A Practitioner’s View on the Role and Powers of National Competition Authorities

Study for the ECON Committee

2016
A Practitioner’s View on the Role and Powers of National Competition Authorities

Background to the *ECN plus* project

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**Abstract**

This study analyses the policy decisions resulting in a reform of EU competition law and establishing a decentralised application of EU competition rules, i.e. the European Competition Network (ECN) and its functions. It compares the institutional set-up, the investigative measures, the fining policy and the leniency programs of national competition authorities (NCAs).

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LIST OF ABBREVIATIONS

AG  Advocate General (to the ECJ)
BT-Drs. Drucksachen des Deutschen Bundestages (Gazette of the German Federal Parliamentary Assembly)
ECHR  European Court of Human Rights
ECJ  European Court of Justice
ECN  European Competition Network
EEA  European Economic Area
EEC  European Economic Community
EU  European Union
NCA  National Competition Authority
OFT  Office of Fair Trading
TFEU  Treaty on the Functioning of the European Union

REFERENCES TO JURISDICTIONS

AT  Austria
BE  Belgium
BG  Bulgaria
CY  Cyprus
CZ  Czech Republic
DE  Germany
DK  Denmark
EE  Estonia
EL  Greece
ES  Spain
EU  European Union
FI  Finland
FR  France
HU  Hungary
HR  Croatia
IE  Ireland
IT  Italy
LV  Latvia
LT  Lithuania
LU  Luxembourg
MT  Malta
NL  The Netherlands
PL  Poland
PT  Portugal
RO  Romania
SI  Slovenia
SK  Slovakia
SE  Sweden
UK  United Kingdom
A Practitioner’s View on the Role and the Powers of National Competition Authorities

EXECUTIVE SUMMARY

Prior to the establishment of the European Competition Network (ECN), the European Commission was the exclusive enforcer of European Union competition law. This centralised system lead to the functional suffocation of the European Commission and called for a more practical approach. Despite the disapproval of some stakeholders fearing the re-nationalisation of the competition law, Regulation 1/2003\(^1\) introduced the *ex post* assessment concept, requiring companies to perform a self-assessment of their conduct. In order to facilitate enforcement and ensure consistent application, Regulation 1/2003 also established the ECN, a platform for exchange of information and discussion between the European Commission and the National Competition Authorities (NCAs).

The aim of the ECN is an effective enforcement of competition law through cooperation of the independent NCAs. This decentralised enforcement system allows the European Commission to focus on policy development and to safeguard efficiency and consistency in the application of European Union competition law.

**General Principles in Regulation 1/2013**

Beside the two general ECN principles described above, Regulation 1/2003 generally regulates further aspects of the cooperation between the European Commission and the NCAs, i.a. regarding

- **Pre-decision consultation and sharing of information**
  
  The European Commission and the NCAs are obliged to inform each other about envisaged decisions and to exchange information gathered during investigations. NCAs can consult the European Commission for cases involving the application of EU law and are obliged to inform the European Commission about decisions requiring the infringement to be brought to an end. Draft decisions can be shared with other ECN members.

- **Assistance with investigative measures**
  
  The European Commission and the NCAs are obliged to cooperate for the purpose of investigating allegedly anti-competitive behaviour.

- **Uniform application of European competition law**
  
  Uniform application of EU competition law is ensured by prohibiting national courts and NCAs to adopt decisions conflicting with decisions previously adopted by the European Commission and by ordering national courts to avoid issuing decisions which would conflict with a decision contemplated by the Commission in ongoing proceedings.

Despite this detailed legislative framework, this system has not completely achieved its objectives: NCAs are not prevented from taking decisions conflicting with those of other NCAs. This case allocation system has led to conflicting decisions regarding the same behaviour (for example in the ‘Booking Cases’\(^2\)) questioning the envisaged efficiencies of a decentralised application.

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\(^2\) See Opinion of AG Kokott in Expedia; Bundeskartellamt Press release 23.12.2015 on booking.com; Konkurrensverket, Decision of 15.4.2015 on bookingdotcom; OFT case close summary CE/9320-10 on online booking case closure; Deutscher Bundestag (BT-DRS. 16/13500).
The NCAs’ institutional set up and national rules on procedure

Procedural rules and the NCA’s investigative powers are not harmonised and are still exclusively regulated by national laws. When comparing existing national competition law regimes, central aspects show a limited set of choices:

- **NCAs’ independence**
  
The NCAs’ institutional set-up differs as some of the NCAs act as independent authorities applying only competition law while others act as integrated authorities that also deal with other topics like consumer protection.
  
Almost all of the NCAs are established as independent administrative bodies. Due to the different appointment processes, the degree of their independence varies. The objective of the establishment of fully independent NCAs which are not subject to political control or supervision has therefore not been fully achieved, despite the great progress made since the adoption of Regulation 1/2003.

- **Investigation and enforcement: Single or dual system**
  
As for the structure of the NCAs, few Member States have decided to adopt a system where the NCA is entitled to investigate and enforce its findings. The majority of Member States have opted for a two-institution system with an authority investigating the facts of the case and an independent institution finding an infringement and enforcing it with for example imposing a fine. After criticism that this set-up of the NCAs is incompatible with Article 6 of the European Convention on Human Rights (ECHR) on fair trial due to the fact that investigative, prosecutorial and adjudicative powers are being accumulated within one NCA, most Member States have decided to adopt a dual system with two distinct administrative entities under the umbrella of the respective NCA. The decision-making body usually has adjudicative powers while the other entity has investigative powers.

- **The NCAs’ budget**
  
In most Member States, the budget of the NCA is part of the national budget. Some NCAs also benefit from other sources of funding. Being faced with sometimes limited budgets, NCAs still see a lack of human resources. Many NCAs have established ‘prioritisation guidelines’, providing factors to be taken into account when deciding whether to allocate human resources and time to the investigation of a case.

- **The NCAs’ investigative measures**
  
Contrary to the European Commission’s enforcement rights, the majority of NCAs are entitled to carry out dawn raids on business premises of undertakings only after issuance of a court warrant. All the NCAs are entitled to request information from undertakings and the majority of the NCAs may carry out sector inquiries to investigate an entire sector.

- **The NCAs’ powers to impose fines**
  
While administrative fines can only be imposed in few Member States by the competent courts, the majority of Member States allow the NCA to impose fines. The majority of the NCAs have also adopted guidelines on fines. Caps applied to fines are mostly consistent with the European Commission’s system that caps fines at 10% of the total annual turnover in the preceding financial year. The criminalisation of cartels is not a widespread practice but an increasing number of national jurisdictions have decided to also penalise individuals.
The NCAs’ leniency programs

All Member States (with the exemption of Malta) have established leniency programs more or less in line with the Commission’s system. The main deviation point is the range of fine reductions. Additionally, some jurisdictions also grant leniency for anticompetitive behaviour other than in the form of cartels.

ECN activities and framework

• ECN documents

The ECN is not an institution or even a legal entity but it can issue non-binding recommendations and model programs.

• Case allocation

The European Commission’s (2004) Network Notice regulates the case allocation between the NCAs and the European Commission, highlighting the European Commission as the competent authority when the case has effect in more than three Member States, when the cases is closely related to other aspects of European Union law and in case of novel competition law questions. In all other scenarios, the relevant NCAs are considered as the competent authority to enforce EU competition law.

• ECN Leniency Programme

Regulation 1/2003 does not foresee a pan-European leniency system. Member States’ leniency programs and the Commissions' leniency program are still independent. The ECN’s (2006) Leniency Programme was revised in 2012 and coordinates the interplay between the European Commission and NCAs with so-called summary applications. Despite its non-binding character, the NCAs have formally agreed to respect the principles set in the Programme.

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3 See the Model Leniency Programme (revised 2012) or the various ECN Recommendations in the area of investigative and decision-making powers on the ECN webpage http://ec.europa.eu/competition/ecn/documents.html.
1. INTRODUCTION

KEY FINDINGS

- The European Competition Network (ECN) was established to ensure a decentralised yet uniform application of European Union competition law ('level-playing-field'). According to Regulation 1/2003, National Competition Authorities (NCAs) have to apply the relevant substantive provisions of the TFEU, but need to apply national enforcement tools, fining policies, and leniency programs.

- While a certain degree of convergence exists - partially due to Commission and ECN recommendations and guidelines -, procedural rules and investigation methods still differ between NCA. Consequently, in certain cases the application of the same provisions of the Treaty leads to conflicting results.

The ECN is a cooperation of the NCAs of all EU Member States. It was established based on the modified enforcement system foreseen in the Commission’s (1999) White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EEC Treaty and put in place by Regulation 1/2003 which changed the enforcement of European competition law in two distinct ways:

- Firstly, the new system ended the European Commission’s notification system which allowed companies to notify agreements to the European Commission.

- Secondly, a decentralised application required NCAs and national courts to apply directly EU competition rules.

These reforms were implemented to reduce the European Commission’s workload and to cope with enlargement, i.e. the accession of many new Member States. The previous system, established by Council Regulation (EEC) No 17/1962, foresaw that only the European Commission applied EU competition law and required notifications for individual exemptions. Between 1988 and 1998, only 13% of new cases were initiated upon the Commission’s own motion, whereas 58% resulted from notifications and the remaining 29% were triggered by complaints. The European Commission thus diagnosed a need to refocus its implementation of EU competition rules in the Treaty - today Article 101 TFEU. The centralised scheme of notification to and clearance by the European Commission was replaced by a self-assessment system, i.e. a system under which undertakings have to assess on their own if the criteria of an exemption from Article 101 (1) TFEU are met.

The European Commission also feared that centralised enforcement would become increasingly inefficient and inappropriate with an expanding Union of more than 20 Member States. As a consequence, the current system was adopted which enables and obliges both, the European Commission and the NCAs, to apply EU competition law. NCAs thus apply the respective provisions of the Treaty directly and in their entirety, i.e. NCAs

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4 European Commission (1999), paragraph 44; N.B. Articles 85 and 86 of the EEC Treaty later became Articles 81 and 82.
7 European Commission (1999), paragraph 44.
8 European Commission (1999), paragraph 45.
9 European Commission (1999), paragraph 46.
examine if a certain conduct is a prohibited restriction of competition and if the criteria for an exemption from that prohibition are met.

While Regulation 1/2003 stipulates that all NCAs shall apply the substantive competition rules of the Treaty, it did not harmonise the investigative powers and other procedural rules. Thus, the NCAs apply their own procedural rules and impose fines or other penalties provided for in their national laws (Article 5 Regulation 1/2003). In order to still be able to ensure a coherent application and a close co-operation between the NCAs, the ECN was established. It serves as a framework for the cooperation of NCAs and the European Commission but does not hold any rights or has any obligations itself.
2. THE ECN’S LEGAL STATUS

Recital 15 of Regulation 1/2003 states that ‘the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation.’ While this statement and other recitals refer to the ECN, neither an Article of Regulation 1/2003 nor any other Regulation mention the ECN directly. The ECN itself is not a European institution but merely a loose framework and a forum where NCAs and the European Commission can meet and discuss in order to ‘constructively coordinate enforcement action, ensure consistency and discuss policy issues of common interest’11. Recital 15 of Regulation 1/2003 continues to state that for the purpose of close cooperation ‘it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.’ The European Commission (2004) has published the Network Notice12, which outlines the cooperation mechanism among the NCAs as well as between the NCAs and the Commission.

However, the European Court of Justice (ECJ) stated that the ‘ECN, being intended to encourage discussion and cooperation in the implementation of competition policy, does not have the power to adopt legally binding rules’13. The effect of ECN recommendations is therefore comparable to Commission Notices. In this respect, the ECJ has already held that neither the Commission (2004) Notice on Cooperation, nor the Commission (2006b) Leniency Notice14 is binding on Member States15. Therefore, these Notices are not capable of creating obligations on Member States16.

The only binding legislation specifically regulating the relationship among NCAs, and between NCAs and the European Commission is Chapter IV of Regulation 1/2003 which foresees specific cooperation rules such as the exchange of information or the assistance with investigative measures. Pursuant to settled case-law, this cooperation mechanism is intended to ensure the coherent application of the competition rules in the Member States17.

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10 However, Geradin et al. (paragraph 5.70) see the fact that the ECN occasionally speaks with one voice and can convey messages to policy makers (even if this is all done via the Commission) as a clear sign that the ECN is developing into a strong, stand-alone organisation.
11 European Commission (2011b), paragraph 393.
3. HISTORIC DEVELOPMENT: FROM COMMISSION CLEARANCE ONLY TO ESTABLISHING THE ECN

3.1. The previous system (Regulation 17/1962)
Under the former system established by Regulation 17/62, the European Commission had the monopoly to apply Article 101 (3) TFEU, i.e. the rule exempting overall anti-competitive conduct even though it restricts competition. This means that the Commission was the only authority that provided ex ante assessments of agreements in the context of the so-called ‘notification procedure’ where undertakings requested clearance for their commercial agreements. Article 4 of Regulation 17/62 stipulated that all agreements covered by Article 85 of the EEC Treaty (now Article 101 TFEU), i.e. all agreements including provisions that restrained competition, had to be notified to the European Commission in order to receive an individual exemption prior to their implementation. NCAs were not empowered to interpret the exemption criteria foreseen in Article 85. As a result of this monopoly to grant exemptions\(^{18}\), the European Commission had to deal with an enormous number of cases creating a substantial workload\(^{19}\).

To alleviate this burden, the European Commission began to issue so-called ‘comfort letters’ instead of formal exemption decisions. A ‘comfort letter’ often provided no or only very limited reasoning, just stating that at this point in time the European Commission could not identify any reason to intervene against the notified agreement and therefore decided to close the file. Nonetheless, the European Commission reserved its right to re-open proceedings at any time. ‘Comfort letters’ were not published and were only addressed to the notifying parties. They remained mere administrative letters that generated no binding effect, neither for national courts, nor for the European Commission itself. They gave the parties only a preliminary position and lacked any legal certainty. In theory, the notifying parties still retained their right to demand a formal decision rather than a ‘comfort letter’, though, de facto, this was more the exception than the rule\(^{20}\).

3.2. The reform resulting in Regulation 1/2003
In the legislative process, several options were considered to achieve a more efficient enforcement. Suggestions included the introduction of a rule of reason approach, i.e. changing the interpretation of Article 85 EEC Treaty to limit the cases requiring a notification\(^{21}\) as well as the suggestion to keep the notification system itself but to decentralise the application thereof and to allocate some notifications to national authorities\(^{22}\).

