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**COMMISSION STAFF WORKING DOCUMENT**

**Enhancing competition enforcement by the Member States' competition authorities:  
institutional and procedural issues**

*Accompanying the document*

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

**Ten Years of Antitrust Enforcement under Regulation 1/2003:  
Achievements and Future Perspectives**

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## 1 INTRODUCTION

1. Regulation 1/2003 which entered into application in May 2004, ushered in a new system for the application of Articles 101 and 102 TFEU (the “EU competition rules”).<sup>1</sup>
2. The recent anniversary of ten years of application of Regulation 1/2003 makes this a timely moment to: (1) provide a facts-based evaluation of enforcement by the Commission and the Member States' competition authorities ("NCAs") during the last decade; and (2) examine some key aspects of enforcement by the NCAs. This Staff Working Document, which accompanies the Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (the “Communication”), addresses aspect (2), in particular institutional and procedural issues, with a view to enhancing enforcement by the NCAs.<sup>2</sup>
3. Regulation 1/2003 constituted a major reform of antitrust procedures in the EU. Article 3 of Regulation 1/2003 requires all enforcers in the EU (the European Commission, national competition authorities ("NCAs") and national courts) to apply the EU competition rules to agreements and practices that are capable of affecting trade between Member States. The European Competition Network ("ECN") has been created as the framework for close cooperation between the NCAs and the Commission.<sup>3</sup> Consultation and cooperation tools have been introduced to ensure the effective and coherent application of the common competition rules.<sup>4</sup>
4. As set out in detail in the Staff Working Document on Ten Years of Antitrust Enforcement under Regulation 1/2003, the Commission and the NCAs can together look back on a considerable enforcement record, with more than 780 enforcement decisions applying the EU competition rules, underpinned by policy and horizontal work to enhance cooperation.
5. Regulation 1/2003 has brought about a landmark change in the way the European competition law is enforced. The EU competition rules have to a large extent become the “law of the land” for the whole of the EU. Cooperation in the ECN has contributed towards ensuring their coherent application. The network is an innovative model of governance for the implementation of EU law by the Commission and the NCAs.

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<sup>1</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1, 4.1.2003, p.1, in particular Recitals 1-8 and Articles 1-3 and 5. See also the White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty of 28.04.1999, OJ C 132 of 12.05.1999, p. 1, and the proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 of 27.9.2000, OJ C 365 E, 19.12.2000, p.284.

<sup>2</sup> For aspect (1) see the other Staff Working Document accompanying the Communication: Ten Years of Antitrust Enforcement under Regulation 1/2003, SWD(2014) 230 (the “Staff Working Document on Ten Years of Antitrust Enforcement under Regulation 1/2003”).

<sup>3</sup> Recital 15 of Regulation 1/2003 and the Notice on cooperation within the Network of Competition Authorities, OJ C101, 27.04.2004, p. 43 (the “Network Notice”).

<sup>4</sup> Notably, Articles 11, 12, 13 and 22 of Regulation 1/2003.

6. The NCAs have become an essential pillar of the application of the EU competition rules. That being said, there is still scope for further improvements to ensure the effective enforcement of EU competition rules by the NCAs, including by reinforcing their institutional position and through further convergence of national procedures and fines.
7. This document reports on the initiatives which have been taken by way of follow up to the Report on the functioning of Regulation 1/2003 of 2009.<sup>5</sup> Moreover, it analyses a range of areas that: (1) were not addressed by Regulation 1/2003; (2) were addressed in a general way while a need for a detailed response has subsequently arisen in practice or; (3) have emerged as new issues.
8. The structure of this document is as follows: Chapter 2 looks into the institutional position of the NCAs. Chapters 3 and 4 address the level of convergence achieved, and the remaining diversity, with respect to procedures and sanctions for the application of the EU competition rules by NCAs. This includes the development of leniency programmes and the interface of public enforcement of the EU competition rules against undertakings with the imposition of sanctions on individuals, notably under Member States' criminal law provisions that cover the same conduct.

## **2 INSTITUTIONAL POSITION OF NCAs**

### **2.1 Institutional set-up of NCAs**

9. All NCAs enforce the same substantial rules, i.e. Articles 101 and 102 TFEU, but their institutional set-up varies and each NCA has its own specificities. EU law leaves Member States a large degree of flexibility for the design of their competition enforcement regimes. The basic requirement as regards the institutional framework of competition enforcement in the Member States is contained in Article 35 of Regulation 1/2003. It only requires that the Member States designate the competition authority or authorities responsible for the application of the EU competition rules in such a way that the provisions of the Regulation are effectively complied with. While this provision clearly aims at ensuring the effective application of EU competition rules by putting in place an NCA (or more than one) in each Member State, Regulation 1/2003 refrains from imposing any specific requirements concerning the NCAs, except that they comply with the mechanisms of the Regulation. Nevertheless, the limited case law of the Court of Justice of the European Union on Article 35 suggests that this very general provision may require granting powers to NCAs which were ruled out, or were not foreseen, by the national legislator.<sup>6</sup> In addition, Member States are bound to respect general principles of EU law, such as the principles of effectiveness and

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<sup>5</sup> Report on the functioning of Regulation 1/2003, COM(2009) 206 final and the accompanying Staff Working Paper SEC(2009) 574 final ("2009 Report on Regulation 1/2003"), see the Internet (<http://ec.europa.eu/competition/antitrust/legislation/regulations.html>).

<sup>6</sup> In Case C-439/08, *VEBIC*, [2010] ECR I-2471, the ECJ had to rule on whether Regulation 1/2003 requires that an NCA should be able to defend its own decisions before the national review courts. At the time, Belgian law did not allow the NCA to appear as defendant at the appeal stage. The ECJ held that national provisions that prevent a NCA from defending its own decision in judicial proceedings are contrary to the obligation in Article 35 of Regulation 1/2003 of ensuring the effective application of Articles 101 and 102 TFEU.

equivalence as well as requirements arising from fundamental rights. These principles can have a concrete impact on the national procedural or institutional framework.

10. At present, two basic institutional models can be distinguished among the NCAs.<sup>7</sup> The most common institutional model within the ECN is the administrative model where a single administrative authority investigates cases and takes enforcement decisions subject to judicial control. It currently exists for all, or part, of the types of decisions taken in the large majority of Member States, with variations in the internal structures of the authorities.<sup>8</sup> Two main configurations can be distinguished within this model, which are almost evenly divided among the different jurisdictions. The first involves a functional separation between the investigative and decision-making activities of the single administrative institution whereby the inquiry is carried out by investigation services and the final decision is adopted by a board/college/council of this administrative institution. Within this structure, there may be significant differences in terms of internal organisation and relationship between the different bodies. For example, in France and Spain a full functional separation between investigative and decision-making bodies has been set up, where their respective competences are carried out independently from one another. The second configuration follows a more unitary structure and does not have different bodies carrying out different steps in the procedure although there may be different divisions (e.g. a Competition department and a Legal department) inside these authorities that deal with separate aspects of the same case.
11. A small minority of other Member States operate a judicial model, where, in essence, an administrative authority carries out the investigation and then brings the cases before a court, either for a decision on substance and on sanctions (if any)<sup>9</sup> or in relation to the imposition of sanctions only.<sup>10</sup> The 'dual' administrative model, where one body is in charge of the investigation into cases and hands them over at the end of the investigation to another body in charge of decision-making, previously also existed in a number of Member States. However, they have all moved to the single

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<sup>7</sup> Network Notice, paragraph 2.

<sup>8</sup> This is the case for Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom and the European Commission. See ECN Decision-Making Powers Report, see the Internet (<http://ec.europa.eu/competition/ecn/documents.html>). See also ECN Brief, Special Issue, A look inside the ECN: its members and its work, December 2010, see the Internet ([http://ec.europa.eu/competition/ecn/brief/05\\_2010/brief\\_special.pdf](http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf)).

<sup>9</sup> This is the case in Austria, Estonia (in criminal proceedings) Ireland and Sweden (cases involving the imposition of a fine). Where the Swedish NCA considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested by the undertakings subject to the fine order.

