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## EU COMPETITION LAW ENFORCEMENT: IS BRUSSELS I SUITED TO DEALING WITH ALL THE CHALLENGES?

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# EU COMPETITION LAW ENFORCEMENT: IS BRUSSELS I SUITED TO DEALING WITH ALL THE CHALLENGES?

MIHAIL DANOV\*

**Abstract** There are arguments indicating that Brussels I could be applicable to cross-border competition law proceedings before a National Competition Authority located in one Member State and private EU competition law proceedings before another Member State court. However, an analysis of the current private international law framework appears to indicate that Brussels I is not well suited to deal with the difficulties that could arise in this context. Given the fact that, in the new proposal for a regulation on jurisdiction and the recognition and enforcement of judgments there is no indication that special jurisdictional bases for competition law actions in the successor to Brussels I are on anyone's agenda, an option for a reform may be setting up a new and special regulation to be applicable with regard to EU competition law claims only.

## I. INTRODUCTION

Regulation 1/2003 of the European Council replaced the centralized enforcement system with a directly applicable exception system, in which the national competition authorities and Member States' courts have the power to apply not only article 101(1) TFEU (ex article 81(1) TEC) and article 102 TFEU (ex article 82 TEC), which had been deemed to have direct effect by virtue of the Court of Justice case law,<sup>1</sup> but also article 101(3) TFEU

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<sup>1</sup> Case 127/73 *BRT v SABAM* [1974] ECR 51, paras 14–16; Case C–282/95 P *Guerin Automobiles v Commission* [1997] ECR I–1503, para 39; Case C–453/99 *Courage Ltd v Crehan* [2001] ECR I–6297, para 23.

(ex article 81(3) TEC).<sup>2</sup> One of the important objectives of Regulation 1/2003 was to encourage private EU competition law enforcement in Europe. Articles 5 and 6 of the Regulation state that the National Competition Authorities (NCAs) and national courts have the powers to apply articles 101 and 102 TFEU in individual cases. The regulation also provides for mechanisms to ensure that ‘competition authorities of the Member States shall apply the [EU] competition laws in close co-operation’.<sup>3</sup> The Commission Notice on cooperation within the Network of Competition Authorities<sup>4</sup> goes further, preventing parallel proceedings relating to the same EU competition law infringement and ensuring that those cases will be dealt with by an appropriate competition authority.<sup>5</sup> Articles 15 and 16 of Regulation 1/2003 are meant to guarantee uniform and consistent application of EU competition law in proceedings before the Commission and in cross-border EU competition law proceedings before Member State courts.

However, Regulation 1/2003 does not deal with the problem of coherent and uniform application of EU competition law in proceedings before an NCA located in one Member State and private EU antitrust law proceedings related to the same breaches of article 101 TFEU and/or article 102 TFEU before a court in another Member State. Problems are bound to arise in such cases. On the one hand, it is well established that an NCA may have the power to apply articles 101 and 102 TFEU in cases where the markets in several Member States have been affected.<sup>6</sup> On the other hand, a Member State court may have jurisdiction to hear and determine a claim regarding an EU competition law infringement that has affected the markets in several countries, as well as having jurisdiction to award damages in such cases.<sup>7</sup> It has been submitted that EU competition law proceedings before NCAs have no primacy over private EU antitrust law proceedings before Member State courts and that the two should be seen as independent.<sup>8</sup> In view of that, potentially irreconcilable

<sup>2</sup> See Recital 4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.

<sup>3</sup> Arts 11–14 of Council Regulation 1/2003. See further, S Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart Publishing 2009).

<sup>4</sup> Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43.

<sup>5</sup> Brammer (n 3) 153–61.  
<sup>6</sup> See art 5 of Council Regulation 1/2003; Commission Notice (n 4) para 5. Parallel action by two or three NCAs may be appropriate in some cases. In such a scenario, the authorities dealing with the case may decide to designate one of them as a lead authority and to delegate some tasks to that designated lead authority. See *ibid* paras 12–13. See also Brammer (n 3) 159.

<sup>7</sup> See *Provimi v Aventis Animal Nutrition* [2003] EWHC 961 (Comm), [2003] ECC 29.

<sup>8</sup> A Komninos, ‘Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight’ (2007) 44 CMLRev 1387, 1426; A Komninos, ‘Relationship Between Public and Private Enforcement: *Quod Dei Deo, quod Caesaris Caesaris*’ (16th Annual EU Competition Law and Policy Workshop—Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies, Florence, 17–18 June 2011) <<http://ssrn.com/abstract=1870723>> (a version of the latter paper will be published in P Lowe and M Marquis

decisions on the same (or a related) EU competition law issue by an English court and a foreign competition authority should be avoided. According to Mario Monti, ‘multiple control and forum shopping before national courts should be avoided. In this respect we can fortunately rely on the rules of [Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>9</sup> (Brussels I)].’<sup>10</sup> This, however, raises a fundamental question: is Brussels I applicable in the context of parallel EU competition law proceedings brought before an NCA located in one Member State and a court in another Member State?

Furthermore, given that Regulation 1/2003 provides for multiple enforcers of EU competition law, some complex and important issues could arise at the recognition and enforcement stage that may be of importance in follow-on EU competition law actions brought before an English court following a foreign NCA decision. Should an English court always follow a foreign NCA decision finding an infringement of articles 101 and 102 TFEU? Could an English court refuse the recognition and enforcement of a decision of a foreign competition authority? A related question that should be considered is whether the English courts could refuse the recognition and enforcement of a foreign judgment that is in conflict with a decision of a UK competition authority or a decision of a foreign competition authority.

Another closely linked question, which is bound to arise in this context, is whether an English court can request a foreign competition authority to take evidence for use in private EU competition law actions brought in England (whether those actions be stand-alone or follow-on). Article 22(1) of Regulation 1/2003 states that:

The 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 TFEU.

This provision, however, makes no reference to requests made by national courts. Furthermore, it has been submitted that ‘The weakness of Article 22(1) of Regulation 1/2003 lies in the fact that it establishes only a right, not a duty.’<sup>11</sup> A better approach is adopted by the Evidence Regulation, which

(eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies* (Hart Publishing 2012) (forthcoming). See also Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] 5 CMLR 219, Opinion of AG Mazák, para 40.

<sup>9</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (‘Brussels I’).

<sup>10</sup> M Monti, ‘Competition Law Reform’ (CBI Conference on Competition Law Reform, London, 12 June 2000) <[http://ec.europa.eu/comm/competition/speeches/text/sp2000\\_008\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp2000_008_en.html)>.

<sup>11</sup> Brammer (n 3) 82.

appears to suggest that the requested NCA (if it were regarded as a ‘competent court’ within the meaning of the Regulation) would be required to execute the request made by the English court without delay.<sup>12</sup> However, is the Evidence Regulation even applicable in the context of cross-border EU competition law actions?

The aim of this article is to consider whether the difficulties that could arise in EU competition law proceedings before an NCA located in one Member State and private proceedings related to the same infringement of article 101 and/or article 102 before another Member State court could be dealt with under the current EU civil justice framework.<sup>13</sup> More specifically, the article will begin by attempting to indicate whether proceedings in which an NCA seeks to establish an infringement of article 101 and/or article 102 could be within the scope of Brussels I. Following this, the question of whether a foreign competition authority could take evidence in support of private EU competition law proceedings in England will be examined in the context of the Evidence Regulation. The problem of avoiding parallel antitrust proceedings before an NCA in one Member State and court proceedings related to the same EU competition law infringement in another Member State will then be examined under Brussels I. Finally, in the context of Brussels I, the issue of the recognition and enforcement of a foreign competition authority decision in England, as well as the recognition and enforcement of foreign judgments in conflict with a decision of the Office of Fair Trading (OFT) finding an EU competition law infringement, will be duly analysed.

## II. BRUSSELS I AND THE EVIDENCE REGULATION—PROCEEDINGS BEFORE NATIONAL COMPETITION AUTHORITIES

Given the fact that Regulation 1/2003 does not itself deal with the problems of avoiding the risk of irreconcilable decisions related to the same EU competition law infringement rendered by a court in one Member State and an

<sup>12</sup> See art 10(1) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters [2001] OJ L174/1 (Evidence Regulation).

<sup>13</sup> It seems that as a result of the enhanced private antitrust enforcement reform, private international law has a vital role to play if EU competition rules are to be enforced effectively in cross-border court proceedings. See M Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing 2010). A conference entitled ‘International Antitrust Litigation: Conflict of Laws and Coordination’ took place in Brussels (26 March 2010): for information, see J Basedow, S Francq and L Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing 2012) (forthcoming). The issue of the recognition of an NCA decision in civil proceedings of another Member State was recently discussed by J Basedow, ‘Recognition of Foreign Decisions Within the European Competition Network’ in J Basedow, J Philipp Terhechte and L Tichy, *Private Enforcement of Competition Law* (Nomos 2011) 169, 172–74, 176, 177.

NCA located in another Member State,<sup>14</sup> the aim of this sub-section is to determine whether Brussels I and the Evidence Regulation could be helpful in this context.