Ultimately, the current ex post assessment was introduced that is applied by both, the European Commission and the NCAs. The new system largely relies on market players assessing themselves the legality of their conduct in order to enable the European Commission to allocate its resources more efficiently to cases that cause severe competitive concerns\(^{23}\). To facilitate market players’ self-assessment, the European Commission (1999), paragraph 58.

19 For example, in 1997 the Commission dealt with 221 notifications, in 1996 the respective number was 206 while in 1995 they amounted to 360.


Commission has provided guidance to undertakings and NCAs, namely to help undertakings to better assess whether a certain market behaviour may fall within the scope of competition law. It has adopted Guidelines with regard to, for example, horizontal cooperation agreements between competitors\(^{24}\), vertical restraints along the supply chain\(^{25}\), and abusive exclusionary conduct by dominant undertakings\(^{26}\). The European Commission published also Notices, for example the De-minimis Notice\(^{27}\), which outlines criteria to identify restraints that typically have no effect on competition. However, these Guidelines and Notices only outline the European Commission’s approach when dealing with the situations described therein and are not binding on NCAs or the courts in Member States\(^{28}\).

### 3.3. Main objectives of the enforcement reform

When adopting Regulation 1/2003, the European Council and the European Commission adopted a Joint Statement on the Functioning of the Network of Competition Authorities\(^{29}\), a political statement that does ‘not create any legal rights or obligations. It is limited to setting out common political understanding shared by all Member States and the Commission on the principles of the functioning of the Network’\(^{30}\).

The statement details that the goals of the ECN are to create an effective enforcement of competition law through independent NCAs cooperating on the basis of equality, respect and solidarity\(^{31}\). It recognises that the decentralisation of the implementation of European Union competition rules will strengthen the position of the NCAs by granting them the power to fully apply the relevant articles of the Treaty\(^{32}\). The statement also establishes the institutions’ understanding that the European Commission ‘has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency’\(^{33}\).

The reform’s objective was to streamline the administrative process and, in particular, to alleviate the European Commission’ enforcement burden while ensuring that European Union competition law is applied consistently even by different enforcement authorities. In order to fulfil this objective and to clarify the procedure foreseen in Regulation 1/2003, the European Commission (2004) adopted the Network Notice which outlines the cooperation methods used for the case allocation process, the assistance by other NCAs, and the method used to ensure a consistent application in parallel cases.

\(^{24}\) European Commission (2011a), Guidelines on horizontal co-operation agreements.


\(^{26}\) European Commission (2009), Guidance on the Commission’s enforcement priorities. Paragraphs 2 and 3 of this Communication state that ‘this documents sets out the enforcement priorities that will guide the Commission’s actions in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission’s specific enforcement decisions, it is intended to provide greater clarity and predictability with regard to the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behavior is likely to result in intervention by the Commission under Article 82. [3] This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities’.

\(^{27}\) European Commission (2014b), De minimis notice.

\(^{28}\) See for example regarding the European Commission (2014b) De minimis notice: Judgment of 13 December 2012 in Expedia, C-226/11, ECLI:EU:C:2012:795, paragraph 23ff. where the CJEU stated that ‘in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds established in paragraph 7 of the de minimis notice but it is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.’

\(^{29}\) Joint statement of the Council and the Commission.

\(^{30}\) Joint statement of the Council and the Commission, Recital 3.

\(^{31}\) Joint statement of the Council and the Commission, Recital 7.

\(^{32}\) Joint statement of the Council and the Commission, Recital 9.
3.4. Stakeholder’s appraisal before the reform

Internal discussions started as early as 1997 within a small working group tackling the problem presented by the notification system of Council Regulation No. 17/62. The major reform brought about by Regulation 1/2003 was first suggested in the European Commission’s (1999) White Paper in 1999. Stakeholders had an option to submit their opinions on the proposed reform. The European Commission received submissions from 14 Member States and 104 formal position papers from third parties. Stakeholders can roughly be grouped into three categories:

- the Member States and EEA States,
- the European Parliament, and
- representatives from industry associations and lawyers.

The consultation responses focused on various aspects of the reform, but most notably on:

- the end of the notification of agreements,
- a decentralisation of the application of European Union competition law by national courts and national authorities,
- a further strengthening of the European Commission’s enforcement powers, and
- clearer rules as to the primacy of European Union competition law and its link to national competition laws.

3.4.1. The self-assessment

While there was consent that changes to the old system were necessary, the positions of the stakeholders diverged in respect to the details. The representative of the industry associations for example welcomed the decentralised application of EU competition law. However, they argued for voluntary notifications or opinions within this system. Under Regulation 1/2003, undertakings must assess whether their agreements are compatible with Article 101 and 102 TFEU. Without a finding of conformity by the European Commission the new system would deprive undertakings of legal certainty.

3.4.2. Uniform and independent application of European competition law

The European Parliament as well as industry representatives also pointed out that a decentralised application of EU competition law must not lead to a re-nationalisation of competition law. Their concerns were based on the assumption that at that time some NCAs were not as independent from political influences as the European Commission. While according to the European Commission no re-nationalisation has occurred, the level of autonomy of NCAs is a continuing concern of the European Commission. It was also...
argued by some Stakeholders that NCAs will not be endowed with sufficient resources and that this might hinder a coherent application of EU competition law.

With respect to the incoherent application of EU competition law, the European Parliament as well as the industry representatives and lawyers pointed out that a harmonisation of national procedural laws would be desirable. These commentators even feared that a decentralisation of enforcement without a harmonisation of the related enforcement rules would create a serious risk of incoherence to the detriment of the Internal Market. The differences were found to be particularly problematic in the field of sanctions and fact finding powers.\footnote{European Commission (2000), Point 8.2.}

The major changes triggered by the reform with respect to new forms of cooperation related to

- the work sharing amongst the competition authorities,
- the possibility for NCAs to ask other NCAs to carry out investigations or other fact finding measures, and
- the possibility of exchanging information between NCAs and its use as evidence for the purpose of applying European Union competition law.\footnote{For a detailed description of the cooperation between enforcers in the framework of the ECN see Faull/Nikpay, paragraphs 2.154ff.}

However, Regulation 1/2003 prescribes that the 'modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States'\footnote{Recital 15.} Thus, the exact set-up and functioning of the ECN was still unclear during the consultation phase.

Stakeholders voiced a strong opinion concerning the allocation of cases among the authorities. While the European Parliament stressed the importance of clear allocation criteria, the Member States expressed an interest in avoiding multiple investigations into the same conduct. This concern was shared by industry stakeholders expressing the wish to have a one-stop-shop-principle. Some also suggested using the European Commission as an appellate body for decisions by NCAs.

With regard to the need for coherent decisions, the European Parliament already stated the importance of information exchange among the ECN members. The European Commission’s (2014a) evaluation of Regulation 1/2003 concluded inter alia with the remark that it is important to ‘further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources [and to] ensure that NCAs have a complete set of effective investigative and decision making powers at their disposal’\footnote{European Commission (2014a), p. 12.} which indicates that some of the initial concerns voiced by the stakeholders in the consultation process in 2000 are still valid today.

\footnote{European Commission (2000), Point 8.2.}
4. THE CURRENT SYSTEM AND THE ECN’S ACTIVITIES

As described earlier, the ECN is technically a platform for the European Commission and the NCAs to cooperate. It is merely a common brand, i.e. a description used for the entirety of all competition authorities in the EU. The ECN itself has no legal rights or obligations and cannot issue binding guidelines or decisions, but non-binding recommendations and model programmes46.

4.1. Case allocation

4.1.1. Principles of case allocation

One of the tasks described by the European Commission (2004) Network Notice is the allocation of cases. The Notice outlines a procedure which strives to ensure that cases are dealt with by well-placed authorities. In most instances the authority that receives a complaint or starts an ex officio procedure will remain in charge of the case. Re-allocation of a case is only foreseen at the outset of a procedure where either that authority considered that it was not well placed to act or where other authorities also consider themselves well placed to act47.

NCAs are considered to be well placed if the following three cumulative criteria are met:

- the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within, or originates from its territory; and
- the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order which will effectively end the infringement and it can, where appropriate, sanction the infringement adequately; and
- the authority can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement48.

The European Commission is considered particularly well placed to investigate a case if it is likely that it has an effect in more than three Member States49 or in cases that are closely related to other aspects of European Union law, or that raise novel competition law questions50. The latter is likely ‘if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement’51. According to the European Commission (2004) Network Notice, the European Commission ‘has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law’52.

This case allocation process is supposed to ensure a system in which traditional cases can be dealt with by all NCAs whereas cases posing new legal questions ought to be dealt with by the European Commission. This allocation of responsibilities demonstrates the intention

47 The practice apparently shows that reallocation is the exception and not the norm. Cases typically stay with the competition authority initiating the proceedings. See Faull/Nikpay, paragraph 2.156.
50 European Commission (2004), para. 15.
51 European Commission (2004), para. 15.
to ensure that even with the new decentralised application of competition law, a coherent and uniform application can be achieved. Under the previous regime of Regulation 17/62, NCAs have initially not been considered to be well placed to deal with European Union competition law as no prior case law existed and Regulation 17/1962 was drafted under the assumption that there was significant uncertainty regarding the exemption criteria foreseen in today’s Article 101 (3) TFEU\textsuperscript{53}. When adopting Regulation 1/2003, these considerations were, however, deemed less critical because in the meantime the European Commission had dealt with many cases and had thus clarified the concept of restraints of competition as well as the criteria for an exemption pursuant to Article 101 (3) TFEU\textsuperscript{54}. These precedents and the fact that the European Commission had published several guidance papers\textsuperscript{55} were considered to be a sufficient basis to empower also the NCAs to apply European Union competition law.

In brief, the European Commission (2004) \textit{Network Notice} thus acknowledges that NCAs can be well placed to deal with traditional cases, i.e. cases that require the application of well-established principles of competition law. However, it also pronounces a preference that novel legal questions are to be dealt with by the European Commission in order to ensure that the provisions of the Treaty are applied consistently\textsuperscript{56}.

\subsection*{4.1.2. The case allocation process}

The European Commission and the NCAs are required to inform each other when investigating undertakings for a suspected infringement of Article 101 or 102 TFEU. Pursuant to Article 11(3) Regulation 1/2003, NCAs shall ‘\textit{inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States’}. According to the European Commission (2004) \textit{Network Notice}, the Commission has accepted an equivalent obligation under Article 11(2) Regulation 1/2003, which reads ‘\textit{The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case’}.

The case allocation has to be done within two months after the respective authority has informed the other authorities that it intends to pursue a case\textsuperscript{57}. Article 13 Regulation 1/2003 empowers NCAs of the Member States to suspend a case if another ECN member is investigating the case and to reject a complaint if another NCA is either currently investigating or has terminated its investigation into the conduct under review. The European Commission may decide to initiate proceedings to the effect that the NCAs are relieved from their competence to apply Art. 101 and 102 TFEU, see Article 11(6) Regulation 1/2003. However, if an NCA is already acting on a case, the initiation of proceedings by the European Commission shall only occur after consulting with that NCA.

\textsuperscript{53} Wolf, Article 101 (1), paragraph 792.
\textsuperscript{54} Wolf, Article 101 (1), paragraph 792.
\textsuperscript{55} Wolf, Article 101 (1), paragraph 792.
\textsuperscript{56} Joint statement of the Council and the Commission, paragraph 19; Langen/Bunte, paragraph 5.
\textsuperscript{57} European Commission (2004), paragraph 18.
4.1.3. The case allocation in practice

While one of the case allocation’s objectives is to ensure consistent decisions regarding infringements no matter where they occur in the EU, the allocation process actually resulted in conflicting decisions regarding the same behaviour.

For instance, several authorities have dealt with the so-called ‘Booking Cases’: In essence, these cases deal with hotel booking platforms’ contractual clauses obliging hotels that offer rooms on their platforms to offer the rooms at the best available rate on the market. Thus, the hotels are unable to offer rooms cheaper on their own websites or on competing booking platforms. While some NCAs have banned these best price clauses outright, others have closed the proceedings after most of the booking platforms have offered to amend their contracts. In effect some NCAs, such as Sweden\(^{58}\) and the UK\(^{59}\), have not yet banned the so-called ‘narrow best price clauses’ that allow hotels, under certain conditions, to offer cheaper prices on other portals but not on their own website whereas the German NCA has also opposed these narrow clauses\(^{60}\). The German decision came just two weeks after EU Commissioner Vestager announced that enforcers throughout the EU will work together closely to monitor the commitments and to evaluate if the sector warrants further investigation\(^{61}\).

On one hand, the German NCA has also initiated and partially concluded probes into clauses used by manufacturers to prohibit dealers from selling their products via third-party platforms or auction portals\(^{62}\). The European Commission on the other hand has launched a sector inquiry into the e-commerce sector with the purpose to identify restraints for competition in these markets\(^{63}\), which indicates that the European Commission is currently still gathering evidence and has not yet felt a need to open investigations into a particular undertaking’s conduct.

The European Commission and the German NCA also did not concur on which authority was best placed with regard to the E.On Gastransport investigation: The German NCA initiated administrative proceedings against E.On Gastransport for a suspected refusal to supply\(^{64}\). It considered itself well placed and explained in its assessment that the European Commission was not better placed in its activity report to the German parliament\(^{65}\). The European Commission, however, considered itself well placed and initiated proceedings pursuant to Article 11 (6) Regulation 1/2003 relieving the NCA of its jurisdiction\(^{66}\).

In the i-tunes case, the British NCA, at the time the UK’s Office of Fair Trade (OFT), has decided to refer a consumer association’s complaint alleging price discrimination in Apple’s i-tunes store to the European Commission because Apple operated the store in more than three Member States and because the OFT considered the European Commission better placed to ‘to address the issues raised by [the consumer association] in the context of wider single market issues relating to how the online exploitation of music is licensed across Europe\(^{67}\).”

