Parallel enforcement of international cartels and its impact on the proportionality of overall punishment

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5. CHAPTER 5: EXTRATERRITORIAL CARTEL ENFORCEMENT WITHIN THE EUROPEAN COMPETITION NETWORK

This chapter is based on the article 'Fining Foreign Effects: A New Frontier of Extraterritorial Cartel Enforcement in Europe?', 40 World Competition 3, 2017.

5.1 Introduction

Chapters 3 and 4 have addressed the legal doctrine and practices on jurisdictional limitations and extraterritorial cartel enforcement, focussing on the EU (Chapters 3 and 4) and the US (Chapter 3). This fifth chapter assesses the same issues but from a different perspective, within the specific context of the decentralised enforcement of EU competition law. The term *decentralised* means that it is not just the European Commission that is competent and responsible for the enforcement of EU competition law, so is each individual national competition authority (NCA) within the EU. The Commission and the NCAs together form the European Competition Network (ECN). The sharing of enforcement powers within the ECN gives rise to particular jurisdictional issues not yet addressed in the previous chapters. One particular issue relevant to the research of this dissertation is whether the power of NCAs to prosecute and sanction infringements of Article 101 TFEU could (or should) extend beyond their own national borders.

In designing the system of decentralised cartel enforcement under Regulation 1/2003 (the Regulation), the obvious question arose whether the power of NCAs to prosecute and sanction infringements of Article 101 TFEU could (or should) extend beyond their own national borders. But this issue was considered too sensitive to seriously address in the negotiations on the Regulation. The EU Member States and the Commission therefore left it open whether NCAs had the right or perhaps even the obligation to sanction cross-border cartels for their full effects within the Union. In the absence of any legal basis for such extraterritorial sanctioning by NCAs in the Regulation, the members of the ECN proceeded on the basis of the common understanding that each authority would only pursue cross-border cartels for their domestic effects.[1] Article 101 cartel infringements not dealt with by the Commission have therefore often been broken down along territorial lines, resulting in the businesses concerned at times being faced with multiple national proceedings targeting the same overall conduct.

With its 2012 decisions in the *Silverskin Onions* and *Onion Sets* cartel cases[2], the Dutch NCA (the ACM) has clearly moved away from this approach to decentralised enforcement of cross-border cartels. With the aim to ensure effective enforcement of Article 101, the ACM in these cases imposed fines that took into account the EU-wide effects of the respective cartels. The decisions were upheld by the highest appeal court in 2016. The ACM's approach in these cases has brought back to life the debate on the legality of NCAs fining foreign effects within the Union. In this debate, various authors argue that NCAs have the right to sanction cross-border cartels for their full European effects because of the need to (i) give full effect to the Regulation and (ii) avoid duplicate proceedings from creating double jeopardy concerns. Some even argue NCAs have an obligation to do so. On the other end of the spectrum, several writers maintain that no such right or obligation can be derived from EU law. They believe NCAs remain bound by international public law and the principle of territoriality, preventing NCAs from sanctioning conduct on the basis of harm caused elsewhere.

Now that NCAs have started to test the boundaries of their fining powers unilaterally, it is time for this academic debate to enter the political arena. The territorial extension of one NCA's powers within the ECN by definition encroaches on the powers of other authorities. Any steps in that direction in the absence of a common view shared across the network are therefore likely to result in jurisdictional conflicts. Moreover, a lack of clear guidance as to the ability for NCAs to fine foreign effects within

[1] S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, 179, 387, 437 (Hart Publishing 2009); E. Paulis and C. Gauer, *Le règlement N° 1/2003 et le principe du ne bis in idem*, Concurrences 1-2005, 34, point 19 (2005).

[2] ACM decision in case 6964 *Zilveruien* (25 May 2012); ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012).

the Union creates substantial legal uncertainty for businesses and the legal community. That is why this sensitive issue should no longer be ignored within the ECN.

By examining the current enforcement practices in a number of key jurisdictions, this chapter will first highlight the wide differences between NCAs in respect of the territorial scope of fines imposed by them under Article 101. A legal assessment reveals that there is much uncertainty as to the legality of NCAs taking into account foreign effects in sanctioning cross-border cartels. Many of the legal arguments used to either support or object to the right for NCAs to do so are unsatisfactory, at least in the context of the current legal framework. As such a right can significantly enhance the effectiveness of decentralised enforcement of Article 101, it may well be desirable to further explore this new frontier of extraterritorial cartel enforcement within the Union. However, it is submitted that this will require legislative action, so that legal certainty can be provided in accordance with the common views of Member States. While unfortunately not being addressed in Directive 2019/1 on the empowerment of NCAs (ECN+ Directive)[3], the European legislator may still decide to amend the Regulation in order to put in place the necessary procedural rules and safeguards to give NCAs the right to fine foreign effects in a way that ensures effective enforcement and proportionate sanctioning while still allowing for sufficient prosecutorial discretion at the national level.

5.2 A widely diverging NCA practice

This section assesses the current enforcement practices of the NCAs in the Netherlands, the UK, Spain, France, Germany and Belgium. It reveals that there is a clear lack of consistency in respect of the ability and willingness of NCAs to take into account foreign turnover in the calculation of fines for cross-border cartels.

In the Netherlands, the ACM has historically adopted a restricted approach when it comes to the sanctioning of cross-border cartels. In the 2003 *North Sea Shrimps* cartel case[4], the ACM (then NMa) coordinated its enforcement with the European Commission and the Danish and German NCAs and ultimately was the only authority to sanction the cartel. Still, the fines imposed by the ACM only sanctioned the cartel for its effects on the Dutch market.[5] The ACM took a slightly different but similarly restricted approach in the *Flour* cartel case.[6] In this case, the ACM delineated the object of its own enforcement from that of the German and Belgian NCAs by merely sanctioning the part of the overall cartel conduct which was considered to have the object to stabilise the Dutch flour market.

The ACM adopted a markedly different approach in *Silverskin Onions* (2012) by deciding that in this case the 'relevant turnover' used as a basis for the cartel fine calculation should encompass the companies' EU-wide turnover. Whereas the ACM fining guidelines were silent on the ability to take into account foreign turnover, the authority argued that this was necessary mainly to preserve the effectiveness and uniform application of EU competition law.[7] The ACM stated that it followed the principles for the cooperation of NCAs as laid down in the Commission's Notice on cooperation within the Network of Competition Authorities (the ECN Notice)[8] by ascertaining that no other authority had started or intended to start a separate investigation into the alleged cartel behaviour. Later in 2012, the ACM similarly took into account EU-wide relevant turnover in calculating the fines it imposed in the *Onion Sets* cartel case. In the appeal proceedings against the respective decisions, the Trade and Industry Appeals Tribunal confirmed the ACM's power to calculate a cartel fine on the basis of a

3 EU Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

4 ACM decision in case 2269 *Noordzeegarnalen* (14 January 2003).

5 The fines were based on turnover achieved in the Netherlands, using a proxy figure for each party that was calculated by taking the proportion of the parties' combined turnover on the relevant market that was achieved in the Netherlands (40%) and applying this proportion to each party's individual aggregate turnover.

6 ACM decision in case 6306 *Meel* (16 December 2010).

7 ACM decision in *Zilveruien*, para 266.

8 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43 (27 April 2004).

company's EU turnover.[9] It reasoned that this matter is determined by national rather than European law, and that the applicable national laws in the Netherlands do not impose an obligation on the ACM to limit the basis for its fine calculations to domestic turnover. In reaching its conclusions, the Tribunal also took into account that the ACM had assured itself that no other European authority had intended to launch an investigation into the relevant conduct, so that the ACM's approach would not create a potential *bis in idem* situation.

In the UK, the fining guidelines stipulate that in cartel cases sanctioned under Article 101 the authority may take into account foreign effects by including the relevant turnover generated in another Member State in the fine calculation.[10] The guidelines state that this is only possible where the relevant geographic market is wider than the UK and where in each particular case the relevant NCA has given its express consent. This reflects the UK Government's position that under the Regulation, foreign effects may only be sanctioned where the NCAs of the Member States concerned have agreed to this.[11] It is interesting that the UK guidance on the calculation of cartel fines under national law, dating from 2000, already provided that the 'relevant turnover' may include turnover generated outside the UK where the relevant geographic market is wider than the UK.[12] Under this older guidance, there was no need to obtain the prior consent of another Member State. Despite the express legal basis provided in the guidelines, it appears that thus far the NCA in the UK has never used its ability to take into account foreign turnover in the calculation of its cartel fines.

