Sanctions in EU competition law: principles and practice

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THE DEVELOPMENT OF DOMESTIC SANCTIONING POWERS: IN SEARCH OF CONVERGENCE AND DIFFERENTIATION
In addition to the centralisation effects detailed in chapter 4, the sanctioning powers of the Member States are also subject to a process of convergence. In its 2009 Report on the functioning of Regulation 1/2003, the Commission observed a significant degree of voluntary convergence of national enforcement powers and procedures and concluded that this process was due to Regulation 1/2003 and policy work in the EC. These findings are in line with observations in the academic literature. In fact, earlier work in this area by Drahos has demonstrated that convergence tendencies long preceded the adoption of Regulation 1/2003. The Commission's findings are based on a Staff Working Paper. In this Working Paper, the Commission's administrative services refer to the ‘consistent trend’ towards deterrent fines and further note ‘considerable convergence’ with regard to the power to adopt interim measures and commitment decisions. The Working Paper also mentions ‘(micro-)divergence’ of Member States’ enforcement systems, which seems to refer to differences rather than a process of divergence. Amongst others, these differences would relate to the calculation methods for fines, the availability of criminal sanctions, the applicable prescription periods, the power to adopt structural remedies and the procedures leading to the adoption of commitment decisions.

In accordance with what has been concluded in chapter 3, a process of convergence testifies that there is an increasing degree of homogeneity with regard to sanctioning.

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3 M Drahos, Convergence of Competition Laws and Policies in the European Community. Germany, Austria, and the Netherlands (Kluwer Law International 2001). In the context of her quest for tendencies of convergence and divergence, Drahos has compared differences and similarities in the enforcement of competition law by the Commission, the German authorities, the Dutch authorities and the Austrian authorities at two moments in time (1950 and 2000). Her focus was on enforcement institutions, the initiation of procedures and punitive sanctions, and was limited to a ‘macro level’ comparison. Drahos concluded first that while there was considerable variety in 1950 (at 165-166) this was less so in 2000 (at 172-175), certainly with regard to the Commission and the German and Dutch authorities. Her second conclusion was that there had been strong convergence between the German and the Dutch authorities, some convergence between the Commission and the German authorities, and no convergence between the Commission and the German authorities (at 205).
5 ibid paras 202 and 204.
6 ibid para 205.
7 ibid paras 203-205.
preferences between the Member States. Dependent on the drivers of this process, convergence could be the result of interjurisdictional learning. Convergence therefore has various economic implications. On the one hand, it suggests that potential savings through centralisation have been foregone. After all, decentralisation would then not cater for heterogeneous preferences, while still creating duplication costs and coordination costs. On the other hand, convergence could be evidence for regulatory innovation. Where this regulatory innovation is Member State-driven, this would form an economic argument in favour of decentralisation. Against this background, this chapter examines the degree and drivers of convergence with regard to domestic sanctioning powers. For this purpose sanctioning powers and their development will be analysed for a subset of jurisdictions. This subset includes Germany, the Netherlands and the United Kingdom. This selection has the benefit of comparing three jurisdictions that have an entirely different, yet long-standing history of competition policy. Any convergence tendencies observable in these regimes could be significant for the existence of such tendencies more widely and therefore be evidence for homogeneous preferences in terms of sanctioning powers. Moreover, these jurisdictions generally end up high in the yearly rankings of Global Competition Review, which suggest that they do well in the area of competition law enforcement. It also means that Member State-driven regulatory innovation, if at all, is likely to be found in one of these jurisdictions.

Supported by the Commission documents and existing literature, it is hypothesised that the above three Member States will have largely aligned their sanctioning powers for Articles 101 and 102 TFEU to the Commission’s powers and that this convergence process is reinforced by policy coordination initiatives of the ECn and ECA. It should be noted that alignment to the Commission model is a poor driver of convergence, as it would imply that decentralisation has not enhanced regulatory innovation. To test the above hypothesis, the sanctioning regimes in Germany, the Netherlands and the United Kingdom will be contrasted with the EU’s internal regime, administered by the Commission, and compared to the ECA Fining Principles and ECn Model Leniency Programme. A comparative legal analysis will be made in which different types of sanctioning powers are compared cross-jurisdictionally. This analysis will be preceded by a comparison of the institutional

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9 Global Competition Review is a journal and news service owned by Law Business Research Ltd. It brings out yearly ‘star rating’ of competition authorities from across the globe. The ‘elite’ authorities are awarded five stars, ‘very good’ authorities are awarded 4.5 or 4 stars, ‘good’ authorities are awarded 3.5 or 3 stars, and ‘fair’ authorities are awarded not more than 2.5 stars. In the period between 2005 and 2011, the German’s Bundeskartellamt and the UK’s Office of Fair Trading have been awarded 4 stars or more. The rankings of the Dutch competition authority fluctuate between 3.5 and 4 stars. On a European scale, it is fair to say that these authorities are among the high-achievers.
enforcement frameworks in which these sanctioning powers are situated. Accordingly, this chapter provides a cross-jurisdictional analysis of:

(i) Institutional enforcement frameworks (paragraph 5.2)
(ii) Interim measures (paragraph 5.3)
(iii) Early resolution measures (paragraph 5.4)
(iv) Declaratory findings (paragraph 5.5)
(v) Reparatory sanctions (paragraph 5.6)
(vi) Pecuniary sanctions (paragraph 5.7)
(vii) Custodial sanctions (paragraph 5.8)
(viii) Disqualification orders (paragraph 5.9)

It is hoped that with this approach a practical format for the identification of (the drivers of) convergence tendencies and (the roots of) prevailing differences may be developed.

More than just clarifying the development of domestic sanctioning powers for infringements of Articles 101 and 102 TFEU, the below analysis has two further objectives. First, to provide a critical analysis of four sanctioning regimes, highlighting some features of the domestic regimes that are difficult to reconcile with the EU sanctioning principles set out in chapters 2 and 4. In this respect it should be reminded that the EU sanctioning principles do not impose rigid standards on the Member States (supra paragraph 4.7). Therefore, the evaluation is limited to the clear-cut discrepancies between the domestic sanctioning regimes and the EU sanctioning principles. These discrepancies will be touched upon in passing. Another objective of this chapter is to actually contribute to interjurisdictional learning by detailing various sanctioning alternatives. In this sense, the below analysis is therefore instrumental to the latent economic benefits of decentralisation. Ultimately, the below analysis will serve as input for chapter 6, where the results of chapters 4 and 5 will be joined and where the economies and diseconomies of decentralisation are discussed. All these objectives require an in-depth analysis of the selected four sanctioning regimes.

The following eight paragraphs are all structured alike. Each paragraph starts with a general introduction to the particular type of sanctioning power, is then broken down in separate subparagraphs to study all four jurisdictions, and concludes with findings on the degree and drivers of convergence in that area. Paragraph 5.10 draws all these findings together to conclude on the degree and drivers of convergence for sanctioning powers as a whole.

5.2 INSTITUTIONAL ENFORCEMENT FRAMEWORKS

This paragraph primarily has a preparatory function. It is meant to explain institutional features that have a bearing on the entire enforcement process and to help appreciate the intricacies of the various sanctioning powers that will be discussed in later paragraphs. The term ‘institution’ refers to the public bodies (administrative authorities or courts) that have a role in the public enforcement of EU competition law. A basic understanding of
the institutional framework in the selected jurisdictions is also necessary for an accurate perspective on these sanctioning powers. For example, the sanctioning powers of an administrative authority will be more or less severe depending on the review mandate (scope and intensity) of the appeal courts. Further to this introduction to the four sanctioning regimes, this paragraph also highlights some institutional differences (and similarities), as well as some tendencies of institutional convergence and divergence.

5.2.1 Enforcement Institutions on EU Level

On EU level, the enforcement of Articles 101 and 102 TFEU is in the hands of the Commission. The Commission derives its enforcement competence directly from the Treaties. Regulation 1/2003 provides the Commission with the requisite powers. The Commission is a fully integrated enforcement authority. It decides on the initiation of proceedings, it conducts the investigations, it formulates the objections against the undertakings, it takes a decision on the legality of the behaviour, and it imposes sanctions. In practice, all the preparatory activities are done by the administrative services of the Commissioner in charge with competition policy. These administrative procedures are governed by Commission Regulation (EC) No 773/2004 ('Regulation 773/2004'). In accordance with this Regulation, the Commission should issue a statement of objections, informing the parties of the Commission’s objections, prior to the adoption of any sanction. Parties may then respond to the statement of objections in writing, setting out all facts relevant for their defence. For this purpose, the Commission grants access to the administrative file. Parties may also request a hearing before the Commission’s administrative services, as well as an oral hearing before the Hearing Officer. The position of the Hearing Officer has been established through a Decision of the President of the Commission. The Hearing Officer safeguards the effective exercise of procedural rights.

Decisions of the Commission can be appealed before the General Court, with a further appeal on points of law to the Court of Justice. The General Court has jurisdiction to review the legality of the decision. A decision can be annulled on grounds of lack of competence, infringement of an essential procedural requirement, infringement of any rule

10 Article 104 TFEU and Article 17 TEU.
18 Article 4 Decision on the function and terms of reference of the hearing officer in certain competition proceedings.
19 Article 256 TFEU, in conjunction with Article 263 TFEU.
20 Article 256 TFEU.
of EU law, or misuse of powers. In addition, the General Court has unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. Accordingly, it may cancel, reduce or even increase these punitive sanctions as deemed appropriate. In practice, this difference in jurisdiction between punitive sanctions and all other decisions does not play a prominent role, certainly not with regard to the intensity of review. The General Court increasingly scrutinises the Commission's finding of infringement, while tending to follow the Commission's approach in determining the amount of the fine. The General Court reserves its powers to increase fines for exceptional cases only.

5.2.2 Enforcement Institutions in Germany
In Germany, the enforcement of Articles 101 and 102 TFEU is split into two trajectories, each with its own procedural framework. Articles 101 and 102 TFEU can be enforced through reparatory proceedings (Verwaltungsverfahren) and penalty proceedings (Bußgeldverfahren). Reparatory proceedings can only result in reparatory sanctions. In cases where a penalty could be warranted, investigations should take place in accordance with penalty proceedings. What starts out as reparatory proceedings could develop into penalty proceedings, or vice versa. Infringements warranting both penalties and remedies formally require two (parallel) procedures. Whereas reparatory proceedings are directed to the undertakings that actually committed the infringement, penalty proceedings are directed first and foremost to the natural persons responsible for the infringement.

The basic legal text for competition law in Germany is the Act against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen, 'GWB'). With regard to the enforcement of Articles 101 and 102 TFEU, this text supplements various framework laws. The GWB only deals with penalty proceedings summarily. Penalty proceedings are subject to the Act on Administrative Offences (Gesetz über Ordnungswidrigkeiten, 'OWiG'). Reparatory proceedings, on the other hand, are largely covered by the GWB.

The burden of enforcing Articles 101 and 102 TFEU is shared by various institutions. By virtue of § 50(1) GWB, enforcement competences have been granted to the Federal Cartel Authority (Bundeskartellamt, 'BKartA') and the 16 designated state authorities (Landeskartellbehörden, 'LKartBs'). These authorities will be jointly referred to as ‘German authorities', 'competition authorities', or 'authorities'. There is no hierarchical relationship between the BKartA and the LKartBs. In addition to these ‘first-line’ enforcement authorities, also the public prosecutor has a role in the enforcement of Articles 101 and 102 TFEU. As soon as penalty proceedings reach the appeal stage, the public prosecutor takes over the case from the BKartA/LKartB. The former makes an autonomous decision.
whether or not to pursue the case. While the public prosecutor thus takes a key position in the enforcement of Articles 101 and 102 TFEU, it has not been designated as NCA. This sits oddly with Regulation 1/2003, especially because it means that an institution other than an NCA applies Articles 101 and 102 TFEU and because it circumvents the Regulation’s professional secrecy safeguards (supra paragraph 2.2).

The BKartA is a so-called independent federal authority (selbständige Bundesbehörde). This notion derives from the German Constitution (Grundgesetz, ‘GG’) and has various implications for the institutional position of the BKartA. By virtue of Article 87(3) GG the federal legislator may create independent federal authorities for purposes falling within the former’s scope of competences. Often, these authorities are subordinated to federal departments. The term ‘independent’ refers to the authority’s independence vis-à-vis the responsible minister. For ‘organisational’ and ‘functional’ purposes the authority can operate independently from the minister. However, the term ‘independent’ does not connote a lack of power for the minister to get involved in the authority’s operations. The degree in which ministerial instructions can be given depends on the general powers of the responsible minister rather than on the characteristics of the particular authority.

The BKartA is subordinated to the Federal Department of Economic Affairs and Technology (Bundesministerium für Wirtschaft und Technologie, ‘BMWi’). The BKartA is, in any case, independent from BMWi in an organisational and functional fashion: it can take decisions in its own name and on its own initiative. The question whether BMWi has the power to give instructions to the BKartA is subject to debate. Some commentators argue that lack of legal grounds to the contrary suggest that the BMWi does have this power. Others commentators refer to the system of the GWB and the type of the decisions the BKartA takes to draw the opposite conclusion. Still other commentators deny BMWi powers of instruction for reasons of the authority’s structure, with its specific units in charge.

24 In practice, the public prosecutor will terminate the proceedings only in exception circumstances, see R Raum in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht (Band 1: Deutsches Kartellrecht, 11. Auflage, Carl Heymanns Verlag / Luchterhand 2011) § 81 Rdnr 67.
25 The requirement of professional secrecy, laid down in Article 28 Regulation 1/2003, does not extend to the public prosecutor. Yet, the competition authorities need to share highly confidential information every time a case is transferred to the public prosecutor.
26 § 51(1) GWB.
28 Lerche in Maunz – Dürig (n 27) Art 87 Rdnr 183-184.
29 ibid Art 87 Rdnr 184.
30 § 51(1) GWB.
31 Cf Lerche in Maunz – Dürig (n 27) Art 87 Rdnr 184, footnotes 77 and 78.
33 Becker in Loewenheim/Meessen/Riesenkampff (n 23) § 52 Rdnr 2.
of actual decision-making (infra).\textsuperscript{34} Although the issue remains unresolved, there can be no doubt that BMWi should not\textsuperscript{35} and is not likely to\textsuperscript{36} exercise any power of instruction lightly.

The organisational structure of the BKartA shields the enforcement of Articles 101 and 102 TFEU from non-competition law considerations. The GWB has allocated decision-making powers in individual cases to special units within the BKartA (Beschlussabteilungen).\textsuperscript{37} To date, 12 of such units exist. Three units are solely responsible for cartels. The other nine units are structured according to sectors of the economy and have a broader agenda dealing with both restrictive practices and merger control. In principle, these 12 units are exclusively competent for all enforcement decisions.\textsuperscript{38} Decisions are taken in a three-member composition, consisting of a chair and two other members.\textsuperscript{39} The members are government officials that have been appointed for life.\textsuperscript{40} Eligible for membership are individuals suitable for a position as judge or senior civil servant.\textsuperscript{41} Not only does this reinforce the arms-length relation between the BKartA and BMWi,\textsuperscript{42} it also prevents the authority’s superiors, notably the president of the BKartA, from influencing decisions.

Also the LKartBs may apply Articles 101 and 102 TFEU. LKartBs are established by their respective state legislators. The state legislator also determines the specific institutional structure of the LKartB and the procedures it should follow in reparatory proceedings.\textsuperscript{43} In practice, the state departments of economic affairs fulfil the role of LKartB, or better yet the state ministers or senators of economic affairs.\textsuperscript{44} In contrast to the BKartA, LKartBs are not characterised by their organisational and functional independence and proceedings for the enforcement of Articles 101 and 102 TFEU are integrated with the infrastructure of the state department. The resources devoted to competition law enforcement on state level cannot be compared to the resources of the BKartA. Dependent on the respective state administration, competition issues will be managed by anything ranging from a small team to a single part-time official. As a result, enforcement actions by the LKartBs under

\begin{itemize}
\item \textsuperscript{34} V Emmerich, \textit{Kartellrecht} (Verlag CH Beck 2008) 537.
\item \textsuperscript{35} Bechtold (n 32) § 52 Rdnr 2.
\item \textsuperscript{36} Becker in Loewenheim/Meesen/Riesenkampff (n 23) § 52 Rdnr 1, where the four times the BMWi made use of its power to give general instructions (in 1972, 1976, 1978 and 1980) are listed.
\item \textsuperscript{37} § 51(2) GWB.
\item \textsuperscript{38} T Nägele in Jaeger/Pohlmann/Rieger/Schroeder, \textit{Frankfurter Kommentar zum Kartellrecht} (Stand April 2009, Verlag Dr Otto Schmidt) § 51 Tz 13. Exceptions to this exclusive competence relate to investigatory powers, which in particular circumstances could also be exercised by officials of the BKartA. See § 59(3), (4) GWB.
\item \textsuperscript{39} § 51(3) GWB. It is possible and common practice that a Beschlussabteilung consists of more than three members. This allows each Beschlussabteilung to deal with several cases simultaneously. A single Beschlussabteilung could thus render decisions in several compositions of three members.
\item \textsuperscript{40} § 51(2) und (4) GWB.
\item \textsuperscript{41} § 51(4) GWB. These decision-making units within the BKartA are not to be considered as courts, in the sense of independent and impartial tribunals, but are ‘unselbständige Untergliederungen’ of the BKartA. See Nägele (n 38) § 51 Tz 11-16.
\item \textsuperscript{42} Bechtold argues that the BMW could give instructions to the Beschlussabteilungen. See Bechtold (n 32) § 52 Rdnr 1.
\item \textsuperscript{43} § 84 GG.
\item \textsuperscript{44} Bechtold (n 32) § 48 Rdnr 3; H-J Bunte, \textit{Kartellrecht} (Verlag CH Beck 2008) 401.
\end{itemize}
Articles 101 and 102 TFEU will remain rather exceptional. The allocation of enforcement competences to the LKartBs was mainly motivated by the objective to secure their role in the context of national competition law.45

Case allocation and Network cooperation
Case allocation between the BKartA and LKartBs takes place in accordance with § 48(2) GWB. Enforcement proceedings can be transferred from the BKartA to an LKartB and vice versa. Whenever the BKartA or the LKartBs initiate enforcement procedures a duty exists to inform the relevant LKartB or the BKartA.46 This mechanism applies to the initiation of both reparatory and penalty proceedings.47 Enforcement competence is allocated on the basis of an effect-principle (Auswirkungsprinzip).48 Neither the seat of the undertakings involved, nor the geographical markets on which they are active are relevant for case-allocation purposes. The BKartA is the competent authority for all cases where the anti-competitive practice affects more than one German state. Anti-competitive practices the effects of which are limited to a single state are handled by the LKartB of this state.49 Already limited cross-border effects suffice to prompt the BKartA’s exclusive competence.50 In accordance with § 49(3) and (4) GWB, the BKartA and the LKartBs can deviate from this mechanism in individual cases, and agree on a case being transferred to federal or state level, whatever the case may be.51 Thus, a statutory allocation mechanism applies by default, the binding effect of which can only be overcome through an agreement between the competition authorities.52 Although this mechanism might not prevent disputes over the allocation of cases, issues of

45 Due to Article 3(1) Regulation 1/2003, national authorities need to apply EU competition law in parallel to national competition law. Without the power to apply Articles 101 and 102 TFEU, the role of the LKartBs with regard to national competition law would be rendered less meaningful. See Begründung zum Regierungsentwurf der 7. GWB-Novelle vom 26. Mai 2004, WuW-Sonderheft (Verlagsgruppe Handelsblatt 2005) 141.
46 § 49(1) GWB. The LKartB that is to be informed by the BKartA is the LKartB of the state where the undertaking has its seat.
47 WuW-Sonderheft (n 45) 140. See also § 36 OWiG in conjunction with § 81(10) GWB.
48 Becker in Loewenheim/Meessen/Riesenkampff (n 23) § 48 Rdnr 4.
49 ibid Rdnr 5.
50 OLG Düsseldorf WuW/E DE-R 1179 (1181ff) – Stromcontracting. Indications of cross-border effects suffice for the BKartA to assume competence. If the investigations then later reveal that cross-border effects have not materialised, the case is transferred to the competent LKartB. For a more nuanced description of this effect-principle, see Becker in Loewenheim/Meessen/Riesenkampff (n 23) § 48 Rdnr 5.
51 Where an LKartB requests the BKartA to hand over a case, the transfer can be blocked by another LKartB.
52 The binding allocation mechanism of § 48 GWB creates rights for the parties involved in reparatory proceedings (Beteiligten). This can be concluded from § 55 GWB, which provides a means for judicial redress against decisions of the BKartA and LKartBs assuming competence. It should be noted that decisions on relative competence are no exact science and that the courts seem to deal with this issue in a rather flexible manner. Even when cross-border effect cannot be proved indisputably, this does not necessarily lead to the annulment of the decision, see eg OLG Düsseldorf 30.03.2009 VI-2 Kart 10/08 – Transportbeton.
concurrency will not arise. Either the BKartA is competent to take enforcement action or a single LKartB, but never both and never several LKartBs.

Some tasks in relation to EU competition policy fall within the exclusive domain of the BKartA. These exclusive functions concern activities within the ECN and follow from §§ 50(2) and 50a(1) GWB. All communication of the LKartBs to and from the Commission and foreign NCAs takes place centrally over the BKartA. It implicitly follows from § 50(2) GWB that the LKartBs can give instructions to the BKartA on issues (e.g. viewpoints and questions) concerning them and their cases. The BKartA then takes on the role of agent of the LKartB vis-à-vis the Network. This centralised communication system does not prevent the LKartBs from pursuing direct contacts with the Commission or other NCAs on a more informal basis. In addition to this centralised system of notification and information-exchange, the GWB also reserves to the BKartA the power and duty to cooperate with investigations of other Network members taking place on German territory.

Decisions by the competition authorities can be appealed in two instances. A first instance appeal lies with the Court of Appeal (Oberlandesgericht, 'OLg'). A further appeal on points of law can be lodged with the Federal Court of Justice (Bundesgerichtshof, 'BGH'). The OLG with jurisdiction over the particular competition authority is exclusively competent. Decisions of the BKartA can be appealed before the OLG in Düsseldorf. The OLGs have specialised chambers that hear competition law cases. The appeal procedures differ, dependent on whether reparatory sanctions or punitive sanctions are concerned.

With regard to reparatory sanctions, addressees and other interested parties can apply to the OLG for 'judicial review'. Before the application reaches the OLG, the competition authority re-evaluates whether it maintains its decision. This mechanism is formalised by requiring the applicant to lodge its application for review with the competition authority. If the latter decides to maintain its decision, the application is transferred to the OLG. The OLG then reviews the legality of the decision. This action for review is called a Beschwerde. The OLG investigates the facts of the case on its own motion and can base its decision on

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53 As a result of the exclusive competence of the BKartA for anti-competitive practices with cross-border effects, allocation issues between two or more LKartB will not arise.
54 The BKartA seems to be the only German NCA that has signed the Statement regarding the Network Notice, see <http://ec.europa.eu/competition/antitrust/legislation/list_ofAuthorities_jointStatement.pdf> accessed 1 July 2012.
55 Bechtold (n 32) § 50 Rdnr 6; C-D Bracher in Jaeger/Pohlmann/Rieger/Schroeder, Frankfurter Kommentar zum Kartellrecht (Stand April 2009, Verlag Dr Otto Schmidt) § 50 Tz 10.
56 WuW-Sonderheft (n 45) 184.
57 § 50(3) GWB.
58 § 91 GWB.
59 § 63(4) GWB.
60 Bechtold (n 32) § 66 Rdnr 3.
61 § 70(1) GWB.
on new facts and evidence.\footnote{\textsection 63(1) GWB.} Within the boundaries of the application\footnote{Bechtold (n 32) \\textsection 71 Rdnr 6.}, the OLG decides the case on the basis of the conclusions it ‘freely reaches from the overall results of the proceedings.’\footnote{\textsection 71(1) GWB (‘Das Beschwerdegericht entscheidet durch Beschluss nach seiner freien, aus dem Gesamtergebnis des Verfahrens gewonnenen Überzeugung.’).} This phrase should not be misinterpreted. These conclusions can basically lead to two decisions: the OLG may either uphold or annul (a part of)\footnote{Bechtold (n 32) \textsection 71 Rdnr 6.} the enforcement decision.\footnote{\textsection 71(2) GWB.} Annulment of the enforcement decision can be based on two grounds: the enforcement decision is \textit{ultra virus} (\textit{unzulässig}) or unfounded (\textit{unbegründet}).\footnote{ibid.} Judgments of the OLG can be appealed to the BGH.\footnote{\textsection 74(1) and 76(2) GWB.} The BGH will only consider the application of the law and will not re-establish the relevant facts and circumstances.\footnote{\textsection 76(2) and (4) GWB.}

Also penalty decisions can be appealed before the OLG.\footnote{\textsection 83 GWB.} Before having access to the OLG, the applicant should apply to the competition authority for administrative review (\textit{Einspruch}).\footnote{\textsection 67 OWiG.} The authority will then decide whether it maintains or withdraws its decision and, for this purpose, could reopen the investigation and, for instance, hear new witnesses.\footnote{\textsection 69(2) OWiG.} If the authority decides to maintain its decision, it sends the case file to the public prosecutor.\footnote{\textsection 69(3) OWiG and 83(1)GWG.} The latter then takes over the case. The public prosecutor takes an autonomous decision on whether to pursue the case before the OLG.\footnote{In penalty proceedings, the initiation and continuation of proceedings fall within the pflichtgemäßen Ermessen of the ‘prosecuting authority’. This follows from \textsection 47 OWiG. By referring to ‘prosecuting authority’ (\textit{Verfolgungsbehörde}), the scope of \textsection 47 OWiG covers not only the initiation of proceedings by the competition authorities, but extends to the continuation of the proceedings by the public prosecutor after an application has been made for administrative review.} Although the public prosecutor generally decides to continue prosecution, this decision could easily take several months and is by no means a formality. In penalty proceedings, the OLG undertakes a full merits review.\footnote{\textsection 77(1) OWiG.} The decision of the competition authority has a mere guiding role and might be best described as an indictment. In accordance with the \textit{Mündlichkeitsprinzip} (requiring all evidence to be brought in the proceedings orally) and the \textit{Unmittelbarkeitsprinzip} (requiring the OLG to base its judgment on the findings reached in the main proceedings) all facts need to be established afresh. For this purpose the court disposes of investigatory powers, most notably the hearing of (expert) witnesses.\footnote{\textsection 71(2) OWiG.} The OLG does not give a ruling on the enforcement decision, but renders a wholly autonomous enforcement decision instead,
vesting ‘original’ rights and obligations. The decision of the OLG may even lead to a more severe penalty than originally imposed and thus to a reformatio in peius.\textsuperscript{77} Decisions by the OLG may be appealed on points of law to the BGH.\textsuperscript{78}

5.2.3 Enforcement Institutions in the Netherlands

The institutional enforcement framework in the Netherlands is in a phase of transition. At the cut-off date for this study, Articles 101 and 102 TFEU were enforced by the Netherlands Competition Authority (\textit{Nederlandse Mededingingsautoriteit, ‘NMa’}).\textsuperscript{79} The NMa has been established with the introduction of the Netherlands Competition Act (\textit{Mededingingswet, ‘Mw’}) in 1998. Its enforcement powers are laid down in the Mw, as supplemented by the General Act on Administrative Law (\textit{Algemene wet bestuursrecht, ‘Awb’}). Pursuant to Article 89 Mw, the enforcement of Articles 101 and 102 TFEU benefits from all enforcement powers available for national competition law.\textsuperscript{80} At the beginning of 2011, and as part of a broader governmental cost savings and austerity plan, preparations started for institutional changes. This has resulted in a legislative proposal for the merger of the NMa with the Independent Post and Telecommunications Authority (\textit{Onafhankelijke Post en Telecommunicatie Autoriteit, OPTA}) and the Consumers Authority (\textit{Consumenten Autoriteit}) into a single authority.\textsuperscript{81} This merger should be finalised before 2013.\textsuperscript{82} This new organisation will be named Consumer and Market Authority (\textit{Autoriteit Consument en Markt, ‘ACM’}).\textsuperscript{83} The enforcement of Articles 101 and 102 TFEU will then be in the hands of an authority responsible for competition law, sector-specific regulation and consumer protection.\textsuperscript{84} This merger is meant to increase the efficiency and effectiveness of market regulation.\textsuperscript{85} The possibility to exchange information between the various departments within the organisation is considered crucial to this objective.\textsuperscript{86} Yet, also other measures to streamline decision-making procedures are contemplated. As can be inferred from a consultation document published in March 2012, these institutional changes may also have repercussions for the enforcement of Articles 101 and 102 TFEU.\textsuperscript{87} While the institutional structure of the new organisation will probably be very similar to that of the NMa (an

\begin{itemize}
\item \textsuperscript{77} The possibility for a reformatio in peius is subject to one exception. If the main proceedings have not been opened and the OLG decides by ways of an order, the OLG cannot reach a decision that is more burdensome for the parties involved than the original enforcement decision, see § 72(3) OWiG.
\item \textsuperscript{78} § 84 GWB.
\item \textsuperscript{79} Article 88 \textit{Mededingingswet} (‘Mw’).
\item \textsuperscript{80} For ease of reference, Article 89 Mw will not be included in future references to enforcement powers.
\item \textsuperscript{81} TK 2011-2012, 33186, nr 2.
\item \textsuperscript{82} TK 2010-2011, 31490, nr 55.
\item \textsuperscript{83} TK 2011-2012, 33186, nr 2.
\item \textsuperscript{84} Apart from competition law and consumer protection law, the ACM will be responsible for the following sectors: energy, transport and telecom.
\item \textsuperscript{85} TK 2010-2011, 31490, nr 69.
\item \textsuperscript{86} ibid.
\item \textsuperscript{87} Voorstel van Wet (31-5-2012), Wijziging van de Instellingenwet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden marktoezicht.
\end{itemize}
independent authority without legal personality)\(^{88}\), its sanctioning powers may very well differ.\(^{89}\) This study cannot anticipate all these changes. However, in light of the impending change of name of the Dutch NCA, this study will use the neutral terms ‘Netherlands authority’, ‘competition authority’ or ‘authority’ as much as possible.

Decision-making powers are vested in the Board of Directors of the authority. The Directors are appointed by the responsible minister for a limited duration. The minister can also terminate the appointment.\(^{90}\) The Directors are independent from government and private parties.\(^{91}\) The authority has no legal personality and staff is provided by the responsible minister. However, in accordance with Article 16 of the Framework Act on Independent Government Agencies (Kaderwet Zelfstandige Bestuursorganen) staff is subordinated and accountable only to the authority. The minister may adopt guidelines on the exercise of the authority’s powers\(^{92}\) and it may give instructions to the competition authority to take certain actions in the context of Articles 101 and 102 TFEU.\(^{93}\) More clearly than currently the case, the legislative proposal for the establishment of the ACM indicates that these instructions may not relate to individual cases.\(^{94}\)

In accordance with Article 54a Mw, the administrative procedure is divided by ‘Chinese walls’ in an investigatory phase and an adjudicative phase. Accordingly, the activities leading to the imposition of a fine or periodic penalty will be done by persons that have not been involved in the collection of evidence and the drafting of the statement of objections. In ETB Vos, this division of tasks was not respected and this led to the exclusion of evidence collected by the adjudicative department and – consequently – in the collapse of the case.\(^{95}\)

When the competition authority decides to exercise its enforcement powers and impose a sanction, further safeguards are available. Parties can make an application to the authority for administrative review (bezwaar). The authority then has to re-assess the case. This reassessment takes place on the basis of an opinion of the Committee of Advice, an advice committee independent of the competition authority.\(^{96}\) If the authority maintains (part of) its decision, parties may apply to the Rotterdam Court (administrative division) for judicial review.\(^{97}\) Parties may also request the authority to skip the administrative review phase and make a direct application to the Rotterdam Court.\(^{98}\) The Court’s examination is limited

\(^{88}\) TK 2010-2011, 31490, nr 55.
\(^{89}\) This could in any case impact on the conditions for administrative review, interim measures and early resolution measures. See Voorstel van Wet (31-5-2012), Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden marktoezicht.
\(^{90}\) Article 12 Kaderwet Zelfstandige Bestuursorganen.
\(^{91}\) Article 9 and 13 Kaderwet Zelfstandige Bestuursorganen.
\(^{92}\) Article 5d Mw.
\(^{93}\) Article 5b Mw.
\(^{94}\) TK 2011-2012, 33186, nr 2.
\(^{95}\) Rb Rotterdam ETB Vos LJN BI3337.
\(^{96}\) Article 92 Mw.
\(^{97}\) Article 93(1) Mw.
\(^{98}\) Article 7:1a Awb.
to the legality of the decision, with a full review of any punitive sanction.\textsuperscript{99} However, this full review cannot lead to a \textit{reformatio in peius}.\textsuperscript{100} It should be noted that the application of this domestic legal principle in the context of EU law has been accepted by the Court of Justice.\textsuperscript{101} A further appeal may be lodged with the Appeal Tribunal for Trade and Industry (\textit{College van Beroep voor het bedrijfsleven}, ‘CBb’).\textsuperscript{102} Similar to the Rotterdam Court\textsuperscript{103}, the jurisdiction of the CBb is \textit{not} limited to points of law and extends to the facts on which the decision has been based.\textsuperscript{104}

5.2.4 Enforcement Institutions in the United Kingdom

The institutional enforcement framework in the UK has been under review. With its 2011 consultation document \textit{A Competition Regime For Growth: A Consultation On Options For Reform}\textsuperscript{105}, the Department for Business, Innovation & Skills (‘BIS’) has started a debate on the future of competition law enforcement in the UK. From the very beginning BIS has not shied away from suggesting far-reaching changes to the current institutional framework. Meanwhile, the UK is in the process of merging two of its competition authorities, the Office of Fair Trading and the Competition Commission, into one institution, to be named Competition and Markets Authority (‘CMA’).\textsuperscript{106} Traditionally, the Office of Fair Trading has been responsible for the enforcement of Articles 101 and 102 TFEU and their domestic equivalents. It shares this responsibility with various sector regulators. The remit of the Competition Commission is more diverse but in any case does not include Articles 101 and 102 TFEU. The CMA will be constituted as a non-ministerial department, given its independence from government.\textsuperscript{107} Decisions on the basis of Articles 101 and 102 TFEU will be taken by the CMA Board, consisting of executive and non-executive members.\textsuperscript{108} With regard to the enforcement of Articles 101 and 102 TFEU, little seems to change in

\begin{itemize}
  \item \textsuperscript{100} Rb Rotterdam \textit{Garnalen} LJN AY4888.
  \item \textsuperscript{101} Case C-455/06 \textit{Heemskerk and Schaap} [2008] ECR I-8763.
  \item \textsuperscript{102} Wet bestuursrechtspraak bedrijfsorganisatie.
  \item \textsuperscript{103} Article 8:69 Awb.
  \item \textsuperscript{104} Article 22 Wet bestuursrechtspraak bedrijfsorganisatie. See further A Gerbrandy, \textit{Convergentie in het Mededingingsrecht: De Invloed van het EG-Recht op Materiële Toepassing, Toegang, Bewijs en Toetsing bij de Nederlandse Mededingingsbestuursrechter, Bezet in het Licht van Effectieve Rechtsbescherming} (Boom Juridische uitgevers 2009) 7.
  \item \textsuperscript{105} Department for Business, Innovation & Skills, \textit{A Competition Regime For Growth: A Consultation On Options For Reform} (2011) <www.bis.gov.uk/Consultations/competition-regime-for-growth> accessed 1 July 2012.
  \item \textsuperscript{107} ibid para 10.9.
  \item \textsuperscript{108} ibid paras 10.11-10.13.
\end{itemize}
terms of institutional arrangements. The sector regulators will even retain their concurrent powers. This study can only anticipate some of the upcoming changes.

