notwithstanding the negatively formulated requirement in relation to EU
implications of the principle of equivalence can be different. Where an EU right is at stake, the principle of equivalence may in very exceptional circumstances limit the enforcement actions of national authorities.325

For the purpose of this study mainly the second category is relevant, the duty of sincere cooperation as a reinforcement of EU obligations. This means that the Court’s elaborations in Greek Maize326 are crucial in understanding the EU sanctioning principles deriving from the duty of sincere cooperation. In Greek Maize, the dispute centred on the measures to be taken by the Greek government against importers of maize fraudulently withholding import levies from the EU budget. The Court considered that Member States are bound under Article 4(3) TEU to give effect to the principles of equivalence, effectiveness, proportionality and dissuasiveness.327 Later cases have clarified the scope of application of these principles. First, the Greek Maize principles apply in situations where EU legislation does not mention enforcement at all, or where EU legislation only leaves the Member States some discretion in the organisation of enforcement. Second, these principles apply in disputes over whether a Member State uses appropriate means to enforce EU law328 and in disputes over whether a Member State has (un)lawfully extended the scope of EU legislation.329 Considering the system of shared administration in the area of EU competition law, the Greek Maize principles apply a fortiori to the enforcement of Articles 101 and 102 TFEU.

A closer examination of the principles articulated in Greek Maize allows for the following categorisation:

(i) Member States must ensure that infringements of EU law are penalised under procedural conditions analogous to those that are applicable to infringements of national law of a similar nature and importance.

rights, the Court has not shied away from superimposing private law remedies on the Member States. See Case C-213/89 Factortame I [1990] ECR I-2433; Case C-453/99 Courage v Crehan [2001] ECR I-6297; Case C-253/00 Muñoz [2002] ECR I-7289. This somewhat activist approach has often been motivated by the desire to ensure the direct effect of EU rights. Paradoxically, the Court has been rather reticent in superimposing sanctions onto the Member States for the enforcement of EU obligations. See Case C-265/95 Commission v France (Spanish Strawberries) [1997] ECR I-6959; Case C-36/94 Siesse [1995] ECR I-3573; Case C-213/99 De Andrade [2000] ECR I-11083.

325 Cf Case C-34/02 Pasquini [2003] ECR I-6515.
326 Case 68/88 Commission v Greece (Greek Maize) [1989] ECR 2965.
(ii) Member States must ensure that infringements of EU law are penalised under substantive conditions analogous to those that are applicable to infringements of national law of a similar nature and importance.

(iii) Member States must ensure that infringements of EU law are penalised under procedural conditions that make the penalty effective, proportionate and dissuasive.

(iv) Member States must ensure that infringements of EU law are penalised under substantive conditions that make the penalty effective, proportionate and dissuasive.

In subsequent cases the Court has applied these principles to different types of sanctions, eg fines, confiscation orders, surcharges and compensatory payments. This suggests that the Greek Maize principles extend beyond penalties and apply to sanctions for infringements of EU law more generally. For the purpose of this study, the terms ‘procedural conditions’ and ‘substantive conditions’, as used by the Court in Greek Maize, are understood as covering both sanctioning procedures and sanctioning powers.

The following four subparagraphs will detail the implications of the principles of equivalence, effectiveness, dissuasiveness and proportionality for the sanctioning autonomy of the Member States with regard to Articles 101 and 102 TFEU.

4.6.2 The Principle of Equivalence

The principle of equivalence essentially prohibits discrimination against EU law. Member States must ensure that infringements of EU law are terminated and penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance. The principle of equivalence is an autonomous legal principle that should be respected, irrespective of whether EU law is enforced effectively.

The application of this principle raises the question as to what the domestic law equivalent should be against which to assess sanctions for infringements of EU competition law. As long as Member States operate a regime of national competition law, this question seems to have been resolved by the Court of Justice in Manfredi. Applying the principle of equivalence in a private enforcement context, the Court considered:

... it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed rules governing those actions, provided that the provisions concerned are not less favourable than those...

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In similar vein it can be argued that sanctions for infringements of EU competition law should be equivalent to sanctions for infringements of national competition law. This of course raises the question what qualifies as national competition law and who should have the final say on this matter: the Court of Justice or the Member States? In practice, it is not always clear whether or not a particular sanction forms part of national competition law and, therefore, whether that sanction should be available for EU competition law. For example, UK government has argued that the criminal cartel offence does not form part of national competition law. This argument was made not so much to deprive EU competition law from particular sanctions, but rather to justify that criminal procedures under UK law may run alongside the administrative procedures of the Commission. However, this discussion does make clear that it is not always obvious what qualifies as national competition law. Issues of this kind have not yet reached the Court.

Like all other principles deriving from the duty of sincere cooperation, the principle of equivalence only applies in the absence of specific EU legislation. As a result, this principle requires Member States to enforce EU competition law with measures equivalent to those prevailing in national competition law, provided these measures are compatible with EU legislation. This caveat can be clarified with the help of Tele2 Polska. In that case, the Court of Justice prohibited NCAs from using certain measures in the enforcement of EU competition law (the adoption of a negative decision on the merits) for being contrary to the wording, scheme and objectives of Regulation 1/2003, even though this measure was available for the enforcement of national competition law (supra paragraph 2.3). The more general conclusion may be drawn that the duty of sincere cooperation laid down in Article 4(3) TEU can only supplement existing requirements under EU legislation and cannot amend these.

Centralisation effects
The principle of equivalence limits the sanctioning autonomy of the Member States. The latter may not reserve particular sanctioning powers (for instance, appropriate but costly

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336 ibid para 72.
337 This interpretation is less obvious than it appears. It could be argued that the nature and importance of EU competition law cannot be equated with national competition law. First, unlike national competition law, EU competition law also has a market integration objective. Second, the importance of EU competition law for the EU legal order exceeds the importance normally accorded to national competition law, cf Case C-126/97 Eco Swiss [1999] ECR I-3055. Therefore, it has been suggested in the legal literature that the maximum sanctions available for infringements of EU competition law might even have to be more severe than those available for national competition law, see Oliver (n 21) 367-368.
sanctions) solely for infringements of national competition law. While this principle narrows down the autonomy of the Member States, it does not force a ‘foreign’ sanction onto the Member States and therefore does not lead to more uniformity throughout the EU. After all, it only requires the Member States to align their sanctioning powers and procedures for infringements of Articles 101 and 102 TFEU to those for infringements of national competition law.