The Spanish fining guidelines adopted in 2009 specify that when the affected market is wider than national, the volume of sales affected by the infringement in the EEA shall be taken into account.[13] In such cases the authority (CNMC) will proceed in accordance with the Regulation and the ECN Notice. Based on the decisions published on the CNMS's website, it does not appear that the authority has ever explicitly relied on this provision in the guidelines. Still, there have been cases in which the CNMC based its cartel fines on turnover achieved outside Spain, such as the export cartel cases on envelopes[14] and sherry[15]. In these two cases, the turnover taken into account was not explicitly limited to sales in the EEA, and at least for the envelopes cartel included sales in countries outside the EEA. The 2009 fining guidelines are no longer applied following a ruling by the Spanish Supreme Court in January 2015 in which the method of calculating fines under the 2009 fining guidelines was found to be contrary to the Spanish Competition Act.[16] However, this has not affected the authority's policy that foreign turnover can be taken into account in the fine calculation where the market affected by the infringement extends beyond Spain. In the 2016 cartel case on international removal services for example, the CNMC calculated the fine on the basis of turnover related to not only international removals with Spain as origin or destination, but also those between countries other than Spain.[17]

In France, the fining guidelines clearly state that cartel fines are calculated on the basis of domestic sales.[18] However, the authority may take into account turnover achieved elsewhere in the EEA where as a result of a market sharing agreement a company refrains from making sales in France.[19] The

9 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56; *Eerstejaars plantuienkartel* (CBb, 6 October 2016), ECLI:NL:CBB:2016:272.

10 OFT (now CMA), OFT's guidance as to the appropriate amount of a penalty (OFT423), para 2.10 (Sept. 2012).

11 In its 2003 consultation on the changes necessary in view of the entry into force of the Regulation the UK Government considered that 'NCAs should be able to take into account effects on competition in another Member State in calculating the appropriate amount of any penalty when applying Article 81 or 82 provided that the NCA in that Member State agrees that the OFT can take into account effects within its territory in that particular case'. Department of Trade and Industry, Modernisation - a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998, para 5.9 (Apr. 2003).

12 OFT, Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423), para 2.3 (March 2000).

13 CNC, Comunicación de la Comisión Nacional de la Competencia, sobre la cuantificación de las sanciones derivadas de infracciones de los artículos 1, 2 y 3 de la Ley 15/2007, de 3 de julio, de Defensa de la Competencia y de los artículos 81 y 82 del Tratado de la Comunidad Europea, point 11 (6 February 2009).

14 CNMC decision in case S/0318/10 *Exportación Sobres de Papel* (15 October 2012).

15 CNMC decision in case S/0091/08 *Vinos Finos Jerez* (of 28 July 2010). Other cases in which sales outside of Spain have been taken into account include cases *Postensado y Geotecnia* (S/0287/10) and *Carpa Dorada y Club de Variedades Vegetales Protegidas* (S/0312/10).

16 *BCN Aduanas* (Spanish Supreme Court, 29 January 2015), ECLI:ES:TS:2015:112.

17 CNMC decision in case S/DC/0544/14 *Mudanzas Internacionales*, 98 (6 September 2016).

18 Autorité de la Concurrence, Notice on the Method Relating to the Setting of Financial Penalties, point 34 (16 May 2011).

19 Ibid., point 39.

French NCA indeed took into account turnover achieved in both France and Germany in calculating the fines imposed for the *Flour* cartel, a case concerning a French-German market sharing agreement between flour producers in both Member States.[20] In its fining decision, the authority clarified that while the fines were based on sales made in both countries, the sanction should only reflect the gravity of the conduct and the harm it caused to the economy on the French territory.[21] According to the French NCA, it was for the Bundeskartellamt to impose its own sanction for the anti-competitive conduct in respect of its effects on the German market. However, when the German authority imposed cartel fines for the collusion in the flour sector almost a year after the adoption of the French decision, it only sanctioned the collusion on the domestic market, ignoring the French-German market sharing agreement.[22]

The German fining guidelines of 2013 determine that fines must be based on an overall appraisal of all aggravating and mitigating factors within an upper limit set by a combination of a company's total turnover and its domestic turnover in the relevant market affected by the infringement.[23] The guidelines reflect the position that the cartel fines imposed by the Bundeskartellamt should be limited to sanctioning effects in Germany.[24] This is in line with the view Germany has taken in ECN discussions in the context of the entry into force of the Regulation, namely that NCAs only have the power to sanction cartels under Article 101 for the effects on their own territory.[25]

Both in its decisions and in its wider advocacy efforts, the Belgian NCA (BMA-ABC) has historically supported a restricted approach to extraterritorial cartel enforcement.[26] The authority has maintained that it should focus solely on the effects of cartel conduct within its own borders. A first example of this approach is the 2008 *BBP* cartel case[27]. Despite the European scope of the infringement and the affected market, the NCA only took into account sales in Belgium when calculating the fine in this case, reasoning that it has only been given the powers to impose fines necessary to protect competition on the Belgian market.[28] According to the BMA-ABC, even where NCAs sanction cross-border cartels under Article 101, they still pursue an end that is separate from ends pursued by other NCA's, each in its respective market.

In the *Flour* cartel case[29], the BMA-ABC was particularly keen to adopt a very cautious approach to avoid double punishment allegations. This was because the Dutch NCA had already imposed a fine on some of the same flour producers for collusion in the flour market. The BMA-ABC explicitly limited itself to prosecuting only those aspects of the cartel that related to the Belgian market. With respect to the sanctioning, the authority decided to limit the fine for all five addressees to a lump sum fine of EUR 100,000, in view of the penalties already imposed in the Netherlands.[30] Despite the cautious approach by the BMA-ABC, its decision was overturned on appeal for (potentially) violating

20 Autorité de la Concurrence decision in case 12-D-09 *Farine Alimentaire*, para 779 (13 March 2012).

21 Ibid., para 801.

22 Bundeskartellamt, *Bußgeldverfahren gegen Unternehmen der Mühlenindustrie*, Fallbericht Case B11 – 13/06 (27 May 2013).

23 Bundeskartellamt, Guidelines for the setting of fines in cartel administrative offence proceedings (25 June 2013). Similar to the situation in Spain, the current fining guidelines were adopted following a judgement of the German Supreme Court ruling that the previous guidelines incorrectly applied the statutory maximum of 10% of total turnover as a cap rather than an upper limit of the fining range that should be reserved for the worst possible infringements. *Grauzement* (Federal Court of Justice, 26 February 2013), KRB 20/12, WuW/E DE-R 3861.

24 Bundeskartellamt, Guidelines for the setting of fines in cartel administrative offence proceedings, para 11.

25 Bundeskartellamt, *Stellungnahme der Bundesregierung zum Tätigkeitsbericht des Bundeskartellamtes 2003/2004*, vii (22 June 2005). *See* also C.E. Mosso, *A critical view on Chapter 2 - Relationship between EC competition law and national competition law*, in M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 460 (Bruylant 2010).

26 *See* e.g. the amicus curiae brief of the BMA-ABC in *Motorola v AU Optronics*, No. 14-8003 (7th Cir. 9 Oct. 2014). Interestingly, outside the realm of cartel enforcement the BMA-ABC seems to be less concerned about enforcement action targeting conduct also with respect to its effects beyond the territory of Belgium. In the 2015 decision against Fédération Equestre Internationale, the authority imposed interim measures calling for the suspension of restrictive clauses in respect of a Belgian organiser of equestrian competitions, without limiting the scope of the measures to Belgium or the EU. BMA-ABC decision in case 2015-V/M-23 *TTB vs FEI* (27 July 2015).

27 BMA-ABC decision in case 2008-I/O-13 *Bayer - Ferro - Lonza - Solutia Europe* (4 April 2008).

28 Ibid., para 67.

29 Decision of the BMA-ABC in case 13-IO-06 *Meel* (28 February 2013).

30 The authority noted that for two of the companies the Dutch fines amounted to 10% of their worldwide turnover, the legal maximum under Dutch law. The BMA-ABC considered that imposing additional fines on these companies would result in these companies being worse off compared to the situation where only one fine was imposed by the European Commission up to the 10% maximum.

the principle of *ne bis in idem*.[31] According to the Brussels Court of Appeal, it could not be ruled out that the Belgian authority had sanctioned the same offender for the same facts in pursuit of the same legal interest. In particular, the court found that by imposing a lump sum fine instead of a fine based on turnover achieved in Belgium, it was not possible to confirm that the BMA-ABC had sanctioned the flour cartel only for its effects on the Belgian territory.[32] Following the ruling, the Belgian NCA adopted new fining guidelines which clarify that fines will be calculated solely on the basis of sales in Belgium.[33] Only in the case of cross-border market sharing agreements may the relevant turnover be based on sales outside of Belgium.[34]

The above review of NCA practices in just a small number of Member States demonstrates that there is clear lack of consistency when it comes to the calculation of fines for cross-border cartels. It appears that most authorities still prefer to limit the territorial scope of their sanctions to their own national borders. But the practices in the Netherlands and Spain show that one can no longer point to a common understanding among NCAs to refrain from fining foreign effects.

