


# What is the Interplay between EU and National Enforcement and the Impact on Sanctions?

**Christophe LEMAIRE**  
**Partner Ashurst**  
**Senior Lecturer Sorbonne School of Law**

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE) ITALY JAPAN  
PAPUA NEW GUINEA SINGAPORE SPAIN SWEDEN UNITED ARAB EMIRATES UNITED KINGDOM UNITED STATES OF AMERICA

- 
- Interplay between EU and National Enforcement:  
basic principles
  - Two main issues as regard impact on sanctions
    - Cooperation and parallel competences of competition  
authorities: complexity and higher risks for sanctions
    - Convergence process throughout Europe



## Interplay between EU and National enforcement: basic principles

- Situation before Regulation 1/2003
- Situation after Regulation 1/2003



# Situation before Regulation 1/2003

- Possibility for NCA to apply EU law (but no obligation)
- Not all NCAs had the power to apply EU law (half of them)
- Centralised notification and authorisation system (for Art 101§3)
- No specific mechanisms of cooperation between CAs
- Possibility of two sets of parallel proceedings
  - Vertically: one before the Commission under EU law, the other before NCA under national law, with potentially two sanctions (ECJ Walt Wilhelm 1969)
  - Horizontally: possibility for a NCA to apply its national law in parallel with other NCAs



## Situation after Regulation 1/2003 (1)

- On the substance
  - Article 3 specifies rules to govern relationship between national and EU competition provisions
  - NCAs and courts must apply both national and EU competition law (when trade between Members States is affected)
  - National law should be applied in conformity with EU law (with specific provisions for unilateral conduct)
  - Decentralised system for exemption (exception system)



## Situation after Regulation 1/2003 (2)

- Powers of NCAs and of the Commission
  - Article 5 circumscribes the types of decisions that can be taken by NCAs, as follows
    - Requiring that an infringement be brought to an end
    - Ordering interim measures
    - Accepting commitments
    - Imposing fines, periodic penalty payments or any other penalty provided for in their national law
  - The Commission has the same powers, but
    - It may impose behavioural or structural remedies
    - Exclusivity to adopt non-infringement decisions, NCAs can only decide that “*there are no grounds for action on their part*” (ECJ, Tele 2 Polska, 2011)



## Situation after Regulation 1/2003 (3)

- New cooperation area between CAs
  - Creation of ECN : “*forum of discussion and cooperation*”
  - Division of the work in a system of parallel competences
    - Principles of case allocation between ECN members
    - Tools for cooperation between CAs
      - Exchange and use of confidential information (Art 12)
      - Assistance for investigations (Art 22)
  - Consistent application of EU rules
    - Information of the Commission (Art 11.4 and 11.5)
    - Specific power for EU Commission (Art 11.6)



## First impact: complexity and higher risks for sanctions

- Two main reasons:
  - Potential multiple investigations
  - Potential multiple decisions





## Multiple investigations and sanctions (1)

- The creation of the network increases the capacity of detection and of investigation of CAs
- Greater detection
  - all CAs are aware, through the network (Art 11§3), of all new cases or investigations in Europe
  - except in case of leniency, this information can be used by other members to start investigations
- Increase directly powers of investigation
  - new tools of cooperation between enforcers (exchange of information, assistance in investigations)
  - several uses each year
  - could be decisive in certain cases
    - See for example French “Carbureacteurs” case (prosecution was only possible because of evidence collected in UK)



## Multiple investigations and sanctions (2)

- Do the different levels of protection of the rights of defence in Europe limit the exchange and the use of information?
  - Different levels of protection of the right of defence between members (e.g. legal privilege for in-house lawyer; need for a court warrant for inspections)
  - Recital 16 “*rights of defence ... in the various systems can be considered as sufficiently equivalent*”
  - Consequence: evidence collected through Art. 12 can be used by a NCA, even if this NCA could not itself lawfully have collected this evidence, or could not have used it had collected it itself
  - Limits imposed by Art. 12 as regard sanctions on natural persons
    - Transmitting and receiving NCAs foresee sanctions of similar kind
    - Or where information is collected in a way which respects the same level of protection of rights of defence of natural persons and receiving authority cannot impose custodial sanctions



## Multiple decisions and sanctions (1)

- Both Commission and NCAs have competence to apply EU competition law
- Mechanism of case allocation:
  - Allocation based on flexible criteria (no challenge)
  - Identify the “*single well placed*” CA
  - Recital 18: “*The objective being that each case should be handled by a single authority*”
- If identify a single authority is an objective, several CAs can intervene in parallel