Several UK authorities share responsibility for the enforcement of Articles 101 and 102 TFEU. These are the following:

- Office of Fair Trading (‘OFT’)
- Office of Communications (‘Ofcom’)
- Gas and Electricity Markets Authority (‘Ofgem’)
- Water Services Regulation Authority (‘OFWAT’)
- Office of Rail Regulation (‘ORR’)
- Civil Aviation Authority (‘CAA’)
- Northern Ireland Authority for Utility Regulation (‘OFREG NI’)

The OFT and sector regulators are all part of the ECN. These authorities will be jointly referred to as ‘UK authorities’, ‘competition authorities’, or ‘authorities’. For the purpose of EU competition law, the OFT is clearly the most important UK authority. The powers of the six sector regulators with regard to Articles 101 and 102 TFEU do not extend beyond their respective sectors. The OFT can apply Articles 101 and 102 TFEU to anti-competitive practices in any sector. For a limited number of sectors the OFT thus shares its powers under Articles 101 and 102 TFEU with one of the sector regulators.

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**Case allocation**

Rules on concurrency between the OFT and the sector regulators in relation to Articles 101 and 102 TFEU are laid down in the Competition Act 1998 (Concurrency) Regulations 2004 (the ‘Concurrency Regulations’). The Concurrency Regulations provide that none of the authorities is to exercise investigatory or enforcement action as long as the best placed authority is not decided on or once this has been decided.

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109 ibid para 8.13.
113 The sector regulators are responsible for the following sectors: Ofcom for activities connected with communications matters; Ofgem for activities connected with the commercialisation of gas and commercial activities connected with the generation, transmission or supply of electricity or the use of electricity interconnectors; OFWAT for commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services; ORR for the supply of services relating to railways; CAA for the supply of air traffic services; OFREG NI for the conveyance, storage or supply of gas and commercial activities connected with the generation, transmission or supply of electricity.
115 ibid reg 6(1).
decided in favour of another authority.\textsuperscript{116} The decision on the best placed authority is agreed on by the authorities themselves.\textsuperscript{117} If agreement cannot be reached, the secretary of state determines who will handle the case.\textsuperscript{118} Any authority that intends to undertake investigatory or enforcement action should first inform the other competent authorities.\textsuperscript{119} During the investigation cases can be transferred from one authority to another.\textsuperscript{120} The Concurrency Working Party, consisting of the various authorities, has a coordinating role in this process.\textsuperscript{121} The best placed authority is decided on the basis of factors including: the sectoral knowledge of a regulator; whether more than one regulatory sector is affected; whether there are previous contacts between the authority and the complainants or parties; and whether any authority has recent experiences with the undertakings or issues involved.\textsuperscript{122} In March 2012, UK government has decided to amend the Concurrency Regulations with a view to require more information-sharing between the various authorities and to permit the new CMA to take over cases from the sector regulators.\textsuperscript{123}

In addition to the enforcement of Articles 101 and 102 TFEU and the equivalent domestic provisions, both the OFT and the sector regulators have other responsibilities as well. The sector regulators are first and foremost regulators of their respective sector, meaning that they monitor and determine the conditions under which goods and services are commercialised. The OFT’s responsibilities extend to consumer protection, although this could change in the near future.\textsuperscript{124}

The OFT carries out its functions on behalf of the Crown.\textsuperscript{125} It is a so-called non-ministerial government department. The OFT consists of a chairperson and no fewer than four members.\textsuperscript{126} The secretary of state appoints the chairperson and the other members.\textsuperscript{127} The term in office for a member is fixed for a period of five years\textsuperscript{128}, with the possibility of reappointment.\textsuperscript{129} The enforcement of individual cases is in the hands of senior officials. The official in charge decides whether to open an investigation, whether there is sufficient evidence to issue a statement of objections and whether there is sufficient evidence to issue

\begin{footnotes}{
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\item \textsuperscript{116} ibid reg 6(2).
\item \textsuperscript{117} ibid reg 4(2).
\item \textsuperscript{118} ibid reg 5(1).
\item \textsuperscript{119} ibid reg 4(1).
\item \textsuperscript{120} ibid reg 7(1). The undertaking under investigation has the opportunity to make representations on the proposed transfer, unless the undertaking is still unaware of the procedures, reg 7(2)-(4).
\item \textsuperscript{121} OFT, \textit{Concurrent application to regulated industries} (n 111) paras 3.9-3.11.
\item \textsuperscript{122} ibid para 3.13.
\item \textsuperscript{123} \textit{Growth, Competition and the Competition Regime} (n 106) para 8.28.
\item \textsuperscript{124} ibid para 10.8.
\item \textsuperscript{125} \textit{Enterprise Act 2002} (‘EA02’) s 1(2).
\item \textsuperscript{126} EA02, sch 1, para 1.
\item \textsuperscript{127} ibid.
\item \textsuperscript{128} ibid para 3(1).
\item \textsuperscript{129} ibid para 3(3).
\end{enumerate}
}
an infringement decision.\textsuperscript{130} In March 2011, the OFT has started a one-year trial with a Procedural Adjudicator. The role of the Procedural Adjudicator is comparable to the Hearing Officer in Commission procedures. Parties under investigation can ask the Procedural Adjudicator to review certain decisions on procedural issues taken during an investigation. This includes, for instance, confidentiality requests. The creation of this adjudicator was meant to improve the speed, efficiency, transparency and accountability of investigations into potential breaches of competition law. In accordance with a government request\textsuperscript{131}, the OFT has extended the trial with the Procedural Adjudicator and expanded its role.\textsuperscript{132} Although the OFT and the sector regulators have identical powers for the enforcement of Articles 101 and 102 TFEU, they operate under distinct institutional frameworks. These institutional differences mainly concern the degree of independence to government.

Institutional differences
Compared to the OFT, the institutional arrangements for the CAA differ most significantly. The CAA is not a servant or agent of the Crown and does not enjoy any status, privilege or immunity of the Crown.\textsuperscript{133} It is therefore not exempt from any tax, duty, rate, levy or other charge whatsoever, whether general or local. Its property is not to be regarded as property of, or held on behalf of, the Crown. The CAA is a public cooperation.\textsuperscript{134} The CAA consists of no less than six and no more than sixteen persons.\textsuperscript{135} These persons are appointed by the secretary of state as members of the CAA.\textsuperscript{136} CAA’s work is not government-funded, its costs are met entirely from the charges it imposes on those it regulates.\textsuperscript{137} Pursuant to Section 11 of the Civil Aviation Act 1982 and subject to consultation with the secretary of state, the CAA can impose charges in respect of the performance of its functions.

In addition to the OFT and the sector regulators, also the Competition Commission plays an important role in the implementation of competition policy within the UK. Apart from its role in merger control, the Competition Commission can undertake so-called market investigations upon a reference by the OFT\textsuperscript{138}, the sector regulators\textsuperscript{139} or the secretary of

\begin{itemize}
  \item Cf OFT, \textit{Review of the OFT’s Investigation Procedures in Competition Cases} (OFT 1263\textasciitilde con2 2012), para 2.14 <www.oft.gov.uk/shared_oft/policy/OFT1263\textasciitilde con2> accessed 1 July 2012.
  \item Growth, \textit{Competition and the Competition Regime} (n 106) para 6.25.
  \item OFT, \textit{Review of the OFT’s Investigation Procedures in Competition Cases} (n 130), para 1.12.
  \item Civil Aviation Act 1982, s 2(4).
  \item See <www.caa.co.uk/default.aspx?catid=1> accessed 1 July 2012.
  \item Civil Aviation Act 1982, s 2(2).
  \item ibid.
  \item Pursuant to Section 11 of the Civil Aviation Act 1982 and subject to consultation with the secretary of state, the CAA can impose charges in respect of the performance of its functions.

131 Growth, \textit{Competition and the Competition Regime} (n 106) para 6.25.
132 OFT, \textit{Review of the OFT’s Investigation Procedures in Competition Cases} (n 130), para 1.12.
133 Civil Aviation Act 1982, s 2(4).
134 See <www.caa.co.uk/default.aspx?catid=1> accessed 1 July 2012.
135 Civil Aviation Act 1982, s 2(2).
136 ibid.
137 See <www.caa.co.uk/default.aspx?catid=1> accessed 1 July 2012.
138 EA02, s 131.
139 Communications Act 2003, s 370; Electricity Act 1989, s 43; Gas Act 1986, s 36A; Transport Act 2000, s 86; Water Industry Act 1991, s 31; Railways Act 1993, s 67; Electricity (Northern Ireland) Order 1992, s 46; Gas (Northern Ireland) Order 1996, s 23.
state.\textsuperscript{140} A reference can be made if there are reasonable grounds for suspecting that any feature, or combination of features of a UK market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in (a part of) the United Kingdom.\textsuperscript{141} The term ‘feature of a market’ relates to the structure of the market and the conduct by market operators.\textsuperscript{142} Once a reference has been made, the Competition Commission examines whether any feature of a market adversely affects competition by preventing, restricting or distorting competition.\textsuperscript{143} It further decides whether and what action should be taken to remedy, mitigate or prevent the adverse effect on competition or the detrimental consequences for customers.\textsuperscript{144} The Competition Commission can either adopt remedies itself or make recommendations for others to adopt remedies. The remedies that the Competition Commission may adopt with regard to individual undertakings include behavioural remedies (restrictions on conduct and obligations to be performed, including the supply and publication of information) and structural remedies (restrictions on acquisitions and obligations of division).\textsuperscript{145} Irrespective of the Competition Commission’s important role in the implementation of competition policy, it has not been designated as NCA and cannot apply Articles 101 and 102 TFEU.

As was mentioned above, the UK is currently in the process of merging the OFT with the Competition Commission. The new institution, to be named CMA, will administer Articles 101 and 102 TFEU and their domestic equivalents, the merger regime and the market investigation regime. With regard to the enforcement of Articles 101 and 102 TFEU and the domestic equivalents, UK government has decided to separate investigation from decision-making.\textsuperscript{146} This is thought to encourage independence of mind and to reduce the risk of confirmation bias. Ultimately, this is meant to achieve a greater and swifter throughput of decisions whilst reducing the frequency and success of appeals against those decisions.\textsuperscript{147} UK government has indicated that it will evaluate the efficiency gains of this enhanced administrative model with a view to decide whether or not it should stick to the model of administrative decision-making.\textsuperscript{148} In March 2012, the OFT has launched a

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\item[140] EA02, s 132.
\item[141] EA02, s 131(1). Competition concerns that would otherwise have been referred to the Competition Commission for a market investigation can also be addressed by the referring authority itself by accepting undertakings in lieu of a reference, see EA02, s 154.
\item[142] EA02, s 131(2).
\item[143] EA02, s 134(1) and (2).
\item[144] EA02, s 134(4).
\item[145] EA02, sch 8.
\item[146] Growth, Competition and the Competition Regime (n 106) paras 6.25-6.26.
\item[147] ibid para 6.29.
\item[148] ibid paras 6.29-6.30. In this respect it should be noted that the consultation document that preceded this government response contemplated both the reinforcement of the existing administrative model, in which fines can be imposed by an administrative authority, as well as a turn to a wholly prosecutorial model, in which fines can only be imposed by an independent and impartial tribunal. See A Competition Regime For Growth (n 105) ch 5 and 10.
\end{itemize}
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consultation on how best to organise decision-making under the administrative model. The OFT is consulting on a proposal to introduce collective decision-making. This involves the formation of a 'Decisions Committee' constituted of the OFT's senior staff. This Committee will appoint a three-member group to be the decision-makers in each case in which a statement of objections is issued. A so-called Senior Responsible Officer would be responsible for authorising an investigation and issuing the statement of objections, as well as making case closure decisions prior to the statement of objections. This organisational change would separate investigation from decision-making. The implementation of this proposal will depend on the results of consultation.

Enforcement decisions under Articles 101 and 102 TFEU can be appealed before the Competition Appeal Tribunal ('CAT') or the administrative division of the High Court. The CAT is a specialised competition law tribunal, established under the Enterprise Act 2002 ('EA02'). The jurisdiction of the CAT is limited but binding. Only where jurisdiction is expressly conferred to the CAT by statute it hears cases. Dependent on the issue at hand, the CAT undertakes either a full merits review or judicial review. The difference between these two forms of judicial redress has been succinctly described by O'Neill and Sanders:

A full merits review entails the CAT inquiring into the regulator’s assessment of the facts, with a view to deciding whether the correct decision was reached on all the evidence, including new evidence that may be laid before the CAT on appeal. In challenges by way of judicial review, the question is whether the regulator erred – it is not an appeal from the decision, but a review of the soundness of the underlying decision-making process, which does not normally require a consideration of fresh evidence.

In judicial review procedures, the CAT may dismiss the appeal or quash the whole or part of the decision. In the latter case it may refer the matter back to the competition authority. In cases where the CAT has jurisdiction to exercise a full merits review it may assume the role of primary decision-maker. In this capacity it may, for instance, penalise undertakings more severely than the competition authority did or establish liability where the competition authority did not. This situation may change, however. In March 2012, UK government has expressed its intention to require the CAT to have regard to the administrative guidance on the appropriate amount of a penalty as drafted by the OFT.

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149 OFT, Review of the OFT’s Investigation Procedures in Competition Cases (n 130).
150 With regard to the cases under Articles 101 and 102 TFEU, see Competition Act 1998 ('CA98') ss 46 and 47.
152 CA98, sch 8, para 3A(3)(a).
153 CA98, sch 8, para 3A(3)(b).
156 Growth, Competition and the Competition Regime (n 106) para 6.27.
Decisions of CAT may be appealed on points of law \(^{157}\) and in relation to the amount of a penalty. \(^{158}\) In Scotland, the Court of Sessions is the competent appeal court, in the rest of the UK appeals may be lodged to the Court of Appeal. \(^{159}\) It should be noted that the admissibility of these appeals is dependent on the permission of either the CAT or the competent appeal court. \(^{160}\) Reportedly, the CAT grants this permission only sparingly. \(^{161}\) Judgments by the Court of Appeal and the Court of Sessions can be appealed before the UK Supreme Court (formerly the House of Lords). In the absence of a statutory provision to this effect, and only then \(^{162}\), judicial redress takes place before the administrative division of the High Court. \(^{163}\)

Whether a full merits review or a judicial review, the appeal courts will be able to rule on the ‘governing principles clause’ laid down in Section 60 of the Competition Act 1998 (‘CA98’). The purpose of this clause is to ensure that questions arising under Part I of CA98 ‘so far as is possible’ and ‘having regard to any relevant differences’ are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law. Part I of CA98 contains the UK competition law prohibitions, as well as the sanctioning powers for infringements of EU and UK competition law. Section 60 CA98 requires the OFT and any court, first, to secure that there is no inconsistency between principles applied and decisions reached under Part I of CA98 and principles laid down in the EU Treaties and relevant decision by the Court of Justice. \(^{164}\) Second, the OFT and the courts should have regard to any relevant decision or statement of the Commission. While the implications of Section 60 CA98 are far more diverse \(^{165}\), it in any case provides a domestic legal basis for the application of EU principles in the national orders with regard to the enforcement of Articles 101 and 102 TFEU \(\textit{supra}\) chapter 4). The CAT indeed follows EU case law on

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157 CA98, s 49(1)(c).
158 CA98, s 49(1)(a).
159 CA98, s 49(3).
160 CA98, s 49(2)(b).
161 Whish and Bailey (n 112) 449.
162 O’Neill and Sanders (n 151) 12.133: ‘Where an appellant chooses to apply to the administrative court in preference to an existing statutory mechanism of appeal, it is unlikely that the administrative court would entertain the application for judicial review where there is a statutory mechanism for appeal that has not been pursued.’
163 O’Neill and Sanders (n 151) 12.04, 12.61 and 12.133. See also R Whish, \textit{Competition Law} (Sixth Edition, Oxford University Press 2009) 427: ‘In so far as the Act does not provide for an appeal there remains the possibility that a claim for judicial review may be brought before the Administrative Court of the Queen’s Bench Division under Part 54 of the Civil Procedure Rules in relation to perceived procedural irregularities (for example unreasonable delay) or the improper exercise of administrative discretion. It may be that permission would be refused if the Administrative Court were to consider that a particular issue can be addressed within the statutory appeal procedure.’ (footnotes omitted).
164 CA98, s 60(2) and (3).
165 Whish and Bailey (n 112) 369-373.
access to file\textsuperscript{166}, burden of proof\textsuperscript{167}, standard of proof\textsuperscript{168}, attribution of liability\textsuperscript{169}, and the conditions of intent or negligence necessary to impose a penalty.\textsuperscript{170} There are limits to this consistency requirement, however. The governing principles clause cannot require a \textit{contra legem} interpretation of domestic principles and powers. For instance, a difference in the method of setting fines between the OFT and the Commission is not prohibited under Section 60 CA98.\textsuperscript{171}

5.2.5 Degree and Drivers of Convergence

The four jurisdictions that have been analysed above have situated the enforcement of Articles 101 and 102 TFEU in entirely different institutional regimes. On EU level, enforcement is entrusted to a single authority: the Commission. The more practical and preparational enforcement activities have been delegated to the administrative services of the Commissioner responsible for EU competition policy. The Commission is an integrated enforcement authority, combining prosecutorial and adjudicative functions. Its decisions are subject to judicial review before the EU judiciary. The General Court has unlimited jurisdiction with regard to the severity of punitive sanctions, allowing it even to increase the amount of the penalty.

The institutional enforcement framework in the Netherlands is fairly similar, but differs in relation to some key aspects. Also in the Netherlands, the enforcement of Articles 101 and 102 TFEU is entrusted to a single, integrated authority. However, with regard to the administration of Articles 101 and 102 TFEU there is an important institutional difference between the Netherlands authority and the (administrative services of the) Commission. The former is divided in an investigatory department and an adjudicative department. Finally, there are substantial differences at the judicial review stage. Unlike the General Court, the first instance Dutch appeal court does not have jurisdiction to increase administrative penalties. Unlike the Court of Justice, the jurisdiction of the final instance Dutch appeal court is not limited to points of law.

The institutional enforcement frameworks in Germany and the UK show some more fundamental deviations from the EU model. The German legislator has created parallel procedural frameworks for reparatory sanctions and punitive sanctions, has delegated enforcement competences to a federal authority and 16 state authorities, and has allocated decision-making powers with regard to the federal authority to 12 court-like chambers. Institutional features that do appear equivalent to the institutional environment in which the Commission operates, in reality differ to a significant extent. If a penalty decision of a German authority is appealed, the decision of the competition authority more or less gets demoted to an indictment. In this appeal procedure all facts need to be established afresh.

\textsuperscript{166} Napp Pharmaceuticals [2002] CAT 1, para 138.
\textsuperscript{167} ibid paras 110-112.
\textsuperscript{168} ibid paras 110-112.
\textsuperscript{169} ibid para 167.
\textsuperscript{170} ibid paras 455-458.
\textsuperscript{171} ibid para 503.
If the court is satisfied with the authority’s case it may decide to impose a lower or higher fine than originally levied by the authority.

The UK has opted for yet another institutional design, with enforcement competences being shared between a general competition authority and various sector regulators. Another institutional feature that distinguishes the UK from the other three jurisdictions concerns the appeal procedures. Judicial protection against enforcement decisions under Article 101 and 102 TFEU is allocated to different tribunals, with different review mandates.

More than just identifying these static institutional differences, this paragraph has also revealed tendencies of institutional convergence. With regard to the latter point reference could be made to the Procedural Adjudicator trial in the UK. The role of this Procedural Adjudicator is comparable to the Hearing Officer in Commission procedures. Parties under investigation can ask the Procedural Adjudicator to review certain decisions on procedural issues taken during an investigation. A more salient point of convergence relates to the allocation of decision-making powers within the various NCAs. The OFT proposal for collective decision-making would combine features of both the Dutch and the German institutional regimes. By having a special Decisions Committee delegate decision-making powers to three officials with no prior involvement in the investigations, the OFT would separate investigation from decision-making while at the same time creating *ad hoc* decision-making chambers. These examples can be seen as instances of convergence and indicate that convergence tendencies are inspired both by the EU model and national enforcement features.

### 5.3 INTERIM MEASURES

The investigation of infringements of Articles 101 and 102 TFEU may take a long time. Years can go by between the earliest signal of anti-competitive behaviour and the adoption of a decision that censures this behaviour. The duration of enforcement procedures may span from anything between a couple months to many years. In the meantime, competition may be irreparably damaged. For example, an entrant challenging the dominance of an incumbent may have withdrawn from the market already. To prevent scenarios such as these from happening, legislators can grant their competition authorities powers to adopt so-called interim measures. Through these measures competition authorities can protect the status quo on the market pending the investigations. Interim measures are essentially means for temporary conservation. Regulation 1/2003 explicitly provides for such measures. The Commission can adopt interim measures by virtue of Article 8 Regulation 1/2003, while Article 5 of this Regulation allows for similar measures to be taken by the NCAs. It has been concluded in subparagraph 4.6.3 that the EU principle of effectiveness even requires Member States to accommodate for interim measures. This paragraph details the degree and drivers of convergence in this area.
5.3.1 Powers of the Commission

Already prior to the entering into force of Regulation 1/2003, the Court of Justice concluded that the power to adopt interim measures should be seen as an essential feature in the enforcement process. Adopting interim measures could be a necessary first stage in the termination of infringements of Articles 101 and 102 TFEU. Meanwhile, Regulation 1/2003 has codified and reinforced this Commission power. Breach of interim measures is threatened with fines and periodic penalty payments. The Commission may impose a periodic penalty payment of up to 5 per cent of the undertaking's average daily turnover per day of non-compliance. Where the addressee intentionally or negligently contravenes an interim measures decision, the Commission may also impose a fine of up to 10 per cent of the undertaking's worldwide turnover.

The Commission may order interim measures on the basis of a prima facie infringement. However, the use of this power is reserved for behaviour that poses an urgent risk of 'serious and irreparable damage to competition'. This damage relates to competition rather than competitors. While the prospect of a forced market exit due to a prima facie infringement may justify the adoption of interim measures, the interests of individual undertakings alone are not (or at least no longer) decisive. In this respect it should be noted that victims of anti-competitive behaviour always have the possibility to start private actions before the national courts. Within the limits of Article 16(1) Regulation 1/2003, these courts should provide for interim relief whenever appropriate. As to the point of urgency, the Commission should take into account the duration for the adoption of a final decision. Regulation 1/2003 does not circumscribe the type of measures that can be ordered. Interim measures can thus take the form of temporary prohibitions or requirements (e.g. the termination of prima facie predatory conduct or the resumption of supplies). However, the measures must be temporary or conservatory. Accordingly, interim measures may only be adopted for a limited period of time (but are renewable) and will expire with the adoption of a final decision. Prior to the adoption of interim measures, the Commission should give the addressees the opportunity of being heard. For this purpose, undertakings have access to the Commission's file. The Commission should then consult the Advisory Committee on Restrictive Practices and Dominant Positions on the draft decision. Only

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174 Article 23(2) Regulation 1/2003.
175 P Roth and V Rose (eds), Bellamy & Child: European Community Law of Competition (Sixth Edition, Oxford University Press 2008) 13.119. Prior to the entering into force of Regulation 1/2003, the Commission’s power to adopt interim measures was recognised by the Court in Case 792/79 R Camera Care [1980] ECR 119. In Camera Care, the Court allowed the Commission to adopt interim measures ‘in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest’ (para 19) (emphasis added).
177 Roth and Rose (eds), Bellamy & Child (n 175) 13.119.
178 ibid 13.122.
179 Article 8(2) Regulation 1/2003.
after these administrative stages may the Commission adopt interim measures. A decision imposing interim measures can be appealed. While this does not suspend the measures, a separate application for suspension could be made to the President of the General Court. As interim measures are adopted on the Commission’s own initiative, there is no need to reject a request to adopt interim measures by third parties by ways of formal decision¹⁸⁰, and there are in principle no possibilities to appeal a rejection either. In practice, the Commission uses its power to adopt interim measures only sparingly.¹⁸¹

5.3.2 Powers of the German Authorities

Pursuant to § 32a GWB the German authorities may adopt interim measures in the context of investigations into infringements of Articles 101 and 102 TFEU. This provision has been introduced with the 7th amendment to the GWB, entering into force in 2005.¹⁸² It has been inspired by and largely mirrors the power of the Commission under Article 8 Regulation 1/2003.¹⁸³ Interim measures under § 32a GWB are reinforced by fines and penalty payments.¹⁸⁴ Breach of interim measures can attract fines of up to EUR 1 million or – in the case of undertakings – 10 per cent of the undertaking’s worldwide turnover. Penalty payments may range from EUR 1000 to as much as EUR 10 million. Addressees of the interim measures may apply for judicial review. This does not suspend the authority’s decision, however.¹⁸⁵

Interim measures are adopted on the authority’s own initiative. They may be adopted where there is a risk of serious and irreparable damage to competition. Damage to one or more undertakings is not sufficient if the anti-competitive practice does not damage competition more generally.¹⁸⁶ Although the text of § 32a GWB does not refer to the existence of a prima facie infringement, this is generally considered a precondition for the adoption of interim measures.¹⁸⁷ The competition authorities have almost full discretion as to the type of measure to impose, although the nature of this instrument excludes the ordering of structural measures.¹⁸⁸ In principle, the competition authorities should hear

¹⁸¹ Whish (n 163) 253.
¹⁸² Prior to the introduction of § 32a GWB interim measures could adopted by virtue of the still existing § 60 GWB. The later provision is now applicable to competition law issues falling outside the scope of Articles 101 and 102 TFEU.
¹⁸⁴ § 81(2), (4) GWB (for fines); § 86a GWB (for penalty payments).
¹⁸⁶ ibid Rdnr 3.
¹⁸⁷ T Klose in G Wiedemann, *Handbuch des Kartellrechts* (Verlag CH Beck 2008) § 51 Rdnr 27; Bechtold (n 32) § 32a Rdnr 5; Bornkamm in Langen/Bunte (n 185) § 32a Rdnr 4.
¹⁸⁸ Wiedemann/Klose (n 187) § 51 Rdnr 28; Bornkamm in Langen/Bunte (n 185) § 32a Rdnr 4.
the parties prior to the adoption of interim measures. For this purpose, parties should be granted access to the authority’s file. However, when the circumstances demand urgent intervention, interim measures may be adopted without hearing the parties in advance. In these exceptional cases, parties should be given the possibility to be heard directly after the adoption of the interim measures. This possibility to adopt interim measures instantly allows the German authorities to intervene directly upon a prima facie infringement. In any case, § 32a GWB limits the duration of the interim measures to one year. Within this period the competition authority should render a final decision. This maximum duration urges the competition authorities to speed up the decision making process. Considering both the possibility for direct intervention and the maximum duration, the powers of the German competition authorities seem relatively well-streamlined. However, this has not led to a rich practice of interim measures. As yet, the German competition authorities have not published any interim measures decision.

5.3.3 Powers of the Netherlands Authority

Pursuant to Article 83 Mw, the Netherlands authority may impose a voorlopige last onder dwangsom. Essentially this is an order for interim measures (voorlopige last) supplemented with an automatic (periodic) penalty in case of non-compliance (dwangsom). The penalty is automatically enforceable and can be executed by the authority. The authority can summon payment by ways of a separate decision. This type of interim measure was and still is a unique measure in Dutch administrative law. Penalty payments are usually reserved for situations in which the administrative authority has already established an infringement. Article 83 Mw allows for the adoption of interim measures on the basis of a prima facie infringement. Notwithstanding the legislator’s objective to align the enforcement powers of the Netherlands authority with those of the Commission, Article 83 Mw seems more powerful than Article 8 Regulation 1/2003. The penalty for non-compliance may either be a lump sum payment, a periodical payment, or a payment for every new infringement. The authority decides which type of penalty is most appropriate. While the competition authority is required to indicate the maximum amount beyond which no further penalties will be levied (and obviously also the amount of the penalty that becomes periodically due),

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189 Bechtold (n 32) § 32a Rdnr 11.
190 H-H Schneider in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht (Band 1: Deutsches Kartellrecht, 11. Auflage, Carl Heymanns Verlag / Luchterhand 2011) § 56 Rdnr 5.
191 ibid Rdnr 4.
192 Bechtold (n 32) § 32a Rdnr 11.
193 § 32a(2) GWB.
194 Bornkamm in Langen/Bunte (n 185) § 32a Rdnr 2.
195 Article 5:33 Awb.
196 Article 5:37 Awb.
199 Article 5:32b Awb.
this penalty is not subject to any statutory maximum. The only statutory limitation to
the level of the penalty is that it should be proportionate both to the gravity of the prima
facie infringement and to the purpose of the sanction. The competition authority should
indicate the period within which the addressee should implement the measure in order to
avoid the penalty.

Interim measures may be imposed where the behaviour is likely to qualify as an
infringement and intervention is urgently necessary in view of the interests of the
undertakings affected or the interests of effective competition. The interests of individual
undertakings alone may thus already warrant the adoption of interim measures. In this
respect it should be noted that interim measures may be adopted not only on the authority’s
own initiative, but also on the application of interested third-parties. This combination of
condition (interest of individual undertakings) and procedural right (right to apply for
interim measures) suggests that third-parties could try to ‘force’ the authority to adopt
interim measures. Consequently, the position of third parties seems better protected under
Dutch law than under EU law. The urgency of interim measures is considered in light of
the expected duration for the adoption of a final decision. If by that time the consequences
of the infringement could longer be reversed – for instance as a result of a forced exit –
interim measures may be taken. Interim measures can require an undertaking to take or
refrain from taking certain actions. These actions can be purely factual, but may also relate
to legal obligations vis-à-vis third parties. The interim measures automatically lapse if the
authority fails to issue a statement of objections within a period of six months. Obviously,
the interim measures also lapse with the adoption of a final decision. Before imposing
interim measures, the authority has to communicate its plans to the undertaking concerned
and allow it to make representations. Interim measures are subject to judicial review,
but the initiation of review procedures does not suspend the effects of the measure. In
practice, interim measures are occasionally applied for but only exceptionally imposed.

5.3.4 Powers of the UK Authorities
Also the UK authorities have the power to impose interim measures. This power is laid
down in Section 35 CA98 and originates in the 1998 reform, which was meant to align UK
competition policy with EU competition policy. Section 35 CA98 allows the authorities
to give ‘such directions as it considers appropriate for that purpose.’ The temporary purpose

\[\text{\textsuperscript{200}}\text{Article 5:32b(2) Awb.}\]
\[\text{\textsuperscript{201}}\text{Article 5:32b(1) Awb.}\]
\[\text{\textsuperscript{202}}\text{Article 5:32a(2) Awb.}\]
\[\text{\textsuperscript{203}}\text{LEJ Korsten and M van Wanroij, Nederlands Mededingingsrecht (Kluwer 2008) 287.}\]
\[\text{\textsuperscript{204}}\text{Article 85 Mw.}\]
\[\text{\textsuperscript{205}}\text{Article 84 Mw.}\]
\[\text{\textsuperscript{206}}\text{Article 6:16 Awb.}\]
\[\text{\textsuperscript{207}}\text{See also Van der Meulen (n 197) 21-22; W VerLoren van Themaat and B Reuder (eds), Nederlands Mededingingsrecht 2011 (Kluwer 2011) 364.}\]
\[\text{\textsuperscript{208}}\text{Competition HL Bill (1997-98) 140.}\]
of these measures suggests that structural measures are excluded. Interim measures cannot be enforced by the competition authorities directly. If a person fails, without reasonable excuse, to comply with these measures the authorities may apply for a court order. The court may then order the person in default to make good its failure within a given timeframe. In the case of undertakings, the court may direct this order to the undertaking itself or to any of its officers. Anyone who fails to comply with such an order will be ‘in contempt of court’ and can be sentenced to a term in prison of up to two years or to payment of a fine.

Interim measures may be adopted where there are reasonable grounds for suspecting an infringement and where this is necessary as a matter of urgency in order to prevent serious, irreparable damage to a particular person or category of persons or to protect the public interest. The condition of ‘reasonable grounds for suspecting an infringement’ applies to any power of investigation under CA98 and is not particularly high. The conditions of ‘urgency’, ‘serious, irreparable damage’ and ‘public interest’ have been interpreted by the OFT in its 2004 Enforcement Guidelines and by the CAT in its 2006 ruling in The London Metal Exchange. It follows from The London Metal Exchange that urgency caused by the OFT itself may not suffice for the adoption of interim measures. This may be puzzling, as the OFT does not have a ‘personal’ interest in ordering interim measures. ‘Serious damage’ is damage inflicting a considerable competitive disadvantage on the person(s) concerned and likely to have a lasting effect. This may be a loss of revenue or damage to good-will or reputation. ‘Irreparable damage’ is damage which cannot be remedied by later intervention. The threat of insolvency of an individual undertaking will generally qualify as such. ‘Public interest’ has been interpreted as the interest in preventing damage being caused to a particular industry, to consumers or to competition more generally. In 2012, UK government has observed that interim measures are hardly ever used even though they have great value, particularly in cases of alleged predatory pricing. The paucity of these measures has been explained by the fact that the conditions of serious, irreparable damage

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209 CA98, ss 35(6)(7) and 34.
210 UK courts are protected by the law of contempt, whether pursuant to common law or the Contempt of Court Act 1981, and hold an inherent or statutory power to punish for contempt. See Contempt of Court Act 1981, s 14. Cf OFT, Enforcement: Incorporating the Office of Fair Trading’s guidance as to the circumstances in which it may be appropriate to accept commitments (OFT 407 2004), paras 3.16 and 2.9 <www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/of407.pdf> accessed 1 July 2012.
211 CA98, s 35(2).
212 See also PJ Slot and AC Johnston, An Introduction to Competition Law (Hart Publishing 2006) 227; O’Neill and Sanders (n 151) 6.62.
214 ibid para 160. It should be noted that this ruling was given in the context of an application for costs after the OFT had withdrawn its rather frivolous interim measure decision.
215 OFT, Enforcement (n 210) para 3.5.
216 ibid para 3.6.
218 Growth, Competition and the Competition Regime (n 106) paras 6.62-6.63.
constitute too high a threshold. UK government has proposed to relax this condition and require 'significant damage to a particular person or category of persons'.