5.3 Legal assessment

In assessing the legality of NCAs taking into account foreign turnover in calculating cartel fines, it is important to distinguish three types of situations in which this may be done:

a) to sanction a company for implementing a market sharing agreement as a result of which it refrained from making sales in the relevant Member State;

b) to take into account the overall size of the company reflected by its total turnover; and

c) to sanction a cartel (also) for its effects outside of the relevant Member State.

It is the third situation that gives rise to most legal discussions. These discussions focus on the separate but related themes of jurisdiction, competence, comity, effectiveness of EU law, adequate and proportionate fining, and double jeopardy.

For a large part, the legality of fining foreign effects by NCAs has been a matter of debate because the Regulation and the ECN Notice are completely silent on the issue. A paper published by the Dutch NCA in 2005 on the implementation of the Regulation reveals that there was no political agreement between the Member States to explicitly deal with this sensitive issue in the Regulation.[35] Céline Gauer, involved in the negotiations on the Regulation in the Council, has confirmed that after entry into force of the Regulation it has remained unclear whether NCAs have the power to fine foreign effects in Europe.[36]

The absence of any legislative guidance or rulings from the European courts has allowed for different views to be maintained by authors. Among the various views, one can identify two main approaches in assessing the legality of NCAs fining foreign effects.[37] Under the first approach, the competence for NCAs to sanction cross-border cartels for their full effects in the EU is considered to be derived

31 *Brabomills* (Brussels Court of Appeal, 12 March 2014), 2013MR6.

32 Ibid., 36–38.

33 The relevant turnover for the purposes of the Belgian fining guidelines is "the turnover generated by the relevant undertakings in Belgium to which the infringement directly or indirectly relates". BMA-ABC, Richtsnoeren betreffende de berekening van geldboeten voor ondernemingen en ondernemingsverenigingen bedoeld in artikel IV.70, § 1, eerste lid WER bij overtredingen van de artikelen IV.1, § 1 en/of IV.2 WER, of van de artikelen 101 en/of 102 VWEU, para 5 (26 August 2014).

34 Ibid., para 6(a).

35 P. Kalbfleisch, Director General of the Netherlands Competition Authority (NMa), *The NMa and modernisation: Past, present and future*, paper written for the conference Antitrust Reform in Europe: A Year in Practice, jointly organised by the International Bar Association and the European Commission (9–11 March 2005), https://www.acm.nl/download/documenten/nma/paper_EC_IBA.pdf.

36 Paulis and Gauer, *supra* n. 1, at 34, point 18.

37 *See also* the distinction made by Van Bockel, focusing on the legality of multiple fines being imposed by different NCAs for the same overall cartel conduct but for different effects. B. van Bockel, *De 'lange arm' van ACM bij het bepalen van de boetegrondslag*, 5 Markt & Mededinging 205, 206 (2016).

from the objective of decentralised enforcement of Article 101 under Regulation 1/2003 and the need for Member States to give full effect to this objective. Under the second approach, the competence to sanction conduct also for its foreign effects is considered to stretch beyond the territorial limitations of national enforcement powers and must therefore rest on an express legal basis agreed between Member States. As explained below, both approaches raise many questions in respect of the validity of the underlying legal arguments.

A. First approach: competence based on the need to ensure effectiveness of EU law

The view that NCAs are competent and perhaps even required to sanction cross-border cartels for their full European effects is advocated by Pignataro[38], Brammer[39], Monti[40], Wils[41] and others. Their starting point is the objective that each Article 101 infringement should be handled by a single authority within the ECN, as stipulated in recital 18 of the Regulation. To this end, the Regulation gives each NCA "full parallel competence" to apply Article 101.[42] Article 5 of the Regulation further gives the NCAs the right to impose fine decisions for individual violations of Article 101. Whereas the calculation of cartel fines imposed by NCAs is left to be determined by national law, the duty of sincere cooperation laid down in Article 4(3) TEU requires Member States to ensure the full effectiveness of EU law and requires fines imposed for violations of EU law to be 'effective, proportionate and dissuasive'.[43] According to the authors supporting this view, the effectiveness requirement implies that NCAs should take into account the effects in other Member States when sanctioning cartels under Article 101.[44]

Under this approach, it is submitted that fining cross-border cartels for only their domestic effects would either lead to disproportionately low penalties and hence under-enforcement, or would require duplicate proceedings in different Member States.[45] The latter would be inefficient and contrary to the objective that each cartel case should be handled by a single authority.[46] Moreover, it would create double jeopardy concerns as the alleged cartelists would be prosecuted and punished several times for the same conduct. Such concerns are not considered to be resolved by NCAs splitting up a cartel on the basis of national effects and each NCA only sanctioning the domestic effects. First, because the principle of *ne bis in idem* prohibits multiple prosecution or punishment for the same offence, and not merely for the same effects of an offence.[47] Second, because it is very difficult if not impossible to break down cartel conduct on the basis of its effects, certainly where the cartel conduct is considered to form a 'single and continuous infringement'.[48]

Brammer and Wils argue that the power to fine foreign effects solely derives from EU law, not from national law.[49] They do not consider the territoriality principle under international public law to limit the powers of NCAs in this respect. According to Brammer, the principles of international public law are not unconditionally applicable in the supranational legal order of the EU where Member States

38 L. Pignataro, *La riforma del diritto comunitario della concorrenza: il regolamento n. 1/2003 sull'applicazione degli articoli 81 e 82 del Trattato CE*, 8 Contratto e Impresa – Europa 233, 264 (2003).

39 S. Brammer, *supra* n. 1, at 437-459; S. Brammer, *Don't slice the onion, take the whole bulb*, 4 *Mededingingsrecht in the Praktijk* 14 (2014).

40 G. Monti, *A plea for 'Extraterritorial' antitrust enforcement by national competition authorities*, unpublished paper presented during the fourth ACELG annual conference Ten Years of Decentralised EU Competition Law Enforcement: Success or Failure? (14 November 2014).

41 W.P.J. Wils, *The reform of competition law enforcement brought about by Regulation No 1/2003: Will it work?*, Concurrences 4-2005, 19, point 134 (2005).

42 Joint Statement of the Council and the Commission on the functioning of the network of competition authorities (Joint Statement), 15435/02 ADD 1, para 11 (10 December 2002).

43 *See* Wils, *supra* n. 41, at 19, footnote 205, referring to the ECJ judgements of 21 September 1989 in case 68/88 *Commission v Greece* [1989] ECR 2984, paras 23 and 24, and of 18 October 2001 in case C-354/99 *Commission v Ireland* [2001] ECR I-7684, para 46.

44 *See* in particular Pignataro, *supra* n. 38, at 264 and Brammer, *supra* n. 1 at 439, 447, 459.

45 Ibid., 438.

46 This objective is stated in recital 18 of the Regulation, para 16 of the Joint Statement and point 7 of the ECN Notice.

47 Wils, *supra* n. 41, at 18, point 126.

48 Brammer, *supra* n. 1, at 381; Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39), at 16; M. Merola and others, *Relationship between EC competition law and national competition law*, in: M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 162, point 85 (Bruylant 2010).