\(^{58}\) See Swedish Konkurrensverket decision of 15 April 2015.
\(^{59}\) See OFT case close summary (Case reference: CE/9320-10).
\(^{60}\) See Federal Cartel Office/Bundeskartellamt, Press release of 23 December 2015;.
\(^{61}\) Vestager, Speech on conference on the digital single market, Copenhagen, 9 December 2015.
\(^{62}\) Federal Cartel Office/Bundeskartellamt case summary for the Asics decision.
\(^{64}\) BT-Drs. 16/13500 p. 48.
\(^{65}\) Deutscher Bundestag, BT-Drs. 16/13500 p. 48; European Commission (2010a) decision of 4.5.2010.
\(^{66}\) Deutscher Bundestag, BT-Drs. 16/13500 p. 48.
\(^{67}\) OFT press release of 3 December 2004.
These examples demonstrate that the case allocation process does not necessarily lead to a uniform application of European Union competition law or that at least novel questions are not always dealt with by the European Commission. The case allocation process at times does not achieve its objective to deliver coherent results. While the British NCA seems to consider the European Commission better placed to adjudicate matters of ecommerce, others NCAs, such as the German NCA, consider themselves well placed to investigate issues potentially affecting more than one jurisdiction.68

4.2. Pre-decision consultation and sharing of information

Articles 11(4) and 11(5) Regulation 1/2003 regulate the cooperation once a NCA is investigating a case. NCAs are entitled to consult the European Commission on any case involving the application of European Union competition law. At the same time, NCAs are obliged to inform the European Commission no later than 30 days before adopting a decision requiring that an infringement is brought to an end, accepting commitments or withdrawing the benefit of a Block Exemption Regulation.69 The drafts and other documents provided to the European Commission may also be shared with the other ECN members.

Besides informing each other about envisaged decisions, NCAs are also entitled to exchange information gathered while investigating conduct suspected of infringing European Union competition law. The information exchanged may only be used to apply European Union competition law and, if harmonised, national competition law.

4.3. Assistance with investigative measures

Articles 17-21 Regulation 1/2003 regulate the European Commission’s investigative powers. However, several of these provisions foresee that the Member States participate in the investigations, be it upon the European Commission’s request or on the NCA’s application. For instance Article 20(5) Regulation 1/2003 reads: ‘Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2’.

In addition, Article 22 Regulation 1/2003 regulates investigative measures by the Member States. Article 22(1) Regulation 1/2003 states that ‘[t]he competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article [101] or Article [102] of the Treaty’ [references to Articles updated].

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68 At the moment the German Federal Cartel Office is also investigating facebook on suspicion of having abused its market power by infringing data protection rules; Bundeskartellamt/Federal Cartel Office, Press release of 2 March 2016; http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

69 A Block Exemption Regulation provides a safe harbour for undertakings for certain agreements as long as they do not contain any serious restrictions of competition and also meet the other conditions laid down by the relevant Regulation. The Block Exemption for vertical agreements (Commission Regulation 330/2010) for example provides a safe harbour for agreements entered into between two or more undertakings each of which operates at a different level of the production or distribution chain as long as the undertakings do not have a market share of more than 30%. These vertical agreements – with a few exceptions –can be regarded as satisfying the conditions laid down in Article 101(3) TFEU and thus do not raise competitive concerns. Accordingly, the Block Exemption Regulation declares that Article 101(1) TFEU shall not apply to these vertical agreements.
Regulation 1/2003 thus foresees several instances of cooperation between the ECN members for the purpose of investigating alleged anti-competitive behaviour. Depending on which competition authority investigates, different procedural law applies.

4.4. **Provisions on uniform application of competition law**

Regulation 1/2003 strives to achieve a uniform application of European competition law in spite of the decentralised application. To achieve this goal even the application of national competition law may not lead to different results than the application of European Union competition law, the uniform application of which is supposed to be safeguarded by a prohibition to deviate from established case law.

4.4.1. **Convergence of national competition law**

Article 3(2) Regulation 1/2003 states that ‘*The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty*’. This so-called convergence clause ensures that national and European competition law evaluate agreements with the same result and ensures coherence of decisions among different jurisdictions.

4.4.2. **Coherence of application of European Union competition law**

For the purpose of ensuring a uniform application of European competition law, Article 16(1) and (2) Regulation 1/2003 prohibit national courts and NCAs to adopt decisions conflicting with a decision previously adopted by the European Commission. This might require a national court to stay proceedings if the validity of the Commission decisions is challenged in front of the European Courts. When a national court rules on agreements, decisions and practices which have already been the subject of a European Commission’s decision, they are not allowed to take decisions conflicting with this decision already adopted. As cited in *Otis*, this rule is thus a specific expression of the division of powers within the EU between, on the one hand, national courts, and, on the other hand, the European Commission and the EU Courts. While a national court is required to accept that a prohibited agreement or practice exists, the existence of damages or the existence of a direct causal link between the damages and the agreement or practice in question remains a matter to be assessed by the national court.

Further, national courts must also avoid issuing decisions which would conflict with a decision contemplated by the European Commission in already initiated proceedings. In this context, the national court may assess whether it is necessary to stay its proceedings.

Under Article 16 (2) Regulation 1/2003, NCAs are not allowed to take decisions running counter to a decision already adopted by the Commission. Article 16 Regulation 1/2003, however, does not specify the procedure to be undertaken in case a contemplated decision is likely to run counter to a decision taken by another Member States’ Competition Authority that has previously applied European Union competition law. The system thus seems to presume that all relevant cases of competition law have been established by a

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European Commission’s precedent. As shown before - for instance, in the hotel booking cases - this presumption is not necessarily correct.

Such a divergence occurred even though the European Commission has published several Notices and Guidelines on different competition law aspects. These are, however, not binding as exemplified by the ECJ’s Expedia case. With regard to the European Commission (2014b) de minimis notice, which outlines the circumstances under which the European Commission presumes that an agreement does not have an appreciable effect, the ECJ held that 'a Commission notice, such as the de minimis notice, is not binding in relation to the Member States' but that 'the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU'. The ECJ has however held that the Notice may and does indeed 'intend [...] to give guidance to the courts and authorities of the Member States in their application of that article'. While Member States’ NCAs or courts are thus not bound by the European Commission’s interpretation or application, they may and partially do use it as a reference. According to Advocate General Kokott, ‘Publications like the de-minimis notice are in the nature of “soft law” the relative importance of which in cartel proceedings, at the European and the national levels, should not be underestimated’. In her opinion, the Advocate General stresses the importance that these publications have for the coherent application of the decentralised system of competition law enforcement and states that these guidelines support the creation of the ‘level-playing-field’. She therefore proposed a ruling which would allow NCAs to deviate in their application from the de minimis notice ‘provided that they have taken due account of the Commission’s guidance in the notice and that, in the particular case, there is evidence,’ that justifies a deviation. However, the ECJ did not follow this proposal.

NCAs are thus currently not obliged to take due account of guidance papers. Undertakings and their legal counsel, however, will often take these notices and guidelines into account when contemplating market behaviour. During the consultation process that lead to the adoption of Regulation 1/2003, these groups have already indicated their preference for a system that ensures legal certainty.

4.5. Leniency Programmes in the ECN

Undertakings participating in a cartel have an opportunity to avoid the imposition of a fine or at least achieve a reduction of a fine already imposed on them by applying for leniency. In the context of a so-called ‘leniency programme’ an undertaking may achieve full immunity or a partial reduction of the fine if it cooperates with the authorities and supports the investigation. In a few national jurisdictions, undertakings may even apply for leniency not only with regard to cartel, but also for other forms of infringement of competition rules such as vertical agreements (AT) or other forms of collusion (SE). Some information on the Commission’s leniency practice is also provided in section 5.4.


‘In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency

to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question [...]. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.

However, in 2012 the ECN published a revised version of its Model Leniency Programme that provides recommendations on the criteria which the NCAs should foresee for leniency applicants and the possible consequences. It also outlines the envisaged interplay between the European Commission’s leniency programme and those of NCAs. This model proposes to provide undertakings with the possibility to file so-called summary applications, i.e. a short application for leniency that is intended to save the undertaking’s spot in the leniency queue without having to file an extensive application. Such summary applications are intended for cases in which the undertakings consider the European Commission to be well placed to deal with a case, but, as a matter of precaution, need the summary application to ensure that they may benefit from leniency before the NCAs of various countries in case the European Commission does not take up the case or reduces the scope of investigation later on.

The ECJ held that the Model Leniency Programme is non-binding as the ECN has no power to adopt measures that are binding on the Member States, even though the NCAs have formally undertaken to respect the principles set out in the European Commission (2004) Notice on Cooperation. Leniency programmes of the NCAs and the European Commission’s programme are, even after the introduction of the ECN Model Leniency Programme, independent of one another and undertakings are well-advised to submit summary applications in all jurisdictions whose NCAs might consider themselves well placed to deal with a case.

This has been confirmed by the ECJ in a case with regard to a freight forwarding cartel in which the European Commission granted the leniency applicant conditional immunity for the entire freight forwarding sector consisting of air, maritime and road transport. However, the European Commission later limited its case to air transport which lead the Autorità Garante della Concorrenza e del Mercato, i.e. the Italian NCA, to open an investigation into the Italian road transport sector. While the European Commission’s leniency applicant had filed a summary application with the Italian NCA, the NCA granted immunity to a different undertaking claiming that the European Commission’s immunity applicant did not specify that the road transport sector was included in its summary application.

This example shows that the current ECN model leniency programme expects undertakings to conduct an assessment which NCA might consider itself well placed and to file summary

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80 Judgment of 20 January 2016 in DHL Italy, C-428/14, ECLI:EU:C:2016:27. DHL Italy argued that the decision of the Italian NCA did not respect the principles set out, inter alia, in the European Commission (2004) Notice on Cooperation and in the ECN Model Leniency Programme. According to DHL Italy, the rules and instruments of the ECN are binding on the Italian NCA, since it is a NCA which forms part of that network. The ECJ rejected this argument citing that in particular the ECN Model Leniency Programme is not binding on NCAs. Pursuant to settled case-law, the ECN Model Leniency Programme was deemed to have no binding effect on the courts and tribunals of the Member States, see Judgment of 14 June 2011 in Pfleiderer, C-360/09, ECLI:EU:C:2011:389, paragraph 22.
applications that are applicable in case the respective NCA’s view with regard to the scope of conduct differs from the European Commission’s view. A misappropriation might in this context lead to significant fines and can thus potentially also reduce undertakings’ incentive to file for leniency with any authority.

This system also deviates from the approach taken in the merger control context. The EU Merger Regulation\footnote{Council Regulation (EC) No. 139/2004.} is characterised by the \textit{one-stop-shop principle}\footnote{Council Regulation (EC) No. 139/2004, Recital 8.}, i.e. the acknowledgement that a specific case with an EU-wide dimension should be dealt with by the EU Commission in order to spare undertakings the burden of filing several applications.
5. NATIONAL COMPETITION AUTHORITIES AND THEIR TOOLBOXES

Regulation 1/2003 has changed the enforcement method within the European Union in a profound way. NCAs have been empowered to directly apply the provisions of the Treaty and to enforce European Union competition law. However, this change has not coincided with a harmonisation of the rules of procedure and the respective investigative tools. In essence, NCAs are empowered and requested to apply the same substantive law with a (potentially) vastly different set of enforcement methods and tools at their disposal.

The NCAs' institutional set-up as well as their enforcement rights are regulated by the national law of the respective Member State. While some countries have chosen to align their system with the European Commission’s regime, others have kept their previous systems in place. The ECN has published recommendations on several topics in particular key investigative and decision-making powers, which are intended as ‘advocacy tools vis-à-vis policy makers’. These recommendations deal with the following subjects:

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

All these Recommendations are available on the European Commission’s ECN website [http://ec.europa.eu/competition/ecn/documents.html](http://ec.europa.eu/competition/ecn/documents.html) (but not in the ‘References’ section of this study).

5.1. The NCAs’ institutional set-up

The institutional set-up of the NCAs differs among Member States. The European Commission has not advocated a ‘one size fits all model’ to apply to each NCA. Member States remain free to choose which system addresses best their special legal situation while delivering effective enforcement. Some NCAs are independent authorities only dealing with competition law. In other cases, competition law is applied by an integrated authority that also deals with other topics such as consumer protection and unfair business practices, while in a few cases the respective NCA forms part of an authority which has also been vested wider regulatory powers.

The operational and financial independence of the NCAs is a core issue of paramount significance for the enforcement of competition law within the EU. The risk that NCAs are

86 For example in AT, BE, CY, DE, EL, FR, HR, PT, RO, SL, SE.
87 For example in BG and IT.
88 For example in EE and ES.
directly supervised and even politically influenced by the national central governments must not be marginalised and can be an obstacle to an efficient and uniform application of European competition law. The OECD views independency from the government as a key factor in the institutional framework of competition authorities. While almost all national competition laws contain a provision declaring that the respective NCA is an independent administrative body, the respective implementation and safeguards vary. In a number of Member States the leading employees of the NCAs are appointed and/or dismissed directly by the supervising minister or the council of ministers (e.g. CY, EE, IE), the Prime Minister (e.g. PL, HU), or the national parliament (e.g. BU, HR, EL). In other Member States, the NCAs form a division of the supervising ministry (e.g. AT, DE). By contrast, the jurisdictions where the head of the NCA does not report to any supervising administrative authority are few (e.g. IE, LT, NL, UK). Therefore, it can be concluded that the degree of the NCA’s independence across Member States differs significantly, and no common pattern has been established.

This assessment is confirmed by the European Commission (2014a) Communication on 10 Years of Regulation 1/2003. It states that ‘to ensure the effective enforcement of competition rules, NCAs should be independent when exercising their functions and should have adequate resources’. The European Commission mentioned that ‘challenges in this regard still persist, in particular concerning the autonomy of NCAs vis-à-vis their respective governments and appointments and dismissals of NCA management or decision-makers’. Even though significant steps have been taken throughout the last 12 years following the implementation of the Regulation 1/2003, the objective of fully independent NCAs not being subject to any political control or supervision has not been achieved. Alexander Italianer, the European Commission’s former Director General for Competition, summarised that ‘we are well aware that no system can guarantee full independence in practice, but it is possible to put safeguards in place to protect against most forms of undue or inappropriate influence’. He, however, concluded that the majority of the NCAs are carrying out its tasks and mandates in a sufficiently independent way. The European Commission thoroughly follows any organisational change that could affect the function and the institutional set-up of the NCAs in order to safeguard that the implementation of competition rules is coherent.