Interim measures can be adopted on the authority’s own initiative or on a request. Before giving a direction the authority must give written notice of its intention and allow that person to make representations. This notice must indicate the nature of the proposed direction and the authority’s reasons. The addressee of the notice obtains access to the investigation file. Before rejecting an application for interim measures, the OFT allows the applicant to comment and submit additional information on the provisional rejection decision. Any decision by the authorities on the basis of Section 35 CA98, whether or not to make particular directions, may be appealed by the applicant before the CAT. In practice, unsuccessful applicants for interim measures indeed do appeal these decisions. This happened for instance in *JJ Burgess & Sons*, where a firm of funeral directors appealed a decision of the OFT rejecting an application for interim access to its competitor’s crematorium. Appeals against interim measure decisions do not suspend the effect of these measures. As an alternative for the adoption of an interim measure decision, the authorities may also accept informal assurances given by the undertaking in lieu of a formal decision. Just as interim measures, also these informal assurances have only been accepted on a few occasions.

5.3.5 Degree and Drivers of Convergence

This paragraph has demonstrated that the three Member States have sought alignment to Regulation 1/2003 with regard to interim measures. The NCAs in the investigated jurisdictions all have at their disposal the power to adopt interim measures and thereby fulfil one of their requirements under the principle of effectiveness. Moreover, the conditions under which these powers may be exercised are largely identical. Yet, upon a closer examination of the various regimes, some differences can be identified. First, under UK law interim measures may already be adopted where there are reasonable grounds for suspecting an infringement, whereas the other jurisdictions require a *prima facie* infringement. Second, there are differences with regard to applicable time-limits and the administrative procedures. Under Dutch law, a statement of objections in

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219 ibid para 6.64.
220 ibid para 6.65.
221 CA98, s 35(3).
222 CA98, s 35(4).
225 CA98, s 46.
227 CA98, ss 46(4) and 47(3).
228 OFT, *Enforcement* (n 210) para 3.17. Informal assurances are also possible before the CAT in lieu of interim relief, see *Albion Water* [2005] CAT 19, para 4.
229 Whish (n 163) 398.
the main proceedings need to be issued within six months after the measures have been adopted. Under German law, interim measures cannot exceed the duration of one year. More generally, it could be said that the German procedures for interim measures are relatively well-streamlined. The maximum duration urges the German authorities to speed up the decision-making process in the main proceedings, while the possibility to order interim measures without prior hearing of the parties allows for a swift intervention. Third, there are differences with regard to the enforceability of interim measures. Under Dutch law, interim measures are automatically supplemented with a periodic penalty for non-compliance. Under UK law, failure to comply can only be remedied through a separate court order – but contempt of court could result in a custodial sentence. Fourth, there are differences with regard to the role and relevance of third parties. Both under Dutch and UK law, interim measures may be adopted in the interest of and on a request by third parties. The role of third parties before the Commission and the German authorities is less formal in this matter. These differences with regard to the powers and procedures for the adoption of interim measures should not obscure the fact that over the whole interim measures are seldom adopted in any of the jurisdictions. There is only limited experience with interim measures. In fact, the paucity of interim measures has urged UK government to propose a relaxation of the conditions.

5.4 EARLY RESOLUTION MEASURES

As mentioned earlier, competition law proceedings can span many years. The complexity of the applicable legislation, the confidentiality of business strategies, the secrecy of many infringements and the financial interests for the undertakings concerned, all contribute to the protraction of enforcement proceedings. The administrative investigations alone can easily take a number of years, and the possibilities of appeal in two or three instances may lead to a multiplication of this duration. Decades can go by before all legal remedies have been exhausted and an infringement is finally established. Apart from the legal profession and the bureaucrats involved, no one benefits from extended proceedings. Much is therefore to gain from undertakings and competition authorities finding a solution to their dispute at an early stage of the investigations, provided this takes place in a transparent environment so as to limit the risks of maladministration and to enhance the precedent value of this solution. This paragraph analyses the available enforcement powers and practices to reach such early resolution, as well as the degree and drivers of convergence in this area.

5.4.1 Powers of the Commission

The Commission can steer towards early resolution of competition law disputes in a variety of ways. Occasionally, it engages in informal resolution. Undertakings then adapt their

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Roth and Rose (eds), *Bellamy & Child* (n 175) 13.113.
commercial practices, and in return the Commission discontinues its investigations. The Commission’s practice of informal resolution predates the entering into force of Regulation 1/2003. To date, the Commission has at its disposal a formal means to reach early resolution. By virtue of Article 9 Regulation 1/2003 it may terminate enforcement proceedings through the adoption of a so-called commitment decision. With such a decision the Commission makes binding the commitments offered by the investigated undertakings. Where the Commission intends to censure anti-competitive practices and the undertakings concerned offer commitments that meet the competition-related concerns as expressed in a preliminary assessment, the Commission may adopt a commitment decision. The adoption of a commitment decision is appropriate only in those cases where the Commission does not intend to impose a fine. A commitment decision does not establish the existence of an infringement, but simply concludes that there are no longer grounds for further action. While a commitment decision could be adopted for a specified period, the Commission is not required to limit the duration. The introduction of this power was motivated by considerations of procedural economy. It provides the Commission with a means to find a rapid solution to competition problems.

Commitment decisions are reinforced by Articles 23 and 24 Regulation 1/2003, allowing the Commission to impose fines and periodic penalty payments for failure to comply. Accordingly, breach of a commitment decision exposes undertakings to a fine of up to 10 per cent of its worldwide turnover or a daily penalty payment of up to 5 per cent of its average daily turnover. Moreover, in case of failure to comply with a commitment decision the Commission may reopen proceedings, either upon request or on its own initiative. The Commission may also reopen proceedings when there has been a material change in the facts on which the decision was based or where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Where the Commission intends to adopt a commitment decision it has to ‘market-test’ the commitments by publishing a concise summary of the case and the main content of the commitments, thus allowing interested third parties to submit observations. Once a commitment decision has been adopted, it may be appealed both by the addressee of the decision and by interested third parties. By virtue of Article 263 TFEU the addressee could argue, for instance, that the Commission has abused its powers and forced it to offer commitment, or that the commitments offered have not been reproduced correctly in the decision. Third parties may want to challenge the proportionality of the commitment decision, for instance when the commitments indirectly affect their commercial position. In 2006, Alrosa Company Ltd made use of this possibility, when it challenged the decision that

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231 Recital 13 of the preamble to Regulation 1/2003.
233 Article 9(2)(b) Regulation 1/2003.
234 Article 9(2) Regulation 1/2003.
235 Article 27(4) Regulation 1/2003.
236 Faull and Nikpay (n 180) 2.135.
made binding the commitment offered by De Beers SA to refrain from purchasing Alrosa’s raw diamonds. This case shows that commitment decisions under Article 9 Regulation 1/2003 are not subject to a comprehensive appropriateness test. The Commission should only verify 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.

In carrying out this assessment, the Commission should take into account the interests of third parties. However, the Commission is not required to seek out less onerous or more moderate solutions than the commitments offered. This approach can be contrasted with the requirements of the Commission in the context of reparatory sanctions, where the proportionality requirements are more demanding (supra subparagraph 4.6.5). In this respect, the legal safeguards for third parties affected by commitment decisions are more limited than for third parties affected by reparatory sanctions. In contrast, interested third parties do have the possibility to comment on the proposed commitments, a legal safeguard they have to do without in relation to reparatory sanctions. It should moreover be noted that subject to Article 16 Regulation 1/2003, a commitment decision binds neither national courts nor NCAs. Therefore, a commitment decision in principle does not deprive third parties of the possibility to protect any rights they might have vis-à-vis the addressee of this decision.

The Commission regularly adopts commitment decisions. In the Commission’s 2010 Report on Competition Policy a graph indicates that in the period between 2005 and 2010 19 commitment decisions have been adopted. Practice shows that the Commission adopts commitment decisions for any type of anti-competitive behaviour except for hardcore cartels.

As commitment decisions cannot be combined with a fine for past behaviour, not every case will lend itself for this type of resolution. However, also in relation to infringements that do merit a fine procedural economies can be sought. With regard to cartel cases, early
resolution may be reached within the framework of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (‘Settlement Notice’). By virtue of Article 33 Regulation 1/2003 the Commission has created for itself the possibility to engage in settlement discussions. Settlements are meant to speed up the decision-making process once the Commission has sufficient evidence to proceed to the decision-making stage. The objective of the settlement procedure is to handle more cases with the same resources, thereby ensuring effective and timely punishment, while increasing overall deterrence. Therefore, the Commission takes into account efficiency gains in terms of resources in engaging in and continuing settlement procedures. In 2010, the Commission adopted its two first settlement decisions. The Settlement Notice applies exclusively to cartels.

And then there is the third way for the Commission to come to an early conclusion of investigatory proceedings. The Commission can also reward the cooperation of the undertakings under investigation outside the context of the Settlement Notice. While this does not cut short the enforcement proceedings, cooperation by the undertakings can speed up these proceedings significantly. Both in the context of its fining policy and its leniency policy, the Commission rewards undertakings for their cooperation in the investigations. The latter alternative is available for cartel cases only and is meant to trigger or advance an investigation by rewarding undertakings for providing incriminating evidence. While neither alternative is explicitly meant to reach early resolution, both policy instruments do support the Commission in achieving procedural efficiencies. In practice, virtually every cartel investigation benefits from the cooperation of the undertakings involved.

5.4.2 Powers of the German Authorities
Early resolution of competition law disputes is also facilitated by the German enforcement framework. On the basis of § 32b GWB the competition authorities may end their investigations into infringements of Articles 101 and 102 TFEU by declaring binding the commitments offered by the undertakings concerned. This power was introduced in 2005 with the 7th amendment to the GWB. § 32b GWB was inspired by and largely mirrors the Commission’s power under Article 9 Regulation 2003. As with Article 9 Regulation

247 Settlement Notice, para 1.
248 ibid para 5.
249 Commission’s Report on Competition Policy 2010 (n 244) 16.
250 Within the framework of these policy instruments the Commission is required to follow a full procedure, with all the regular legal safeguards.
251 BT-Drucksache 15/3640 (n 183) 34.
1/2003, decisions on the basis of § 32b GWB refrain from any legal qualification of the alleged anti-competitive behaviour. With regard to the feasibility of early resolution through commitment decisions, the distinction between reparatory proceedings and penalty proceedings plays an important role. Reparatory proceedings and penalty proceedings are distinct procedural trajectories that may run parallel from each other in relation to a single infringement of Article 101 or 102 TFEU. The suggestion made by some authors that commitment decisions cannot exist alongside penalty decisions can therefore be questioned. As the adoption of a commitment decision is only an alternative for infringement decisions in reparatory proceedings, the offering of commitments (formally) cannot deflect penalties. This could reduce the benefits for undertakings of offering commitments instead of mounting a defence against the allegations. While this circumstance seems capable of limiting the chances for early resolution, in practice competition law disputes are frequently resolved through a commitment decision. In 2008 alone the BKartA adopted 18 commitment decisions. No examples have been found of anti-competitive practices attracting both commitment decisions and penalties.

Commitment decisions can be enforced separately. The competition authorities may impose fines and periodic penalty payments for breach of commitments. These fines are maximised at EUR 1 million or 10 per cent of the undertaking’s worldwide turnover. Periodic penalty payments range from EUR 1000 to 10 million. In addition, the competition authorities may enforce their commitment decisions by using ‘administrative force’ (Verwaltungszwang). This means that the competition authority could even rely on Ersatzvornahme and Unmittelbarer Zwang, meaning that the latter could, first, require third parties to do whatever is in their powers to have the commitments take effect (eg give access to certain infrastructures) and, second, could itself take the measures that the undertaking has committed to. It will depend on the nature of the commitments whether such direct enforcement is feasible. In any case, failure to comply with a commitment decision allows the competition authority to reopen proceedings under Articles 101 and 102 TFEU. Proceedings may further be reopened when there has been a material change in the facts on which the decision was based, or the decision was based on incomplete, incorrect or

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252 Bornkamm in Langen/Bunte (n 185) § 32b Rdnr 4 and 16.
253 § 32(b) GWB.
254 Commitment decisions cannot include any kind of financial obligation either. § 47(3) OWiG explicitly excludes this. Pursuant to this provision, the termination of penalty proceedings cannot be made conditional on the payment of a monetary amount to a ‘gemeinnützige Einrichtung oder sonstige Stelle’. This prohibition includes payments to the state or federation. See G Dannecker and J Biermann in Immenga/Mestmäcker, GWB Kommentar (Verlag CH Beck 2001) Vor § 81 Rdnr 162.
255 Bornkamm in Langen/Bunte (n 185) § 32b Rdnr 2; Wiedemann/Klose (n 187) § 51 Rdnr 31
256 See <www.bundeskartellamt.de> accessed 1 July 2012.
257 § 81(2), (4) GWB (for fines); § 86a GWB (for periodic penalty payments).
258 Bechtold (n 32) § 32b Rdnr 6.
259 §§ 10 and 12 Verwaltungs-Vollstreckungsgesetz.
260 § 32(b)(2) GWB.
misleading information provided by the parties. In all other cases, the adoption of a commitment decision prevents the competition authorities from adopting cease-and-desist orders or interim measures.

Commitments can be offered only after the competition authority has notified a preliminary assessment of its concerns to the undertakings concerned. The commitments should be capable of dispelling these concerns. This means that they should either aim to address the authority's preliminary legal qualification, or the urgency of intervention. Commitments may have the form of behavioural or structural measures. It falls within the discretion of the competition authority whether or not to close proceedings with a commitment decision. The competition authorities have to ensure that the commitments are clear and specific enough to function as a legal basis for penalties in case of failure to comply.

As a result of the consensual nature of commitment decisions, successful appeals by the addressees of the decision seems limited to situations of mistake (Irrtum), where the decision does not coincide with the commitments offered, or where there is a disagreement on interpretation. Commitment decisions may also be appealed by third parties, namely where their commercial interests are affected. The competition authorities are not explicitly required to market-test the commitments before adopting the decision. This deviation from the Commission model has some advantages in terms of procedural economy as market-testing could significantly protract the proceedings. However, this does limit the legal safeguards of third parties. Of course, the competition authorities are not prohibited from publishing draft decisions and inviting comments.

The competition authorities may also seek early resolution in the context of penalty proceedings. These settlements are less formalised than the adoption of commitment decisions. The BKartA’s settlement practice is part of its fining policy. It grants early confessing offenders a reduction of up to 10 per cent of the amount of the fine otherwise imposed. This practice supplements the BKartA’s leniency policy, which also supports

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261 § 32b(2) GWB.
262 Bornkamm in Langen/Bunte (n 185) § 32b Rdnr 5.
263 ibid Rdnr 7-8.
264 ibid Rdnr 7.
265 ibid Rdnr 16.
266 ibid Rdnr 13.
267 ibid Rdnr 10-11.
268 ibid Rdnr 35-36.
269 Bechtold (n 32) § 32b Rdnr 6a.
270 ibid Rdnr 6a; Bornkamm in Langen/Bunte (n 185) § 32b Rdnr 39.
271 Wiedemann/Klose (n 187) § 51 Rdnr 38.
early resolution. The BKartA regularly manages to speed up penalty procedures, whether through a settlement or with the help of leniency applications.²⁷³

5.4.3 Powers of the Netherlands Authority

As is the case with the Commission and the German authorities, also the Netherlands authority is vested with powers to seek early resolution of competition law disputes. Pursuant to Article 49a Mw, the authority may adopt a decision rendering binding the commitments offered by the undertakings involved. These commitments can be offered even before a statement of objections has been issued and up to and until the moment that a final decision is adopted. If satisfied by the commitments, the authority can decide to terminate the investigations with a commitment decision. The authority then refrains from making a final decision on the nature of the behaviour and from imposing sanctions. This power was introduced in 2007²⁷⁴ with the objective to align the domestic enforcement regime with Regulation 1/2003.²⁷⁵ The authority regularly resolves competition concerns with a commitment decision.²⁷⁶ Prior to the introduction of this power, the competition authority occasionally terminated investigations informally, after assurances about future conduct had been made by the undertakings concerned.²⁷⁷

Commitment decisions can be enforced separately. The Netherlands authority may impose a fine of up to EUR 450,000 or 10 per cent of the undertaking’s worldwide turnover, whichever is more, for failure to comply with a commitment decision.²⁷⁸ However, the authority cannot impose a periodic penalty payment. Breach of the commitments also allows the authority to reopen proceedings under Articles 101 and 102 TFEU.²⁷⁹ Investigations may also be resumed in case of a material change in the facts on which the commitment decision was based, or in case the decision was based on incomplete, incorrect or misleading information provided by the parties.

The conditions under which the Netherlands authority may adopt commitment decisions differ from the Commission’s power under Article 9 Regulation 1/2003, both in procedural and substantive terms. First, commitment decisions may only be adopted for a limited duration, although they can be renewed.²⁸⁰ Second, and more important, while a commitment decision contains no judgment on the (il)legality of the undertakings’

²⁷³ BT-Drucksache 16/13500 (n 272) 35.
²⁷⁴ Wet van 28 juni 2007 houdende wijziging van de Mededingingswet als gevolg van de evaluatie van die wet. TK 2005-2006, 30071, nr. 19 herdruk.
²⁷⁵ TK 2005-2006, 30071, nr. 19 herdruk.
²⁷⁶ NMa Zaak 5709_1/242.B931 Kinderopvang Amsterdam; NMa Zaak 7138 Stichting Zorggroep West- en Midden-Brabant.
²⁷⁸ Article 76a Mw.
²⁷⁹ Article 49c(1)(c) Mw.
²⁸⁰ Article 49a(5) Mw.
behaviour\textsuperscript{281}, the Netherlands authority may adopt such a decision in order to ‘prevent’ or ‘terminate’ ‘infringements’ and provided that compliance with competition law is ‘guaranteed’.\textsuperscript{282} It follows that while the scope for commitment decisions is broader than under Article 9 Regulation 1/2003 (termination and prevention of an infringement),\textsuperscript{283} the conditions for application are more restrictive (termination and prevention).\textsuperscript{284} The conditions for the adoption of commitment decisions seem more restrictive in another sense as well. The Netherlands authority may contemplate the adoption of a commitment decision only when i) this guarantees that the undertakings concerned will indeed act in accordance with Articles 101 and 102 TFEU, ii) it is likely that the undertakings will comply with the decision in a verifiable manner and iii) the adoption of a commitment decision is a more effective (doeltreffend) enforcement measure than a fine or a periodic penalty payment.\textsuperscript{285} The Netherlands authority has recognised that the text of Article 49a Mw differs from Article 9 Regulation 1/2003, but has also indicated to interpret its powers in accordance with Article 9 Regulation 1/2003.\textsuperscript{286}

The procedure that governs the adoption of commitment decisions is surrounded by various legal safeguards, both for the undertakings involved and for third parties. The preparation of commitment decisions takes place in accordance with the public preparation procedure (uniforme openbare voorbereidingsprocedure).\textsuperscript{286} This is a general administrative law procedure in accordance with which draft decisions should be consulted and can be commented upon. For this purpose, the draft decision, or its most important parts, needs to be published in one or more newspapers. This ensures transparency of the decision-making process and allows third parties to participate in the proceedings. Once adopted, commitment decisions can be appealed both by its addressee and by interested third parties.\textsuperscript{287} In addition, the rejection of an application to close an investigation with a commitment decision can be appealed by the applicant.\textsuperscript{288} As judicial review is limited to the legality of the decision and as the authority’s power to adopt commitment decisions is discretionary, the (rejection of the) adoption of commitment decisions will be annulled only where the applicant demonstrates a manifest procedural failure (eg lack of competence, failing to hear parties, misinterpretation of the offered commitment, etc).

Early resolution is also possible for cases where penalties are a more effective enforcement measure and where commitment decisions therefore are not available. The Netherlands authority rewards cooperative undertakings by given penalty reductions in the context of the applicable fining guidelines and its leniency policy. Furthermore, in the context of

\begin{itemize}
\item Article 49a(3) Mw.
\item Article 49a(1)(2) Mw.
\item Article 49a(2) Mw.
\item Article 49b Mw.
\item NMa Zaak 6435/29 NMa v X, para 28.
\item Article 8:1 Awb.
\end{itemize}
wide-spread bid-rigging practices in the Dutch construction sector\textsuperscript{289}, the authority has applied an \textit{ad hoc} fast-track procedure in order to render the enforcement of over 1400 cases manageable. Within the context of this unique procedure, undertakings could earn an additional discount by waiving certain procedural rights (eg access to documents and possibility to dispute the main findings). This has been largely a successful experiment and has supposedly attracted a lot of attention from other authorities.\textsuperscript{290} Other examples of the authority’s more general interest in early resolution are the deal it negotiated with representatives of the homecare sector, which was ultimately rejected by the homecare undertakings\textsuperscript{291}, and the settlement it has reached with a manager who initially was unwilling to pay a fine imposed upon him in the administrative phase.\textsuperscript{292}

5.4.4 Powers of the UK Authorities

Also the UK authorities may seek early resolution of competition law disputes. They may for instance adopt commitment decisions to terminate investigations into infringements of Articles 101 and 102 TFEU. This discretionary power is laid down in Section 31A CA98 and was introduced with the \textit{Competition Act 1998 and Other Enactments (Amendment) Regulation 2004}.\textsuperscript{293} This amendment was meant to align the domestic enforcement regime with Regulation 1/2003.\textsuperscript{294} Prior to the introduction of this power, cases could be closed on the basis of informal assurances by the undertakings concerned.\textsuperscript{295} The OFT regularly manages to reach early resolution, whether by accepting informal assurances\textsuperscript{296}, by adopting commitment decisions\textsuperscript{297}, or by negotiating informal settlements.\textsuperscript{298}

Commitment decisions cannot be enforced directly. Instead, if a person fails to comply with a commitment decision the authority may apply for a court order.\textsuperscript{299} Application can be made for an order requiring the addressee to make good its failure within a given timeframe. In the case of undertakings, this order can be directed either to the undertaking itself or to any of its officers. Any person who fails to comply with such an order will be ‘in contempt of court’ and risks a custodial sentence or a fine. Alternatively, the authority could simply reinitiate enforcement proceedings under Articles 101 and 102 TFEU, possibly

\begin{itemize}
\item Bid-rigging could be described as agreements between undertakings on the conditions of their bids in the context of a public or private tender.
\item The website of the ICN includes a presentation by an NMa official giving a presentation at the 2006 Cartel Workshop in The Hague on this bid-rigging investigation. See \texttt{<www.internationalcompetitionnetwork.org> accessed 1 July 2012}.
\item NMa press release of 20 May 2010, available through \texttt{<www.nma.nl> accessed 1 July 2012}.
\item NMa press release of 11 November 2010, available through \texttt{<www.nma.nl> accessed 1 July 2012}. This manager reportedly paid the fine plus a part of the authority’s costs for bringing the case before court.
\item SI 2004/1261.
\item Competition Act 1998 and Other Enactments (Amendment) Regulation 2004, explanatory notes.
\item \textit{Pernod-Ricard} [2004] CAT 10.
\item ibid.
\item OFT Case CE/2479/03 \textit{London-wide newspaper distribution}.
\item OFT Case CE/2890-03 \textit{Independent fee-paying schools}; OFT Case CE/2596-03 \textit{Tobacco}.
\item CA98, s 31E.
\end{itemize}
leading to the imposition of fines and reparatory sanctions. Moreover, enforcement proceedings may be resumed where there are reasonable grounds for believing that there has been a material change of circumstances, or that the commitment decision was based on incomplete, false or misleading information.

Commitments can be offered in the period between the initiation of proceedings and the adoption of a final decision. However, the OFT has indicated to reserve this instrument mainly to the stage prior to the statement of objections. The OFT will accept both behavioural and structural commitments. The power ‘to take such action (or refrain from taking such action) as it considers appropriate’, laid down in Section 31A(2) CA98, indeed seems sufficiently unspecific to allow for both types of commitments. However, as the OFT has indicated to adopt commitment decisions for limited durations, structural commitments will be rather exceptional. Once commitments have been offered, form and content of these commitments can be subject to further negotiations between the party and the authority. While a commitment decision will not include a statement on the legality of the undertaking’s behaviour prior or after the commitments, it should state that the commitments meet the authority’s concerns. Section 31B(3) CA98 suggests that the authorities may also adopt commitment decisions to deal with part of their concerns. Any remaining issues may then be addressed with an infringement decision. The OFT has indeed left open this possibility in its Guideline Enforcement. Nevertheless, it seems rather exceptional that the OFT would accept such 'partial-commitments'. In the same Guideline the OFT has indicated to accept commitments only when they fully address its concerns.

The adoption of commitment decisions is subject to various conditions. Commitment decisions can only be adopted if the salient issues are readily identifiable and the commitments can be implemented effectively. Commitments that cannot be properly monitored will not be accepted and also deterrence considerations could lead to a rejection. In line with the latter condition, the OFT has indicated not to accept commitments in cases involving secret cartels or serious abuses of dominance such as predatory pricing. After a commitment decision has been adopted, the authority is no longer able to continue the investigation.
and to adopt other enforcement decisions. Of course, this does not prevent the authority from monitoring compliance with the commitments or from re-evaluating their adequacy and effectiveness, and vary or release them whenever appropriate. In fact, the secretary of state may demand a report on the effectiveness of the operational commitment decisions. Of course, this does not prevent the authority from monitoring compliance with the commitments or from re-evaluating their adequacy and effectiveness, and vary or release them whenever appropriate. In fact, the secretary of state may demand a report on the effectiveness of the operational commitment decisions.

Before a commitment decision can be adopted the OFT must market-test the draft decision by ‘giving notice’. The OFT will give notice to ‘such persons as it considers likely to be affected’. Interested third parties then have the opportunity to make representations. Once adopted and in place, the addressee of the decision may always propose variations to the commitments. Third parties with a sufficient interest may appeal to the CAT with regard to a decision of the authority to accept (a variation to) or release commitments. The addressee of a commitment decision that has unsuccessfully requested the authority to release it from the commitments may appeal to the CAT as well. Moreover, the addressee may appeal a decision that releases it from the commitments. It may have an interest to do so, as the release of commitments allows the authority to resume enforcement proceedings. Notwithstanding the CAT’s wide jurisdiction with regard to commitment decisions, it has no jurisdiction to hear appeals against a commitment decision by the addressee of such a decision. In case of perceived maladministration in the adoption of a commitment decision, the addressee should file an appeal with the administrative division of the High Court.

Further to the adoption of commitment decisions, the OFT may also reach financial settlements with undertakings that are under investigation and are willing to cooperate in the authority’s investigations. These undertakings can benefit from a reduction to the amount of the fine as a quid pro quo for cooperation. In return for an admission and cooperation, the OFT will mitigate the penalty. The OFT decides on the appropriateness of a settlement on a case by case basis. This reduction may be granted both within and outside the framework of the OFT’s leniency policy. Also these financial settlements could speed up procedures and lead to the early resolution of competition concerns.

5.4.5 Degree and Drivers of Convergence

With a view to establish the degree and drivers of convergence, this paragraph has analysed powers and practices to reach early resolution of putative infringements of Articles 101 and

512 CA98, s 31B(2).
513 CA98, sch 6A.
514 CA98, s 31C.
515 CA98, sch 6A, para 2.
516 OFT, Enforcement (n 210) para 4.21.
517 CA98, s 31A(3).
518 CA98, s 47.
519 CA98, s 46(2)(g).
520 CA98, s 46(2)(h).
521 OFT, A guide to the OFT’s investigation procedures (n 224) para 11.2.
522 ibid.
523 Cf OFT Case CE/2890-03 Independent fee-paying schools.
There are essentially three alternatives for the early resolution of competition law disputes and these alternatives are available in all four jurisdictions. First, the authorities may agree to terminate the investigations after having reached a formal accord with the undertakings involved. For this purpose, the competition authorities can adopt so-called commitment decisions. With these decisions the authorities can render binding the commitments offered by the undertakings under investigation. A commitment decision does not contain a statement on the legality of the commercial practices that triggered the investigation and therefore does not establish whether or not an infringement of Article 101 or 102 TFEU has been committed. As long as the undertakings comply with their commitments, the authorities will in principle refrain from reopening investigations. Breach of a commitment decision may lead to penalties, irrespective of whether this behaviour also qualifies as an infringement of Article 101 or 102 TFEU. In addition, the authorities may decide to reopen their investigations in order to censure and penalise the behaviour under Articles 101 and 102 TFEU.

The other two alternatives for the early resolution of competition law disputes are more informal or coincidental. Competition authorities may simply decide to terminate their investigations as a result of informal assurances given by the undertakings. No decision will be adopted and no fines are imposed (or looming), but investigations can be resumed at any time. Such informal accords have been practised by the authorities in all four jurisdictions, but have lost much of their appeal with the introduction of commitment decisions. Procedural economies can further be obtained by rewarding the cooperation of undertakings with a reduction of the fine otherwise imposed. While this will not necessarily cut short procedures, it can speed up the procedures significantly. Mitigation as a quid pro quo for cooperation can be organised in the framework of the authority’s fining policy or leniency programme, but can also be the subject of a separate settlement procedure. In the latter case, undertakings agree to a fast-track procedure in which they waive certain procedural rights in exchange for a reduction in fine.

Strong tendencies of convergence can be observed with regard to the measures for early resolution of competition law disputes. All four jurisdictions provide for essentially the same alternatives, without any EU requirement to this effect. With regard to commitment procedures it can be concluded that the domestic regimes have all been inspired by Regulation 1/2003. Article 5 of this Regulation explicitly allows NCAs to terminate investigations into infringements of Articles 101 and 102 TFEU with a commitment decision (supra paragraph 2.3). Parliamentary deliberations indicate that national legislators have sought to mirror the Commission’s powers under Article 9 Regulation 1/2003. When comparing the conditions and legal safeguards applicable to commitment decisions, it becomes clear that national legislators have largely succeeded in this objective. From a convergence perspective it is further noteworthy that the Netherlands authority has shown some degree of ‘administrative disobedience’ with regard to its policy on commitment decisions. The Netherlands authority has stretched its statutory powers by indicating to adopt commitment decisions under conditions equivalent to Article 9 Regulation 1/2003.
However, there are also some notable differences. A first difference relates to the attractiveness for the undertakings concerned to engage in commitment procedures. The adoption of a commitment decision by the German authorities does not seem to preclude the same authority from penalising the undertakings involved for their past conduct. This is the consequence of the procedural separation of reparatory decisions and penalty decisions. In practice, the combination of a commitment decision and a penalty decision to terminate and punish a single infringement will be rather exceptional. A comparable situation occurs in the UK. Also the UK authorities may decide to adopt a commitment decision to deal with a part of their concerns. Any remaining concerns may then be addressed by an infringement decision and accompanying sanction. Also in the UK partial commitments will be rather exceptional, however.

More substantial differences can be found in the context of the enforcement of commitment decisions. While not always feasible, the German authorities can enforce commitments even without the help of the undertaking that offered them. This possibility complements the authority’s more conventional powers of enforcement through fines and periodic penalty payments. At the other end of the enforcement spectrum are the possibilities of the UK authorities, who need a court order to enforce their commitment decisions. Only failure to comply with this court order will attract penalties. Yet, these penalties are severe. Contempt of court can attract custodial sentences, alongside financial penalties. The Netherlands authority and the Commission take the middle ground, but also their enforcement powers differ. Whereas the Commission can enforce its commitment decisions through fines and periodic penalty payments, the Netherlands authority relies on fines alone.

The conditions for the adoption of commitment decisions and the role of third parties in drafting these decisions is not entirely uniform either. Unlike the other authorities, the German authorities need not to ‘market-test’ draft decisions. Were the German authorities indeed to refrain from consulting market parties, this would mean that third parties are in this respect worse off in Germany than in the other jurisdictions. Not having to deal with the observations of third parties of course also means that the German legal framework is better streamlined and more conducive to early resolution. Furthermore, there are some differences with regard to the possibility of judicial redress. Especially in UK law detailed appeal arrangements for addressees and third parties have been put in place.

Outside the area of commitment decisions, all authorities are willing to engage in financial settlements and to reward undertakings that cooperate with the investigations. Especially the Netherlands authority has built a track record of flexible financial settlements. However, in terms of detail and transparency the Commission’s settlement procedure is unprecedented.

5.5 DECLARATORY FINDINGS

With a declaratory finding competition authorities can establish that an infringement of Articles 101 and 102 TFEU has been committed. Such a decision will normally be adopted jointly with a sanction, but may also be adopted separately in cases where a sanction would
not be warranted or no longer be allowed due to statutes of limitation. Not imposing any legal obligations, declaratory findings of past infringements cannot be considered sanctions themselves. Yet, the precedent value of such a decision may be used by the competition authority as an enforcement instrument and the exposure this will generate may feel as a sanction for the undertakings concerned.\textsuperscript{324} In this respect one should note the intertwined systems of public enforcement and private enforcement. Pursuant to Article 16(1) Regulation 1/2003, decisions of the Commission are binding for the national courts. The latter cannot take decisions running counter to the decisions of the Commission. This means that national civil courts should treat a declaratory finding of a past infringement by the Commission as undisputable evidence for the unlawfulness of the behaviour. Some Member States go even further. Under German law, more specifically § 33(4) GWB, civil courts are bound by the decisions of the Commission, the German competition authorities and the competition authorities of the other Member States. Also in the other Member States, decisions by the NCAs will always have at least some precedent value in the civil courts.\textsuperscript{325} The binding effect (or precedent effect) of administrative decisions in private disputes facilitates victims in pursuing damages claims. The addressees of a declaratory finding might experience this as a sanction. Declaratory findings also contribute to the public enforcement of Articles 101 and 102 TFEU. The authorities may use this as an instrument to clarify the implications of Articles 101 and 102 TFEU. This limits information costs for market participants and may reduce future infringements. In this respect, declaratory findings of past infringements could be as valuable as declaratory findings of non-infringement. However, declaratory findings that Articles 101 and 102 TFEU are not applicable to a particular type of commercial behaviour, so-called findings of inapplicability, have been reserved for the Commission (\textit{supra} paragraph 2.3). What remains for the NCAs are findings of applicability. This paragraph details the degree and drivers of convergence in this area.

### 5.5.1 Powers of the Commission

The Commission can adopt declaratory findings with regard to Articles 101 and 102 TFEU. Pursuant to Article 7(1) Regulation 1/2003 and provided it has a legitimate interest in doing so, the Commission may find that an infringement has been committed in the past. It may also adopt declaratory findings in relation to persisting infringements of Articles 101 and 102 TFEU. In fact, the Commission is not even required to terminate persisting anti-competitive behaviour once it has found an infringement of Article 101 or 102 TFEU.\textsuperscript{326} Prior to the adoption of Regulation 1/2003, the Court of Justice considered declaratory findings an implied power of the Commission.\textsuperscript{327} More specifically, the Court found that

\textsuperscript{324} Cf Joined Cases T-22/02 and T-23/02 \textit{Sumitomo} [2005] ECR II-4065, where the applicant argued (at para 39), albeit unsuccessfully, that a decision finding an infringement falls within the meaning of penalties.

\textsuperscript{325} See also WPJ Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 \textit{World Competition} 3, 15-16.