49 Brammer, *supra* n. 1, at 447–448; Wils, *supra* n. 41, at 19, point 134.

have agreed to limit their sovereign rights.[50] Even if these principles were to apply, she stipulates that a distinction must be made between the basis to exercise jurisdiction and the method of calculating a cartel fine.[51] Taking into account foreign effects is argued to merely relate to the latter and does not affect the jurisdictional basis for the enforcement. Brammer and Wils further maintain that a sufficient jurisdictional nexus is ensured on the basis of the criteria under the ECN Notice for considering an NCA 'well placed' to deal with a particular cartel.[52]

As regards comity considerations and deference, Monti submits that no consent of other NCAs is required before an NCA can sanction a cartel for its full effects in the EU.[53] Brammer points to the practice of NCAs informing others in the network of the start of cartel proceedings. Where no other authorities express an interest in the matter, she considers this a tacit approval of the matter being investigated and sanctioned for its full effects by the NCA giving the notice. [54]

The approach of Pignataro, Brammer, Monti and Wils is attractive because it clearly supports the desirable outcome of facilitating effective and efficient decentralised enforcement of cross-border cartels while avoiding double jeopardy concerns. However, its reliance on extensive teleological reasoning can be considered problematic. In particular, to derive the competence to fine foreign effects from the duty to ensure the full effect of EU law completely ignores the fact that in drafting the Regulation, Member States failed to reach agreement on the power of NCAs to sanction a cartel for its full effects in the EU. It is clear that the Regulation does not provide an explicit legal basis for this. The ECN Notice is even based on the assumption that no power to fine foreign effects exists and that effective enforcement may require that a single cartel is fined by several NCAs in parallel.[55] From the start of the entry into force of the Regulation, NCAs have agreed to work together on the basis that each NCA would only fine cartels for their domestic effects.[56] To introduce an obligation for NCAs to fine foreign effects through the backdoor of the need to ensure the full effect of EU law goes against the political will of the Member States and hence the European legislator. Recital 18 of the Regulation must not be made into more than it is, i.e. the mere general objective to guide discussions between Member States on case allocation. It cannot form the basis of a prescriptive rule that there must be only one authority sanctioning cartels for their full EU effects.

The ECN+ Directive also appears to supports the view that NCAs do not have the obligation to sanction cartels for their full EU effects. Article 29(1) of the Directive stipulates that proceedings by one NCA suspend the limitation periods applying to that conduct in other Member States, so that NCAs in other Member States can await the outcome of proceedings elsewhere before pursuing the same conduct themselves.[57] This clause facilitates parallel enforcement of the same conduct by several NCAs, and would not be necessary in the case of an obligation for Article 101 infringements to be sanctioned by a single competition authority.

If the power to fine foreign effects is derived from EU law, the lack of a provision giving NCAs such a power is clearly unsatisfactory. Article 5 of the Regulation cannot reasonably serve as a basis for such power as it merely points to the types of decisions that NCAs can take, without in any way expanding existing fining powers under national law. This was confirmed by the Dutch Trade and Industry Appeals Tribunal, which dismissed the view that an NCA could rely on Article 5 of the Regulation as a legal basis to take into account foreign effects.[58] Instead, the Tribunal ruled that this

50 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at 18.

51 Ibid., 17–18. *See also* Van Bockel, *supra* n. 37, at 207–208.

52 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at 17; Wils, *supra* n. 41, at 19, point 136.

53 Monti, *supra* n. 40, at 10.

54 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at.17. *See also* S. Brammer and others, *Report on the enforcement by NCAs and the ECN*, in: M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 303 (Bruylant 2010).

55 *See* in particular point 12 of the ECN Notice. This is acknowledged by Monti, *supra* n. 40, at 8.

56 Brammer, *supra* n. 1, at 179, 387, 437; Paulis and Gauer, *supra* n. 1, at 34, point 19.

57 It is interesting to assess how this clause relates to the principle of *ne bis in idem*. It will be difficult for an NCA to suspend the limitation period in respect of the same conduct that is pursued elsewhere, while on the other hand arguing that there is no 'idem'.

58 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.3.

is left for national procedural law to determine.[59] Rather than concluding that the ACM was required to take into account EU-wide turnover because of the need to ensure its fines were effective, proportionate and dissuasive, the Tribunal held that applying this approach did not render the sanction ineffective or disproportionate.[60]

This approach also raises several issues in respect of jurisdictional aspects. First, while in a strict sense the exercise of jurisdiction is indeed a different matter from the method of calculating fines, the two become very closely related when NCAs on the one hand use the effects doctrine to exert extraterritorial jurisdiction and on the other hand calculate fines on the basis of such effects, using relevant turnover as a proxy. Where the relevant turnover and effects both relate to a particular territory, it is difficult to maintain that this has no effect on the jurisdictional scope. The reasoning of Brammer on this point seems to imply that once jurisdiction over a cartel is established (based on nationality, place of conduct and/or effects), no matter how narrow the link, an NCA can exert its jurisdiction over the cartel in its entirety for the purposes of its sanctioning. It is precisely such an extensive interpretation of an authority's jurisdictional reach that creates comity concerns and double jeopardy issues.

Second, it is questionable whether a sufficient jurisdictional nexus can always be ensured through the criteria for 'well placed' authorities under the ECN Notice. The Notice is merely an informal guidance document that is not necessarily binding for NCAs.[61] The Notice itself therefore cannot prevent NCAs from using the power to fine foreign effects in cases that have little or no material link to their own territory. It is also not very plausible that Member States would have effectively given each other the power to sanction cross-border cartels for their full EU effects while not making the essential limitations to such power binding upon the Member States.

Third, it is a stretch to accept Brammer's argument that NCAs effectively waive their right to impose sanctions by not expressing an interest in the matter when notice is given of the start of proceedings elsewhere.[62] The argument ignores the fact that the interest for an NCA to pursue a matter may well come up at a later stage, for example in response to a complaint that is submitted some time after the start of an *ex officio* investigation by another NCA. Under the Regulation, Member States have only agreed to give the NCAs the right, and not the obligation, to suspend proceedings or reject a complaint regarding a matter already dealt with by another authority.[63] They did not impose an obligation to do so on NCAs, as they did not agree on the enforcement by one NCA to bar all other NCAs from pursuing the matter. To state that a failure to respond to the notice of another NCA nevertheless leads to that result is a questionably extensive interpretation of the information requirements under Article 11 of the Regulation.

Fourth, any limitation of the sovereignty of Member States within the supranational legal order of the EU will arguably still need to be considered *in concreto* and on the basis of the specific powers granted to the European institutions and to other Member States. Member States have given the European Commission the power to sanction cross-border cartels for their full effects in the EU. In the context of decentralisation under the Regulation, Member States have not agreed to give that same fining power to each other. Instead, they have remained silent in this respect. One therefore cannot point to a positive agreement by Member States to limit their sovereignty and waive their rights under international public law by granting extraterritorial fining powers to the NCAs of other Member States.

The argument that NCAs should take into account foreign effects to ensure adequate punishment also raises questions. The sanctioning of cartels is not harmonised throughout the Union and wide

59 Interestingly, while the ACM in its 2005 paper clearly stated that the Regulation contained no explicit basis for NCAs taking into account foreign effects, it adopted the opposite view in the Silverskin Onions appeal before the Trade and Industry Appeals Tribunal. Kalbfleisch, *supra* n. 35, at 6–7; *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.2.

60 ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012) section 7.3.8.

61 Brammer and others, *supra* n. 54, at 290.

62 Brammer, *supra* n. 1, at 455–456.

63 Art. 13 of the Regulation.

differences still exist as to the way in which fines are calculated.[64] It is difficult to make a general claim that cartel fines solely based on domestic effects are inadequate, without assessing the way in which such fines are calculated under the national guidelines in a particular case. Furthermore, while fine calculation methods often start with a percentage of the relevant turnover affected by the infringement, it is incorrect to consider that a fine can only be effective and proportionate if it is based on the entire relevant turnover in the EU. This is because the relevant turnover is only used as an imprecise proxy for the harm or the price effects caused by the infringement, without further quantifying such harm or effects. It may well be that a fine calculated on the basis of only part of the relevant turnover is sufficiently deterrent. In the *Flour* case for example, the Belgian NCA considered a symbolic fine to be sufficient as it found the fines imposed in the Netherlands to provide for adequate punishment for the cartel, even though the Dutch fines were solely based on domestic effects.

Lastly, it appears that the support of Brammer, Wils and others for the right to fine foreign effects in the EU rests for a large part on the notion that parallel proceedings targeting different effects of the same cartel conduct create *ne bis in idem* concerns. Whereas this notion is very sensible, it is not (yet) the legal opinion of the European courts or NCAs.[65] In *Toshiba*, the European Court of Justice confirmed that there is no *idem* if authorities sanction the same cartel but in respect of different effects.[66] Even the NCA and courts in Belgium, which arguably have the most respect for *ne bis in idem* considerations, find that an NCA can impose a fine for a cartel that was already sanctioned elsewhere in the EU provided that it solely considers the domestic effects.[67]

B. Second approach: competence requiring an express legal basis in EU law

At the other end of the spectrum, there are those that hold the view that because of the limitations under international public law, Member States are only competent to sanction cartels to the extent that such cartels have caused harm on their territories. This view is advocated by Paulis and Gauer[68], Burnside and Crossly[69], and others[70]. They emphasise that Regulation 1/2003 has not expanded the fining powers of Member States and that the competence to fine foreign effects would require an express legal basis at the bilateral or European level.[71] Consequently, the right to fine foreign effects at a minimum requires the express consent of the relevant other Member States. Without such consent, NCAs do not have the right to effectively bar other NCAs from sanctioning the cartel for the effects relating to their territories. In addition, national law will need to allow NCAs to (i) give consent to another NCA for fining effects on one's own territory and (ii) fine effects in other Member States.[72] This more conservative and restricted view is in line with the consensus that has existed within the ECN after entry into force of the Regulation.[73]

This approach has its own difficulties. First, it is not clear whether international public law indeed prohibits NCAs from fining foreign effects in the absence of any permissive rule at the international

64 While the ECN+ Directive contains some limited measures to harmonise the calculation of fines imposed under Art. 101, wide differences will continue to exist, including because of the different geographic scope of the turnover considered for the determination of the fine.