### A. Scope of Brussels I

Article 1 of Brussels I states that the ‘Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal’. Are EU competition law claims within the scope of Brussels I? Although no definition is given by the Regulation to the concept ‘civil and commercial matter,’ the Court of Justice has clearly stated that the concept ‘civil and commercial matter’ must be given an independent meaning in the light of ‘the objectives and scheme of the [Regulation]’<sup>15</sup> and ‘the general principles which stem from the corpus of the national legal system’.<sup>16</sup> The European Commission has clearly stated that the Brussels I Regulation will be applicable to all competition cases of a civil and commercial nature.<sup>17</sup> A similar conclusion has been reached by Professor Brozolo, who holds that there is no doubt that an EU competition law claim falls within the scope of the term ‘civil and commercial matter’.<sup>18</sup> The deduction was explicitly confirmed by the English High Court in *SanDisk Corporation v Koninklijke Philips Electronics and others*.<sup>19</sup> Thus, it is beyond doubt that an EU competition law claim brought before a Member State court is properly regarded as a ‘civil and commercial matter’ for the purposes of the Brussels I Regulation.

However, difficulties as to the scope of Brussels I are bound to arise because, despite the fact that articles 101 and 102 TFEU regulate relationships between private undertakings, EU competition law provisions may often be enforced by NCAs in the public interest. Article 35 of Regulation 1/2003 provides that either administrative authorities<sup>20</sup> or courts<sup>21</sup> may be designated as NCAs for the purposes of applying articles 101 and 102 TFEU in the different Member States.<sup>22</sup> Article 1 of the Brussels I Regulation, however, states that

<sup>14</sup> Compare arts 13 and 15(3) of Regulation 1/2003.

<sup>15</sup> Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541. See also L Collins and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 314.

<sup>16</sup> See *Eurocontrol* (n 15) para 5.

<sup>17</sup> See Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 [2004] OJ C101/04, 3. See also Commission (EC), *Damages Actions for Breach of EC Antitrust Rules* (Green Paper) COM(2005) 672 final, para 2.8; Office of Fair Trading, ‘Response to the European Commission’s Green Paper, *Damages Actions for Breach of the EC Antitrust Rules*’ May 2006 OFT 844 <[http://www.offt.gov.uk/shared\\_of/reports/oft\\_response\\_to\\_consultations/oft844.pdf](http://www.offt.gov.uk/shared_of/reports/oft_response_to_consultations/oft844.pdf)>.

<sup>18</sup> R di Brozolo, ‘Antitrust Claims: Why Exclude Them from The Hague Jurisdiction and Judgment Convention’ (2004) 25 ECLR 780, 783.

<sup>19</sup> [2007] EWHC 332 (Ch), [2007] Bus LR 705. See also *Provimi* (n 7).

<sup>20</sup> eg in Bulgaria, Czech Republic, France, Italy, Romania, the UK.

<sup>21</sup> eg in Austria and Ireland.

<sup>22</sup> eg Bulgaria, Czech Republic, France, Italy, Romania, the UK.

'[the Regulation] shall not extend, in particular, to . . . administrative matters'. This raises the question of whether an NCA's proceedings seeking to establish an EU competition law infringement fall within the scope of Brussels I. The problems as to the scope of Brussels I would arise particularly sharply in cases where proceedings were brought before an NCA (which is an administrative public authority) located in one Member State and private proceedings related to the same infringement of article 101 and/or article 102 TFEU were brought before the courts of another Member State. In both proceedings, the question as to whether there is an EU competition law infringement should be determined as a matter of EU substantive law. However, there would be an important difference as far as the procedure is concerned. While a national court would apply civil procedure rules that presuppose respect of due process, an NCA would apply administrative procedure rules that could potentially raise concerns as to the undertaking's right to a fair trial and hearing.<sup>23</sup> In view of that, it would be very important to determine the scope of civil and commercial matters and the scope of administrative matters in the context of Brussels I.<sup>24</sup> This would be especially so in the context of decentralized EU competition law enforcement, which may be privately enforced in proceedings before national courts and publicly enforced in proceedings before NCAs.

In other words, the question is: does Brussels I apply in the context of EU competition law proceedings before an NCA that seeks to establish an infringement of article 101 and/or article 102 TFEU? A problem of definition may arise because different Member States may have adopted different 'models of administrative adjudication'.<sup>25</sup> For example, it is submitted that 'the most important characteristic of the French system of administrative adjudication is the location of the administrative courts/tribunals within the executive branch . . .'.<sup>26</sup> The detail that such public bodies are not part of the judiciary, when taken together with the fact that 'the common features of administrative-public enforcement are the verticality of the dispute, which remains one between the state and private individuals . . .',<sup>27</sup> might lead some Member State courts to adopt a narrow interpretation of Brussels I in cases where proceedings seeking to establish an EU competition law infringement are brought before an NCA that is an administrative public authority. In the same context, a broader

<sup>23</sup> IS Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 *ELRev* 817; J Killick and P Berghe, 'This is Not the Time to Be Tinkering with Regulation 1/2003—It is Time for Fundamental Reform—Europe Should Have Change We Can Believe in' (2010) *Competition Law Review* 259. The due process issue may receive renewed attention after the entry into force of the Lisbon Treaty. See art 6(1) TEU. See also art 6(1) ECHR and art 47(2) of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1. See further, J Kuhling, 'Fundamental Rights' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 479–514; P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010) 193–245.

<sup>24</sup> E Stroskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (OUP 2008) 10.

<sup>25</sup> See P Cane, *Administrative Tribunals and Adjudication* (OUP 2009). <sup>26</sup> *ibid* 89.

<sup>27</sup> A Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 6.

interpretation may be adopted in other Member States. For example, ‘In the UK model, . . . administrative tribunals are best understood . . . as species of courts.’<sup>28</sup> Thus, it seems that different Member States may have different views as to whether proceedings seeking to establish an EU competition law infringement before an NCA that is an administrative public authority are to be regarded as falling within the scope of Brussels I. This result would be unsatisfactory.

This clearly suggests that there is a need to adopt an autonomous definition for the purposes of Brussels I. One might argue that a narrow definition should be adopted and that proceedings seeking to establish an EU competition law infringement before an NCA that employs administrative procedural rules should not be within the scope of Brussels I. This deduction could be further strengthened by pointing out that the Court of Justice has already held that ‘the Epitropi Antagonismou [the Greek Competition Commission] is not a court or tribunal within the meaning of Article 234 EC [now Article 267 TFEU]’.<sup>29</sup> If such reasoning were to be followed then an NCA that is an administrative public authority should not be regarded as a court within the meaning of Brussels I.

However, it should be noted that the provision of article 1 of Brussels I is somewhat more widely drafted than article 267 TFEU, and there are strong arguments suggesting that proceedings seeking to establish an EU competition law infringement before an NCA that is an administrative public authority are to be regarded as falling within the scope of Brussels I. It has been submitted that Brussels I ‘also applies to civil or commercial matters brought before administrative tribunals’.<sup>30</sup> The Jenard<sup>31</sup> and Schlosser<sup>32</sup> reports seem to suggest that the question as to which set of procedural rules (ie administrative or civil) is applied does not arise when determining the scope of Brussels I. Neither set is relevant if the action is between a public authority and a person governed by the private law.<sup>33</sup> A broader interpretation of the scope of Brussels I has already been adopted by the Court of Justice<sup>34</sup> in the context of article 1 of the Regulation. Therefore, in order to determine whether proceedings before an NCA are to be regarded as falling within the scope of Brussels I an important factor would be whether the designated authority, having ‘judicial characteristics’,<sup>35</sup> is exercising judicial functions in ‘civil and commercial matter’.<sup>36</sup> In this context, it should be noted that, despite the fact that articles 101 and 102 TFEU are meant to protect important public interests by

<sup>28</sup> Cane (n 25) 72.

<sup>29</sup> Case C-53/03 *Synetairismos Farmakopion Aitolias & Akarnanis (Syfait) v GlaxoSmithKline* [2005] ECR I-4609, para 37. Compare Case C-67/91, *Asociacion Espanola de Banca Privada* [1992] ECR I-4785.

<sup>30</sup> Jenard Report OJ [1979] C59/1, 9; Schlosser Report OJ [1979] C59/71, para 23.

<sup>31</sup> Jenard Report (n 30) 9.

<sup>33</sup> *Eurocontrol* (n 15) para 4.

<sup>35</sup> *Synetairismos* (n 29) Opinion of AG Jacobs, para 45.

<sup>36</sup> Compare *Eurocontrol* (n 15) para 4.

<sup>32</sup> Schlosser Report (n 30) para 23.

<sup>34</sup> *ibid.*



maintaining the process of competition, it is well established that 'these provisions regulate the behaviour of private undertakings'.<sup>37</sup> If an EU competition law claim brought before national courts in order to establish an article 101/102 infringement is regarded as a 'civil and commercial matter' for the purposes of Brussels I,<sup>38</sup> then there is no reason to suggest that the matter would be regarded differently only because the proceedings were brought before an NCA that is an administrative body.