\textsuperscript{326} Case T-16/91 \textit{Rendo} [1992] ECR II-2417, para 98.

the Commission’s explicit powers to end an infringement and impose sanctions necessarily implied a power to make a finding that the infringement exists or existed. Yet, the power to adopt a declaratory finding was not dependent on the use of explicit powers. The termination of an infringement prior to the adoption of a decision did not in itself constitute an obstacle for the Commission to adopt such a finding. However, this implied power was conditional upon the Commission having a legitimate interest in taking such a decision. Article 7(1) Regulation 1/2003 thus codifies existing practice. Further to the adoption of declaratory findings of past or persisting infringements, the Commission may also adopt findings of inapplicability. This power has been introduced by Article 10 Regulation 1/2003. Where the EU public interest so requires, the Commission may, acting on its own initiative, adopt a decision stating that the conditions of Articles 101 and 102 TFEU are not fulfilled. As yet, the Commission has not made use of this power.

Declaratory findings of past infringements require a legitimate interest on the part of the Commission. These findings may be adopted where there is a real danger of a resumption of the anti-competitive behaviour, so as to clarify that this is prohibited. The General Court has further suggested that the Commission may adopt declaratory findings of past infringements in order to help injured third parties in legal proceedings before the national civil courts, provided these proceedings are already initiated or can be envisaged.

As long as there are no specific rules on the limitation period for declaratory findings, the Commission is only precluded from making such findings where it initiates these actions excessively late. The procedure for the adoption of these decisions offers all regular legal safeguards. The parties involved should be given the possibility of being heard by the Commission, to comment on a statement of objections and to access the Commission’s file. Declaratory findings can be appealed. The General Court has demonstrated that it will seriously test the Commission interests in taking such a decision.

5.5.2 Powers of the German Authorities

Pursuant to § 32(3) GWB, the German authorities can make declaratory findings of past infringements. This power was introduced in 2005 with the 7th amendment to the GWB.

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530 ibid para 37.
531 ibid para 24.
533 Joined Cases T-22/02 and T-23/02 Sumitomo [2005] ECR II-4065, paras 137-138. See also Faull and Nikpay (n 180) 2.95.
534 Joined Cases T-22/02 and T-23/02 Sumitomo [2005] ECR II-4065, para 88. See more extensively subparagraph 4.5.4.
535 Article 27 Regulation 1/2003. See also Regulation 773/2004 (n 246).
537 BT-Drucksache 15/3640 (n 183) 33.
The German legislator drew its inspiration from Regulation 1/2003. The authorities may adopt a finding of past infringements only if they have a legitimate interest. It has been suggested in the literature that this condition does not require a direct risk of a resumption of the anti-competitive behaviour by the undertakings concerned. In fact, were such a risk to exist the competition authorities may already adopt a cease-and-desist order. In practice, the BKartA has adopted declaratory findings of past infringements with a view to clarify the law and limit future infringements. Various authors have argued that assisting injured third parties in follow-on damages actions qualifies as a legitimate interest as well.

The German authorities would even be allowed to adopt declaratory findings with a view to stimulate damages actions. It should be recalled that the German civil courts are bound by these findings. The administrative procedures leading to the adoption of such a decision are surrounded by various legal safeguards. Parties participating in the procedure are offered the possibility to make representations and may challenge the findings before the court. By virtue of § 32c GWB, the authorities also have the possibility to terminate proceedings with a finding that there are no grounds for further action on their part. Also this power was introduced with the 7th amendment to the GWB and is meant for those cases in which the authorities conclude that the conditions of Articles 101 and 102 TFEU are not fulfilled. Decisions on the basis of § 32c GWB fall within the discretion of the competition authorities. The latter may also terminate proceedings in an informal way. Occasionally, the BKartA terminates proceedings on the basis of § 32c GWB. In 2009, it found that there were no grounds for further action after first having made an in-depth analysis of an alleged margin squeeze strategy and finding the existence of an abuse highly unlikely.

Through this approach the BKartA complied with its requirements under Regulation 1/2003 not to make findings of inapplicability (supra paragraph 2.3), while still clarifying the implications of the competition law prohibitions.

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338 ibid.
339 Bornkamm in Langen/Bunte (n 185) §32 Rdnr 49-50.
340 Bechtold (n 32) § 32 Rdnr 18; Bornkamm in Langen/Bunte (n 185) §32 Rdnr 49.
341 BKartA B9-149/04 Bau und Hobby.
342 Bechtold (n 32) § 32 Rdnr 19; Bornkamm in Langen/Bunte (n 185) §32 Rdnr 51.
343 Bechtold (n 32) § 32 Rdnr 19.
344 § 33(4) GWB.
345 §§ 56 and 63ff GWB.
346 BT-Drucksache 15/3640 (n 183) 34.
347 ibid.
348 In fact, thus far the competition authorities are more likely to terminate proceedings informally than through a decision on the basis of § 32c GWB. See Bornkamm in Langen/Bunte (n 185) §32c Rdnr 3.
5.5.3 Powers of the Netherlands Authority

While the Netherlands authority may give undertakings a direction to comply with Articles 101 and 102 TFEU, it cannot adopt a decision making declaratory findings of past infringements. A ‘decision’ under Dutch administrative law is an administrative act which vests original rights or obligations: an act with legal effect. Declaratory findings, by definition, do not establish rights or obligations. ‘Declaratory decisions’ – a *contradictio in terminis* under Dutch administrative law – do exist, but seem limited to policy areas where the exercise of rights requires some form of registration (e.g., voting rights). A more common instrument under Dutch administrative law, albeit not an unproblematic one, is the administrative interpretation (*bestuurlijk rechtsoordeel*): an interpretation of the law by an administrative authority charged with the application of this law. The adoption of a *bestuurlijk rechtsoordeel* is mainly practised in the field of zoning law and its problematic aspects concern the available legal safeguards (only ‘decisions’ are subject to judicial review). As the *bestuurlijk rechtsoordeel* generally relates to future situations, rather than past behaviour, the transposition of this implied power to a competition law context would be somewhat unusual. Consequently, what remains is the possibility for the competition authority to issue an opinion on the nature of past behaviour. This alternative would of course be subject to the statute of limitation applicable to fines, which could limit its value.

The Netherlands authority makes use of both alternatives, albeit somewhat obliviously. In a press release of 7 February 2003, the authority has indicated to let an association of real estate agents off with a warning. This action could be interpreted as an opinion in relation to past behaviour. In ANKO and *Taxi Rotterdam* the authority adopted a ‘decision’ but refrained from imposing fines. In neither instance did it wonder whether its actions actually qualified as decisions. It is submitted that these declaratory findings do not qualify as such, precisely because they had no legal effect. From a doctrinal perspective it would have been more appropriate in these cases for the authority to impose a fine and reduce the amount to nil. Declaratory findings of past infringements, however framed, will remain a rather rare phenomenon. In *OSB*, the authority has indicated that it will refrain from imposing a fine only in case of exceptional circumstances.

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351 Article 56(1)(c) Mw.
353 ibid 246.
356 NMa Zaak 2234/36 ANKO.
357 NMa Zaak 2228 *Taxi Rotterdam*.
358 See also NMa Zaak 2501 *Dienstapotheek Regio Assen*, where the authority imposed a periodic penalty payments for future conduct but refrained from imposing a fine.
359 NMa Zaak 2021/397 *OSB*, para 20.
Occasionally, the Netherlands authority makes findings of inapplicability. Both in Shiva and more recently in GasTerra it concluded that the undertakings concerned did not charge excessive prices. And also in FHRS v CR Delta the authority reached the conclusion that there was no abuse of dominance. In view of the Tele2 Polska ruling of the Court of Justice, the Netherlands authority seems prohibited from making such absolute findings with regard to practices falling within the scope of Articles 101 and 102 TFEU any longer (supra paragraph 2.3). In accordance with Article 5 Regulation 1/2003, the authority should terminate investigations with a finding that there are no grounds for action on its part.

5.5.4 Powers of the UK Authorities
The UK authorities can adopt declaratory findings with regard to past infringements of Articles 101 and 102 TFEU. Whereas an explicit power seems lacking, it follows from Sections 31, 32 and 36 CA98 that the authorities may adopt a decision establishing that Articles 101 and 102 TFEU have been breached without imposing directions or penalties. This interpretation finds resonance in the OFT’s guide for investigation procedures, which provides that the infringement decision sets out the facts on which the OFT relied and may also contain a fine or directions. More importantly, the possibility to adopt declaratory findings is confirmed by Sections 46 and 47 CA98, providing that a decision as to whether Articles 101 and 102 TFEU have been infringed is an appealable act. In practice, declaratory findings of past infringements are occasionally adopted. For instance, in its MasterCard UK Members Forum Limited case, the OFT found an infringement of Article 101 TFEU but refrained from imposing directions or penalties. In Cardiff Bus, the OFT concluded that an infringement had been committed, without attaching any legal consequences to this finding. It should be noted that the latter case concerned an infringement of national competition law and that the anti-competitive behaviour originally benefited from the de minimis immunity for fines provided by Section 40 CA98. Not being part of a specific legal regime, a decision making declaratory findings of past infringements is subject to the regular legal safeguards. The OFT has to issue a statement of objections, give access to its file, and allow parties to make written and oral representations. Both the addressee of a declaratory finding and interested third parties may appeal this decision before the CAT.

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361 NMa Zaak 11 Shiva.
363 NMa Zaak 1205–165 FHRS v CR Delta.
365 OFT, A guide to the OFT’s investigation procedures (n 224).
366 OFT Case CP/0090/00/S MasterCard UK Members Forum Limited.
367 OFT Case CE/5281/04 Cardiff Bus.
368 Sections 39 and 40 CA98 provide immunity for fines in relation to anti-competitive behaviour of minor importance. These provisions do no apply to the prohibitions laid down in Articles 101 and 102 TFEU.
370 CA98, ss 46 and 47.
The UK authorities also have a practice of adopting non-infringement decisions. For example, in its Anaesthetists’ group investigation the OFT terminated proceedings after it concluded that the anaesthetists’ groups each operated as a single undertaking. 371 The agreements between the members of each group as to the levels of fees to be charged for their private professional services, therefore, did not fall within the scope of the competition law prohibitions. This approach was common in the notification days, when undertakings could still notify their agreements and practices under Sections 14 and 22 CA98. Meanwhile these provisions have been repealed. 372 Yet, case closure through non-infringement decisions still occurs. In EDFE, Ofgem concluded that the conditions of Article 102 TFEU were not fulfilled, as EDF Energy plc did not hold a dominant position. 373 In Television Access Service, Ofcom concluded that BBC Broadcast Limited’s exclusive agreement with the Channel 4 Television Corporation to provide television access service was not in breach of Articles 101 and 102 TFEU. 374 BBC was found not to have a dominant position in the sense of Article 102 TFEU and the agreement benefited from the Commission’s Block Exemption Regulation on Vertical Agreements, while the non-compete obligation did not appreciably restrict competition in the sense of Article 101(1) TFEU. In fact, Ofcom has adopted a whole range of non-infringement decisions over the years. 375 This practice of terminating investigations with non-infringement decisions is even facilitated by legislation. Rule 9 of the OFT’s Rules provides procedural safeguards with regard to decisions finding that the conditions of Articles 101 and 102 TFEU are not fulfilled. Since the Court of Justice rendered its Tele2 Polska judgment, it is highly questionable whether such findings can still be made with regard to Articles 101 and 102 TFEU (supra paragraph 2.3). In this respect it is interesting to note that in the more recent Flybe 378 and BT 379 cases the competition authorities closed the investigations with findings that there were insufficient grounds for finding an abuse. 380

5.5.5 Degree and Drivers of Convergence

This paragraph has shown, first of all, that the authorities all have a practice of adopting declaratory findings. These findings are not limited to past infringements, but include findings of inapplicability. In light of the Tele2 Polska ruling of the Court of Justice it can be expected that national authorities will refrain from making absolute statements on the

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372 SI 2004/1261.
374 Ofcom Case CW/00842/06/05 Television Access Service.
375 Ofcom Decision of 07-08-2006 Digital cordless phones; Ofcom Decision of 01-08-2008 BT’s charges for NTS call termination; Ofcom Case CW/00805/12/04 Vodafone Limited.
378 OFT Case MPINF-PSWA001 Flybe.
379 Ofcom Case CW/00613/04/03 BT.
380 The ORR has recently still adopted a non-infringement, in which it concludes that the conditions of Article 102 TFEU were not fulfilled, see ORR Decision of 02-08-2010 DB Schenker Rail.
inapplicability of Articles 101 and 102 TFEU any longer. Indeed, in the UK a change in approach can already be observed. Apart from this limitation of domestic sanctioning powers, there are no clear tendencies of convergence. This is the second conclusion of this paragraph. Only the German legislator has explicitly sought alignment with Regulation 1/2003 and the powers of the Commission. Yet, this alignment is not perfect. The conditions under which the German authorities may adopt declaratory findings are more generous than the conditions for the Commission. This places the German authorities in a better position to clarify the implications of Articles 101 and 102 TFEU and to decide on the legality of commercial practices. Contrary to the Commission, the German authorities may even adopt declaratory findings with a view to stimulate damages actions. The Netherlands even deviates from the basic features of the EU model. Declaratory findings of past infringements are legally non-existent under Dutch law. In the UK, declaratory findings of past infringements have been made but these do not seem subject to similar conditions as the Commission’s power. It follows that there are no clear and widespread tendencies of convergence towards the EU model.

### 5.6 REPARATORY SANCTIONS

Undertakings will generally cease their anti-competitive practices as soon as the competition authorities start their investigations. However, there are also cases in which the anti-competitive behaviour continues pending the investigation, or, more commonly, where there are reasons to fear that the anti-competitive behaviour may be resumed after the proceedings. In these situations, the competition authorities may have to issue cease-and-desist orders or impose other remedies (hereinafter jointly referred to as ‘remedies’ or ‘reparatory sanctions’). Unlike punitive sanctions such as fines, reparatory sanctions are not meant to punish the offender for past behaviour. These sanctions are forward-looking in that they are meant to terminate and/or prevent future offences. With a remedy the competition authority can impose customised obligations to bring the undertakings’ activities in line with Articles 101 and 102 TFEU.381 These obligations may be enforced separately.

Anti-competitive behaviour can come in various forms and, accordingly, demands a variety of remedies. These remedies are generally divided along two lines. One line

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381 Cf Case T-201/04 Microsoft [2007] ECR II-3601, where the General Court held: ‘When the Commission finds in a decision that an undertaking has infringed Article 82 EC [now Article 102 TFEU], that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision. Where remedies are provided for in the decision, the undertaking concerned is required to implement them – and to assume all the costs associated with their implementation –, failing which it exposes itself to liability for periodic penalty payments imposed pursuant to Article 16 of Regulation No 17’. See however Case T-34/92 Fiatagri [1994] ECR II-905, para 39, where the General Court held that a decision requiring the undertakings involved to refrain from entering into any information-exchange system having an object identical or similar to the agreement for which an exemption had been sought, was purely declaratory.
distinguishes negative orders from positive orders. The other line distinguishes behavioural remedies from structural remedies. A negative order imposes an obligation to cease or refrain from certain anti-competitive behaviour. A positive order imposes an obligation to take certain action in order to discontinue the infringement. Both types could have the form of a behavioural remedy. Behavioural remedies require the addressee to change its commercial behaviour either by refraining from certain action or by engaging in certain action. Structural remedies are positive orders without exception, as they require the addressee to divest itself of the possibility to engage in anti-competitive behaviour, for instance by terminating joint venture contracts or selling off assets. Structural remedies are generally perceived as the more intrusive form of intervention. In order to establish the heterogeneity of sanctioning preferences and the instances of regulatory innovation, this paragraph analyses the degree and drivers of convergence in the area of reparatory sanctions.

5.6.1 Powers of the Commission
Pursuant to Article 7(1) Regulation 1/2003, the Commission may require undertakings to bring infringements of Articles 101 and 102 TFEU to an end. For this purpose, the Commission may in principle impose ‘any’ behavioural or structural remedy. 382 The Commission may order remedies even in the event that the undertakings have ceased their anti-competitive behaviour already. This is the case either when the Commission cannot tell whether the infringement has been terminated, or simply in order to prevent them from engaging in this behaviour in the future. 383

Decisions on the basis of Article 7 Regulation 1/2003 can be reinforced with a periodic penalty payment. Jointly with a decision under Article 7 Regulation 1/2003 or by ways of a later decision, the Commission can require undertakings to comply with a remedy on pain of forfeiting a periodic penalty. 384 This periodic penalty may not exceed 5 per cent of the average daily worldwide turnover in the preceding business year per day of non-compliance. Breach of a decision under Article 7 Regulation 1/2003 cannot result in fines directly. However, failure to comply with such a decision will often amount to an infringement of Articles 101 and 102 TFEU and may trigger new enforcement proceedings. This could eventually lead to a fine (infra subparagraph 5.7.1).

382 The power to impose positive orders was already recognised by the Court of Justice prior to the entering into force of Regulation 1/2003, when this power was not yet explicitly provided. See Joined Cases 6/73 and 7/73 Commercial Solvents [1974] ECR 223, para 45.
383 Roth and Rose (eds), Bellamy & Child (n 175) 13.126.
Regulatory innovation by the Commission

The analysis of the development of sanctioning powers that is undertaken in this chapter is partially aimed to determine if decentralisation has led to regulatory innovation. It should be noted that regulatory innovation may of course also result from a jurisdiction’s own experiences. This type of innovation is not necessarily linked to decentralisation. An example of innovation through own experiences is the Commission’s use of periodic penalty payments to reinforce remedies. Decisions on the basis of Article 7 Regulation 1/2003 can be reinforced by a periodic penalty payment. The periodic penalty payment may be imposed jointly with a decision under Article 7 Regulation 1/2003 or by ways of later decision. In Microsoft, the Commission opted for the multi-stage alternative. The Commission’s administrative services have indicated that this alternative, in which periodic penalty payments are imposed by ways of separate decision, can be relatively lengthy and cumbersome. This has to do with the duplication of procedures and accompanying legal safeguards for the undertakings involved. In light of these experiences, the Commission decided to go with a different approach in MasterCard. In the latter case, prohibition and periodic penalty payment were ordered in a single decision.

Irrespective of what the text of Article 7(1) Regulation 1/2003 may suggest, the Commission cannot impose any remedy whatsoever. A first limitation follows from Ford, where the Court of Justice concluded that the Commission cannot adopt orders to change behaviour that is not itself contrary to Articles 101 and 102 TFEU. Secondly, in choosing an appropriate remedy the Commission should have regard to the principle of proportionality. Remedies should be proportionate to the infringement and necessary to bring the infringement effectively to an end. The proportionality of orders prohibiting (the continuation of) certain action is dependent on this action itself being contrary to Article 101 or 102 TFEU, but does not depend on the situation of the undertakings concerned at the time when the decision was adopted. With regard to structural remedies, the principle of proportionality limits their use to situations where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned. A structural remedy would be an appropriate response in cases where the risk of a lasting or repeated infringement derives from the very structure of the

385 Microsoft (Case COMP/C-3/37.792) (n 384).
386 Commission Staff Working Paper (n 4) para 137.
387 MasterCard (Case COMP/34.579) (n 384).
390 Article 7(1) Regulation 1/2003.
392 Article 7(1) Regulation 1/2003.
undertaking. The implications of the principle of proportionality for the Commission's powers to impose remedies can further be demonstrated with Automec II. In this case, the General Court assessed whether the Commission could order BMW AG to grant access to its distribution network to an independent car dealer. In response to a request for such an order, the Commission had argued that it lacked this power. The Court sided with the Commission and concluded that the latter is not allowed to order a party to enter into contractual relations where there are other suitable remedies available. The potential infringement of Article 101 TFEU could also be eliminated by abandoning or amending the conditions of the distribution system. In those situations it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty.

Automec II may also be understood as a more fundamental limitation of the Commission's powers, restricting the use of compulsory supplies to infringements of Article 102 TFEU. This brings us to the third limitation of the Commission's remedial powers. Some types of remedies simply seem excluded from the Commission's powers altogether. It is, for instance, questionable whether the Commission has a power to control prices. This limitation is mainly relevant in the context of ‘excessive pricing’, ‘predatory pricing’ or ‘margin squeezing’ – three abuse strategies falling within the scope of Article 102 TFEU. Further, the Commission cannot simply delegate its supervisory duties. In its Microsoft decision the Commission ordered the appointment of an independent monitoring trustee, empowered to access and have available Microsoft Corp's assistance, information, documents, premises, employees and the source code of its relevant products. At the same time, the Commission ordered Microsoft to bear all the costs of the appointment and activities of the monitoring trustee. On appeal, the General Court quashed this part of the decision, holding that under these conditions there was no legal basis for the appointment of an independent monitoring trustee. This case provides another indication that the Commission cannot impose any remedy whatsoever.

The initiation of proceedings and the adoption of remedies falls within the discretion of the Commission. The Commission may decide not to open proceedings and refer complainants to the national courts for private actions. Where the Commission decides to initiate proceedings with a view to impose remedies, the administrative procedure offers various legal safeguards to the parties involved. Prior to adopting these remedies,
the Commission should give the parties the possibility of being heard, to comment on a statement of objections, and to access the Commission’s file.402

The Commission regularly makes use of its power to impose remedies. These remedies range from the obligation to inform third parties that the infringement has been brought to an end403 to the resumption of supplies404, and from licencing intellectual property rights405 to the obligation to unbundle products and offer them separately.406 Highly unusual are structural remedies under Article 7 Regulation 1/2003. This reservation with regard to structural remedies finds support in the legal literature.407

5.6.2 Powers of the German Authorities

By virtue of § 32(1) GWB, the German authorities may adopt decisions requiring undertakings to bring infringements of Articles 101 and 102 TFEU to an end. The authorities may also order undertakings not to engage in specific anti-competitive behaviour, provided there is a real risk that an infringement will be committed.408 These cease-and-desist orders could be supplemented with further obligations. The competition authorities may impose all proportionate measures that are necessary to bring the infringement to an end.409 In accordance with this proportionality requirement the authorities should opt for the least onerous alternative in ending an infringement.

Remedies can be enforced separately. In case of non-compliance, the authorities may use Verwaltungszwang.410 This means that the competition authorities could require third parties to do whatever is in their powers to make sure that the remedies are implemented and could even itself take the measures that the undertaking failed to take.411 Not every remedy will be suitable for this type of direct enforcement. It will depend on the nature of the remedies whether this is feasible. Alternatively, compliance with an earlier remedy decision can be secured with the help of periodic penalty payments.412 Breach of a remedy may also constitute an administrative offence, provided this breach has been committed intentionally or negligently.413 This offence can be punished separately with a fine of up to EUR 1 million or 10 per cent of the undertaking’s worldwide turnover.

407 Faull and Nikpay (n 180) 2.106, where several additional conditions have been suggested before the Commission should consider structural remedies (substantial impact on competition and consumers, repeated infringements or a market structure that causes infringements, break-up does not lead to a significant loss of efficiency at the level of the undertaking)
408 Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 18-19; Bechtold (n 32) § 32 Rdnr 10.
409 § 32(2) GWB.
410 Bechtold (n 32) § 32 Rn. 8.
411 §§ 10 and 12 Verwaltungs-Vollstreckungsgesetz.
412 § 86a GWB. Penalty payments range from EUR 1000 to 10 million.
413 § 81 GWB.
Remedies may take the form of both negative and positive orders. The power to give positive orders was introduced in 2005 with the 7th amendment to the GWB. Prior to this amendment, the competition authorities’ remedial powers were in principle limited to negative orders. This extension of the authorities’ powers was meant to align their powers with those of the Commission. Yet, the remedial powers of the German authorities are more extensive. It has been suggested in the literature that § 32(2) GWB allows competition authorities to order undertakings to pay damages to third parties that have been injured as a result of the anti-competitive behaviour. This interpretation has indeed found resonance with the BGH in Stadtwerke Uelzen. Irrespective of the current status of this remedy, the draft of the 8th amendment to the GWB provides exactly for this possibility. Apart from the possibilities under § 32 GWB, by virtue of § 34(1) GWB the authorities are in any case allowed to skim-off illegal gains made through an intentional or negligent infringement of Article 101 or 102 TFEU. The latter measure is aimed to supplement fines, even fines imposed by the Commission, and will be discussed more extensively in subparagraph 5.7.2. Another positive order that may be imposed on the basis of § 32(2) GWB is a structural remedy, for instance the divestiture of shares or certain assets. Although not explicitly provided for, the parliamentary deliberations in the context of the 7th amendment to the GWB indicate that the German authorities may adopt structural remedies. Also this power will be reinforced with the 8th amendment to the GWB, making provision for structural remedies in the text of § 32(2) GWB. Structural remedies will in any case remain an ultimum remedium, to be reserved for situations where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned.

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414 WuW-Sonderheft (n 45) 130.
415 BT-Drucksache 15/3640 (n 183) 33.
416 ibid. See also Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 27; Bechtold (n 32) § 32 Rdnr 14
417 BT-Drucksache 15/3640 (n 183) 33.
418 Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 32-36.
419 BGH Stadtwerke Uelzen WuW/E DE-R 2538 Tz. 16, as discussed by Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 33. The BGH referred the appeal back to a lower court to render final decision but noted that the power to impose reparatory sanctions includes the requirement to pay back illegal gains.
421 WuW-Sonderheft (n 45) 134: ‘Eine Vorteilsabschöpfung ist darüber hinaus bei Geldbußen der Kommission, die reinen Ahndungscharakter haben und nicht die Abschöpfung des wirtschaftlichen Vorteils bezwecken, denkbar.’
422 The application of structural measures may not undermine undertakings’ unfettered rights to organic growth, see WuW-Sonderheft (n 45) 130.
423 BT-Drucksache 15/3640 (n 183) 33.
424 BT-Drucksache 17/9852 (n 420) 10.
425 Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 31. See also Bechtold (n 32) § 32 Rdnr 17, who argues that structural remedies are in principle not allowed, except for very exceptional situations.
The initiation of proceedings and the adoption of remedies are discretionary powers.\footnote{426} If the authorities decide to initiate proceedings with a view to impose remedies, they need to comply with the framework for reparatory proceedings. This means, for instance, that the authorities should issue a statement of objections prior to the adoption of the remedies.\footnote{427} It also means that the remedies should leave the addressee as much choice as possible in terminating the infringement.\footnote{428} Irrespective of the intended alignment to the Commission’s powers, German law seems more demanding as to the specificity of the remedy.\footnote{429} In this respect the BGH has held:

\begin{quote}
\end{quote}

In this respect it should be noted that unlike remedies imposed by the Commission, breach of remedies imposed by German authorities is a separate administrative offence which directly attract fines. It seems that precisely this difference has urged the BGH to depart from EU case law as to the required specificity of the remedies.

The BKartA regularly imposes remedies. Often, these remedies are not limited to negative orders. In \textit{Laborchemikalien}, for instance, the BKartA ordered the supply of certain goods in order to terminate behaviour that was both contrary to Article 101 TFEU and the German prohibition of discriminatory treatment laid down in § 20 GWB.\footnote{431} In \textit{Kalksandstein}, the BKartA required one of the parties to terminate its partnership with other undertakings.\footnote{432} In \textit{Fahrdienst}, finally, the BKartA required undertakings to enter into negotiations with regard to granting access to port facilities.\footnote{433}

5.6.3 Powers of the Netherlands Authority

To remedy an infringement of Article 101 or 102 TFEU, the Netherlands authority can impose an ‘order’ or a ‘direction.’ The order (\textit{last}) is limited to the termination of an actual

\begin{quote}
\footnote{426} Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 12; Bechtold (n 32) § 32 Rdnr 4-6.
\footnote{427} Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 14.
\footnote{428} ibid § 32 Rdnr 40-48. Cf BKartA B9-188/05 \textit{Fahrdienst}.
\footnote{429} Bornkamm in Langen/Bunte (n 185) § 32 Rdnr 48.
\footnote{430} BGH \textit{Gaslieferverträge} WuW/E DE-R 2679 Tz. 52.
\footnote{431} BKartA B3-64/05 \textit{Laborchemikalien}.
\footnote{432} BKartA B1-116/04 \textit{Kalksandstein}.
\footnote{433} BKartA B9-188/05 \textit{Fahrdienst}.
\end{quote}
infringement and comes jointly with a periodic penalty payment (dwangsom). The order should specify which measures the undertaking must take and give the latter a period within which it can remedy the situation without incurring a penalty. The order may include a separate requirement to keep the authority informed. This would allows the authority to monitor compliance with the order. The periodic penalty payment that supplements the order can be levied in three ways: a single lump sum payment for non-compliance after a certain period; a penalty that is levied periodically in accordance with a set time-frame for as long as the infringement persists; a penalty for each time an infringement is committed. Whichever alternative is chosen, the competition authority should fix a maximum amount beyond which no further penalties can be levied. Although both the periodic and the maximum amount need to be proportionate to the gravity of the infringement and to the purpose of the penalty, these amounts are not subject to any statutory cap. Payment is due within six weeks upon the expiration of the set period and can be summoned by the authority itself, provided it has adopted a decision on the execution of the penalties. The authority may at any time amend or withdraw the order, but not before having invited the addressee to submit observations.

The Netherlands authority can order both behavioural and structural remedies. Behavioural remedies can be ordered for a period of up to two years. With regard to the structural remedies, the Dutch legislator has sought alignment to the powers of the Commission in the most explicit terms possible. Article 58a Mw provides that the authority may impose orders 'of the type referred to in Article 7 Regulation 1/2003 as structural remedies'. The introduction of this power was motivated by the fact that the Council deemed it necessary for the Commission to have this power; the Netherlands authority was therefore deemed to need this power too. The conditions under which the Netherlands authority may impose structural remedies for infringements of Articles 101 and 102 TFEU are identical to the conditions for the Commission: structural remedies may only be imposed where there is no equally effective behavioural remedy available or where any equally effective behavioural remedy would be more burdensome for the undertaking.

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434 Article 5:31d Awb.
435 Article 56(1)(b) Mw.
436 5:32a Awb.
437 Article 58(1) Mw.
438 Article 5:32b(1) Mw.
439 Article 5:32b(2) Mw.
440 Article 5:32b(3) Mw.
441 Articles 5:33 and 5:37 Awb.
442 Article 66 Mw.
443 Articles 58 and 58a Mw.
444 Article 58(2) in conjunction with Article 58a(2) Mw.
445 The authentic Dutch translation reads: ‘in de vorm van een structurele maatregel als bedoeld in artikel 7 van Verordening 1/2003’.
concerned. In the parliamentary deliberations, structural remedies have been presented as a *ultimum remedium*.

Alternatively, the Netherlands authority may give a ‘direction’ to comply with Articles 101 and 102 TFEU (*bindende aanwijzing*). As the legislator has not limited the type of directions that could be given, in principle both behavioural and structural directions seem possible. Breach of a direction allows the authority to adopt an order or a decision imposing a fine. A direction differs from an order, in that a penalty for breach of the former does not follow automatically. In fact, breach of a direction may lead to the imposition of an order, thus postponing the penalty even further. At the stage of enforcement, all the authority would seem to have to prove is that the addressee acted contrary to the direction. Whether the direction is indeed necessary for the purpose of Articles 101 and 102 TFEU seems no longer up for dispute. This point would had to be raised against the decision giving the direction. This interpretation finds support in the fact that a direction can only be given after an infringement of Articles 101 and 102 TFEU has been established. The introduction of the power to give directions was primarily meant to involve consumer organisations in the enforcement process. The latter may request the competition authority to give a direction and could thereby voice the interests of consumers in the enforcement of Articles 101 and 102 TFEU. However, directions may also be given *ex officio*, allowing the competition authority to use this power more widely.