**=> Risks of violation of principle of *ne bis in idem* ?**



## Multiple decisions and sanctions (2)

- Legal sources of *ne bis in idem* principle
  - Art 4 Protocol 7 ECHR prohibits multiple trials and punishments under the jurisdiction of the same State
  - Art 50 CFR extends the scope of the right not to be tried or punished twice within the Union
- According to ECJ (*Aalborg Portland* 2004), *ne bis in idem* depends on the reunion of “*the threefold condition of identity of facts, unity of offender and unity of the legal interest protected*”
- Debate on the third criteria
  - In the area of freedom, security and justice, ECJ considered the criterion of unity of the legal interest protected to be irrelevant
  - ECtHR has regard only to whether or not the facts are identical (*Zolotoukhine c. Russie* 2009)



## Multiple decisions and sanctions (3)

- Scenario 1: could EU and national competition laws be applied in parallel?
  - Question arises if NCA intervenes after Commission for the same infringement
- Solution before Reg. 1/2003
  - ECJ Walt Wilhelm: concurrent sanctions possible since the legal rules infringed are not the same and the two proceedings pursue different ends
- Solution after Reg. 1/2003
  - Similar situation should no longer occur
  - NCAs' duty to apply also EC competition whenever they apply national competition law
- New questions after the Toshiba judgment (ECJ 2012)



## Multiple decisions and sanctions (4)

- In Toshiba 2012, ECJ:
  - the opening of a proceeding by the Commission does not “*permanently and definitively removes the NCAs’ power to apply national legislation*”
  - did not exclude the possibility for NCA to impose a second sanction after the Commission without violating *ne bis in idem*
- General principle or specific judgement?
  - Could we explain the solution by the specific circumstances of the case? (Czech Republic was not part of EU at the time of the infringement and the Commission had no jurisdiction to sanction the cartel in that state)
- A general principle would be questionable
  - Difficult to see how an infringement could be unique for the legal qualification and then becomes distinct facts for the purpose of setting fines
  - Compatibility with ECtHR *Franz Fischer* (2001) decision doubtful (principle not only apply when a person is punished twice for nominally the same offence, but also when the essential elements of two offences overlap)



## Multiple decisions and sanctions (4)

- Scenario 2: could EU competition law be applied several times to the same infringement?
  - Either 2 NCAs acting in parallel or Commission acting for some territories and NCA for another one
  - Rare since 2004 (e.g. Belgium and German NCA in the BBP case; French and German NCA in the flour case)
- Is the second prosecution for the same offence?
  - Are the facts or the legal interest protected the same?
  - Debate on whether the existence of effects within various territories could justify the absence of “*idem*”
  - No real answer in the Toshiba case, even if ECJ refers to “*effects produced by the cartel*” to conclude that the condition of identity of the facts was lacking



## Multiple decisions and sanctions (5)

- Multiple prosecutions should be banned
  - Art 50 CFR and principle of *ne bis in idem* refer to the same offence and not to the same effects of an offence
  - Compatibility with ECtHR *Franz Fischer* (2001) decision doubtful
  - How can an infringement be unique for the legal qualification and distinct facts for the purpose of setting fines?
  - Reference to the effects is questionable since it exists infringement by object and effects are not taken into consideration by the Commission when setting the fines
- Prohibition of multiple prosecutions would not be dramatic
  - align competition law on other laws
  - force CAs to ensure that each case is dealt with by the relevant authority
  - encourage convergence and harmonisation of sanctions (in particular to avoid under enforcement) -> phenomenon which is already at stake






## Second impact on sanctions: convergence process throughout Europe


Questions:

- Why is there a movement of convergence?
- How does convergence take place?
  - Firstly, a peripheral convergence
  - Towards convergence of sanctions themselves?



## Why is there a movement of convergence? (1)

- No legal obligation of convergence under Reg. 1/2003
  - Sanctions are mainly questions of procedure -> principle of procedural autonomy applies
  - Recital 35 “*recognises the wide variation which exists in the public enforcement systems of Member States*”
- But various incentives for convergence
  - Lot of references to “*effectiveness*” and also to “*uniform application*” of EU competition law in the Modernisation Package
  - According to ECJ, with regard to penalties for an infringement of EU law, national law must provide for sanctions which are *effective, proportionate and dissuasive* (C-68/88 COM/Greece)
  - ECJ, more recently, stricter standard of procedural autonomy
    - From « *not render practically impossible or excessively difficult the exercise of rights conferred by EU law* »
    - To an obligation for Member State to ensure that its procedural rules guarantee that competition law is applied “*effectively*” (see ECJ *Vebic*; *Pfeiderer*)



## Why is there a movement of convergence? (2)

- Other incentives for convergence
  - *Amicus curiae* of EU Commission
    - ECJ recognized large powers to the Commission to intervene, even in proceedings relating to penalties (ECJ, *X B.V.* 2009)
    - Commission regularly used this power, including in relation to sanctions
      - Deductibility of fines from taxable profits (NL, *X B.V.* 2009)
      - Concept of economic continuity and the effectiveness of fines in this context (2010, Supreme Court Slovak Republic)
  - Benchmark between CAs and share of (good) experiences (e.g. *settlement*)
  - Practical need: convergence is sometime necessary to maintain attractiveness (e.g. *leniency*)