In other words, for the purposes of Brussels I, the question would not be whether the action is pending before a court (or whether the action is pending before an administrative body or what the applicable sets of procedural rules are), but rather what is the subject matter of the proceedings and whether the proceedings relate to civil and commercial matters. Therefore, article 1 of Brussels I read together with the Jenard and Schlosser Reports leaves no doubt that the context in which the proceedings before an NCA are brought would be more important than the constitutional status of the public authority before which the proceedings are brought. Following this line of reasoning it can be argued that proceedings before NCAs should be regarded as within the scope of Brussels I as long as an NCA is exercising judicial functions in civil and commercial matters.

The test would not be satisfied and an NCA decision, or part of one, imposing fines on an undertaking that has infringed articles 101 and 102 TFEU, would not be within the scope of Brussels I. This would be so because in those proceedings an NCA could not be regarded as exercising judicial functions in civil and commercial matters. Nevertheless, the test would be satisfied and the proceedings would be within the scope of Brussels I if an NCA seeks to determine whether an undertaking (or undertakings) committed an infringement of articles 101 and 102 TFEU. Similarly, a decision (or part of a decision) of an NCA that establishes an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I. Such an interpretation would be consistent with the fact that the EU legislator seems to consider the adoption of a rule to the effect that a Member State court cannot take decisions running counter to a final decision of an NCA finding an infringement of articles 101 and 102 TFEU.<sup>39</sup>

However, one might object to the deduction that an NCA final decision, or part of one, establishing an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I by pointing out that the right to a fair trial of an allegedly infringing undertaking might be undermined in the course of proceedings before NCAs. In particular, article 6(1) ECHR states that 'In the determination of his civil rights and obligations . . ., everyone is entitled to a

<sup>37</sup> A Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization of Private Law' in F Cafaggi (ed), *The Institutional Framework of European Private Law* (OUP 2006) 244, 260.

<sup>38</sup> Section IIA above.

<sup>39</sup> Commission (EC), *Damages Actions for Breach of the EC Antitrust Rules* (White Paper) COM(2008) 165 final, para 2.3.

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ It is well established that article 6(1) ECHR requires that, in the determination of civil rights and obligations, decisions taken by administrative authorities should be subject to a judicial body that has full jurisdiction.<sup>40</sup> Similar requirements would have to be satisfied with regard to decisions taken by NCAs.<sup>41</sup> These requirements seem to suggest that the recognition of an NCA decision (or part of a decision) would potentially have to overcome a public policy defence that could be based on the breach of the undertaking’s right to fair trial and hearing in administrative proceedings.<sup>42</sup> This might be particularly difficult in cases where such decisions were taken by NCAs that are administrative bodies, combining the functions of a party to competition law proceedings and a judge.<sup>43</sup> In other words, the fact that article 34(1) and (2) of Brussels I would allow for a national court to refuse the recognition of a decision taken by an NCA that does not respect due process rules in its adoption<sup>44</sup> may be seen as just another argument suggesting that an NCA final decision (or part of one) establishing an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I. A broader interpretation of Brussels I would further uphold the independence of national courts, safeguarding the defendant’s right to a fair trial. This would be particularly important in view of the above-mentioned proposal for the adoption of a rule to the effect that a Member State court cannot take decisions running counter to a final decision of an NCA finding an infringement of articles 101 and 102 TFEU.

### *B. Scope of the Evidence Regulation*

The issue of taking evidence by a foreign NCA in support of private proceedings in England could be very important in many cross-border EU competition law actions. For example, it would be bound to arise in a follow-on EU competition law action brought before an English court. This would be particularly so if the decision of a Member State competition authority that establishes an infringement of articles 101 and 102 TFEU were regarded as being within the scope of Brussels I.<sup>45</sup> The need for taking evidence by the foreign competition authority in support of private proceedings in England could arise because the NCA decision establishing that a foreign undertaking

<sup>40</sup> *Le Compte v Belgium* (1982) 4 EHRR 1. See also WPJ Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 46–47; Forrester (n 23) 821.

<sup>41</sup> Wils (n 40) 47; Forrester (n 23) 821.

<sup>42</sup> Art 34(1) and (2) of Brussels I. The issue is further discussed in section IVA below.

<sup>43</sup> Wils (n 40) 88.

<sup>44</sup> See Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1395. See also J Fawcett, ‘The Impact of Article 6(1) of the ECHR on Private International Law’ (2007) 56 ICLQ 1; P Beaumont and E Johnston, ‘Can *Exequatur* Be Abolished in Brussels I Whilst Retaining a Public Policy Defence?’ (2010) 6 *Journal of Private International Law* 249.

<sup>45</sup> See section IIIB below. See also Commission (EC), *Damages Actions* (n 39) para 2.3.

had committed an EU competition law infringement would not have dealt with such issues as, for example, whether a concrete claimant had suffered damages and what damages should be awarded in order for a plaintiff to be compensated. It has been recently stated by Lord Justice Jacob that:

the party claiming damages is not a party to the proceedings before the regulator. Facts about causation and damages, which will normally include an investigation into whether and if so how the infringing conduct affected that particular party, are not necessarily a part of the regulator's inquiry.<sup>46</sup>

In other words, despite the fact that a party could be relying on an infringement decision taken by an NCA, evidence as to the causation and assessment of damages would need to be collected in a follow-on action. This raises the question of whether an English court could request evidence from the foreign competition authority in support of private proceedings in England by relying on the Evidence Regulation. Article 1 of the Evidence Regulation states that:

This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of the State, requests: (a) the competent court of another Member State to take evidence; or (b) to take evidence directly in another Member State.

Is an NCA to be regarded as a 'competent court' for the purposes of the Evidence Regulation? As already mentioned, an NCA, as an administrative public authority, is not a 'court or tribunal' within the meaning of article 267 TFEU.<sup>47</sup> However, there are some strong reasons to suggest that a broader interpretation of the term 'competent court' should be given under the Evidence Regulation. First, the interpretation of the Evidence Regulation, whose objective is 'the improvement of cooperation between the courts on the taking of evidence in civil or commercial matters',<sup>48</sup> should be consistent with the interpretation of Brussels I.<sup>49</sup> In view of that, it could be argued that NCAs should be regarded as 'competent courts' for the purposes of the Evidence Regulation because they are bodies exercising judicial functions in civil and commercial matters. Indeed, as already mentioned, the White Paper on damages seems to indicate that Member State courts should avoid taking decisions running counter to a final decision of an NCA finding an infringement of articles 101 and 102 TFEU.<sup>50</sup>

Secondly, 'a specialised competition authority having judicial characteristics'<sup>51</sup> would be better placed to take evidence in EU competition law cases

<sup>46</sup> *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, [2011] UKCLR 303 [150].

<sup>47</sup> *Synetairismos* (n 29) para 37. Compare *Asociacion Espanola de Banca Privada* (n 29).

<sup>48</sup> Recital 5 of the Evidence Regulation.

<sup>49</sup> See Proposal for a Council Directive on the service in the member states of judicial and extrajudicial documents in civil and commercial matters COM(1999) 219 final 10. See also *Stroskrubb* (n 24) 10.

<sup>50</sup> Commission (EC), *Damages Actions* (n 39) para 2.3.

<sup>51</sup> *Synetairismos* (n 29) Opinion of AG Jacobs, para 45.

than a generalist Member State court. In this context, it should be pointed that an NCA is already entitled to 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.<sup>52</sup> If competition authorities of Member States were allowed to do so in the context of NCA proceedings seeking to establish an EU competition law infringement, then a foreign competition authority should be seen as a ‘competent court’ to take evidence in support of cross-border EU competition law proceedings in the context of the Evidence Regulation also.

Therefore, it can be argued that requests to foreign competition authorities for taking evidence in support of private proceedings in England could be made under the Evidence Regulation. One may, however, object to such a deduction by saying that the use of evidence from the foreign competition authority in support of private proceedings in England may undermine the right to defence of the affected undertakings if evidence gathered by NCAs that enjoy some intrusive powers may be used in the courts. Indeed, it has been submitted that ‘there is a clear risk that information collected within the context of particularly intrusive powers within a specific legal system with a given set of checks and balances are “exported” and used in another legal context’.<sup>53</sup>

Although it may be true that the NCAs enjoy intrusive powers, these powers may be justified by the difficulties encountered in detecting cartels<sup>54</sup> and the importance for the EU internal market to provide for a system that ensures that competition is not distorted.<sup>55</sup> There seems to be a good balance between these powers and the EU interests that they protect on the one hand, and the EU policy to protect fundamental rights on the other. It is well established that all NCAs must respect all procedural rights of the investigated undertakings in the context of proceedings under articles 101 and 102 TFEU.<sup>56</sup> This has been clearly confirmed by the Court of Justice, which held that ‘the rights of defence must be observed in administrative procedures which may lead to the imposition of penalties’.<sup>57</sup>

Moreover, the rights of defence would be well protected if the evidence collected by a foreign competition authority were used in the civil judicial proceedings in which parties have the right to legal representation and enjoy legal professional privilege. Such evidence would be used together with any evidence collected in the course of the civil judicial proceedings in order for

<sup>52</sup> See art 22 of Regulation 1/2003.