4.6.3 The Principle of Effectiveness

The duty of sincere cooperation further contains a principle of effectiveness. Also this principle is capable of limiting the sanctioning autonomy of the Member States and it may even lead to more uniformity throughout the EU. The implications of this principle cannot be determined in the abstract. Effective sanctioning in one area of EU law could mean that as many infringements as possible should be terminated and punished, whereas in other areas case prioritisation may take place without jeopardising the effectiveness of EU law. Effective sanctioning will therefore have a different meaning with regard to, for instance, the EU fishery policy than with regard to EU competition law. Another important circumstance for the implications of the principle of effectiveness is that the Union is neither solely relying on the Member States nor on public enforcement to implement its competition policy. After all, the Commission may initiate enforcement actions too and private parties may always bring a case under Article 101 or 102 TFEU before the national courts. The competition authorities of the Member States therefore need not to act upon every infringement in order to maintain an effective competition policy. Such discretion may be less desirable in other fields of EU law, notably those where there is no private enforcement alternative. But even within the context of EU competition law, the implications of the principle of effectiveness are case-specific. Different types of anti-competitive behaviour warrant different types of sanctions.

Flexibility

Before detailing the specific requirements in the area of competition law sanctions, it should be pointed out that the principle of effectiveness leaves the Member States with considerable flexibility. NCAs are not under any inherent EU obligation to terminate or penalise every (intentional or negligent) infringement. Instead, they should be considered to enjoy the same margin of discretion as the Commission. In Automec II it was decided that the Commission may prioritise cases and need not to go after every potential infringement. Also, it follows from Visa that the Commission’s margin of discretion in setting the amount

341 Cf I Simonsson, Legitimacy in EU Cartel Control (Hart Publishing 2010) 18, who even argues: ‘it (...) seems unlikely that effectiveness means the same thing when referred to in various parts of the Regulation [1/2003]. Effectiveness of fines must be interpreted in relation to the case law on sanctions as developed by the Community Courts. When effectiveness is used as the legal basis for regulating burden of proof and fact-finding in Regulation 1/2003, it must be understood in the light of the abundant case law on rights of defence.’
of the fine ‘extends, necessarily, to deciding whether or not it is appropriate to impose a fine’.343 It is in the specific context of each case that the Commission decides whether it is appropriate to impose a fine in order to penalise the infringement and protect the effectiveness of competition law.344 There is no reason to assume that the NCAs would be subject to stricter requirements than the Commission in this respect.

This flexibility under the principle of effectiveness extends to the type of sanctions that can be imposed for infringements of Articles 101 and 102 TFEU. This follows from Nunes, where the Court of Justice was asked to decide whether a Member State is empowered to impose criminal penalties for conduct which only attracts a sanction of civil law nature under EU law.345 It should be reminded that the Greek Maize principles not only apply in disputes over whether a Member State uses appropriate means to enforce EU law, but also in disputes over whether a Member State has (un)lawfully extended the scope of EU law. Against this background the Court concluded:

that Article 5 of the Treaty [now Article 4(3) TEU] requires the Member States to take all effective measures to sanction conduct which affects the financial interests of the Community. Such measures may include criminal penalties even where the Community legislation only provides for civil sanctions. The sanction provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.346

It follows that the mere fact that Regulation 1/2003 grants particular sanctioning powers to the Commission and qualifies these as non-criminal347 does not circumscribe the sanctioning possibilities of the Member States. The latter may, for instance, decide to enforce Articles 101 and 102 TFEU by means of custodial sanctions. In fact, Regulation 1/2003 even anticipates that national sanctioning powers will deviate from the Commission’s powers.348 More generally, it can be concluded that considerations of effectiveness normally will not force specific sanctions onto the Member States.349

Notwithstanding the above conclusions, it should be noted that particular forms of liability may be superimposed on the Member States by the EU legislator precisely to ensure that EU law is fully effective and to take away potential distortions of competition. While the Court of Justice has excluded harmonisation of penalties in the area of competition law

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346 ibid para 14.
348 Article 12 Regulation 1/2003 contains specific rules for the transmission of information to jurisdictions that provide custodial sanctions for infringements of EU competition law (supra paragraph 2.4).
on the basis of Article 103(2)(a) TFEU, this seems nonetheless possible on the basis of Article 114 and/or Article 83(2) TFEU. On the basis of Article 114 TFEU, the EU legislator may adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In accordance with Protocol (No 27) on the Internal Market and Competition, the internal market includes a system ensuring that competition is not distorted. Accordingly, harmonisation of penalties in the area of EU competition law on the basis of Article 114 TFEU is possible if this is needed to ensure that competition is not distorted. This interpretation is confirmed by Tobacco Advertising, Framework Decision Environmental Crimes and Framework Decision Ship-Source Pollution. On the basis of Article 83(2) TFEU, the EU legislator may adopt directives with minimum rules with regard to the definition of criminal offences and sanctions, should this be necessary to ensure the effective implementation of a Union policy in any area which has been subject to harmonisation measures. It could be argued that Article 83(2) TFEU also provides a legal basis for the adoption of directives with minimum rules with regard to criminal sanctions in the area of EU competition law.

Sanctioning principles

The principle of effectiveness requires Member States to terminate and penalise infringements of Articles 101 and 102 TFEU effectively. Both national legislators and NCAs should take note of this requirement. The former should provide for effective sanctioning powers, the latter should use these powers effectively. What constitutes an effective sanction for the purpose of Article 4(3) TEU depends on the type of anti-competitive behaviour and the circumstances of the case. It is suggested that persisting infringements, whether as a consequence of the undertaking’s behaviour or its very structure, require a remedy that effectively terminates the infringement. How this is achieved seems less important. A cease-and-desist order together with a sufficiently severe penalty payment and attached to a well-reasoned decision establishing the infringement may be as effective as an order stating positively what commercial changes are to be made (divestitures, compulsory licensing, etc).

In any case, considerations of effectiveness would appear to require Member States to provide for interim measures where appropriate. In Camera Care, the Court of Justice accepted that the Commission could adopt interim measures even though this power had not been granted explicitly. Decisive for the Court in reaching this conclusion was that this power had not been excluded explicitly and that it had to be avoided that the exercise of powers that had been granted explicitly to the Commission – powers to bring

552 Case C-176/03 Commission v Council (Framework Decision Environmental Crimes) [2005] ECR I-7879.
553 Case C-440/05 Commission v Council (Framework Decision Ship-Source Pollution) [2007] ECR I-9097.
to an end any infringement – were rendered ineffectual or illusory.\textsuperscript{355} Moreover, the Court found the possibility to adopt protective interim measures necessary in view of the efficacy of competition law and the protection of the legitimate interests of Member States and undertakings.\textsuperscript{356} In light of these considerations, one may argue that Member States cannot make do without interim measures either.

