

**Case Allocation in antitrust and collaboration between the National Competition  
Authorities and the European Commission**

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## I. Introduction

Council Regulation No.1/2003 (“Regulation 1/2003”) entered into force on May 1<sup>st</sup> 2004 and launched a new antitrust enforcement regime in the European Union. The modernization package has a severe impact on competition law, because of the fact that important responsibilities of EU competition’s law enforcement are assigned to member states (National Competition Authorities –NCAs- and national courts)<sup>1</sup>. Words as

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<sup>1</sup> See among others C. W. Bellamy/G. D. Child, *European Community Law of Competition*, (Oxford, 2008), J. Faull and A. Nikpay, *The EC law of Competition*, (Oxford, 2007), U. Immenga/E.-J. Mestmäcker, *Wettbewerbsrecht, Kommentar zum europäischen Kartellrecht*, Teil 2, (München, 2007), E. Langen/H.-J. Bunte, *Kommentar zum deutschen und europäischen Kartellrecht, Band 2, Europäisches Kartellrecht*, 10 Auflage, (2006), R. Bechtold/W. Bosch/J. Brinker/S. Hirsbrunner, *EG-Kartellrecht, Kommentar, Art. 81-86 EG, EG-Kartell-VO 1/2003, Gruppenfreistellungsverordnungen 2790/1999, 1400/2002, 772/2004, 2658/2000 und 2659/2000 sowie EG-FusionskontrollVO 139/2004*, (Beck Juristischer Verlag, München, 2005), D. Dalheimer/C. Feddersen/G. Miersch, *EU-Kartellverfahrensverordnung, Kommentar zur VO 1/2003*, (Beck Juristischer Verlag, München, 2005), U. Schnelle/A. Bartosch/A. Hübner, *Das neue EU-Kartellverfahrensrecht*, (Richard Boorberg Verlag GmbH & Co KG, Stuttgart 2004), A. Klees, *Europäisches Kartellverfahrensrecht (mit Fusionskontrollverfahren)*, (Carl Heymanns Verlag, 2004), E.-J. Mestmäcker/A. Schweitzer, *Europäisches Wettbewerbsrecht*, 2 Auflage, (Beck Juristischer Verlag, München, 2004), T. Lampert/N. Niejahr/J. Kübler/G. Weidenbach, *EG KartellVO, Praxiskommentar zur Verordnung Nr. 1/2003*, (Verlag Recht und Wirtschaft GmbH, Frankfurt, 2004), R. Whish, *Competition Law*, (Oxford University Press, 5<sup>th</sup> edn, 2003), D.G. Goyder, *EC Competition Law*, (Oxford EC Law Library, 4<sup>th</sup> edn, 2003), pp. 471, 549, A. Jones and B. Sufrin, *EC Competition Law, Text, cases, materials*, (2<sup>nd</sup> edn, 2004), D. Dalheimer, “Die neue Verordnung zur Durchführung der Artikel 81 und 82 EG-Vertrag –ein Beispiel für neue Konzepte im Recht der Europäischen Union”, in *Die Europäische Union nach Nizza*, T. Bruha/C. Nowak (eds) (Baden-Baden, 2003), K. Dekeyser/C. Gauer, “The new enforcement system for

decentralization and subsidiarity are often used to describe the new system<sup>2</sup>. Regulation 1/2003 is based on the principle of parallel competences. Each national competition authority in the EU is not only empowered to apply fully art. 81 and 82 of the EC Treaty, but is also obliged to do so when there is an anti-competitive effect between Member States. This has the meaning that at least 27 NCAs in the EU share the same competence. Therefore, case allocation becomes one of the central challenges of the new enforcement system. The European Competition Network (“ECN or Network”), composed of the NCAs and the European Commission, is the vehicle for this task<sup>3</sup>.

The whole argumentation of the necessity of the new enforcement system is based on economic analysis<sup>4</sup>. Supporters of Regulatory Competition<sup>5</sup> argue that effective enforcement system presupposes concurrent jurisdiction, whereby decisions and procedures in different NCAs have a benchmarking effect in a sense that it creates a motive for each NCA to apply competition law in a perfect and efficient manner<sup>6</sup>. In addition, the decentralized enforcement permits innovative application of competition

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Articles 81 and 82 EC and the Rights of Defence”, in *International Antitrust Law & Policy: Fordham Corporate Law 2004*, B. Hawk (ed) (Juris Publishing, 2005), L. Idot, “The application of EC Competition Rules by National Courts, Remarks by a French Academic”, paper presented at the 2005 IBA Conference: *Antitrust Reform in Europe: a year in practice* (5<sup>th</sup> roundtable: ‘Due process in the face of divergent national procedures and sanctions’), held in Brussels, March 9-11, D. Geradin, “Competition between Rules and Rules of Competition, A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law”, [2002] 9 *Columbian Journal of European Law*, T. Tridimas, *The General Principles of EC Law*, (Oxford University Press, 1999).

<sup>2</sup> I. M. Sinan/J. Uphoff, “The modernization of EC Competition Law: decentralization through subsidiarity”, *The 2003 Handbook of Competition Enforcement Agencies*, pp. 5, 6.

<sup>3</sup> A. Schaub, “Continued focus on reform: Recent developments in EC competition policy” in *International Antitrust Law & Policy: Fordham Corporate Law 2004*, Hawk (ed), (Juris Publishing, 2002), 31, 39, A. Schaub, “Developments of Competition Law and Policy in EU Competition Law & Policy, Developments and Priorities”, Athens Conference April 19<sup>th</sup>, (Nomiki Bibliothiki, Athens, 2002), pp. 103, 106.

<sup>4</sup> D. Geradin, “Competition between Rules and Rules of Competition, A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law”, [2002] 9 *Columbian Journal of European Law*, 12.

<sup>5</sup> C. M. Tiebout, “A Pure Theory of Local Expenditures”, (1956) 64 *Journal of Pol. and Econ.*, 416.