The structures of the NCAs differ as well. Some NCAs are empowered to investigate and fine an infringement themselves, whereas other Member States have opted for a system with two institutions, under which one authority investigates the facts of the case and another independent institution decides on an infringement and potentially imposes a sanction.

The majority of the Member States have opted for the dual system with two distinct entities under the umbrella of the respective NCA. The decision-making body of a NCA

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89 This issue had been extensively discussed in the framework of the OECD roundtable held in December 2014 on ‘Changes in institutional design of competition authorities’, see summary record.

90 For example, in Article 12(1) of the relevant national competition act in EL, it is cited that ‘the members [of the Competition Commission] enjoy personal and operational independence and, in the course of the exercise of their competences, they are only bound by the law and their conscience’. Further, in Article 1(3) of the relevant competition act in AT, it is cited that ‘the Director General for Competition […] does not receive any instructions and is independent in the course of the exercise of its competences’.


95 For example in DE.

96 For example in AT, CY, EL, and SE.
usually exercises its adjudicative powers while the other body (often named the 'Directorate General') investigates a case using its prosecutorial powers.

Creating the proper decision-making structure is not only important for the quality of decisions, but also in respect to an allocation of powers which complies with the conditions established by Article 6 ECHR on fair trial. The OECD cited as early as 2005 that ‘combining the function of investigation and decision in a single institution may have the effect to dampen the internal critique within the institution and raise concerns about the checks and balances’97. The European Commission and NCAs with a similar structural set-up and enforcement powers have been criticised for an – allegedly - undue accumulation of investigational, prosecutorial, and adjudicative powers98. The European Court, however, concludes that even if the Commission as an administrative body does not fulfil all criteria of an impartial tribunal, the possibility of an annulment by the European Court is a remedy incorporating the safeguards required by Article 6 ECHR99.

To pre-empt this discussion, some NCAs (e.g. BE, CY, EL, LT, LV.) have been set-up in a way to safeguard the attainment of the prerequisites established by Article 6 ECHR through the separation of into an investigative and a decision-making body. These developments may be helpful to enhance of the quality of the decisions delivered while safeguarding checks and balances.

Financial independence is another aspect of the institutional set-up of the NCAs. In general, the budget of the NCAs is allocated by the government and forms part of the national budget administered by a central administration (e.g. BG, EE, HU, LU, NL and PL). Nonetheless, in some jurisdictions, NCAs also benefit from other sources of funding such as fines imposed on undertakings (e.g. BU, LT, PT) and notification fees (e.g. DE). In some jurisdictions like EL, IT, NCAs are financed by multiple sources to safeguard a higher degree of independence. For example, in EL, a fee equal to 1‰ of the initial shared capital of all stock corporations incorporated in EL is allocated to the NCA, while in IT a mandatory levy equal to 6‰ is imposed on every undertaking incorporated in IT whose annual turnover exceeds EUR 50 million.

A further recurring problem - particularly, in small and medium-sized jurisdictions - is scarcity of human resources. To address this issue, some NCAs have established so-called 'prioritisation guidelines’ that provide significant guidance with regard to competition enforcement at a national level and a higher degree of administrative transparency. These guidelines display a list of factors to be considered by the respective NCA upon deciding whether it will allocate human resources and time to a case. While these factors are not identical, there is a common pattern among most NCAs’ prioritisation guidelines. The main factors taken into account are for example the attainment of public interest for the investigation of a case, alleged impact on competition and/or consumers, whether a case relates with a business sector of particularly high importance for the national economy, expiration of time limitation period, required human resources, whether a leniency application has been submitted, and the alleged effect of an eventual decision of the respective NCA on the relevant market100.

Some NCAs, such as DE, ES, FR, NL, PL, SE and the UK, have a large number of staff working on competition law enforcement. However, other NCAs face significant problems

98 See ECHR, Menarini Diagnostics S.R.L v Italy, Request (43509/08) and ECHR Lilly France S.A. v France, Request No 53892/00.
99 See Case T-351/03, Schneider Electric v Commission, paragraphs 183ff.; it is called into question if this view is still valid considering that significant fines are imposed and anticompetitive conduct is partially criminalised, see Slater et al.
100 See, for example, the respective prioritisation guidelines of the NCAs in CY, EL, FR, NL and the UK.
because of scarce human resources. For example, in AT the respective NCA has only 24 staff members which has led the European Commission to conclude that it is under-resourced and that this impedes effective enforcement. This number is not much higher for BE, a jurisdiction of similar features, where the staff members amount to 41 (excluding 20 part-time assessors). Therefore, the number of NCAs’ staff differs greatly and is not directly related to the size of the respective national economy. Scarce resources require a prioritisation of cases based on transparent criteria.

5.2. The NCAs’ investigative measures

The ECN (2013) has also published a Recommendation on investigative powers, enforcement measures and sanctions in the context of inspections and requests of information. This Recommendation is addressed to the NCAs and shall provide guidance for the purposes of further convergence in respect to their investigative powers.

The ECN recommends that all jurisdiction have the power to inspect business premises and in particular the power to conduct unannounced inspections on business premises, land and means of transport, the power to examine books and other records and make copies thereof, collect digital and/or forensic evidence, seal premises and books or records, ask for explanations or information in the course of the inspection, allow staff from another Member State to attend or assist, secure or seize incidental evidence as well as impose sanctions for non-compliance.

Regarding the inspections of non-business premises, the ECN recommends that all NCAs have the power to conduct such inspections in non-business premises, land and means of transport, including the homes of directors and other members of the staff, examine books and records related to the business and make copies thereof, collect digital and/or forensic evidence, ask for explanations or information, allow staff from another EU Member State to attend or assist, secure or seize incidental evidence as well as impose sanctions for non-compliance.

The ECN further recommends that NCAs have the power to issue requests for information on a compulsory basis, either written or orally, to undertakings or associations of undertakings, irrespective of whether they are the subject of the competition proceedings as well as impose sanctions for non-compliance.

All NCAs are empowered to carry out dawn raids on business premises of undertakings in the course of an investigation of a case. Contrary to the practice of the Commission, the majority of the NCAs are entitled to inspect business premises only upon a court warrant. In some jurisdictions, including AT, BE, DE, FR, PL, SE, UK, a court warrant has to be issued prior to an unannounced inspection. By way of contrast and acting in line with the pattern displayed by Regulation 1/2003, in other jurisdictions (e.g. CY, CZ, EL, ES, IT, NL) no court warrant has to be issued; the prior authorisation of the competition authority issued in accordance with the national laws and granted to the officials carrying out an inspection is sufficient for the legitimacy of the dawn raid in these jurisdictions.

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101 For example, in AT the respective NCA has only 24 staff members, in BE this figure amounts to 41, in IE it is 20, while in SI 26. By contrast, the respective figures in major jurisdictions are as follows: 246 in the UK, 163 in ES, 155 in NL, 154 in DE, 141 in FR and 130 in SE; though, even in the latter cases, prioritisation guidelines still apply in order to allocate human resources most efficiently.
103 ECN Recommendation (2013).
Further, almost all NCAs (with the exemptions of BG, where no such power is granted to the NCA, and EL, where an inspection may be carried out in the presence of a judge) are empowered to carry out inspections in non-business premises. Due to the fact that these inspections may be carried out in residential premises as well and thus amount to a higher degree of violation of privacy, the prior issue of a court warrant is required.

Most NCAs are empowered to request information from undertakings in the course of an investigation of an alleged anticompetitive conduct. The undertakings requested to do so are obliged to provide whatever information is requested. If companies do not comply with the requirements of the NCAs, an administrative fine may be imposed.

NCAs may also carry out sector inquiries. The conditions which have to be fulfilled in order for a NCA to conduct a sector inquiry are more or less similar in all national jurisdictions and are aligned with Article 17 Regulation 1/2003. In more detail, NCAs may carry out an inquiry in a specific sector of economic activity or into a specific type of agreements when the trend of trade, the rigidity of prices or other circumstances create suspicion or suggest that competition may be distorted and/or restricted within the relevant sector.

5.3. The NCAs’ powers to impose fines

Similarly to the European Commission, almost all NCAs are empowered to impose administrative fines on undertakings which are found to have violated competition rules. In AT, FI, IE and SE, however, an administrative fine may be only imposed by a competent court.

A growing number of NCAs adopted their own guidelines on the calculation of fines to safeguard a higher degree of legal certainty and transparency. Some NCAs (e.g. in AT, BE, CZ, ES, EL, NL, SL, UK) have adopted such guidelines in light of the respective European Commission guidelines, even though the degree of deviation from these guidelines differs among the jurisdictions. While the factors gravity and duration of the infringement are considered by all NCAs when setting a fine, other factors may also be taken into account such as culpability (e.g. in AT) and damaging effect of the infringement (e.g. in CZ, FR).

Other jurisdictions have not established a calculation method for fines in the competition law itself or in a separate notice or guideline (e.g. CY, HR, LU, MT, and SI). However, these NCAs often follow European Commission’s practice after adapting it in the specific context of their national jurisdiction.

In exceptional cases, the European Commission may, upon request, take account of a company’s financial situation if a company provides sufficiently clear and objective evidence that a fine is likely to seriously affect the economic viability of said company. This so called ‘inability to pay’ is described in point 35 of the European Commission (2006) fining guidelines. This inability to pay concept is expressly mentioned in the fining framework of some jurisdictions, namely IT and RO. Nonetheless, NCAs which loosely apply the European Commission’s fining guidelines (e.g. CY) may still decide that an undertaking may escape the payment of an imposed fine on grounds of an inability to pay under the same strict conditions established by the European Commission.

Almost all Member States’ jurisdictions cap administrative fine at 10% of the total annual turnover or the group to which the company belongs if the parent of that group exercises decisive influence over the operation of the subsidiary during the infringement period. By

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108 See, for example, the NCA in DE (Bundeskartellamt) which carried out ten sector inquiries in the last seven years in various sectors such as gas transmission, electricity, fuels, milk, district heating and food retail.

contrast, in BE the respective cap refers to the national turnover. The fine imposed shall achieve a sufficient degree of deterrence and even exceed the amount of gains improperly made as a result of the infringement. The function of the cap is to pay due respect to the viability of the undertaking.

Regulation 1/2003 has been designed to allow criminalisation of specific types of ‘hard-core’ restrictions (e.g. cartels and bid rigging). It is up to the Member States to decide if they deem criminal sanctions for certain conduct appropriate for deterrence purposes. Harmonisation has not been achieved in this field. Unlike in the US, where undertakings and individuals are subject to criminal prosecution for cartel conduct including price fixing, bid rigging and market allocation\textsuperscript{110}, criminalisation of cartels is not a widespread practice in Member States. Nonetheless, in an increasing number of national jurisdictions, a sanction of criminal nature might be imposed on either an undertaking and/or an individual for hard-core cartels\textsuperscript{111}. For example, in DE, DK, EE, FR, IE, SI and in the UK, criminal sanctions may be imposed for the involvement in certain cartel practices (e.g. bid rigging); though, as a rule, such criminal sanctions may only be imposed by a competent court, not by the NCA itself. Criminal sanctions, e.g. imprisonment or individual fine, are rarely imposed by competent national courts.

5.4. The NCAs’ leniency programmes

The objective behind leniency programmes (i.e. an undertaking may achieve full immunity or a partial reduction of the fine if it cooperates with the authorities and supports the investigation) is the detection of cartels which consist of a secret business practice difficult to detect. The leniency programmes are structured in a fashion that creates a so-called prisoner’s dilemma. Cartelist has to fear that an alleged co-conspirator will notify the authorities first about the anticompetitive conduct and receive full immunity from administrative fines. Thus, there is a strong incentive to be the first to file for leniency. The incentive provided to a potential leniency applicant to benefit from no - or a significantly reduced - fine has to outweigh its incentive to stay in the cartel. However, the deterring character of fines imposed on undertakings for cartel infringements has to be safeguarded.

The national leniency programmes of the NCAs closely resemble the European Commission (2006b) leniency practice and the ECN (2006) Model Leniency Programme. In order to receive full immunity under these programmes, an undertaking must be the first to inform the European Commission about an undetected cartel by providing sufficient information to allow the European Commission to launch an inspection. If the European Commission has already launched such an inspection, an undertaking has to provide significant added value to prove the cartel infringement. In both cases, though, the undertaking shall fully and continuously cooperate with the European Commission and put an immediate end to the infringement. However, immunity may not be granted to undertakings which have coerced others to join the conduct under investigation. The latter is a common pattern encountered in almost all national jurisdictions.

In case an undertaking does not qualify for immunity (e.g. because it was second to disclose the cartel), it may still benefit from a reduction of fines on the condition that it provides the Commission or an NCA with evidence that adds ‘significant value’ to that already in the European Commission’s possession and terminates its participation in the cartel. Under the 2006 Leniency Notice of the Commission, the first undertaking to provide such evidence is granted 30% - 50% reduction, the second 20% - 30% and subsequent applicants up to 20%.


\textsuperscript{111} Wils, p. 117-159.
With the sole exemption of Malta all national jurisdictions of the Member States have established a leniency programme that follows - with a lesser or greater degree of deviation - the pattern of the European Commission’s leniency programme. The main deviations are the range of fine reductions applied by the NCAs; though, this deviation is rather limited to a low number of jurisdictions (e.g. AT, BE, EL, FR, IT).

In some jurisdictions leniency can also be granted for types of anticompetitive market conduct other conduct than the formation of cartels (e.g. AT for vertical agreements, SE for other forms of collusion); though, this is the exemption rather than the rule.

The establishment of leniency programmes in almost every jurisdiction around the EU has largely contributed to the detection of a steadily growing number of cartels which, otherwise, would most-likely not have been detected.
6. CONCLUSION

While the reform of Regulation 1/2003 certainly relieved the European Commission from the burden of the notification procedure – very few cases are today reviewed by the European Commission – the presumed reduction of guidance and legal certainty is today the other side of the same token. The fact that most of the European cases relating to Article 101 (3) TFEU are handled in the so-called commitment procedure based on Article 9 Regulation 1/2003 that allows the European Commission to accept commitments and to end the proceedings without finding an infringement, further reduces legal certainty, guidance and transparency.

While the ECN provides a useful platform for NCAs and the European Commission to discuss case allocation and even individual cases, the respective investigative tools are not consistent and are likely to result in different outcomes. Even when the ECN made recommendations, for example for leniency programmes, the most relevant tool to identify and end cartels, the actual application of national rules and the handling of cases are resulting at times in inconstant findings and ragged enforcement. The examples of the hotel booking platforms also show that currently even the ECN cannot ensure a uniform application of the substantive law.