## Sanctions: Peripheral convergence (1)

- First question: distinguish substantive and procedural rules
  - Autonomy for procedural rules. Obligation of alignment on EU law for substantive rules
  - Possible debate on sanctions: e.g. parent liability -> French CA and Court of Appeal decided that French law should be applied in line with EU law (ECJ *Akzo*) ; debate in Germany
- Procedural convergence: the hidden side of Reg 1/2003
  - Convergence of the leniency regimes (2006)
    - In 2004 a limited number of NCAs had a leniency programme
    - Because of the parallel competences system, risk to discourage potential leniency applicant from applying as a result of the discrepancies between existing leniency programmes within the ECN
    - Adoption of the *ECN Model Leniency Programme* and ECN members commit to using their best efforts to align their respective programmes with the ECN Model Programme
    - Today all NCAs (except one) have a leniency programme and these programmes are globally aligned (but not completely)



## Sanctions: Peripheral convergence (2)

- Procedural convergence, other areas
  - Settlement (2007/2008)
    - Procedure implemented for several years within some Member States (GER, FR), but absent from the Commission's arsenal
    - 2007: public debate and final text adopted in 2008
    - Influence of NCAs on EU law
  - Time limitation
    - Not harmonize by Reg 1/2003, but convergence in Europe
    - For example in France in 2004 and 2008, alignment on the EU regime for both the 5 years period and the 10 years period (after which CA cannot impose fines)
- Characteristics of the convergence process
  - Not mandatory ; slow but constant movement
  - Not a one way movement, but vertical (up-down but also bottom up) and horizontal inspiration and convergence



## Towards convergence of sanctions? (1)

- Regulation 1/2003 is silent
  - Apart from references to general principles of effectiveness and uniform application of EU competition law, no specific provisions in Regulation 1/2003
- Convergence process has already started
  - No specific initiative originally from ECN
  - Early request for more convergence (e.g. Speech of B. Lasserre, Pdt French CA, in 2005)
  - 2008: ECA set up a working group on sanctions and adopt « *Principles for convergence* » in relation to pecuniary sanctions



## Towards convergence of sanctions? (2)

- ECA “Principles of convergence” (2008)
  - Adoption of a three-step method
    - Calculation of a “basic amount” depending on the value of the sales related to the infringement and on coefficients that reflect both the duration and seriousness
    - Adjustment of the basic amount taking into account aggravating and mitigating circumstances
    - Cap the fines on maximum amount (usually 10% WW turnover) and apply (where relevant) specific reductions due to leniency and/or settlement arrangements
- Movement of convergence after 2008
  - Number of NCAs have adopted written guidelines and follow these principles (e.g. French CA in 2011, revised guidelines of OFT 2012)
  - Others directly refer to EU guidelines (e.g. AGCM)



## Towards convergence of sanctions? (3)

- But discrepancies remain in Europe
- Discrepancies on the institutional model
  - Vast majority of unique administrative authority
  - Sometime more or less separation between investigation body and decision-making (e.g. France)
  - Judicial model in several Member States
- Discrepancies on the types of sanctions
  - All CAs can impose pecuniary sanctions on undertakings
  - In some Member States criminal sanctions on individuals (UK, GER, FR...)
  - Or administrative sanctions on individuals





## Towards convergence of sanctions? (4)

- Discrepancies on pecuniary sanctions
  - Considerable differences exist as regard the level of the fines (which cannot be only explained by the difference of gravity or of size of the market concerned)
  - Differences as regard the calculation of the fines
    - Effect of the duration (EU 100% each year; Fr 100% first year, 50% subsequent years)
    - Recidivism: definition and consequences
    - Consider the effects of the infringement (in Fr need to take into account the damage to the economy)
    - Take into consideration compliance programmes



## Towards convergence of sanctions? (5)

- Is convergence/harmonisation desirable?
  - There is no reason to impose different sanctions when applying the same substantive rules
  - Could increase transparency and legal certainty
- The scope of the debate should be large and cover
  - The types of sanctions for optimal enforcement
    - Are administrative fines the best way?
    - Are criminal sanctions for individuals necessary?
  - The articulation between public and private enforcement
  - The methodology and principles for the determination of pecuniary sanctions
- Should not be only a top-down process but also a bottom-up and horizontal process
- ECN: a new WG on sanctions recently set up
  - To do what?
  - Which agenda?



Thank you for your attention

***Christophe LEMAIRE***  
***Partner Ashurst***

***Senior Lecturer Sorbonne School of Law***

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE) ITALY JAPAN  
PAPUA NEW GUINEA SINGAPORE SPAIN SWEDEN UNITED ARAB EMIRATES UNITED KINGDOM UNITED STATES OF AMERICA