<sup>6</sup> D. Geradin, [2002] 9 *Columbian Journal of European Law*, 12, 15.

law<sup>7</sup>. Finally, the decentralization brings about the avoidance of the so called information asymmetry in a sense that the NCAs are in a better position of collecting critical evidence<sup>8</sup>. On the contrary, the opponents of decentralization share the arguments of externalities, race to the bottom and economies of scale as basis in favour of concentrative competition<sup>9</sup>. Especially, externalities are to be regarded as the basic cause of markets' failure and race to the bottom brings about less effective competition rules because of the fact that every NCA is possible to apply rules with low specifications in order to attract undertakings and investments. In any case a sole provider (European Commission) can be more effective than multiple providers-NCAs.

However, Regulation 1/2003 did not create a hierarchical system, whereby the NCAs would become local enforcers of the Commission, nor does it provide for a "Community dimension" evaluation<sup>10</sup>, nor does it empower the Commission, an NCA or the Advisory Committee to assign cases. Thus, the principle of concurrent jurisdiction applies both vertically and horizontally and it has to be fully clarified because of the danger of issuing contradictory decisions on behalf of NCAs, double procedures before different NCAs, multiple costs for complainants and undertakings and multiplication of work for both undertakings and NCAs.

## **II. Case allocation within the Network.**

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<sup>7</sup> D. Geradin, "Dealing with Environmental Issues in an Integrated Market: The Regulatory Harmonization Policy of the European Community", in *The Greening of Trade Law? A Comparison of International Trade Organizations on Environmental Issues*, R. Steinberg (ed) (Rowman & Littlefield, 2002), pp. 117, 132.

<sup>8</sup> M. Armstrong, S. Cowan and J. Vickers, *Regulatory Reform-Economic Analysis and British Experience*, (Cambridge: MIT Press, 1994), pp. 11, 12.

<sup>9</sup> E. M. Fox, "Antitrust Law on Global Scale: Races up, Down and Sideways" in *Regulatory Competition and Economic Integration*, D. Esty & D. Geradin (eds) (Oxford University Press, 2001), pp. 348, 352. See also D. Geradin, [2002] 9 *Columbian Journal of European Law*, 15.

<sup>10</sup> The concept of "Community dimension" is defined by means of quantitative criteria at the EC Merger Regulation.

As mentioned above, Regulation 1/2003 does not regulate the work sharing between the Commission and the NCAs. The only provision on jurisdiction in Regulation 1/2003 is contained in art. 11 para 6, according to which the initiation of proceedings by the Commission will relieve the national authorities of their competence of applying art. 81 and 82 EC. However, there is no such provision as far as the horizontal level is concerned, which excludes parallel investigation of the same case by several NCAs. So, theoretically, each NCA may investigate any agreement or practice which affects trade between Member States, without regard to where it is concluded or implemented, where the parties are located or where the restrictive effects are detected<sup>11</sup>.

On the other hand, most national competition rules have embodied the principle of effects doctrine, which prevents the NCAs from prosecuting restrictive agreements or practices, which do not affect competition in their domestic territory<sup>12</sup>. The principle of effects doctrine will not reduce the number of competent authorities, because the vast majority of art 81 and 82 cases will have significant cross-border elements and are thus likely to affect competition in two or more Member State. Inevitably, this raises the question of how the work will be divided effectively among the NCAs and which criteria and principles will be applied to allocate cases among them<sup>13</sup>.

According to the Commission the allocation of cases should not be a mechanical process, but flexible solutions should be found. However, the Commission would not accept legally binding rules by which certain cases would be *a priori* excluded from its

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<sup>11</sup> J. Basedow, "Who Will Protect Competition in Europe? From central enforcement to authority networks and private litigation", (2001) 2 *European Business Organization Law Review* 443, 450. See also S. Brammer, "Concurrent Jurisdiction under Regulation 1/2003 and the issue of case allocation", [2005] *Common Market Law Review*, 1386.

<sup>12</sup> J. Basedow, (2001) 2 *European Business Organization Law Review*, 450.

<sup>13</sup> A. Schaub, n. 3 above, 39.

jurisdiction<sup>14</sup> and this is why Regulation 1/2003 does not contain any criteria for allocating cases. On the contrary, the allocation criteria, which the Commission elaborated in cooperation with the NCAs and which are purely indicative, are laid down in the Notice on cooperation within the Network of Competition Authorities (Network Notice)<sup>15</sup>.

### **A. Lack of binding allocation rules**

In accordance with recital 18 of Regulation 1/2003, to ensure that cases are allocated appropriately within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it. The objective is that each case should be dealt with by one single authority. Moreover, pursuant to the Network Notice the allocation rules are based on the condition that the competition authority that receives a complaint or commences an *ex officio* procedure will usually remain in charge of the case. If re-allocation takes place, it should be done directly and efficiently<sup>16</sup>.

### **1. Center of gravity**

In the discussion paper which was published prior to the White Paper, the German Competition Authority (Bundeskartellamt) had introduced the proposal to allocate cases

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<sup>14</sup> See K. Dekeyser and D. Dalheimer, “Cooperation within the European Competition Network – taking stock after 10 months of case practice”, paper presented at the 2005 IBA Conference: *Antitrust Reform in Europe: a year in practice* (5<sup>th</sup> roundtable: ‘Due process in the face of divergent national procedures and sanctions’), held in Brussels, March 9-11, 6.

<sup>15</sup> OJ 2004, C101/43.

<sup>16</sup> Para 19 of the Network Notice. Also see S. Brammer, [2005] *Common Market Law Review*, 1387.

according to the “centre of gravity” test<sup>17</sup>. The CFI had already referred to this concept in its judgment BEMIM<sup>18</sup>, of 1995, when it was considering whether the Commission could reject a complaint on the ground that there was no Community interest. The CFI decided that the Commission was entitled to reject the complaint for lack of interest on its behalf solely because it held that the centre of gravity of the alleged infringements was in France and that the matter had already been brought before the French courts. However, the Commission rejected the test as being ambiguous and proclaimed that the Network would “ensure an efficient allocation of cases based on the principle that cases should be dealt with by the best placed authority”<sup>19</sup>.