<sup>10</sup> Denmark (except for administrative fines) and Finland.

administrative model.<sup>11</sup> Irrespective of the institutional model, decisions of NCAs are subject to judicial review – most often including more than one tier of appeal.<sup>12</sup>

## 2.2 Independence and adequate resources

12. In order to ensure effective enforcement of the EU competition rules, it is generally accepted that NCAs should be independent when exercising their functions. Independence means that the authority's decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments. In the vast majority of Member States, the NCAs benefit from a certain degree of independence but the extent of their independence and equally the degree of supervision exercised by other state bodies varies. Many NCAs are designated in national law as independent state bodies and formally established as either an administrative authority or an agency. In addition, around half of the NCAs have legal personality.
13. In terms of accountability, which is generally seen as an important counterpart for a state body's independence, almost all NCAs are obliged to report on their activities of the previous year, mostly in the form of submitting an annual report to the parliament or (part of) the executive branch. In addition, some NCAs may have to appear before a parliamentary committee or have to submit an annual plan for the upcoming year.
14. The majority of NCAs are not subject to supervision by another state body. However, a number of NCAs are formally assigned to, or come under the responsibility of, a minister or ministry. Moreover, some NCAs may in principle be subject to general supervision or to general instructions by the executive branch or parliament although, such supervision may not have been exercised in practice, or at least not recently. In addition, the degree of supervision differs and may range from guiding and coordinating the NCA's activities or outlining the NCA's activities without intervening or deciding on individual cases or on the actual application of the law, to giving instructions regarding the general application of the law or regarding budgetary issues or general policy matters which is also directed to other governmental institutions. In a number of Member States, the minister may instruct the NCA, for example, to carry out sector inquiries or competition studies or analyses, which the NCA cannot otherwise initiate itself, but without, however, directing the outcome. The minister may also instruct the NCA to investigate a particular case or examine the need for interim measures.<sup>13</sup>

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<sup>11</sup> Already at the time of the 2009 Report on the Functioning of Regulation 1/2003, Estonia, France and Spain had departed from such a system, see the 2009 Report on Regulation 1/2003 – Staff Working Paper, paragraph 192. In the meantime, Belgium, Luxemburg and Malta have also changed their set-up and opted for a single administrative authority.

<sup>12</sup> See further the ECN Decision-Making Powers Report, see the Internet (<http://ec.europa.eu/competition/ecn/documents.html>). However, in at least one Member State, the NCA is not the body defending its decisions imposing fines when they are appealed.

<sup>13</sup> In a number of Member States a specific form of government intervention exists in merger cases. It usually means that the government or competent minister may intervene on public interest grounds after the NCA has analysed the merger's impact on consumers and businesses. In one Member State, the Prime Minister may declare a merger to be of state interest and, as a consequence, exempt from competition scrutiny by the NCA.

15. The vast majority of NCAs also enjoy operational, organisational and financial independence. Operational independence is foreseen for most NCAs in carrying out their duties, for example, by explicitly excluding interference by, or instructions from, other state bodies or other persons when investigating and deciding on individual competition cases. The large majority of NCAs also decide on their internal organisation and they have a separate budget allocation in the overall state budget for which they have budgetary autonomy to spend. However, while most NCAs have a separate budget line, a few NCAs generate their own income. Only the Italian NCA is exclusively funded through its own income consisting of a mandatory contribution levied on companies with an annual turnover above 50 million EUR. The contribution is equal to 0.08 per thousand of the turnover of such companies and it cannot exceed 100 times the minimum contribution equal to 4,000 EUR. The Greek NCA receives a 1‰ contributory fee on the initial share capital of a corporation or the amount of any share capital increase thereof. This contribution comes on top of its allocation from the state budget. This is also the case for the few other NCAs which have additional own income from charging merger notification fees or administrative fees in the framework of access to file or from miscellaneous non-core activities.
16. Almost all NCAs employ their own staff, mostly under the general civil service rules. However, the NCAs' staff in two Member States is formally employed by another state body and put at the NCAs' disposal. Logically, the vast majority of NCAs are responsible for the selection and recruitment of their staff.
17. The body appointing the top management or board members of the NCA differs between the Member States. Formal appointment is most often the responsibility of the executive branch and is almost equally divided among the government, the competent minister, the President/Head of State or, exceptionally, the Prime Minister. In a few Member States, the top management or board members of the NCA are appointed by parliament or, exceptionally, by a general body in charge of public service appointments. Appointments of the top management or members of the board are for the large majority of NCAs based on specific criteria in the competition law or the general civil service framework but with differing level of detail. In a minority of Member States, there are no criteria laid down for the appointment of the top management or members of the board of the NCA.
18. The mandate of the top management or members of the board varies from a fixed term of three years up to, exceptionally, an indefinite term with in between fixed periods of four, five, six and seven years. Moreover, in case of a fixed term, in the majority of Member States their mandate is renewable either once or without limitations. In most jurisdictions, the NCAs' top management or board members are appointed for a renewable period of five years. In two Member States their mandate is limited to one term of six or seven years respectively.
19. Specific rules on conflicts of interests and/or incompatibilities exist for the NCAs' top management or board members of a large majority of NCAs. One NCA adopted its own code of conduct on conflicts of interests based on its general power to organize its own structure. In some Member States, the top management or members of the board are subject to conflicts of interests requirements contained in the general civil service rules or anti-corruption legislation. Such rules may involve different types of obligations. Examples include a general duty of information regarding their interests,

abstaining from matters involving such interests and general or specific incompatibilities with other activities in the public sector, such as exercising an elected public mandate, and/or the private sector, mainly in terms of conducting business activities or participating in a management or supervisory board. Exceptions may apply, for example, for educational or scientific activities.

20. Finally, the legal framework of the large majority of NCAs contains specific rules on the early dismissal of the top management or members of the board either in the competition law or, in a few jurisdictions, in the applicable general civil service rules. Common grounds for early dismissal include the impossibility to perform their duties, conflicts of interests, disregarding professional secrecy, disciplinary sanctions, criminal conviction and personal reasons. Such specific rules on early dismissal do not exist in two Member States so that the prime minister or government, respectively, can dismiss the top management of the NCA without any limitation. Early dismissal is not foreseen in two Member States and in another Member State the top management of the NCA, which has the status of federal civil servants, cannot be dismissed but only be relocated to another comparable position in the federal administration.
21. The attribution of sufficient staff and budget to NCAs is a fundamental precondition for each authority to be able to effectively enforce the EU competition rules. In terms of financial and human resources, significant differences exist among NCAs. Particularly the competition authorities in the smaller Member States suffer from limited financial resources or very low staff numbers. However, these NCAs also need to have the same basic equipment, both in terms of facilities and a minimum level of core personnel, as NCAs in larger Member States in order to be able to effectively enforce the competition rules.
22. Moreover, in the current budgetary and economic context, reforms of the competition enforcement framework in the Member States may impact on financial and human resources. Member States are responsible for ensuring that their competition authorities are adequately equipped for their duties and able to act under suitable conditions for the execution of their tasks. In 2010, an ECN Resolution called upon them to continue guaranteeing effective competition enforcement including in times of budgetary constraints.<sup>14</sup>

### **2.3 Portfolios of NCAs: Combining competition enforcement and other functions**

23. Developments can be observed in relation to the overall portfolio of NCAs. While certain NCAs have for a long time combined competition enforcement and other functions (e.g. the Italian and the Polish NCAs with competition and consumers protection functions), there appears to be a recent dynamic in this area. Over the past years competition enforcement and consumer protection functions have become integrated in one single authority in Denmark, Finland and Malta and such changes are

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<sup>14</sup> Resolution of the meeting of Heads of European competition authorities of 16 November 2010 on Competition authorities in the European Union – the continued need for effective institutions, see the Internet (<http://ec.europa.eu/competition/ecn/ncas.pdf>).



currently contemplated in Ireland.<sup>15</sup> In the UK, the Office of Fair Trading ("OFT") for many years combined competition supervision with consumer protection functions. However, it shared its competition supervision functions with the Competition Commission and the sectoral regulators. The Competition and Markets Authority ("CMA") has recently been set up, which joins the Competition Commission and the competition functions of the OFT.<sup>16</sup> The CMA also keeps certain consumer functions of the OFT<sup>17</sup> and the sectoral regulators retain concurrent competition powers which include the power to apply the EU competition rules.