<sup>53</sup> M Araujo, ‘The Respect of Fundamental Rights Within the European Network of Competition Authorities’ in BE Hawk (ed), *International Antitrust Law and Policy: Fordham Corporate Law Institute: Annual Proceedings 2004* (Juris Publishing 2005) 511, 524–25.

<sup>54</sup> *ibid* 512.

<sup>55</sup> The TEU Protocol on the internal market and competition.  
<sup>56</sup> WPJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008)

20. See also art 6 TEU; Case C–292/97 *Kjell Karlsson and Others* [2000] ECR I–2760, para 37.

<sup>57</sup> Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para 26. See also Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 7.

the court to determine whether there was infringing conduct and as to how the infringing conduct affected a concrete claimant. Furthermore, any submission that 'the free circulation of evidence . . . may erode the fundamental rights'<sup>58</sup> could not be supported in the context of requests made under the Evidence Regulation. Article 1(2) of the Regulation leaves no doubt that requests to a foreign competition authority for taking evidence in support of private proceedings in England would only be used in the commenced (or contemplated) civil judicial proceedings.<sup>59</sup>

Consequently, there are strong arguments indicating that Brussels I and the Evidence Regulation could be applicable to cross-border competition law proceedings before NCAs and private EU competition law proceedings before courts. Such an approach with regard to the interpretation of the Evidence Regulation and Brussels I would serve to avoid the risk of irreconcilable decisions being handed down on the same antitrust issue in different Member States. This poses the question: are these legal instruments suited to dealing with such cross-border proceedings?

### III. PARALLEL PROCEEDINGS—RISK OF IRRECONCILABLE DECISIONS

As already clarified, EU competition law proceedings before an NCA seeking to establish an infringement of articles 101 and 102 TFEU should be regarded as being within the scope of Brussels I.<sup>60</sup> In other words, Brussels I should be used to deal with the problem of parallel proceedings before an NCA located in one Member State and private EU antitrust law proceedings related to the same infringement in another Member State. This deduction could be further strengthened by pointing out that a broad interpretation of Brussels I would serve to avoid the inconsistency that would have followed if a complaint against a decision of an NCA constituted as an administrative authority had been lodged and if those proceedings were pending before national courts. (For example, in the case of the UK such a complaint against a decision finding an EU competition law infringement could be brought before the Competition Appeal Tribunal (CAT).<sup>61</sup> Decisions of the CAT could be further appealed before the Court of Appeal. In so far as the Competition Act does not provide for an appeal, there remains the possibility that a claim for judicial review may be brought before the Administrative Court of the Queen's Bench Division under part 54 of the Civil Procedure Rules.)

<sup>58</sup> Araujo (n 53) 530.

<sup>59</sup> See art 1(2) of the Evidence Regulation.

<sup>60</sup> See section IIA above. See also Danov (n 13) 184–86; *Eurocontrol* (n 15) paras 4–5.

<sup>61</sup> See sections 46 and 47 of the Competition Act 1998. The 1998 Act goes further and lists the 'appealable decisions'. Schedule 4 of the Enterprise Act 2002 permits most decisions of the CAT to be enforceable by registration at the High Court in England and Wales. By virtue of those provisions, the decision becomes enforceable in the same way as a judgment of the High Court. See also R Whish, *Competition Law* (6th edn, OUP 2008) 426–36; section IV below.

That said, it should be noted that articles 27 and 28 of Brussels I are ‘intended to prevent parallel proceedings before the courts of different [Member States] and to avoid conflicts between decisions which might result therefrom’.<sup>62</sup> Are the provisions in question adequate to avoid the problem of parallel proceedings in a situation where a claim (or counter-claim) that a contract (or contracts) violates EU competition law is brought before an English court and a complaint is lodged before a foreign NCA?

### *A. Staying the Proceedings—lis pendens Actions*

Article 27(1) of Brussels I states that:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established . . .

This provision is intended to deal with the problem of *lis pendens*.<sup>63</sup> The effect of article 27 of Brussels I is that any court other than the court first seised must, depending on the circumstances, either stay its proceedings or decline jurisdiction. One condition that could cause particular problems in connection with antitrust claims is to do with the requirement that ‘proceedings [are] to be brought before the courts of different Member States’. It should be noted that the Court of Justice has held that article 27 requires the parallel proceedings to involve three elements: the proceedings must have the same subject matter (or the same object), the same cause of action and the same parties.<sup>64</sup> In view of that, it seems that the phrase ‘same cause of action’ in article 27 should be regarded as a European concept that is not to be interpreted according to the criteria of national law.<sup>65</sup> There are two tests that have to be satisfied in this respect. First, do the actions have as their basis the same facts and rule of law?<sup>66</sup> Secondly, do these actions have the same object (ie do the claims in the parallel proceedings seek to achieve the same outcome)?<sup>67</sup> Briggs and Rees suggest that another way of testing the matter is to ask ‘whether a decision in

<sup>62</sup> Case 144/86 *Gubisch Maschinen-fabrik v Palumbo* [1987] ECR 4861, para 8.

<sup>63</sup> ‘A pending lawsuit’ (Latin). See also C McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers 2009) 23.

<sup>64</sup> A Briggs and P Rees, *Civil Jurisdiction and Judgements* (5th edn, Informa 2009) 314; J Fawcett and JM Carruthers (eds), *Cheshire, North & Fawcett Private International Law* (14th edn, OUP 2008) 305. See also *Royal & Sun Alliance Insurance v MK Digital FZE (Cyprus)* [2005] EWHC 1408 (Comm) ILPr 51 (QBD (Comm)), para 66 (reversed without reference to this point), [2006] EWCA Civ 629, [2006] 2 Lloyd’s Rep 110 (CA).

<sup>65</sup> Case C-406/92 *Tatry* [1994] ECR I-5439, para 39; Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9657, para 38 (Court of Justice, Third Chamber).

<sup>67</sup> *Tatry* (n 66) paras 41–43; Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, para 25 (Court of Justice, Fifth Chamber). See also *Gubisch* (n 62); Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317. See further, *Cheshire, North & Fawcett* (n 65) 305–10; Briggs and Rees (n 65) 314–16.

the one set of proceedings would have been a conclusive answer to the question raised in the other'.<sup>68</sup>

The 'cause of action' requirement for the purposes of article 27 would obviously be met in the situation where both sets of proceedings are for nullity of a contract that is in conflict with EU competition law. But what if a complaint is lodged before the French Competition Authority (the Conseil de la Concurrence) by a company X that is party to a contract with a dominant undertaking Y, and subsequently Y brings proceedings for enforcement of the same contract in England, where a defence of nullity is raised by X, together with a counter-claim for damages? In such a scenario, there would be proceedings for enforcement of a contract in England, where a defence of nullity was raised together with a counter-claim for damages; and another set of proceedings before the French competition authority that were brought to put an end to an EU antitrust law infringement resulting from the implementation of the same contract in France and England.

Would article 27 be helpful in such a scenario (assuming that the NCA, being a body exercising judicial functions, were to be regarded as a 'court' for present purposes and that it applied the Brussels I Regulation)? It seems that it would be impracticable for an English court to try the validity of the contract issue until the French national authority had ruled on the EU competition law infringement issue. Before a hearing determining whether the contract was valid under article 101 and/or article 102 TFEU, the English court could determine neither whether the contract should be performed nor whether there were an antitrust damages claim. However, it seems that the conditions of article 27 of Brussels I would not easily be satisfied. The Court of Justice has held that:

in order to determine whether there is *lis pendens* in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law ...<sup>69</sup>

This ruling, however, has been made in respect of defence submissions and a set-off defence in particular. This can be justified by the fact that such a defence could not result in a separate judgment. A counter-claim<sup>70</sup> that a contract (or part of a contract) was void as being in conflict with articles 101 and 102 TFEU would indicate that the court should make a separate judgment as to whether there were an antitrust law infringement that might result in inconsistent application of EU competition law and might potentially run counter to the decision of a foreign NCA, so that it could be argued that an

<sup>68</sup> Briggs and Rees (n 65) 315.

<sup>69</sup> *Gantner Electronic* (n 67) para 31.

<sup>70</sup> Case C-341/93 *Danvaern Production A/S v Schuhfabriken Otterbeck GmbH & Co* [1995] ECR I-2053.

English court would have to stay its proceedings in relation to the EU competition law claim.

However, even if *Gantner Electronic* were distinguished and the submission that the contract was in conflict with EU competition law were taken into account in order to determine whether there was *lis pendens* between the two disputes, the English courts would not be precluded under article 27 of Brussels I from trying to enforce the contract claim. The latter claim could be seen as related to EU competition law proceedings for the purposes of article 28, but the actions would not be identical within the meaning of article 27. Furthermore, nor would the ‘same parties’ requirement of article 27 of Brussels I be satisfied. Company X that lodged the complaint before the French Competition Authority would not be not party to the administrative proceedings in France, which would be conducted between the foreign NCA and the dominant undertaking Y.<sup>71</sup>

### B. Staying the Proceedings—Related Actions

Article 28 of Brussels I states that ‘where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings’, and it is designed to deal with those situations that do not fall within the strict confines of article 27 of the Regulation. In other words, if EU competition law actions are not identical within the meaning of article 27, but are related, then article 28 may be applied. Article 28 of has to do with a situation where related actions are pending in the courts of different Member States. The court second seised may, as a matter of discretion, stay its proceedings. Article 28(2) goes further and gives an additional discretion to the court. Based on that provision, the court may decide to decline jurisdiction as opposed to merely staying its proceedings if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. It should be clearly outlined, however, that this is not a *forum conveniens* discretion: ‘[T]he question: “which court would be the more convenient or the more appropriate?” does not arise.’<sup>72</sup> A stay should be granted simply in order to avoid irreconcilable decisions.