## **2. Best placed v. Well placed authority.**

It has to be noted that the concept of the best placed authority was replaced later on by the concept of the well placed authority, which does not necessarily premise one single authority, but actually implies that several authorities can deal with a particular matter. The Network Notice provides that an NCA is well placed to deal with a case when: a) the agreement or conduct has substantial direct (actual or foreseeable) effects in its territory, b) the NCA is able to effectively bring to an end the infringement and it has the power to prohibit the agreement or practice and, where appropriate, impose appropriate sanctions;

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<sup>17</sup> See Bundeskartellamt, *Praxis und Perspektiven der dezentralen Anwendung des EG-Wettbewerbsrechts* (1998), pp. 19, 21. See Monopolkommission, “Problems consequent upon the reform of the European cartel procedures”, 32<sup>nd</sup> Special Report, 2001, para 42 (available at [www.monopolkommission.de/sg\\_32/text\\_s32\\_e.pdf](http://www.monopolkommission.de/sg_32/text_s32_e.pdf)). See also S. Brammer, [2005] *Common Market Law Review*, 1388.

<sup>18</sup> *BEMIM v. Commission*, Case T-114/92 [1995] ECR II-147, para 93. See also S. Brammer, [2005] *Common Market Law Review*, 1388.

<sup>19</sup> See p. 6 of the Commission’s Explanatory Memorandum of 27 Sept. 2000, (COM (2000) 582 final).

and c) it can collect the relevant evidence alone or with the assistance of other authorities<sup>20</sup>.

If all of the above conditions are fulfilled, an NCA can deal with the case on its own. If a case has material links with several Member States three scenarios are conceivable:

1. In the cases where two or three Member States are concerned, the actions of one NCA may, in certain cases, be sufficient to bring the whole infringement to an end. To the extent that evidence must be gathered and in the other Member States concerned, the acting NCA can ask for the assistance of the NCAs in these other Member States according to art. 22 para 1 of Regulation 1/2003.

2. Where a single NCA cannot effectively bring the infringement to an end, two or three NCAs may act in parallel. Preferably, one of them should be the leading authority<sup>21</sup>.

3. Finally, the infringement at issue may affect competition in more than three Member States. In such situations, the Commission is considered to be better placed authority to deal with the case<sup>22</sup>.

Except the above mentioned third scenario, the Commission is also regarded as the well placed authority, when a case bears a certain Community interest. This category includes mainly cases which raise new competition issues and therefore it is necessary that the Commission sets a precedent, as well as cases which involve legal issues that are closely linked to other EC law provisions. Cases that require the adoption of a Commission decision in order to ensure effective enforcement also fall in this category. The latter rule is quite vague and could be considered as a provision, which covers all situations that are

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<sup>20</sup> Para 8 of the Network Notice.

<sup>21</sup> This scenario would prevail where the companies involved in illegal agreements or practices are located in different Member States. See paras 12 and 13 of the Network Notice.

<sup>22</sup> See para 14 of the Network Notice. See also S. Brammer, [2005] *Common Market Law Review*, 1391.

not yet covered by any of the other alternatives. It may be seen as a necessary complement to art. 11 para 6 of Regulation 1/2003 which empowers the Commission to take a case out of the jurisdiction of the NCAs at any stage of a national investigation.

## **B. Initial allocation period**

In order for the Network to work efficiently, cases should be reallocated as quickly as possible<sup>23</sup>. The Joint Statement<sup>24</sup> refers to an indicative timetable within which case allocation should be completed<sup>25</sup>. The Network Notice provides for a period of two months during which reallocation should be settled. After the two-month period, cases will not be reallocated to another authority, unless there is a material change of the facts known about the case during the investigations, in a way that it becomes obvious that another authority should handle the case<sup>26</sup>. The two-month period begins when the first information is sent to the Network. But, the fact that the Network Notice is an informal document affirms the non-binding character of the time limit, which is also emphasized by the wording of para 18 of the Network Notice. Moreover, in para 54 of the Network Notice, the initial allocation period is expressly referred to as “*indicative time period*”. This time limit may therefore be exceeded at the discretion of the Network members<sup>27</sup>.

What’s important is that after the initial allocation period the Commission cannot remove a particular case from the jurisdiction of an NCA. However, para 54 of the Network Notice contains five scenarios in which the Commission retains the right to remove a case

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<sup>23</sup> See para 7 and 18 of the Network Notice. See also S. Brammer, [2005] *Common Market Law Review*, 1391.

<sup>24</sup> Joint Statement of the Council and the Commission on the functioning of the network of competition authorities of 10 Dec. 2002 (Council of the EU, doc. no 15435/02 ADD 1).

<sup>25</sup> See para 12 of the Joint Statement.

<sup>26</sup> See paras 18 and 19 of the Network Notice.

<sup>27</sup> S. Brammer, [2005] *Common Market Law Review*, 1392.

from the jurisdiction of an NCA even after the expiry of the two-month period. These have to do mostly with situations where NCAs confront decisions which are in conflict with each other or with established case law.

### **C. Exchange of information**

The main goal of the information exchange is to allow a prompt and efficient allocation of cases<sup>28</sup>. The information transmitted on new matters must, therefore, be such that it is possible for all Network members, with minimum effort, to identify the case, to uncover whether a complaint concerning the same facts has also been addressed to them, or whether they have already dealt with the case in the past or are currently dealing with it.

Art. 11 para 3 of Regulation 1/2003 establishes an obligation for NCAs to report new cases only *vis-à-vis* the Commission. Informing other NCAs of new cases remains merely an option. However, it can be assumed that an efficient allocation procedure requires that all members of the Network are aware of new cases. Therefore, para 17 of the Network Notice provides that information on incoming cases “*should therefore be provided to NCAs and the Commission*”. In practice, the information is disseminated electronically through a common platform accessible by all Network members<sup>29</sup>.

Pursuant to art. 11 para 3 of Regulation 1/2003, new cases must be reported “*before or without delay after commencing the first formal investigative measure*”. This means that the Network should be informed as soon as an NCA starts a new matter in order to allow

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<sup>28</sup> Explanatory Memorandum Explanatory Memorandum of 27 Sept. 2000, which was published together with the proposal for Regulation 1/2003 (COM(2000)582 final; not published in the O.J.), 19, 20.

<sup>29</sup> A. Schaub, n. 3 above, 39.

for a quick re-allocation of the case. An exception would be justified, where an NCA has to act quickly in order to secure evidence<sup>30</sup>.