24. Moreover, in the Netherlands the energy and transport regulatory functions were already integrated in the competition authority which was recently further merged with the consumer authority as well as with the postal and telecoms regulator. This type of combination between sectoral regulatory functions and competition supervision already exists in Estonia, where the competition authority acts also as the sectoral regulator for the energy, postal, railway, telecoms and water sector. A similar merger has been decided in Spain which brings together the competition authority and six sectoral regulators in charge of airports, energy, postal, railways and telecom sectors into one organisation, the *Comisión Nacional de los Mercados y la Competencia* (CNMC).<sup>18</sup>
25. As a result, in terms of competences, a minority of NCAs remain exclusively responsible for competition enforcement, covering both antitrust and merger control, while the majority of NCAs now have additional competences in various areas including, inter alia, consumer protection, public procurement and the supervision of liberalised sectors such as energy, post, telecommunications and railways.
26. Such merging of authorities is part of a Member State's discretion and is often motivated by a search for synergies and efficiency gains. The Commission has closely followed instances where NCAs were merged with other regulators. Such amalgamation of competences should not lead to a weakening of competition enforcement or of the additional competences granted to the NCAs, or to a reduction in the means assigned to competition supervision.

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<sup>15</sup> Competition Authority Strategy Statement 2012-2014 (pending amalgamation), see the Internet ([http://www.tca.ie/images/uploaded/documents/Strategy%20Statement%202012-2014%20FINAL%20\(signed\).pdf](http://www.tca.ie/images/uploaded/documents/Strategy%20Statement%202012-2014%20FINAL%20(signed).pdf)).

<sup>16</sup> Enterprise and Regulatory Reform Bill, see the Internet (<http://news.bis.gov.uk/Press-Releases/Enterprise-and-Regulatory-Reform-Bill-published-67a68.aspx>).

<sup>17</sup> A greater role has been granted to the local authority Trading Standards Services ("TSS") in the enforcement of consumer protection law at national level. That being said, the CMA, similar to the OFT, retains all of its previous consumer enforcement powers but will tend to use them only where breaches of consumer protection law point to systemic failures in a market.

<sup>18</sup> Law 3/2013 of 4 June 2013.

## 2.4 Comparison with other policy areas

27. EU legislation in related policy areas, such as telecommunications,<sup>19</sup> energy<sup>20</sup> and railways,<sup>21</sup> contains a number of requirements regarding the national supervisory authorities. This includes, in the first place, an explicit requirement for the Member States to guarantee the independence of the authority and to ensure that it exercises its powers impartially and transparently. In addition, the staff of these authorities are explicitly precluded from seeking or taking instructions from any other body when carrying out their tasks and the top management or board members may only be dismissed if they no longer fulfil the conditions required for the performance of their duties (or have been found guilty of misconduct).
28. Moreover, the respective directives oblige the Member States to grant the authority a separate annual budget or separate annual budget allocations, with autonomy in the implementation thereof, and to allocate adequate financial and human resources to carry out its duties, which may include active cooperation at EU level.
29. A more general independence requirement applies in the area of data protection where the EU legal framework explicitly provides that the national supervisory authorities "shall act with complete independence in exercising the functions entrusted to them".<sup>22</sup> Recent case-law of the Court of Justice indicates that such an independence guarantee is intended to ensure the effectiveness and reliability of the supervision of compliance with data protection rules. It precludes not only any influence exercised by the supervised bodies but also any directions or any other external influence, whether direct or indirect, including by the State.<sup>23</sup> The authority should therefore fall outside the classic hierarchical administration and be independent of the government. However, this does not exclude all accountability by the authority to other bodies. For example, certain parliamentary control over such authorities remains possible.<sup>24</sup>

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<sup>19</sup> See Article 3 of Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 2002, L 108, 33 as amended by Directive 2009/140 of the European and of the Council of 25 November 2009, OJ 2009, L 337, 37.

<sup>20</sup> See Article 35 of Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54, OJ 2009, L 211, 55.

<sup>21</sup> See Article 55 of Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ 2012, L343, 32.

<sup>22</sup> Article 28 of Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281, 31. See also Article 43 of Regulation No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001, L 8, 1 and Article 8(3) of the Charter of Fundamental Rights of the European Union which provides that compliance with the rules on personal data protection set out in Article 8(1) and (2) shall be subject to control by an independent authority.

<sup>23</sup> Case C-518/07 *Commission v. Germany* [2010] ECR I-1885.

<sup>24</sup> Such parliamentary control may be exercised, for example, through the definition of their powers, the appointment of the management of these authorities and by obliging it to report its activities to the parliament.

30. In *Commission v. Austria*, the Court has added that operational independence,<sup>25</sup> although an essential condition, is not sufficient to ensure complete independence.<sup>26</sup> It requires that the head of the authority maintains no service-related link with or is not supervised by the government to avoid any suspicion of partiality. An organisational overlap between the supervisory authority and the government is incompatible with the requirement of independence as it prevents the former from being above all suspicion of partiality. The same applies where the (head of) government has a right to be informed at all times by the top management or board of the supervisory authority of all aspects of its work. Such an unconditional and broad right to information is also liable to subject it to direct influence. The attribution of the necessary equipment and staff must also not prevent them from acting with complete independence. This is not the case if the staff consists of officials who are subject to supervision by the government.
31. In a recent judgment regarding the independence of the Hungarian data protection authority the Court again emphasised that "the mere risk that the State scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks".<sup>27</sup> In particular, the Court noted that the threat of early dismissal of the head of the authority could have such a negative effect. Therefore, the independence requirement includes the need for the head of the authority to be able to serve its full term and premature termination should only be imposed in accordance with the rules and safeguards, in the sense of overriding and objectively verifiable reasons, foreseen in the applicable legal framework. As the underlying case involved a restructuring or changing of the institutional model of an existing authority, the Court emphasised that this does not qualify as an objective justification. While Member States are free to choose the appropriate institutional model and alter it, this should not affect its independence and, in particular, the guarantee that the head of the authority can serve his/her full term. Recent legislative proposals in the field of data protection consolidate the case law of the Court of Justice on independence and add more specific requirements.<sup>28</sup>
32. Where competition enforcement and sectoral regulatory functions are integrated in a single authority, the question arises whether such integrated authority has to comply with the most stringent requirements for all its functions and, thus, whether its competition enforcement function could benefit from a spill over effect of the sectoral requirements. The recent liberalisation directive for the railway sector addresses this

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<sup>25</sup> Operational independence means that the members of the authority are independent and are not bound by instructions of any kind in the performance of their duties.

<sup>26</sup> Judgment of 16 October 2012 in Case C-614/10, *Commission v. Austria*.

<sup>27</sup> Judgment of 8 April 2014 in Case C-288/12, *Commission v. Hungary*.

<sup>28</sup> Articles 47 to 49 of the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final of 25.1.2012, and Articles 40 to 42 of the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final of 25.1.2012.

scenario and explicitly confirms such extended application in requiring that the integrated authority fulfils the sector specific independence requirements.

## **2.5 Strengthening position of NCAs in Programme Countries and in the framework of the European Semester**

33. In the absence of any explicit requirements concerning NCAs in Regulation 1/2003 or, in the case of an integrated authority, any extended application of sector specific requirements, there are no EU law provisions which explicitly oblige Member States to ensure the independence of the NCAs and to require the grant of sufficient resources. Nonetheless, the competition enforcement regimes in several Member States have been strengthened in the framework of the Memorandum of Understanding of Specific Economic Policy Conditionality (“MoU”) with the Member States benefiting from a financial-assistance programme (the so-called “Programme countries”) or following country specific recommendations in the framework of the European Semester.
34. For example, the MoU with Greece addressed the issue of enhancing the independence and continuity of the NCA.<sup>29</sup> In this context, the new competition law provides for the appointment of both its President and Vice-President by parliament and the decoupling of their mandates from the electoral cycle. Furthermore, the competition authority in Ireland was hindered in its task of effectively enforcing the competition rules due to a strong reduction in its resources. Therefore, the MoU with Ireland specified that the effective functioning of the Irish competition authority must be ensured which eventually led to the partial restoration of the pre-crisis staffing level.<sup>30</sup> Similarly, the MoU with Portugal provided that sufficient and stable resources should be allocated to the NCA.<sup>31</sup> The MoU with Portugal also led to the adoption of a framework law on national regulatory authorities which provides for general principles on the structure, functioning and financing of administrative authorities in Portugal, including the NCA.<sup>32</sup>
35. The institutional position of NCAs has also been addressed in the context of the European Semester with the aim of ensuring effective competition enforcement in all Member States as they contribute to fostering competition as a growth-enhancing policy.<sup>33</sup> Over the past couple of years, priority has been given to clear-cut shortcomings in the position of the NCA and the degree of independence. This has contributed to the reform process in those Member States where the NCA was still (partly) incorporated in a ministry as this could raise doubts regarding its independence from the State. Both Belgium and Slovenia have now established an independent administrative authority separate from the ministry.