A level playing field among the Member States could be achieved (even in light of various institutional setups and investigative tools) by further strengthening and clarifying the role of the ECN.
REFERENCES


Case Law
• European Court of Justice (ECJ)
Judgment of 6 November 2012 in Otis and others, C-199/11, ECLI:EU:C:2012:684.

- European Court of Human Rights (ECHR)
Lilly France S.A. v France, (53892/00), Affaire Lilly France c. France, Requête no 53892/00, Arrêt, Strasbourg, 14 octobre 2003, définitif 14/01/2004; http://hudoc.echr.coe.int/fre?i=001-65912#{"itemid": ["001-65912"]}.


- German Federal Cartel Office/Bundeskartellamt


Bundeskartellamt, Press release of 2 March 2016 (facebook); http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

- Swedish Competition Authority/Konkurrensverket

- U.K. Office of Fair Trading

### ANNEX: Overview of the NCAs within the ECN

#### AUSTRIA

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| The Bundeswettbewerbsbehörde (BWB) is a division of the Ministry of economics, family and youth\(^{112}\). | - Budget in total: EUR 2.8 million  
- Staff in total: 37 | The BWB leads any investigation related to the purpose of the Austrian Competition Act. It has the right to carry out inspections at both undertaking’s and employees’ premises\(^{113}\). It can also request information from undertakings\(^{114}\) and can conduct sector inquiries. | The BWB itself has no authority to fine undertakings. It can only file a petition with the cartel court and the court imposes the fine\(^{115}\). The fine level is technically a discretionary decision\(^{116}\); however, the court and EU Commission are guided by similar principles. One minor difference is that there is a stronger emphasis on the degree of culpability of the members of the cartel for determining the fine whereas this is only a mitigating circumstance under EU law. The amount is capped at 10% of the groups’ annual turnover\(^{117}\). A potential enrichment of parties and their annual turnover are determining factors for the fine to be imposed\(^{118}\). | The BWB operates a leniency programme. This programme was modelled after the ECN leniency programme\(^{119}\) but it also allows the BWB to be lenient with regard to vertical restrictions\(^{120}\). |

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\(^{112}\) § 1 Bundeswettbewerbsgesetz (Austrian Federal Competition Law)  
\(^{113}\) § 12 Bundeswettbewerbsgesetz.  
\(^{114}\) § 11a Bundeswettbewerbsgesetz.  
\(^{115}\) § 29 Kartellgesetz (Austrian Cartel Law)  
\(^{116}\) § 30 Kartellgesetz.  
\(^{117}\) § 29 Nr. 1 Kartellgesetz.  
\(^{118}\) § 30 Kartellgesetz.  
**BELGIUM**

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<tr>
<td>Under the Belgian Competition Act of 2013, the new Belgian Competition Authority (BCA) is an autonomous legal entity, managed by a Board of Directors consisting of the President of the Competition Authority, the Prosecutor General, the Chief Economist and the Chief Legal Counsel. The BCA is divided into an investigative unit and a decision making unit.</td>
<td>- Budget in total: EUR 8.9 million - Staff in total: 41</td>
<td>The BCA may inspect both business as well as residential premises. However, any inspection requires a mission statement from the Prosecutor and a prior authorisation by an independent judge. The BCA may also request information and launch sector inquiries.</td>
<td>For infringements of Art. 101 and 102 TFEU the BCA can impose a fine up to 10% of the Belgian turnover of the undertaking(s) concerned. Individuals may be fined up to EUR 10,000 for negotiating in the name and for the account of an undertaking (or association of undertakings) with competitors and/or decide on price fixing, limitation of output and market allocation. For infringements of Art. 101 and 102 TFEU the BCA can impose a fine up to 10% of the Belgian turnover of the undertaking(s) concerned. Individuals may be fined up to EUR 10,000 for negotiating in the name and for the account of an undertaking (or association of undertakings) with competitors and/or decide on price fixing, limitation of output and market allocation.</td>
<td>Belgian Competition Law foresees a leniency programme. The Belgian Leniency Notice of 2007 was replaced in March 2016. It is based on the Model Leniency Programme developed by the European Competition Network. The BCA's programme differs from the Commission's with regard to the bandwidths for fine reductions. The second applicant can benefit from a 30 to 50% reduction, the third from 20-40 % and any subsequent applicant can benefit from a reduction between 10 and 30%.</td>
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122 Articles IV.27 et seq. Belgian Competition Act.
123 Article IV.21 Belgian Competition Act.
124 Art. IV.41 § 3 Belgian Competition Act. Art. IV.41 § 3 Belgian Competition Act.
126 Article IV.70 § 1 Belgian Competition Act. Article IV.70 § 2 Belgian Competition Act.
### BULGARIA

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<tr>
<td>The Commission on Protection of Competition (CPC) is an independent, specialised state body, elected by the Parliament. It consists of seven members, including a chairperson, a deputy chairperson and five members, all of them elected and dismissed by the National Assembly. CPC is structured in two general and five specialised directorates.</td>
<td>- The CPC’s budget could not be identified - Staff in total: 107</td>
<td>Inspections of business premises require an authorisation by a judge from the Administrative Court. During the inspections, the CPC officials have the power to:</td>
<td>CPC is empowered to impose fines on undertakings and individuals. CPC has adopted a methodology on setting fines. It also distinguishes between light infringements (vertical restrictions of competition affecting only a small geographic region or a limited range of undertakings or consumers), not very grave infringements (horizontal restrictions of competition, which do not fall under “cartels” notion, vertical restriction of competition which do not result or might not result in market foreclosure or excluding competitors from the market) and grave infringements (cartels).</td>
<td>The CPC operates a leniency programme for secret cartels but not for other competition law violations.</td>
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<td>- enter any premises, means of transport and other locations used by the undertakings or associations of undertakings; - examine all documents and records, related to the activity of the undertakings or associations of undertakings; - seize or obtain in paper, digital or electronic medium any copies of or extracts from documents and records; - seize or obtain electronic, digital and forensic evidence; - receive access to all types of information media, including servers; - seal for a certain period of time any premises, means of transport and other locations, used by the inspected undertakings or associations of undertakings; - take oral statements of any representative or member of the management or staff of the undertakings or associations of undertakings.</td>
<td>The CPC cannot inspect employee's premises. However, it may request information from undertakings and launch sector inquiries.</td>
<td>The CPC operates a leniency programme for secret cartels but not for other competition law violations.</td>
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<td>Sanctions (of up to 1% of the total turnover in the preceding financial year) can be imposed on the parties in the proceedings before the CPC in case of procedural infringements. These fines are also comparable to those foreseen in Regulation 1/2003.</td>
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132 Article 3(1) Bulgarian Competition Act.
133 Article 4(1) Bulgarian Competition Act.
134 Article 51(1) Bulgarian Competition Act.
135 Article 50(1) Bulgarian Competition Act.
136 Articles 45 – 47 Bulgarian Competition Act.
137 Article 99 Bulgarian Competition Act.
138 See the Competition Authority’s description under point ‘IV. What pecuniary sanctions can be imposed by the CPC?’; http://www.cpc.bg/Competence/ProhibitedAgreementsDescription.aspx.
139 Article 100(2) Bulgarian Competition Act.
140 See the explanations of the Bulgarian Competition authority; http://www.cpc.bg/Competence/Leniency.asp x.
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<tr>
<td>The Croatian Competition Agency (CCA) is an independent legal entity. The CCA reports only to the parliament which ratifies the statute of the CCA and appoints the members of the Competition Council. The members of the CCA may not be state officials, persons who perform duties in any administrative body of a political party, members of any supervisory boards and executive bodies of undertakings, or members of any kind of interest association, which could lead to a conflict of interest.</td>
<td>- Budget in total: 12,575,887 Kuna (2014) &lt;br&gt; - Staff in total: 48 (2014)</td>
<td>The CCA has the power to request from the parties to the proceedings or other legal or natural persons - including public administrative authorities all necessary information in writing, or to make oral statement. It can also inspect all business and employees’ premises, all immovable and movable assets, business books, data bases and other documentation and seize objects and documents found, particularly if there it can be reasonably assumed that the evidence might be destroyed or concealed. However, inspections require court authorisation. The CCA can launch sector inquiries.</td>
<td>The CCA can impose fines of up to 10% of an undertakings worldwide turnover in the last financial year. The Croatian Competition Act specifies the fine calculation method which is comparable to the European Commission’s.</td>
<td>The CCA’s leniency programme closely resembles the European Commission’s. However, immunity cannot be granted to the originator (leader) or instigator of the cartel.</td>
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141 Article 26 Croatian Competition Law.  
142 Article 26 Croatian Competition Law.  
143 Article 28(5) Croatian Competition Law.  
144 Article 41(1) Nr. 1 Croatian Competition Law.  
145 Article 42 Croatian Competition Law.  
146 Article 42(1) Croatian Competition Law.  
147 Article 64(1) Croatian Competition Law.  
148 Article 64(1) Croatian Competition Law.  
## CYPRUS

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<tr>
<td>The Commission for the Protection of Competition of the Republic of Cyprus (CPC) consists of 5 members. It is the decision-making body. The Chairperson and the members of the CPC are appointed by the Council of Ministers upon proposal of the Minister of Energy, Commerce, Industry and Tourism.</td>
<td>- Budget in total: EUR 1.5 million</td>
<td>The Service of the CPC may inspect business premises upon a prior order of the CPC where the specific scope of the inspection is duly described. The Service of the CPC may also inspect residential premises only upon prior authorisation of an independent court. Besides inspections the Service of the CPC can also issue request for information to the undertakings concerned and conduct sector inquiries.</td>
<td>The CPC may impose administrative fines based on the gravity and the duration of the infringement up to 10% of the total turnover of the liable undertaking(s) achieved in the preceding financial year. Neither administrative fines nor criminal sanctions are imposed on individuals. The CPC has not issued its own Fining Guidelines. In practice, the CPC loosely adopts the Fining Guidelines of the Commission, namely with regard to mitigating circumstances.</td>
<td>The CPC’s leniency programme closely resembles the European Commissions’ approach. In particular, undertakings that coerced others to participate in a cartel are not eligible for immunity but might nonetheless benefit from reductions. The reduction bandwidths are the same as with the European Commission’s leniency notice.</td>
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<td>- Staff in total: 30</td>
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150 Article 9(1) Cypriot Competition Law.
151 Article 9(1) Cypriot Competition Law.
152 Article 31 Cypriot Competition Law.
153 Article 32(1) Cypriot Competition Law.
154 Article 30(2) Cypriot Competition Law.
155 Article 32A Cypriot Competition Law.
156 Article 24 Cypriot Competition Law.
158 Article 5(c) of the Cypriot Leniency Programme.
159 Article 22(1) (c) of the Cypriot Leniency Programme.
### CZECH REPUBLIC

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| The Czech Competition Authority is established by law as an independent government body reporting to the Czech Parliament. It is led by the Chairman, who also decides on the appeals against the decisions of the NCA. The ruling of the Chairman can be further challenged before court, also subject to appeal. | - Budget in total: EUR 8.8 million  
- Staff in total: 239 (60 in competition law enforcement) | All entities and individuals are obliged to provide cooperation to the Authority (e.g. provide requested information). Broadly speaking, the investigative powers of the Authority are similar to those of the European Commission. The Authority can inspect business premises without a court order, but may only inspect employees' premises in case of a previous court order. The Authority can also issue request for information and launch sector inquiries. | The Czech Act on the Protection of Competition empowers the Authority to impose fines. Fines can amount to up to 10% of annual net turnover in the last full financial period. The Authority has also issued guidelines for the imposition of fines. The basic amounts are 3% of net turnover for very serious breaches, 1% for serious breaches and 0.5% for less serious breaches. In practice, fines are usually imposed on the lower end of the range, rarely exceeding 1% of turnover on large competitors. | The Czech Competition Authority operates a leniency programme which reflects the European Commission's. |

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162 Article 21f Czech Competition Law.
163 Article 21g Czech Competition Law.
164 Articles 22 and 22a Czech Competition Law.
### DENMARK

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| The Danish Competition and Consumer Authority (CCA) serves as secretariat to the Competition Council which consists of the Chairman and 17 members appointed by the Minister for Business and Growth for up to four years. They are independent in carrying out their duties. Under certain circumstances the CCA refers cases to the State Prosecutor. This is inter alia the case for intentional or grossly negligent conduct. | - Budget in total: EUR 11.1 million.  
- Staff in total: 259 (86 in competition law enforcement) | The Public Prosecutor is empowered to inspect business and private premises upon court warrant. The CCA can only investigate business premises. Inspections require a court order. The CCA may ask factual questions during the inspections and can issue requests for information as well as launch sector inquiries. | Competition law violations can both be fined and can also trigger criminal liability for the persons involved. Criminal sanctions can be up to one year and six months. The Danish legislation has been amended significantly in 2013 and case law under the new system is yet developing. | Denmark introduced a leniency system that closely resembles the European Commission's. |

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167 Article 14(2) Danish Competition Act.  
168 Article 15 Danish Competition Act.  
169 Article 15 Danish Competition Act.  
170 Article 18(1) Danish Competition Act.  
171 Article 18(3) Danish Competition Act.  
172 Article 17 Danish Competition Act.  
173 Article 23(3) Danish Competition Act.  
174 See Article 23a Danish Competition Act.
### ESTONIA