Another issue arising in connection with the question when the Network is to be informed of new cases is the definition of the term “*first formal investigative measures*”. In para 17 of the Network Notice, the Commission refers to the measures of investigation that it can undertake itself under Regulation 1/2003, namely simple and formal requests for information, interviews of natural or legal persons, and inspections of the premises of undertakings and private homes. Though it is likely that the above mentioned term will not be interpreted uniformly by the NCAs as they act under their own national procedural laws, which may contain different rules with regard to the handling of cases including the opening of new matters, the institution of proceedings, and the conduct of investigations.

Another question that may be raised is whether the NCAs should report purely national cases to the Network. Neither Regulation 1/2003 nor the Network Notice foresees any exchange of information on purely national cases. The obligation established by art. 11 para 3 of Regulation 1/2003 to inform the Commission and the right to inform other NCAs of new cases only apply to cases involving the application art. 81 and 82. Therefore, where an NCA erroneously assumes the absence of an appreciable effect on intra-Community trade, no case information would be forwarded to the Network.

It seems that in practice Network members often contact each other even before the new case has actually been reported to the Network. Such early contacts are apparently triggered by parallel complaints on the same alleged cartel or by the suspicion that the

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<sup>30</sup> J. Fingleton, “The Distribution and Attribution of Cases Among the Members of the Network: The Perspective of the Commission/NCAs”, in *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, C.-D. Ehlermann and I. Atanasiu (eds) (Oxford/Portland: Hart Publishing, 2005), p. 6.

infringement at issue concerns more than one Member States. Obviously, it is not necessary to have a new case entered into the common database of the ECN in order to initiate the allocation process. All Network members seem to be alert to the possibility that another Network member could be better placed to handle a particular case and share the common understanding that re-allocation of cases should in any event take place at the earliest stage possible.

### **III. Conflicts of jurisdiction under the allocation system**

#### **A. Positive and negative conflicts**

The main objective of the Network members was to create allocation rules which are flexible, but also precise enough to make predictable which authority is well placed to deal with the case. However, whether the allocation criteria ensure that “*the vast majority of cases allocate themselves*”<sup>31</sup> remains far from certain. The basic pitfalls of the allocation system result from the fact that neither Regulation 1/2003 nor the Network Notice addresses the issue of potential, positive or negative, conflicts of jurisdiction<sup>32</sup>.

As already mentioned, each Network member retains full discretion in deciding whether or not to investigate a case. Hence, if several Member States are affected by an agreement or practice and the NCAs concerned cannot decide on who should initiate proceedings and who should step back there is no formal procedure that would allow the Commission or the Advisory Committee to assign the case to one of them or to appoint the leading

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<sup>31</sup> A. Schaub, n. 3 above, 39.

<sup>32</sup> S. Brammer, [2005] *Common Market Law Review*, 1402.

NCA. This approach may result in parallel proceedings in up to three Member States<sup>33</sup> leading to an unnecessary and costly multiplication of work for the undertakings and the NCAs concerned.

The only mechanism that could be used to resolve these types of conflicts is art. 11 para 6 of Regulation 1/2003. However, nothing obliges the Commission to exercise this right just because it may otherwise end up in the hands of up to three NCAs. That would also be against the spirit of the decentralized system if the Commission were to handle every case affecting two or three Member States because the NCAs concerned disagree on who is well placed<sup>34</sup>.

Another possible solution is provided by art. 20 para 7 of Regulation 1/2003 which enables the Commission to put cases that are dealt with by NCAs on the agenda of the Advisory Committee as a forum for the discussion of case allocation<sup>35</sup>. However, this avenue is again merely an option which can only be used if an NCA or the Commission actually requests that the allocation issue be included in the agenda. Moreover, the Advisory Committee cannot decide the question nor issue a non-binding opinion on the allocation problem discussed.

The reasons for a negative conflict of jurisdiction, where no authority considers itself well placed to handle the case, are many. One main reason why an NCA would decline

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<sup>33</sup> If more than three Member States are affected, the Commission may be expected to initiate proceedings itself in accordance with the “three plus” rule (para 14 of the Network Notice). See also S. Brammer, [2005] *Common Market Law Review*, 1402.

<sup>34</sup> A. Schaub, “The Commission’s position within the Network” in *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, C.-D. Ehlermann and I. Atanasiu (eds) (Oxford/Portland: Hart Publishing, 2005), at pp. 3 and 7 of the on-line version of the article, available at <http://www.iue.it/RSCAS/Research/Competition/2002/200207CompSchaub.pdf>. Schaub admits that there is a need for a referee which can only be the Commission. Schaub also maintains, however, that the Commission will not let itself be turned (by companies) into an appeal body for case allocation. Id., 8. These two positions seem difficult to reconcile

<sup>35</sup> It is true that this paragraph particularly aims at situations where an NCA is already dealing with a case and the Commission intends to de-seize it by applying art 11 paras 11 of Regulation 1/2003. However, nothing prevents the Advisory Committee from discussing also other allocation issues.

jurisdiction could be the lack of resources. What may also be the case is that NCAs are not really inclined to pursue a matter if it not interesting enough<sup>36</sup> with regard to their domestic territory.<sup>37</sup> It has been suggested that the Commission should intervene in situations where no NCA intends to act in order to compensate for lack of enforcement.<sup>38</sup> However, according to recital 18 of Regulation 1/2003<sup>39</sup>, nothing “*prevent[s] the Commission from rejecting a complaint for lack of Community interest ... even if no other competition authority has indicated its intention of dealing with the case*”<sup>40</sup>. Consequently, the Commission cannot be compelled to take up an art. 81 or 82 case for the sole reason that no national authority is ready to pursue the matter. It is therefore not very probable that the Commission will intervene in cases which no NCA wants to handle.<sup>41</sup>

In view of the above, it becomes obvious that parallel proceedings or no proceedings will only be avoided where the Network members choose to do so with goodwill and mutual trust.

## **B. Unpredictability of penalties**

According to settled case law of the European Court of Human Rights (ECHR), “*an offence must be clearly defined in the law*”, so that the individual can know in advance

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<sup>36</sup> S. Brammer, [2005] *Common Market Law Review* 1383, 1400, J. Fingleton, n. 31 above, p. 10, who speaks of the “boring cases”.