The latter provision contains no requirement about the same cause of action or same parties in the two proceedings. The only question that needs to be answered affirmatively in order for a Member State court to rely on article 28 is whether the two actions are related. The answer to this question should be provided in a broad common sense manner, bearing in mind the objective of article 28, namely to improve coordination of the exercise of judicial functions within the EU and to avoid conflicting and contradictory decisions,<sup>73</sup> thus

<sup>71</sup> See *Enron* (n 46) para 150.

<sup>72</sup> *The ‘Linda.’* [1988] 1 Lloyd’s Rep 175 (QBD (Admlty)) 179 (per Sheen J).

<sup>73</sup> *ibid* paras 32, 52.



facilitating the proper administration of justice in the EU<sup>74</sup> and the coherent and uniform application of articles 101 and 102 TFEU.

In the context of EU competition law claims, the court should determine two issues: are the antitrust actions related; if so, should the court exercise its discretionary power? In order to answer the question of whether the actions are related two factors should be considered. The first, and major factor, is the degree of risk of irreconcilable decisions. It has been submitted that the risk of irreconcilable judgments applies just as much to the risk of inconsistent findings of fact as it does to the risk of inconsistent findings of law.<sup>75</sup> In the *Provimi* case, the English court clearly outlined that different views of national courts may be a reason for hearing EU competition law claims together in order to avoid irreconcilable judgments.<sup>76</sup> The court went further and held that, even though the law on competition in European countries is very similar, 'it is highly arguable that different courts would take different approaches to these issues and those different approaches could result in irreconcilable judgments'.<sup>77</sup> It is beyond doubt that there is a risk of irreconcilable decisions if a cartel agreement (or abusive practice) has been implemented in two different States and an action related to that agreement or practice is pending in one Member State while an NCA located in another Member State has started to investigate the matter in respect of the same agreement or practice. A finding that there is an EU competition law infringement and that a contract is void under articles 101 and 102 TFEU would be irreconcilable with a finding that the contract should be enforced. The second factor is that the court should determine whether it is expedient to hear and determine the two actions together, so that they could be regarded as related for the purposes of article 28 of Brussels I. It seems that no particular difficulties in competition cases could arise out of this requirement. However, one major problem relates to the fact that the current version of the Brussels I Regulation appears to assume that the court or NCA first seised is always an appropriate forum. Indeed, articles 27 and 28 always give priority to the court first seised.<sup>78</sup> Accordingly, a plaintiff who intends to delay settlement of a future substantive antitrust law dispute may deliberately commence pre-emptive proceedings before a court that is not well placed to deal with an EU competition law case or has no jurisdiction.<sup>79</sup> This is not a satisfactory outcome as it could result in delay.

<sup>74</sup> *Sarrio v Kuwait Investment Authority* [1999] 1 AC 32 (HL) 39 (per Lord Saville). See also A Briggs, 'Private International Law' (1997) 68 British YBIntL 331, 339–42; J Harris, 'Related Actions and the Brussels Convention' (1998) *Lloyd's Maritime and Commercial Law Quarterly* 145.

<sup>75</sup> *Gascoine v Pyrah* [1994] ILPr 82 (CA), para 44; See also *ET Plus SA v Welter* [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep 215, para 59. <sup>76</sup> See *Provimi* (n 7) [47].

<sup>77</sup> *ibid* [45]–[46]. See further, Danov (n 13) 51–54.

<sup>78</sup> PE Herzog, 'Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?' (1995) 43 *AmJCompL* 379, 381–84.

<sup>79</sup> Case C–116/02 *Erich Gasser v MISAT* [2003] ECR I–14693, Opinion of AG Philip Leger para 68. Compare *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864, [2010] 2 CLC 104. See also TC Hartley, 'The European Union and the Systematic

Furthermore, it may often be the case that the court (or NCA) first seised is not well placed to hear and determine an EU competition law case because an anti-competitive agreement or practice that has been implemented in a number of Member States does not affect the market in the Member State where the action is brought. It is unfortunate that jurisdiction in such cases would depend on the question of who is faster in lodging his claim. A more satisfactory result would have been reached if the court (or NCA) first seised had been entitled to decline jurisdiction in cases where agreement or practices have no substantial direct effects (whether actual or foreseeable) on competition within the Member State.<sup>80</sup> However, particular difficulties could arise in cases where competition law proceedings were brought before a foreign NCA and private proceedings with respect to the same infringement were brought before an English court.

Even if NCAs (being bodies exercising judicial functions in civil and commercial matters) were regarded as ‘courts’ within the meaning of article 28 of Brussels I, the question would remain whether NCAs should exercise their discretion to stay their proceedings or indeed decline jurisdiction. In some cases, such discretion could well be exercised as long as the allegedly anti-competitive practice had affected the competition within the market where the court seised was located, which would make such a court well placed to hear and determine an EU competition law claim. This can be justified by two main arguments.

First, as already indicated,<sup>81</sup> a judicial decision presupposes respect of the right to fair trial and hearing, something that is far from guaranteed in respect to decisions taken by NCAs, which are administrative bodies combining the function of a party to competition law proceedings and a judge. If decisions of such NCAs are considered to be compatible with article 6(1) ECHR only if subject to full review by a judicial body meeting, then it can be argued that the right to fair trial would only be guaranteed if the court had actually reviewed the decision.<sup>82</sup> Following this line of reasoning, one could go a step further and say that an NCA should normally exercise its discretion and stay its proceedings in favour of the court seised with the related EU competition law dispute because the court would be able to guarantee adversarial proceedings. This deduction can be further strengthened by noting that the independence of NCAs can be questioned. In particular, it has been submitted that

the obligation for the competition authorities to consult the Commission provided for in Article 11(4) of [Regulation 1/2003] together with the Commission’s power pursuant to Article 11(6) of [Regulation 1/2003] to withdraw the case from the national competition authorities... thus raises a problem under Article 6 ECHR.<sup>83</sup>

Dismantling of the Common Law of Conflict of Laws’ (2005) 54 ICLQ 813; P de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing 2007).

<sup>80</sup> Compare the approach in respect of allocation of cases between the NCAs. See Commission Notice (n 4) para 8. <sup>81</sup> Section IIA above. <sup>82</sup> Wils (n 40) 89. <sup>83</sup> Wils (n 40) 90.

This is in sharp contrast with article 15 of Regulation 1/2003, which is meant to safeguard the independence of national courts and the right to fair trial and hearing, by providing for a 'soft' form of cooperation between the Commission and Member State courts. These are especially important considerations following the entry into force of the Lisbon Treaty.<sup>84</sup>

Secondly, the submission that an NCA should normally exercise its discretion and stay its proceedings in favour of the court seised with the related EU competition law dispute can be further justified by pointing out that national courts would be able to establish that there was an infringement of articles 101 and 102 TFEU, as well as being entitled to award damages<sup>85</sup> that would rectify the harm caused by the breach of EU competition law.<sup>86</sup> In other words, the fact that '[p]rivate actions ensure compensation for those harmed by anti-competitive conduct'<sup>87</sup> may be seen by NCAs as an important factor in favour of staying their proceedings or declining jurisdiction. Therefore, in many cases, the national courts may be better suited than the Member States' NCAs to establish an infringement of EU competition law. The possibility for an NCA to stay its proceedings would raise the question whether the foreign NCA in question could be relied upon to take evidence in support of private proceedings in England. It has already been noted that requests to foreign competition authorities for taking evidence in support of private proceedings in England could be made under the Evidence Regulation.<sup>88</sup> Nevertheless, this would be an important issue, which indicates that if the Commission wishes to create mechanisms to improve the legal conditions for EU antitrust claimants to get full compensation for suffered damages<sup>89</sup> as well as to promote the right to defence of allegedly infringing undertakings further, then it might consider a Notice on the cooperation between NCAs and Member State courts. Such a Notice might clearly outline that an NCA can carry out any inspection or other fact-finding measure under its national law on the request of a court of another Member State. This would be an important legislative development, which would have significant implications for cases in which an NCA decides to stay its proceedings in favour of a court seised with a related EU competition law dispute.

In other cases, however, the various leniency programmes adopted by the Member States competition authorities<sup>90</sup> may be seen as a strong factor suggesting that, in some cases, an NCA may decide not to stay their proceedings (or decline jurisdiction). Indeed, it could be argued that in some

<sup>84</sup> See art 6(1) TEU. See also: art 6(1) ECHR and art 47(2) of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

<sup>85</sup> Commission Staff Working Paper, *Annex to the Green Paper, Damages Actions for Breach of the EC Antitrust Rules* SEC(2005) 1732, para 8.