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<tr>
<td><strong>The</strong> Estonian Competition Authority (ECA) is an integrated authority, encompassing the functions of a competition authority and sector regulator. The ECA is an independent governmental agency which operates under the responsibility of the Ministry of Economic Affairs and Communications. Under the rules of criminal procedure, the ECA has the status of an independent investigative body empowered to carry out a series of investigative pre-trial activities.<strong>&lt;sup&gt;175&lt;/sup&gt;</strong></td>
<td>- <strong>Budget in total:</strong> EUR 2 million - <strong>Staff in total:</strong> 49 (2014)</td>
<td>The powers of investigation depend on which aspect of the competition law ECA is dealing with and whether the process relates to a misdemeanour or criminal offence or some other infringement of competition law. The ECA can request information and documents from the relevant parties&lt;sup&gt;176&lt;/sup&gt;, conduct interviews and carry out unannounced inspections of the seat and place of business of an undertaking.&lt;sup&gt;177&lt;/sup&gt; In case of criminal offences the investigative powers are more far-reaching (e.g. covert surveillance and other similar measures may be used).</td>
<td>Estonian law differentiates with regard to sanctions between agreements and an abuse of a dominant position. The former are considered penalties punishable with a fine of up to 10% of the group’s aggregate turnover in the last financial year. The latter are considered a misdemeanour punishable with a fine up to EUR 400,000.&lt;sup&gt;178&lt;/sup&gt; Natural persons responsible for the involvement in a hard-core cartel will risk a pecuniary sanction or an imprisonment of up to three years. The sanctions differ for hard core cartels and other infringements of competition law.</td>
<td>An amendment to the Penal Code, the Code of Criminal Procedure and Competition Act introduced a specific leniency programme.&lt;sup&gt;179&lt;/sup&gt; The programme gives protection from public enforcement action in criminal proceedings. Both companies and natural persons can apply for any violation of Competition law regardless if horizontal or vertical. Applicants can benefit from immunity or a reduction of fine. However, the law does not specify bandwidths for reductions.</td>
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</tbody>
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175 Articles 31 and 212 (2) Nr. 5 Estonian Competition Act.  
176 Article 57 Estonian Competition Act.  
177 Article 83 et seq. Estonian Code of Criminal Procedure.  
178 Article 73(2) Estonian Competition Act.  
179 § 400 of the Penal code; see also the information on the NCA’s website; [http://www.konkurrentsiamet.ee/index.php?id=15112](http://www.konkurrentsiamet.ee/index.php?id=15112).
### FINLAND

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| The Finnish Competition and Consumer Authority (FCCA) is led by the Director General, who is appointed by the Government. The Director General is responsible for the development and effectiveness of the agency’s operations and meeting of objectives. | Budget in total: EUR 6.2 million  
Staff in total: 142 (63 enforcing competition law) | The FCCA can inspect both business and other premises. For the latter it requires a court authorisation. When inspecting premises officials have the right to ‘image’ computer hard drives using forensic IT tools, may require an explanation of documents or information supplied and can secure premises overnight (e.g. by seal).
Since March 2015, the FCCA has the right to obtain information from outsourced services, such as business information stored in external service providers’ servers and cloud services. It can also request information and carry out compulsory interviews with individuals. The FCCA can also conduct sector inquiries. | Fines are foreseen by the Finnish Competition Act. The fine shall not exceed 10% of the aggregate turnover of the legal entity involved in the financial year preceding the imposition of the fine. The FCCA does not impose the fine itself but proposes that a fine be imposed to the market court. The fine is to be calculated based upon an overall assessment taking account of the nature and extent, the degree of gravity, and the duration of the infringement. | A leniency programme is foreseen by the Finnish Competition Act. For horizontal conduct it is comparable to the European Commission’s. The law explicitly refers to the possibility of a shortened application in case the applicant has also applied for leniency with the European Commission. However, the law also empowers the FCCA to refrain from or to reduce fines for other conduct if the undertaking significantly assists the FCCA. |

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181 Sections 35 and 36 Finnish Competition Act.
182 Section 36(3) Finnish Competition Act.
183 Section 37 Finnish Competition Act.
184 Section 33 and 34 Finnish Competition Act.
185 Section 33 Finnish Competition Act.
186 Section 13 Finnish Competition Act.
187 Section 12(3) Finnish Competition Act.
188 Sections 16 - 18 Finnish Competition Act.
189 Section 17(2) Finnish Competition Act.
189 Section 18 Finnish Competition Act.
## FRANCE

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| **The French Competition Authority (FCA-Autorité de la concurrence)** is an independent body in charge of generally enforcing anti-cartel measures. FCA consists of 17 members (12 permanent members and non-permanent President and four Vice-Presidents). | - **Budget in total:** EUR 20.7 million | - The FCA has the following investigatory powers:  
  - order the production of specific documents or information and require explanation thereof;  
  - carry out compulsory interviews with individuals;  
  - carry out an unannounced search of business premises and residential premises;  
  - image computer hard drives using forensic IT tools;  
  - retain original documents;  
  - secure premises overnight.  
The FCA can use investigative powers also for advocacy and verification of compliance with commitments and injunctions. FCA agents can participate in the criminal investigations. The FCA can also launch sector inquiries. | - The FCA may impose administrative fines only to undertakings and not to the employees (including individuals engaged in economic activities).  
According to the FCA’s Guidelines, fines can reach up to 10% of the highest worldwide turnover achieved by the undertakings in any financial year during the period in which the practices took place. In addition, the FCA may impose periodic penalty payments of up to 5% of the daily average turnover, achieved during the latest closed financial year, for every day of delay in the implementation of either a decision of the FCA or an injunction imposed by the FCA. For individuals, the fine is capped to EUR 3 million.  
In case of bid rigging and hardcore cartels, individuals may be subject to criminal penalties of max EUR 75.000 and imprisonment of up to four years.  
The Guidelines do not envisage automatic or mandatory reduction of fines on the basis of “financial hardship” or “inability to pay”. However, the FCA may take into account the financial situation of the undertaking concerned.  
Difference from the European Commission’s Guidelines: When calculating the fine, the minimum percentage, normally not less than 15% of the value of sales, for the most harmful restriction of competition is taken into account. Further, the harm to the economy must be taken into account when setting a fine. | - The FCA’s leniency programme provides for immunity as well as fine reductions.  
Full immunity is available in two forms:  
- Type 1A immunity can be granted where an investigation has not yet been launched. The applicant may qualify for full immunity if both the FCA did not previously have sufficient evidence to be able to carry out a targeted inspection on its own initiative and if the evidence submitted by the applicant provides a sufficient basis to carry out a targeted inspection.  
- Type 1B immunity is available where the FCA is already in possession of information on the cartel or has already carried out an inspection. In this scenario, the applicant may still qualify for full immunity if: at the time of the application, the FCA did not have sufficient evidence to find an infringement or the applicant provides sufficient evidence to establish the existence of an infringement, if no undertaking has been conditionally granted type 1A immunity.  
A reduction of fines is also available. First undertaking to provide information of a significant added value: reduction of 25 to 50%; second undertaking: reduction of 15 to 45%; every other undertaking: maximum reduction of 25%. |

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The Federal Cartel Office (FCO - Bundeskartellamt) is an independent federal authority organised as a division of the federal Ministry of economics and energy.

On the regional state level there are 16 regional state competition authorities.

- Budget in total: EUR 27.6 million
- Staff in total: 355

In administrative fine proceedings, the FCO is entitled to:
- carry out an unannounced search of business and residential premises (automobiles, briefcases etc. included). A judicial warrant is needed and only in exigent circumstances a search can be carried out without a warrant.
- seize original documents. A court order is required if the undertaking objects to the seizure of the document.

The FCO can launch sector inquiries.

The FCO imposes fines primarily on individuals (representatives of the undertaking involved) and secondarily on the undertakings.

The fines on individuals amount up to EUR 1 million while the fines on undertakings amount up to 10% of the worldwide turnover in the year preceding the imposition of the fine. For negligent infringements, the upper limit of the fine is 5% of the total turnover.

The FCO’s method of setting fines on undertakings changed with the new Guidelines introduced in 2013. In contrast to the European Commission’s practice, the FCO applies for the purposes of legal certainty the maximum fine of 10% of the total turnover as an absolute upper limit of the fine range and not as a mere capping threshold.

For the calculation of the fine on undertakings within this statutory framework of the fine, the FCO takes into account the profits gained from and the harm caused by the infringement, which are assumed to amount to 10% of the offence-related turnover (i.e. the turnover achieved from the infringement). A multiplication factor related to the size of the undertaking is then applied thereto. Finally, aggravating and mitigating factors can influence the amount of the fine.

German law does not provide for criminal sanctions for competition law infringements, except for the involvement in bid-rigging in tender proceedings.

The FCO applies a leniency programme, which’s revised version since 2006 reflects to a large extent the European Commission’s leniency programme.

However, due to the liability of individuals, the FCO’s leniency programme is available also to individuals.

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193 Section 51(1) Act against Restraints of Competition.
194 See Sections 94ff. Code of Criminal Procedure in conjunction with Section 46(1) Act on Regulatory Offences and Section 81 Act against Restraints of Competition.
195 Section 81(4) Act against Restraints of Competition.
196 Section 17(2) Act on Regulatory Offences.
197 See http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.
198 Section 298 Criminal Code.
GREECE

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| The Hellenic Competition Commission (HCC) consists of the President, the Vice-President, 4 Commissioner-Rapporteurs and 2 members. The Directorate-General of the HCC consists of 4 Directorates. By default, the HCC has to issue a decision within 12 months from the submission of the above mentioned report. | - Budget in total: EUR 7.5 million  
- Staff in total: 108 | HCC is entitled to inspect business premises, including business e-mail accounts (upon a prior order of the HCC where the specific scope of the inspection is duly described). Inspection of residential premises is allowed only upon the presence of a judge. Further, HCC can request information in cartel proceeding and launch sector inquiries. | The HCC may impose administrative fines based on the gravity and the duration of the infringement up to 10% of the total turnover of the liable undertaking achieved in the financial year when the infringement ceased. If the infringement continues, the HCC may impose a fine up to EUR 10,000 per day. An individual that enters an agreement, takes a decision or applies concerted practices may be punished with a fine ranging between EUR 15,000 and 150,000. Greek law also envisages criminal sanctions. If the criminal behaviour of an individual relates to undertakings that are actual or potential competitors, imprisonment up to 2 years and a fine ranging between EUR 100,000 and 1,000,000 may be imposed. HCC Fining Guidelines are almost identical to the Commission’s approach; however, there is no reference to inability of the undertaking(s) to pay the fine. | The Greek leniency programme is envisaging the full immunity for an undertaking or a natural person that provides first evidence of an alleged cartel or evidence which allow the HCC to undertake targeted investigation on an alleged cartel. No ‘ringleader’ may be granted full immunity; nonetheless, this exemption does not apply vis-à-vis individuals that act on behalf of the undertaking(s) concerned. The Greek leniency program also allows for reduction of fines (to a limited extent). A fine may be reduced up to 50%. For individuals, the threshold is set up to 70%. In order to fix the level of reduction, the HCC considers a number of factors, namely i) the time of the submission of evidence of added value; ii) whether the undertaking(s) is first, second etc. to provide this evidence; iii) the extent of the added value of the submitted evidence; and iv) the extent of collaboration of the undertaking and/or the individual following the submission of the evidence. |

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201 Article 39 Greek Competition Act.
202 Article 25 Greek Competition Act.
203 Article 44 Greek Competition Act.
The Hungarian Competition Authority (GVH) is a state administrative authority controlled by the Hungarian Parliament. GVH is headed by the president of GVH and two vice presidents. The president is appointed by the President of Hungary upon the nomination of the Prime Minister for a period of six years.

### HUNGARY

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<td>The GVH is entitled to order an investigation in connection with any allegedly illegal activity, conduct or predicament falling within the jurisdiction of GVH. If the infringement is not covered by the original order, the GVH has still jurisdiction, the investigator may extend the scope of the investigation by issuing an order. Upon conclusion of the investigation, the investigator prepares a report, presents it and sends it, together with the relevant documents, to the Competition Council. Further, the GVH is allowed to carry out inspections, to inspect employees' property and has a right to request information in cartel proceedings and a right to launch sector inquiries.</td>
<td>The GVH is entitled to impose a fine as well as an administrative penalty. Fines can be imposed on undertakings as well as individuals. The GVH together with the president of the Competition Council publishes guidelines on the methods of determination of fines in different types of infringements. Competition Act: the maximum amount of the fine shall be 10% of the undertaking's net sales revenue, or the net sales revenue of the group for the financial year preceding the year when the resolution was adopted. The fine imposed upon associations of companies shall be a maximum of 10% of the previous financial year's net sales revenue of the member companies. The fine shall be determined with regard to all applicable circumstances, in particular, to the gravity and duration of the infringement, the advantage gained by such conduct, the market position of the offenders, the degree of responsibility, the cooperation in the investigation, the repeated occurrence and frequency of the infringement. The gravity of the violation shall be determined, in particular, on the basis of the degree of obstructing competition, and the scope and extent of the violation of the interests of the trading parties. The minimum amount of the administrative penalty shall be HUF 200,000 (EUR 650) for undertakings, and HUF 50,000 (EUR 150) for natural persons not recognised as business entities, and the maximum amount thereof shall be - in respect of companies - 1% of the net sales revenue of the financial year proceeding the year of the ruling, or HUF 500,000 (EUR 1,500) for natural persons.</td>
<td>Full immunity is available under the Hungarian Leniency Programme regarding agreements or concerted practices on fixing purchase/sale prices, for market division (including their collaboration in competitive tender procedures), or for establishing production or sales quotas and their participation therein. Exemption from fine shall be granted to the undertaking that first submits a petition therefor and supplies any evidence. Reduced fines: Upon request, competent competition council shall reduce fine if no exemption may be granted and the undertaking in question supplies to GVH any evidence relating an infringement that is recognised considerably more valuable than any proof GVH has in its possession at the time the evidence if provided. The rate of reduction of the fine shall be between 30 to 50% in respect of the undertaking being the first to meet the condition set out in the provision above; between 20 to 30% in respect of the undertaking being the second to meet the condition set out in the provision above; and up to 20% in respect of the undertaking being the third or beyond to meet the condition set out in the provision above.</td>
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206 For investigative powers see Articles 64/A ff. Hungarian Competition Act.