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<sup>29</sup> See the Internet

([http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm)).

<sup>30</sup> See the Internet ([http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/ireland/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm)).

<sup>31</sup> See the Internet ([http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/portugal/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm)).

<sup>32</sup> This has still to be implemented through the adoption of by-laws.

<sup>33</sup> See the Internet ([http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)).

36. In addition, the need for equipping competition authorities with adequate resources has been emphasised as this may affect the NCA's ability to expand its enforcement actions and to lend institutional weight to competition-increasing reform efforts. This was the case for Austria, Belgium, Latvia, Luxemburg, Malta and Slovenia, where the NCAs suffer from low staffing levels or limited financial resources compared to other NCAs. Notwithstanding these difficulties, the NCAs in these Member States have contributed to the increased enforcement of the EU competition rules.
37. The establishment of the new CNMC in Spain, merging the Spanish NCA with six sectoral regulators, has also been subject to close monitoring in the context of the European Semester, inter alia regarding its independence, financial and human resources and the division of functions between the regulator and the competent ministries. In relying on the EU legal framework for sectoral supervisory authorities, Spain was called upon to ensure the effectiveness, autonomy and independence of the newly created authority.
38. While these initiatives have been broadly successful and it is clear that the European Semester can make a useful contribution to enhancing the position of NCAs, they are Member State specific and recommendatory in nature.

## **2.6 Evaluation**

39. The position of the NCAs has evolved in the direction of more autonomy and effectiveness and many national laws already contain specific safeguards to ensure the independence and impartiality of NCAs. Such guarantees emphasize their importance for effective competition enforcement, strengthen the NCAs' position vis-à-vis the Member States and very importantly strengthen the legitimacy of their action vis-à-vis stakeholders, including national parliaments and citizens. However, there are no explicit requirements in EU law to ensure: (1) minimum guarantees of independence so that NCAs are able to execute their tasks in an impartial and independent manner; and (2) the effective and sustained operation of NCAs by means of sufficient human and financial resources.
40. As set out in the Communication, it is necessary to ensure that NCAs can execute their tasks in an impartial and independent manner. For this purpose, minimum guarantees are needed to ensure the independence of NCAs and their management or board members and to have NCAs endowed with sufficient human and financial resources. Important aspects in this respect are the grant of a separate budget with budgetary autonomy for NCAs, clear and transparent appointment procedures for the NCA's management or board members on the basis of merit, guarantees ensuring that dismissals can only take place on objective grounds unrelated to the decision-making of the NCA and rules on conflicts of interest and incompatibilities for the NCA's management or board.

## **3 CONVERGENCE OF PROCEDURES**

### **3.1 Overview**

41. Under Regulation 1/2003, NCAs and national courts have an obligation to apply the EU competition rules to agreements and practices that are capable of affecting trade between Member States. The same substantive rules, i.e. Articles 101 and 102 TFEU,

are applicable to agreements, decisions of associations of undertakings, concerted practices and conduct which is prohibited by Article 102 TFEU.<sup>34</sup> The ECN cooperation tools are regularly used to ensure the coherent application of the common rules.<sup>35</sup>

42. The application of the EU competition rules by a multitude of enforcers throughout the EU is one of the major successes of Regulation 1/2003. Stakeholders from the legal and business communities have largely confirmed that Regulation 1/2003 has positively contributed to the creation of a level playing field.
43. However, the situation is more complex in relation to procedures and sanctions for the application of the EU competition rules in the Member States, as they are not harmonised by Regulation 1/2003. They are only subject to general principles of EU law, in particular, the principles of effectiveness and equivalence, as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable. This means that the procedures and sanctions used by the NCAs to apply Articles 101 and 102 TFEU are largely governed by national law. Accordingly, Member States apply the same substantive rules according to divergent procedures and they may impose a variety of sanctions.
44. The 2009 Report on Regulation 1/2003 found that despite the significant degree of voluntary convergence of Member States' laws with the system set out for the Commission in Regulation 1/2003, divergences in Member States' enforcement systems remain on important aspects. It concluded that this aspect may merit further examination and reflection. There are recurring calls by stakeholders to enhance convergence in the ECN on procedures and sanctions.
45. Currently many basic elements of investigation and decision-making powers and procedures, which are the main working tools of competition authorities, are present in the vast majority of jurisdictions. However, divergence subsists for some fundamental questions, e.g. whether competition authorities have the power to set priorities or to inspect non-business premises. This results in a dispersed picture where NCAs have strong and convergent powers in some fields but are non-convergent in others.
46. There are also differences in the rules governing the procedural steps, which can significantly affect the scope of investigative and decision-making powers, e.g. powers to inspect, to request information or to take commitment decisions. For example, some NCAs when adopting a prohibition decision cannot impose behavioural or structural remedies. Differences also exist with regard to the procedural rights of parties under investigation, e.g. different scope of the privilege against self-incrimination for undertakings, and the enforcement measures and sanctions related to non-compliance with decisions, e.g. some NCAs do not have the power to impose fines directly in case of non-compliance with a commitment decision. Difficulties also persist with regard to

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<sup>34</sup> For unilateral conduct, stricter national laws are still permissible pursuant to Article 3(2) of Regulation 1/2003.

<sup>35</sup> See the Staff Working Document on Ten Years of Antitrust Enforcement under Regulation 1/2003, section IV.

the notification by NCAs of administrative acts in other Member States, as well as the enforcement of NCA decisions imposing fines across the territory of the EU.

47. Such divergence means that while some NCAs are better equipped than others, the vast majority of authorities do not have a complete set of powers at their disposal which are comprehensive in scope and are effective.

### **3.2 Convergence by 'soft tools' – achievements and limitations**

48. Voluntary convergence can be achieved if Member States decide to align their procedures and/or sanctions with a common EU model, despite the absence of harmonisation by legislation. Indeed, many Member States have voluntarily aligned their procedures for the enforcement of competition law to a greater or lesser extent with those set out for the Commission in Regulation 1/2003.
49. Procedural convergence has been enhanced in the context of agreements on financial support from the EU with the Programme Countries. In Greece, a new comprehensive competition law was adopted, which, inter alia, empowered the Greek NCA to reject complaints and set priorities and thereby address its backlog of cases. In Portugal, a new competition law was adopted which provides for major improvements, including the introduction of priority setting and more effective investigatory powers for the NCA. In Ireland, changes to the competition law made against the backdrop of the MoU mean that binding commitment decisions can now be reached, with penalties available for failure to comply (as opposed to the mere possibility of reaching informal non-binding settlements, as was hitherto the case).
50. Other reforms have been spurred by recommendations in the framework of the European Semester. For example, in Austria, the powers of the NCA were enhanced, including in particular the right to search and seal companies' premises, to issue requests for information and to sanction non- or misinformation in response to such requests.
51. Outside the European Semester framework, bilateral contacts have been used to foster convergence, often prompted by requests from NCAs for informal reactions to policy measures under preparation. Examples include consultations from NCAs on draft leniency programmes.
52. Importantly, multilateral work within the ECN has been a major catalyst in encouraging Member States and/or NCAs to ensure greater convergence. This has resulted in the production of comparative reports as well as policy and guidance documents aimed at enhancing convergence in the areas of procedures, leniency and fines, as is explained further below.
53. However, there are limits to what can be achieved by voluntary convergence and 'soft tools' developed in the ECN, as well as the means to foster convergence in the context of cross-cutting EU programmes. Where procedural differences are rooted in national legal traditions, national fundamental right standards or other general principles, it may be difficult to achieve convergence with a common standard through the use of 'soft tools', including in the context of economic adjustment programmes. For example, in Ireland, the NCA does not have the ability to seek the imposition of civil/administrative fines for the breach of either EU or national competition rules. It can do so solely in criminal proceedings, involving trial by jury which in practice

means that prosecutions are only brought against hard-core cartels. In view of avoiding any situation of under-enforcement of the competition rules in Ireland, a provision in the MoU with Ireland tried to address this issue. However, it appears that the power to impose civil/administrative sanctions will only be introduced if this would be made mandatory through EU legislation.