It is further submitted that intentional and negligent infringements, whether persisting or terminated, require a penalty that punishes the offender and effectively deters. Precisely for the enforcement of Articles 101 and 102 TFEU, the Court of Justice has underpinned the importance of penalties and notably fines.\textsuperscript{357} Moreover, the conditions for liability may not be overly strict. In the context of Commission procedures, the Court of Justice has been keen to limit the thresholds for liability. The effectiveness of EU competition law would be compromised if these conditions were too demanding. Accordingly, in Volkswagen\textsuperscript{358} the Court accepted a rather low threshold for intent – an alternative condition for the Commission’s penalty power and a variable for the amount of the fine. Intent can already be established without having to identify the persons who acted improperly within the undertaking or who ought to have been held responsible for any defective organisation of the undertaking.\textsuperscript{359} In the light of Volkswagen, it can be argued that the need to penalise infringements of Articles 101 and 102 TFEU effectively prevents the Member States from applying overly demanding conditions.\textsuperscript{360} Whether a penalty is imposed on a natural person or a legal person and whether this penalty is of administrative or criminal law nature remains within the sanctioning autonomy of the Member States.

\textit{The principle of effectiveness and leniency}

It has been argued in the literature that whichever penalty a Member State ultimately imposes, the duty of sincere cooperation requires it to mitigate this penalty in relation to whistleblowing cartel participants. More precisely, Member States would have to mitigate their penalties in relation to undertakings that have successfully applied for leniency in an other jurisdiction within the EU.\textsuperscript{361} Undertakings would be dissuaded from breaking ranks and confess their cartel involvement to one authority if faced with full and hefty fines in other jurisdictions. This would seriously interfere with the EU objective of improving the effectiveness of EU competition law and could frustrate the Commission’s leniency policy, as well as those of the NCAs. Therefore, the duty of sincere cooperation would require NCAs

\textsuperscript{355} ibid paras 15-18.
\textsuperscript{356} ibid.
\textsuperscript{357} Case C-429/07 Inspecteur van de Belastingdienst v X BV [2009] ECR I-4833, paras 36-37. Articles 101 and 102 TFEU would be ineffective if they were not accompanied by fines and the effectiveness of penalties is a condition for the coherent application of these prohibitions.
\textsuperscript{358} Case C-338/00 P Volkswagen [2003] ECR I-9189.
\textsuperscript{359} ibid para 98.
\textsuperscript{360} See also Simonsson (n 341) 309; Oliver (n 21) 367.
(and possibly also the Commission) to take into account successful leniency applications in other jurisdictions within the EU and to mitigate the penalty otherwise imposed.\footnote{Temple Lang, ‘The Implications of the Commission’s Leniency Policy’ (n 361) 431-432.} As to the practical working of this obligation, Temple Lang has further suggested that

it would have to be an obligation to reduce any national fine which would otherwise be imposed by a percentage corresponding to the reduction given by the Commission. No other obligation would make sense.\footnote{ibid 432.}

This interpretation of the duty of sincere cooperation would introduce a one-stop-shop for leniency in the EU through the backdoor of the principle of effectiveness. It would also imply that Member States are required to operate a leniency programme of their own.\footnote{Indeed, Simonsson has suggested that Member States have to operate a leniency programme of their own. Simonsson (n 341) 306.}

By ways of background, it should be noted that the Commission and the NCAs have recognised the importance of leniency programmes throughout the entire EU and have drafted and published an ECN Model Leniency Programme. This model coordinates the various leniency programmes but does not provide for a one-stop-shop.

It is debateable whether such an extensive interpretation of the duty of sincere cooperation is justified. First, it breaks with consistent EU case law that Article 4(3) TEU can only reinforce existing requirements. Second, it would be difficult to reconcile with the idea behind Regulation 1/2003, as it would effectively limit the competences of the NCAs in starting parallel proceedings. Third, it is entirely speculative that a one-stop-shop for leniency makes the programme substantially more effective – it would of course cut costs for the undertakings involved and taxpayers. More importantly, this extensive interpretation of the duty of sincere cooperation has not found resonance with the Court of Justice. Member States’ requirements in relation to leniency have been touched upon in Pfleiderer, where the Court held:

while the establishment and application of those rules [on leniency] falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with European Union law (…). In particular, they may not render the implementation of European Union law impossible or excessively difficult (…) and, specifically, in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (…).\footnote{Case C-360/09 Pfleiderer [2011] OJ C232/5, para 24.}
While the Court has therefore accepted that leniency programmes are useful tools to uncover and bring to an end infringements of Articles 101 TFEU and 102 TFEU, it has unmistakably found that the Member States are entirely free in deciding whether or not to operate a leniency programme of their own.

Centralisation effects
It follows from the above that while the Member States retain considerable flexibility under the principle of effectiveness their sanctioning autonomy is nonetheless reduced. NCAs should be able to terminate every type of infringement, whatever its causes. This means that NCAs should be able to even terminate infringements that are the result of the undertaking’s very structure. Whether they do so on the basis of a positive order for structural changes or a negative order with regard to ‘structural infringements’ seems less important. Furthermore, NCAs should be able to adopt interim measures pending the investigation in order to ensure that the objective of the investigations is not compromised. Finally, NCAs should be able to impose deterrent penalties under conditions that are not overly strict. This requirement to provide for deterrent penalties is subject to further EU conditions, which will be detailed directly below.

4.6.4 The Principle of Dissuasiveness
Member States must ensure that infringements of EU law are penalised under procedural and substantive conditions which make the penalty dissuasive. Occasionally, a Member State is criticised for failing this requirement. This requirement, which could be referred to either as the principle of dissuasiveness or the principle of deterrence, also applies to infringements of EU competition law. Member States should ensure that undertakings are dissuaded from committing infringements of Articles 101 and 102 TFEU. Sanctions that are not able to change the undertakings’ intent or to induce them to take the requisite precautionary measures do not dissuade. Logically, the requirement to provide for dissuasive sanctions applies solely to infringements committed intentionally or negligently. Undertakings acting contrary to EU competition law in good faith may be corrected by means of a sanction but simply cannot be dissuaded. The Court of Justice has insisted that especially infringements that are harmful both to competition and to the attainment of the EU’s greater internal market objectives (eg market-sharing and boycotts) require a dissuasive sanction.