65 Contra Van Bockel, who argues that it is now a settled matter that parallel enforcement by several NCAs of the same cartel, but for different effects, violates the principle of *ne bis in* idem. He appears to base this conclusion on the 2009 ruling of the European Court of Human Rights in *Zolotukhin v. Russia*, but without considering the ECJ's ruling in *Toshiba* that clearly points in a different direction. Van Bockel, *supra* n. 37, at 207.

66 ECJ judgement of 14 February 2012 in case C-17/10 *Toshiba* [2012] ECR-I 72. paras 101-103.

67 Decision of the BMA-ABC in case 13-IO-06 *Meel* (28 February 2013) paras 184-208; *Brabomills* (Brussels Court of Appeal, 12 March 2014), 2013MR6, 36–38.

68 E. Paulis and C. Gauer, *La réforme des règles d'application des articles 81 et 82 du Traité*, 65 Journal des tribunaux Droit européen 11, point 58 (2003).

69 A. Burnside and H. Crossley, *Co-operative mechanisms within the EU: a blueprint for future co-operation at the international level?*, 10 International Trade Law & Regulation 2, 25, 31–32 (2004).

70 Brammer also refers to Waelbroeck and Temple Lang. Brammer, *supra* n. 1, at 451, footnote 472. *See also* R. Smits, *The European Competition Network: selected aspects*, 32 Legal Issues of Economic Integration 2, 175, 184 (2005).

71 *See* in particular Paulis and Gauer, *La réforme des règles d'application des articles 81 et 82 du Traité*, *supra* n. 68, at point 58.

72 *See also* Kalbfleisch, *supra* n. 35, at 7.

73 *See supra* n. 56. In the Silverskin Onions appeal proceedings, the ACM however argued that Member State have deliberately left each other the freedom to impose fines for the full EU effects of a cartel if national law permitted them to do so. *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.2.

level. The 1927 *Lotus* case[74] is often referred to in this respect. The Permanent Court of International Justice determined in this case that absent a permissive rule to the contrary, a state may not exercise its power in the territory of another state.[75] However, it further held that States have a wide measure of discretion, only limited in certain cases by prohibitive rules, to exercise jurisdiction in their own territory with respect to persons, property and acts outside their territory.[76] It is not fully clear how to apply the distinction drawn by the court to the situation where a Member State has a jurisdictional link to cross-border cartel conduct (based on nationality, place of conduct and/or effects) and takes into account the effects of the cartel in other Member States in calculating the level of the fine. If an NCA has already established its jurisdiction, what rule of international law justifies a limitation on the elements to be taken into account to calculate the level of the fine? Brammer and others argue that such sanctioning in the strict sense does not amount to the exercise of jurisdiction outside the Member State.[77] The Dutch Trade and Industry Appeals Tribunal held the same view, referring to the ECJ's ruling in *Innolux* in which the existence of jurisdiction and the method of calculating cartel fines were considered two separate matters.[78]

If it is accepted that Member States are prevented from fining foreign effects in absence of any permissive rule at the international level, it is not clear whether the mere consent by another NCA would be sufficient to confer this power on an NCA. Arguably, that would presume that Member States already have the power to sanction foreign effects and that the reason for not doing so is purely a matter of deference and self-restraint. However, if such power is not considered to exist because of the territorial limitations to national jurisdiction and enforcement, it does not seem convincing that this power can be delegated or transferred to a foreign NCA by mere administrative consent in absence of a firm legal basis established through both national and European legislation.

Furthermore, the argument that NCAs are only competent to sanction domestic effects of cross-border cartels is difficult to reconcile with the responsibility given to them under the Regulation to enforce Article 101 in full. The European cartel prohibition aims to protect cross-border competition for businesses and consumers throughout the Union. The decentralisation of enforcement under the Regulation has not changed the substance of Article 101 nor its objectives. It is therefore difficult to argue that national enforcement of this provision can justifiably be limited to only safeguarding competition within one's own national borders.[79]

The main arguments that are used to counter the view that NCAs can only sanction domestic effects are related to the effectiveness of decentralised cartel enforcement and the risk of double jeopardy concerns. As infringements of Article 101 by definition create cross-border effects, not allowing NCAs to consider foreign effects makes it difficult to achieve both effective enforcement at the national level and pursue the single authority objective.[80] Parallel enforcement by the different NCAs whose territories were affected, is hardly an optimal solution. Duplicate proceedings are inefficient, may lead to a waste of enforcement resources and create difficulties in appropriately splitting up a cartel between NCAs.[81] The *Flour* cartel cases in the Netherlands, Germany, Belgium and France demonstrate how NCAs are struggling to break down an international cartel without creating overlaps or leaving gaps.

Multiple national proceedings for the same overall cartel can clearly also be detrimental to businesses. While not (yet) accepted by the ECJ or NCAs, there are many authors taking the view that the *ne bis*

74 *S.S. Lotus (France v Turkey)* (PCIJ, 7 September 1927), series A, No. 10.
75 Ibid., para 45.
76 Ibid., para 46.
77 Brammer, *supra* n. 1, at 451–452; Van Bockel, *supra* n. 37, at 208.
78 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.3 referring to *Innolux* (ECJ, 9 July 2015), C-231/14, ECLI:EU:C:2015:451, paras 73–74. *See also* W.W. Geursen, *Grensoverschrijdende kartels: ook jurisdictieoverschrijdende omzet in de boetegrondslag?*, 7 Mededingingsrecht in de Praktijk 28–36 (2015), on the link between the *Innolux* judgement and the ACM's fines in *Silverskin Onions* and *Onion Sets*. For a critical opinion of the *Innolux* judgement, *see* Philip Bentley and David Henry, *Calculating the Cartel Fine: a Question of Jurisdiction or a Question of Economic Importance?*, 39 World Competition 3, 431 (2016).
79 Monti, *supra* n. 40, at 17–18; Bockel, *supra* n. 37, at 207–208.
80 Brammer, *supra* n. 1, at 438.
81 Ibid., 381; Brammer and others, *supra* n. 54, at 301.

in idem principle should prevent authorities in Europe from targeting businesses more than once for the same cartel conduct, even if they focus on different effects.[82] Brammer and others have rightly noted that it is artificial to split up a cartel on the basis of effects in different territories, in particular where a cartel is considered a single continuous infringement.[83] Relying on territorially defined effects to delineate jurisdictional power is also questionable considering that the effects are not particularly relevant for infringements of Article 101 by object, and hence hardly assessed for cartel conduct.[84] As submitted by Monti, Merola and others, the piling on of national fines for the same cartel may also lead to over-punishment.[85] And finally, irrespective of the legality of parallel proceedings by NCAs, they undoubtedly increase the burdens for companies under investigation. Even where in terms of efficiency they may benefit to some extent from coordination between NCAs during the investigation stage, multiple fining decisions are also likely to result in multiple appeals under different national procedures.[86]

C. The need for legal certainty

It is clear from the above that both approaches to assessing the legality of NCAs fining foreign effects are in many respects unsatisfactory. This reflects the complexity and sensitivity of the matter, which in turn explains the lack of legal certainty and absence of a political consensus that has existed for over 15 years.

The Dutch rulings in the *Silverskin Onions* and *Onion Sets* appeal cases have done little to increase the legal certainty on a European level. First, despite a request from the plaintiffs in *Onion Sets*, the Trade and Industry Appeals Tribunal did not seek a preliminary ruling from the ECJ to confirm whether the matter could solely be determined on the basis of national law.[87] This is to be regretted, as a ruling from the ECJ could have done much to guide NCAs in all Member States on the legal position under EU law. Second, the *Silverskin Onions* and *Onion Sets* cases may be more 'national' in nature than most cross-border cartel cases, as both infringements mainly related to Dutch companies[88] implementing agreements in the Netherlands concerning the Dutch production of silverskin onions or onion sets, respectively.[89] There was no other NCA that had expressed an interest in prosecuting the cartels and perhaps also no other NCA that considered itself 'well placed' to do so under the criteria of the Cooperation Notice.[90] These cases may therefore be of little relevance to situations where there is more potential for positive conflicts and a greater need to pay attention to comity considerations.