54. The fact that virtually all NCAs do not have a complete set of powers at their disposal which are comprehensive in scope and are effective, impinges on their ability to effectively apply the EU competition rules. It also results in costs for undertakings operating cross-border as they have to acquaint themselves with the different procedural rules which apply in different Member States. Divergences in procedures also reduce predictability for such businesses. Another issue of concern is that the level of convergence achieved to date remains fragile, as changes in national laws or practices could result in the roll-back of improvements which have been made at any time.

### **3.3 Investigative and decision-making procedures**

55. By way of follow up to the 2009 Report on Regulation 1/2003, the ECN made a detailed inventory of the investigation and decision-making procedures for competition enforcement which exist in the Member States. The Reports, which were published in November 2012, provided a clear overview of the status quo in the ECN for the first time.<sup>36</sup>
56. In view of the divergences identified in these Reports, work was launched in the ECN to promote voluntary convergence through the joint production of a set of ECN Recommendations. A set of seven ECN Recommendations on key enforcement powers were endorsed in 2013.<sup>37</sup> These Recommendations are intended to serve as a 'soft' framework of reference which competition authorities can use as an advocacy tool vis-à-vis policymakers, and thereby help ensure that all authorities are equipped with a complete and effective competition toolkit. While these soft tools cannot overcome constitutional impediments, obstacles flowing from national legal traditions or from national case law, the Recommendations show that there is a considerable degree of consensus within the ECN on the procedural tools which authorities must have to be able to effectively apply competition law.

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<sup>36</sup> See the two ECN Reports on Investigative and Decision-Making Powers, see the Internet (<http://ec.europa.eu/competition/ecn/documents.html>).

<sup>37</sup> See the Internet (<http://ec.europa.eu/competition/ecn/documents.html#powers>). The ECN endorsed Recommendations on:

- Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information,
- The Power to Collect Digital Evidence, including by Forensic Means,
- Assistance in Inspections conducted under Articles 22(1) of Regulation (EC) No 1/2003
- The Power to set Priorities
- Interim Measures
- Commitment Procedures
- The Power to Impose Structural Remedies



57. Work in the ECN has focussed on key aspects of competition proceedings from their initiation to the decision making and enforcement phase.
58. Two main strands are important in this regard: (1) ensuring that NCAs have all necessary powers at their disposal, e.g. some NCAs cannot inspect non-business premises or adopt commitment decisions; and (2) ensuring that these powers are comprehensive and effective, e.g. although the majority of NCAs have the power to carry out inspections, some NCAs do not have the power to seal premises, to effectively gather digital evidence and/or to inspect non-suspected undertakings etc. Similarly, some NCAs have powers that cannot be effectively enforced, e.g. they cannot effectively sanction non-compliance with a commitment decision or a decision ordering interim measures or they are unable to enforce their powers to inspect, e.g. they cannot request the assistance of the police if an undertaking refuses to submit to an inspection or otherwise swiftly and effectively overcome opposition.
59. The following aspects have been identified within the ECN as forming key components of the toolbox that authorities should have at their disposal:
  - a. Priority setting: there is a need for further convergence on the ability of the authorities to set priorities in the exercise of their tasks and maximise administrative efficiency when choosing which cases to pursue. Progress has been made in this regard in Greece and Portugal, where the NCAs are now able to set their priorities and to reject complaints without the need for a detailed investigation on substance. However, some NCAs still have a legal duty to consider all complaints and requests for interim measures received. The ECN Recommendation on the power to set priorities advocates for authorities to have greater flexibility to choose which cases to investigate.
  - a. The basic set of effective investigation tools: namely (1) the power to inspect business premises, (2) the power to inspect non-business premises and (3) the power to issue requests for information. Here, there is generally a common basis, although some authorities lack essential powers, e.g. to inspect non-business premises or to issue binding and enforceable requests for information. A number of authorities also do not have the right to carry out interviews.

Some authorities have limited investigative powers, for example, they lack the power to seal premises. The power to effectively collect digital evidence is increasingly important in carrying out inspections. A number of authorities face limitations in this regard. For instance, some authorities cannot gather digital data stored on mobile phones or cannot take forensic images or face other limitations depending on where and how data is stored, e.g. when information is accessible for the undertaking from the inspected premises, but the storage media is claimed to be physically located outside the territory of the authority.

Some authorities do not have the means to effectively enforce their powers to inspect and overcome opposition (e.g. by calling on the assistance of the police) or their investigation powers are not backed up by sanctions or only by sanctions set at a very low level or they lack the means to compel compliance e.g. periodic penalty payments.

- b. Core decision-making powers: there are a number of decision-making powers which a competition authority must have:
- i. The power to adopt prohibition decisions, which includes the possibility to impose behavioural or structural remedies. The power to impose such remedies can be an important tool to bring infringements to an end, prevent their recurrence and restore competition in the market. Some authorities do not have the (explicit) power to impose behavioural or structural remedies.
  - ii. The ability to adopt commitment decisions. While the majority of authorities have the power to adopt commitment decision, they do so according to a large variety of procedures. It is important that the advantages of commitment decisions, i.e. securing swift changes to the market and procedural economies can be fully realised in all jurisdictions. This is particularly important in light of the increasingly significant role played by commitment decisions in the ECN (around 25% of envisaged decisions submitted to the Commission pursuant to Article 11(4) of Regulation 1/2003).
  - iii. The ability to adopt interim measures is an important tool for competition authorities to ensure that during an investigation no irreparable harm to competition is caused which cannot be remedied by a decision taken at the conclusion of the proceedings. Not all authorities have an explicit legal basis to adopt interim measures. Moreover, interim measures are currently not adopted according to a common minimum substantive standard.
  - iv. The ability to enforce decisions of all the types listed above and to compel compliance therewith. A number of authorities do not have effective sanctions at their disposal to sanction non-compliance with decisions, which can significantly impinge on their effectiveness, e.g. undertakings may easily enter into commitments which cannot be enforced and therefore no market change ensues. Other instruments for ensuring compliance are also lacking in some jurisdictions, e.g. the power to monitor compliance by means such as the appointment of a trustee.

### **3.4 Evaluation**

60. In conclusion, despite the absence of explicit requirements in EU law for the procedures used by NCAs when applying the EU competition rules, voluntary convergence with the procedures set out for the Commission in Regulation 1/2003 has occurred in virtually all jurisdictions. However, the degree of convergence on procedures differs and divergence subsists even for some fundamental powers. This means that while some NCAs are better equipped than others, the vast majority do not have a complete set of powers at their disposal to apply Articles 101 and 102 TFEU, which are comprehensive in scope and are effective in all respects. This impinges on the ability of NCAs to effectively apply the EU competition rules. Soft tools developed within the ECN are helpful in facilitating further convergence, but not where divergences are rooted in constitutional rules or national legal traditions. Undertakings operating cross-border incur costs in terms of acquainting themselves with the different procedural rules which apply in different jurisdictions. Divergences

in procedures also reduce predictability for such businesses. Another issue of concern is that achievements made to date are fragile as there is nothing to prevent changes in national laws or practices that weaken the powers of the NCAs.

61. As set out in the Communication, it is necessary to ensure that all NCAs have a complete set of powers at their disposal, which are comprehensive in scope and are effective. Important elements are the core investigative powers, the right of NCAs to set enforcement priorities, key decision-making powers and the necessary enforcement and fining powers to compel compliance with investigative and decision-making powers.

## **4 CONVERGENCE IN THE AREA OF SANCTIONS**

### **4.1 Fines**

#### **4.1.1 Need for effective fines**

62. Fines on undertakings are a central tool in the enforcement of the EU competition rules for both the Commission and NCAs. The purpose of fines is to punish undertakings which have infringed competition rules and also to deter the same and other undertakings from engaging in or continuing illegal behaviour. At present, EU law does not regulate or harmonise sanctions imposed by NCAs for breach of the EU competition rules. It is for the Member States to ensure that they provide for sanctions which are effective, proportionate and dissuasive.<sup>38</sup>
63. NCAs are generally equipped with powers to impose sanctions on undertakings and associations of undertakings. In 2008, the European Competition Authorities endorsed "Principles for Convergence".<sup>39</sup> Those principles, together with the Commission's 2006 Fines Guidelines, have inspired the design of the guidelines of a number of NCAs relating to the setting of administrative pecuniary sanctions on undertakings.<sup>40</sup>
64. In 2009, the Court of Justice ruled that the effectiveness of the penalties imposed by the national or EU competition authorities is a condition for the coherent application of EU competition rules.<sup>41</sup> More recently, the Court has clarified that a competition

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<sup>38</sup> Case 68/88, *Commission v Greece*, [1989] ECR 2965, paragraphs 23 - 25.