<sup>37</sup> An NCA may also avoid investigating a case where this would imply the enforcement of EC competition law against a State-owned company or a national champion, S. Brammer, [2005] *Common Market Law Review*, 1405.

<sup>38</sup> A. Schaub, n. 35 above, 3.

<sup>39</sup> *Automec v. Commission* (Automec II), T-24/90 [1992] ECR II-2223, paras 83–85.

<sup>40</sup> Para 28 of the Notice on Complaints.

<sup>41</sup> J. Bourgeois, “The Modernization of the EC Competition Rules Regulation 1/2003, Some Loose Ends”, available at <http://www.abanet.org/intlaw/hubs/programs/Fall0312.01-12.13.pdf>, 6, concludes that complainants “*risk being smashed between the Charybdis of the ‘no Community interest’ and the Scylla of the NCAs’ indifference*”. See also S. Brammer, [2005] *Common Market Law Review*, 1406.

*“from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.*<sup>42</sup>

Therefore, it is beyond doubt that the provisions on the enforcement of art. 81 and 82 must be such that the sanctions which can potentially be imposed for an infringement of those articles are sufficiently clear and predictable.

In the new antitrust enforcement system, the Commission and each NCA apply their own procedural rules and impose the sanctions provided for in their respective legal system. But, there are significant differences between the sanctions available under the various national regimes and the Community law system, with regard to the persons that can be punished, the type of sanctions that can be imposed and, in case of pecuniary sanctions, the possible amount of fines<sup>43</sup>.

In view of these divergences, the allocation of cases has considerable impact on the sanctions that can ultimately be imposed for a particular infringement.

### **III. Procedural rights of the parties**

A major problem raised by the issue of case allocation and the heterogeneity of national competition laws is the protection of the rights of the parties. Since the question which competition authority will deal with a case determines the procedural rules to be applied, case allocation is of great importance for both defendants and complainants as their procedural rights depend on the applicable law.

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<sup>42</sup> *Cantoni v. France*, (45/1995/551/637) judgment of 15 Nov. 1996, *Recueil/Reports* 1996–V 1615, para 29.

<sup>43</sup> While some systems only allow for sanctions to be imposed on undertakings, others provide also sanctions for individuals. In some Member States, the breach of substantive prohibitions or hard-core infringements can even be punished by imprisonment. Finally, there are remarkable variations in the level of fines available.

Paragraph 31 of the Network Notice explicitly provides that “... *the allocation of cases between members of the network constitutes a mere division of labour .... The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority.*”

Indeed, there is no formal role for the undertakings concerned or the complainants in the informal procedure leading to the (re-)allocation of a case. The discussions concerning case allocation remain internal to the Network as the whole consultation process under Article 11 of Regulation 1/2003 is meant to be a purely internal matter of the ECN.<sup>44</sup>

In any case, since the NCAs are obliged to apply arts 81 and 82 EC to all forms of competitive behaviour having an appreciable effect on trade between the Member States, their action should be compatible with the fundamental rights standards developed by the ECJ and the general principles of community law<sup>45</sup>. Under this scope, one could suggest that the standards of protection of the rights of defence should be applicable to proceedings not only before the Commission, but also before the NCAs, so that investigated companies could enjoy a common set of procedural rights through the ECN.

#### **A. The right to a fair hearing.**

As already mentioned, case allocation takes place at a very early stage and the companies concerned may not even be aware of the ongoing investigation and able to comment on

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<sup>44</sup> See para 4 of the Network Notice: “Consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.” See also A. Schaub, n. 3 above, 42.

<sup>45</sup> J. Bourgeois and T. Baume, “Decentralisation of EC Competition Law and General Principles of Community Law”, in *30 Years of European Legal Studies at the College of Europe. Liber Professorum 1973-74 - 2003-04*, P. Demaret I. Govaere, D. Hanf (eds) (P.I.E.-Peter Lang, Bruxelles, 2005), p. 1. See also T. Tridimas, n. 1 above, pp. 9, 10.

the question of allocation. But also where case allocation is discussed at a later stage, defendants and complainants are unlikely to be heard.

The ECJ has held that the right to be heard is fundamental “in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person”<sup>46</sup>. It is a fundamental principle of community law which must be guaranteed even in the absence of any rules governing the procedure in question. This right requires that any person whose interests are noticeably offended by a decision<sup>47</sup> or who is negatively affected<sup>48</sup> be clearly and in good time informed of the essence of conditions to which the Commission intends to impose considerable obligations and it must have the opportunity to submit its observations to the Commission and make known his views on the truth<sup>49</sup>. The right to a fair hearing is not and should not be affected by the fact that the Commission is not a court of law<sup>50</sup>.

## **B. The right to a fair administrative procedure.**

The ECJ with many of its judgements has vested the investigatory powers of the Commission, conferred on it by art. 14 of Regulation No 17/62 in order to enable the Commission to perform its task of ensuring that the competition rules are applied in the common market<sup>51</sup>. Now, pursuant to Regulation 1/2003 the Commission can by decision,

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<sup>46</sup> *Hoffman-La Roche v Commission*, Case 85/76 [1979] ECR 461, paras 9 and 11

<sup>47</sup> *Transocean Marine Paint v. Commission*, Case 17/74 [1974] ECR 1063, para 15.

<sup>48</sup> *Belgium v. Commission*, Case 234/84, [1986] ECR 2263, para 28.

<sup>49</sup> *VBVB and VBBB v. Commission*, Joint Cases 43/82 and 63/82 [1984] ECR 19, para 25, *Hoffman-La Roche v Commission*, paras 9, 11, *Transocean Marine Paint v. Commission*, para 15.

<sup>50</sup> A. Klees, *Europäisches Kartellverfahrensrecht (mit Fusionskontrollverfahren)*, &5 para 3, 80. It is also clear both from the nature and objective of the procedure for hearings, and from articles 5, 6 and 7 of Regulation No 99/63, that this regulation applies the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.