Penalties for infringements of Articles 101 and 102 TFEU should dissuade both the offender and society at large. These objectives are commonly referred to as special

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565 ibid para 25.
(or specific) deterrence and general deterrence. The adequate level of special deterrence should be determined on the basis of the undertaking’s characteristics. This follows from Microsoft, where the General Court took into consideration Microsoft Corp’s current and future economic capacity, its capabilities of engaging in new infringements and its prior convictions in other jurisdictions.370 Special deterrence further requires that the undertakings’ characteristics are considered as they were at the end of the infringement, rather than at any earlier point in time.371 The objective of special deterrence further requires that any earlier infringement of EU competition law (recidivism) is taken into account.372 The objective of general deterrence requires the severity of the penalty to be assessed not solely by reference to the particular situation of the undertaking.373 This objective has the effect of raising the severity of the penalty as not every infringement will be penalised.374 The undertakings that are caught bear the costs of this objective by having to sustain a more severe penalty than would have been needed to deter them from committing infringements in the future. Indeed, in the application of the principle of dissuasiveness regard may be had of the frequency of infringements.375

The dual objective of special and general deterrence helps clarifying the apparently contradicting inferences by the Court of Justice and the General Court from the principle of dissuasiveness. It follows from EU case law that while penalties imposed in other jurisdictions cannot diminish the need to have dissuasive sanctions for infringements of EU competition law376, infringements of competition rules in other jurisdictions do warrant more severe sanctions for infringements of EU competition law.377 Whereas the former inference can be explained by considerations of general deterrence, the latter may find its explanation in the need to ensure special deterrence. The General Court also seems to take account of the issue of ‘marginal deterrence’: an undertaking that already engages in one form of anti-competitive behaviour should be deterred from engaging in a second infringement. This would at least explain why the requisite deterrent effect of two penalties for two already terminated infringements of Article 101 TFEU is assessed separately.378 Owing to the deterrence increment for both infringements, undertakings could be deterred from committing a second infringement.

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The objective of general deterrence requires the details of the infringement and the penalty to be published.\(^{379}\) Without publication it would be difficult to send out a clear signal to society. In Bank Austria Creditanstalt, the General Court held that in order to guide undertakings in complying with Articles 101 and 102 TFEU

it is essential that economic operators be informed, through the publication of decisions finding infringements and imposing fines, of the conduct that has led the Commission to take punitive action (...).\(^{380}\)

In the light of the shared responsibility of the NCAs with regard to the enforcement of Articles 101 and 102 TFEU and the principle of dissuasiveness, it is suggested that also NCAs are under an EU obligation to publish penalty decisions. The General Court has already confirmed that publication of a penalty decisions is fully warranted and cannot be blocked by considerations of professional secrecy or legality.\(^{381}\) At the same time, EU case law also suggests that some flexibility for the competition authority in determining an appropriate penalty, and the corresponding uncertainty for the undertakings, enhances general deterrence even further.\(^{382}\) The combination of publication and this uncertainty allows the competition authorities to send out clear signals to society, while limiting the possibility for undertakings to engage in infringements on the basis of cost-benefit analyses.\(^{383}\)

Centralisation effects

It can be concluded that NCAs have to penalise intentional and negligent infringements of Articles 101 and 102 TFEU in a way that deters both the offender and society at large. This has an effect on the severity of domestic sanctions. Member States should further publish the details of penalty decisions. Finally, the Member States are urged to leave their NCAs sufficient flexibility in meting out an appropriate penalty. Especially the first two requirements limit the sanctioning autonomy of the Member States. Notwithstanding the above limitations, the Member States remain entirely free to decide on the appropriate type of penalties, as well as on the interplay between the severity of the penalties and the changes of getting caught in designing a deterring sanctioning regime. The latter point means that the Member States can either focus on detection rates or rely on severe penalties.

\(^{379}\) Cf Case T-198/03 Bank Austria Creditanstalt [2006] ECR II-1429, para 57; Case C-54/07 Feryn [2008] ECR I-5187, para 39.

\(^{380}\) Case T-198/03 Bank Austria Creditanstalt [2006] ECR II-1429, para 57.


4.6.5 The Principle of Proportionality

As a final requirement under the duty of sincere cooperation, Member States should apply the principle of proportionality in terminating and penalising infringements of Articles 101 and 102 TFEU. The principle of proportionality is a general principle of EU law, the roots whereof are not limited to the duty of sincere cooperation. For the purpose of EU competition law, it constitutes a fundamental right for the legal and natural persons that are the subject of enforcement actions, and it reinforces the implementation of Articles 101 and 102 TFEU and EU law more generally. In its fundamental right capacity, the principle of proportionality directly influences the sanctioning powers of the Member States, whether as an obligation resting on the Member States by virtue of Article 4(3) TEU or as a subjective right under Article 49 EU Charter. In its other capacity, the principle of proportionality reinforces the EU free movement rights and the Articles 101 and 102 TFEU. In this capacity, the principle of proportionality is, first, capable of limiting domestic sanctions for infringements of Articles 101 and 102 TFEU that hinder inter-state trade. Second, it may also strengthen domestic sanctions in order to reinforce Articles 101 and 102 TFEU, by ensuring that sanctions are proportionate enough. The latter dimension is largely covered by the principles of effectiveness and dissuasiveness. It follows that the principle of proportionality has various identities and serves different masters. This subparagraph focuses on the principle of proportionality in its fundamental right capacity. In this respect it should be noted that the scope of application of Article 4(3) TEU is much wider than that of Article 49 EU Charter. The latter provision is limited to criminal offences. While it cannot be excluded that the Court of Justice will give a wide interpretation to the term ‘criminal offence’, it is deemed unlikely that this will include reparatory sanctions.

**Punitive sanctions**

In relation to punitive sanctions, the General Court applies a two-step proportionality test: the sanction must not be disproportionate for the objectives pursued and application of a sanction must be proportionate to the gravity of the infringement. This test can be found in *Otis*, where the Court concluded:

> [that] fines must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole, account being taken, in particular, of the gravity of the infringement (...).