<sup>39</sup> Pecuniary sanctions imposed on undertakings for infringements of antitrust law: principles for convergence, ECA (European Competition Authorities) document published in May 2008, see the Internet ([http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA\\_principles\\_for\\_convergence.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_principles_for_convergence.pdf); [http://www.autoritedelaconurrence.fr/doc/eca\\_principles\\_uk.pdf](http://www.autoritedelaconurrence.fr/doc/eca_principles_uk.pdf)).

<sup>40</sup> See for instance, concerning sanctions imposed by the French NCA: see the Internet ([http://www.autoritedelaconurrence.fr/doc/communiqué\\_sanctions\\_concurrence\\_16mai2011\\_fr.pdf](http://www.autoritedelaconurrence.fr/doc/communiqué_sanctions_concurrence_16mai2011_fr.pdf)), for sanctions imposed by the UK NCA: see the Internet ([http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft423.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf)) and for sanctions imposed by the Spanish NCA see the Internet (<http://www.cnmc.es/Portals/0/Ficheros/cnmc/normativa/COMUNICACION%20DE%20LA%20COMISION%20NACIONAL%20DE%20LA%20COMPETENCIA%20SOBRE%20LA%20CUANTIFICACION%20DE%20LAS%20SANCIONES%5B1%5D.pdf>).

<sup>41</sup> Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECR I-04833, in particular, paragraph 37.

authority's decision not to impose a fine for an intentional or negligent infringement of the EU competition rules could only exceptionally be justified provided that it does not undermine the requirement of effective and uniform application of Article 101 TFEU.<sup>42</sup> This can be the case where the principle of the protection of legitimate expectations applies, or where the undertaking concerned has participated in a leniency programme.

65. The need for sufficiently deterrent fines across the EU has also been emphasised by the Commission in the context of the European Semester vis-à-vis Member States which did not provide for effective fines. As a result, in 2013 Denmark significantly increased the fines that can be imposed on both undertakings and natural persons.<sup>43</sup> Finland has commissioned a survey looking into the possibility of introducing personal criminal responsibility for forbidden cartels in addition to the current administrative system.
66. Whatever the mix of sanctions available in a Member State, it is generally recognized that there can be no effective public enforcement in the antitrust field without deterrent civil/administrative sanctions on undertakings.<sup>44</sup> This is confirmed by experience in Ireland where currently a purely criminal system of antitrust sanctions is in force and the competition authority does not have the ability to seek the imposition of civil/administrative fines for the breach of either the EU or national competition rules.
67. In a small number of Member States, the imposition of fines on undertakings is conditional on finding liability of natural persons, which complicates the enforcement of the EU competition rules.

#### **4.1.2 Convergence in the area of fines**

68. Sustained attention to the need to provide for effective fines for infringements of the EU competition rules, has led to a high level of voluntary convergence in the manner fines are being determined in the Member States, with a large majority of authorities operating a similar basic methodology for determining the amount of the fines.
69. The vast majority of NCAs use a basic amount method, whereby most of them draw on a base consisting of the undertaking's relevant value of sales which is further modulated to take into account the gravity and the duration of the infringement. Almost all NCAs also take into consideration both aggravating and mitigating circumstances.

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<sup>42</sup> Judgment of 18 June 2013 in [Case C-681/11 \*Schenker & Co\*](#), paragraphs 36, 40/41, 46 and 50.

<sup>43</sup> Denmark groups infringements into the following categories: (i) less serious, (ii) serious and (iii) very serious. For the first group (less serious), the legislative amendment results in a ten-fold increase in possible fines for undertakings. For so-called serious infringements, the increase in the amount of fines on undertakings is also ten-fold. For very serious infringements the lowest possible fine has been increased by 33 per cent. In addition, the amendment substantially increased possible fines on natural persons and foresees prison terms of up to 18 months for participation in secret cartels. When specific aggravating circumstances are present, a natural person could be imprisoned for up to six years.

<sup>44</sup> In the vast majority of EU Member States pecuniary sanctions on undertakings in the context of public enforcement of the EU competition rules fall outside the scope of classical criminal law; fines and the procedures leading to their imposition may be qualified as civil, administrative, misdemeanour, or similar depending on the categories of national laws.

70. A majority of the NCAs may also increase the fine to ensure a sufficient deterrent effect on the basis of a specific criterion independent from the assessment of gravity of the infringement or that of aggravating circumstances. Most of them base their assessment on the economic strength of the group to which the infringer belongs. Lastly, fines in almost all jurisdictions are subject to a legal maximum of ten percent of the turnover in a given year which applies as a “cap” to limit the fine imposed.<sup>45</sup>
71. Nevertheless, significant divergences still exist with regard to specific steps in the fines calculation, such as the base used for calculating the basic amount of the fine, the method for taking into account gravity and duration and the interpretation and level of the maximum amount of the fine, which may all have an impact on the actual amount of fines imposed.
72. Amongst the NCAs that use a basic amount to calculate the fine, some base their calculation on the undertaking’s total turnover instead of the value of sales. This also affects the actual percentage ranges applied to reflect the gravity of the infringement where substantially lower percentages are used by NCAs relying on total turnover while the maximum percentage (ranges) also vary to some extent for those competition authorities using the value of sales.
73. A similar divergence can be observed with regard to duration where different methods are used by the NCAs. For instance, some NCAs apply a 100% uplift for each year of infringement or an increase by a specified band depending on the number of years of infringement.<sup>46</sup> Another example of factoring in duration involves relying on a base which comprises the total sales or turnover achieved during the period of infringement. A large number of Member States identify a limited number of aggravating and mitigating circumstances but usually the list is not exhaustive.
74. Furthermore, some NCAs still lack the power to impose fines on associations of undertakings. Among the competition authorities who may fine associations of undertakings, there is an even split between those that only consider the association’s turnover (or fees received) and those that may consider its members’ turnover as well where the activity of the association is conducted on behalf of or to the benefit of the members which pursue an economic activity. Divergences in terms of prescription periods are also to be found.
75. The legal maximum of ten percent is in a number of Member States regarded not as a cap but as an 'upper frame' which is only relevant for the most serious infringements, so that fines for less serious infringements are set at a lower level. This approach has recently been confirmed by the German Federal Supreme Court regarding the German legal basis for fines which is very similar to the legal basis for the Commission’s fines in Article 23 of Regulation 1/2003. In its judgment the German court explicitly

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<sup>45</sup> On 11 February 2014, the Dutch Minister of Economic Affairs announced his intention to introduce draft legislation to amend the rules on fines in two ways. Firstly, the legal maximum for cartel fines would be raised from the current ten percent of the undertaking’s worldwide turnover in the preceding business year to ten percent of the undertaking’s turnover achieved during the cartel infringement, subject to a maximum duration of four years. Secondly, the level of the legal maximum would be doubled in case of recidivism.

<sup>46</sup> For example, increasing the base by up to 50% when the infringement lasts between one and five years and by up to ten percent for each additional year.

rejected the notion of the ten percent legal maximum as a cap and instead interprets it as the upper end of a frame in which the individual fine has to be calculated and where the upper end is only relevant for the most serious infringements. This judgment has led the German NCA to suspend the application of its fining guidelines which were similar to those of the Commission. In addition, the turnover used to determine the legal maximum may vary between the Member States, where most rely on the worldwide turnover and some on the national turnover (sometimes including export sales) or the total turnover in the affected market.

76. Finally, a coherent interpretation of the concept of undertaking is crucial for the consistent application of the EU competition rules. Fundamental issues concerning the potential addressees of a fining decision and liability issues pose problems in a number of jurisdictions. The basic concept of undertaking relied on by NCAs which is relevant for establishing parental liability and economic succession, is not always entirely convergent with the notion of undertaking as is contained in Articles 101 and 102 TFEU and interpreted by the EU Courts. While in many Member States the possibility exists for the competition authority to apply the EU competition rules to undertakings as a whole, including entities directly involved in the infringement as well as parent companies that exercised decisive influence over them, in line with the case law of the EU Courts and the decisional practice of the Commission, some NCAs are not in a position to apply this notion of parental liability, including the presumption of exercise of decisive influence.<sup>47</sup> In addition, while legal succession is generally recognised for determining the addressees of fines decisions, economic succession is much less generally accepted.