The ECN+ Directive also does not clarify whether NCAs have a right to take into account foreign effects when sanctioning cross-border cartels. One recital of the Directive stipulates that in calculating fines imposed for Article 101 factors that might be taken into account include '*the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates*'. But the geographic scope that NCAs should or may take into account in doing so is not defined.[91]

If it is going to become a more common sight in European cartel enforcement that NCAs are taking into account foreign effects, there needs to be more robust legal framework governing this practice

82 *See* in particular Wils, *supra* n. 41, at 18, point 126; W.P.J. Wils, *The principle of ne bis in idem in EC antitrust enforcement: A legal and economic analysis*, 26 World Competition 2, 131, 145 (2003).

83 *See supra* n. 48.

84 Brammer and others, *supra* n. 54, at 306.

85 Monti, *supra* n. 40, at 20; Merola and others, *supra* n. 48, at 162, point 86.

86 Kalbfleisch, *supra* n. 35, at 7.

87 *Eerstejaars plantuienkartel* (CBb, 6 October 2016), ECLI:NL:CBB:2016:272, sections 7.1.3 and 7.3.3.

88 One of the parties in in the *Onion Sets* operated through both French and Dutch subsidiaries.

89 The ACM decision in *Silverskin Onions* also points to some conduct in Italy. While the fined Dutch producers referred to the involvement of Italian producers, the ACM noted that it had found insufficient evidence to start proceedings against them. *Zilveruienkartel* (District Court of Rotterdam, 20 March 2014) ECLI:NL:RBROT:2014:2045, para 71. The ACM decision in *Onion Sets* indicates that a limited portion of the affected production was located in France. ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012) paras 105, 107.

90 Ibid., para 76.

91 Recital 47 of the ECN+ Directive.

going forward.[92] Given the political sensitivity of the matter, a situation where some Member States are moving ahead with the sanctioning of foreign effects despite continuing concerns of others may easily give rise to conflicts within the ECN.[93] In addition, the current level of legal uncertainty and lack of transparency as to the way in which NCAs may allocate the sanctioning of cross-border cartels within the ECN is problematic as it diminishes the predictability and foreseeability of penalties for businesses.[94] For these reasons, there is a clear need for legislative action on this topic to create legal certainty in accordance with the common views of Member States. It is a missed opportunity that this was not addressed as part of the ECN+ Directive, but it could still occur through an amendment of the Regulation.

5.4 Future framework for cross-border cartel sanctioning by NCAs

Some have expressed the view that the Regulation failed to achieve the key objective of effective, decentralised competition enforcement because it did not sufficiently empower NCAs to take on the shared responsibility of fully enforcing EU competition law.[95] As a consequence, NCAs have generally treated Article 101 cartel cases in exactly the same way as purely domestic cartel cases.[96] The *Flour* cartel cases show that where a cross-border cartel clearly requires enforcement to cover several Member States, the relevant NCAs fail to adopt a uniform approach and lack an EU-wide perspective. They merely work together to avoid conflicts between their domestically focused proceedings.

While it is not surprising that the entry into force of the Regulation has not fundamentally changed the focus of national authorities, it calls into question the move towards decentralisation. Given the continuing economic integration within the Union, one would expect a continuously more pan-European approach to cartel enforcement. Some have therefore been surprised by the focus on decentralised enforcement under the Regulation.[97] Leaving the availability of resources out of the equation, it makes little sense to let national agencies deal with cross-border conduct if their focus does not transcend the national level. Otherwise, it would be best for the Commission to handle any cases that involve more than one Member State. As the latter would significantly weaken the position of NCAs, the alternative seems more attractive and more realistic: making sure that NCAs adopt a more cross-border approach to enforcement of Article 101 cartel conduct.

From the perspective of efficient and effective cartel enforcement within the ECN, there is little doubt that it would be desirable to grant NCAs the right to prosecute and sanction cross-border cartels with effects beyond their national territories. For the reasons described by Brammer and others, both authorities and businesses could benefit from a more firm commitment to the objective that infringements of Article 101 should be dealt with by a single authority. Using the words of Monti, it would also greatly enhance the ability for NCAs to act as 'real European agencies'[98], which aim to safeguard competition within the Union as effectively as the Commission but in a decentralised manner.

Giving NCAs the right to fine foreign effects therefore seems an appropriate step to help achieve the objective of effective decentralised cartel enforcement. However, it is submitted that this will require (i) political consensus between Member States, (ii) a more robust procedural framework for NCAs and (iii) enhanced safeguards for businesses.

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92 Contra Monti, who argues that no amendment of the Regulation or Cooperation Notice is required. Monti, *supra* n. 40, at 22. Smits submits that the 'apparent gap in NCA enforcement' can be made good by 'particularly close collaboration among NCAs', while also hoping that the ECJ would clarify the matter. Smits, *supra* n. 70, at 190.

93 Burnside and Crossley have even suggested this may lead to Member States adopting blocking statutes, *supra* n. 69, at 32.

94 Such concerns have already been raised under the current functioning of the Regulation. Brammer, *supra* n. 1, at 197–212. Contra Wils, *supra* n. 41, at 26, point 194.

95 *See* e.g. A. Riley, *EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1*, 12 ECLR 657, 664-665, 672 (2003).

96 Monti, *supra* n. 40, at 5–18.

97 Riley, *supra* n. 95, at 671.

98 Monti, *supra* n. 40, at 21.

A. Political consensus between Member States

There are several reasons for why Member States might now agree to give NCAs the right to fine foreign effects. First and foremost, the Dutch decisions in *Silverskin Onions* and *Onion Sets* show that some NCAs may continue down this path anyway. There is therefore a greater need to address the issue and to remove the existing legal uncertainty than there was before 2003. Second, NCAs have gained much experience in mutual cooperation, coordination and case allocation within the ECN. This has led to a certain level of trust in the functioning of the system of decentralised cartel enforcement.[99] At the same time, criticism as to the handling of the *Flour* cartel cases may point Member States to the need to further revise the system to avoid suboptimal outcomes of cases dealt with by multiple NCAs in parallel. Third, while there continues to be much room for improvement, the gradual process of substantive and procedural convergence and strengthening of NCA powers has likely given Member States greater confidence in the way cartel cases are dealt with by others in the network.[100] Fourth, whereas it was hardly discussed in the negotiations of the Regulation due to its sensitivity, explicitly addressing the matter will allow the Member States to empower NCAs while at the same time providing for appropriately caveats and sufficient safeguards to deal with national concerns.

The most sensitive issue for Member States to resolve relates to the circumstances under which an NCA may effectively bar other NCAs from pursuing a matter by sanctioning the cartel for its domestic and foreign effects. Some favour a system where the action by one NCA under Article 101 automatically prevents others from taking action.[101] That effectively comes down to exclusive power being granted to whichever authority is the quickest to start proceedings against a particular cartel, which seems to be an obvious source of conflict. Others favour a system of binding case allocation rules pointing to a single authority, i.e. identifying the 'best placed' authority within the ECN rather than one or more 'well placed' authorities.[102]

Not allowing for any exceptions to the principle that cross-border cartels should be handled by a single authority within the ECN will prevent any duplicate cartel proceedings within the ECN. However, it will also put much pressure on the case allocation system and will require more rules and procedural safeguards to be put in place to govern the actions of NCAs. Even then, it is questionable whether Member States will be willing to fully give up the discretion of pursuing a case with a domestic impact in each situation where another NCA is already dealing with the same cartel or is considered better placed to do so.

Merely giving NCAs the right, not the obligation, to fine foreign effects and making that right subject to the consent of the relevant other NCAs may be a more politically realistic objective to pursue. It does not avoid duplicate proceedings altogether, but it does allow for full enforcement by a single NCA whenever that is considered most appropriate. The discretion of NCAs to hold on to the prosecution of a matter already pursued by another NCA may also be limited in several ways. A refusal to consent to the enforcement by another NCA may for example require a statement of reasons, may be limited to particular circumstances, may result in an obligation for the objecting NCA to start its own proceedings or it may be a trigger for the Commission to take over the case. Requiring mere tacit approval rather than express consent by other NCAs may also help to make full enforcement by a single NCA the rule rather than the exception.