The procedural requirements for the adoption of orders and directions differ. Prior to the adoption of an order, the Netherlands authority should issue a statement of objections. This requirement is an exception to the general administrative law regime, limiting the requirement to adopt statements of objections to fines and, to the extent provided for in specific legislation, other punitive sanctions. Administrative orders, even those that come jointly with a periodic penalty payment, are considered reparatory sanctions under Dutch law. The exceptional nature of this requirement helps explaining why directions to comply with Articles 101 and 102 TFEU and/or simple findings of infringement need not to be preceded by a statement of objections. Pursuant to Article 59 Mw, the scope of the requirement to issue a statement of objections is limited to situations where the competition authority has a reasonable suspicion that an infringement of Article 101 or 102 TFEU has been committed and a fine or order needs to be imposed. The addressee of the statement of objections obtains access to the authority’s file and the authority is, in principe, required

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447 Article 58a(1) Mw.
448 TK 2005-2006, 30071, nr 3, p 11.
449 Article 56(1)(c) Mw.
450 Article 56(2) Mw.
451 Article 56(1) Mw.
453 Article 59 Mw.
454 Articles 5:48 and 5:54 Awb.
455 Article 5:31d Awb.
456 Article 59(2) Mw, in conjunction with Article 5:49 Awb.
to organise a hearing.\footnote{Article 4:8 Awb. There are situations in which the authority is not required to organise a hearing prior to the adoption of a decision imposing an order. This is the case when the authority relies entirely on information provided by the addressee itself, or – even more exceptional – when the salient information does not relate to the addressee. As the (exceptions to the) hearing requirement follows from the general administrative law regime, these exceptions seem primarily relevant for decisions outside the remit of competition law.} Within eight months after issuing the statement of objections, the competition authority should take a final decision.\footnote{Article 62 Mw.}

The Netherlands authority does not make frequent use of its remedial powers in the context of Articles 101 and 102 TFEU.\footnote{Orders for infringements of Dutch competition law have been imposed (although not necessarily maintained), for instance, in the following cases: NMa Zaak 3353-89 CR Delta; NMa Zaak 757 Chilly en Basilicum v G-Star/Secon Groep; NMa Zaak 1528/894 Wegener. The Netherlands authority frequently gives directions in other areas of economic regulation, for instance in its capacity of regulator of the energy sector.} The 2011 \textit{GasTerra} decision\footnote{NMa Zaak 4296_1/213 \textit{GasTerra}.} appears to be the first time that remedies were imposed for infringements of EU competition law. This concerned a perceived infringement of Article 102 TFEU. However, this remedy was already withdrawn in the administrative review stage.\footnote{NMa Zaak 4296_1/214 \textit{GasTerra}.}

5.6.4 Powers of the UK Authorities

The UK authorities may adopt remedies in response to infringements of Articles 101 and 102 TFEU. Pursuant to Sections 32 and 33 CA98 the authorities may give ‘to such person or persons as it considers appropriate such directions as it considers appropriate’ to bring infringements of Articles 101 and 102 TFEU to an end. The CAT has indicated that the power to give a direction includes the power to ensure that an infringement is not repeated.\footnote{\textit{Genzyme} [2005] CAT 32.} Moreover, the power to bring the infringement to an end would cover conduct closely linked to, or to the like effect as, the infringement found.\footnote{ibid.} In practice, the OFT will not give any directions in cases where it is satisfied that the infringements have ceased.\footnote{OFT Case CE/2464-03 \textit{Desiccant}; OFT Case CE/3861-04 \textit{Stock check pads}; OFT Case CE/2890-03 \textit{Independent fee-paying schools}; OFT Case CE/2596-03 \textit{Tobacco}.} Where a direction is deemed necessary, the OFT will closely determine whether the burden on the undertakings is proportionate to the benefits for consumers.\footnote{OFT Case CE/8931-08 \textit{Reckitt Benckiser}.}

Before adopting an infringement decision and giving directions, the OFT should issue a statement of objections and allow the addressees to inspect the relevant documents in the OFT’s case file and make written and oral representations.\footnote{Competition Act 1998 (Office of Fair Trading’s Rules) Order 2004, SI 2004/2751, r 5.} This statement of objections should include the (reasons for the) proposed directions. However, the OFT is not obliged
to give directions together with the infringement decisions; it may give directions by
separate decision some time later.467

Directions under Sections 32 and 33 CA98 can be addressed to a relatively wide group
of persons. ‘Appropriate persons’ are not necessarily the perpetrators of the infringement,
but could be anyone with the ability to influence the perpetrator.468 Directions may be
addressed to legal persons and natural persons and could thus be directed to the company,
or to persons in charge with the management of the undertaking.469

There exists some uncertainty as to the type of directions that can be given. ‘Appropriate
directions’ could take the form of cease-and-desist orders, but may also include positive
obligations (eg reporting requirements).470 What seems important in light of the CAT’s case
law is that the directions are sufficiently ‘ancillary’ to the authority’s purpose in terminating
the infringement.471 The OFT takes the position that its power to take ‘such directions
as it considers appropriate’ covers directions aimed at changing the undertaking’s very
structure, ie structural remedies.472 The availability of structural remedies with regard to
Articles 101 and 102 TFEU is not undisputed, however. The text of Sections 32 and 33 CA98
only lists examples of behavioural remedies.473 Moreover, also the interplay between the
enforcement of Articles 101 and 102 TFEU and the domestic equivalents, on the one hand,
and the UK market investigation regime, on the other hand, may suggest otherwise. Under
the latter regime, the UK Competition Commission has been granted the explicit power
to adopt structural remedies amongst other if the conduct of an undertaking restricts
competition in connection with the supply or acquisition of any goods or services in the
UK (supra subparagraph 5.2.4).474 As the OFT and the other competition authorities have
been granted the power to make references to the Competition Commission they are in any
case not powerless when it comes to anti-competitive behaviour caused by the structure
of the undertaking.475 The OFT has even indicated to consider making a reference in
situations where individual undertakings behave anti-competitively and where the OFT is
not able to take effective action.476 Sufrin and Furse have therefore concluded that structural
remedies are not available under the enforcement regime of CA98, which also governs the
enforcement of Articles 101 and 102 TFEU.477 Similarly, Slot and Johnston have argued
that compulsory divestitures or break-ups ‘would not necessarily be an appropriate use

467 O’Neill and Sanders (n 151) 10.114.
468 Whish (n 163) 400.
469 OFT, Enforcement (n 210) para 2.2.
470 ibid para 2.3.
471 Napp Pharmaceuticals [2002] CAT 1, para 553.
472 OFT, Enforcement (n 210) para 2.3.
473 CA98, ss 32(3) and 33(3).
474 EA02, s 161 and sch 8.
475 EA02, s 131.
476 OFT, Market Investigation References: Guidance about the making of references under Part 4 of the
Enterprise Act (OFT511 2002) paras 2.3 and 2.8 <www.oft.gov.uk/shared_oft/business_leaflets/
of the power to issue directions. Whish and Bailey, on the other hand, have submitted that structural remedies would seem justified where the infringement of Article 101 or 102 TFEU is the consequence of a structural feature in the market (eg an anti-competitive joint venture agreement), but hesitate when it comes to the use of structural remedies more generally. Yet another position has been taken by O’Neill and Sanders. These authors have argued that the competition authorities may ‘need’ to impose structural remedies for infringements of 101 and 102 TFEU. This conclusion is based on the need to provide remedies to ensure the effectiveness of EU competition law.

More important than any consideration of effectiveness to decide whether the competition authorities should be empowered to impose structural remedies are considerations of equivalence (supra subparagraphs 4.6.2 and 4.6.3). If the Competition Commission can impose structural remedies for the protection of UK competition law, then the OFT and the other competition authorities should be able to impose structural remedies for the protection of EU competition law as well. Until the OFT actually ventures structural remedies, which can then be tested before the CAT, it remains uncertain whether this would be ultra vires under the CA98. Meanwhile, the need for clarification has only become more urgent. The UK is currently in the process of merging the OFT with the Competition Commission into the CMA. Along with this institutional change, UK government will supplement the CMA’s remedial powers under the merger and market investigation regime. The CMA will be enabled to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies. In other words, the CMA will be allowed to do exactly what Microsoft has prohibited the Commission to do in the context of Articles 101 and 102 TFEU (supra subparagraph 5.6.1). UK government has further indicated that there is no need for further legislation to improve the interaction between market investigations and the enforcement of Articles 101 and 102 TFEU. This suggests that current tensions between these parallel competition regimes and the EU principle of equivalence are not taken away. The UK still reserves some powerful measures for national competition law alone. In fact, by supplementing the CMA’s powers in the context of market investigations UK government has only made these tensions worse.

Irrespective of the type of directions that can be imposed for infringements of Articles 101 and 102 TFEU, the authorities cannot enforce them directly. Instead, if a person fails, without reasonable excuse, to comply with a direction the authority should apply for a court order.

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478 Slot and Johnston (n 212) 226.
479 Whish and Bailey (n 112) 408.
480 O’Neill and Sanders (n 151) 10.112.
481 Thus far, the CAT has interpreted the OFT’s power to give directions with reference to the remedial powers of the European Commission, see Napp Pharmaceutical [2002] CAT 1, para 557.
482 Growth, Competition and the Competition Regime (n 106) para 4.38.
483 ibid para 4.52.
484 CA98, s 34.
or administration of the undertaking, application can be made for an order requiring the undertaking or any of its officers to comply with the direction. Any person who fails to comply with a court order will be ‘in contempt of court’ and risks custodial sentences or fines.

As to the specificity of the imposed remedies, the CAT has conformed to EU practice. In *Napp Pharmaceuticals* the CAT concluded that an obligation to cease the infringements in question, and refrain from conduct of the same or equivalent effect, is a measure similar to orders made in decisions of the Commission and should therefore be accepted. Any doubt as to the scope of that obligation would have to be resolved if and when the authorities came to enforce their directions before the court.

The competition authorities occasionally give directions. In *National Grid*, Ofgem required the undertaking involved to terminate an infringement and refrain from engaging in conduct with equivalent exclusionary effects. In *Napp Pharmaceuticals*, the OFT gave extensive directions, requiring the addressee, amongst others, to lower the list prices of certain of its products and renegotiate existing supply contracts. Also in *Genzyme* the OFT imposed price related directions.

### 5.6.5 Degree and Drivers of Convergence

It can be concluded from the foregoing analysis that there is a considerable degree of convergence with regard to the types of remedies that can be imposed for infringements of Articles 101 and 102 TFEU. In all four jurisdictions, the authorities may impose both negative and positive behavioural orders and most jurisdictions explicitly provide for structural remedies as well. With the exception of the UK when it comes to the principle of equivalence, the duty of sincere cooperation seems fulfilled with regard to all three Member States. To a large extent, Regulation 1/2003 and the powers of the Commission have functioned as a driver of convergence. Yet, upon a closer look some notable differences emerge. In a general sense it seems that the Commission is less keen to impose intrusive remedies than some of the national authorities. This difference is most apparent with regard to compulsory supplies to remedy infringements of Article 101 TFEU and with regard to price intervention under Article 102 TFEU. Also, there are some more specific differences.

For instance, the German authorities are alone in their ability to skim-off illegal gains and to order undertakings to pay damages to third parties that have been injured as a result of the anti-competitive behaviour. While also Dutch law (and to a lesser extent UK law) blends remedial intervention with some form of consumer protection, injured parties cannot rely on the Netherlands authority (nor on the UK authorities) for compensation of the harm caused by the infringement of Articles 101 and 102 TFEU. Another difference relates to the group of potential addressees. No other jurisdiction than the UK so clearly allows its authorities to impose remedies on managers and other company officials.

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485 *Napp Pharmaceuticals* [2002] CAT 1, para 553.
486 ibid.
487 Ofgem 27/08 *National Grid*.
488 OFT No CA98/2D/2001 *Napp Pharmaceuticals*.
The conditions for imposing remedies are not perfectly aligned either. Remedies by the Netherlands authority seem limited to the termination of existing infringements. The other authorities also have the possibility to prevent future infringements, provided these are sufficiently related to the original infringement. Dutch law contains a further deviation from Regulation 1/2003 and the powers of the Commission, by limiting the maximum duration of behavioural orders to a period of two years.

Also, the enforcement of remedies has been organised differently in the various jurisdictions. The German authorities are vested with the most extensive powers. They can require third parties to do whatever is in their powers to make sure that the remedies are implemented and could even itself take the measures that the undertaking failed to take. Furthermore, they have at their disposal the power to impose periodic penalty payments and fines. The UK authorities can be positioned at the other end of the spectrum, lacking autonomous enforcement powers. Yet, non-compliance with a remedy imposed by the UK authorities could ultimately result in a custodial sentence, making non-compliance in the UK a highly risky activity. In between these extremes the Commission and the Netherlands authority are situated. Breach of a Commission remedy may lead to periodic penalty payments but is no ground for the imposition of a fine. The powers of the Netherlands authority are more elaborate and flexible. For the purpose of remedying an infringement of Articles 101 and 102 TFEU, the Netherlands authority can choose either to issue an order with an automatic penalty payment, or to proceed on the basis of a direction. Breach of a direction provides a ground for the adoption of an order or the imposition of a fine. Where the Netherlands authority chooses for an order, either directly or after first having given a direction, it may supplement this order with a single lump sum payment for non-compliance after a certain period, with a penalty that is levied periodically in accordance with a set time-frame for as long as the infringement persists, or with a penalty for each time an infringement is committed. As there is no statutory cap on the total amount of periodic penalties, the Netherlands authority should fix this amount in accordance with the principle of proportionality.

These differences in relation to the enforcement of remedies have an impact on the legal safeguards for the undertakings involved. Because breach of a remedy imposed by the German authorities constitutes an administrative offence and may attract fines, German law deviates from Commission procedures as to the specificity of the remedy. The opposite development can be observed in the UK, where the courts have sought alignment to the criteria for the Commission. In this respect it should be reminded that UK authorities cannot enforce their remedies directly. The available legal safeguards with regard to remedies for infringements of Articles 101 and 102 TFEU also differ in other respects. For instance, the Netherlands authority may impose certain remedies without having to issue a statement of objections. This is in stark contrast to the other jurisdictions, which in this respect provide better legal protection. Notwithstanding the tendencies of convergence, there thus remain considerable disparities in the remedial powers of the various authorities.
5.7 PECUNIARY SANCTIONS

The most common type of pecuniary sanction for infringements of Articles 101 and 102 TFEU is the fine. A fine is a measure to punish past behaviour. However, the fact that this sanction is a response to something that happened in the past should not obscure the measure's ability to change future conduct. Fines not only have a retributive function, they may also be used to deter undertakings and individuals from engaging in anti-competitive behaviour. In fact, in the context of competition law, deterrence seems to have become the key driver in fining policy.490 This is reflected in the Commission fines, the average amount of which has steadily increased in the last two decades.491 This development is not so much the consequence of anti-competitive practices becoming ever more pernicious, but could rather be explained as a response to the pervasiveness of some of these practices. The adjustment of the level of the fines to the deterrence effects of earlier fines could be seen as the outcome of a learning process. In accordance with what was concluded in chapter 3, the decentralisation of the enforcement of Articles 101 and 102 TFEU could give a boost to these learning processes. It also allows Member States to cater for domestic preferences in the area of fines, for instance in terms of severity and potential addressees. Whether such regulatory innovation and preference matching actually occur is dependent on the development of domestic fining powers. Against this background, this paragraph will study the development in our subset of jurisdictions. More specifically, it will look for convergence and differentiation with regard to fines and other pecuniary sanctions. Additionally, this paragraph will evaluate the compatibility of the domestic regimes with the principles set out in chapter 4, as well as with the Model Leniency Programme and the Fining Principles adopted under the aegis of ECN and ECA.

5.7.1 Powers of the Commission

The Commission may impose fines on undertakings that intentionally or negligently infringe Articles 101 and 102 TFEU.492 The maximum fine that can be levied equals 10 per cent of the undertaking’s worldwide turnover. Regulation 1/2003 stresses that these fines are not of a criminal law nature.493 In principle, the Commission cannot fine individuals. Save for the highly exceptional situation that an infringement is committed by an unincorporated trader, fines will always be borne by legal persons.

In contrast with reparatory sanctions, fines may only be imposed for intentional or negligent infringements. There is no clear distinction between these conditions and the Commission, although formally required to establish intent or negligence, sometimes

492 Article 23 Regulation 1/2003.
493 Article 23(5) Regulation 1/2003.
does not characterise the nature of the infringement at all. These conditions can be fulfilled even if the undertaking played only a subsidiary, accessory or passive role in the infringement. Moreover, a fine may already be imposed where the undertaking cannot have been unaware of the anti-competitive nature of its conduct. Whether or not it is aware that this conduct is contrary to Article 101 or 102 TFEU is irrelevant. The Court of Justice considers intentional and negligent infringements equally serious.

Undertakings may escape liability if they erroneously assume that their agreement or practice is covered by any of the ‘safe havens’ provided by the Commission. This follows from the Commission’s *De Minimis* Notice, laying down guidelines on how the Commission deals with the notion of ‘restriction of competition’ in the application of Article 101 TFEU. In this Notice, the Commission elaborates on the case law requirement that any restriction of competition in the sense of Article 101 TFEU should be appreciable. The Commission qualifies this notion of appreciability with the help of market share thresholds, below which it considers the initiation of enforcement proceedings unwarranted. Importantly, the *De Minimis* Notice also exonerates undertakings that in good faith wrongly assumed that their agreement benefited from the safe haven.

The Commission may impose fines both for past and persisting infringements. However, this power is subject to a limitation period. Past infringements cannot be fined indefinitely. Regulation 1/2003 has fixed this limitation period at five years. Time begins to run the day on which the infringement is committed. However, infringements of Articles 101 and 102 TFEU hardly ever come in the form of a one-off act that can be assigned to a single day. Therefore, Regulation 1/2003 provides an alternative starting date for repeated or continuous infringements: the day on which the infringement has ceased. This alternative starting date for continuous infringements has led to a large body of case law on the question when exactly various anti-competitive acts can be considered part of a single act.

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494 Roth and Rose (eds), *Bellamy & Child* (n 175) 13.137; Faull and Nikpay (n 180) 8.592.
495 Cf T-29/05 *Deltafina* [2010] ECR II-4077, para 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.’
497 Case C-137/95 *P SPO* [1996] ECR I-1611, para 55. However, the Commission considers that infringements committed out of negligence are eligible for a mitigated fine, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.
500 *De Minimis* Notice, para 4.
502 Article 25(2) Regulation 1/2003.
503 A rare example of a one-off act contrary to Article 101 TFEU can be found in Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, where the infringement consisted of a single anti-competitive meeting.
504 Article 25(2) Regulation 1/2003.
continuous infringement (SCI). If these acts are part of a single anti-competitive objective, in that they are complementary in their object or effect to restrict competition, they may be considered part of an SCI (supra subparagraph 4.3.3). The starting date of the limitation period for anti-competitive behaviour forming part of an SCI is effectively extended to the final instance of anti-competitive conduct.

The five year limitation period can be interrupted. Any investigatory action by the Commission or an NCA notified to at least one of the undertakings implicated in the putative infringement interrupts the limitation period in relation to all undertakings involved. With each interruption the five year period starts running afresh. However, interruptions may not extend the total duration between termination of the infringement and the imposition of the fine to more than two times the limitation period. This means that this duration cannot exceed 10 years. Procedures before the Court of Justice, whether interim or appeal, have no effect on the limitation period. The limitation period is suspended for as long as the decision is pending before the Court.

Determining the amount of the fine

In fixing the appropriate amount of the fine, the Commission must take into account the gravity and duration of the infringement. The gravity of the infringement is determined by reference to various factors. The proportion of turnover derived from the goods in respect of which the infringement was committed has been considered a relevant factor. Further, the Commission should have regard to the profit which the undertaking was able to derive from the infringement. However, the fact that the undertaking did not benefit from the infringement does not preclude the imposition of a (severe) fine. The Commission does not have to take account of the financial situation of the undertakings involved either. In any case, the final amount may not exceed the statutory maximum of 10 per cent of the undertaking’s worldwide turnover in the preceding business year.

The wide margin of discretion enjoyed by the Commission allows it to pursue a fining policy aimed at deterrence. The Commission’s tasks are not limited to the enforcement of Articles 101 and 102 TFEU in individual cases. It has a broader supervisory role, which

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505 Article 25(3) Regulation 1/2003.
506 Article 25(3)-(5) Regulation 1/2003.
507 Article 25(6) Regulation 1/2003. See also Case T-372/10 Bolloré II (General Court, 27 June 2012), para 216.
508 Article 23(3) Regulation 1/2003.
510 Cf Case T-446/05 Amann & Söhne [2010] ECR II-1255, para 188.
514 Article 23(2) Regulation 1/2003.
includes the duty to pursue a general policy to steer undertakings away from infringements. Accordingly, the Commission’s fines should not only deter the undertakings concerned from engaging in future infringements (special deterrence), they should also be able to deter potential future offenders more generally (general deterrence). This requires the Commission to take into account the frequency of infringements. Within the limits of Regulation 1/2003, the Commission may deviate from earlier fining practice if this is needed to implement EU competition law in an effective manner. The Commission may therefore at any time, and within the boundaries of the statutory maximum, adjust the level of its fines. For this purpose, it may also take into account aggravating circumstances not taken into account in earlier decisions. The persistance of infringements of Articles 101 and 102 TFEU has led the Commission to increase the average amount of its fines. The ten largest fines for individual undertakings have all been levied in the new millennium. Nine digit fines have become the standard. In 2008, Saint Gobain SA was fined for a record amount of EUR 896 million for its participation in the Car Glass cartel.

In order deter undertakings from engaging in infringements of Articles 101 and 102 TFEU and, at the same time, ensure the transparency and impartiality of its fining decisions, the Commission has published Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (‘Fining Guidelines’). In these Fining Guidelines, the Commission indicates that fines should have a deterrent effect in order to punish the undertakings involved in the infringement and to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 101 and 102 TFEU. This has resulted in a method for setting fines in which, first, a basic amount is calculated by reference to the value of the undertaking’s sales of goods or services to which the infringement relates. Dependent on the nature and scope of the infringement, on whether the infringement has been implemented, and on the market share of the undertakings, the Commission will set the basic amount of the fine at a level that will generally not exceed 30 per cent of the value of sales. This amount will then be multiplied by the number of years of participation in the infringement and topped-up with an ‘entrance-fee’ of between 15 and 25 per cent of the value of sales, irrespective of the duration. Second, this basic amount can be increased if there are aggravating circumstances (recidivism, refusal to cooperate, leading role). Third,
the basic amount may be reduced if there are mitigating circumstances (swift termination, unintentional infringement, limited involvement, cooperation with the Commission, authorisation or encouragement by public authorities or legislation). Compensation of injured parties does not qualify as a mitigating circumstance.\textsuperscript{527} Fourth, the Commission may then increase the amount again in order to ensure a sufficiently deterring effect. This may be needed when the undertakings are large and diversified or when they have made considerable illegal overcharges. It should be noted that the calculation of the basic amount of the fine, using a percentage of the relevant turnover, seems to have been inspired by the 2001 fining guidelines of the Netherlands competition authority.\textsuperscript{528}

The Commission has supplemented its deterrence-focused fining policy with a whistleblower arrangement for the most serious infringements of Article 101 TFEU. The Commission considers that it is in the EU’s interest to reward undertakings involved in covert horizontal agreements (ie agreements between competitors) which are willing to terminate their involvement independently and assist the Commission in its investigations. This reward consists in granting immunity or reduction of fines. This leniency policy has been laid down in the Commission Notice on Immunity from fines and reduction of fines in cartel cases (‘Leniency Notice’).\textsuperscript{529} There are three general conditions for leniency: i) genuine, full, continuous and expeditious cooperation, ii) prompt termination of the infringement and iii) no tampering with the evidence or disclosure of the leniency application.\textsuperscript{530} In addition, there are specific conditions for full and partial immunity.

The leniency applicant who is the first to submit information and evidence enabling the Commission to either carry out a targeted inspection or to prove an infringement is entitled to full immunity.\textsuperscript{531} Immunity is conditional on the Commission not already having sufficient information itself to carry out an inspection or to establish the infringement.\textsuperscript{532} A further condition for immunity is that the applicant undertaking did not coerce its former co-cartelists to participate in the cartel.\textsuperscript{533} The immunity applicant must provide the Commission with a corporate statement (written or oral), including a detailed description of the infringement and the participants, as well as other (contemporaneous) evidence.\textsuperscript{534}

\textsuperscript{527} While there is no formal Commission policy to take into account compensatory payments in setting the amount of the fine, on two occasions it has done so nonetheless. See Pre-insulated Pipes (Case IV/35.691/E-4) Commission Decision 1999/60/EC [1999] OJ L24/1, para 172; PO Video Games, PO Nintendo Distribution, Omega – Nintendo (Case COMP 35.587) (Case COMP 35.706) (Case COMP 36.321) [2003] OJ L255/33, paras 440-441. However, the General Court has held that the Commission is not required to take into account compensation as a mitigating circumstance, see Case T-59/02 Archer Daniels Midland [2006] ECR II-3627, paras 349-355.


\textsuperscript{529} [2006] OJ C 298/17.

\textsuperscript{530} Leniency Notice, paras 12 and 24.

\textsuperscript{531} ibid para 8

\textsuperscript{532} ibid paras 10-11.

\textsuperscript{533} ibid para 13.

\textsuperscript{534} ibid para 9.
Immunity applicants have the opportunity to apply for a so-called ‘marker’ before proceeding to a formal application. This allows them to gather all incriminating evidence without jeopardising their position relative to other leniency applicants. If the applicant completes its application within the period set by the Commission, the evidence provided will be deemed to have been submitted on the date when the marker was registered.

Undertakings that do not qualify for immunity are entitled to apply for a reduction of the fine. To qualify for such a reduction, the undertaking must provide the Commission with evidence that has significant added value, meaning evidence that strengthens the Commission’s ability to prove the alleged cartel (e.g. directly incriminating contemporaneous documentary evidence). The level of reduction depends on the value of the evidence provided and the order of application. The first undertaking to provide evidence of significant added value may expect a reduction of 30 to 50 per cent. The second undertaking is eligible for a 20 to 30 per cent reduction. Subsequent applicants can earn a reduction of up to 20 per cent. Incriminating facts that increase the gravity or duration of the infringement are not taken into account in relation to the applicant who furnished the evidence for these additional facts (‘mini-immunity’).

Cooperation with the Commission’s cartel investigations can also be rewarded in the context of a settlement procedure (supra subparagraph 5.4.1). This procedure has been worked out in the Settlement Notice. Just as the Leniency Notice, also the Settlement Notice applies exclusively to cartels. Whereas the Leniency Notice is meant to trigger or advance an investigation by rewarding undertakings for providing incriminating evidence, the Settlement Notice is meant to speed up the decision-making process once the Commission has sufficient evidence to proceed to the decision-making stage.

Undertakings can make an application under the Settlement Notice, either subsequent to an earlier leniency application or autonomously. Cooperation in the framework of the Settlement Notice may lead to an (additional) fine discount of 10 per cent. During the bilateral settlement discussions the Commission will disclose the essential elements which it intends to take into consideration in drafting its statement of objections in order to reach a common understanding. The undertaking may then file a settlement submission in which it, amongst others, acknowledges liability for the infringement in accordance with the common understanding and waives certain procedural rights (access to the file,

535 ibid para 14.
536 ibid para 15.
537 ibid paras 24-25.
538 ibid para 26.
539 ibid.
541 Settlement Notice, para 1.
542 ibid paras 32-33.
543 ibid para 16.
oral hearing). The Commission then drafts a statement of objections in accordance with the settlement submission, to which the parties may reply with a simple confirmation. Finally, the Commission adopts a regular fining decision pursuant to Articles 7 and 23 Regulation 1/2003. During the whole process the Commission retains a broad margin of discretion in determining which cases may be suitable to explore the parties’ interest to engage in settlement discussions, as well as to engage in them or discontinue them or to definitely settle.

Judicial protection

A fine can be appealed in two instances. After a first instance appeal before the General Court, a further appeal may be lodged with the Court of Justice on points of law. In accordance with Article 261 TFEU, the General Court has ‘unlimited jurisdiction’ to review decisions whereby the Commission has fixed a fine. This suggests that the Court has unlimited jurisdiction only with regard to the level of the fine. The finding that there has been an infringement can of course be appealed as well, but is subject to the review procedure of Article 263 TFEU. The Court’s unlimited jurisdiction with regard to fines allows it to reassess all matters of fact or law and to cancel, reduce or increase the fine. In making this assessment, the Court is not in any way bound by the Commission’s Fining Guidelines and it may take into account additional information, not part of the decision. In practice, the General Court tends to follow the approach of the Fining Guidelines and reserves its powers to increase the fine only for exceptional cases. It is for this reason that lodging an appeal against a Commission fine is generally worthwhile. The detailed calculation method of the Commission provides ample opportunity to convince the Court of a weak spot somewhere in the calculation. With the unparallelled amounts the Commission levies, already the smallest percentual reduction by the Court can reduce a fine with millions of euros.

Fines are generally payable within three months. An appeal does not automatically suspend this requirement. However, parties may apply to the President of the General Court for interim relief. Such an interim procedure is generally not necessary as the Commission is willing to accept a bank guarantee pending the appeal procedures.

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544 ibid para 20.
545 ibid paras 25-26.
546 ibid para 28.
547 ibid paras 5-6.
548 Article 31 Regulation 1/2003.
549 Under Article 263 TFEU, the Court has jurisdiction to annul a decision for lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or EU legislation, or misuse of power. While it may partially annul a decision, the Court cannot find an infringement different from the one found by the Commission.
551 Roth and Rose (eds), Bellamy & Child (n 175) 13.248.
552 ibid.
5.7.2 Powers of the German Authorities

Just as the Commission, also the German authorities can impose fines for infringements of Articles 101 and 102 TFEU. This is the case for infringements that constitute an administrative offence (Ordnungswidrigkeit).\footnote{§ 81(1) GWB.} For this purpose, the infringement has to be committed intentionally or negligently. Both natural and legal persons can be fined for their involvement in infringements of Articles 101 and 102 TFEU. Natural persons can be punished with fines of up to EUR 1 million.\footnote{§§ 81(4) GWB, 130(3) OWiG.} Legal persons may be punished with fines up to EUR 1 million or 10 per cent of the undertakings worldwide turnover.\footnote{§ 81(4) GWB.} Where the authorities intend to disgorge the illegal gains of the infringement rather than to punish the offender, the fine may exceed the above amounts (\textit{infra}).

The general system of administrative offences has traditionally been concerned with the actions of natural persons. The administrative offence resulting from an intentional or negligent breach of Article 101 or 102 TFEU therefore focuses on the responsible natural persons. While legal persons cannot escape liability for their role in infringements of Articles 101 and 102 TFEU either, their exposure is mainly of secondary nature, deriving from the administrative offence committed by the responsible natural persons.

Natural persons may be fined as (co-)perpetrator of the administrative offence or in their capacity of proprietor (\textit{Inhaber}) of the undertaking. The latter possibility is rather exceptional, however. In the exceptional circumstance that an infringement of Article 101 or 102 TFEU has been committed by an unincorporated undertaking, the natural person that can be identified with the undertaking is directly liable on the basis of § 81(1) and (4) GWB, possibly in conjunction with § 130 OWiG. In the more common scenario where the natural person and the undertaking are not unified, the former may be fined as (co-)perpetrator of the infringement. Natural persons responsible for the actions of the undertakings and involved in the infringement may be fined in accordance with § 81(1) and (4) GWB in conjunction with § 9 or 14 OWiG.

Also legal persons can be held liable for infringements of Articles 101 and 102 TFEU. In accordance with § 30 OWiG, a company can be fined if one of its officers\footnote{§ 30(1) OWiG limits the group of company officers, whose breach of obligations could attract liability for the legal person. This group includes, among others, statutory directors and responsible managers.} has committed an administrative offence by breaching rules that are addressed to the company. This laborious approach alone shows that liability of legal persons is somewhat atypical under German law. The possibility to fine companies for infringements of Articles 101 and 102 TFEU was mainly inspired by the powers of the Commission.\footnote{Raum in Langen/Bunte (n 24) § 82 Rdnr 1.} While the liability of a legal person for an infringement of Article 101 or 102 TFEU thus derives from the administrative
offence committed by a natural person, the competition authority may decide to use its fining powers on the former alone.\footnote{30(4) OWiG.}

There are also situations where a company can be fined more directly for its involvement in infringements of Articles 101 and 102 TFEU. This is the case for companies engaged in criminal bid-rigging cartels. A single bid-rigging cartel may be prohibited both under Article 101 TFEU and § 298 of the German Criminal Code (\textit{Strafgesetzbuch}, ‘StGB’).\footnote{An important difference between illegal bid-rigging under Article 101 TFEU and illegal bid-rigging under § 298 StGB is that the latter relates to the offer based on an anti-competitive agreement rather than the underlying agreement itself.} As legal persons are exonerated under German criminal law, companies that rig bids are not subject to criminal sanctions. § 82(1) GWB foresees in this lacuna, by providing that the competition authorities may initiate administrative proceedings under Article 101 TFEU against companies engaged in criminal bid-rigging cartels. In other words, bid-rigging cartels could lead to two \textit{autonomous} enforcement proceedings: criminal proceedings by the public prosecutor against the natural persons involved and administrative proceedings by the competition authorities against the responsible companies.

### Criminal Fines

Apart from administrative fines, imposed by the competition authorities, some anti-competitive practices may also attract criminal fines. This is the case for bid-rigging cartels (§ 298 StGB). Proceedings under § 298 StGB take place outside the realm of the competition authorities. Only natural persons can be fined in these criminal proceedings. The amount of the fine is fixed in accordance with § 40 StGB. The statutory maximum of this fine is calculated by multiplying the maximum amount of daily instalments (\textit{Tagessätze}) with the maximum value an instalment could have. This could lead to a maximum amount of EUR 1,8 million for a single offence.\footnote{A very clear description of the calculation of criminal fines can, surprisingly, be found in an OFT report: ‘criminal fines are payable in daily instalments, where for each sentence the number of instalments is at least five, but cannot exceed 360. The amount payable in each instalment can range from €1 to €5,000, so that the maximum total fine for offences under the Criminal Code is 360 x €5,000 = €1.8 million.’ (footnotes omitted) See OFT, \textit{An assessment of discretionary penalties regimes} (OFT 1132 2009) para A.117 <www.oft.gov.uk/shared_oft/economic\_research/of1132.pdf> accessed 1 July 2012.} The actual amount of the fine in individual cases is based on the personal and economic circumstances of the offender.\footnote{§ 40(2) StGB.} 

Compared with these criminal fines, the maximum fine for administrative offences (EUR 1 million) appears relatively modest. This may cause a rift between anti-competitive practices prohibited under § 298 StGB and all other infringements of Articles 101 and 102 TFEU and may raise concerns in relation to the EU principle of equivalence (\textit{supra} subparagraph 4.6.2). Whatever could be said about this policy choice, it does not seem contrary to the spirit of the principle of equivalence. After all, the ‘discriminatory treatment’ relates more to the nature of the anti-competitive practice than to the origin of the prohibition. Bid-rigging cartels that fall within the...
A second possibility for autonomous corporate fines in the context of Articles 101 and 102 TFEU is provided by §§ 82 GWB and 130 OWiG. Under the latter provision the proprietor of an undertaking can be fined for intentionally or negligently failing to take precautionary measures necessary to prevent the undertaking from engaging in infringements of Articles 101 and 102 TFEU. The term proprietor (Inhaber) not only relates to natural persons, but also covers legal persons. § 130 OWiG thus provides a legal basis to hold a parent company liable for infringements committed by its subsidiaries. In light of what has been concluded in subparagraph 4.3.2, this explicit legal basis is mainly relevant for situations where parent and subsidiary do not form a single economic entity in the sense of Articles 101 and 102 TFEU. In the circumstance that parent and subsidiary do form a single economic entity, parent liability follows directly from the concept of undertaking laid down in Articles 101 and 102 TFEU.

Irrespective of the addressee of the decision, whether a natural or legal person, infringements of Articles 101 and 102 TFEU may no longer be fined after expiration of the statutory limitation period. This period is five years, but may be interrupted by any enforcement action listed in § 33 OWiG (eg hearing, inspection, statement of objections). This possibility of interruption is extended to similar actions by the Commission or other NCAs. With each interruption time starts running afresh. The interruption of the limitation period is personal and only applies to those persons against whom the enforcement action is directed. In any case, interruptions may not extend the total duration between the termination of the infringement and the imposition of the fine more than two times the limitation period. In this respect it should be noted that the limitation period extends to the proceedings before the OLG. The latter should therefore render a judgment imposing fines within 10 years from the termination of the infringement.

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562 Cf LG Düsseldorf Aktenzeichen 24b Ns 9/06, where a criminal fine of below EUR 100 was imposed.
563 Parent liability under § 130 OWiG not even seems to require a 100 per cent shareholding. § 14 OWiG suggests that various shareholders could also breach § 130 OWiG jointly, provided they have a supervisory duty.
564 § 81(8) GWB.
565 § 81(9) GWB.
566 § 33(4) OWiG. See also Raum in Langen/Bunte (n 24) § 81 Rdnr 189.
567 § 33(3) OWiG.
568 §§ 31-33 OWiG.
Determining the amount of the fine

Under the pre-2005 penalty regime, fines for infringements of competition law were capped by a relatively low fixed ceiling (EUR 500,000), or by an amount equal to three times the illegal gains (Mehrerlös). This put the competition authorities between a rock and a hard place. They either had to content with a modest fine or face the challenge of calculating the illegal gains. As a result, fines were either manifestly insufficient or fraught with contestable assumptions. To put an end to this conundrum, in 2005 the German legislator exchanged this regime for the arguably more effective method laid down in Regulation 1/2003. As is clear from the report of the parliamentary committee responsible for competition matters, this amendment was considered especially urgent in light of the establishment of the ECN and the power of the Commission to take over cases from the German authorities pursuant to Article 11(6) Regulation 1/2003. Consequently, with the 7th amendment to the GWB, the German authorities saw their fining powers being aligned to those of the Commission. This alignment even has a dynamic feature, as it extends to the Commission’s fining guidelines, which can be amended at any time. Accordingly, the BKartA needs to take into account the Commission’s Fining Guidelines in determining the appropriate amount of the fine. As yet, it is unclear how this requirement will exactly play out in situations where there is a conflict between the administrative guidelines of the BKartA and the Commission’s Fining Guidelines.