#### **4.1.3 Evaluation**

77. As set out in the Communication, in order to make enforcement of the EU antitrust rules more convergent and effective throughout the EU, it is necessary to ensure that all NCAs have effective powers to impose deterrent fines on undertakings and on associations of undertakings. Important aspects in this regard are ensuring that NCAs can impose effective civil/administrative fines on undertakings and associations of undertakings for breaches of the EU competition rules; ensuring that basic fining rules are in place taking into account gravity and duration of the infringement and foreseeing a uniform legal maximum; and ensuring that fines can be imposed on undertakings, in line with the constant case law of the EU courts, in particular, on issues such as parental liability and succession. Any measures taken to this end would need to find the right balance between increased convergence of the basic rules for fines and an appropriate degree of flexibility for NCAs when imposing fines in individual cases.

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<sup>47</sup> Case C-97/08 P *AkzoNobel NV and others v Commission* [2009] ECR I-8237.

## 4.2 Leniency

### 4.2.1 Convergence in the leniency area: a long-standing priority of the ECN

78. The entry into application of Regulation 1/2003 coincided with, and contributed to, a general stepping up of enforcement against secret cartels.<sup>48</sup> By 2004, leniency programmes were increasingly recognised as an important tool to detect secret cartels.<sup>49</sup> At the same time, the creation of the ECN enhanced information-sharing among enforcers in the EU and the possibility to re-allocate cases to another well-placed authority within the Network was introduced, including the possible re-allocation of cases from the Commission to one or several NCAs.
79. Against this background, potential leniency applicants are encouraged to seek leniency coverage from all authorities in the ECN that may be competent and well-placed to act on a given case. As a leniency application to one authority cannot be considered as an application to any other authority, this means in practice that leniency applicants need to file for leniency separately with each authority that may be well-placed to act.<sup>50</sup>
80. Stakeholder concerns related to the need for such multiple applications have been addressed by the ECN Model Leniency Programme (“MLP”).<sup>51</sup> The MLP was created to further increase the effectiveness of leniency programmes; it provides the Member States / the NCAs with a cohesive model of rules and procedures. As a result, virtually all Member States have introduced leniency programmes<sup>52</sup> and a significant process of alignment with the MLP has taken place, even though certain divergences remain.<sup>53</sup> All leniency programmes cover at least secret cartels while some go further (e.g. covering certain vertical hard core restraints).
81. Importantly, the MLP undertook to alleviate the burden of multiple filings in cases where the Commission is particularly well placed to deal with a case, i.e. when cartels have effects on competition in more than three Member States.<sup>54</sup> To this end, it introduced the system of summary applications. This allows undertakings that are applying for leniency with the Commission to file simplified applications with NCAs to reserve a place in the leniency queue should the case (or part of it) ultimately be pursued by the NCA e.g. as a result of the Commission not pursuing the case and one or more NCAs taking it up (re-allocation). Summary applications were introduced in

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<sup>48</sup> The Regulation removed the former notification system with a view to enable the Commission to concentrate its resources on curbing the most serious infringements; cf. Recital 3.

<sup>49</sup> Cf. the Network Notice paragraph 37.

<sup>50</sup> Paragraph 38 of the Network Notice. The Notice also introduced certain limitations on the exchange of leniency information between authorities.

<sup>51</sup> The original MLP was endorsed by the heads of authorities in 2006. It was amended in 2012. See the Internet ([http://ec.europa.eu/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/competition/ecn/model_leniency_en.pdf)). By endorsing the MLP, the heads of the ECN authorities have agreed to use their best efforts to align their current and future leniency programmes and practices with the MLP.

<sup>52</sup> Malta is in the process of adopting its first leniency programme.

<sup>53</sup> Cf. the 2009 ECN Report on the state of convergence in the leniency field, see the Internet ([http://ec.europa.eu/competition/ecn/model\\_leniency\\_programme.pdf](http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf)).

<sup>54</sup> Cf. paragraph 14 of the Network Notice.

virtually all Member States.<sup>55</sup> Under the 2012 revision of the MLP, the availability of summary applications has been extended from the sole immunity applicant to all leniency applicants, so as to take account of the fact that a case may be re-allocated at a stage when more than one undertaking has already applied for leniency within the ECN.<sup>56</sup>

82. The summary application mechanism came in response to a recurrent criticism from stakeholders that there is no "real one-stop-shop for leniency" in the ECN, whereby an undertaking would only need to apply for leniency at the Commission or one NCA in order to obtain coverage in the entire EU.
83. This issue has been thoroughly contemplated as from 2005 without there being a simple answer. A single entry point at the Commission would entail a considerable re-centralisation of the enforcement system and run counter to the concept of empowering the NCAs as enforcers, which was a major objective pursued by Regulation 1/2003. On the other hand, a decentralised system with the mutual recognition of leniency applications would not be workable, as it would require a high degree of harmonisation of the rules and extensive coordination in practice for every step of the leniency application process to ensure harmonious application of the rules. Against this background, the ECN opted for the summary application system which has been enhanced by the review of the MLP in 2012.
84. In addition to the alignment of ECN leniency policy through the MLP, ECN members have stepped up cooperation in cases and regularly exchange experience in the ECN Cartels working group.
85. A further challenge in this area arose from the discussion on the conditions under which leniency material can be disclosed and used in the context of the civil damages actions before national courts, as illustrated by the *Pfleiderer* judgment.<sup>57</sup> This issue is addressed in the Commission's Proposal for a Directive on Actions for Damages of 11 June 2013.<sup>58</sup> The proposal deals inter alia with the interface of public and private enforcement in the context of disclosure orders by national courts and the use in damages actions of information obtained through access to file. The approach taken is based on an assessment that the (non-)disclosure of leniency material in the context of

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<sup>55</sup> NCAs in 26 Member States accept summary applications. Summary applications are also proposed in Malta, which is in the process of introducing its first leniency programme. For the list of NCAs which accept summary applications, see the Internet ([http://ec.europa.eu/competition/ecn/mlp\\_2012\\_language\\_regime\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_2012_language_regime_en.pdf)).

<sup>56</sup> The ECN also agreed on a standard template for summary applications, which companies should be able to use in all Member States and published a list of NCAs which accept summary applications in English.

<sup>57</sup> C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.

<sup>58</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013. On 17 April 2014, the European Parliament adopted a text of the Directive on antitrust damages actions which was agreed between the European Parliament and the Council during the ordinary legislative procedure. The agreed text of the Directive has been sent to the Council for final approval. Once the Directive is adopted, Member States will have two years to implement the provisions of the Directive in their national legal systems, see the Internet ([http://ec.europa.eu/competition/antitrust/actionsdamages/proposed\\_directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html)).



damages claims could only be addressed through legislative action. Indeed, the non-binding nature of the MLP was expressly underlined by the ECJ in *Pfleiderer*.

#### **4.2.2 Evaluation**

86. In conclusion, though the level of convergence in the field of leniency is exemplary, there are limitations. As in other areas, achievements made through 'soft' convergence remain fragile and soft instruments are not helpful where divergences are rooted in national legal traditions. Further issues that arise in the context of leniency programmes for the enforcement of the EU competition rules include public access to documents, rights of defence/right to a fair trial before national and EU courts and the interface with criminal enforcement (see below). As far as private damages claims before national courts are concerned, some of these issues will be addressed by the Directive on Actions for Damages once it is finally adopted.
87. As set out in the Communication, a well-designed leniency programme is an essential tool for enhancing effective enforcement against the most serious infringements, in particular secret price-fixing and market-sharing cartels. Therefore, it is necessary to ensure that the achievements made in leniency programmes are secured.
88. Work on convergence in relation to more detailed elements of leniency policy as well as the practical implementation of leniency programmes and cooperation between enforcers in the Network should continue within the ECN.