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584 Article 4(3) TEU and Article 49 EU Charter.
585 Article 4(3) TEU.
587 Article 4(3) TEU.
In the first step, the proportionality of a particular penalty can be considered by abstracting away from the concrete situation. For instance: are custodial sanctions disproportionate to the implementation of EU competition policy? In the second step, the circumstances of the case can enter the equation. For instance: is a fine equivalent to 8 per cent of the undertaking’s worldwide turnover proportionate to its involvement in the cartel? Member States will in any case not be castigated easily at the first step.389 The Court of Justice does not even require that a particular type of penalty is proportionate to every single group of potential addressees.390

The principle of proportionality requires that the severity of the penalty is determined on the basis of the established facts and circumstances and that none of these factors is given disproportionate significance over the others.391 In case of an infringement committed by several undertakings, the relative gravity of the participation of each of them has to be taken into account.392 More precisely, the roles played by each of them in the infringement for the duration of their participation should be established and accounted for in the severity of the sanction.393 As a result, the ringleaders to an infringement should be punished more severely than other participants.394 With regard to corporate fines, it seems appropriate to relate the penalty to the ‘scale of the infringement’ and the ‘economic power’ of the undertaking.395

Regard should be had of the turnover to which the infringement relates; fines may not be a reflection of the total turnover of the undertaking accounted for by products to which the infringement related was relatively low.396

The Court of Justice and the General Court have ruled out the necessity of taking into account particular facts and circumstances that could be deemed prima facie relevant in meting out a proportionate penalty. It should be noted that these rulings do of course not limit the sanctioning autonomy of the Member States. EU law does not require the penalty to be proportionate to the undertaking’s size on the product market in respect of which the infringement was committed.397 It further follows from EU case law that the Commission is not required in setting the amount of the fine to take into account the

389 Cf Case C-186/98 Nunes and de Matos [1999] ECR I-4883, where the Court was asked to decide whether a Member State is empowered to impose criminal penalties for conduct which only attracts a sanction of civil law nature under EU law. The Court only mentioned the principle of proportionality, without making a substantive evaluation.


394 Case T-410/03 Hoechst [2008] ECR II-881, para 423. Simonsson comes to a different conclusion: ‘It is not possible to imply at present that Member States are required to impose higher fines on ringleaders and instigators.’ Simonsson (n 341) 320. She bases this conclusion, mistakenly it is argued, on the assumption that the Court’s case law is entirely based on the procedural framework governing the Commission’s actions.


degree of culpability, the harmful effects of the infringement or the illegal gains of the offender. This is especially noteworthy in relation to the prohibition laid down in Article 101 TFEU, which even has ‘anti-competitive object’ and ‘anti-competitive effect’ as alternative conditions and where one could have expected the degree of culpability and the size of the effect, respectively, to play a decisive role. While the General Court has indicated to take into account the degree of culpability when punishing ‘object-restrictions’ and to take into account the harmful effects of the infringement when punishing ‘effect-restrictions,’ it has only paid lip service to this intention.

Reparatory sanctions

The principle of proportionality also applies in relation to reparatory sanctions. Reparatory sanctions are meant to remedy the illegality rather than to punish the offender. Reparatory sanctions in the area of EU competition law regularly take the form of orders prohibiting (the continuation of) certain action or requiring certain action. These orders are subject to the principle of proportionality. In accordance with Magill:

the principle of proportionality means that the burden imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (...).

The practical implications of this requirement can be demonstrated with the help of Sarrió. In Sarrió, the General Court had to review the legality of a Commission order prohibiting the exchange of information between undertakings found to have participated in a cartel on the market for cartonboard. More specifically, the Commission had prohibited

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401 Cf Wils, ‘The European Commission’s 2006 guidelines on Antitrust Fines’ (n 222) 222-223, who favours a policy in accordance with which intentional infringements are penalised more harsh than negligent infringements.
403 The General Court has not been criticised over this matter by the Court of Justice either. Cf Case C-272/09 P KME [2012] OJ C 32/4, para 34: ‘the actual impact of cartels on the market is not a decisive factor for determining the level of fines.’ However, these considerations have found resonance in Commission policy. In its Guidelines on the matter of setting fines, the Commission indicates that infringements that have not been implemented or that have been committed as a result of negligence warrant a reduced fine. See Commission Guidelines on the method of setting fines [2006] OJ C 210/2 (paras 22 and 29).
Sarrió SA to exchange aggregated statistical data and statistical information. The Court accepted that the Commission had the power to specify what the undertakings had to do to bring the infringement to an end.\footnote{ibid para 267.} However, such requirements could not exceed what is appropriate and necessary to attain the objective of restoring compliance with Article 101 TFEU.\footnote{ibid.} The Court considered that the proportionality of the prohibition was dependent on whether the exchange itself was contrary to Article 101 TFEU.\footnote{ibid para 276.} It then concluded:

Such a prohibition exceeds what is necessary in order to bring the conduct in question into line with what is lawful because it seeks to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information on the ground that the information exchanged might be used for anti-competitive purposes. First, it is not apparent from the Decision that the Commission considered the exchange of statistical data to be in itself an infringement of Article 85(1) of the Treaty [now Article 101(1) TFEU]. Second, the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect (…).\footnote{ibid para 280.}

The Court thus concluded that the prohibition to exchange statistical information was a disproportionate sanction.

It follows from Sarrió that the proportionality of orders prohibiting (the continuation of) certain action is dependent on this action itself being contrary to Article 101 or 102 TFEU. This conclusion works two ways. In Gütermann it was decided that the proportionality of the remedy ‘does not depend on the situation of the undertakings concerned at the time when the contested decision was adopted’.\footnote{Joined Cases T-456/05 and T-457/05 Gütermann [2010] ECR II-1443, para 66.} As a result, the fact that one of the participants in the Industrial Thread cartel was no longer active in this sector did not affect the validity of a remedy requiring this undertaking to refrain from repeating the illegal behaviour.\footnote{ibid paras 65-66.} A similar approach obviously cannot be transposed to orders requiring certain positive action. In these cases the infringement results from the status quo. Yet, also orders requiring certain action are subject to the principle of proportionality.\footnote{Case T-65/98 Van den Bergh Foods [2003] ECR II-4653, para 170.}

**Negotiated forms of reparation**

While the requirements of appropriateness and necessity apply to reparatory sanctions\footnote{Joined Cases T-456/05 and T-457/05 Gütermann [2010] ECR II-1443, para 63.}, negotiated forms of reparation are subject to a more limited proportionality test. It follows from Alrosa that commitment decisions under Article 9 Regulation 1/2003, with which the
Commission terminates an investigation without a finding of infringement but after the undertaking has given commitments to make certain changes in its commercial activities, are not subject to a comprehensive appropriateness test:

Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.415

The Court of Justice concluded further that the Commission is not required to seek out less onerous or more moderate solutions than the commitments offered to it.416 In so doing, it overturned the General Court’s ruling on this matter. The approach of the Court of Justice in relation to the proportionality of commitment decisions is in stark contrast to the treatment of reparatory sanctions. The Court of Justice deliberately deviated from this approach, simply by holding that as the characteristics of the power to terminate an infringement differ from the characteristics of the power to adopt a commitment decision, also the requirements under the principle of proportionality differ. 417 An explanation for this discrepancy could be that commitments should address the concerns of the Commission expressed in a preliminary assessment. This could require more onerous measures than what would be needed to address a proven infringement.418

Different proportionality standards
It follows from the foregoing that the proportionality requirements differ with the type of sanction.419 While punitive sanctions are essentially subject to a negative test, filtering out disproportionate sanctions, the Court applies a full-blown proportionality test (‘appropriate and necessary’) to reparatory sanctions. Negotiated forms of reparation, on the other hand, are subject only to a very light proportionality test focusing mainly on the principle’s reinforcing effects. Especially the difference between punitive sanctions and reparatory sanctions is noteworthy. Only procedures resulting in the imposition of punitive sanctions are subject to the presumption of innocence.420 The application of this principle

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415 Case C-441/07 P Alrosa [2010] ECR I-5949, para 41.
416 ibid para 61.
417 ibid para 38.
418 This point has been made earlier in MJ Frese, ‘Het Toezeggingsbesluit; Kenmerken van een Nieuw Handhavingsinstrument’ [2007] Markt & Mededinging 39, 43.
419 This conclusion is in line with Tridimas’ findings on the application of the principle of proportionality more generally: ‘far from dictating a uniform test, proportionality is a flexible principle which is used in different contexts to protect different interests and entails varying degrees of judicial scrutiny.’ Tridimas (n 21) 173.
requires courts to undertake a full review with regard to administrative penalties. One would therefore expect the Court to apply the principle of proportionality more thoroughly to punitive sanctions than to reparatory sanctions. It should be noted in this respect that from the undertaking's perspective reparatory sanctions could be far more costly than pecuniary penalties. Whereas the latter might be perceived as a tax on anti-competitive profits, the former actually prevent the continuation of certain, potentially very lucrative, commercial behaviour. Notwithstanding these considerations, the reason for the Court to adopt a different approach is probably one of pragmatism rather than principle. It will generally be easier for the Court to review the necessity of a reparatory sanction than the necessity of the level of a penalty.

Centralisation effects

It can be concluded that the Member States should take into account the principle of proportionality in terminating and penalising infringements of Articles 101 and 102 TFEU. The requirements under this principle differ per sanction. Punitive sanctions may not be disproportionate to the aim of compliance. This requirement still leaves the Member States considerable leeway. In meting out a proportionate penalty, NCAs should pay attention to the role played by the undertakings in the infringement, as well as to the scale of the infringement. Reparatory sanctions might arguably be subject to a stricter proportionality regime. These sanctions may not exceed what is appropriate and necessary to (re-)establish compliance with Articles 101 and 102 TFEU. Negotiated forms of resolution are virtually excluded from the principle of proportionality, at least from the principle's mitigating capacity. It follows that the EU principle of proportionality mainly limits the NCAs in imposing reparatory sanctions.

4.7 CONCLUSION

Contrary to what Regulation 1/2003 may suggest, national legislators are not entirely free in allocating sanctioning powers to their NCAs. The NCAs themselves are not entirely free in exercising their powers either. Where the Member States act as ‘agents’ of EU law, enforcing Articles 101 and 102 TFEU, the domestic sanctioning powers are governed by various EU principles. This chapter has clarified these principles. The EU sanctioning principles limit the autonomy of the Member States and may enhance the uniformity of enforcement procedures throughout the EU. In this respect, these principles can be seen as a form of centralisation. In accordance with what has been concluded in chapter 3, these principles can have various economic implications. The more comprehensive the EU legal framework for domestic sanctioning powers, the fewer the possibilities for preference matching and regulatory innovation, but the larger the savings on transaction costs, duplication costs and coordination costs. This chapter has therefore provided relevant input to determine the economies and diseconomies of the current EU framework for competition law enforcement (infra chapter 6). This concluding paragraph, first, summarises the above findings on the sanctioning principles, to then discuss the areas and the degree of centralisation.
EU principles in the national legal order

Paragraph 4.2 paved the way for the analysis of EU sanctioning principles. The centralisation effect of these principles is due to the EU principle of priority. On the basis of this principle, EU law has priority over national law. Only outside the scope of EU law, the Member States remain free in their legislative activities. While the opportunities for the Court to elaborate on the requirements for the decentralised enforcement of EU competition law have been limited so far, there exists a vast body of case law on the legality of the Commission’s enforcement decisions and on the administration of EU law more generally. For two reasons, many of these cases and the principles developed therein are equally valid to the decentralised enforcement of EU competition law. First, it has been argued that to the extent that these principles derive from primary sources of EU law, there can be no strict distinction with regard to the application of these principles between centralised and decentralised enforcement of Articles 101 and 102 TFEU, or between the enforcement of EU competition law and other EU law. Second, the procedures of the Commission in the context of Articles 101 and 102 TFEU may constitute a benchmark for the procedures of the NCAs. It follows that every EU principle with relevance to sanctions is capable of limiting the sanctioning autonomy of the Member States in the context of EU competition law. Apart from the specific rules laid down in Regulation 1/2003, the applicable principles for the sanctioning powers of the Member States derive from: i) the Articles 101 and 102 TFEU themselves; ii) the EU free movement rights; iii) the EU fundamental rights; and iv) the duty of sincere cooperation laid down in Article 4(3) TEU.

Centralisation effects of the Articles 101 and 102 TFEU: liability principles

Paragraph 4.3 has shown that some elements of the Articles 101 and 102 TFEU have developed into detailed principles for the attribution of liability. This concerns the elements of ‘undertaking’, ‘agreement’ and ‘restriction of competition’. The liability principles originating in the competition law prohibitions are motivated mainly by considerations of uniform and effective enforcement, but they occasionally also protect undertakings and their owners against spurious allegations.

It has been concluded that the Member States have to apply the EU principle of personal responsibility. In this context, Member States should also recognise the doctrines of parent liability and economic continuity. The latter obligation is especially relevant for national review courts. The NCAs may in principle always decide to refrain from seeking parent liability or from imputing liability on the economic successor of the culprit in individual cases.