<sup>51</sup> *Hoechst v Commission*, Joined Cases 46/87 and 227/88 [1989] ECR 2859.

if there exists a reasonable suspicion that books or other records are being kept in any other premises, land and means of transport, including the homes of directors etc, order an inspection to be conducted in such premises, land and means of transport.

At first it has to be noted that the ECJ has established a wide range of guarantees, in order to protect the rights of defence. In its judgement of *Roquette Freres*<sup>52</sup> the ECJ held that the competent national court could refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned is so limited, or the evidence sought is so peripheral, that the intervention in the sphere of the private activities of a legal person, which a search using law-enforcement authorities entails, appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation. In the same case the ECJ added that in order for the competent national court to be able to carry out the review of proportionality which it is required to undertake, the Commission must in principle inform that court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned<sup>53</sup>.

## **C. The right to a fair trial**

### **1. Review of art. 11 para 6 decisions**

As already mentioned the Commission can initiate proceedings by itself and remove a case from the jurisdiction of the NCAs, pursuant to art. 11 para 6 of Regulation 1/2003.

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<sup>52</sup> *Roquette Frères SA v Directeur général de la concurrence and Commission of the European Communities*, Case C-94/00 [2002] ECR I-09011, para 80.

<sup>53</sup> *Ibid*, para 81.

The issue arising is whether this decision can be reviewed by the CFI in case it is harmful for the interests of the involved companies. The Commission is required to consult with the NCA concerned where it intends to take a case out of its jurisdiction<sup>54</sup>, but it is not intended that this dialogue results in a formal Commission decision addressed to the relevant Member State. The written explanations provided by the Commission to the NCAs pursuant to paragraph 55 of the Network Notice constitute a simple act of communication which is part of the cooperation process between the Commission and the NCAs. Such explanations merely set out why the Commission envisages initiating proceedings and thus have a purely informative character<sup>55</sup>.

In the judgment of the ECJ in *IBM*<sup>56</sup> it was expressly stated that the initiation of proceedings is not a decision within the meaning of Article 230 which may be the subject of an application for annulment. In the discussed case, the decision of the Commission may constitute a provisional measure preparatory to the final decision for the infringement, but it is also final as it has the automatic effect of depriving the NCAs of their competence<sup>57</sup>. In this sense, although an informal process within the Network it may have legal effects on the Member States' authorities and on the parties concerned, especially if the initiation of proceedings by the Commission deprives the applicants of certain procedural rights which they would have enjoyed under the procedural rules of the NCA and for which the Commission procedure does not offer an equivalent. This

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<sup>54</sup> See art. 11 para 6, second sentence, of Regulation 1/2003.

<sup>55</sup> S. Brammer, [2005] *Common Market Law Review*, 1420.

<sup>56</sup> *IBM v. Commission*, Case 60/81 [1981] ECR 2639.

<sup>57</sup> D. Schnichels, "The Network of Competition Authorities: How Will it work in Practice?" in, *Modernization and Enlargement, Two major challenges for EC Competition Law*, D. Geradin (ed) (Antwerpen-Oxford, Intersentia, 2004), p. 119. See also A. Weitbrecht, "The Network of Competition Authorities: How Will it work in Practice? – Remarks from a practitioner" in *Modernization and Enlargement, Two major challenges for EC Competition Law*, D. Geradin (ed) (Antwerpen-Oxford, Intersentia, 2004), p. 127.

issue should also be viewed with regard to the European Convention on Fundamental Rights which in art. 6 provides for the right to a fair trial. But, since the EC is not a party to the Convention yet, the re-allocation of cases would result in preventing the investigated firms from accessing the Strasbourg court<sup>58</sup>. That's why it is strongly suggested that Art.230 may apply when the Commission used the mechanism of art. 11 para 6 to re-allocate a case to another NCA<sup>59</sup>.

The aforementioned illustrate the legal insecurity existing regarded to the new competences of the Commission and to the nature of its decisions. On the other hand this could benefit the Commission, in the sense that it avoids the risk of having its decisions annulled. The companies seek after a wide interpretation of the right of annulment, while the Commission does not. In our opinion the judicial review of the Commission's decisions is a necessity. One has to mention the suggestion to provide for a special court for competition cases in order to eliminate any difficulties<sup>60</sup>. The objections raised against this special jurisdiction are not cogent, since the basic one is the increase in costs; it is beyond any doubt that the uniform and effective protection of the fundamental rights throughout the ECN is more important than that. In this scope, it is suggested that the whole community legal protection system should be reformed for the benefit of those who are offended by the enforcement of Regulation 1/2003<sup>61</sup>.

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<sup>58</sup> D. Waelbroeck, "Twelve feet all dangling down and six necks exceeding long – the EU network of competition authorities and the European Convention on Fundamental Rights", in *The EU Network of Competition Authorities* Hart Publishing 2005, p. 465.

<sup>59</sup> D. Geradin/N. Petit, "Droit de la concurrence et recours en annulation à l'ère post-modernisation", [2005] RTDE 795, 805.

<sup>60</sup> B. Vesterdorf, "The Community Court System, ten years from now and beyond, challenges and possibilities", [2002] *European Law Review* 303, 317, D. Waelbroeck, "Vers une harmonisation minimale des règles de procédure nationale?" in *L'avenir du système juridictionnel de l'Union Européenne*, M. Dony, E. Bribosia (eds) (Bruxelles, 2002), pp. 65, 66.

<sup>61</sup> D. Geradin/N. Petit, [2005] RTDE, 835.

## **2. Review of art. 13 decisions**

The same issue arises in connection to art. 13 of Regulation 1/2003 which provides for the suspension or termination of proceedings before an NCA, in case there are pending proceedings regarding the same case before another NCA. It is suggested that these decisions should be subject to judicial review<sup>62</sup>. However, pursuant to art. 230 EC, only acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, as well as acts of the European Parliament intended to produce legal effects vis-à-vis third parties may be reviewed. Accordingly, acts of the NCAs are not included therein.

It is a question of national law if the decision could be challenged. It depends on the nature of the administrative act by which the national procedure is terminated.