#### **4.3 Criminal interface**

##### **4.3.1 Overview of sanctions on individuals and enforcement record**

89. Over and above the common base formed by the possibility to impose fines on undertakings in all competition law systems in the EU, the vast majority of Member States provide for one or more type of sanctions on individuals in respect of breaches of competition law. These sanctions take multiple forms and range from fines on individuals that are imposed by a competition authority at one end of the spectrum to custodial sanctions imposed in a classical criminal-style procedure involving a prosecutor and court at the other end. Moreover, the classification of sanctions on individuals in national law (as administrative, civil, criminal or other) varies and depends on the categories in national law.<sup>59</sup> Consequently, while custodial sanctions are generally qualified as being of a criminal nature, pecuniary sanctions can be of either an administrative or criminal nature while disqualification orders are qualified as either administrative, civil or criminal.
90. In terms of the legal rules applicable, a relatively large number of Member States provide for sanctions on individuals for all types of competition infringements, covering both restrictive agreements and abuse of a dominant position. The type and level of sanctions and their qualification can differ according to the type and gravity of the infringement. For example, custodial sanctions may be foreseen for individuals

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<sup>59</sup> In the debate about 'criminal sanctions' for competition infringements, the term 'criminal' is often used as meaning custodial sanctions imposed through a procedure involving public prosecutor and court/jury trial. Hereafter we will report about sanctions on individuals in the EU more generally and will refer to the afore-mentioned scenario as 'classical criminal' where the distinction is relevant.

involved in hard-core cartels, while other competition infringements may be sanctioned with a (criminal) fine. Moreover, specific types of criminal infringements are foreseen in a few Member States for cartel type behaviour and in others for a particular type of cartel, namely bid rigging.

91. Moreover, the difference in the qualification of sanctions for individuals at national level has an impact on the type of enforcement system in place for imposing such sanctions. Administrative fines on individuals are imposed by some NCAs in the same way as fines on undertakings. Custodial sanctions and criminal fines are imposed by a (criminal) court after the case has been investigated and brought to its attention by a public prosecutor. Public prosecutors may often be informed by the NCA of the case as the latter may have an obligation to report criminal offences. Generally, public prosecutors have at least similar or more far-reaching investigative powers than NCAs. In some Member States public prosecutors have an obligation to pursue criminal facts which come to their attention, while in others public prosecutors have discretion in choosing the cases they bring to the court's attention. In a few Member States, custodial sanctions are also imposed by a criminal court but the case is prosecuted by the NCA either in all cases or for certain types of offences.
92. Although sanctions on individuals for competition infringements exist in many Member States, such sanctions play a limited role in practice. Administrative fines on individuals, where they exist, are more frequently imposed than (classical) criminal sanctions of which there is generally very little experience in the EU.
93. The reasons for the relative lack of pursuit of classical criminal enforcement in the competition field in Europe, where such rules exist, may be manifold and could relate to the complexity of competition cases, the amount of documentation to be processed, the standard of proof, and a lack of resources at the level of public prosecutors and/or courts.
94. Some direct experience with criminal enforcement exists in Ireland where under the Competition Act 2002, the Director of Public Prosecutions has obtained over 30 convictions against undertakings and individuals involved in hard core cartel activity. Fines totalling approximately €600,000 have been imposed and individuals have been sentenced to terms of imprisonment of up to 12 months. In the UK, the Enterprise Act introduced criminal sanctions for cartels in 2002<sup>60</sup> and convictions have been obtained in the renowned Marine Hoses case.<sup>61</sup>
95. Overall, there does not seem to be a clear consensus about the merits of criminalisation. Whereas the threat of classical criminal sanctions and notably custodial sanctions is often seen as a strong factor of deterrence, it appears that - based on the available information - classical criminal procedures, where they exist in the EU, have only very rarely resulted in successful prosecution in the competition field or led to significant penalties. A range of Member States have examined the introduction

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<sup>60</sup> See the Internet (<http://www.legislation.gov.uk/ukpga/2002/40/contents>).

<sup>61</sup> Court of Appeal (Criminal Decision) - Case [2008] EWCA Crim 2560 - Regina - and - Peter Whittle, Bryan Allison, David Brammar; see the Internet (<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2560.html>). The case against the undertakings was pursued by the Commission, see: Decision of 28 January 2009, Case COMP/39406 – Marine Hoses.

of classical criminal sanctions in recent years and have opted not to do so after thorough deliberation (e.g. Belgium, the Netherlands and Sweden<sup>62</sup> where an expert committee was set up to consider the question).

#### **4.3.2 Interplay with corporate leniency programmes in the EU**

96. While many Member States foresee sanctions on individuals for competition infringements, such sanctions and, in particular, classical criminal sanctions, currently play a limited role in practice.
97. However, even the mere threat of sanctions for individuals can be counter-productive for corporate leniency programmes if they are not accompanied by an effective leniency option for the individuals concerned: the legal risks for the individuals involved can have a stifling effect on the willingness of undertakings to report cartels to the authorities. It can also reflect negatively on their possibilities to collect information internally from employees in order to prepare for corporate leniency applications. This issue has been repeatedly signalled by stakeholders/legal community as one of the main concerns which, if not resolved, would have a chilling effect on leniency applications.
98. This is exacerbated by the fact that investigations against individuals are not always in the same hands as the follow up to corporate leniency applications. Often such investigations are outside the competence of NCAs. For example, bid-rigging in Germany or Italy would be prosecuted by a public prosecutor, not the NCA. In other jurisdictions, like the UK and Ireland, the NCA is competent to investigate both the conduct of undertakings and individuals, though different departments may be involved with "Chinese walls" between them, as in the UK.
99. The chilling effect that may arise from a threat of sanctions on individuals in one Member State reaches beyond the territory of one Member State. Notably charges against individuals on the basis of classical criminal rules can most often be brought in a Member State irrespective of any leniency application made by an undertaking to the Commission and/or to one or several NCAs and of the work sharing between these authorities, depending on the national rules on criminal jurisdiction and the features of the case. After an inspection or another investigatory measure has been carried out, the investigation by a competition authority may become publically known, which may spur investigations by public prosecutors in the same or in other Member States.
100. Conversely, adequate leniency protection for individuals may encourage them (and their employers) to cooperate with authorities, remove the hindrance that the threat of separate sanctions on individuals can create for employees in providing input to undertakings' applications and may form an additional source of leniency applications.
101. Most national leniency programmes only address – if at all – the interplay of individual sanctions with their own corporate leniency programme. However, there are a few Member States that have dealt with this interplay outside their jurisdiction:

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<sup>62</sup> “A new competition law”, Report of the Legal Review Committee appointed by the Swedish Government, 29 November 2006, SOU 2006:99.

#### a. Approach in the UK

The CMA's leniency programme sets out particular arrangements aimed at safeguarding the Commission's leniency programme. Employees of undertakings cooperating with the Commission receive/may receive immunity from criminal penalties.<sup>63</sup> Moreover, the CMA and the competent sectoral regulators will not apply for a competition disqualification order against any current director whose company has benefited from leniency in respect of the activities to which the grant of leniency relates, including for leniency granted by the Commission.<sup>64</sup>

#### b. Approach in Sweden

The Swedish competition authority may bring proceedings leading to a trading prohibition against an individual who seriously failed to fulfil his or her professional obligations by being involved in cartel activity contrary to Article 101 TFEU and/or the national equivalent rule. However, persons who hold a position at an undertaking that is granted immunity from or reduction of a competition administrative fine will be granted immunity from such trading prohibition. This also applies if the immunity or reduction has been granted by another NCA or by the Commission.<sup>65</sup>

### 4.4 Evaluation

102. In sum, while experience with classical criminal sanctions in the EU remains limited, a large number of Member States provide for sanctions on individuals in different forms. Currently, adequate arrangements to protect employees of undertakings from individual sanctions if they cooperate under the corporate leniency programme of a NCA or the Commission exist only in a few Member States. In view of maintaining the attractiveness of corporate leniency policies, it is therefore appropriate to consider possibilities to address the issue of interplay between corporate leniency programmes and sanctions on individuals that exist at Member State level.

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<sup>63</sup> Section 8 of "Applications for leniency and no-action in cartel cases. OFT's detailed guidance on the principles and process" (originally published by the OFT and adopted by the CMA Board), see the Internet (<https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>).

<sup>64</sup> "Director disqualification orders in competition cases, an OFT guidance document" (originally published by the OFT and adopted by the CMA Board), see the Internet (<https://www.gov.uk/government/publications/competition-disqualification-orders>).

<sup>65</sup> See the General Guidelines of the Swedish Competition Authority on trading prohibition in the event of infringements of the rules on competition (KKVFS 2012:2), paragraph 19.

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