It has further been concluded that NCAs should apply Article 101 TFEU in accordance with the doctrine of the ‘single and complex infringement’ or ‘single and continuous infringement’ (SCI) and that also this has implications for the liability of the undertakings involved. Again, national review courts need to sanction this approach. The SCI-doctrine also limits the discretion of the NCAs. While NCAs may decide not to include certain anti-competitive manifestations of an SCI in their investigation, they cannot prosecute these manifestations separately. However, the latter safeguard seems limited to the actions by a single NCA and risks losing much of its meaning in situations of parallel actions by various NCAs.
As a final point in paragraph 4.3 it has been argued that Member States cannot exclude any form of participation in a cartel from the scope of Article 101 TFEU. As with the earlier points, also this issue is most relevant in the review stage of the enforcement proceedings. National courts need to accept that any form of participation qualifies as co-perpetration, irrespective of the domestic procedural framework. This co-perpetrator doctrine is not without obligations for the NCAs either. First, it seems inappropriate for NCAs to refrain from proceeding against particular participants systematically and solely on the basis of their marginal role in the infringement. More importantly, in applying the co-perpetrator doctrine NCAs should take account of the degree of participation in deciding on the severity of the penalty.

Centralisation effects of the free movement rights
The implications of the free movement rights for the decentralised enforcement of EU competition law have been detailed in paragraph 4.4. It has been concluded, first, that the free movement rights indeed condition domestic sanctions for infringements of Articles 101 and 102 TFEU. Second, it follows from the applicability of the free movement rights (as supplemented by Article 18 TFEU) that discriminatory sanctions for infringements of Articles 101 and 102 TFEU are prohibited. Third, excessive sanctions for anti-competitive conduct with hardly any significance, or – more problematic – sanctions that directly limit trade flows, both risk being caught and overruled by the free movement rights.

Centralisation effects of the fundamental rights
Paragraph 4.5 has identified and analysed a whole range of fundamental rights with particular salience for domestic sanctioning powers. The following principles have been identified as relevant: the right to property, the right to economic engagement, the principle of legal certainty, the right to a reasoned decision, the principle of good administration, the protection against undue delays, the principle of retroactivity in mitius, the principle of ne bis in idem, the principle of nulla poena sine culpa, the principle of equal treatment and, finally, the principle proportionality. The latter principle has been discussed in the context of the EU duty of sincere cooperation. It has been demonstrated that EU case law on the above rights is not always elaborate or even equivocal. Still, numerous concrete conclusions have been drawn with regard to the sanctioning autonomy of the Member States and the centralisation of sanctioning powers and procedures.

In accordance with the right to property, any restriction of ownership or the exploitation of assets should correspond with the objectives of Articles 101 and 102 TFEU. In the case of compulsory licensing under Article 102 TFEU, for instance, this means that the licensor is entitled to a reasonable compensation. Closely related is the right to economic engagement. While this right still needs to develop in the context of EU competition law, it seems capable of limiting Member States in administering sanctions that are aimed at the professional activities of the undertaking or its staff.

Under the principle of legal certainty, Member States have to draw up statutes of limitation, as they cannot delay the exercise of their powers to impose penalties for infringements of Articles 101 and 102 TFEU indefinitely. Furthermore, Member States
should ensure that sanctions for infringements of Articles 101 and 102 TFEU rest on a clear and unambiguous legal basis so that the consequences of an infringement are foreseeable. Finally, if Member States wish to grant their NCAs a margin of discretion as to the level of the penalty, they should provide an upper limit.

The right to a reasoned decision and the corresponding duty to state reasons require the Member States to ensure that the exercise of discretionary sanctioning powers remains verifiable. Pursuant to this duty, NCAs are required to explain the grounds for deciding on a particular sanction.

The principle of good administration is relied upon ever more often and in relation to a broad range of issues. Considering its fundamental nature and general principle status, it would appear to extend to the decentralised enforcement of Articles 101 and 102 TFEU. Based on case law in relation to Commission decisions, it can be concluded the principle of good administration requires competition authorities, in any case, to clarify how they will exercise their discretionary penalty powers, to record the essential aspects of the assertions made at meetings in the context of a leniency application, and to undo any increase of the fine for reasons of recidivism if the decision finding the first infringement is subsequently annulled. Further implications for the sanctioning powers of the competition authorities need to be clarified in future case law.

Another fundamental right that penetrates the national legal orders and that is capable of limiting the sanctioning autonomy of the Member States is the protection against undue delays. This requires Member States to compensate undertakings for periods of inactivity in the enforcement process. This could be done by applying a rebate to the penalty otherwise imposed.

A reduction of the penalty could also be required by the principle of retroactivity in mitius. In accordance with this principle, the introduction by a Member State of more lenient penalties for infringements of Articles 101 and 102 TFEU demands immediate application to all running investigations. More lenient penalties need thus to be applied retroactively.

Some fundamental rights exclude domestic sanctions altogether. The principle of ne bis in idem prohibits NCAs from commencing proceedings under Articles 101 and 102 TFEU against any person that has already been penalised or acquitted for certain material acts by a previous decision under Articles 101 and 102 TFEU. As a result, double punishment is prohibited as well.

The analysis of the principle of nulla poena sine culpa has shown that it highly uncertain whether this principle constitutes a general principle of EU law. Outside the field of EU competition law the Court of Justice has implicitly denied the existence of this principle and there is no clear authority for the applicability of this principle in the context of the decentralised enforcement of Articles 101 and 102 TFEU. As a result, it is still unclear whether or not the principle of nulla poena sine culpa is capable of centralising parts of the sanctioning regime.

By virtue of the principle of equal treatment, Member States are precluded from treating similar situations differently and different situations similarly. With regard to sanctions, this requirement should be applied to every single element that ultimately decides the severity of the sanction (eg involvement of the undertaking, size of the undertaking, cooperation by
the undertaking). In terms of practical implications, this principle is mainly concerned with instances of manifest inequality.

As to the centralisation effects of all of these principles, it should be noted that they only provide a floor below which Member States may not operate. Therefore, centralisation only takes place to the extent that national laws are less generous. However, Member States can be precluded from adopting more generous legal safeguards where this is deemed contrary to the duty of sincere cooperation, for instance where this limits the effectiveness of EU competition law.

Centralisation effects of the duty of sincere cooperation

Further to the sanctioning principles deriving from Regulation 1/2003, the Articles 101 and 102 TFEU, the free movement rights and the fundamental rights, domestic sanctioning powers for EU competition law are subject to the duty of sincere cooperation laid down in Article 4(3) TEU. Paragraph 4.6 has detailed the requirements of the Member States under this duty, more specifically under the principles of equivalence, effectiveness, dissuasiveness and proportionality. With regard to the centralisation effects of these principles it should be noted that they apply both in disputes over whether a Member State uses appropriate means to enforce EU law and in disputes over whether a Member State has unlawfully extended the scope of EU legislation.