Since 2005, the competition authorities may punish infringements of Articles 101 and 102 TFEU with fines up to EUR 1 million or, with regard to undertakings, 10 per cent of the worldwide turnover. In fixing the amount of the fine, the competition authorities should take into account the gravity and duration of the infringement. Above and beyond the gravity and duration of the infringement, fines should be calculated in accordance with hierarchical superior general principles of domestic law (allgemeine übergeordnete

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570 ibid.

571 BT-Drucksache 15/3640 (n 183) 42.


573 § 81(4) GWB. For fines in excess of EUR 1 million the maximum amount is capped by a 10 per cent turnover barrier. For infringements committed negligently the BKartA has circumscribed its discretionary powers by indicating not to levy fines in excess of 5 per cent of the undertakings worldwide turnover. See BKartA, Bekanntmachung Nr. 38/2006 über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) gegen Unternehmen und Unternehmensvereinigungen – Bußgeldleitlinien – vom 15. September 2006, Rdnr 18 <www.bundeskartellamt.de/wDeutsch/download/pdf/06_Bussgeldleitlinien_Logo.pdf> accessed 1 July 2012.

574 § 81(4) GWB.
Grundsätze and allgemeine rechtliche Grenzen). Accordingly, market impact, affected commerce, economic conditions of the undertakings involved, the period between infringement and fine, and the implications of the Doppelverwertungsverbot (in accordance with this ‘dual-use prohibition’, the constituent elements of the prohibition may not be used as an aggravating factor for the severity of a penalty), should all be taken into account.

The possibility to impose fines with the sole aim to punish is an exception to the general rules for penalty proceedings under German law. Outside the field of competition law, administrative fines are meant to exceed the illegal gains and therefore have an inherent disgorgement effect. This exception for competition law purposes was motivated by the wish to follow the Commission’s fining practice, which was understood to have as its sole objective to punish (‘Sanktionscharakter’). Notwithstanding this aim to converge to the Commission model, § 81(5) GWB still allows the competition authorities to fix the amount of the fine with a view to disgorge the illegal gains. In other words, fines may be adopted with the sole aim to punish, but may also be adopted with the dual aim of punishment and disgorgement. Contrary to what § 81(4) GWB might suggest, the disgorgement part may bring the amount of the fine well over 10 per cent of the worldwide turnover, as only the punitive part (Ahndung) of the fine has been capped. This possibility is in accordance with the ECA Fining Principles, which provide that ‘the level of fines should exceed any potential gains that may be expected from the infringement’.

Disgorgement of illegal gains
In addition to punitive fines, perpetrators of Articles 101 and 102 TFEU may also be confronted with disgorgement measures, skimming off illegal gains made with the anti-competitive practices. While this could be done through several means, illegal gains can only be skimmed-off once. On the basis of § 81(5) GWB, competition authorities may take into account the illegal gains in fixing the amount of the fine. This allows the authorities to disgorge illegal gains under the guise of a fine. Pursuant to § 34 GWB, disgorgement could also take place by way of a separate decision. This possibility for disgorgement may be contemplated to the extent that the illegal gains have not already been deducted from corporate income taxes.

575 Raum in Langen/Bunte (n 24) § 81 Rdnr 160-168.
576 ibid.
577 § 17(4) OWiG.
578 BT-Drucksache 15/3640 (n 183) 42.
579 § 81(5) GWB reads as follows: ‘Bei der Zumessung der Geldbuße findet § 17 Abs. 4 des Gesetzes über Ordnungswidrigkeiten mit der Maßgabe Anwendung, dass der wirtschaftliche Vorteil, der aus der Ordnungswidrigkeit gezogen wurde, durch die Geldbuße nach Absatz 4 abgeschöpft werden kann. Dient die Geldbuße allein der Ahndung, ist dies bei der Zumessung entsprechend zu berücksichtigen.’
580 § 17(4) OWiG. See also Mundt (n 572) 463. The disgorgement part of the fine may be deducted from corporate income taxes, cf WuW-Sonderheft (n 45) 146: ‘Im Falle einer reinen Ahndungsfunktion sind Geldbußen künftig nicht mehr steuerlich abzugsfähig.’
581 ECA Fining Principles, para I.3.
582 WuW-Sonderheft (n 45) 134-135.
583 Competition authorities might indeed be tempted to use § 34 GWB instead of imposing a ‘dual-objective fine’. This way they can try to disgorge illegal gains without any extra risks with regard to the
been redistributed as a result of fines and/or awarded damages claims.\textsuperscript{584} This power under § 34 GWB is only available with regard to intentional or negligent infringements. A third possibility to redistribute illegal gains relies on the initiative of trade and industry associations. Associations for the promotion of commercial interests or independent professional interests may under specific circumstances initiate proceedings to have the illegal gains flow into the public (federal) budget.\textsuperscript{585} With the 8\textsuperscript{th} amendment to the GWB, also consumer organisation will be able to initiate proceedings for the recovery of illegal gains.\textsuperscript{586} This third option exists only in relation to infringements committed intentionally and to the extent redistribution has not been accomplished by earlier intervention of the authorities. In practice, none of these means to disgorge illegal gains is much used.\textsuperscript{587}

The BKartA has adopted Fining Guidelines (\textit{Bußgeldleitlinien}), which apply to punitive fines for undertakings imposed by the BKartA.\textsuperscript{588} Considering the multitude of fining modalities under German law, the scope of these Guidelines is therefore limited. The \textit{Bußgeldleitlinien} provide for a two step calculation method. As a first step, a base amount is calculated. This amount is the product of a percentage of the net domestic turnover affected by the infringement (max. 30 per cent) and the duration of the infringement. This percentage depends, amongst others, on the nature and the effect of the infringement. In the second step, this base amount is adjusted on the basis of correction factors. Essentially there are three correction factors: i) the dissuasive effect of the fine; ii) aggravating circumstances; iii) attenuating circumstances. To ensure the dissuasive effect of fines, the BKartA may increase the base amount with up to 100 per cent. This increase is determined on the basis of the size of the undertaking. Contrary to what one might expect, this adjustment seems to take place before other correction factors are taken into account. One would expect an increase for reasons of dissuasiveness to be the final increment. After all, only this would ensure that the fine truly has a deterrent effect, as required by the EU principle of dissuasiveness (\textit{supra} subparagraph 4.6.4), without being overdeterrent. After the deterrence increment, the amount of the fine may be further increased so as to take into account aggravating

\textsuperscript{584} Damages claims have priority over disgorgement actions. To the extent that illegal gains have not been redistributed to the victims of anti-competitive practices, the competition authority may skim off the (remaining) illegal gains. If damages are awarded after the authority has skimmed off the illegal gains, the latter needs to transfer the corresponding amount back to the offender, see § 34(2) GWB.

\textsuperscript{585} § 34a(1) GWB.

\textsuperscript{586} BT-Drucksache 17/9852 (n 420420) 10-11.


\textsuperscript{588} See n 573.
circumstances (degree of fault, recidivism\textsuperscript{589}, role within the infringement). In this respect it should be noted that the far-reaching \textit{nemo tenetur} principle under German law limits the possibilities for treating uncooperative behaviour (e.g., destruction of evidence) as an aggravating circumstance.\textsuperscript{590} Contrary to the increase for reasons of dissuasiveness, there is no limit as to the size of the increase prompted by aggravating circumstances other than the statutory maximum of the fine. Finally, the amount of the fine can be decreased so as to take into account mitigating circumstances (e.g., compensation of injured third parties). Considering the BKartA’s calculation method, one could argue that more weight is put on retribution than on deterrence. The \textit{Bußgeldleitlinien} do not bind the courts.\textsuperscript{591}

The BKartA also operates a leniency policy, known as the \textit{Bonusregelung}.\textsuperscript{592} The \textit{Bonusregelung} lays down the conditions under which immunity for fines or reductions will be granted to whistleblowing cartel participants. It applies both to legal and natural persons.\textsuperscript{593} A leniency application by an undertaking covers its (former) employees and other natural persons who participated in the cartel on behalf of that undertaking.\textsuperscript{594} The BKartA grants markers to leniency applicants that still need to gather all incriminating evidence and it also accepts so-called summary applications in cases where a full leniency application has been submitted to the Commission.\textsuperscript{595} Furthermore, it allows initial contacts to be made on an anonymous basis\textsuperscript{596} and (marker\textsuperscript{597}) applications to be made orally.\textsuperscript{598} The BKartA has committed itself to indicate the application’s success at an early stage of the procedure.\textsuperscript{599}

Only first applicants are eligible for immunity.\textsuperscript{600} Immunity is granted if the application allows the BKartA either to initiate investigations or, beyond this initial stage, to prove the existence of the infringement.\textsuperscript{601} Immunity is not available for undertakings (nor for the

\textsuperscript{589} The period within which a second infringement qualifies as recidivism is five years, § 153(1) \textit{Gewerbeordnung}. It follows that earlier infringements may only constitute an aggravating circumstance if they have been punished less than five years before.

\textsuperscript{590} In penalty proceedings any form of active cooperation may be denied. Use of this right may not be used against its holder. This strict application of the \textit{nemo tenetur} principle could be explained by the fact that suspects of the administrative offence are first and foremost natural persons, who generally benefit from stronger rights of defence than legal persons. Moreover, under German law, the \textit{nemo tenetur} principle derives from the protection of human dignity. See M Herdegen in Maunz/Dürig, \textit{Kommentar zum Grundgesetz} (Stand April 2009, Verlag CH Beck) Art 1 Rdnr 82.

\textsuperscript{591} Raum in Langen/Bunte (n 24) § 81 Rdnr 181.


\textsuperscript{593} ibid Rdnr 1.

\textsuperscript{594} ibid Rdnr 17.

\textsuperscript{595} ibid Rdnr 11 and 13.

\textsuperscript{596} ibid Rdnr 2.

\textsuperscript{597} ibid Rdnr 11.

\textsuperscript{598} ibid Rdnr 15.

\textsuperscript{599} ibid Rdnr 19-20.

\textsuperscript{600} ibid Rdnr 3-4.

\textsuperscript{601} ibid.
responsible natural persons) that either were the sole ringleader of the cartel or coerced others into participating.\textsuperscript{602} Especially the former exclusion is noteworthy, as this is not provided for in the ECN Model Leniency Programme. The \textit{Bonusregelung} does not provide for a ‘mini-immunity’ either. As a result, there is no general assurance that incriminating evidence will not be used against the leniency applicant that furnished the evidence. Reportedly, in practice the BKartA does grant mini-immunity.\textsuperscript{603} Applicants not eligible for immunity may benefit from a reduction of the fine of up to 50 per cent of the original amount.\textsuperscript{604} For this purpose, applicants should provide information that significantly contributes to proving the infringement.\textsuperscript{605} The actual size of the reduction depends on the value of this collaboration and the order of the applications.\textsuperscript{606} 

Leniency applicants may benefit from more than immunity or a reduction of the fine alone. The BKartA will generally also renounce disgorgement actions under § 34 GWB.\textsuperscript{607} This intention is of course not the same as an absolute guarantee.\textsuperscript{608} Arguably more problematic in terms of the attractiveness of the \textit{Bonusregelung} is that a leniency application does not release the BKartA from its obligation to refer criminal offences (most notably bid-rigging) to the public prosecutor.\textsuperscript{609} In fact, the whole idea behind leniency is at odds with the principle of mandatory prosecution governing criminal proceedings.\textsuperscript{610} 

The adoption of a leniency policy falls within the domain of the competition authorities. As the BKartA and the LKartBs have exclusive jurisdiction, there is no single leniency policy for the whole of Germany. Some of the LKartBs apply the \textit{Bonusregelung} of the BKartA\textsuperscript{611}, some LKartB have leniency programmes of their own\textsuperscript{612}, which are generally closely aligned to the \textit{Bonusregelung}. However, not all LKartBs have a publicly available leniency policy. This seems to go against the idea of the ECN Model Leniency Programme. 

Further to its \textit{Bonusregelung}, the BKartA may reward natural and legal persons with a reduction of up to 10 per cent of the fine in exchange for an early confession.\textsuperscript{613} This settlement policy (\textit{einvernehmliche Verfahrensbeendigung}) has not been formalised in any 

\textsuperscript{602} ibid.  
\textsuperscript{604} \textit{Bonusregelung} (n 592) Rdnr 5.  
\textsuperscript{605} ibid.  
\textsuperscript{606} ibid.  
\textsuperscript{607} ibid Rdnr 23.  
\textsuperscript{608} Cf Raum in Langen/Bunte (n 24) § 81 Rdnr 182.  
\textsuperscript{609} \textit{Bonusregelung} Rdnr 24.  
\textsuperscript{610} Ch Vollmer, ‘Experience with criminal law sanctions for competition law infringements in Germany’ in KJ Cseres, MP Schinkel and FOW Vogelaar, \textit{Criminalization of Competition Law Enforcement. Economic and Legal Implications for the Member States} (Edward Elgar 2006) 259.  
\textsuperscript{611} See eg the L.KartB of Nordrhein-Westfalen <www.mwme.nrw.de/100/160/162/index.php> accessed 1 July 2012.  
\textsuperscript{612} See eg the L.KartB of Bayern <www.bayerische-landeskartellbehoerde.de/themen/ informationen/ > accessed 1 July 2012.  
\textsuperscript{613} BT-Drucksache 16/13500 (n 272) 35.
policy document but has emerged from case practice and has been communicated by the BKartA through its biannual report to parliament.\textsuperscript{614} In its \textit{Kaffeeröster} decision\textsuperscript{615}, the BKartA has elaborated on the conditions for settlements. In accordance with the procedure described in this decision, the parties concerned should first express their willingness to engage in settlement negotiations. The BKartA will then inform the parties about the results of the investigation, its preliminary objections and the maximum amount of a possible fine. The BKartA will set a deadline within which parties can make a formal settlement confession. This confession should include the prohibited conduct, as well as the circumstances that are relevant for the severity of the fine. More specifically, these persons should accept both the facts on which the objections are based and the projected fine. Parties need not to waive their right to appeal. However, they do have to waive certain administrative safeguards, as parties will only get access to key evidence and have to accept a scantily motivated decision.\textsuperscript{616} While the BKartA’s settlement practice has been developed in the context of its \textit{Bonussregelung}, settlements do not seem excluded outside the cartel context.\textsuperscript{617}

\textit{Judicial protection}

Fines for infringements of Articles 101 and 102 TFEU may be appealed before the OLG, with a further appeal on points of law to the BGH. The OLG exercises a full merits appeal.\textsuperscript{618} The decision of the competition authority has a mere guiding role and might be best described as an indictment. In accordance with the \textit{Mündlichkeitsprinzip} (requiring all evidence to be brought in the proceedings orally) and the \textit{Unmittelbarkeitsprinzip} (requiring the OLG to base its judgment on the findings reached in the main proceedings) all facts need to be established afresh. For this purpose the court disposes of investigatory powers, most notably the hearing of (expert) witnesses.\textsuperscript{619} The OLG does not rule on the enforcement decision, but renders a wholly autonomous enforcement decision instead, vesting ‘original’ rights and obligations. The decision of the OLG may even lead to a \textit{reformatio in peius}.\textsuperscript{620}

\textsuperscript{614} ibid. Pursuant to § 53 GWB, the BKartA should lay before parliament a biannual report.
\textsuperscript{615} BKartA B11-18/08 \textit{Kaffeeröster}.
\textsuperscript{616} Parties will generally be keen to accept a scantily motivated decision as this limits their exposure to follow-on damages claims.
\textsuperscript{618} § 77(1) OWiG.
\textsuperscript{619} § 71(2) OWiG. This could for instance mean that leniency applicants and authors/proprietors of incriminating documentary evidence are heard.
\textsuperscript{620} The possibility of \textit{reformation in peius} is subject to one exception: if the main proceedings have not been opened and the OLG decides by ways of an order, the OLG cannot reach a decision that is more burdensome for the parties involved than the original enforcement decision, see § 72(3) OWiG.
5.7.3 Powers of the Netherlands Authority

The Netherlands authority may impose fines on legal persons and natural persons for infringements of Articles 101 and 102 TFEU. This requires that the infringement can be imputed (verweten) to the person in question. For this purpose, fault need not to be proved by the authority and will be assumed unless the offender demonstrates the contrary.

In light of current EU case law, this does not seem contrary to the EU principle of *nulla poena sine culpa* (supra subparagraph 4.5.10). Where an infringement has been committed by an incorporated undertaking, as will generally be the case, a fine may be imposed on the legal person and/or those persons that ordered the infringement (‘opdrachtgevers’) or that were the *de facto* decision-makers (‘feitelijk leidinggevenden’). The distinction between these two forms of ‘derived liability’ is not watertight, but the latter will generally be satisfied easier, as this covers passive modes of involvement. *De facto* decision-making entails that a ‘person’ who is competent and required to take measures needed to prevent the infringement fails to take such measures, thereby consciously taking for granted the possibility of an infringement.

The fines that may be imposed for infringements of Articles 101 and 102 TFEU are subject to a statutory maximum amount or percentage. With regard to the undertaking that committed the infringement, fines may not exceed EUR 450,000 or 10 per cent of the undertaking’s worldwide turnover, whichever amount is the higher. Any form of derived liability is limited to an amount of EUR 450,000. In light of this difference, it is important to consider which persons can be directly liable for an infringement of Articles 101 and 102 TFEU and which persons are caught by the forms of derived liability.

Liability which derives from the legal person is first and foremost directed to the natural persons that are responsible for the infringement: company directors and company staff. The possibility to penalise *de facto* decision-makers has been introduced precisely to hold natural persons liable for infringements of competition law. Prior to the introduction of this criminal law doctrine of derived liability in the area of competition law, natural persons could be fined for infringements of Articles 101 and 102 TFEU only if they could be identified with the ‘undertaking’ – a rather theoretical possibility in the context of EU competition law. However, the doctrine of derived liability for *de facto* decision-makers does not exonerate parent companies either. After all, despite the outright rejection by its Advocate General, the Dutch Supreme Court (*Hoge Raad*) has left open the possibility that also legal persons

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621 Articles 56(1) Mw and 5:1(3) Awb.
622 Article 5:41 Awb.
623 Cf Schlössels and Zijlstra (n 352) 1008.
624 Article 5:1(3) Awb.
626 Article 57 Mw. This system has the remarkable consequence of allowing the competition authority to punish small undertakings (turnover figures below 4.5 million) more severely than large undertakings. This consequence has been accepted by the court, albeit implicitly, in Rb Rotterdam *Sallandse Wegenbouw BV* L[IN] BD8523.
may qualify as *de facto* decision-maker. While this decision was rendered in a criminal law context, the Supreme Court’s ruling is equally valid in proceedings under competition law. In both cases, the legal basis for derived liability is the same: Article 51 of the Dutch Criminal Code (*Wetboek van Strafrecht*, ‘WvSr’).

Were the term ‘person’ in Article 51 WvSr indeed to include legal persons, this would provide a specific legal basis and, more importantly, a separate regime for parent liability in context of competition law. This would raise several questions with regard to the enforcement of Articles 101 and 102 TFEU. First, the application of this separate legal regime would entail that fines for parent companies are limited to EUR 450,000, instead of the 10 per cent turnover cap that normally applies to undertakings. A parent company that *de facto* committed the infringement would then face a relatively modest fine. This approach would be difficult to reconcile with EU case law, in accordance with which parent liability is inherent in the concept of ‘undertaking’ (*supra* subparagraph 4.3.2). Second, once it is concluded that a parent company has acted as *de facto* decision-maker, it seems that the individuals behind the corporate veil can no longer be held liable on this ground. In this respect it should be reminded that the objective of extending this criminal law doctrine of derived liability to competition law was precisely to penalise natural persons. Against this background it is suggested herewith that any form of derived liability of legal persons under Article 51 WvSr should be used only to supplement forms of parent liability inherent in the Articles 101 and 102 TFEU. This could be the case where two legal persons are not part of a single economic entity. This approach would normally bring parent and subsidiary jointly under the 10 per cent turnover cap and reserve ‘derived liability’ primarily for the responsible natural persons. Moreover, this would be in accordance with earlier doctrine (prior to the introduction of derived liability in the context of competition law), when EU case law on parent liability was loyally followed.

Irrespective of the addressess of the decision, the power to impose fines for infringements of Articles 101 and 102 TFEU expires five years after the infringement has taken place. This period of limitation is interrupted with each act of investigation by the authority, as well as with any such act by the Commission or the competition authorities of the other Member States. The interruption has effect from the day on which at least one of the undertakings is informed of such an act in writing. With every interruption the period of limitation starts afresh. However, the authority’s power to impose a fine expires at the latest

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629 It should be noted that a natural person employed by the parent company (rather than the parent company itself) may be seen as the responsible decision-maker with regard to the infringement committed by the subsidiary. See HR 25 januari 2000, *NJ* 2000, 279.
630 TK 1995-1996, 24707, nr 3, p 86-87; Rb Rotterdam *Ooms Averhorn* LJN BG2730; Rb Rotterdam *Beheersmaatschappij X* LJN BD7003.
631 Article 5:45 Awb.
632 Article 64 Mw.
633 Article 64(2) Mw.
ten years after the infringement has taken place, extended by the period during which the
decision is appealed.634

Even within this limitation period, the authority and the appeal courts should prevent
any undue delays. The CBb has indicated that an administrative procedure of two years, a first
instance appeal procedure of one and a half years and a last instance appeal procedure of two
years will generally form the outer limits of what still qualifies as a reasonable duration.635
In AUV en Aesculaap, the CBb reduced the fine by as much as 20 per cent for undue delays
in the entire enforcement chain, including delays caused by itself. In Bongaertsz Holding, the
Rotterdam Court awarded a 5 per cent reduction for undue delay on its part.636 In Erdo, the
CBb awarded a 10 per cent reduction for undue delay on its part.637 All these cases illustrate,
that the protection against undue delay is taken very seriously. These cases may also function
as an example for other jurisdictions, who sooner or later will all be confronted with the EU
principle of protection against undue delays (supra subparagraph 4.5.7).

Determining the amount of the fine

The amount of the fine is dependent on various other factors. In fixing this amount the
authority needs to take into account the seriousness of the infringement and the degree of
fault (verwijtbaarheid) of the person concerned.638 The duration of the infringement is not
directly relevant but can play a role in the context of the ‘seriousness’ of the infringement.
However, the Rotterdam Court has applied a remarkable limitation with regard to the
relevance of duration in fixing the amount of the fine. The competition authority may not
calculate the fine on the basis of turnover generated in periods dating back more than five
years from the day at which the decision has been adopted.639 This is effectively the same as
saying that a single and continuous infringement can be partially time-barred. The five year
period is equal to the statutory limitation period, beyond which the competition authority
can no longer exercise its power to impose a fine (supra). The Rotterdam Court has thus
used the limitation period for the authority’s statutory powers to circumscribe the latter’s
margin of discretion in calculating the amount of the fine. This approach is not only at
odds with EU case law on the SCI-concept (supra subparagraph 4.3.3), the ECA Fining
Guidelines640, and the domestic fining guidelines adopted by the minister (infra), it is also
incomprehensible why a five year period as per the date of the decision has been chosen.
After all, provided that the limitation period is timely interrupted, a penalty may be adopted
as much as 10 years after the termination of the infringement (supra).

Within the limits of the statutory requirements, the competition authority should
exercise its discretionary fining powers in accordance with the Fining Guidelines adopted

634 Article 64(3) Mw.
635 CBb AUV en Aesculaap LJN BD6629.
636 Rb Rotterdam Bongaertsz Holding LJN BK1215.
637 CBb Erdo LJN BM1588.
638 Article 5:46 Awb.
639 Rb Rotterdam Darthuizer Boomkwekerijen LJN BM9911.
640 ECA Fining Guidelines, para III.8
by the minister in 2009 (Beleidsregels van de Minister van Economische Zaken voor het opleggen van bestuurlijke boetes door de NMa). As a general objective, these Guidelines require the competition authority to set the rate of the fines in accordance with the objectives of special and general deterrence. For corporate fines, the following calculation method applies. The authority first needs to determine a base quotient which forms the basis of the fine (boetegrondslag). This base quotient is 10 per cent of the ‘relevant turnover’, representing the value of sales of the goods or services to which the infringement related. In principle, the relevant turnover is calculated for the entire duration of the infringement. However, as was mentioned above, the Rotterdam Court has limited the possibility to take into account turnover for periods dating back more than five years from the day at which the decision has been adopted. In the second step, this base quotient is multiplied by a factor between 1 and 5, depending on the gravity of the infringement and the economic context (products, markets, size of the undertakings, regulatory context, impact of the infringement). For the most serious infringements, the competition authority is to add a ‘fine supplement’ (basisboetetoeslag) of up to 25 per cent of the relevant turnover in the last full year of the undertaking’s involvement in the infringement. In the third and final step, the competition authority needs to take into account aggravating and mitigating circumstances. Aggravating circumstances are recidivism, obstruction of the investigation, coercion or ringleading, the use of monitoring and enforcement measures. Mitigating circumstances are cooperation outside the scope of the leniency programme (infra), voluntary termination of the infringement, compensation of injured third parties. It follows that deterrence alone is not decisive in calculating the fine. With regard to fines imposed on natural persons, the competition authority needs to determine a base quotient on the basis of the seriousness of the infringement and the income and capital of the individual concerned. For infringements of Articles 101 and 102 TFEU, the base quotient will range between EUR 50,000 and 400,000. After the base quotient has been determined, the authority needs to consider the abovementioned aggravating and mitigating circumstances, as well as the role played by the individual within the infringement and his/her position within the company.

Leniency is currently available on the basis of the 2009 Leniency Guidelines adopted by the minister (Beleidsregels van de Minister van Economische Zaken tot vermindering van bestuurlijke boetes betreffende kartels). These Guidelines cover both undertakings and individuals that are implicated in agreements and concerted practices between competitors which have the object to restrict competition (ie cartels). The Leniency Guidelines offer three types of leniency: a reduction of 100 per cent (immunity), a reduction between 60 and 100 per cent, and a reduction between 10 and 40 per cent. A reduction between 40 and 60 per cent does not seem possible. The first two types of leniency are only available to first applicants, provided they did not coerce others in joining the cartel and provided

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641 Stcr 22 September 2009, nr 14079.
642 Rb Rotterdam Darthuizer Boomkwekerijen LJN BM9911.
643 Stcr 22 september 2009, nr 14078.
they cooperate fully in the investigations. Only when the competition authority has not yet started an investigation and the leniency application allows the authority to carry out targeted inspections, will the applicant be granted full immunity. Where the authority has already started investigations but has not yet adopted a statement of objections, the first applicant will benefit from a 60 to 100 per cent reduction, provided the application has significant added value. If this application allows the authority to actually prove the infringement, a 100 per cent reduction will be granted. All other leniency applicants which provide information with significant added value and which fully cooperate in the investigations will be granted a reduction in the range of 10 and 40 per cent. The order and timing of the applications plays an important role in the size of the reduction. Information provided in the context of a leniency application will not be used against the applicant that provided the information.

Leniency applications can be made by an undertaking, by an individual, and by various individuals jointly, provided they worked for the same undertaking during the infringement. Individuals that apply for leniency may request to share in the leniency status of their undertaking. Leniency applications can be made orally, and may be preceded by a discussion with the authority on an anonymous basis so as to determine whether immunity is still available. A leniency application should fulfil various conditions, amongst which a full description of the cartel and a confession. The competition authority will provide ‘markers’ to incomplete applications – in order to allow the applicant within a short period to supplement its application without losing its place in line – and to applications in cases where the Commission is the best placed authority (summary applications).

An interesting development with regard to whistle-blowing in the Netherlands are the parliamentary initiatives to protect individuals that bring to light corporate offences. Although these initiatives are not specifically meant for competition law infringements, they do appear to cover whistle-blowing in the context of Articles 101 and 102 TFEU. In accordance with the current proposals, the individuals concerned are protected in their contractual relations with their employers and may apply to a special fund for compensatory payments should they nonetheless suffer income losses.

Prior to the adoption of the 2009 ministerial Fining Guidelines and Leniency Guidelines, the Netherlands authority exercised its fining powers and leniency programme under policy documents of its own. In an effort to separate policy from administration, the minister has decided to assume responsibility over fining policy, while leaving the authority wide discretion in determining the amount of the fine in individual cases. Under the pre-2009 fining regime, the authority has once applied an ad hoc lenient fining scheme for wide spread bid-rigging practices in the Dutch construction sector (supra subparagraph 5.4.3). For future purposes, any such ad hoc arrangement would seem to require ministerial blessing.

**Judicial protection**

Fines can be appealed before the Rotterdam Court, but in principle not before an application for administrative review has been made to the authority. A further appeal may be lodged with the CBb. The jurisdiction of the CBb is *not* limited to points of law and extends to the facts on which the decision has been based.\(^{645}\) The decision is suspended pending the appeal.\(^{646}\) The examination of the Rotterdam Court and the CBb is limited to the legality of the decision, with a 'full' review of the fine.\(^{647}\) This review cannot lead to a *reformatio in peius*, however.\(^{648}\) Accordingly, the *total* amount of the fine after appeal may not exceed the amount before the appeal.\(^{649}\) Apart from incurring moratory interests, the appellant can thus appeal the fine without any risks. Whatever could be said about this domestic principle, it does not seem contrary to EU law.\(^{650}\)

**5.7.4 Powers of the UK Authorities**

The UK authorities may impose fines on undertakings which have intentionally or negligently breached Article 101 or 102 TFEU.\(^{651}\) These alternative conditions are interpreted by the CAT in accordance with EU case law on intent and negligence in Commission procedures. These conditions are met where the undertaking could not have been unaware (intent) or ought to have known (negligence) that its conduct would result in a restriction of competition.\(^{652}\) Fines may not exceed 10 per cent of the undertakings' worldwide turnover.\(^{653}\) The applicable turnover is limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after reduction of taxes and sale rebates.\(^{654}\) In determining the amount of the fine, the authorities may take into account anti-competitive effects in other Member States.\(^{655}\) Conversely, the UK authorities and courts need to take into account any penalty already adopted by the Commission, NCA or foreign court in relation to the same infringement.\(^{656}\) This approach seems consistent with the EU principle of natural justice (*supra* subparagraph 4.5.9).

In March 2012, UK government has promised to delegate powers to the secretary of state for the introduction of a statutory time limit.\(^{657}\) Until this has been realised and a statutory time limit has been adopted, the power to impose fines for infringements of Article 101 and

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\(^{645}\) Gerbrandy (n 104) 7.

\(^{646}\) Article 63 Mw.

\(^{647}\) Rb Rotterdam *Fietsenkartel* Ljn BB0440.

\(^{648}\) Rb Rotterdam *Garnalen* Ljn AY4888.

\(^{649}\) ibid.

\(^{650}\) *Case C-455/06 Heemskerk and Schaap* [2008] ECR I-8763.

\(^{651}\) CA98, s 36.

\(^{652}\) Napp Pharmaceuticals [2002] CAT 1, paras 456-457.

\(^{653}\) OFT, *Enforcement* (n 210) para 5.1. See further Slot and Johnston (n 212) 228; O’neill and Sanders (n 151) 10.111.


\(^{655}\) CA98, s 38(1A).

\(^{656}\) CA98, s 38(9).

\(^{657}\) *Growth, Competition and the Competition Regime* (n 106) para 6.26.
102 TFEU is not subject to any limitation period. Contrary to suggestions made in the legal literature, the CAT has decided that a penalty imposed by the competition authorities does not fall within the scope of Section 9 of the Limitation Act 1980. In Quarmby, the CAT concluded squarely ‘that the Limitation Act 1980 does not apply to the issuing by the OFT of a Statement of Objections or a penalty notice.’ More importantly, the CAT also rejected the argument ‘that the lack of a limitation period leads to any adverse position as regards legal certainty or administrative fairness.’ The CAT considered that parliament intended not to constrain the OFT by any period of limitation in relation to the exercise of its powers. It therefore concluded that it would be inappropriate to read the limitation period that applies under Article 25 Regulation 1/2003 ‘in’ the domestic penalties regime.

It is debatable whether this position can be maintained with regard to infringements of Articles 101 and 102 TFEU. In accordance with the EU principle of legal certainty, Member States cannot leave undertakings in uncertainty about their legal position indefinitely.

5.7 PECUNIARY SANCTIONS

**Criminal fines**

Individuals who cannot be identified with the undertaking do not face any administrative fines. However, individuals implicated in cartels may face a criminal fine. Section 188 EA02 establishes a cartel offence. The most serious forms of collusion between competing undertakings (price fixing, output reduction, market sharing, customer sharing and bid-rigging) are covered by this provision. Although enforcement procedures under Section 188 EA02 are distinct from those under Article 101 TFEU, both provisions could be applicable to a single set of facts. Individuals involved in infringements of Article 101 TFEU and Section 188 EA02 may thus expect criminal fines. A person convicted by the Crown Court on indictment is liable to an unlimited fine. A person found guilty by the Magistrates’ Court may receive a fine of up to £5,000. The cartel offence may also result in a custodial sanction. The procedure for pecuniary sanctions and custodial sanctions is the same and will be discussed in subparagraph 5.8.4.

Criminal fines are only available in relation to particular forms of anti-competitive behaviour. Whatever could be said about this policy choice, it is not contrary to the spirit of the EU principle of equivalence. While it might ‘discriminate’ against certain forms of anti-competitive behaviour, it does not truly discriminate against the origin of the prohibition. After all, cartels that fall within the scope of Article 101 TFEU may also fall within the scope of Section 188 EA02, thus benefiting from criminal fines.

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658 O’Neill and Sanders (n 151) 10.105; Whish (n 163) 401.
659 This section provides: ‘an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.’
661 ibid para 48.
662 ibid para 47.
663 EA02, s 190(1).
Determining the amount of the fine
Section 38 CA98 requires the OFT to publish guidance as to the appropriate amount of the administrative fine. This guidance requires prior approval by the secretary of state. From 2004 onwards, the OFT has imposed fines in accordance with its Guidance as to the appropriate amount of a penalty (‘2004 Penalty Guidance’). The 2004 Penalty Guidance is supplemented by the OFT’s Enforcement Guidelines.

As to the conditions under which a fine can be imposed, the OFT has indicated that intent and negligence do not require any knowledge on the part of the partners or principal managers of the undertaking; action by a person who can act on behalf of the undertaking suffices. The OFT has further indicated that the fact that a particular type of agreement or conduct has not previously been found in breach of Articles 101 and 102 TFEU does not mean that the infringement cannot be committed intentionally or negligently. Even where an undertaking has been pressurized to participate in the infringement, it can still be considered to have acted intentionally or negligently. This approach to intent and negligence is in accordance with EU case law (supra subparagraphs 4.5.10 and 5.7.1). Also in other respects, UK fining policy has been inspired by EU practice. In accordance with EU case law on ‘economic continuity’ (supra subparagraph 4.3.2), the OFT’s Enforcement Guidelines provide that a penalty may be imposed on a company that takes over the undertaking in question. Changes in the legal identity or ownership of an undertaking will therefore not prevent it or its component parts from being penalised. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

With regard to the severity of the fine, the OFT has indicated to take into account the seriousness of the infringement and the objective of special and general deterrence. The amount of the penalty is determined in five steps. First, the OFT decides on a percentage of the turnover affected by the infringement on the basis of the seriousness of the infringement. Second, this amount is multiplied by the number of years the infringement lasted. Then, as a third step, the amount is adjusted for the purpose of deterrence. It should be noted that this adjustment for deterrence takes place before other correction factors are taken into account. Fourth, the OFT considers whether aggravating and mitigating factors should increase or
decrease the amount. The admission of liability and other forms of cooperation qualify as a mitigating factor. In the fifth and final step, the amount may be reduced to comply with the statutory maximum and to take into account penalties imposed in parallel proceedings within the EU. The OFT has further elaborated on how it intends to take account of anti-competitive effects in other Member States. This can be done by including turnover generated in other jurisdictions in the calculation. The OFT has indicated to proceed on this basis only when express consent is given by the relevant Member State or NCA.