A particular aspect that may also prove to be sensitive is the distribution of financial gains from imposed penalties. Giving one NCA the right to sanction a cross-border cartel also for the harm caused elsewhere leads to the obvious question whether it is fair for the prosecuting authority to keep all

99 *See* Commission Staff Working Document *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, SWD(2014) 230/2, 69–72 (2014).

100 Commission Communication to the European Parliament and the Council, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM(2014) 453 (2014).

101 Monti, *supra* n. 40, at 17.

102 Merola and others, *supra* n. 48, at 163, 167.

proceeds, even more so where other NCAs are required to assist in gathering evidence. As pointed out by Wils, there is a risk that financial incentives may lead to 'pre-emptive prosecutions'.[103] To avoid this risk, it may be preferable to distribute gains from fines on the basis of enforcement efforts or according to the relevant turnover per Member State.[104]

B. A robust procedural framework

If Member States can agree to give NCAs the right to fine foreign effects, more robust procedural rules need to be put in place to ensure this right is used appropriately. Binding rules should be agreed to determine key aspects such as (i) the process of identifying the authority that will take on the responsibility for EU-wide sanctioning, (ii) the process of requesting and obtaining the consent of other NCAs to the sanctioning by the lead NCA 'on their behalf', (iii) the obligations for NCAs to assist the lead NCA in not just investigating but also prosecuting and sanctioning a cross-border cartel in its entirety, and (iv) the obligation for NCAs to refrain from pursuing cases (either *ex officio* or in response to a complaint or leniency application) for which another NCA has already been given the sole responsibility.

Determining which authority will be in the lead of the investigation, prosecution and sanctioning of a cross-border cartel will make it more important to follow sound case allocation principles. It has been pointed out that the rules currently described in the ECN Notice are not precise enough to identify a 'best placed' authority.[105] Alternative or additional criteria will need to be applied that point to a single authority that can best be made responsible for a particular case. These criteria will need to be sufficiently clear and unequivocal. However, as rightly noted by Merola and others, the system should still provide for some flexibility because of the difficulty and sensitivity of allocating sole responsibility to a particular NCA.[106] Making the right of NCAs to act on behalf of the entire network subject to the consent of others will to a great extent help to maintain this flexibility. It can also be considered to give the Commission a right to intervene where case allocation in a particular case results in a suboptimal outcome or where NCAs fail to agree on the allocation.[107]

It is important for the NCAs involved and the businesses under investigation that the allocating of responsibility for the prosecution and sanctioning of a case under Article 101 is determined at an early stage. The Cooperation Notice recognises the need to deal with any re-allocation issues quickly, normally within two months of the first NCA notifying the ECN of the start of its proceedings.[108] A similar time limit should apply to the period in which other NCAs can consent or object to the lead NCA prosecuting and sanctioning a cartel for its entire EU effects. Allowing NCAs to make that decision at a late stage of an investigation will create uncertainty for the businesses concerned and may result in unnecessary duplication of investigative efforts. On the other hand, the time period should be long enough to allow NCAs to consider a cartel's scope and weight of effects and properly assess whether there is a need to hold on to right to prosecute the cartel for its domestic effects in parallel.

The prosecution and sanctioning of a cross-border cartel by a single NCA will require a greater level of investigative assistance from other NCAs. The *Flour* cartel cases in Germany, France, the Netherlands and Belgium show that cross-border cartel conduct can consist of various elements that cut across territories and that involve different sets of participants. Splitting the overall conduct into territorially defined infringements may be artificial, inefficient and problematic from a double jeopardy and proportionality perspective. But it does allow the respective authorities to focus on the conduct for which they are generally best placed to gather the evidence. If a single NCA is given the

103 Wils, *The principle of ne bis in idem in EC antitrust enforcement*, *supra* n. 82, at 146.
104 Ibid., Monti, *supra* n. 40, at 17.
105 Merola and others, *supra* n. 48, at 163.
106 Ibid, 164.
107 Merola and others have proposed that the Commission may be given the authority to determine the best place authority if the NCAs fail to do so within three months. Ibid., 167.
108 ECN Notice, paras 16–19.

sole responsibility to fine a complex, multi-faceted, cross-border cartel, it will rely heavily on the evidence-gathering by its counterparts in other Member States. The Regulation merely gives NCAs the right to carry out inspections or other fact-finding measures on behalf of others.[109] The ECN+ Directive includes some limited measures to strengthen the framework of cooperation between NCAs, also in respect of the enforcement of fine decisions imposed by other NCAs. More far-reaching measures will need to be implemented to ensure that full support is given to the authority that has been made solely responsible for the prosecution and sanctioning of a case. Apart from investigative considerations, any centralisation of enforcement will result in many other practical considerations regarding the conduct of proceedings, e.g. in respect of translations, local representation and logistics of hearings.

Any procedural rules agreed to on an EU level will need to be reflected in the national laws of the Member States. Most importantly, national law would need to give the national authority the right to prosecute and sanction cross-border cartels under Article 101 also for the effects in other Member State (subject to the consent of the other NCAs) and allow domestic effects of cross-border cartels to be prosecuted and sanctioned by NCAs in other Member States (subject to the consent of the national authority). [110]

C. Safeguards for businesses

Granting additional fining powers to NCAs must come at the price of increasing safeguards for businesses. The Commission confirmed that in the consultation on the ECN+ Directive, there was a "recurrent demand from a majority of the stakeholders, including lawyers, business and business organisations that any enhancement in NCAs' enforcement powers be accompanied by increased procedural guarantees at national level".[111] Additional safeguards in the context of Article 101 cartel enforcement at national level are particularly necessary to prevent double jeopardy, disproportionate fines, unpredictable sanctioning, arbitrary use of prosecutorial discretion, opaque coordination within the ECN, and undue investigative processes.

The principle of *ne bis in idem* requires that whenever NCAs prosecute and sanction Article 101 infringements for their full effects across the Union, other NCAs and the Commission must be barred from pursuing the same conduct. To this effect, the first sentence of article 11(6) of the Regulation must be extended to clarify that the initiation of proceedings by one NCA that has been granted sole responsibility for the case shall relieve other NCAs of their competence to apply Article 101 in that case. The Commission should similarly be prevented from starting parallel proceedings.[112]

An extension of the territorial scope of NCA fining competences will likely require an amendment of national fining guidelines to ensure sanctions imposed for the full effects within the Union continue to be proportionate. Simply applying the existing framework of fine calculation to a company's relevant turnover in the EEA rather than the Member State concerned may not result in the appropriate level of deterrence. Importantly, the existence of widely diverging fining practices across the Union confirms that there is no uniform interpretation and application of the notion of proportionality by Member States. The lack of harmonisation means that the same Article 101 infringement will be sanctioned differently depending on the fining practices of the NCA that has been made responsible for the overall sanctioning of the case. This has also been recognised in the ECN+ Directive.[113] Leniency applicants and complainants may be influenced by such national fining differences in

109 Art. 22(1) of the Regulation.

110 Kalbfleisch, *supra* n. 35, at 7.

111 Answer by Competition Commissioner Vestager on behalf of the Commission to the parliamentary question of Mr Schwab, reference E-005658/2016 (12 October 2016). *See* in particular the submission of Business Europe, *Effective enforcement by National Competition Authorities* (16 February 2016), http://ec.europa.eu/competition/consultations/2015_effective_enforcers/businesseurope_en.pdf .

112 It may be necessary to maintain some flexibility to allow the Commission to take over the case from the responsible NCA, for example where in the course of the investigation it appears that more than three Member States are affected.