<sup>86</sup> J Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer 2007) 1–2; Komninos (n 27) 7–8. <sup>87</sup> Komninos (n 27) 8. <sup>88</sup> See section IIB above.

<sup>89</sup> Commission (EC), *Damages Actions* (n 39) para 1.2.

<sup>90</sup> See U Boge, 'Leniency programs and the private enforcement of European competition law' in Basedow (n 86) 217, 218.

cases the competition authorities' leniency programmes would provide stronger incentives for infringing undertakings to cooperate in order for a breach of EU competition law to be established, so that an English court might decide to stay its proceedings and await the decision of a foreign NCA that might be better placed to deal with the case. Accordingly, there may well be cases in which the NCAs would be better suited than the national courts to establish an infringement of EU competition law.

Although in some cases it could be more appropriate for a Member State court to be given a discretionary power to stay their proceedings in favour of a foreign NCA that could be more appropriate or better placed to determine whether there was infringement of EU competition law, this would raise the question of the recognition and enforcement of a foreign NCA decision in England. The White Paper on modernisation seems to indicate that an NCA decision is enforceable only within the territory on which the authority in question operates.<sup>91</sup> The issue of the recognition and enforcement of decisions taken by NCAs is left out of Regulation 1/2003.<sup>92</sup> Nevertheless, there are strong arguments suggesting that a foreign NCA decision could be recognized by the OFT or another NCA if a request were made by the Member State that adopted the decision.<sup>93</sup> But would they be recognized by the courts in the context of cross-border private antitrust proceedings? Can NCA decisions be recognized and enforced under Brussels I? Are decisions of NCAs within the scope of the Brussels I Regulation?

#### IV. RECOGNITION AND ENFORCEMENT UNDER BRUSSELS I

As already mentioned, the EU legislator seems to have considered the adoption of a rule to the effect that a Member State court cannot take decisions running counter to a final decision of an NCA in the ECN finding an infringement of articles 101 and 102 TFEU.<sup>94</sup> Are the decisions of NCAs to be regarded as 'judgments' for the recognition and enforcement purposes? Could an English court refuse the recognition and enforcement of a judgment that is in conflict with a decision of an NCA?

<sup>91</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, para 60. See Komninos (n 27) 77; Brammer (n 3) 426–36.

<sup>92</sup> It has been submitted that 'Article 10 EC [now Article 4(3) TEU], while not requiring Member States to automatically and mutually recognise the legal force of all decisions which are adopted to implement Article 81 or 82 EC [now Articles 101 and 102 TFEU], can certainly be construed in such a way as to impose a duty on Member States to recognise the validity of foreign NCA decision on a case-by-case basis. This means that recognition would take place only when a request is made by the Member State which adopted the decision and only by the NCA of the Member State to which the request is submitted' (Brammer (n 3) 428–29). Even if this interpretation were correct, the effect of such recognition would be somewhat limited, as the foreign NCA would only be recognized by the local NCA being part of the same ECN.

<sup>93</sup> *ibid.*

<sup>94</sup> Commission (EC), *Damages Actions* (n 39) para 2.3.

### A. Recognition and Enforcement in England of Foreign NCAs' Decisions

Decisions of NCAs are given in the context of administrative public proceedings in which NCAs enjoy extensive investigative and decision-making powers.<sup>95</sup> Although one might say that decisions of public authorities do not produce *res judicata* effect, it should be pointed out that such decisions do enjoy finality.<sup>96</sup> Indeed, it is well established that a *res judicata* effect is not a pre-condition for the purposes of recognition under the Brussels I Regulation as the words '*res judicata*' have been deliberately omitted by the EU legislator from the text of the Regulation.<sup>97</sup> However, are foreign NCA decisions to be regarded a 'judgments' for the purposes of article 32 of the Brussels I Regulation? One of the main requirements for recognition and enforcement purposes is that the judgment must be given by a court or tribunal of a Member State. The Court of Justice has also firmly held that to be classified as a judgment the decision must emanate from a judicial body of a Member State.<sup>98</sup> Are the NCAs judicial bodies? Article 35 of Regulation 1/2003 provides that Member States are to designate the competition authorities responsible for the application of articles 101 and 102 TFEU. Article 35(2) makes clear that designated authorities may include judicial authorities.<sup>99</sup> Most Member States, however, have designated an administrative, rather than a judicial, body because most follow the EU scheme of having an administrative body investigating and deciding cases.<sup>100</sup> Clearly, the requirement that 'a decision [is] to emanate from a judicial body of a Member State' will not be met where the task of applying articles 101 and 102 TFEU is entrusted to administrative authorities. For example, one might think that decisions of the OFT (being an independent government department and administrative body) would not qualify as a 'judgment of a court of competent jurisdiction'.<sup>101</sup> A different result for the purposes of the Brussels I Regulation can be reached with respect to NCAs' decisions adopted in countries<sup>102</sup> where the judicial bodies are designated as NCAs.<sup>103</sup> Such a different outcome could be explained by the fact that the decisions of NCAs that are judicial bodies may be regarded as judgments within the meaning of article 32 of Brussels I.

<sup>95</sup> Komninos (n 27) 119.

<sup>96</sup> X Groussot and T Minssen, 'Res Judicata in the Court of Justice Case-law: Balancing Legal Certainty with Legality?' (2007) 3 European Constitutional Law Review 385.

<sup>97</sup> Jenard Report (n 30) 43.

<sup>98</sup> Case C-414/92 *Solo Kleinmotoren v Boch* [1994] ECR I-2237, para 17. Compare Jenard Report (n 30) 42. See also Schlosser Report (n 30) para 23.

<sup>99</sup> See Joined cases 209–213/84 *Ministere Public v Lucase Asjes* [1986] ECR 1425, para 55. See also *BRT* (n 1) 1.

<sup>100</sup> eg Bulgaria, Czech Republic, France, Italy, Romania, the UK.

<sup>101</sup> Compare *The Sennar (No 2)* [1985] 1 WLR 490 (HL) [499].

<sup>102</sup> eg Austria and Ireland. In other countries, the task of applying arts 81 and 82 is entrusted to quasi-judicial bodies, which are only from an organizational point of view part of the NCA (eg Germany).

<sup>103</sup> See D Cahill, JD Cooke and W Wils (eds) *The Modernisation of EU Competition Law Enforcement: FIDE 2004 National Reports* (CUP 2004). See also C Kerse and N Khan, *EC Antitrust Procedure* (5th edn, Sweet & Maxwell 2005) 260.

In view of the above, a better approach is to hold that a decision of an NCA would be within the scope of the Regulation as long as it related to a civil or commercial matter. It has already been concluded that proceedings before NCAs should be regarded as within the scope of Brussels I as long as an NCA is exercising judicial functions in civil and commercial matters. As already noted,<sup>104</sup> this would mean that a decision (or part of a decision) of an NCA that imposes fines on an undertaking that has infringed articles 101 and 102 TFEU would not be within the scope of Brussels I.<sup>105</sup> However, a decision (or part of a decision) of an NCA that establishes an infringement of articles 101 and 102 TFEU *should* be within the scope of Brussels I.<sup>106</sup> Indeed, if an EU competition law claim brought before national courts in order to establish an EU competition law infringement is regarded as a ‘civil and commercial matter’ for the purposes of Brussels I, then there is no reason to suggest that the matter would be regarded differently simply because the proceedings were brought before an NCA that is an administrative body.<sup>107</sup> Such an interpretation would be in line with article 1 of Brussels I which seems to suggest that ‘judgments given in a [Member] State in civil commercial matters by . . . administrative tribunals must be recognized and enforced in the other [Member] States’.<sup>108</sup> A broader interpretation of article 32 of Brussels I would lead to achieving uniform results as to the recognition and enforcement of all NCAs’ decisions under Brussels I.

The need for a broader interpretation can be further strengthened by pointing out that even though a decision made by the OFT might not be regarded as a judgment within the meaning of article 32 of Brussels I, a different interpretation could be made for the purposes of Brussels I if an appeal were made in respect of the OFT. For example, schedule 4 of the 2002 Act permits most decisions of the CAT to be enforceable by registration at the High Court in England and Wales (and by a corresponding procedure in Scotland and Northern Ireland). Through these provisions, the decision becomes enforceable in the same way as a judgment of the High Court. Decisions of the CAT could be further appealed before the Court of Appeal or Court of Session respectively.<sup>109</sup> There is no doubt that in the latter case the judgment of the Court of Appeal would preclude recognition and enforcement of the foreign judgment in England. Thus, it seems that if a complaint against a decision of the OFT has been lodged, then in some cases the judgment rendered at the appeal could be regarded as a judgment. If no appeal against a decision of the OFT has been made, however, this would not be regarded as a judgment within the meaning of Brussels I. The different results are due to the different constitutional positions of a court, on the one hand, and other public

<sup>104</sup> See section IIA above.

<sup>105</sup> *Eurocontrol* (n 15) paras 4–5.

<sup>106</sup> *ibid* para 4.

<sup>107</sup> See section IIA above.

<sup>108</sup> *Jenard Report* (n 30) 42. See also *Schlosser Report* (n 30) para 23.