207 For investigative powers see Articles 64/A ff. Hungarian Competition Act.

208 For investigative powers see Articles 64/A ff. Hungarian Competition Act.

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[http://www.gvh.hu/en//data/cms1000089/szakmai_felhaszn%C3%A1l%C3%B3k_eng_pol_AL_EN_07_10_2015.pdf](http://www.gvh.hu/en//data/cms1000089/szakmai_felhaszn%C3%A1l%C3%B3k_eng_pol_AL_EN_07_10_2015.pdf)

[http://www.gvh.hu/en//data/cms1032308/For_professional_users_Antitrust_Fine_Setting_Notice_FIN_Tpvtengedekenyseg_m%C3%B3d_a.doc](http://www.gvh.hu/en//data/cms1032308/For_professional_users_Antitrust_Fine_Setting_Notice_FIN_Tpvtengedekenyseg_m%C3%B3d_a.doc)
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| The Competition and Consumer Protection Commission (CPC) is composed of the Competition Authority and the National Consumer Agency. The CPC is governed by an executive Chair and six Members. | - Budget in total: EUR 4,955,000  
- Staff in total: 86 (20 for competition enforcement) | On production of a valid search warrant, the CPC has the power to enter and search the company premises, including nearby company vehicles, to examine, seize and retain books, documents, or record, ask for oral explanations of any such documents or correspondence on the spot, examine, seize and retain laptop computers and other hardware, require company staff and directors to provide factual information and to enter the homes of any member of staff. | The CPC does not have the power to impose fines, as this is in realm of the judicial system. The CPC can though investigate suspected breaches of competition law and either takes legal proceedings in Court or, for serious criminal breaches or sends a file to the Director of Public Prosecutions, who decides whether to take a criminal prosecution on indictment. Businesses and individuals found guilty of hard-core cartel offences face a number of penalties. An undertaking convicted on indictment of participating in a cartel can be fined up to EUR 5 million or 10% of turnover, whichever is greater. Similar fines may also be imposed on individual managers or directors together with a maximum of 10 years imprisonment. The maximum penalty for a summary prosecution is a fine of EUR5,000 and up to six months imprisonment. The sanction of imprisonment applies only to hard-core cartels (price-fixing, market sharing and bid rigging on tenders). Other competition offences prosecuted in the criminal courts are subject only to financial fines. | The Irish Cartel Immunity Programme outlines the policy of both the CPC and the Director of Public Prosecutions (DPP). The CPC manages immunity applications and makes recommendations on granting conditional immunity to applicants to the DPP in appropriate cases. The CPC actually acts as an intermediary between applicants and the DPP in seeking immunity from prosecution in return for providing evidence in a criminal trial. An undertaking may apply on its own behalf and on behalf of its employees, directors and officers who require individual immunity. Directors, officers and employees of an undertaking who require immunity may also apply on their own behalf. Immunity is only available to the first participant. An undertaking or individual who has coerced or attempted to coerce others to join or remain in a cartel would not be eligible to apply for immunity. The CPC will not consider second and subsequent applicants under the Programme but they can approach the DPP directly in such cases and ask to have their position in a queue noted and can consent to being contacted if the first applicant no longer requires immunity, has withdrawn from the Programme or has its conditional immunity revoked. |

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### ITALY

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| The Italian Competition Authority (ICA - Autorità garante della concorrenza e del mercato) is an independent administrative body. Beside enforcement of competition law, ICA also deals with the consumer protection and unfair commercial practices. The ICA has the status of a public agency, whose decisions are taken without any interference by the Government. | -Budget in total: EUR 48.9 million  
-Staff in total: 288 (120 in competition enforcement) | The ICA has a right to demand access to all premises, land and vehicles of the party under inspection, excluding their place of residence or domicile which are extraneous to the operations of the undertakings. Residential premises can be searched upon issuing a Court warrant. The ICA may at any time request the parties to supply any information in their possession, and exhibit any documents of relevance to the investigation. ICA also has a right to launch a sector inquiry. | Fines can be imposed on any subject that can be qualified as an undertaking in accordance with competition law. The ICA has issued Guidelines on the method of setting fines, which are comparable to the ones of the European Commission. The ICA uses two-step methodology to calculate the fine: Basic amount of fines is calculated on the basis of a percentage of the value of sales made in the relevant market by the undertaking during its previous financial year\(^2\)\(^{11}\); the fine can be up to 10% of the turnover. This amount is then multiplied by the years that infringement lasted; the fine may be up to 30% of this value, according to the seriousness of the violation. The fine can be increased up to 50% if the undertaking achieved significant worldwide revenues or belongs to a group of significant economic strength. There is the possibility to add an entry between 15% and 25% of the value of sales for more serious infringement. In case of recidivism, there is the possibility of a further increase up to 100% of the basic amount. Specific economic conditions may justify an instance of inability to pay. | The leniency program\(^2\)\(^{12}\) applies to horizontal infringements. In theory, the Notice can also be applied to vertical aspects of cartels (not yet in practice). The Italian compliance system offers both full leniency, as well as partial leniency (reduction of fine up to 50% - there is no fixed reduction bands). Partial leniency is granted to undertakings which provide evidence that adds significant value to the evidence already held by the ICA. Only companies can apply; employees are not covered by leniency applications since no personal liability is provided under the Law. |

\(^{211}\) Article 14(2) Italian Competition law.  
\(^{212}\) Article 15bis Italian Competition law.
### LATVIA

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| The Latvian Competition Council (LCC) consists of two members and a chair appointed by the Cabinet of Ministers. The Council is a direct administrative institution under the supervision of the Ministry of Economics. It is supported by an Executive Directorate that acts as a secretariat and inter alia runs the investigation and drafts the decisions. | - Budget in total: EUR 1.1 million  
- Staff in total: 43 | The LCC has the following investigatory powers:  
- require the necessary information;  
- inspect any market participant or an association of market participants (including without prior notice);  
- request documents and explanations;  
- withdraw property items and documents;  
- enter the non-residential premises, means of transport, flats, structures and other immovable and movable object that are in the ownership, possession or use by a market participant or employees thereof. | Fines vary for horizontal and vertical infringements of Competition Law. Fines for horizontal infringements are capped at 10% of net turnover for the previous financial year whereas those for vertical infringements and abuses of a dominant position are capped at 5%.  
The Latvian Cabinet has issued regulations outlining the method of setting fines. The LCC shall consider the type of violation, its effects, its gravity and the role played by each participant. Fines are calculated based on the undertakings net turnover of the last financial year and can range from 0.03% of that turnover to 7% in case the infringement's duration does not exceed one year. The fine can be increased for longer durations or other circumstances such as recidivism or coercion. | The Latvian Leniency Programme foresees both the option of immunity as well as reduction of fines. Initiators of cartels cannot benefit from immunity. The first applicants meeting the conditions for a reduction of the fine can benefit from a reduction between 30 to 50%. Subsequent applicants can benefit from a 20-30% reduction. |

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| LITHUANIA |
|-----------------|-----------------|-----------------|
| **Statutory set-up** | **Budget & size** | **Investigative powers** | **Fines** | **Leniency** |
| The Competition Council of the Republic of Lithuania (KT) is an independent entity. It consists of its Chairperson and four Members appointed by the President of the Republic. | - Budget in total: EUR 1.61 million (2013) -Staff in total: 72 (45 in Competition Law enforcement) | The Law on Competition endows KT with investigative powers including the ability to search business and residential premises, including digital evidence and the option to seize evidence. KT can also request information and require individuals to appear at the offices of the Council. Furthermore, the KT can conduct sector inquiries. | KT’s methodology for setting fines is mostly comparable to the European Commission’s. The resolution on the methodology for setting fines establishes a two-stage process. The basic amount will be calculated taking up to 30% of the value of sales directly or indirectly related to the infringement, multiplied by the number of years of the infringement. For cartels the percentage will be set at 20-30% of the value of the sales. In case of price-fixing, market-sharing and output-limitation cartels, the Council will add a sum (“entry fee”) the amount of which is 15% and 25% of the value of sales. This value can be further increased or reduced in case of aggravating or mitigating circumstances. | The KT applies a leniency programme for both horizontal and vertical infringements of competition law. The first applicant can benefit from immunity if the KT has not yet initiated an investigation and the applicant neither initiated the conduct nor coerced another undertaking’s participation. If the KT initiated proceeds, a reduction of 50-75% is possible. Subsequent applicants can benefit from reductions of 20% to 50%. |

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**Statutory set-up**

The Competition Council (Conseil de la concurrence) is an independent administrative authority.²¹⁹ It consists of 4 members (the President and 3 counsels).

**Budget & size**

- Budget in total: EUR 1.3 million
- Staff in total: 7

**Investigative powers**

The Competition Council may carry out inspections in both business and non-business (including residential) premises upon issuing a court order in both cases, i.e. in business and non-business premises. Further, the Competition Council has a right to inspect employees' property, to request information in cartel proceedings and a right to launch sector inquiries.

**Fines**

The Competition Council may impose an administrative fine of up to 10% of the global turnover²²⁰. Criminal sanctions cannot be imposed. The Competition Council has not issued its own Fining Guidelines, though in practice, it adopts the approach and the methodology of the European Commission as displayed in the latter's Fining Guidelines.

**Leniency**

Full immunity or reduction of fine may be granted to undertakings.²²¹ An undertaking may be granted full immunity from a fine if it is the first to provide evidence that allows the Competition Council to carry out an investigation for alleged infringement of the relevant national law and/or its equivalent Art. 101 of the TFEU. However, no “ringleader” may be granted full immunity and an undertaking which has forced another undertaking to participate in the cartel, may not benefit from immunity.

The Competition Council may also reduce the fine for any other undertaking that provides relevant evidence, however no specific ranges are defined in the law. The Competition Council has discretion to reduce the fine taking into account a series of factors, namely the time when the evidence is provided, the extent of the scope as well as the utility of this evidence.

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²²⁰ Article 20(2) Luxembourg Competition Act.

²²¹ Article 21 Luxembourg Competition Act.
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| The Office for Competition is one of four entities that form part of the Malta Competition and Consumer Affairs Authority (MCCAA). | - Budget in total: EUR 4.75 million  
- Staff in total: 10 | Upon a written authorisation signed by the Director General specifying the subject-matter and purpose of the inspection, MCCAA officials can carry out inspections in business premises. Inspections in non-business premises, including houses of directors etc. may be undertaken only after the Director General, duly authorised by a warrant issued by a Magistrate (Judge), orders it.  
Further, the MCCAA has a right to request information in cartel proceedings and a right to launch sector inquiries. | The Director General may impose an administrative fine of up to 10% of the total turnover generated in Malta in the preceding business year. If the infringement continues, the Director General may impose a penalty payment up to 5% of the average daily turnover of the undertaking achieved in the preceding financial year for each day the undertaking fails to comply with its obligations. In fixing the amount of the fine, the Director General shall have regard to the gravity and duration of the infringement and to any aggravating or mitigating circumstances.  
No criminal sanctions are imposed and no specific Fining Guidelines have been issued so far. | Malta is the sole EU Member State that does not operate a Leniency Program. |

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223 Chapter 379 Section 21 Competition Act.
### NETHERLANDS

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| The Netherlands Authority for Consumers and Markets (ACM) is an independent regulator charged with competition oversight and enforcement of consumer protection laws. | - Budget in total: EUR 15.5 million  
- Staff in total: 527 (181 working on competition enforcement) | The officials have the authority to enter premises, to request information, to demand access to documents, and to take along data. Such authority applies to business and private premises. Everyone is required to cooperate with ACM investigations. Further, the ACM has a right to request information in cartel proceedings and a right to launch sector inquiries. | The ACM has the ability to impose fines on both the firm and the individuals involved. The level of the fine depends on the seriousness and the duration of the violation as well as on the specific circumstances of the case. | The ACM has issued the Fining guidelines, which differ from the European Commission’s guidelines in the higher percentage share for the basic amount of fine. | The Netherlands has a Leniency policy, comparable to the one of the European Commission. |

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225 Chapter 7 § 1 Article 56 et seq. Dutch Competition Act.
## POLAND

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| The Office of Competition and Consumer Protection (UOKiK) is a central authority of the government administration. The President is appointed by the Prime Minister and reports directly to him. | - Budget in total: PLN 66.3 million (ca. EUR 15.4 million)  
- Staff in total: 475 | In case of control and the investigation proceedings the President of UOKiK has the right to (i) access properties, premises, buildings, locals and means of transport; (ii) access files, books, all kind of letters, documents, correspondence sent by electronic mail or other items (iii) access data carriers, IT devices and IT systems, (iv) make notes regarding the above mentioned materials and correspondence; (v) request copies and print-outs of the above-mentioned materials and correspondence; (vi) request oral explanations from undertaking being controlled or persons authorised by such undertaking; (vii) release and access other items | The President of UOKiK is authorised to impose the fines on the undertakings as well as on the individuals.  
The maximum fine imposed on an undertaking can amount up to 10% of the undertaking's turnover in the financial year proceeding the year in which the fine was imposed. In case the undertaking's turnover in the preceding financial year does not exceed EUR 100,000 and the average turnover for the last three preceding years does also not exceed EUR 100,000, the maximum amount of the penalty is EUR 10,000.227 | The Polish Leniency Programme is comparable to the European Commission's. |
| UOKiK comprises of: (i) the Head Office in Warsaw; (ii) the delegations; and (iii) control and analytics laboratories supervised by the President of UOKiK. |  |  |  | |
| In general, the President of UOKiK shall be considered as an independent central authority of the government administration. However, in practice independence of the President of UOKiK may raise some doubts due to the fact that he/she is appointed and dismissed by the Prime Minister. |  |  |  | |

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227 Chapter 1 Article 106 Act on Competition and Consumer Protection.

228 Chapter 1 Article 106 a Act on Competition and Consumer Protection.
The Portuguese Competition Authority (PCA - Autoridade da Concorrência) is a public entity with the nature of an independent administrative body. It has statutory independence and enjoys administrative, financial and management autonomy.

- **Budget & size**
  - Budget in total: EUR 8,188,899
  - Staff in total: 89 (69 in competition law enforcement)

- **Investigative powers**
  - The "Anti-cartel unit" of the Portuguese Authority has the following investigatory powers:
    - order the production of specific documents or information and require explanation thereof;
    - carry out compulsory interviews with individuals;
    - carry out an unannounced search of business and residential premises;
    - right to image computer hard drives using forensic IT tools;
    - right to retain original documents;
    - Right to secure premises overnight 229.

- **Fines**
  - Cartels are considered administrative offences and not criminal offences 229. Sanctions for individuals: penalties can be imposed on members of the board of the undertaking concerned and on persons responsible for the management or supervision of the areas of activity where the infringement occurred. Companies are held liable for infringements committed on their behalf or account by persons occupying a leading position.

  Difference to European Commission’s approach: PCA follows a three step approach. Firstly it sets a basic amount of fine; then it adjusts it according to mitigating or aggravating circumstances; finally it increases or reduces the amount of the fine taking into account all the facts of the case.

  The maximum fine is up to 10% of the turnover of each participating undertaking or of the aggregate turnover of its members, in case of associations of undertakings 231.