In October 2011, the OFT has published a consultation document on the appropriate amount of a penalty. This consultation should lead to an amended Penalty Guidance. No fundamental changes are contemplated. The OFT maintains its step-based approach. It chooses predictability over flexibility and adds that a step-based approach is in line with the approach taken by other competition authorities enforcing Articles 101 and 102 of the TFEU. One novel feature should be mentioned, however. The OFT proposes to follow foreign examples (notably the Commission model and the German model) and to raise the starting amount of the fine from 10 per cent of the relevant turnover to 30 per cent. More generally, the OFT has indicated that it has considered the ways other authorities calculate fines as well as the discussions within the ECN working group on sanctions. It considers such ‘benchmarking’ an important part of reviewing its approach to setting penalties. At the same time, the OFT finds it important to avoid significant inconsistency with the approach to setting penalties adopted by the Commission and other European competition authorities. In the words of the OFT:

Avoiding such divergence and inconsistency, where possible, will in the OFT’s view help to ensure the effective enforcement of Articles 101 and 102 across the Member States of the European Union.

While this has not resulted in an exact copy of the Commission’s Fining Guidelines, it has led the OFT to draft a consultation document with a strong emphasis on general deterrence and proportionality along the lines of the Commission’s Guidelines. As a consequence, the OFT intends to change the order of steps 2 and 3 and consider special deterrence only after having assessed the aggravating or mitigating circumstances. It is submitted herewith that this approach would indeed be preferable from the perspective of the EU principle of dissuasiveness (supra subparagraph 4.6.4).

674 ibid para 2.6
675 OFT, Enforcement (n 210) para 5.30.
677 ibid para 5.3.
678 ibid para 1.7.
679 ibid para 5.5.
680 ibid annex A.
681 ibid para 5.6.
682 ibid para 1.14.
A further novelty in the OFT’s penalty policy has been forecasted in a 2012 consultation document. In an effort to reduce appeal rates, the OFT has decided to ensure that parties are provided with an opportunity to comment in writing and orally on the key elements of the draft penalty calculation (including the proposed starting point percentage, the proposed relevant turnover figure to be used, the proposed duration and, to the extent possible, the facts that may give rise to aggravating and mitigating factors) in advance of the penalty decision being taken.683

In 2008, the OFT adopted its Guidance Note on the handling of applications of leniency and no-action (‘Leniency Guidance’).684 The Leniency Guidance forms the basis for rewarding ‘cartel participants’ in exchange for cooperation in the investigation. The availability of leniency extends beyond pure cartel activity to cover agreements on resale price-maintenance, as well as vertical agreements that facilitate cartel agreements.685 The OFT’s Leniency Guidance is highly detailed and drafted along the lines of the ECn Model Leniency Programme. The OFT reserves the right to depart from its Leniency Guidance, where it considers it appropriate to do so in the circumstances of the particular case.686

Undertakings may initially approach the OFT on a no-names basis to find out whether immunity is still available.687 The OFT accepts both markers and summary applications and all applications can be made orally.688 The OFT grants immunity from fines to the undertaking that is the first to come forward before the OFT has commenced an investigation (‘Type A leniency’). This means that even if the OFT already has sufficient evidence to launch a formal investigation, the first undertaking to come forward may still qualify for immunity, provided the authority has not yet exercised its powers of investigation.689 Alternatively, immunity is available to the applicant first to approach the OFT after the investigations have commenced (so-called ‘Type B leniency’). This is the case when the information provided has significant added value to the OFT’s investigations. This form of immunity is discretionary690, but will in principle be provided.691 Only undertakings that have not coerced others to participate in the cartel are eligible for immunity. Undertakings that are not eligible for immunity may benefit from a reduction in the amount of the fine (‘Type C

683 OFT, Review of the OFT’s Investigation Procedures in Competition Cases (n 130), para 2.44.
686 ibid para 1.5.
687 ibid para 1.7.
688 ibid.
690 OFT, Leniency and no-action (n 684) para 4.2. This decision depends on a balancing exercise, in which the OFT assesses, ‘the benefits of gaining additional evidence by reason of the grant of immunity against the disbenefit of making an immunity grant after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.’
691 OFT, Leniency and no-action (n 684) para 5.3.
leniency’). A reduction of the fine is conditional on the information having significant added value. This can lead to a reduction of up to 50 per cent of the fine otherwise imposed.\(^{692}\) The order in which applicants for Type C leniency submit their applications is not decisive for the percentage of reduction. Leniency applicants may receive a further reduction of the fine when they confess to the OFT a second cartel in a distinct market.\(^{693}\) This ‘leniency plus’ requires that the undertaking is eligible for total immunity or a 100 per cent fine reduction with regard to this second cartel. Leniency applicants should continuously, completely and in good faith cooperate in the investigations. This could mean that undertakings even need to ‘allow the coming into existence of further evidence of the cartel activity’ and that individuals need to act as ‘secret source’.\(^{694}\) It should be noted that a failure to cooperate on the part of a current or former employee or director of an applicant undertaking will not necessarily jeopardise the undertaking’s leniency application.\(^{695}\) In addition to the (partial) immunity from administrative fines, leniency applications may also exonerate individuals from criminal penalties and disqualification orders (infra subparagraphs 5.8.4 and 5.9.4).

In October 2011, the OFT has published a consultation document on leniency. The OFT aims to enhance the transparency and predictability of its leniency policy, but is not seeking any substantive changes.\(^{696}\) ‘The OFT intends to better align the conditions for corporate leniency with the conditions for criminal immunity.’\(^{697}\) These proposals are based on the OFT’s earlier experiences with civil and criminal investigations.\(^{698}\) The OFT further indicates that applicants need to provide exculpatory material and be specific on what is fact, assumption or belief.\(^{699}\) This minimises the risk of applicants overstating the nature of the reported activity and/or supporting evidence.

Also outside the framework of its leniency policy the OFT offers a reduction of the fine in exchange for cooperation in the cartel investigations.\(^{700}\) In return for an admission and cooperation, the OFT will mitigate the penalty. In the past, also the compensation of injured parties has been part of a negotiated settlement.\(^{701}\) As yet, there is no official settlement procedure. The OFT decides on the appropriateness of a settlement on a case by case basis.\(^{702}\) In two recent consultation documents, the OFT contemplates the formalisation

\(^{692}\) ibid para 5.6.  
\(^{693}\) ibid para 3.17.  
\(^{694}\) ibid paras 8.4-8.6.  
\(^{695}\) ibid para 8.7.  
\(^{697}\) ibid para 5.7.  
\(^{698}\) ibid annex c, para 1.4.  
\(^{699}\) ibid, para 5.8.  
\(^{700}\) OFT, A guide to the OFT’s investigation procedures (n 224) para 11.2.  
\(^{701}\) OFT Case CE/2890/03 Independent fee-paying schools.  
\(^{702}\) OFT, A guide to the OFT’s investigation procedures (n 224) para 11.2.
of its settlement policy with a view to make the procedure more transparent.\textsuperscript{703} The OFT has indicated that parties who admit their involvement in the anti-competitive activity and cooperate in the administrative investigation can obtain a reduction of the fine in recognition of the resource savings of the OFT.\textsuperscript{704} The OFT may grant an agreed reduction where the undertaking admits its participation in the infringement and agrees to cooperate throughout the procedure.\textsuperscript{705} The OFT will invite parties to engage in settlement discussions after it has issued a statement of objections.\textsuperscript{706} However, undertaking may always approach the OFT with a view to reach a settlement at an earlier stage.\textsuperscript{707}

\textit{Judicial protection}

Fines can be appealed before the CAT. The requirement to pay the fine is suspended during these proceedings.\textsuperscript{708} As yet, the OFT’s guidance does not bind the CAT. However, in March 2012, UK government has expressed its intention to require the CAT to have regard to the OFT’s guidance on the appropriate amount of a fine.\textsuperscript{709} Whish and Bailey have described the CAT’s current review practice as, first, reviewing the OFT’s application of its guidance, then to set out its own views on the seriousness of the infringement, and finally to make its own assessment of the level of the penalty on the basis of a ‘broad brush’ approach.\textsuperscript{710} In so doing, the CAT can impose, revoke or vary the amount of a penalty. This may result in a higher fine than initially imposed by the competition authority.\textsuperscript{711} Where it imposes, confirms or varies a penalty, the CAT may in addition order that interest should be payable, as from any date after the appeal was launched, at such rate as the CAT considers appropriate.\textsuperscript{712} Launching an appeal and deferring payment of the fine pending the proceedings thus comes with a risk. A decision by the CAT as to the amount of the fine can be appealed with leave to the Court of Appeal in England and Wales and in Northern Ireland, and the Court of Session in Scotland. A further appeal can be brought before the UK Supreme Court.

5.7.5 Degree and Drivers of Convergence

This paragraph has shown the emergence of closely aligned fining regimes for the enforcement of Articles 101 and 102 TFEU, while at the same time identifying some notable differences. Parallel to this convergence process, various coordination initiatives have been launched under the aegis of ECN and ECA. Although it is perilous to present these policy

\begin{thebibliography}{99}
\bibitem{703} OFT, \textit{Review of the OFT’s Investigation Procedures in Competition Cases} (n 130), para 2.56 and OFT, \textit{Guidance as to the appropriate amount of a penalty: A consultation on OFT guidance} (n 676) para 5.50.
\bibitem{704} OFT, \textit{Guidance as to the appropriate amount of a penalty: A consultation on OFT guidance} (n 676) 3.22, footnote 24.
\bibitem{705} ibid, annex D.
\bibitem{706} OFT, \textit{A guide to the OFT’s investigation procedures in competition cases} (OFT 1263 2011) para 11.2.
\bibitem{707} ibid.
\bibitem{708} CA98, s 46(4).
\bibitem{709} \textit{Growth, Competition and the Competition Regime} (n 106) para 6.27.
\bibitem{710} Whish and Bailey (n 112) 422.
\bibitem{711} \textit{JJIB Sports Plc} [2005] CAT 22.
\bibitem{712} OFT, \textit{Enforcement} (n 210) para 5.48.
\end{thebibliography}

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coordination initiatives as cause for (rather than consequence of) the convergence process in the analysed jurisdictions\textsuperscript{713}, these initiatives in any case reinforce this process. Another explanation for the process of convergence is that the Member States have aligned domestic fining powers to the powers of the Commission and those of their peers. The above analysis has provided clear examples of such unilateral alignment actions. These two narratives for the established convergence tendencies are of course not mutually exclusive.

Whether part of a deliberative coordination process or the consequence of unilateral alignment actions, clear tendencies of convergence can be reported. The competition authorities in the analysed jurisdictions have all been granted the power to impose fines on legal persons responsible for an infringement of Article 101 or 102 TFEU. This is so even for jurisdictions that traditionally did not recognise administrative fines for legal persons. Fines are subject to the alternative conditions of intent and negligence in essentially all four jurisdictions, although the criterion of 'verweten worden' under Dutch law is arguably less demanding. Moreover, fining powers are invariably of a discretionary nature. This discretion covers the question whether a fine should be imposed in the first place, as well as the amount of the fine. A turnover cap of 10 per cent of the undertakings’ worldwide turnover limits the authorities’ discretion in all the analysed jurisdictions. Within these wide statutory boundaries, administrative guidelines ensure the transparency and legal certainty in respect of the applicable calculation methods. Even these methods are highly comparable.\textsuperscript{714} All authorities included in the above analysis take into account the gravity and duration of the infringement and calculate the amount of the fine on the basis of a step-based approach. The first step is to determine a basic amount. This is done by taking a percentage of the turnover derived from the goods or services in respect of which the infringement was committed ('relevant turnover'). This turnover is either calculated by summing up real turnover figures for the duration of the infringement (the Netherlands), or is a fictitious amount based on the turnover in the last business year. This basic amount is then adjusted to take into account aggravating and mitigating circumstances and considerations of deterrence. The final amount is calculated by first applying the 10 per cent turnover cap and then the leniency reduction. All these similarities are in accordance with the ECA Fining Principles. They also seem largely consistent with the EU principle of good administration and the duty of sincere cooperation (\textit{supra} subparagraph 4.5.6 and paragraph 4.6).

Notwithstanding these tendencies of convergence, there are also some fundamental differences. Most fundamental is probably the different approach towards natural persons.

\textsuperscript{713} Cf Drahos (n 3) 30, presenting various perspectives on the role of the EU in the convergence of domestic law: ‘An important strand of the literature argues that adaptation takes place most easily in cases where there already is a good ‘fit’ between the national and the European policy and not much change is necessary for complying with the obligations.’ (footnote omitted). However, Drahos disproves the ubiquity of this relationship (416).

\textsuperscript{714} See also OFT, \textit{An assessment of discretionary penalties regimes} (n 560) paras 4.14-4.20.
Germany and the Netherlands have made it possible to impose administrative fines on natural persons responsible for infringements of Articles 101 and 102 TFEU. In the Netherlands, natural persons face a fine of up to EUR 450,000. In Germany, fines for natural persons are more severe and can be as high as EUR 1 million. The UK authorities have not been granted the power to fine natural persons for infringements of Articles 101 and 102 TFEU. However, UK law does foresee in a criminal cartel offence that can attract unlimited fines for individuals. But there are other differences as well. Fines under German law may exceed 10 per cent of the undertaking’s worldwide turnover, as long as this surplus amount is meant and needed to disgorge illegal gains (rather than to punish the offender). In the UK, the authorities’ powers to impose fines are not subject to any statutory limitation period, although this is about to change. In the other three jurisdictions, fines cannot be levied for infringements terminated more than five years before the first investigatory action or, in case of timely interruptions, more than 10 years before the adoption of the final decision. Only in Germany this period includes the proceedings before the first instance appeal court. Moreover, under German law the interruption of the limitation period is personal, whereas the Commission and the Netherlands authority can interrupt this period for all parties with a single enforcement action. Another fundamental difference relates to the jurisdiction of the appeal courts. Contrary to the situation in the other jurisdictions, the Dutch appeal court does not have the ability to increase administrative fines. Hence, appellants can lodge an appeal without running the risk of seeing their liability increased.

There are also some differences with regard to the methods for calculating fines. As was already mentioned above, there are differences with regard to the calculation of the ‘relevant turnover’. But there is more. For instance, the far-reaching German nemo tenetur principle limits the possibility of treating uncooperative behaviour (eg destruction of evidence) as an aggravating circumstance. In the Netherlands, the Rotterdam Court has limited the authority’s ability to take into account the duration of the infringement. In this respect it should be noted that under Dutch law duration is not a statutory criterion either. At the same time, the Netherlands authority may use a basic amount representing 50 per cent of the undertaking’s relevant turnover to calculate the fine, where 30 per cent is becoming the ‘industry standard’. The various calculation methods also display some notable differences with regard to the element of deterrence. These differences relate to the stage at which the ‘deterrence increment’ is applied, as well as to the magnitude of this raise. Least deterrence-focused are probably the German fining guidelines, providing for a capped deterrence multiplier to be applied at some intermediary stage. Even if this multiplier is initially sufficient, the subsequent application of mitigating circumstances may still result in a fine that fails to deter. From the perspective of the EU principle of dissuasiveness (supra subparagraph 4.6.4), this approach could be problematic. It is not entirely consistent with the ECA Fining Principles either.\footnote{715 ECA Fining Principles, para 1.1.} Most deterrence-focused are the guidelines of the Commission. In Commission procedures, the deterrent increment
is added just before the statutory maximum is applied. Moreover, the Commission applies a so-called ‘entrance fee’ in relation to cartel offenders. Accordingly, the Commission will add a sum of between 15 and 25 per cent of the relevant turnover to deter undertakings from even entering into cartels. There are also differences with regard to the relevance of parallel or consecutive enforcement procedures by colleague authorities. In this respect, the UK fining regime contains a unique feature. In determining the severity of the penalty, the UK authorities may take into account anti-competitive effects in other Member States and must take into account any penalty already imposed in relation to the same infringement by a foreign competition authority. The latter requirement is in accordance with the EU principle of natural justice (supra subparagraph 4.5.9). Finally, the differences with regard to settlements should be mentioned here. Most jurisdictions have gained some experience with rewarding undertakings for waiving certain procedural rights. Yet, only the Commission operates a highly detailed cartel settlement procedure.

The treatment of whistleblowers has been the subject of intensive coordination initiatives. With the publication of the ECN Model Leniency Programme, the NCAs have indicated to use their best efforts to grant favourable treatment to cartel participants which cooperate in the investigations. Further to their commitment to adopt a leniency programme, the NCAs have indicated to align their programmes to the Model. 716

While large parts of the ECN Model Leniency Programme have found their way into the four jurisdictions, this Model has not forged a uniform leniency regime. 717 Some differences deserve to be highlighted. For instance, while three of the analysed jurisdictions award undertakings that have become second in the race for immunity a fine reduction of up to 50 per cent, in the Netherlands these undertakings can expect a reduction of no more than 40 per cent. Both approaches are in accordance with the Model though, which proposes a reduction of the fine with a maximum of 50 per cent. Another notable difference is that only the UK has provided for ‘leniency plus’, which may induce leniency applicants to confess a second, undiscovered cartel. Also this distinct feature is in no way contrary to the ECN Model Leniency Programme. Finally, the Dutch parliamentary proposals for the protection of whistle-blowing individuals should be mentioned. In accordance with these proposals, whistleblowers will be protected in their contractual relations with their employers and may apply to a special fund for compensatory payments. Protection of this kind is not contrary to the ECN Model Leniency Programme either.

There are also deviations from the Model. Under German law, for instance, a leniency application in the context of a bid-rigging cartel does not protect the applicant against criminal prosecution. In this respect it should be reminded that the initiation of criminal proceedings is governed by the principle of mandatory prosecution. In addition, sole ring-leading cartel participants are worse off under the BKartA’s Bonusregelung than under the Model, as they are excluded from immunity. A final source of conflict between the

716 ECN Model Leniency Programme, para 3.
717 Cf ECN, ECN Model Leniency Programme: Report on Assessment of the State of Convergence (n 603).
Model and the German leniency regime is that not every LKartB has published a leniency programme. Also the UK’s Leniency Guidance does not incorporate the ECN Model Leniency Programme in all its respects. Under UK law, leniency is available even outside the area of cartels, ie in the context of resale price-maintenance. Another clear deviation from the Model is that the order in which leniency applications are received is not necessarily reflected in the percentage of reduction.

5.8 CUSTODIAL SANCTIONS

Fines need not be the only punitive sanction for the enforcement of EU competition law. Infringements of Articles 101 and 102 TFEU could also be responded to with custodial sanctions. Subparagraph 4.6.3 has shown that Member States are entirely free to experiment with custodial sanctions. Sanctions of this type are necessarily limited to natural persons and reserved for criminal law proceedings. In accordance with the ECHR and the EU Charter, these proceedings require adjudication by an independent court or tribunal (supra subparagraph 4.5.1). As a result, prosecution has to be separated from adjudication and a division of enforcement powers over separate institutions is needed. A single administrative enforcement system is then no longer feasible. The introduction of custodial sanctions for individuals involved in infringements of Articles 101 and 102 TFEU may therefore have considerable institutional implications. The introduction of custodial sanctions on Member State level may also have economic implications. As was already suggested in chapter 3, this will come with certain costs (eg prison facilities), but it could also satisfy domestic preferences and may bring further the state of the art in competition law enforcement. Precisely in those areas where there is no Commission precedent, the potential for regulatory innovation is greatest. These advantages in terms of preference matching and regulatory innovation are entirely the result of decentralisation; in a centralised enforcement system everyone would be stuck with the powers of the Commission. Whether these latent advantages indeed materialise is ultimately an empirical question. Against this background, this paragraph details the availability, conditions and development of custodial sanctions for infringements of Articles 101 and 102 TFEU.

5.8.1 Powers of the Commission

The Commission cannot bring individuals to jail. The EU legal framework simply does not support this. The penalties that the Commission may impose for infringements of Articles 101 and 102 TFEU are limited to fines and period penalty payments. More importantly, in accordance with fundamental rights conventions, custodial sanctions are reserved for criminal law proceedings, where cases are adjudicated by an independent and impartial

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718 Articles 23 and 24 Regulation 1/2003.
tribunal. Regulation 1/2003 provides for an administrative enforcement system. In this system, cases are adjudicated by the Commission instead of an independent and impartial tribunal. The Court of Justice (in reality the General Court, as the competent first instance appeal court) can ‘review’ the decisions of the Commission, but only upon an application. In other words, the current EU enforcement system neither provides nor accommodates custodial sanctions for infringements of Articles 101 and 102 TFEU.

Notwithstanding the above conclusion, custodial sanctions are not excluded from the Commission’s purview altogether. If the Commission were to find that custodial sanctions are necessary either to ensure that EU competition law is fully effective or to take away potential distortions of competition, it may submit a proposal to the EU legislator for the harmonisation of Member States’ legislation and the introduction of custodial sanctions on Member State level (supra subparagraph 4.6.3). As yet, there are no indications that the Commission is considering any such action.

5.8.2 Powers of the German Institutions

Under German law, infringements of Articles 101 and 102 TFEU may qualify as an administrative offence and attract administrative fines for both natural and legal persons (supra subparagraph 5.7.2). These infringements do not qualify as criminal offences and custodial sanctions are therefore not available. However, German law does foresee in a criminal offence that covers some of the anti-competitive practices falling within the scope of Article 101 TFEU. This criminal offence could result in custodial sentences. Individuals participating in bid-rigging cartels may be criminally liable under § 298 StGB. This is the case where participants in a public or private tender decide on beforehand which of them will submit the most attractive bid, thereby excluding competition among themselves. Releasing the bid is a necessary condition for the criminal offence; the anti-competitive negotiations alone are insufficient. Individuals implicated in an infringement of § 298 StGB could be punished with a custodial sentence of up to five years. The BGH has confirmed that § 298 StGB covers particular infringements of Article 101 TFEU. A single bid-rigging cartel could thus fall within the scope of Article 101 TFEU and § 298 StGB, thereby constituting an administrative offence and a criminal offence at the same time.

With the introduction of § 298 StGB in 1997 the bid-rigging offence was given a solid statutory basis. Earlier, the BGH already accepted that participation in a bid-rigging cartel could fall within the scope of the conventional criminal offence of fraud (Betrug), laid down in § 263 StGB. While § 298 StGB was introduced in the context of a larger legislative reform to combat corruption, this provision explicitly aims to protect competition.

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719 No one may be deprived of his or her liberty by arbitrary arrest or detention. See Article 6 EU Charter and Article 5 ECHR.

720 BGH 4 StR 428/03.

721 M Klusmann in G Wiedemann, Handbuch des Kartellrechts (Verlag CH Beck 2008) § 56 Rdnr 1; Bechtold (n 32) § 82 Rdnr 2.

criminalisation of bid-rigging was intended to make enforcement more effective. Other infringements of Articles 101 and 102 TFEU do not benefit from this additional deterrent. Whatever could be said about this policy choice, it does not seem contrary to the spirit of the principle of equivalence (supra subparagraph 4.6.2). After all, the 'discriminatory treatment' relates more to the nature of the anti-competitive practice than to the origin of the prohibition. Bid-rigging cartels that fall within the scope of Article 101 TFEU may also be contrary to § 298 StGB and are thus subject to the threat of custodial sanctions.

Proceedings under § 298 StGB are governed by the Strafprozeßordnung (‘StPO’). This means that the enforcement of § 298 StGB takes place outside the domain of the competition authorities. Prosecution is the sole responsibility of the public prosecutor and adjudication takes place by the criminal court. However, the competition authorities could have a role in a preliminary stage of the proceedings. The public prosecutor may take over an investigation that has been initiated by a competition authority. Reportedly, investigations by the public prosecutor and the competition authorities into bid-rigging cartels are generally conducted in close cooperation. For this purpose, information can be exchanged from the start of the investigations. The competition authorities have to hand over a case to the public prosecutor whenever there are indications that a criminal offence has been committed. Even a leniency application does not release the competition authority from this obligation. In fact, the whole idea behind leniency is at odds with the principle of mandatory prosecution governing criminal proceedings. Also after the administrative proceedings by the competition authority have been terminated, the public prosecutor may prosecute a case under § 298 StGB. Criminal proceedings may even be initiated against natural persons already punished with an administrative fine. The EU principle of ne bis in idem does not seem to prohibit this form of double jeopardy, as the Court of Justice considers that national and EU competition law protect distinct legal interests (supra subparagraph 4.5.9). If the criminal court comes to a conviction, it repeals, wholly or partially, the earlier administrative decision so as to prevent double punishment. This approach is consistent with the EU principle of natural justice (supra subparagraph 4.5.9). The criminal court may also repeal an earlier administrative decision when it decides not to convict the defendant for reasons that also invalidate the administrative decision. Once criminal sanctions have

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723 ibid.
724 Wiedemann/Klusmann (n 721) § 56 Rdnr 9.
725 Vollmer (n 610) 264.
726 Wiedemann/Klusmann (n 721) § 56 Rdnr 7.
727 Vollmer (n 610) 259. See also F Wagner-Von Papp, ‘What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany’ in C Beaton-Wells and A Ezrachi, Criminalising Cartels: Critical Studies of an International Regulatory Movement (Hart Publishing 2011) 176-177, who sees some possibility for legislative change so as to immunize leniency applicants from criminal procedures.
728 Wiedemann/Klusmann (n 721) § 56 Rdnr 8.
729 ibid.
been imposed for an infringement of § 298 StGB, the German competition authorities can no longer fine these persons under Article 101 TFEU.730

Cases are not systematically published, but there seems to be considerable practice in the field of criminal bid-rigging cartels. Wagner-Von Papp has indicated that in the years between 1998 and 2008, more than 260 persons were indicted, more than 180 of whom were convicted.731 A conviction can lead to anything from a criminal fine below EUR 100732 to a custodial sentence of several years.733 It should be noted that custodial sentences for criminal bid-rigging cartels are not always served. Sometimes these sentences are on probation734 and oftentimes prison sentences below two years are converted into probation orders.735

5.8.3 Powers of the Netherlands Institutions

In the Netherlands, the public enforcement of EU competition law takes place through administrative procedures alone. Custodial sanctions, therefore, are not available for infringements of Articles 101 and 102 TFEU. It has been argued in the legal literature that the criminal prohibition of unfair competition, laid down in Article 328bis WvSr, captures many situations of anti-competitive behaviour.736 The offence of unfair competition may lead to a custodial sentence of up to a year. In practice, prosecution under this provision virtually never takes place, let alone with regard to acts that also qualify as an infringement of Article 101 or 102 TFEU. Separate criminal offences committed in the process of anti-competitive behaviour (e.g. fraud, extortion, forgery of documents) may attract custodial sanctions, however.737

Until 1998, prior to the creation of the NMa, infringements of competition law could solely be prosecuted by the public prosecutor. In practice, prosecution was highly exceptional.738 This was partially due to the fact that anti-competitive behaviour was not automatically prohibited. Commentators have questioned whether the pre-1998 regime was even worthy to bear the label of enforcement regime.739 The final case possible within the statute of limitations under the pre-1998 criminal regime dealt with bid-rigging in the construction sector and resulted in an altogether disappointing outcome for the public

730 ibid Rdnr 7.
732 LG Düsseldorf Aktenzeichen 24b Ns 9/06.
733 BGH 4 StR 428/03.
734 BGH 1 StR 579/00. See also Wagner-Von Papp (n 727) 157ff.
735 Vollmer (n 610) 261.
739 De Bree, ‘Mededingingsrecht en Strafrecht’ (n 736) 209.
prosecutor. To the extent that individuals were convicted, the court imposed modest, non-custodial sanctions. In an effort to strengthen competition policy, the limping criminal regime was exchanged for an administrative enforcement system in 1998. Since then, the NMAs have enforced competition law on the basis of its administrative powers. Compared to the enforcement actions of the public prosecutor prior to 1998, the NMAs have been highly successful in penalising infringements of competition law.

Despite the successes of the NMAs, around 2006 the criminalisation of competition law came under renewed attention. The benefits of custodial sanctions in terms of deterrence attracted the attention of academics, practitioners and politicians alike, and for a moment the reintroduction of criminal enforcement was seriously contemplated. In 2006, the minister promised parliament to prepare legislation providing for the partial criminalisation of competition law and the introduction of custodial sanctions. In November 2009, the minister’s resolve to introduce custodial sanctions was still very strong. At that time, the minister planned to introduce a dual enforcement system of administrative and criminal enforcement, with custodial sanctions for participants in both cartels and abusive behaviour. These plans were not embraced by everyone, however, and critical voices soon emerged. Since then, little action has followed. In fact, the plans to criminalise competition law seem to have been overtaken by plans to merge the competition authority with the post and telecommunications authority and the consumer authority (supra subparagraph 5.2.3). In the context of this reform, legislation is prepared that provides for a single administrative enforcement system. With this reform, the plans to introduce custodial sanctions have effectively been side-tracked.

5.8.4 Powers of the UK Institutions

Certain infringements of Article 101 TFEU could fall within the scope of UK criminal law. Section 188 EA02 establishes a cartel offence. The most serious forms of collusion between

741 Korsten (n 737).
743 De Bree, ‘Mededingingsrecht en Strafrecht’ (n 736). De Bree did not argue in favour of criminalisation, but countered some of points of critique raised against criminalisation.
744 TK 2005-2006, 30071, nr 27.
745 ibid.
746 TK 2009-2010, 24036, nr 369.
747 ibid.
748 Speeches by P Kalbfleisch at the conferences Elseviercongres Ontwikkelingen Mededingingsrecht 2009 and Elseviercongres Ontwikkelingen Mededingingsrecht 2010. The text of both speeches is available through <www.nma.nl> accessed 1 July 2012. See further Doorenbos (n 738).
749 Voorstel van Wet (31-5-2012), Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden marktoezicht.
competing undertakings (price fixing, output reduction, market sharing, customer sharing and bid-rigging) are covered by this provision. Breach of Section 188 EA02 could result in a custodial sanction. While enforcement procedures under Section 188 EA02 are distinct from those under Article 101 TFEU, both provisions could be applicable to a single set of facts. Persons involved in hard core infringements of Article 101 TFEU may therefore face prosecution under Section 188 EA02. Therefore, the reservation of custodial sanctions for the cartel offence is not contrary to the EU principle of equivalence (supra subparagraph 4.6.2).

From its introduction in 2003, Section 188 EA02 prohibited a person from ‘dishonestly’ agreeing with one or more other persons to make or implement, or to cause to be made or implemented, a hard core cartel agreement. The dishonesty requirement derives from more conventional fraud offences and embodies a two stage test. First, whether the act was dishonest according to the standards of reasonable and honest people. Second, whether the defendant realised that his act would be regarded as such. In March 2012, UK government has indicated to amend Section 188 EA02 and to remove the dishonesty requirement. This proposal is motivated by the conclusion that the dishonesty requirement makes the offence too hard to prosecute and that this limits the deterrent effect. Even with the dishonesty requirement stripped off, the criminal cartel offence will still require proof of intention to enter into an agreement and intention as to the operation of the arrangements. Parties will be able to escape prosecution by publishing the details of the arrangements before they are implemented. This is meant to provide a more objectively measurable way of proving whether the offence had been committed.

The cartel offence and national competition law
Secrecy is and will probably remain a condition for the cartel offence. UK government has argued that precisely this element distinguishes the cartel offence from competition law. Unlike Article 101 TFEU and its domestic equivalent, the cartel offence would not apply to concerted practices either. In the eyes of UK government, this divide between the cartel offence and competition law means that criminal cases could still be pursued if there were to be parallel civil proceedings at EU level under Article 101 TFEU. This divide seems rather artificial and UK government should take into account that by maintaining this position it will insulate proceedings under Section

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750 Persons involved in hard core infringements will only face prosecution under Section 188 EA02 if they have a certain degree of responsibility within the undertaking. See in this respect Rodger (n 8) 127.
751 Whish (n 163) 415-416; C Dobbin and G Peretz in T Ward and K Smith (eds), *Competition Litigation in the UK* (Sweet & Maxwell 2005) 5-017.
752 *Growth, Competition and the Competition Regime* (n 106) para 7.10.
753 ibid para 7.8.
754 ibid para 7.9.
756 ibid para 7.26.
757 ibid para 7.30.
758 ibid para 7.32.
759 ibid para 7.30.
Pursuant to Section 190(2) EA02, prosecutions under the cartel offence may be brought by the Serious Fraud Office ('SFO') or the OFT. In Scotland, the powers of the SFO are exercised by the Lord Advocate. The SFO is an independent government department that investigates and prosecutes serious or complex fraud. While the initial investigations are likely to be conducted by the OFT, the SFO will normally bring the case before court and lead the prosecution. Where the SFO is not able or willing to deal with a cartel prosecution, the OFT may prosecute the case itself. Private prosecutions are allowed with the consent of the OFT. The OFT is the only competition authority that can prosecute the cartel offence.

The cartel offence has to be tried before a criminal court. The offence is triable upon an indictment at the Crown Court. Trials are heard by a judge and a 12 person jury. A person convicted on indictment is liable to imprisonment for a term of up to five years. Although the complexity and seriousness of cartel offences suggest that these cases will generally end before the Crown Court, the offence may also be tried in the Magistrates' Court. Trials are then heard by a panel of three judges. A summary conviction by the Magistrates' Court may result in a prison sentence not exceeding six months and/or a modest fine. These 'triable either-way' offences always commence at the Magistrates' Court. Dobbin and Peretz have described how this procedure works. The accused is served a short written statement of the accusation, on the basis of which he or she pleads guilty or not guilty. In the latter case, the accused may elect a trial by indictment before the Crown Court. The case may also be transferred to the Crown Court on the Magistrates' Court own initiative, if it views the case too complex or its own sanctioning powers too limited in light of the severity of the accusation. The case may also be transferred from the Magistrates' Court to the Crown Court at an earlier stage in the procedure, where the prosecutor serves a notice of transfer on the Magistrates' Court. If a case reaches the Crown Court on the prosecutor's initiative, the latter may apply to the Crown Court judge for the trial to be conducted without a jury, for reasons of the case's complexity and expected duration.