Under the principle of equivalence, sanctions for infringements of EU competition law should at least be equal to sanctions for infringements of national competition law. This means that the national legislator should provide its NCA with a set of sanctioning powers for the purpose of Articles 101 and 102 TFEU that are at least equal to those for national competition law. NCAs, in turn, may not reserve particular useful (but perhaps costly) sanctioning powers for infringements of national competition law. While the principle of equivalence limits the sanctioning autonomy of the Member States, it does not lead to more uniformity throughout the EU.

Unlike the principle of equivalence, the principle of effectiveness leaves the Member States considerable flexibility as to the sanctions they use for the enforcement of Articles 101 and 102 TFEU. Pursuant to the principle of effectiveness, NCAs should be able to terminate every type of infringement. How this is organised is less important. However, this requirement does imply that NCAs should be able to order the termination of anti-competitive behaviour, even when this behaviour is caused by the very structure of the undertaking. As a further requirement under the principle of effectiveness, NCAs should be able to adopt interim measures pending the investigation. A final requirement under this principle is that NCAs are able to impose deterrent penalties under conditions that are not overly restrictive. This requirement is further supported by the principle of dissuasiveness.

The principle of dissuasiveness mandates that Member States punish intentional and negligent infringements of Articles 101 and 102 TFEU with penalties that deter both the offender and society at large. As a consequence of the latter objective, Member States need to publish the details of penalty decisions and should be able to punish undertakings more severely than they might deserve.
A final aspect of the Member States’ duty of sincere cooperation is that they should ensure proportionality between infringement and sanction. This requirement not only derives from the duty of sincere cooperation, it also qualifies as a fundamental right on which undertakings and individuals may rely. The principle of proportionality requires that punitive sanctions may not be disproportionate ‘to the aim of compliance’. This means that NCAs should pay attention to the role played by the undertakings in the infringement, as well as to the scale of the infringement. Interestingly, reparatory sanctions seem subject to a stricter regime. These sanctions may not exceed what is appropriate and necessary for compliance with Articles 101 and 102 TFEU. Furthermore, negotiated forms of resolution are virtually excluded from the fundamental right of proportionality between ‘infringement’ and ‘sanction’.

The areas and the degree of centralisation

It can be concluded from the above that there exists an EU framework for decentralised sanctioning that consists of a variety of legal principles. While the principles deriving from Regulation 1/2003, the Articles 101 and 102 TFEU and the duty of sincere cooperation are mainly concerned with the uniform and effective application of EU competition law, the free movement rights and the fundamental rights guarantee that the enforcement actions of the Member States do not impinge on core EU entitlements. Several observations can be made as to the areas and the degree of centralisation caused by these principles, as well as to their economic implications.

First, the EU sanctioning principles are hardly concerned with the type of sanctions Member States deploy in the enforcement of Articles 101 and 102 TFEU. Apart from proscribing inhumane or degrading penalties and prescribing interim measures, none of the EU principles actually limits the autonomy of the Member States with regard to the type of sanctions. For example, the EU principle of effectiveness, while expecting of the Member States to be able to terminate and punish any type of infringement, seems incapable of superimposing particular, potentially very effective, sanctions onto the Member States. To make this point more concrete, Member States remain free to decide whether or not to provide for structural remedies (positive orders to divest shares/assets) and/or custodial sanctions. This is only different in cases where the Member State in question already provides for these sanctions in the context of national competition law and the principle of equivalence therefore demands that these sanctions are also available for EU competition law. Notwithstanding these conclusions as to the concrete EU requirements, the ubiquity of corporate fines in the context of EU competition law makes this type of sanction virtually unavoidable (supra subparagraph 4.6.3). In any case, the Member States remain entirely free in deciding whether or not to open an investigation and, once an infringement has been established, in whether or not to impose a sanction.

Second, and this is in line with the first observation, the EU sanctioning principles are mainly concerned with the conditions under which domestic sanctioning powers are exercised. Examples of this form of centralisation are plentiful. Let us briefly revisit two. In subparagraph 4.3.2 it has been concluded that where an NCA imposes a fine for an
infringement of Articles 101 and 102 TFEU, it should apply the EU principle of personal responsibility in determining who should bear the financial burden. Another example can be taken from subparagraph 4.5.6. Where a Member State grants it NCA discretionary fining powers it has to ensure that the latter explains the methods for calculating the fine.

Third, many of the EU sanctioning principles still leave the Member States considerable discretion in determining the conditions for the domestic sanctioning powers. For example, irrespective of the strong normative connotation of the EU principle of dissuasiveness or the EU principle of equal treatment, Member States will be castigated under these principles only in cases of manifest failure. With regard to the principle of dissuasiveness, for instance, it would seem rather exceptional that a Member State will need to adjust the severity of its penalties in order to reach deterrence levels that are current in other jurisdictions. As a consequence, the principle of dissuasiveness (like other principles) has only limited prescriptive value.

Fourth, many of the more detailed EU sanctioning principles relate to the legal safeguards for the undertakings involved, rather than to the performance standards for the authorities. The more detailed sanctioning principles mainly derive from the EU fundamental rights and the EU free movement rights. These principles ensure that the authorities do not encroach upon core EU entitlements.

Fifth, the detailed sanctioning principles deriving from the EU fundamental rights only provide a floor below which the Member States may not operate. The Member States may choose to adopt higher legal standards, provided this does not jeopardise the effectiveness of EU competition policy.

Considering the areas and degree of centralisation, it may be concluded that the EU sanctioning principles do not impose uniform standards on the Member States and therefore do not limit to any significant extent the transaction costs, coordination costs and duplication costs that come with a system of decentralised enforcement. This also means that Member States have the possibility to accommodate domestic sanctioning preferences and to engage in regulatory innovation, certainly in relation to the type of sanctions.

With the EU framework for domestic sanctioning powers in place, we should now turn to the development of a number of national sanctioning regimes. The economies and diseconomies of the current EU framework are ultimately dependent on the heterogeneity of sanctioning preferences (as reflected in the disparities in sanctioning regimes) and the degree to which Member States engage in innovative experiments. The more heterogeneous the sanctioning preferences across the Member States and the more numerous the innovative experiments, the more likely it becomes that the initial losses of decentralisation are ultimately compensated. This will be examined in the following chapter.