  In addition to these penalties, PCA may impose ancillary sanctions: publication in the official gazette and in a national newspaper of the relevant parts of a decision finding an infringement, or a ban to participate in procurement proceeding 232. Moreover, PCA may impose a periodic penalty payment in cases of non-compliance with a decision imposing a penalty or ordering the application of certain measures (this may result in a payment of up to 5% of the average daily turnover).

  For individuals, penalties may go up to 10% of his/her total annual income in the last complete year of the breach.

- **Leniency**
  - The PCA’s leniency programme covers only cartel cases.

  Full immunity or reduction of fines can be granted either to companies or to individuals. For the immunity it is no longer required (as in the previous leniency regime) that the information be presented to the PCA at a stage where no investigation has been initiated.

  The reductions of fines are of 30-50% for the first undertaking or of the aggregate turnover of its members, in case of associations of undertakings 231.

  In addition to these penalties, PCA may impose ancillary sanctions: publication in the official gazette and in a national newspaper of the relevant parts of a decision finding an infringement, or a ban to participate in procurement proceeding 232. Moreover, PCA may impose a periodic penalty payment in cases of non-compliance with a decision imposing a penalty or ordering the application of certain measures (this may result in a payment of up to 5% of the average daily turnover).

  For individuals, penalties may go up to 10% of his/her total annual income in the last complete year of the breach.

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230 Article 67 and Article 68 Portuguese Competition Act.

231 Article 69 Portuguese Competition Act.

232 Article 71 Portuguese Competition Act.
### ROMANIA

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<td><strong>The Romanian Competition Council</strong> is an autonomous administrative authority. The management bodies within the Competition Council are the President, the general manager, the general secretary, the deputy general secretary, the managers and the department heads. The decision-making bodies at the level of the Competition Council are: the Plenum, the commissions and the President. The Plenum of the Competition Council is a collegial body composed of 7 members, as follows: a President, 2 vice-presidents and 4 competition councillors. The members of the Plenum of the Competition Council are appointed by the President of Romania, at the proposal of the Consultative Collegium of the Competition Council, with the endorsement of the Government and after the hearing of the candidates in the specialised commissions of the Parliament.</td>
<td>Based on both the inspection order issued by the President of the Competition Council and the judicial authorisation granted through ruling by the President of the Bucharest Court of Appeal, inspections can be performed on any premises, including domiciles, land or means of transport belonging to managers, administrators, executives and other employees of the undertakings or associations of undertakings submitted to investigations. The Competition Council has vast investigative powers, including the possibility to make copies of documents during inspections (but not seize originals), to collect digital/forensic evidence, to seal premises, to ask questions during inspections, to conduct interviews (on a voluntary basis), to ask for the police's assistance during inspections. The Competition Council can launch sector inquiries.</td>
<td>As a general rule, any infringement of competition regulations under the Romanian Competition Law may be sanctioned with fines from 0.5% up to 10% of the turnover achieved by the undertaking in the financial year prior to applying the sanction. The wilful set-up or organisation of a cartel or other form of anticompetitive agreement by any director, legal representative or member of the management of an undertaking is considered a criminal offence punishable with imprisonment of six months to five years or with a fine and the interdiction of certain rights. The base level of the fine is calculated on the basis of the gravity and the duration of the infringement. The starting point for the fine is a percentage of the company's annual turnover and varies depending on gravity and duration of the infringement. The base level may be increased by aggravating factors or decreased by mitigating factors. Possibly further decreased by settlement: 10%-30% of the base level, including when the level of the fine is established at the minimum level provided by the law, but not lower than 0.2% of the turnover obtained in the previous fiscal year.</td>
<td>The Competition Council applies a leniency programme comparable to the European Commission’s. However, it applies not only to secret cartels but also to hard-core vertical agreements/concerted practices, such as price fixing, market sharing /absolute territorial protection.</td>
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- **Budget & size**
  - **Budget in total:** RON 55,805,00
  - **Staff in total:** 308

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The Antimonopoly Office of Slovak Republic is an independent central body of state administration. Its Chairman is appointed or dismissed by the President on proposal of the Government of the Slovak Republic.

The Antimonopoly Office has the right to enter any premises and vehicles of the undertakings involved in order to carry out an inspection provided that there is a written authorisation. The Office has the right to demand, from any natural or legal person involved information and documents that are necessary for the operation, regardless of the medium on which they are recorded, copies or extracts thereof, as well as require explanation. Moreover, the Antimonopoly Office has the power to:
- secure documents or media on which information is recorded, seal the premises and equipment as well as vehicles;
- confiscate documents or media on which information is recorded;
- secure access to the premises and means of transport of undertakings, open closed premises and equipment or otherwise provide access to documents or media on which information is stored.

Both individuals and undertakings can be fined. Even government bodies, municipalities, higher territorial units and interest associations carrying out state administration can be fined, if they provide evident advantage to certain undertaking or otherwise restrict competition.

The Slovak Antimonopoly Office issued a guideline for imposing fines. These guidelines are in line with the Guidelines on the method of setting fines imposed pursuant to the Regulation No 1/2003. For natural persons without the status of a businessman the fines are lowered to up to EUR 80,000.

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</table>
| The Antimonopoly Office of Slovak Republic is an independent central body of state administration. Its Chairman is appointed or dismissed by the President on proposal of the Government of the Slovak Republic. | - Budget in total: EUR 2,034,975  
- Staff in total: 63 | The Antimonopoly Office has the right to enter any premises and vehicles of the undertakings involved in order to carry out an inspection provided that there is a written authorisation. The Office has the right to demand, from any natural or legal person involved information and documents that are necessary for the operation, regardless of the medium on which they are recorded, copies or extracts thereof, as well as require explanation. Moreover, the Antimonopoly Office has the power to:  
- secure documents or media on which information is recorded, seal the premises and equipment as well as vehicles;  
- confiscate documents or media on which information is recorded;  
- secure access to the premises and means of transport of undertakings, open closed premises and equipment or otherwise provide access to documents or media on which information is stored. | Both individuals and undertakings can be fined. Even government bodies, municipalities, higher territorial units and interest associations carrying out state administration can be fined, if they provide evident advantage to certain undertaking or otherwise restrict competition. | The Antimonopoly Office applies a leniency programme comparable to the European Commission's. |

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235 Article 22 and 22 Act on Protection of Competition.
236 Article 38 Act on Protection of Competition.
237 Article 38 a para 3 Act on Protection of Competition.
The Slovenian Competition Protection Agency (CPA) is an independent administrative authority. It is led by a director and five council members, all of which are appointed by the Parliament on the proposal of the government. In the administrative procedure, the decision-making body is a panel consisting of the members of the Council, led by the director of the CPA. In misdemeanor procedures, the decision-making body is a panel consisting of the members of the Council and employees of the CPA.

### SLOVENIA

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<td><strong>Budget &amp; size</strong></td>
<td>Two procedures exist, for administrative and minor offences. The minor offence procedure is usually conducted as a follow-on procedure after the infringement has been established in an administrative procedure.</td>
<td>The CPA is the only institution responsible for investigating and deciding upon the case in an administrative procedure. The maximum fine amounts to maximum 10% of the turnover realised by the respective undertaking in the previous financial year or between EUR 5,000 and EUR 30,000 for the responsible person of a legal entity or the responsible person of an entrepreneur. If the undertaking does not provide information based on the special order it can be penalised up to EUR 50,000. The penalty can be imposed again until the combined amount reaches 1% of the annual turnover of the undertaking in the preceding business year. In case of a criminal offence, the most severe possible sanction for responsible individuals is imprisonment ranging from six months up to five years. For a legal person the following sanctions may be imposed under the Penal Code and the Criminal Liability of Legal Entities Act: A fine from EUR 50,000 to EUR 1 million or alternatively up to a maximum of two hundred times the amount of damage caused or illegal gain obtained through the criminal offence. Expropriation of property, winding-up of the legal person or prohibition of trading in financial instruments on a regulated market from one to eight years can also be imposed. The CPA has not adopted guidelines on the setting of fines for breaches of Slovenian antitrust law. When setting a fine, the CPA takes into account the general provisions of the Minor Offences Act and, thus, all mitigating and aggravating factors. Therefore, guidance on the application of the current rules can be gathered mostly from case law of the CPA and the Slovenian courts, which is however still limited.</td>
<td>The leniency program applies to undertakings and responsible persons of the undertakings involved in cartel cases. Leniency is granted as full immunity or a reduction of fine. Full immunity is granted to the first applicant. The second applicant can be granted a reduction of fines between 30 and 50%, the third applicant between 20 and 30% and any other applicant up to 20%. A company applying for leniency has to fulfill certain conditions imposed by the CPA. Leniency only applies to the minor offences procedure and has no bearing on criminal proceedings.</td>
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<td><strong>- Budget in total:</strong> EUR 1.2 million</td>
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<td><strong>- Staff in total:</strong> 26 (2014)</td>
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The National Commission of Markets and Competition (CNMC – Comisión Nacional de los Mercados y la Competencia) is an autonomous authority organically and functionally independent from the Government, but ascribed within the Ministry for Economy.

The CNMC is controlled by the Parliament.

Spanish competition rules can be applied by regional authorities provided the conduct in question has regional scope.

The CNMC consists of a chairman, a Council and four different investigation directorates: a specific Directorate for Competition and three further Directorates for Telecommunications and the Audio-visual sector, for Energy and for Transport and the Postal sector.

### Budget & size
- Budget in total: EUR 59 million
- Staff in total: 509 (163 in competition law enforcement)

### Investigative powers
According to the Competition Act the CNMC has the power to:
- order the production of specific documents or information;
- carry out compulsory interviews with individuals;
- carry out an unannounced search of business premises;
- carry out an unannounced search of residential premises of the entrepreneurs, managers and other members of staff of the undertakings concerned;
- right to image computer hard drives using forensic IT tools;
- right to retail original documents;
- right to require an explanation of documents or information supplied;
- Right to secure premises overnight.

The CNMC has the power to launch sector inquiries.

### Fines
Under the Competition Act and the Communication on the calculation of fines of February 2009, undertakings and individuals can be fined for infringements of competition law.

The fine on individuals (i.e. legal representatives or members of the management body) may be of up to EUR 60,000.

The amount of the fine on undertakings depends according to the Communication on the gravity of the infringement and can be of up to 1% for minor infringements, 5% for serious infringements and 10% for very serious infringements of the total turnover of the infringing undertaking in the business year preceding that of the imposition of the fine.

The method of calculating fines set forth in the Communication was changed by the decision of the Supreme Court of 29 January 2015. The Court decided that the calculation of fines should be based on the global turnover generated by all activities of the infringing undertaking and not only on the turnover generated in the specific activity affected by the infringement.

The Supreme Court also held that the maximum fine of 10% of the total turnover (or 5% or 1% depending on the infringement) shall be applied as an absolute upper limit of the fining range and not as a mere capping threshold, as it is the case in the European Commission’s practice.

### Leniency
The CNMC applies a leniency programme comparable to the European Commission’s. However, in the CNMC’s practice there are more specific collaboration requirements for the companies applying for leniency.

The regional competition authorities are also competent to apply the programme.
### SWEDEN

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| The Swedish Competition Authority is an agency under the Ministry of Enterprise, Energy and Communications headed by a Director-General who has full responsibility for the agency activities. | - Budget in total: SEK 177,808,000  
- Staff in total: 170 | The Swedish Competition Authority may require undertakings or other parties to supply information, documents or other material. Persons who are likely to be in a position to provide relevant information may be required to appear at a hearing. A municipality or county council engaged in activities of an economic or commercial nature may be required to account for the costs of and revenues from these activities. Following a decision by the Stockholm City Court, the Authority may carry out an inspection on the premises of an undertaking. The Court's decision may also concern homes and other premises of the board and employees of the undertaking which are subject to investigation. The Authority can launch sector inquiries. | The Stockholm City Court shall make a decision on the administrative fine following a request by the Swedish Competitive Authority. Administrative fines may amount to no more than 10% of the undertaking’s total annual turnover. The Swedish Competition Authority may decide on an administrative fine if the infringement is established and the parties agree. A fine order that has been accepted is regarded to be a legally binding judgment. Potential addressees of the fines are natural or legal persons that can be defined as undertakings, i.e. those that are engaged in economic or commercial activities. | The Swedish Competition Authority's leniency programme is comparable to the European Commission’s. However, immunity can be granted for any “anti-competitive cooperation” and not only for cartels. |

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239 Chapter 5 Article 3 and Article 5 Swedish Competition Act.  
240 Chapter 3 Article 6 Swedish Competition Act.  
241 Chapter 3 Article 5 and Article 16 Swedish Competition Act.  
242 Chapter 3 Article 12 Competition Act.
### UNITED KINGDOM

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| The Competition and Markets Authority (CMA) is an independent non-ministerial department. | - Budget in total: EUR 48.8 million  
- Staff in total: 700 | The investigating officer may enter any premises in connection with an investigation without a warrant or with a warrant.  
For the purposes of an investigation the Director may require any person to produce to him a specified document, or to provide him with specified information, which relates to any matter relevant to the investigation.  
The CMA has the power to launch sector inquiries. | An undertaking can be fined up to 10% of its worldwide turnover and sued for damages.  
An individual can be fined or sent to prison for up to 5 years if he/she is found guilty of being involved in cartel activity.  
Company directors can be disqualified from being a director for up to 15 years. | The CMA may grant immunity or reduction of fines to undertakings as well as criminal immunity to individuals. In general, the CMA’s leniency programme follows the principles of the European Commission’s leniency programme with some deviations.  
The first leniency applicant without a pre-existing investigation can be granted a full immunity from fines and from criminal prosecution for individual employees. The first applicant following a pre-existing investigation, but prior to the statement of objections, may be granted a fine reduction of up to 100% at the CMA’s discretion, provided that the information adds significant value to the investigation. The second or later applicants may obtain reductions of fines of up to 50%, this being at the CMA’s discretion, provided that the information adds significant value to the investigation. In the last two leniency types, the CMA may also grant criminal immunity to individuals. |

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244 Part I Chapter 3 Section 36 UK Competition Act.
POLICY DEPARTMENT ECONOMIC AND SCIENTIFIC POLICY

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Economic and Monetary Affairs
- Employment and Social Affairs
- Environment, Public Health and Food Safety
- Industry, Research and Energy
- Internal Market and Consumer Protection

Documents