113 Recital 6 of the ECN+ Directive.

deciding where to go first, hence creating a risk of forum shopping.[114] But an arguably greater risk relates to the lack of predictability of fine levels applicable to cross-border cartel infringements. Fining guidelines generally leave a wide margin of discretion for authorities to determine an appropriate fine in a particular case. Even in a purely national context, it is therefore very difficult for companies to predict the level of fines they could be exposed to. But the combination of diverging national fining practices and unpredictable case allocation principles would make it virtually impossible for businesses to assess their potential exposure for cross-border cartel conduct. The ECN is already criticised for its opaque functioning.[115] Giving NCAs the right to fine cartels for their full effects in the Union will significantly increase the potential impact of case allocation within the ECN. It is therefore all the more important to improve the transparency and traceability of steps taken within the network.[116] In addition, it is rightly suggested that the process of case allocation should also be made subject to legal review.[117] Making it possible for businesses to challenge improper allocation of prosecutorial discretion will provide additional protection against enforcement action being taken by NCAs that have little or no jurisdictional nexus to the conduct concerned.[118]

Clearly the most effective way to ensure predictability of fines and avoid forum shopping is to harmonise the sanctioning of Article 101 infringements. Creating a system in which NCAs have the same competence as the Commission to fine cartels for their full effects in the Union increases the need to provide for uniform sanctioning of such cartels. It is difficult to justify why the exact same cross-border violation of Article 101 would be sanctioned differently merely depending on which authority is taking the lead in prosecuting the case. But harmonisation of fining policies is a far-reaching limitation of the procedural autonomy of Member States and hence a particularly sensitive issue in itself.[119] This is especially the case because harmonisation of the calculation of fines imposed under Article 101 will likely require a similar change to the way fines for domestic infringements are calculated, given that cartel conduct is often found to breach the national and European provisions in parallel.[120] However, the ECN+ Directive does contain some measures to harmonise NCA fining policies, including in respect of the maximum amount of the fine and the elements that need to be considered for the fine calculation.[121] So the Commission has found some room to slowly move towards more harmonised sanctioning of Article 101 infringements. A possible next step might be to require the application of the Commission's fining guidelines only in those instances where an NCA is given the responsibility to prosecute and sanction a cross-border cartel on behalf of all authorities in the ECN.

Lastly, additional safeguards are necessary to ensure due process in cross-border cases that require evidence-gathering in multiple Member States under the prosecutorial responsibility of one NCA. As long as national procedural rules continue to differ, cross-border investigations are subject to a patchwork of due process requirements. Businesses in Europe are already suffering from the absence of a level playing field with respect to procedural safeguards.[122] In the context of the ECN+ Directive, some have called for the application by NCAs of the principles of the Commission's Notice on best practices for the conduct of proceedings.[123] But the Commission appears reluctant to step on the toes

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114 Wils, *The principle of ne bis in idem in EC antitrust enforcement*, *supra* n. 82, at 146–147. Brammer argues the risk of forum shopping is exaggerated as there will in practice be limited NCAs that can suitably deal with a case and case allocation rules will prevent allocation to an NCA that is not 'well placed'. Brammer, *supra* n. 1, at 183–186.

115 Brammer and others, *supra* n. 54, at 294–297; J. Rivas, *Interview with Mr Marín Quemada*, 39 World Competition 4, 525, question 6 (2016).

116 Ibid., 310, 316.

117 Ibid., 307–309.

118 This is not the same as proposing to create individual rights for the companies involved to have their case dealt with by a particular authority as referred to in para 31 of the ECN Notice.

119 This was confirmed in the context of the proposal for the ECN+ Directive by the Commission's response to calls for the application of the Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU by NCAs (*see* Business Europe, *supra* n. 111 and the parliamentary question of Mr Schwab, reference E-005658-16 (12 July 2016)). Commissioner Vestager responded to these calls by merely stating that "the exercise of the NCAs' enforcement powers should remain subject to the procedural guarantees, as they are assured by the EU Charter on Fundamental Rights". Vestager, *supra* n. 111.

120 *See* Monti, *supra* n. 40, at 10,11, 16.

121 Art. 14 and 15 of the ECN+ Directive.

122 *See* e.g. Business Europe, *supra* n. 111.

123 Ibid.; Schwab, *supra* n. 119.

of Member States by proposing such a limitation of their procedural autonomy through European harmonisation. The ECN+ Directive contains just one article on fundamental rights and procedural safeguards, mainly referring to the general principles of Union law and the Charter of Fundamental Rights of the European Union.[124] This is clearly not sufficient to guarantee a level playing field as regards due process at an appropriate level.[125]

As an alternative to direct harmonisation of due process standards, it has been suggested that where businesses are exposed to 'double standards', they at least need to have the benefit of 'double safeguards', meaning that investigative efforts must comply with the domestic procedural rules of all Member States concerned.[126] In this light, Brammer has argued that authorities should abide by the principle that the highest protection standard always prevails.[127] This arguably results in procedural harmonisation through the backdoor, at a level considered by most to give too much protection. But if NCAs are to be given the right to prosecute and sanction cross-border conduct also on behalf of others in the Union, this necessarily comes with the burden of guaranteeing full compliance with the due process requirements applicable to businesses under investigation across the various Member States.

5.5 Conclusion

It is clear that in the years before 2003, the question whether NCAs should be given the power to fine foreign effects within the Union was too sensitive to address in the negotiations of the Regulation. Since the entry into force of the Regulation, NCAs have proceeded on the basis of the common view that the object of their sanctioning should be limited to domestic effects. Within the ECN, authorities have worked together on an ad hoc and informal way to discuss case allocation and coordinate their respective enforcement efforts to target cross-border cartels. While considered an overall success by the Commission, it is clear that this approach has not always led to an optimal outcome in terms of efficiency, proportionate fining and avoidance of double jeopardy concerns. In 2012, the Dutch NCA started to move away from the shared, more restrictive approach to decentralised cartel enforcement. In the *Silverskin Onions* and *Onions Sets* cartel cases, the authority imposed fines that were calculated on the basis of EU-wide turnover and that were meant to sanction the effects of the cartel across the Union to ensure effective enforcement of Article 101. While it is expected that there will be more such cases going forward, there is currently still a clear lack of legal certainty as to the legality of NCAs fining foreign effects. Moreover, there continue to be widely diverging views within the ECN as to whether it is appropriate for NCAs to sanction cross-border cartels for their full EU effects.

While the ECN+ Directive aims to strengthen and harmonise NCA enforcement of the European competition rules in various ways, it unfortunately does not clarify the right of NCAs to impose fines that take into account effects in other Member States. It is surprising that the European legislator has not taken this opportunity to address the issue through legislative action. It seems that there should now be sufficient political will to do so. Member States will likely agree that giving NCAs the right to fine foreign effects within the Union could greatly enhance the effectiveness of decentralised enforcement of cross-border cartels. However, most will also agree that before exploring this new frontier of extraterritorial cartel enforcement further in practice, a robust legal framework should be put in place that reflects the views of all members of the ECN, provides for the necessary procedural rules and safeguards, and ensures that sanctions are adequate and proportionate.

The debate discussed in this chapter on the legality of NCAs fining foreign effects is unique to the context of European competition law enforcement. But it links to the assessment of jurisdictional limitations and self-restraint also assessed in Chapters 3 and 4 and it adds to the response to the second

124 Art. 3 of the ECN+ Directive.

125 As an example of insufficient safeguards at national level, Business Europe in its response to the consultation on the ECN+ Directive has pointed to the fact that only as of September 2015 does the Polish Competition Authority issue statements of objections as part of its administrative enforcement proceedings. Business Europe, *supra* n. 111.

126 Brammer and others, *supra* n. 54, at 317–318; Brammer, *supra* n. 1, at 306–324.

127 Brammer, *supra* n. 1, at 324.

research sub-question: *What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?*

The practices described in this chapter confirm that also within the European context authorities have choices in exercising their jurisdictional discretion and that these choices affect the extent to which parallel cartel enforcement might result in overlapping enforcement. The methods used include (i) prosecuting only the domestic elements of a cartel (i.e. limiting the object of the enforcement), (ii) sanctioning a cross-border for only its domestic effects, (iii) also taking into account foreign sales but applying a gravity factor that reflects only domestic harm, and (iv) imposing only a symbolic fine in view of enforcement action elsewhere. By employing these methods, NCAs have in past cross-border cartel cases pursued at the national level been careful to avoid overlapping enforcement. This is also due to the application of the principle of *ne bis in idem*, meaning that without a clear delineation of an authority's enforcement actions, other authorities could be barred from taking subsequent action.

The careful approaches taken in the past by several NCAs have led to sub-optimal outcomes, harming the overall objective of an effective, decentralised enforcement of EU competition law. That may explain why the Dutch NCA has chosen to test the waters by starting to calculate cartel fines on the basis of EU-wide turnover, hence fining foreign effects of the cartel. Outside of the EU context, this would be equivalent to the Commission or the DOJ prosecuting internal cartels for their global effects and calculating the fines on the basis of worldwide affected sales. The diverging legal views and practices among Member States reveal that the legal basis for this approach remains questionable. But it may well be the recommended approach to ensure efficient, effective and proportionate cartel enforcement, serving the interest of both the enforcement community and businesses. This is true within the confines of the ECN, characterised by close cooperation and shared responsibilities between authorities. But these findings are also relevant beyond the European context. They show that an expansion of jurisdictional reach and extraterritorial enforcement may not be automatically objectionable, if it is facilitates the allocation of enforcement to fewer authorities or perhaps even reserves enforcement exclusively to a single authority.