<sup>109</sup> See section 49 of the Competition Act 1998.

authorities, on the other. Nonetheless, it appears that this outcome would not be desirable.

The importance of a broader interpretation of article 32 of Brussels I in the context of cross-border EU competition law proceedings can find further support in the EU legislator's proposal in the White Paper on damages.<sup>110</sup> However, as already noted,<sup>111</sup> a broader interpretation would suggest that the recognition of an NCA decision (or part of a decision) would often have to overcome a public policy defence that could be based on the breach of the undertaking's right to fair trial and hearing in administrative proceedings.<sup>112</sup> The recognition would be particularly difficult in cases where the decision was taken by an NCA that is an administrative body, combining the function of a party to competition law proceedings and a judge.<sup>113</sup> Such NCA proceedings could undermine the right to a fair trial and hearing and the rendered NCA decision could raise 'due process' concerns.

A general principle of EU law is that everyone is entitled to a fair trial and hearing,<sup>114</sup> which is indeed a fundamental human right.<sup>115</sup> It is well established that a manifest breach of a fundamental human right would trigger the public policy defence under Brussels I.<sup>116</sup> In determining whether an NCA's proceedings safeguard the infringing undertaking's right to a fair trial and hearing, the recognizing court should be guided by the case law of the European Court of Human Rights (ECtHR). As already submitted, the ECtHR requires that, in the determination of civil rights and obligations, decisions taken by administrative authorities should be subject to a judicial body that has full jurisdiction.<sup>117</sup> In other words, if a decision taken by an NCA were not reviewed by a court with full jurisdiction, then it could be argued that the right to fair trial of an infringing undertaking would be undermined<sup>118</sup> and hence that recourse to the public policy defence under Brussels I would be possible.<sup>119</sup> Although the European Commission has proposed the abolition of *exequatur*,<sup>120</sup> it seems that there will be safeguards that may be triggered if the right to fair trial of the defendant is undermined. The importance of such safeguards has been noted by Beaumont and Johnston, who have argued that 'Human rights are deemed a major part of the public policy exception and thus if *exequatur* proceedings were abandoned totally without any safeguard, this

<sup>110</sup> Commission (EC), *Damages Actions* (n 39) para 2.3.

<sup>111</sup> See section IIA above.

<sup>112</sup> Art 34(1) and (2) of Brussels I. See also *Krombach* (n 44) para 43; Fawcett (n 44) 25; Beaumont and Johnston (n 44) 253–54.

<sup>113</sup> Wils (n 40) 88.

<sup>114</sup> *Krombach* (n 44) para 26.

<sup>115</sup> See 47(2) of the Charter of Fundamental Rights; art 6(1) ECHR.

<sup>116</sup> *Krombach* (n 44) paras 39–45.

<sup>117</sup> *Le Compte v Belgium* (1982) 4 EHRR 1. See also: Wils (n 40) 46–47; Forrester (n 23) 821.

<sup>118</sup> Wils (n 40) 89.

<sup>119</sup> *Krombach* (n 44) para 42.

<sup>120</sup> Art 38 of the Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM(2010) 748/3 (Brussels I Proposal). See further, *ibid* 5–8.

would in effect prioritise free movement of judgments over fundamental rights, in particular the right to a fair trial.<sup>121</sup> This is certainly a valid argument in the context of cross-border EU competition law proceedings, which may often involve NCAs. Accordingly, in a recently published amendment proposal, the EU Commission has stated that ‘The abolition of *exequatur* will be accompanied by procedural safeguards which ensure that the defendant’s right to a fair trial and his rights of defence as guaranteed in Article 47 of the EU Charter on Fundamental Rights are adequately protected.’<sup>122</sup>

It therefore seems clear that a broader interpretation of article 32 of Brussels I in the context of cross-border EU competition law proceedings would provide for safeguards ensuring that decisions of foreign NCAs would freely circulate within the EU only if the NCAs’ proceedings respected the right to a fair trial and hearing of the infringing undertakings. A broader interpretation of article 32 of Brussels I would further uphold the independence of Member State courts, which would be entitled to deny the recognition of a decision taken by a foreign NCA whose proceedings did not respect the right to a fair trial and hearing of the defendant. Nevertheless, the difficulties arising in this context might suggest that the EU legislator would consider the adoption of a new legislative instrument that would promote free circulation of decisions in relation to EU competition law further safeguarding the defendant’s right to a fair trial, as well as upholding the independence of Member State courts vis-à-vis NCAs.

*B. Recognition and Enforcement of a Member State Court’s Judgment that is Irreconcilable with an NCA Decision*<sup>123</sup>

The main issues that will be addressed in this sub-section relate to the question of whether the recognizing court would be entitled to refuse recognition of a judgment that is in conflict with the decision of an NCA. Article 34(3) of Brussels I provides that a judgment given by the courts of a Member State shall be refused recognition if it conflicts with a judgment<sup>124</sup> given in a dispute between the same parties<sup>125</sup> in the state in which recognition is sought. Thus, a *judgment* in relation to an EU competition law claim that has been given in the State in which enforcement is sought would operate as a defence against the recognition of a foreign judgment in relation to that claim. Article 34(4) of

<sup>121</sup> Beaumont and Johnston (n 44) 253.

<sup>122</sup> See the Brussels I Proposal 6. See also *ibid* Recitals 24, 27.

<sup>123</sup> Danov (n 13) 200–04.

<sup>124</sup> It should be determined whether those judgments entail legal consequences that are mutually exclusive. See Case 145/86 *Hoffmann v Krieg* [1988] ECR 645, para 22.

<sup>125</sup> Section IIIA above. See also Danov (n 13) 124–27.



Brussels I goes further and provides that a *judgment* given by the court of a Member State shall be refused recognition

if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

These requirements cannot be met in the situation where a foreign judgment is contrary to a decision rendered by an NCA. Even if it is assumed that a decision taken by an NCA is to be regarded as judgment, one should not forget that parties to the proceedings before the competition authority are the NCA in question and the allegedly infringing undertaking(s), so that the 'same parties' requirement of article 34(3) and (4) would not be satisfied.<sup>126</sup>

Nevertheless, can the English courts refuse the recognition of a judgment that is in conflict with a decision of an NCA on the ground of public policy? It is well established that recognition of a foreign judgment cannot be refused on the ground of public policy where EU competition law was misapplied by an adjudicating court.<sup>127</sup> A different outcome may be reached, however, in cases where that very judgment is in conflict with a decision of the Commission. Such a result can be deduced from the principle of sincere cooperation as reflected in article 4(3) TEU. In view of this provision, it has been held that national courts must exercise their powers to avoid the risk of judgments that are in conflict with Commission decisions.<sup>128</sup> The duty of national courts to avoid such risk was upheld by the Court of Justice in two leading cases: *Delimitis*<sup>129</sup> and *Masterfoods*.<sup>130</sup> This was reinforced by article 16 of Regulation 1/2003, which binds national courts to take every effort to avoid judgments conflicting with decisions which *have been* (or are about to be) the *subject of a Commission decision*.<sup>131</sup> Thus, public policy may be used to deal with an objection that does not fall within the scope of other defences of recognition<sup>132</sup> and the recognizing court would be entitled to refuse recognition of a judgment that is in conflict with an infringement decision of the Commission. Indeed, arguments suggesting that the English courts have an obligation to avoid recognizing foreign judgments that run against Commission decisions related to articles 101 and 102 TFEU can be inferred from the principle of primacy of EU law and Regulation 1/2003.<sup>133</sup>

<sup>126</sup> *Enron* (n 46) [150]. See also section IIIA above; *Danov* (n 13) 124–27.

<sup>127</sup> Case 38/98 *Renault v Maxicar* [2000] ECR I-2973. *Danov* (n 13) 192–95.

<sup>128</sup> Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369, para 38. See also *Hasselblad v Orbinson* [1985] QB 475 (CA) 504; *Iberian UK v BPB Industries* [1997] EuLR 1 (ChD) 16. See further, Kerse and Khan (n 103) 298.

<sup>129</sup> Case C-234/89 *Delimitis* [1991] ECR I-935.

<sup>130</sup> *Masterfoods* (n 128) para 49.

<sup>131</sup> *ibid* paras 51, 52; *Interpreneur Pub Company v Crehan* [2006] UKHL 38, [2006] 3 WLR 148 (HL) [64]–[66].

<sup>132</sup> Compare *Hoffmann* (n 124); Case C-78/95 *Hendrickman v Magenta Druck & Verlag* [1996] ECR I-4943.

<sup>133</sup> See also *Kominos* (n 27); *Danov* (n 13) 200–04.