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760 Whish and Bailey (n 112) 430.
761 O’Neill and Sanders (n 151) 2.49.
763 G Peretz in T Ward and K Smith (eds), Competition Litigation in the UK (Sweet & Maxwell 2005) 3-005.
764 EA02, s 190(1).
765 Dobbin and Peretz (n 751) 5-053.
766 EA02, s 190(1).
767 Dobbin and Peretz (n 751) 5-052-5-054.
768 ibid 5-057.
Immunity from prosecution may be granted in the form of a ‘no-action letter’ issued by the OFT under section 190(4) EA02. A no-action letter will prevent an individual from being prosecuted for the cartel offence in England, Wales and Northern Ireland. Immunity from prosecution cannot be given in relation to Scotland. However, cooperation by an individual will be reported to the Lord Advocate who will take such cooperation into account.\(^{769}\)

Individuals who themselves coerced others to participate in the cartel and whose undertaking is deemed a coercer too will be denied criminal immunity.\(^{770}\) In all other cases, criminal immunity is available for current and former employees and directors that cooperate in the context of a corporate immunity application. Criminal immunity will be automatic for all implicated current and former employees and directors of an undertaking which is granted Type A immunity.\(^{771}\) Where an undertaking has been able to perfect a marker for Type B immunity, all implicated current and former employees and directors who co-operate with the OFT will be guaranteed criminal immunity.\(^{772}\) There is no such ‘blanket immunity’ for Type B and C leniency cases. Instead, the OFT will consider, on an individual-by-individual basis, whether one or more current or former employees or directors of an undertaking qualifying for Type B or C leniency should be granted individual immunity.\(^{773}\)

Individuals may also apply for criminal immunity outside the context of a corporate leniency application.\(^{774}\) If an individual applies for immunity on his or her own account before the undertaking makes its own application, immunity covering both the undertaking and all of its co-operating current and former employees and directors will become discretionary and not guaranteed.\(^{775}\) This system is meant to stimulate undertakings in making prompt immunity applications, rather than to await any investigations and apply for Type B leniency.\(^{776}\)

There is some experience with criminal cartel proceedings. In the period between the introduction of the cartel offence in 2003 and July 2012 two cases have been prosecuted.\(^{777}\) In the Marine Hose Cartel three men received prison sentences of between two-and-a-half and three years. These sentences were subsequently reduced on appeal to terms between 20 months and two-and-a-half years.\(^{778}\) The convictions were largely due to the three way
plea agreements between the individuals involved, the OFT and the Department of Justice in the United States, where the individuals were first arrested. In the Fuel Surcharge Cartel the OFT was less successful. In May 2010, the OFT decided to withdraw criminal proceedings and the suspects were subsequently acquitted. The withdrawal followed after the discovery of a substantial volume of electronic material, which neither the OFT nor the defence had previously been able to review. Considering the limited and largely unsuccessful experiences with the cartel offence, one commentator has described the UK criminalisation project as a ‘damp squib in terms of both normative functionality and deterrent effect’.

5.8.5 Degree and Drivers of Convergence

Whereas the Commission cannot bring individuals to jail for anti-competitive behaviour, on Member State level such possibilities do exist. Already since 1997, German law explicitly threatens individuals implicated in bid-rigging cartels with custodial sanctions. The introduction of this criminal bid-rigging offence with accompanying sanctions was meant to enhance the level of deterrence with regard to these practices. For similar reasons, the UK legislator in 2002 introduced a cartel offence. Under this criminal law regime, the OFT may seek custodial sanctions for in principle any type of cartel agreement. In the Netherlands, custodial sanctions for infringements of competition law are not available. However, from 2006 onwards there have been a series of parliamentary initiatives to criminalise competition law and to introduce custodial sanctions both for cartels and abusive behaviour. Also these initiatives were mainly motivated by considerations of deterrence. Irrespective of these motivations for the introduction of custodial sanctions in the three Member States, it would go too far to see these initiatives as a duty under the EU principle of dissuasiveness (supra subparagraph 4.6.4).

This brief account may be interpreted in two ways. It could suggest that custodial sanctions are en vogue. What started as an additional deterrent in Germany for a specific form of anti-competitive agreements, has developed into a general cartel repellent in the UK, and has almost spreaded to abusive behaviour in the Netherlands. However, the above developments may also be read as a story of mixed feelings. While the UK has criminalised all cartel practices for some years now, this has not found any definite support in Germany and the Netherlands. Moreover, still in 1998, around the same time as Germany introduced its criminal bid-rigging offence, the Netherlands has actually decriminalised competition law in an effort to align its enforcement regime with that of the Commission. The recent initiatives by Dutch parliament to introduce custodial sanctions for cartels and abusive behaviour have been delayed by government since 2006 and now seem to have been

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781 Joshua (n 779) 130.
side-tracked completely. All the while, the Commission has made no moves towards the criminalisation of EU competition law either. In this respect it should be noted that in other fields of EU law the Commission has sought to criminalise infringements of EU law.\footnote{For an overview of the activities of the EU in the field of criminal law, see A Klip (ed), \textit{Materials on European Criminal Law} (Intersentia 2012).}

While there have thus been clear developments in the context of custodial sanctions, it is difficult to interpret these processes in terms of convergence and divergence. What is certain is that there are some clear differences (but also some similarities) between the analysed jurisdictions with regard to custodial sanctions. It already follows from the above discussion that there are considerable disparities as to the scope of custodial sanctions, with the Commission and the Netherlands institutions being entirely powerless in the respect. Under German law, custodial sanctions are limited to bid-rigging cartels. More specifically, only the act of submitting a bid that has been rigged in a public or private tender falls within the scope of the criminal offence. The anti-competitive negotiations and agreements that preceded the bid are exonerated under criminal law. Under UK law, on the other hand, custodial sanctions are in principle available against any cartel agreement and, moreover, do not require the agreement actually to have been implemented. Another important difference relates to prosecutory powers. The jurisdictions that did ‘go criminal’ exhibit different modes of institutional integration. In Germany, administrative enforcement and criminal enforcement are largely separated. This has the effect that criminal cases can even be brought against individuals that have already been treated to an administrative fine. However, if the criminal court comes to a conviction it repeals the administrative decision. This institutional separation also means that administrative leniency does not protect individuals against criminal prosecutions. Rather the contrary, criminal proceedings are governed by the principle of mandatory prosecution and the competition authorities have to hand over bid-rigging cases to the public prosecutor. Finally, the institutional separation means that the role of competition authorities in the prosecution of the bid-rigging offence is limited to the preliminary stage of the investigation. The UK has opted for an integrated regime. The OFT may prosecute the cartel offence itself. Whether it does so falls within the discretion of the authority. This institutional arrangement has allowed the OFT to supplement its corporate leniency programme with a criminal immunity chapter. More importantly, it has allowed the OFT to play out in its favour the prisoner's dilemma that confronts any cartel participant: whether to confess or collude.\footnote{See also WPJ Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 30 \textit{World Competition} 25, 55-56.} For example, if an individual applies for immunity on his or her own account before the undertaking makes its application, immunity covering both the undertaking and all its cooperating current and former employees and directors is discretionary and not guaranteed. This system is meant to stimulate undertakings in making prompt immunity applications, rather than to await any investigations and speculate on a reduction of the fine. However, it should be noted...
that this sophisticated leniency regime may be hampered by the fact that guarantees of immunity from criminal prosecution cannot be given in relation to Scotland.

There are also various similarities between Germany and the UK when it comes to custodial sanctions for anti-competitive practices. Both jurisdictions have created a separate offence. UK government even insists that its cartel offence does not qualify as competition law. This means that there are formally no custodial sanctions for infringements of Article 101 TFEU and that it is more correct to say that custodial sanctions are available for anti-competitive practices falling within the scope of Article 101 TFEU. Another similarity is that both regimes apply a maximum prison sentence of five years.

5.9 DISQUALIFICATION ORDERS

Through a disqualification order individuals can be disqualified for a professional function, eg a managerial or sales position. This could either be for a limited period of time, or indefinite. The power to impose disqualification orders in the context of EU competition law may function as an additional deterrent, could inhibit individuals from engaging in infringements, but may also be costly for society as a whole (human capital is wasted and individuals may become dependent on the state). In other words, it can be a very useful sanction, but not everyone may support it and preferences may differ per Member State. In this respect, and in accordance with what was concluded in chapter 3, a decentralised enforcement system in which Member States can choose whether or not to implement disqualification orders comes with certain economic benefits. Were Member States to experiment with disqualification orders, this would inevitably result in regulatory innovation. The Commission lacks the power to impose or seek disqualification orders and precisely for that reason the learning curve in this area will be steep. Member States which do provide for this sanction can function as an example for other jurisdictions in terms of what does or does not work. By detailing the availability and conditions for disqualification orders in the various jurisdictions, this paragraph could help this learning process. More importantly, by examining the degree and drivers of convergence in this area, this paragraph may provide useful insights in the domestic sanctioning preferences and the instances of regulatory innovation and, therefore, ultimately in the economic advantages and disadvantages of decentralisation.

5.9.1 Powers of the Commission

Regulation 1/2003 does not provide for disqualification orders. As a result, the Commission cannot impose or seek such sanctions for infringements of Articles 101 and 102 TFEU. However, as the Commission is not a mere administrative authority it needs not to accept the status quo. The Commission is a ‘self-serving authority’ that may try to supplement its own enforcement powers by proposing legislation to the Council. In fact, the Commission may even propose sanctioning powers for decentralised enforcement. This means that disqualification orders for infringements of Articles 101 and 102 TFEU do not fall outside
the Commission’s purview altogether. Were the Commission to find such orders necessary either to ensure that EU competition law is fully effective or to take away potential distortions of competition, it may propose legislation to this effect. In accordance with Article 103 TFEU, possibly in conjunction with Article 352 TFEU, the Commission could draft a proposal to have its own sanctioning powers supplemented with disqualification orders. Pursuant to Articles 83 and/or 114 TFEU, the Commission may further initiate the harmonisation of national legislation and have Member States provide for disqualification orders for the purpose of decentralised enforcement (supra subparagraph 4.6.3). Finally, the Commission may assume a more co-ordinating role, for instance by ensuring that disqualification orders imposed in the Member States are recognised EU-wide. There has already been some activity in this area, albeit not specifically in the area of competition law.

In a 2009 Communication to the European Parliament and the Council, the Commission has indicated that the EU must aim for the mutual recognition of disqualification orders. This Communication complements the Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. In accordance with Article 4(1)(d) of this Framework Decision, disqualification orders are covered by the term ‘alternative sanction’, thus falling within the scope of application of this Decision. The Decision aims, amongst others, to facilitate the application of alternative sanctions in case of offenders who do not live in the Member State of conviction. For this purpose, it provides rules on the basis of which Member States should supervise alternative sanctions imposed by other Member States.

5.9.2 Power of the German Institutions

The German competition authorities lack the power to impose or seek disqualification orders in relation to infringements of Articles 101 and 102 TFEU. Nevertheless, individuals responsible for particular anti-competitive practices falling within the scope of Article 101 TFEU may face such sanctions. As has been dealt with more extensively in subparagraphs 5.7.2 and 5.8.2, individuals participating in bid-rigging cartels are subject to the criminal law regime of § 298 StGB. The BGH has confirmed that § 298 StGB covers particular infringements of Article 101 TFEU. While not primarily intended to reinforce competition policy, let alone EU competition policy, criminal courts may impose a disqualification order (Berufsverbot) on individuals engaged in criminal bid-rigging cartels. This power has been laid down in § 70 StGB. The duration of disqualification is decided by the court. In principle, this will be somewhere between one to five years. Exceptionally, the court may also

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784 See also A Khan, ‘Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?’ (2012) 35 World Competition 77, 97.


787 BGH 4 StR 428/03.

788 See also Vollmer (n 610) 257.
order a lifelong prohibition to engage in certain professional activities. Disqualification orders are regularly used in relation to other criminal offences of an economic nature, but this measure does not seem common practice for criminal bid-rigging cartels. Similar to what was concluded in subparagraphs 5.7.2 and 5.8.2 with regard to criminal fines and custodial sanctions, the reservation of disqualification orders for infringements of § 298 StGB is not contrary to the EU principle of equivalence (supra subparagraph 4.6.2).

A disqualification order may be imposed on individuals that have committed a criminal offence (eg § 298 StgB) by either abusing their professional position or failing their professional duties. This condition is fulfilled when the abuse or failure was directly related to the professional duties. There should be a clear danger that if the offender would continue the work or profession, he would relapse into illegal behaviour. The aim of disqualification is therefore wholly reparatory and not punitive. This is confirmed by the fact that disqualification orders may even be imposed on individuals that have not been convicted for the sole reason that fault could not be established. Disqualification orders can be imposed with regard to any type of profession, and – and this is relevant for competition law purposes – are therefore not limited to persons in the higher echelons of management. The prohibition to engage in certain types of work or professions needs to be specified. The wholesale prohibition of 'any management function' would appear too unspecific. Breach of a disqualification order can amount to a prison sentence of up to a year or a fine.

Under § 61 StGB, disqualification orders qualify as criminal law 'measures' (Maßregeln). These measures need to be distinguished from penalties, as only the latter are conditional on some form of fault. Measures may be imposed even if the infringement has not been committed negligently or intentionally. Measures may be imposed alongside penalties. The imposition of a measure is subject to the principle of proportionality, recognised both in the German Constitution and § 62 StGB. On the basis of this principle, the impact (Bedeutung) of both the committed and foreseen infringement and the degree of danger (Grad der Gefahr) should warrant the measure. These general conditions with regard to criminal law measures also apply to disqualification orders for infringements of § 298 StGB. Pursuant to § 132a StPO, the criminal court may also impose disqualification orders by ways of interim measure. This may be done if there are strong and urgent indications

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789 § 70 StGB.
791 § 70 StGB.
792 Tröndle and Fisher (n 790) § 70 Rdnr 3.
793 ibid Rdnr 5 and 9.
794 ibid Rdnr 5.
795 ibid Rdnr 10.
796 § 145c StGB.
797 Tröndle and Fisher (n 790) Vor § 61 Rdnr 1.
798 ibid § 62 Rdnr 1.
799 ibid Rdnr 4-5.
(dringende Gründe für die Annahme) that a disqualification order will be imposed at the end of the proceedings.

5.9.3 Powers of the Netherlands Institutions

In the Netherlands, disqualification orders are currently not available in relation to EU competition law. The enforcement actions of the competition authority cannot result in anyone being disqualified for certain professional activities. However, in the context of recent parliamentary deliberations on the criminalisation of competition law, the minister has promised to prepare legislation providing for disqualification orders.\textsuperscript{800} Orders of this kind are not uncommon under Dutch criminal law. The idea behind these plans was to deter individuals from engaging in competition law infringements. Meanwhile, the criminalisation of competition law has lost momentum to the plans to merge the competition authority with the post and telecommunications authority and the consumer authority and to provide a single administrative enforcement regime (supra subparagraphs 5.2.3 and 5.8.3).

While the introduction of disqualification orders for infringements of Articles 101 and 102 TFEU is at best uncertain, some relevant features and developments with regard to this criminal law instrument should be mentioned. Disqualification orders can be imposed only for those criminal offences for which the law specifically provides. Currently this includes fraud and economic offences. In these cases, a disqualification order may be imposed by ways of a penalty.\textsuperscript{801} The duration of disqualification is generally limited to a period of two to five years.\textsuperscript{802} Breach of a disqualification order is a criminal offence and may lead to a custodial sentence.\textsuperscript{803} In practice, disqualification orders are a rather rare phenomenon.\textsuperscript{804} Yet, in recent years this penalty has gained popularity. Reportedly, many public prosecutors and judges recognise the usefulness of such orders, albeit as a measure to prevent recidivism (maatregel) rather than as a penalty.\textsuperscript{805} In 2009, the scope of criminal offences for which disqualification orders can be imposed has even been enlarged.\textsuperscript{806}

5.9.4 Powers of the UK Institutions

Under UK law, directors can be banned from managerial positions for having committed an infringement of Article 101 or 102 TFEU. These director disqualifications can either be court-ordered (disqualification order) or part of a deal with the competition authorities

\textsuperscript{800} TK 2009-2010, 24036, nr 369.
\textsuperscript{801} Article 28 WvSr.
\textsuperscript{802} Article 31 WvSr.
\textsuperscript{803} Article 195 WvSr.
\textsuperscript{805} ibid.
\textsuperscript{806} Wet van 12 juni 2009 tot wijziging van het Wetboek van Strafrecht, Wetboek van Strafvordering en enkele aanverwante wetten in verband met de strafbaarstelling van het deelnemen en meewerken aan training voor terrorisme, uitbreiding van de mogelijkheden tot ontzetting uit het beroep als bijkomende straf en enkele andere wijzigingen.
The legal basis for disqualification is the Company Directors Disqualification Act 1986 (‘CDDA86’). The maximum period of disqualification is 15 years. A disqualification order can be imposed by the court in the context of a cartel offence procedure under Section 188 EA02. Outside this criminal law context, the OFT may apply for disqualification orders in relation to all types of infringements of Articles 101 and 102 TFEU. The OFT should then initiate proceedings before the High Court (or the Court of Session in Scotland).

Disqualification has the effect that the person involved can no longer be director of a company, act as receiver of a company’s property, be concerned or take part in the promotion, formation or management of a company, or act as an insolvency practitioner. It is a criminal offence to act contrary to a disqualification order or disqualification undertaking. Tried on indictment, this offence may lead to a custodial sentence of two years and/or an unlimited fine. On summary conviction, liability is limited to a custodial sentence of no more than six months and/or a modest fine. Furthermore, any person subject to a disqualification order or disqualification undertaking but nonetheless involved in the management of a company is personally liable for all the company’s relevant debts.

In principle, applications for a disqualification order will be made after the competition law infringement has been proved (in a separate, earlier procedure) and is no longer subject to appeal. These applications could be made following proceedings by the OFT, a sector regulator or the Commission, or following procedures before the CAT, the Court of Justice or ‘any other competent court’. While this excludes proceedings by foreign NCAs, it seems possible that applications for disqualification orders are made following procedures before foreign courts (upholding the administrative decision of an NCA). In any case, applications will only be made in relation to infringements with an actual or potential impact in the UK. The OFT has indicated that it will only seek disqualification orders for the more serious infringements, which also merits a fine for the undertakings concerned, and that the likelihood of application will increase with the contribution to the infringement by the director in question. The OFT has also formulated several aggravating and mitigating circumstances, increasing and reducing the probability that disqualification will be

807 Before making the application, the individual concerned is given notice and allowed to make representations. This is the stage where the person concerned can offer disqualification undertakings. See Company Directors Disqualification Act 1986 (CDDA86), ss 9C(4) and 9B(2).
808 CDDA86, s 9A(9).
809 CDDA86, s 2.
810 CDDA86, s 9A(10).
811 Whish and Bailey (n 112) 435.
812 CDDA86, s 1(1).
813 CDDA86, s 13.
814 CDDA86, s 15.
816 ibid para 4.6.
817 ibid para 4.8.
818 ibid paras 4.11 and 4.19.
sought. The OFT will not apply for a disqualification order against any current director of a company which benefits from leniency. However, in the context of criminal proceedings under the cartel offence, the court may always impose a disqualification order on its own motion. Both the availability of leniency and the fact that the OFT will only seek a disqualification order in cases that also merit a fine suggest that this penalty is perceived as a punitive sanction. This is confirmed by the fact that the OFT considers this power as a means to provide individuals with a further incentive to comply with competition law.

Director disqualification can only be ordered by the court. The court must impose a disqualification order if the person is a director of the company that committed an infringement of Articles 101 and 102 TFEU and either contributed to the infringement, did not prevent the infringement or ought to have known that an infringement took place (ie is ‘unfit’ for the management of a company). This suggests that the individual concerned needs to be director at the time the infringement took place. It is immaterial whether or not that person still works for the undertaking at the time the order is made. While the OFT considers the term ‘director’ to include a de facto director, staff officers, however senior, are not affected by the CDDA.

There is still little experience with disqualification orders in the context of competition law, but the OFT is gradually recognising the potency of this power. In 2009, the OFT published a consultation document with a clear ambition to use disqualification orders so as to enhance deterrence. This has lead to the 2010 Guidance document Director disqualification orders in competition cases. In 2011, the OFT issued yet another guidance document in this field. According to this document, the OFT will actively consider in all its investigations whether a disqualification order would be appropriate. Although it will look for direct management responsibility, the OFT is even leaving open the possibility to go after non-executive directors.

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819 ibid paras 4.24-4.26.
820 OFT, Applications for leniency and no-action in cartel cases: A consultation on OFT guidance (n 696) 5.5, footnote 8.
822 CDDA86, s 9A. Cf OFT, Director disqualification orders in competition cases (n 815) paras 4.19-4.23.
823 O’Neill and Sanders (n 151) 10.124.
824 OFT, Director disqualification orders in competition cases (n 815) para 4.14.
825 ibid paras 2.3 and 4.5.
826 In the Marine Hose Cartel, three men were disqualified from acting as company directors for a period of between five and seven years.
827 OFT, Competition disqualification orders: A consultation paper (n 821).
828 OFT, Director disqualification orders in competition cases (n 815).
830 ibid para 2.6.
831 ibid paras 3.9 and 5.23-5.27.
5.9.5 Degree and Drivers of Convergence

It can be concluded that disqualification orders are experiencing increased attention in the analysed jurisdictions, albeit not necessarily or exclusively in the context of competition law. The issue of disqualification orders is probably least topical in Germany. German law does foresee in orders of this kind in respect of bid-rigging cartels, but this sanction is not often imposed. The possibility to impose disqualification orders seem to have been a by-product of rather than a reason for the criminalisation of bid-rigging. As this sanction is in any case limited to criminal law proceedings, it plays no role in the enforcement actions of the competition authorities. In the Netherlands, disqualification orders are a topical issue in several areas of the law, but this has not led to their introduction in the context of competition law. Only the UK authorities are both able and committed to use disqualification orders against infringements of Articles 101 and 102 TFEU. As to the Commission, it currently has no power to impose or seek disqualification orders itself, and it has not ventured any legislative proposals to get these powers either. However, the Commission has taken an interest in disqualification orders on national level. As a more general EU objective, the Commission has indicated that the EU must aim for the mutual recognition of these orders. As was concluded in subparagraph 5.9.1, Framework Decision 2008/947/JHA even facilitates this mutual recognition. This seems particularly important in the field of EU competition law, where the potential addressees of disqualification orders are typically persons that will easily find a job abroad and may therefore otherwise circumvent the order.

The above analysis has revealed that tendencies of convergence are still relatively low in this area. Apart from the fact that disqualification orders are not available in every jurisdiction, there are substantial differences with regard to the scope and conditions of this sanction in the jurisdictions that do provide for them. While German law reserves disqualification orders for criminal bid-rigging, UK law makes provision for such orders in relation to any type of anti-competitive practice. A further difference concerns the potential addressees of these orders. Disqualification orders under German law are not limited to persons in the higher echelons of management. Under UK law, on the other hand, disqualification orders are limited to directors, excluding all staff officers. Other fundamental differences between the German regime and the UK regime relate to the sanction’s objectives. In Germany, disqualification orders have an entirely reparatory objective and are only warranted in case of clear danger that the offender will relapse in illegal behaviour. Provided this is necessary, the German courts may even order a lifelong prohibition to engage in certain professional activities. Under UK law, disqualification orders are treated as a punitive sanction. This objective is reflected in the fact that the OFT will not apply for a disqualification order against any current director of a company which benefits from leniency. As could be expected from the sanction’s punitive objective, the period of disqualification is limited. Under UK law, the duration of a disqualification order may not exceed 15 years.
5.10 CONCLUSION

With a view to establishing the legal and economic implications of the decentralisation of enforcement competences, this chapter has examined the degree and drivers of convergence with regard to sanctioning powers. As to the economic implications, convergence can be seen as evidence for homogeneous sanctioning preferences across the Member States and could be the result of regulatory innovation. The latter point depends on the drivers of convergence. On the basis of earlier studies, it was hypothesised that Germany, the Netherlands and the UK have largely aligned their sanctioning regimes for Articles 101 and 102 TFEU to the powers of the Commission and that this convergence process is reinforced by policy coordination initiatives of the ECN and ECA. This hypothesis was tested by contrasting the sanctioning regimes in these Member States with the Commission's powers, the ECN Model Leniency Programme and the ECA Fining Principles. An indepth cross-jurisdictional analysis has been conducted with regard to: i) institutional enforcement frameworks; ii) interim measures; iii) early resolution measures; iv) declaratory findings; v) reparatory sanctions; vi) pecuniary sanctions; vii) custodial sanctions; and viii) disqualification orders. More than just examining the degree and drivers of convergence, this approach has highlighted various sanctioning alternatives, has provided a clarification and analysis of four sanctioning regimes, and has evaluated the consistency of domestic practices with the EU principles set out in chapter 4. The main findings in terms of convergence tendencies are summarized below.

Institutional enforcement frameworks

Paragraph 5.2 has dealt with the institutional enforcement frameworks in which competition law sanctioning is situated. It has been concluded that the various jurisdictions have placed the enforcement of Articles 101 and 102 TFEU in entirely different institutional environments. The EU model has found most resonance in the Netherlands. Both the Netherlands authority and the Commission are integrated enforcement authorities, combining prosecutorial and adjudicative functions. Yet, there are also important differences between these two regimes. The Netherlands authority is functionally divided by 'Chinese walls' in an investigatory department and an adjudicative department and its decisions are subject to a more defendant-friendly regime of judicial review. The institutional enforcement frameworks in Germany and the UK share fewer characteristics with the EU model. The German legislator has created parallel procedural frameworks for reparatory sanctions and punitive sanctions, has allocated enforcement competences to a federal authority and 16 state authorities, and has granted decision-making powers on federal level to 12 court-like chambers. The UK has opted for yet another institutional framework, with enforcement competences being shared by a general competition authority and various sector regulators. Also the appeal procedures in Germany and the UK differ significantly from the situation on EU level, with courts generally having a broader mandate to scrutinise administrative decisions.
Interim measures
With regard to interim measures, it has been concluded in paragraph 5.3 that each of the three Member States has sought alignment to Regulation 1/2003. All the NCAs have been granted the power to adopt interim measures for \textit{prima facie} infringements of Articles 101 and 102 TFEU. However, the UK authorities may already adopt interim measures where there are reasonable grounds for suspecting an infringement. Other differences between the analysed jurisdictions concern duration, time-limits and the enforceability of interim measures, as well as the role and relevance of third parties. In practice, the authorities hardly ever use their powers to adopt interim measures.

Early resolution measures
Paragraph 5.4 has dealt with legal instruments for the early resolution of competition law disputes. There have been strong tendencies of convergence in this area. The four jurisdictions provide for essentially the same alternatives, without any EU requirement to this effect. With regard to commitment decisions it has been concluded that the domestic procedures have been inspired by Regulation 1/2003. National legislators have sought to mirror the Commission’s commitment powers under Article 9 Regulation 1/2003 and have largely succeeded in this objective. The authorities can all terminate their investigations with a decision making binding the commitments offered by the undertakings involved. There are also some notable differences, however. These relate to the attractiveness for the undertakings concerned to offer commitments, the conditions for the adoption of commitment decisions, the role of third parties in drafting these decisions, the judicial protection of addressees and third parties against commitment decisions, and the enforcement of commitment decisions by the authorities. Early resolution can also be reached in cases that do merit a fine. The analysed jurisdictions all cater for financial settlements with a view to reduce the duration of proceedings. However, in terms of detail and transparency the Commission’s settlement procedure is unprecedented.

Declaratory findings
Paragraph 5.5 has demonstrated that all the authorities have a practice of adopting declaratory findings. These findings are not limited to past infringements, but include findings of inapplicability. In light of recent EU case law it has been stressed that national authorities should refrain from making absolute statements on the inapplicability of Articles 101 and 102 TFEU any longer. With regard to findings of past infringements it has been concluded that there are no clear and widespread tendencies of convergence. The national regimes for declaratory findings display various differences. Only the German legislator has explicitly sought alignment with Regulation 1/2003 and the powers of the Commission. Yet, this alignment is not perfect. The Netherlands (and to a lesser extent also the UK) even deviates from the basic features of the EU model.


Reparatory sanctions

Reparatory sanctions have been studied in paragraph 5.6. On a very basic level there is a considerable degree of convergence with regard to the types of remedies that can be imposed for infringements of Articles 101 and 102 TFEU. All the authorities may impose both negative and positive behavioural orders and most jurisdictions explicitly provide for structural remedies too. To a large extent, Regulation 1/2003 and the powers of the Commission have served as a source for inspiration. However, a close examination of the various remedy regimes has led to the identification of some notable differences. First, the Commission seems less keen to impose intrusive remedies than some of the national authorities. Second, the German authorities are alone in their ability to skim-off illegal gains and to order undertakings to pay damages to third parties that have been injured as a result of the anti-competitive behaviour. Third, only the UK allows its authorities to impose remedies on managers and other company officials. Fourth, there are differences with regard to the conditions under which remedies can be imposed. Fifth, the enforcement of remedies has been organised differently in the various jurisdictions. Sixth, the available legal safeguards against remedies differ across jurisdictions.

Pecuniary sanctions

Paragraph 5.7 has dealt with pecuniary sanctions, notably fines. It has been concluded that large-scale convergence in the field of fines has taken place and that this can be attributed partially to unilateral alignment actions by the Member States. The competition authorities have all been granted the power to impose fines on legal persons responsible for infringements of Articles 101 and 102 TFEU. Even jurisdictions that traditionally did not recognise administrative fines for legal persons now provide for this sanction. Without exception, fines are subject to the alternative conditions of intent and negligence. Moreover, fining powers are invariably of a discretionary nature. This discretion covers the question whether or not a fine should be imposed in the first place, as well as the amount of the fine. A turnover cap of 10 per cent of the undertakings’ worldwide turnover limits the authorities’ discretion. Within these wide statutory boundaries, all jurisdictions rely on administrative guidelines to enhance transparency and certainty with regard to the applicable calculation methods. Even these methods are highly comparable. Finally, whistle-blowing cartel participants can benefit from leniency in all four jurisdictions. This convergence process has been reinforced by coordination initiatives, mainly in the context of ECN and ECA. Notwithstanding these tendencies of convergence, there are still various (fundamental) differences with regard to fines for infringements of Articles 101 and 102 TFEU. Probably most fundamental is the difference in approach towards natural persons. Germany and the Netherlands both provide for administrative fines for natural persons that committed an infringement of Article 101 or 102 TFEU. The Commission and the UK authorities have not been granted this power. However, UK law does foresee in a criminal cartel offence that can attract unlimited fines for the individuals involved. Also with regard to fines for legal persons there are some important differences between the various jurisdictions. These differences concern the 10 per cent turnover cap (not necessarily applicable under German law), the
statutory limitation period (currently not applicable under UK law), the jurisdiction of the appeal courts (possibility of a *reformatio in peius* in all analysed jurisdictions except for the Netherlands), the method for calculating fines, the transparency of the authorities’ settlement policy, and the availability and conditions for leniency (including deviations from the ECN Model Leniency Programme in Germany and the UK).

**Custodial sanctions**

Paragraph 5.8 has detailed the availability and conditions of custodial sanctions. There have been several developments in the context of custodial sanctions, but one cannot speak of convergence tendencies. In any case, there is no general alignment to any EU model and policy coordination initiatives have not been undertaken in this area either. The Commission lacks the power to seek custodial sanctions itself. The institutional framework of the European Union simply does not support the imposition and execution of such criminal law sanctions on the level of the EU institutions. In 1998, the Netherlands has decriminalised competition law in an effort to align its enforcement regime with that of the Commission. Irrespective of recent ‘flirts’ with criminalisation, the administrative enforcement model is still firmly embraced. Signs for the absence of convergence in the area of custodial sanctions are borne out by opposite developments in Germany and the UK. In 1997, the German legislator has introduced a criminal bid-rigging offence, accompanied by custodial sanctions. Only the act of submitting a bid that has been rigged falls within the scope of the criminal offence. The anti-competitive negotiations and agreements that preceded the bid are exonerated under criminal law. The UK has moved away from the EU model of a single administrative regime even further. Since the introduction of the cartel offence in 2003, the OFT may seek custodial sanctions for, in principle, any type of cartel agreement. Unlike the situation in Germany, implementation of the cartel agreement is not required. There are also some other differences between the German and UK enforcement procedures. In Germany, administrative enforcement and criminal enforcement are largely separated. The competition authorities have no formal role in the prosecution of the bid-rigging offence and their involvement is in any case limited to the preliminary stage of the investigation. The UK has opted for a more integrated regime, in which the OFT may prosecute the cartel offence itself.

**Disqualification orders**

Finally, infringements of Articles 101 and 102 TFEU may lead to disqualification orders. This sanction has been discussed in paragraph 5.9. It has been concluded that tendencies of convergence are still relatively low in this area. The Commission lacks the power to impose or seek disqualification orders and developments in the Member States do not gravitate to a single model. The UK authorities can seek disqualification orders in relation to any infringement of Articles 101 and 102 TFEU. Under Dutch law there is currently no possibility for professional disqualification in relation to competition law infringements. German law does provide for disqualification orders, but only in the context of the criminal bid-rigging offence, and thus wholly outside the ambit of the competition authorities.
A closer examination of the German and UK regime revealed some further differences. Disqualification orders under German law have an entirely reparatory purpose, are not limited to persons in the higher echelons of management, and may be imposed for an indefinite period of time. Under UK law, on the contrary, disqualification orders have a punitive objective, are limited to directors, and may not exceed the duration of 15 years.

Degree and drivers of convergence

In sum, the analysed jurisdictions display tendencies of convergence with regard to sanctioning powers for infringements of Articles 101 and 102 TFEU. Partially, these are the result of Regulation 1/2003 and the powers of the Commission, which have functioned as a model for all three Member States. This is most clearly the case with regard to interim measures and early resolution measures and, to a more limited extent, reparatory sanctions and pecuniary sanctions. Another driver of the convergence of sanctioning powers are the policy coordination initiatives in the context of ECN and ECA. As yet, these initiatives do not extend beyond the field of pecuniary sanctions. These conclusions all support the hypothesis that Germany, the Netherlands and the UK have largely aligned their sanctioning regimes for Articles 101 and 102 TFEU to the powers of the Commission and that this convergence process is reinforced by policy coordination initiatives of the ECN and ECA. This conclusion offers a rather bleak picture of the ‘innovation through decentralisation’ theorem embraced in chapter 3.

Yet, the above observations also reveal that this narrative of imitating Member States is only part of the story. First, the convergence process has been enhanced by Member States aligning their sanctioning powers to other domestic regimes. This has been the case most clearly in the area of pecuniary sanctions. Second, notwithstanding all the convergence tendencies, there are also some fundamental differences across the four jurisdictions. This is the case most clearly in respect of the institutional enforcement frameworks, declaratory findings, reparatory sanctions, pecuniary sanctions, custodial sanctions and disqualification orders. These differences are partially due to idiosyncrasies of the various legal orders that are unrelated to competition law. Other differences are deliberate deviations from the EU model.

It follows that the current system of decentralised sanctioning is more than a simple geographic expansion of the EU model and that the national authorities are not just the long arm of the Commission. Looking at this through the economic lens of chapter 3, these observations not only support the ‘innovation through decentralisation’ theorem, they also indicate that there are heterogeneous preferences for which decentralisation caters. The next chapter will combine the conclusions of the preceding chapters and elaborate on the economic implications of the allocation of sanctioning competences over EU and national level.