## **3. Review of other decisions**

Art. 10 of the Regulation 1/2003 must also be noted, pursuant to which the Commission may rule that art. 81 EC may not apply in regard to an agreement between undertakings, decisions by associations of undertakings and concerted practices, either because the condition of art. 81 para 1 are not fulfilled or because the conditions of art. 81 para 3 are not fulfilled. The same applies for art. 82 EC. The said art. 10 refers to a declaratory decision, and not to a right constitutive decision<sup>63</sup>. It should not be disregarded that such decisions, even if referred to as declaratory, have legal consequences as they mainly affect competitors. Furthermore, such decisions are binding for the Courts and the NCAs, since art. 16 of Regulation 1/2003 provides that they may not issue decisions which

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<sup>62</sup> S. Brammer, [2005] *Common Market Law Review*, 1415, L. Idot, “Le nouveau system communautaire de mise en oeuvre des Arts. 81 et 82 CE », [2003] *CahDE* 283, & 82.

<sup>63</sup> L. Idot, [2003] *CahDE*, & 212.

contravene the decisions of the Committee<sup>64</sup>. Accordingly, it should be accepted that such decisions are subject to judicial review<sup>65</sup>.

#### **D. Access to the file**

The ECJ and the CFI are reserved as far as the right to access to the file is concerned<sup>66</sup>. The ECJ has adopted a quite strict position with regard to this right, according to which a company can only access the documents and the evidence on which the Commission based its decision. There are no provisions which require the Commission to divulge the contents of its files to the parties concerned<sup>67</sup>. On the other hand, the Court observes at the outset that the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence<sup>68</sup>.

#### **E. Legal representation and the protection of the confidentiality of lawyer-client communications.**

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<sup>64</sup> L. Idot, [2003] CahDE, &213

<sup>65</sup> D. Geradin/N. Petit, [2005] RTDE, 795, 808.

<sup>66</sup> According to the opinion of advocate general Leger in *Interporc Im- und Export GmbH v. Commission of the European Communities*, Case C-41/00 P, [2003] ECR I-2125 as the case-law of this Court currently stands, there is in Community law no fundamental right of access to documents among the general principles of law flowing from the constitutional traditions common to the Member States.

<sup>67</sup> *VBVB and VBBB v. Commission*, Joint Cases 43/82 and 63/82, para 25.

<sup>68</sup> *Cimenteries CBR and Others v Commission*, Joined Cases T-10/92 to T-12/92 and T-15/92 [1992] ECR II-2667, para 38, and *BPB Industries and British Gypsum v Commission*, Case T-65/89 [1993] ECR II-389, para 30.

For the purpose and in the interest of the client's rights of defence, the ECJ requires that the right to legal representation and the privileged nature of correspondence between lawyer and client must be respected as from the preliminary-inquiry stage<sup>69</sup>. The right of a company to be investigated in the presence of its lawyer is acknowledged as one of the fundamental rights of defence. The confidentiality of written communications between lawyer and client is subject to two conditions: these communications should only take place in order to ensure that the rights of the defence may be exercised to the full and should be between the client and an independent legal adviser, in the sense that he or she is employed by that client on a permanent basis<sup>70</sup>. The reasoning behind the second condition is that in-house legal advisers, given their relationship of employment with their client are considered as having waived their ethical autonomy, which represents a precondition to the privilege<sup>71</sup>. The position adopted by the ECJ was inspired by the law in force in several Member States, like France, where the safeguard of lawyer-client confidentiality is regarded as an expression of the duty of professional secrecy imposed by the law on regulated professionals who are authorised to pursue their professional activities under the title of "avocat" and can do so only in full independence<sup>72</sup>. In France, the in-house lawyers do not have the status of an "avocat" and therefore cannot represent their clients before the court of law. However, the general formulation of the ECJ may

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<sup>69</sup> *Hoechst AG v Commission of the European Communities*, Joined cases 46/87 and 227/88 [1989] ECR 02859

<sup>70</sup> *AM & S Europe Limited v Commission of the European Communities*, Case 155/79, [1982] ECR 01575, para 22.

<sup>71</sup> O. Fennely, "Lawyers and employed lawyers: the application of legal professional privilege", (1998) 1 *Irish Bus* 2, 7, A. Andreangeli, "The impact of the Modernization Regulation on the guarantees of due process in competition proceedings", [2006] *European Law Review*, 353.

<sup>72</sup> A. Burnside and H. Crossley, "AM&S, AKZO and Beyond: Legal Professional Privilege in the Wake of Modernization", paper presented at the 2005 IBA Conference: *Antitrust Reform in Europe: a year in practice* (5<sup>th</sup> roundtable: 'Due process in the face of divergent national procedures and sanctions'), held in Brussels, March 9-11, 1, 5.

lead to a denial of the protection to communications which would otherwise be confidential in accordance with the national laws of some Member States, where employed legal advisers are permitted membership to the local Bar Association and enjoy the same rights as independent legal advisers<sup>73</sup>. In Greece, for instance, both salaried and independent legal advisers have the capacity of a “Lawyer”. That is the case in England also, where both barristers and solicitors are subject to the same obligations and empowered with the same rights as their independent colleagues by virtue of their qualification<sup>74</sup>. Similarly, in Ireland there is no distinction between employed and independent legal advisers. Other Member States, such as Spain and Portugal, allow in-house legal professionals to become members of the national Bar Association sometimes subject to an undertaking of independence<sup>75</sup>.

It has to be noted that according to the Guidelines governing the powers of investigation of the OFT<sup>76</sup>: “Whilst UK privilege rules would apply to cases being investigated in the UK by the OFT on its own behalf under national and EC law, the OFT could be sent the communications of in-house lawyers by a NCA from another Member State where communication of in-house lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation.” This provision is justified by the need to ensure the useful effect of art. 12 of Regulation 1/2003.

In any case, the lack of a common approach to the scope of the legal privilege could lead to the lifting of the lawyer-client confidentiality and to a non-equivalent protection of the

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<sup>73</sup> B. Faul, “In house lawyers and legal professional privilege: a problem revised”, [1998] *Columbia Journal of European Law*, 139, 142.

<sup>74</sup> A. Burnside and H. Crossley, n. 74 above, 6.

<sup>75</sup> A. Andreangeli, [2006] *European Law Review*, 354.