Difficulties may arise, however, with regard to decisions taken by NCAs because article 16 of Regulation 1/2003 makes no reference to decisions rendered by an NCA. Nonetheless, the existence of an OFT decision that would be enforceable in England could suggest that the recognition and enforcement of a foreign judgment that was in conflict with an OFT decision would lead to irreconcilable decisions having incompatible consequences on the same subject matter and between the same parties in the same jurisdiction. Hence, there are strong arguments suggesting that an English court should be entitled to hold that it is against English public policy to recognize a foreign decision that is irreconcilable with an OFT decision, within the strict limits of *Crehan*.<sup>134</sup> If such an OFT decision were not before the adjudicating court, it would have to be viewed as persuasive *prima facie* evidence that the court with original jurisdiction misapplied EU competition law.<sup>135</sup> Such a conclusion would be in line with the White Paper on damages, in which the Commission has proposed a rule to the effect that national courts cannot take decisions running counter to an NCA decision finding an EU competition law infringement.<sup>136</sup> In view of that, it could be argued that the English courts can refuse recognition of foreign judgments that run against infringement decisions taken by the OFT.

Although such a deduction would be consistent with the powers of the English courts in respect to foreign judgments that are in conflict with Commission decisions related to articles 101 and 102 TFEU, the answer to the question whether the English courts can refuse the recognition of a judgment that is in conflict with a decision of the OFT is far from certain. In spite of the fact that the English courts may have an obligation to avoid recognizing foreign judgments that run against Commission decisions related to articles 101 and 102 TFEU, the same result does not necessarily follow if the infringement decision is taken by one of the many NCAs. Indeed, difficulties are bound to arise because, as already mentioned, a decision taken by an NCA that was not reviewed by a court with full jurisdiction could raise concerns as to whether the right to a fair trial of an infringing undertaking was not undermined in the administrative proceedings.<sup>137</sup> Moreover, *Crehan*<sup>138</sup> leaves no doubt that the principle of judicial independence is an important factor that needs to be taken into account. Therefore, the issue of whether (and to what extent) a recognizing court would be entitled to refuse recognition of a judgment that is in conflict with the decision of an NCA would have to be carefully considered during the course of the Brussels I review as well as in the context of the EU competition law legislative initiative.

<sup>134</sup> *Crehan* (n 131).

<sup>135</sup> *ibid* [69]. See also *Danov* (n 13) 195–200.

<sup>136</sup> Commission (EC), *Damages Actions* (n 39) para 2.3.

<sup>137</sup> *Wils* (n 40) 89.

<sup>138</sup> *Crehan* (n 131).

## VI. THE WAY FORWARD—SOME CONCLUDING REMARKS

There are strong arguments indicating that Brussels I and the Evidence Regulation could be applicable to cross-border competition law proceedings before an NCA located in one Member State and private EU competition law proceedings before another Member State court. Furthermore, a decision (or part of a decision) of a Member State competition authority that establishes an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I.<sup>139</sup> This broader interpretation would be in line with article 1 of Brussels I, which seems to suggest that ‘judgments given in a [Member] State in civil commercial matters by . . . administrative tribunals must be recognized and enforced in the other [Member] States’.<sup>140</sup> A broader interpretation of article 32 of Brussels I would lead to uniform results as to the recognition and enforcement of all NCAs’ decisions under Brussels I. The importance of the broader interpretation of article 32 of Brussels I in the context of cross-border EU competition law actions was acknowledged by the EU legislator in the White Paper on damages.<sup>141</sup> Indeed, the fact that article 34(1) and (2) of Brussels I would allow for a national court to refuse the recognition of a decision taken by an NCA that does not respect due process rules in its adoption may be seen as yet another argument suggesting that a final decision (or part of a final decision) of an NCA that establishes an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I.

However, articles 27 and 28 of Brussels I would not be adequate to deal with the problems that would arise in EU competition law proceedings before an NCA located in one Member State and private EU antitrust law proceedings related to the same infringement in another Member State. There are two main concerns that should be addressed in this context. First, it would be advisable to clarify that all NCAs, being ‘specialised competition authorit[ies] having judicial characteristics’,<sup>142</sup> should be regarded as ‘courts’ for the purposes of articles 27 and 28 of Brussels I as long as they are bodies exercising judicial functions in civil and commercial matters. Therefore, it seems that proceedings in which NCAs seek to determine whether an undertaking, or undertakings, have committed an infringement of articles 101 and 102 TFEU should be within the scope of Brussels I. This would serve to avoid the risk of irreconcilable decisions rendered on the same antitrust issue in two different Member States by different bodies (an NCA and a court) that are responsible for EU competition law enforcement.

Secondly, the assumption in articles 27 and 28 is that the court first seised is always more appropriate.<sup>143</sup> However, it may often be the case that the court first seised is not well placed to hear and determine an EU competition law case

<sup>139</sup> *Eurocontrol* (n 15) para 4.

<sup>140</sup> Jenard Report (n 30) 42. See also Schlosser Report (n 30) para 23.

<sup>141</sup> Commission (EC), *Damages Actions* (n 39) para 2.3.

<sup>142</sup> *Synetairismos* (n 29) Opinion of AG Jacobs, para 45.

<sup>143</sup> *Danov* (n 13) 119–39.

because an anti-competitive agreement or practice that has been implemented in a number of Member States does not affect the market in the Member State where the action is brought. It is unfortunate that jurisdiction in such cases would depend on the question of who is faster in lodging his claim. A more satisfactory result could be reached if the court (or NCA) first seised was entitled to stay their proceedings, or decline jurisdiction, in cases where the agreement or practice has no substantial direct effects (whether actual or foreseeable) on competition within the Member State and where another court (or NCA) was better placed to deal with the case.<sup>144</sup> Such an approach would be better suited to deal with the difficulties that could arise in EU competition law proceedings before an NCA located in one Member State and private proceedings related to the same infringement of article 101 and/or article 102 before another Member State court. More specifically, in some cases the national courts may be better suited than the Member States' NCAs to establish an infringement of EU competition law. This can be justified by pointing out that national courts would be able to establish if there were an infringement of articles 101 and 102 TFEU, as well as awarding damages<sup>145</sup> to rectify the harm caused by the breach of EU competition law.<sup>146</sup> In other cases, the various leniency programmes adopted by the Member States competition authorities<sup>147</sup> may be seen as a strong factor suggesting that in some cases an NCA might decide not to stay their proceedings (or decline jurisdiction). It could be argued that in some cases the competition authorities leniency programmes would provide stronger incentives for infringing undertakings to cooperate in order for a breach of EU competition law to be established, so that an English court might decide to stay its proceedings and await the decision of a foreign NCA, which might be better placed to deal with the case.

Given the fact that in the new Proposal for a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments<sup>148</sup> there is no indication that special jurisdictional bases for competition law actions in the successor to Regulation 44/2001 are on the agenda, another possibility for a reform might be setting up a new and special Regulation to be applicable with regard to EU competition law claims only. Although it is justifiable to employ private international law when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions brought against defendants who are not domiciled in a Member State, it might be questioned whether the EU should use the current EU private international law framework with regard to EU competition law brought in the European context. Indeed, setting up a new EU law on civil procedure with regard to EU competition law claims may be justifiable in view of the fact that articles 101 and 102 TFEU,

<sup>144</sup> Compare the European approach in respect of allocation of cases between the NCAs. See the Commission Notice (n 4) para 8. See further Danov (n 13) 281–83.

<sup>145</sup> Commission Staff Working Paper (n 85) para 8.

<sup>146</sup> Basedow (n 86) 1–2; Komninos (n 27) 7–8.

<sup>147</sup> See Boge (n 90) 218.

<sup>148</sup> COM(2010) 748 final.

which form part of each Member State's legal order, are at the heart of an EU competition law claim, and that specific issues arise in the context of cross-border enforcement before Member State courts and NCAs. In other words, the EU legislator may wish to consider whether the European Union should use the current EU private international law framework with regard to cross-border EU competition law claims brought by private parties or whether the EU legislator should rather set up a Special Regulation dealing with EU competition law proceedings arising in the European context.<sup>149</sup>

In theory, a Special Regulation could provide for allocation of cases, which would ensure that a well-placed court would be entitled to deal with an EU competition law claim—something that is not done under the current version of Brussels I. This is particularly important in view of the fact that an EU competition law infringement would normally affect small and medium-sized businesses and consumers in several countries, who might bring parallel antitrust proceedings in different Member States. This would contribute to closer judicial cooperation by Member State courts in private claims based on breach of articles 101 and 102 TFEU, which would improve the daily life of consumers and businesses throughout the EU. Furthermore, avoiding such parallel proceedings would further promote the coherent and uniform application of EU competition law rules.

Moreover, a Special Regulation could adequately deal with the problem of the application of EU competition law in proceedings before an NCA located in one Member State and private EU antitrust law proceedings related to the same breaches of article 101 and/or article 102 TFEU before a court in another Member State. In this context, a Special Regulation could uphold the independence of Member State courts in relation to NCAs, safeguarding the defendant's right to a fair trial and hearing.

Finally, such a Special Regulation could go a step further and guarantee the abolition of the *executatur* with regard to judgments in relation to articles 101 and 102 TFEU by envisaging a possibility for the parties to make an appeal on a point of EU competition law directly before the General Court. This would provide for uniform application of EU law throughout the EU by generating a growing body of EU case law in the field of private EU antitrust law enforcement.

<sup>149</sup> The author is currently coordinating a research project funded by the European Commission Civil Justice Programme (JLS/2009/JCIV/AG/0034-30-CE-0350182/00-68). The funded project aims to consider answers to the above questions.