<sup>76</sup> Powers of investigation, Draft Competition law Guidelines for consultation, April 2004, OFT 404a.

rights of defence<sup>77</sup>. More generally, art. 12 of Regulation 1/2003 could result to an inconsistent framing of the rights of defence of the companies, when the information are obtained with a certain degree of guarantee, albeit the fact that their national law grants a greater protection<sup>78</sup>.

#### **F. The protection against self-incrimination.**

The right not to incriminate oneself has been acknowledged by the ECJ in the judgement of *Orkem*<sup>79</sup>, although in a limited nature, given the fact that according to the Court the ECHR has never ruled that the right not to incriminate oneself must be recognised in national or Community procedures concerning restrictive agreements or practices. The Commission is entitled, to compel an undertaking to provide all necessary information and to disclose to it documents as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct<sup>80</sup>. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement<sup>81</sup>. In its judgement of *Mannesmannrohren-Werke AG*<sup>82</sup> the CFI held that it has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law<sup>83</sup>. However, it held that

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<sup>77</sup> *Burnside and Crossley*, n. 74 above, 8.

<sup>78</sup> B. Vesterdorf, "Legal professional privilege and the privilege against self-incrimination in EC law: recent developments and current issues", [2004] *Fordham Corporate Law Institute*, 19.

<sup>79</sup> *Orkem v Commission*, Case 374/87 [1989] ECR 03283.

<sup>80</sup> *Ibid*, para 34.

<sup>81</sup> *Ibid*, para 35.

<sup>82</sup> *Mannesmannrohren-Werke AG v Commission*, Case T-12/98 ECR II-729.

<sup>83</sup> *Ibid*, para 59. See also *Mayr-Melnhof v Commission*, Case T-374/94 [1998] ECR II-1751, para 311.

fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Court of Justice and the Court of First Instance<sup>84</sup>.

Cases Orkem and Mannesmannohren illustrate that the ECF has to achieve a balance between the efficiency of the new antitrust regime and the powers of the Commission on the one hand and the right not to incriminate oneself on the other. One could reach the conclusion that directly incriminating questions are forbidden, when indirectly ones and the imposition of the obligation to provide documents and information are permitted<sup>85</sup>.

### **G. The principle of “ne bis in idem”**

The possibility of parallel action by several NCAs raises the question to what extent this is compatible with the principle of ne bis in idem<sup>86</sup>, as recognised in art. 50 of the Charter of Fundamental Rights of the European Union. In some cases the ECJ held that the Commission should, for the determination of fines, take into account the fines imposed prior on the violators by the national authority<sup>87</sup>. Before the enforcement of Regulation 1/2003 no such matter was raised due to the fact that each national authority was only taking into account the effects of the violation of competition law on its own national territory.<sup>88</sup> After the enforcement of Regulation 1/2003 it is possible for an NCA to take into account, while reaching the stage of final acquittal or conviction, the effects of the infringement at issue outside its domestic territory<sup>89</sup>. In any case, it is argued that a violation of the principle of ne bis in idem can be avoided if the prohibition of double

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<sup>84</sup> Para 60.

<sup>85</sup> A. Klees, *Europäisches Kartellverfahrensrecht (mit Fusionskontrollverfahren)*, &5 81, para 3.

<sup>86</sup> M. Sura in E. Langen/H.-J. Bunte, &23, para 65, p. 770, A. Klees, *Europäisches Kartellverfahrensrecht (mit Fusionskontrollverfahren)*, & 10 para 63, 372, J. Bourgeois, n. 43 above, 1, 9.

<sup>87</sup> *Walt Wilhelm v. Bundeskartellamt*, Case 14/68 [1969] ECR 11.

<sup>88</sup> *Ibid.*

<sup>89</sup> M. Sura in E. Langen/H.-J. Bunte, &23, para 67, 770.

prosecution and punishment is also based on the principle of leniency or the provisions of para 6 art. 11 of Regulation 1/2003.<sup>90</sup>

#### **IV. Conclusion**

Regulation 1/2003 has established the principle of concurrent jurisdiction of the Commission and the NCAs of the Member States, without laying down binding principles on how the work should be divided among them. The (re-)allocation criteria of the Network Notice give some indication on the possible distribution of cases. However, a number of issues remain unresolved. Complainants and undertakings concerned are excluded from the allocation discussions which remain entirely internal to the Network.

As one might note, the radical structural reforms have not been accompanied by the harmonization of the national rules regarding procedures, evidence and sanctions. However, Regulation 1/2003 relies on the assumption that the rights of defense receive equivalent protection across the ECN. The extensive co-operation within the Network could pose problems for the effective safeguard of the fundamental rights of the investigated companies.

Within the decentralized application of EC competition rules, the general principles of the community law pose a frame in the national procedural autonomy, which is expected, although at a limited degree, to modulate the variety of the national procedural rules<sup>91</sup>.

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<sup>90</sup> T. Lampert/N. Niejahr/J. Kübler/G. Weidenbach, *EG KartellVO, Praxiskommentar zur Verordnung Nr. 1/2003*, para 207.

<sup>91</sup> J. Bourgeois and T. Baume, “Decentralisation of EC Competition Law and General Principles of Community Law”, p. 11. The authors refer to “ius commune”. “The decentralised application of EC competition rules could, in a bizarre way, set the basis for the appearance of a ius commune in the field of national procedural rules”.

The said general principles will define the application of the national rules in a more consistent manner with the tenet of equivalent protection.

Inspired by the common traditions of all Member-States, the general principles of law were determined by the European Court and configured under the conditions posed by the Community legal system. As it was stated by the German constitutionalist Häberle<sup>92</sup>: “the general principles of Community law compose the basis of a common apothem for all Member-States, an aggregate of values, which one could find in every national legal culture, the hard core of a European constitutional law, which was configured by multiple streams throughout the history of all national societies of Europe. People will understand Europe through the understanding of the general principles of law, which constitute a spiritual and constitutional heritage and project the future, the forming of a European constitutional law is accomplished by the conjunction of unity and diversity.”

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<sup>92</sup> P. Häberle, “Gemeineuropäisches Verfassungsrecht”, [1991] EuGRZ 261, 262.